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# Contents

Preface
About the Author
Cutoff Dates and CEB Citation

**Volume 1**

**Part I: Overview**

**1** Recovery of Attorney Fees: An Overview

**Part II: Eligibility and Entitlement**

**2** Eligibility and Entitlement to Fees

**3** Fee-Shifting Statutes

**4** Fee Awards Based on Contractual Fee Clauses

**5** Attorney Fee Awards Based on Equitable Theories

**6** Attorney Fees Awarded as Sanctions

**7** Fees as Damages

**Part III: Determining Fee Amount**

**8** Methods of Fee Calculation

**Volume 2**

**9** Determining the Lodestar

**10** Determining Adjustments to the Lodestar

**Part IV: Procedures for Claiming and Opposing Fees**

**11** Claiming and Opposing Trial Court Fees

**12** Obtaining Fees for Appellate Services

**13** Attorney Fees Awarded for Administrative Proceedings

**14** Procedures for Claiming and Opposing Fees for Work in Arbitration

**15** Collecting Fee Awards

**Part V: Appellate Review**

**16** Appellate Review of Fee Orders

**Appendixes**

Table of Statutes, Regulations, and Rules
Table of Cases
Table of References
Table of Forms
Index

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# Preface

California attorneys seeking fee awards have relied for the last 28 years on the first two editions of this book—California Attorney Fees Award Practice (Cal CEB 1982 and 1994). This third edition restructures and builds on the prior editions to aid both novice and expert practitioners in determining whether they are entitled to an award of fees, its amount, and the procedures for obtaining fees.

This edition updates and expands the substantive law discussion in the earlier editions, and includes a new chapter on fees awarded for arbitration proceedings. All of the chapters have been reorganized to make the information they contain more accessible. This edition also offers attorneys the practical advice, sample pleadings, and forms that are a trademark of CEB's publications.

This book was written by Richard M. Pearl (see About the Author). CEB and Mr. Pearl gratefully acknowledge the assistance of Richard A. Rothschild, Director of Litigation, Western Center on Law and Poverty, Los Angeles, California on chapters 6, 11-12, and 16.

CEB Attorney Editor Karen Frasier-Kolligs and Legal Editors Elizabeth Allen, Roberta Klein, Enrique De Anda, Karen Nutter, and Andrew Rosner contributed to this title. Francesca Bannerman also contributed to this title. Administrative support was provided by Cynthia Kimberlin, Debby Harrison, and Nila Kanzaria. The book was designed by Grier Thornburg. Dorie Riepe was responsible for copyediting and production. Robert W. Burke wrote the index. Composition was performed by CEB's Electronic Publishing staff.

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# Cutoff Dates and CEB Citation

### Cutoff Dates

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# 1

# Recovery of Attorney Fees: An Overview

I. SCOPE OF BOOK §1.1

II. AMERICAN RULE: EACH PARTY BEARS OWN FEES UNLESS STATUTE OR CONTRACT PROVIDES OTHERWISE §1.2

III. EXCEPTIONS TO AMERICAN RULE
- A. Statutes §1.3
- B. Contracts §1.4
- C. Equitable Doctrines §1.5

IV. ATTORNEY FEES MAY BE AWARDED AS COMPENSATION, SANCTIONS, OR DAMAGES, DEPENDING ON CIRCUMSTANCES §1.6
- A. Attorney Fees Awarded as Compensation §1.7
  - 1. Calculation of Attorney Fees Awarded as Compensation §1.8
  - 2. Method of Obtaining Compensatory Fees §1.9
- B. Attorney Fees Awarded as Sanctions §1.10
- C. Attorney Fees Awarded as Damages §1.11

V. ATTORNEY FEE AWARDS ARISE IN MULTIPLE SETTINGS
- A. Courts
  - 1. State or Federal §1.12
  - 2. Trial or Appellate §1.13
- B. Administrative Agencies §1.14
- C. Arbitration §1.15
- D. Differences in Eligibility, Entitlement, Amount, Procedure §1.16

VI. ETHICAL CONSIDERATIONS §1.17
- A. Rules of Professional Conduct §1.18
- B. Division of Fees Among Counsel §1.19
- C. Conflicts of Interest §1.20

VII. TAX CONSEQUENCES
- A. Income Tax Consequences of Fee Awards §1.21
  - 1. American Jobs Creation Act of 2004 §1.22
  - 2. *Commissioner v Banks* §1.23
  - 3. Tax Consequences of Fees Awarded Under Other Fee-Shifting Statutes Unclear §1.24
- B. Form: Sample Clause Relating to Taxation of Fee Award §1.25

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## §1.1 I. SCOPE OF BOOK

Under both California and federal law, attorney fees may be awarded in many different proceedings. This book divides the issues that arise in those proceedings into parts: Part I is this overview chapter; Part II (chaps 2-7) covers the substantive law governing eligibility and entitlement to fees; Part III (chaps 8-10) addresses the amount of fees generally recoverable as court-awarded fees; Part IV (chaps 11-15) discusses the procedures to apply for and collect fees; and Part V (chap 16) discusses appellate review of fee awards.

The book's primary focus is on fee awards under California law based on:

- Selected statutes authorizing fee awards, including CCP §1021.5, California's private attorney general fee statute (see chap 3);
- Contractual provisions authorizing fee awards (see chap 4);
- Equitable doctrines, such as the common fund and substantial benefit theories (see chap 5); and
- Statutes and rules that award fees as sanctions for wrongful conduct in litigation (see chap 6).

Fee awards under federal law are discussed in the context of parallel California statutes and to the extent necessary to explain the California approach to awarding fees. The discussion briefly highlights the major differences between federal and state fee statutes, as well as some of the reasons for and against claiming fees under federal statutes. A complete review of federal authority is beyond the scope of this book. See Derfner & Wolf, Court Awarded Attorney Fees (1983); Conte, Attorney Fee Awards (2d ed 1993); Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (4th ed 2003).

Counsel should be aware that special rules not discussed in this book may apply to requests for awards of fees in other settings. For example, the Family Code governs attorney fee awards in dissolution proceedings. See Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual). The Probate Code governs fee awards in probate or conservatorship proceedings. On fees in these contexts, see California Estate Planning (Cal CEB 2002), California Guardianship Practice (Cal CEB Annual), and California Conservatorship Practice (Cal CEB 2005).

Numerous substantive laws, both state and federal, have special provisions for attorney fees. Though it is impossible to cover them all here, this book does discuss those that California practitioners most frequently encounter.

Note that this book deals only with law and practice relating to obtaining an award of fees from an opposing party or counsel. It does not discuss fee issues arising between counsel and client. On that topic, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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## §1.2 II. AMERICAN RULE: EACH PARTY BEARS OWN FEES UNLESS STATUTE OR CONTRACT PROVIDES OTHERWISE

The basic rule governing the right to an award of attorney fees in American jurisprudence is that regardless of who prevails in litigation, each party must bear his or her own attorney fees. *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612; *Cann v Carpenters' Pension Trust Fund* (9th Cir 1993) 989 F2d 313. Compare *Department of Forestry & Fire Protection v LeBrock* (2002) 96 CA4th 1137, 117 CR2d 790 (statute providing for "costs" does not include attorney fees). That rule has been called the "American Rule" to distinguish it from the approach taken in England, in which attorney fees are normally awarded to the prevailing party (the "English Rule").

California follows the American Rule, as codified in CCP §1021:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties.

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## III. EXCEPTIONS TO AMERICAN RULE

### §1.3 A. Statutes

The effect of the American Rule has been diluted by the many statutes that now provide for the award of attorney fees in particular circumstances (see chap 3). Although broad categories of cases, such as routine personal injury actions, still do not involve fee-shifting, most litigation involving important statutory rights does raise the possibility that fees may be shifted from the losing to the prevailing party. It is crucial that counsel explore this possibility because it can change the stakes and tactics in any litigation dramatically. On eligibility for and entitlement to fees under fee-shifting statutes, see chap 2.

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## §1.4 B. Contracts

Many contracts also provide for fee shifting. Again, this is one of the first things an attorney handling a case involving a written contract (or negotiating a contract) should explore. Although the terms of the fee-shifting provision generally control its meaning and scope, counsel must be aware of CC §1717, which makes all such fee provisions reciprocal in actions brought to enforce the contract and also imposes certain nonwaivable terms; for example, there can be no prevailing party (and hence no fee award) if the action is voluntarily dismissed before trial. On eligibility for and entitlement to fees under contractual fee-shifting provisions, see chap 4.

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**Source:** Civil Litigation/California Attorney Fee Awards/1 Recovery of Attorney Fees: An Overview/§1.5 C. Equitable Doctrines

## §1.5 C. Equitable Doctrines

The American Rule is subject to several judicially created exceptions:

- The "private attorney general" doctrine (codified and extended by CCP §1021.5, discussed in chap 3);
- The "common fund" doctrine (discussed in §§5.10-5.31);
- The "substantial benefit" doctrine (discussed in §§5.32-5.53);
- The "third party tort" or "tort of another" doctrine (discussed in §§7.4-7.8); and
- The doctrine of equitable apportionment of attorney fees (discussed in §§5.26-5.30).

California law, however, does not recognize a "bad faith" exception to the American Rule. Trial courts must have a statutory basis for awarding attorney fees against a party or an attorney for sanctionable conduct. See §1.10.

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## §1.6 IV. ATTORNEY FEES MAY BE AWARDED AS COMPENSATION, SANCTIONS, OR DAMAGES, DEPENDING ON CIRCUMSTANCES

Attorney fees may be awarded for at least three different reasons: (1) They may be awarded as compensation for work performed on behalf of a successful party (see §§1.7-1.9; chaps 2-5, 13); (2) they may be awarded to punish a party or an attorney who is pursuing litigation in a sanctionable manner (see §1.10; chap 6); and (3) they may be awarded as consequential damages suffered in a related action (see §1.11; chap 7).

It is essential that counsel identify the basis on which fees may be sought because the rules governing eligibility for and entitlement to an award, the amount of the award, and the procedures for recovering fees may differ depending on the basis on which fees are claimed.

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## §1.7 A. Attorney Fees Awarded as Compensation

The broadest category of attorney fee awards involves awards ordered by the court as compensation for attorney services rendered on behalf of a prevailing party.

The court may award fees as compensation if:

- The action is based on a statute that authorizes the court to award attorney fees to a party (see chap 3);
- The litigation involves a contract that provides for payment of attorney fees if a lawsuit involving the contract arises (see chap 4); or
- The litigation meets the standards for equitable fee-shifting (see chap 5).

Statutory attorney fees are not damages. *Marron v Superior Court* (2003) 108 CA4th 1049, 1064, 134 CR2d 358. On when attorney fees may be considered damages, see §1.11; chap 7. Rather, they are an ancillary matter that arises from the litigation itself, in the nature of costs, provided to compensate attorneys for taking particular types of cases. 108 CA4th at 1065. See also *Flannery v Prentice* (2001) 26 C4th 572, 586, 110 CR2d 809 (statutory attorney fees not intended to compensate prevailing party for damages suffered); *Equilon Enters. v Consumer Cause, Inc.* (2002) 29 C4th 53, 62, 124 CR2d 507 ("Fee-shifting simply requires the party that creates the costs to bear them").

Statutory attorney fees do not "make a party 'liable' for filing a lawsuit." *Equilon Enters. v Consumer Cause, Inc., supra.* See also *Bernardo v Planned Parenthood Fed'n* (2004) 115 CA4th 322, 361, 9 CR3d 197 (following *Equilon*). Nor are they intended to "punish" the fee-opponent. 29 C4th at 63; *Marron v Superior Court* (2003) 108 CA4th 1049, 1065, 134 CR2d 358.

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## §1.8 1. Calculation of Attorney Fees Awarded as Compensation

When the court awards an attorney fee as compensation, the goal is to determine a "reasonable" attorney fee.

In the context of court-awarded fees, the "lodestar" method (see chaps 8-10) is the primary method used to determine a reasonable attorney fee. (The courts often formerly described it as the "touchstone" method, but have generally settled on "lodestar.") Under the lodestar method, the fee is calculated by first multiplying the hours reasonably worked by a reasonable hourly rate to arrive at the lodestar figure. That figure may then be enhanced or diminished by the court in certain circumstances (*e.g.,* to compensate counsel for contingent risk). That increase or decrease is usually accomplished by applying a "multiplier" to the lodestar amount.

The lodestar method is intended to be a more objective way to determine a reasonable attorney fee than other methods. It is intended to provide compensation for services rendered that mirrors the legal marketplace, which is the primary, but not exclusive, goal of these fee-shifting provisions.

In "common fund" cases (*i.e.,* those in which the prevailing party obtains monetary damages that will be divided at least in part among persons who are not named plaintiffs), the court may determine the amount of a compensatory fee award by awarding a percentage of the fund obtained by counsel's efforts, rather than compensating counsel on a per hour basis. See §5.18.

Ethical rules define "conscionable" or "reasonable" attorney fees by looking at several factors. See Cal Rules of Prof Cond 4-200, quoted in §1.18, and ABA Model Rules of Prof Cond 1.5. Those factors are generally, but not always, the same as those that courts apply to determine reasonable attorney fees in fee-shifting contexts.

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## §1.9 2. Method of Obtaining Compensatory Fees

Compensatory attorney fees are generally sought by motion made after judgment on the merits. See chaps 11-12 on seeking fees in trial and appellate courts.

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## §1.10 B. Attorney Fees Awarded as Sanctions

Trial courts lack the equitable power to award attorney fees as sanctions in the absence of a specific statutory mandate. *Bauguess v Paine* (1978) 22 C3d 626, 150 CR 461; *Sheller v Superior Court* (2008) 158 CA4th 1697, 1711, 71 CR3d 207. Many California statutes, however, permit courts to sanction parties or attorneys who take frivolous or bad faith actions in court (*e.g.,* filing a frivolous motion solely to delay proceedings). See discussion of CCP §§128.5, 128.7, and 907, and Cal Rules of Ct 8.276(a) in chap 6. See also *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 70 CR2d 449, for an excellent review of these sanction statutes. On discovery sanctions, see discussion of CCP §§2023.010-2023.040 in §§6.51-6.55.

Because the innocent party and his or her counsel must expend money and effort to counter the sanctionable conduct, the usual method of sanctioning the wrongdoer is to award attorney fees to the innocent party. In doing so, however, the court is not bound by traditional factors such as hours spent or results obtained; it may award sanctions that go beyond compensating the innocent party or that do not fully compensate the innocent party.

The procedures for claiming such awards also differ from the procedures for claiming fees as compensation. See §§6.25-6.28, 6.39. Attorney fees as a sanction are usually sought during the course of litigation either on the injured party's motion or on the court's own motion. See generally chap 6.

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## §1.11 C. Attorney Fees Awarded as Damages

Attorney fees may also be recoverable as damages in certain types of actions. When a person's misrepresentations, fraud, or bad faith compels or requires another to bring or defend a lawsuit, in very limited circumstances the attorney fees spent to bring or defend that prior lawsuit may be claimed as damages in a subsequent lawsuit against the wrongdoer. This rule is called the "third party tort" or "tort of another" doctrine. See §§7.4-7.8.

If fees are sought as damages, the complaint or cross-complaint must claim them as such, and entitlement to those fees must be proved as part of the case in chief. See chap 7.

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**Source:** Civil Litigation/California Attorney Fee Awards/1 Recovery of Attorney Fees: An Overview/ V. ATTORNEY FEE AWARDS ARISE IN MULTIPLE SETTINGS/ A. Courts/§1.12 1. State or Federal

## V. ATTORNEY FEE AWARDS ARISE IN MULTIPLE SETTINGS

### A. Courts

### §1.12 1. State or Federal

The entitlement to and calculation of a fee award may depend on whether the action is based on California or federal law and on whether the action is brought in state or federal court.

Federal courts have the power to award attorney fees under state laws. See, *e.g., Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832; *Chabner v United of Omaha Life Ins. Co.* (9th Cir 2000) 225 F3d 1042, 1053 n11 (fees awarded under Unruh Act (CC §52(a))); *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607 (fees awarded under California Fair Employment and Housing Act (FEHA) (Govt C §12965(b))); *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (fees awarded under CCP §1021.5 and FEHA); *Bouman v Block* (9th Cir 1991) 940 F2d 1211, 1237 (fees awarded under FEHA); *Ackerman v Western Elec. Co.* (9th Cir 1988) 860 F2d 1514 (fees awarded under CCP §1021.5); *Keith v Volpe* (CD Cal 1986) 644 F Supp 1317, aff'd (9th Cir 1988) 858 F2d 467, 486 (same). See also *Masson v New Yorker Magazine, Inc.* (9th Cir 1989) 895 F2d 1535, 1547, rev'd on other grounds (1991) 501 US 496, 115 L Ed 2d 447, 111 S Ct 2419 (denying fees to plaintiff under CCP §1021.7); *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128 (awarding fees under both federal and state law). See §§2.10-2.11.

Similarly, state courts have the power to award attorney fees under federal law. See §§2.12-2.16.

There are many similarities in the California and federal approaches to awarding fees, and California courts often seek guidance from federal case law in making attorney fee awards. See, *e.g., Flannery v Prentice* (2001) 26 C4th 572, 579, 110 CR2d 809 (reconciling federal authorities with determination that statutory attorney fee may be paid directly to attorney); *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750 (awarding fees under federal law but citing interchangeably to California law); *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 38, 97 CR2d 797 (citing this book). This is especially true of federal law that was in effect at the time the fee-shifting statute was enacted. See, *e.g., Serrano v Unruh* (1982) 32 C3d 621, 639, 186 CR 754 (adopting federal rule on fees for fee-related services); *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 934, 154 CR 503.

California law is, however, *independent* of federal law, and state interpretations and policies will trump federal law. *Serrano*, 32 C3d at 639 n29; *Flannery*, 26 C4th at 579. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 568, 21 CR3d 331; *Ketchum v Moses* (2001) 24 C4th 1122, 1131, 104 CR2d 377.

Thus, there are crucial differences between the federal and state approaches. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 568, 21 CR3d 331 (reaffirming "catalyst theory" under California law, despite U.S. Supreme Court decision abolishing theory for federal fee-shifting statutes), discussed in chaps 2-3, 10; §§8.4, 9.6, 9.16; *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371 (applying *Graham* to employment discrimination class action litigated under state law in federal court), discussed in chaps 2-3; *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377 (rejecting federal restrictions on risk enhancements and reaffirming independence of California attorney fee law), discussed in §§8.4, 9.3, 9.16, 9.19, 9.92-9.93, 11.69, 15.15, 16.23, 16.28.

Whether federal or California law on attorney fees will apply is determined as follows:

- If the fee award is sought in state court based on state law, California attorney fees law will apply.
- If the fee award is sought in federal court based on federal law, federal attorney fees law will apply.
- If the fee award is sought in state court but based on a federal fee statute, federal attorney fees law will apply. *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 1034, 204 CR 913. But see *Harman v City & County of San Francisco, supra* (awarding fees under federal law but citing interchangeably to California law).
- If the fee award is sought in federal court but is based on a state attorney fee statute, California attorney fees law will apply. *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 259 n31, 44 L Ed 2d 141, 154 n31, 95 S Ct 1612; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir

1995) 67 F3d 1470. Compare these cases with *Disability Law Ctr., Inc. v Anchorage Sch. Dist.* (2009) 581 F3d 936, 940 (when case involved only federal law questions, state fee-shifting statute inapplicable).

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## §1.13 2. Trial or Appellate

Fee-shifting statutes, contracts, and equitable doctrines generally authorize fees for both trial and appellate work. The standards for recovering fees may differ, however, depending on the stage of the case. See §11.21. The procedures for claiming fees may also differ. See §§11.46-11.63, 12.10-12.27.

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## §1.14 B. Administrative Agencies

Fee shifting is available for some work performed in administrative agencies. See chap 13. Generally, fees may be recovered for some administrative work performed in conjunction with ongoing litigation. See §§13.16-13.20.

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## §1.15 C. Arbitration

Fee shifting is also available in arbitration proceedings. See *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597 (arbitrator has power to determine contractual fees); *Broughton v CIGNA Healthplans* (1999) 21 C4th 1066, 90 CR2d 334 (when statutory claims that include fees are submitted to arbitration, arbitrator has power to award them). See §§14.1-14.6.

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## §1.16 D. Differences in Eligibility, Entitlement, Amount, Procedure

The different fee-shifting bases involve many common issues and many unique issues. This book generally addresses them as follows:

- Eligibility for fee awards under fee-shifting statutes (*i.e.,* does the fee-shifting statute apply to the case?) and entitlement to those awards (*i.e.,* does the party meet the statute's requirements?). See chaps 2-3.
- Contract-based fees. See chap 4.
- Fees based on equitable doctrines. See chap 5.
- Fees as sanctions. See chap 6.
- Fees as damages. See chap 7.
- Fees for administrative work. See chap 13.
- Fees for arbitration work. See chap 14.

Chapters 8-10 address the principles and methods for determining the *amount* of fees to be awarded. Chapters 11-12 address the *procedures* for seeking trial court and appellate fees. Chapter 15 covers collecting fee awards and chapter 16 covers appellate review of fee orders.

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## §1.17 VI. ETHICAL CONSIDERATIONS

Like all other aspects of the practice of law, fee awards are subject to ethical considerations. Just as attorneys may not charge clients illegal or unconscionable fees, the courts will not award such fees. See Cal Rules of Prof Cond 4-200; ABA Model Rules of Prof Cond 1.5. Other ethical considerations also may apply. See, *e.g., Flannery v Prentice* (2001) 26 C4th 572, 587, 110 CR2d 809 (allowing litigants to keep unassigned proceeds of fee award implicates policy fee-splitting prohibition is designed to advance); §§11.9-11.16.

Whether an attorney is authorized to practice law in California may also affect a fee award. See *Birbrower, Montalbano, Condon & Frank v Superior Court* (1998) 17 C4th 119, 70 CR2d 304; *Winterrowd v American Gen. Annuity Ins. Co.* (9th Cir 2009) 556 F3d 815, 819; *Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir 2004) 374 F3d 857, 861; *In re Poole* (9th Cir 2000) 222 F3d 618; *Z.A. v San Bruno Park Sch. Dist.* (9th Cir 1999) 165 F3d 1273. In *Frye v Tenderloin Hous. Clinic, Inc.* (2006) 38 C4th 23, 40 CR3d 221, the California Supreme Court held that the Tenderloin Housing Clinic (THC), a nonprofit corporation whose lawyers represented low-income tenants in housing litigation, was entitled to retain the statutory attorney fees that it had been awarded even though THC had not registered to practice law with the State Bar of California under Corp C §13406(b). The court concluded that the tenant-plaintiff was not entitled to disgorgement because a nonprofit corporation may practice law under authority other than §13406(b), and the statutory fee would have been unaffected had THC registered.

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## §1.18 A. Rules of Professional Conduct

The principal ethical guidance on attorney fees is found in Cal Rules of Prof Cond 4-200, which provides as follows:

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

(8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee.

Adopted Nov. 28, 1988, eff. May 27, 1989. Amended, eff. Aug. 13, 1992.

See also ABA Model Rules of Prof Cond 1.5. These ethical standards are closely related to the standards for determining "reasonable attorney fees" under fee-shifting statutes and contracts. See, *e.g., Ketchum v Moses* (2001) 24 C4th 1122, 1133, 104 CR2d 377; *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 46 n13, 97 CR2d 797.

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### §1.19 B. Division of Fees Among Counsel

The division of fees among counsel also may implicate ethical issues. In *Chambers v Kay* (2002) 29 C4th 142, 126 CR2d 536, the court held that an attorney, associated into the case by the principal attorney by means of a written fee-sharing agreement between the attorneys, could not enforce the agreement because the client had not consented in writing, as required by Cal Rules of Prof Cond 2-200(A)(1). In *Huskinson & Brown v Wolf* (2004) 32 C4th 453, 9 CR3d 693, the court answered the question left undecided in *Chambers* by holding that, as long as the client was not required to pay more fees, Cal Rules of Prof Cond 2-200 did not preclude an attorney promised a fee by another firm from recovering in quantum meruit from that law firm. The court also reaffirmed that a law firm that hires an outside lawyer at one rate and charges the client a higher rate does not violate Rule 2-200 as long as the rate paid to the outside lawyer is not tied to specific legal fees that the client paid. 32 C4th at 459. It should be noted that neither *Chambers* nor *Huskinson & Brown* involved division of a *court-awarded* attorney fee, which, under *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809, should not be affected by Rule 2-200 in most cases. See also *Fletcher v Davis* (2004) 33 C4th 61, 14 CR3d 58 (attorney's lien for hourly fees on client's recovery in action was invalid when attorney did not obtain client's written consent under Rule 3-300 for payment of fees by means of an attorney's lien).

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### §1.20 C. Conflicts of Interest

An attorney's ethical breach of duty may disqualify that attorney from all or part of a fee award. See *Cal Pak Delivery, Inc. v United Parcel Serv.* (1997) 52 CA4th 1, 14, 60 CR2d 207; *Image Tech. Serv. v Eastman Kodak Co.* (9th Cir 1998) 136 F3d 1354. Many of the ethical issues involved in statutory fee-shifting are addressed in *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809.

The possible recovery of attorney fees in class actions creates potential conflicts of interest that both the legislature and the courts have scrutinized. See*, e.g., Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1265, 24 CR3d 818. See §14.11.

When attorneys settle the merits of a case and the attorney fees claim at the same time, there is a potential conflict of interest between attorney and client, either in allocating moneys made available by the settlement or in deciding whether to accept the settlement offer. See §§11.9-11.17.

When an attorney violates his or her ethical duties to the client and is disqualified for a conflict of interest, the attorney generally is not entitled to a fee for his or her services. See *Cal Pak Delivery, Inc. v United Parcel Serv*. (1997) 52 CA4th 1, 15, 60 CR2d 207*,* and cases cited. See also *A.I. Credit Corp. v Aguilar & Sebastinelli* (2003) 113 CA4th 1072, 6 CR3d 813. In addition, fees have been denied when the attorney's relations with the client were tainted with fraud. *Clark v Millsap* (1926) 197 C 765, 785, 242 P 918.

However, fees may be allowed in disqualification cases when there is no objection by the client, and the services were rendered before the ethical breach. *Cal Pak*, 52 CA4th at 16. In *Cal Pak*, the attorney had worked for 3 years before offering to sell out his client and the class his client was representing for payment to himself personally of $8-$10 million. The court of appeal held that the attorney might be entitled to fees for the work performed during those 3 years, especially because the client was not objecting to possible attorney fees, and because the effect of the attorney's labors was not yet clear at the present stage of the litigation, before the class was even certified. See also *Mardirossian & Assocs., Inc. v Ersoff* (2007) 153 CA4th 257, 279, 62 CR3d 665 (technical violation of Cal Rules of Prof Cond 3-310 did not preclude recovery of quantum meruit fee when client not prejudiced); *U.S. ex rel Virani v Jerry M. Lewis Truck Parts & Equip. Inc.* (9th Cir 1996) 89 F3d 574, 580 (under California law, if fee agreement tainted by impropriety, courts refuse to enforce agreement but allow attorney to recover reasonable value of services).

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## VII. TAX CONSEQUENCES

### §1.21 A. Income Tax Consequences of Fee Awards

Developments in tax law during the 1990s resulted in the inclusion in gross income of damage awards and settlement proceeds that formerly were not considered income. See IRC §104(a)(2) (personal injury damages not attributable to *physical* injury or illness are income); *Commissioner v Schleier* (1995) 515 US 323, 132 L Ed 2d 294, 115 S Ct 2159 (back pay is income).

Two major developments in the 2000s clarified the law regarding the taxation of attorney fees. See §§1.22-1.23.

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## §1.22 1. American Jobs Creation Act of 2004

Congress enacted the American Jobs Creation Act of 2004 (Jobs Act) (Pub L 108-357, §703, 118 Stat 1418), which added §62(a)(19) to the Internal Revenue Code (later redesignated as §62(a)(20), under Pub L 109-135, §412(q), 119 Stat 2577). Section 62(a)(20) allows a taxpayer, in computing adjusted gross income, to deduct "attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination." Section 62(e) defines "unlawful discrimination" to include a number of specific federal statutes (see IRC §62(e)(1)-(16)), any federal whistle-blower statute (see IRC §62(e)(17)), and any federal, state, or local law "providing for the enforcement of civil rights" or "regulating any aspect of the employment relationship… or prohibiting the discharge of an employee, [the] discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law." IRC §62(e)(18).

These deductions may be taken even when the Alternative Minimum Tax (AMT) applies. On the AMT and its effect on damages and attorney fees, see California Attorney's Guide to Damages §7.62A (2d ed Cal CEB 2004). The Jobs Act is not retroactive, however; it applies only to fees and costs paid after October 22, 2004, in compliance with judgments or settlements occurring after that date.

**NOTE:** Although the most significant tax consequences occur when the AMT is triggered, the inclusion of attorney fees and costs in gross income also has tax consequences for plaintiffs who are not subject to the AMT; a taxpayer may deduct only that portion of miscellaneous itemized deductions that exceeds 2 percent of adjusted gross income (IRC §67(a)), and the deductions are phased out for higher income taxpayers (IRC §68(a)).

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### §1.23 2. *Commissioner v Banks*

In *Commissioner v Banks* (2005) 543 US 426, 430, 160 L Ed 2d 859, 829, 125 S Ct 826, the Court held that attorney fees paid to lawyers under contingent fee contracts are income to the client and thus subject to taxation. This is so regardless of state law defining the nature of an attorney fee. 543 US at 437, 160 L Ed 2d at 871. The Court recognized that its holding in effect means that when the Alternative Minimum Tax (AMT) is triggered for noncorporate individual taxpayers, the fees may not be deducted. See 543 US at 432, 160 L Ed 2d at 868. On the effect of the *Banks* decision on tax planning issues, see California Attorney's Guide to Damages §§7.49-7.49S (2d ed Cal CEB 2004); Wood, *Contingent Fees and Tax Burdens: Planning After Commissioner v Banks*, 27 CEB Civ LR 52 (Apr. 2005).

The Court in *Banks* did not address arguments that treating statutory fees as income to the plaintiff would defeat the purpose of fee-shifting statutes. 543 US at 438, 160 L Ed 2d at 871. The Court did hold, however, that when a plaintiff has settled his statutory claims and calculated his attorney fee solely on the basis of a private contingent fee agreement, without any court-ordered award or indication in either the fee agreement or in the settlement agreement that the fee was in lieu of statutory fees, then the fee will be treated as a contingency fee, not a statutory fee. 543 US at 438, 160 L Ed 2d at 871.

**NOTE:** In the context of fee awards in public interest cases, taxing attorney fees to the clients makes no sense. Both Congress and the courts, including the Supreme Court, have recognized repeatedly that most civil rights laws depend greatly on private enforcement, requiring fully compensatory fee awards even when damages are small. See, *e.g., City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686, *Jones v Tracy Sch. Dist.* (1980) 27 C3d 99, 165 CR 100, and cases cited in §§8.25-8.28. Neither the courts or Congress have sought to reconcile these purposes with the tax rulings, nor apparently has the IRS.

Other pre-*Banks* decisions have discussed the irrationality of taxing clients for the fees they or their adversaries must pay their attorneys. The dissent in *Sinyard v Commissioner* (9th Cir 2001) 268 F3d 756 argued that fees awarded under the fee-shifting provision of the Fair Labor Standards Act (29 USC §216(b)) should not be counted as income to the plaintiffs because the provision calls for the court to award attorney fees "in addition to" any other recovery, and because the intent of Congress in enacting the legislation was to make the plaintiff whole. 268 F3d at 760. In *Porter v U.S. Agency for Int'l Dev.* (D DC 2003) 293 F Supp 2d 152, 156, the district court said that the possibility that a fee award could place the plaintiff "in a worse position than if he had never filed suit is a matter of serious concern" and ordered the fee paid directly to the attorney to avoid this consequence.

A number of commentators have remarked on the injustice of taxing the successful plaintiff on his or her gross recovery, which often bears no resemblance to any actual benefit he or she received, while not allowing any offset for the cost of obtaining the recovery. See, *e.g.,* Sager & Cohen, *How the Income Tax Undermines Civil Rights Litigation*, 73 S Cal L Rev 1075, 1083 (2000); Zupanick, *Attorney's Fees—Title VII Actions—Tax Consequences*, Federal Litigator (Mar. 2004).

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### §1.24 3. Tax Consequences of Fees Awarded Under Other Fee-Shifting Statutes Unclear

How the courts will interpret fee-shifting provisions not addressed in the American Jobs Creation Act of 2004 (Jobs Act) (Pub L 108-357, §703, 118 Stat 1418) (see §1.22) is an open question. Note that in IRS Letter Ruling 200518017, the IRS ruled that a common fund fee ordered by the court and not based on an agreement with the class or the class representatives is not taxable to the class members or the class representatives.

These tax developments make it advisable for the plaintiff's attorney to:

- Ascertain whether a new or prospective client's claim will result in a taxable recovery;
- Ascertain whether an attorney fee award will have undesirable tax consequences for the client; and
- Advise the client of the importance of getting advice on the matter from a tax practitioner. For example, it may be advisable to explore the possibility of a structured settlement plan that would spread the recovery out over more than one tax year.

**NOTE:** In *Jalali v Root* (2003) 109 CA4th 624, 635, 135 CR2d 168, the defendant-attorney had failed to advise the plaintiff-client in a discrimination action that she might be liable for taxes on the entire amount of the settlement, including the amount she paid for attorney fees. The trial court awarded the plaintiff damages for this bad advice, but the court of appeal reversed, holding, among other things, that the lawyer had not breached his fiduciary duty because the law regarding taxation was unsettled.

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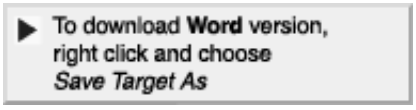
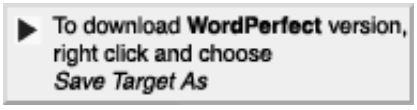
**Source:** Civil Litigation/California Attorney Fee Awards/1 Recovery of Attorney Fees: An Overview/§1.25 B. Form: Sample Clause Relating to Taxation of Fee Award

## §1.25 B. Form: Sample Clause Relating to Taxation of Fee Award




**Attorney has advised Client that any settlement or judgment obtained as a result of the representation may be partly or wholly taxable. Attorney has informed Client that tax advice is specifically excluded from the scope of the services attorney will provide under this agreement. Attorney has informed Client that _ _[*he/she*]_ _ is not an expert in tax law and has recommended that Client obtain advice from a tax practitioner concerning the tax consequences of any recovery.**

**The Court may order, or the parties to the dispute may agree, that another party will pay some or all of Client's attorney fees, costs, or both.**

[*Alternative 1*]

**Attorney and Client agree that any payment of attorney fees or costs made under any order or agreement belong to Attorney. Attorney agrees to accept this payment as payment in full for _ _[*all services rendered/costs advanced*]_ _ under this agreement.**

[*Alternative 2*]

**Attorney and Client agree that any payment of attorney fees or costs made under any order or agreement belong to Attorney.**

**If this payment is equal to or greater than the _ _[*attorney fees/costs/attorney fees and costs*]_ _ to which Attorney would otherwise be entitled under this agreement, Attorney agrees to accept the payment as payment in full for all _ _[*services rendered/costs advanced*]_ _ under this agreement.**

**If the payment is less than the _ _[*attorney fees/costs/attorney fees and costs*]_ _ to which Attorney would otherwise be entitled under this agreement, Attorney may either:**

**(1) Accept the payment as payment in full for _ _[*all services rendered/costs advanced*]_ _ under this agreement; or**

**(2) Choose to be compensated under this agreement.**

**Attorney's election to be compensated under this agreement will operate as an assignment to Client of Attorney's entire interest in any payment made by another party under court order or agreement by the parties.**

*Comment:* These alternative clauses incorporate the rule set forth in *Flannery v Prentice* (2001) 26 C4th 572, 575, 110 CR2d 809 into an attorney fee agreement. Although *Flannery* addressed the issue of who ultimately is entitled to recover the fee, it did not address taxation issues. For discussion of *Flannery,* see §2.32. For additional sample fee agreements, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).

**CAUTION:** These clauses have not been approved by any court. It is currently unclear if they will be effective to prevent a fee award from being deemed the client's taxable income. The Internal Revenue Service "challenges the notion that the tax treatment of plaintiffs should depend on the vagaries of state attorney's lien laws." Sager & Cohen, *How the Income Tax Undermines Civil Rights Litigation*, 73 S Cal L Rev 1075, 1082 (2000). It might well also challenge the notion that tax treatment of plaintiffs should depend on the vagaries of a state's fee-shifting statutes. See §§1.21-1.24.

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# 2

# Eligibility and Entitlement to Fees

I. INTRODUCTION §2.1

II. ELIGIBILITY FOR FEE AWARDS
- A. Eligibility Depends on the Statutory Language §2.2
  - 1. Claim-Filing Requirements §2.3
  - 2. Pleading Requirements §2.4
- B. Jurisdictional Requirements §2.5
- C. Fee-Shifting Statutes Generally Apply to All "Pending" Cases
  - 1. California Courts §2.6
  - 2. Federal Courts §2.7
- D. Eligibility When Merits Fee-Shifting Claim Not Decided §2.8
- E. Eligibility When Multiple Fee-Shifting Statutes Apply §2.9
- F. Does the Fee-Shifting Statute Apply in the Forum?
  - 1. State Fee-Shifting Statutes in Federal Courts
    - a. Federal Courts Can Apply State Fee-Shifting Statutes §2.10
    - b. Advantages of Obtaining Fees in Federal Court Under State Law §2.11
  - 2. Federal Fee-Shifting Statutes in State Courts §2.12
    - a. Advantages and Disadvantages of Using Federal Fee Statutes in State Court §2.13
    - b. Federal Claim Need Not Be Decided §2.14
    - c. Federal Fee-Shifting Statute Need Not Be Pleaded §2.15
    - d. Fees May Be Claimed Under Both State and Federal Law §2.16
  - 3. Trial or Appellate Court §2.17
  - 4. Arbitration §2.18
  - 5. Administrative Proceedings §2.19
- G. Is Fee Claimant Eligible for Attorney Fees?
  - 1. In Pro Per Attorneys
    - a. California Law §2.20
    - b. Federal Law §2.21
  - 2. In Pro Per Nonattorneys §2.22
  - 3. Nonprofit Law Firms and Pro Bono Attorneys §2.23
  - 4. Fees Paid by Others §2.24
  - 5. In-House Attorneys §2.25
  - 6. Government Attorneys §2.26
  - 7. Out-of-State Attorneys §2.27
  - 8. Intervenors §2.28
  - 9. Amicus Curiae §2.29
  - 10. Class Action Objectors §2.30
- H. Who the Fee Belongs to §2.31
  - 1. California Law: Court-Awarded Attorney Fees Belong to Attorney §2.32
  - 2. Federal Law: Court-Awarded Attorney Fees Belong to Party §2.33
- I. Eligibility for Fee Award Unaffected by Irregularities in Representation Arrangements §2.34

III. LIABILITY FOR FEE AWARDS §2.35
- A. Immunity §2.36
- B. Parties Against Whom No Relief Obtained §2.37
- C. Real Parties in Interest §2.38
- D. Intervenors §2.39
- E. Amicus Curiae §2.40
- F. Nonparties §2.41
- G. Apportionment Among Multiple Unsuccessful Parties
  - 1. California Law §2.42
  - 2. Federal Law §2.43

IV. ENTITLEMENT TO FEE AWARDS
- A. Must Be "Prevailing" or "Successful" Party
  - 1. Prevailing Party Concept Applies to Most Fee-Shifting Statutes and Theories §2.44
  - 2. "Prevailing Party" Defined §2.45

3. Comparing California and Federal Law §2.46
4. Prevailing Party for Purposes of Entitlement to Statutory Costs May Not Be Same as for Entitlement to Attorney Fee Award §2.47
a. Prevailing Party for Purposes of Entitlement to Appellate Costs Not Same as for Entitlement to Appellate Fees §2.48
b. Do Costs Statutes Have Different Standards for Prevailing Plaintiffs and Defendants? §2.49
B. Types of Prevailing Party Statutes
1. Statutes Providing That Court "May" Award Fees to Prevailing Party §2.50
a. Prevailing Plaintiffs Ordinarily Entitled to Fees Unless "Special Circumstances" Would Make Award "Unjust"
(1) California Law §2.51
(2) Federal Law §2.52
(3) "Special Circumstances" Interpreted Very Narrowly §2.53
(a) Most Factors Raised as "Special Circumstances" Rejected §2.54
(i) Losing Party's "Good Faith" §2.55
(ii) Limited Success §2.56
(iii) Lack of Resistance to Action §2.57
(iv) Lack of Prelitigation Notice or Necessity for Suit §2.58
(v) Lack of Public Benefit §2.59
(vi) Prevailing Party's Self-Interest/Incentive to Sue §2.60
(vii) Prevailing Party's Free or Reduced Cost Representation §2.61
(viii) Losing Party's Limited Financial Resources §2.62
(ix) Effect on Losing Party's Rights §2.63
(x) Winning Argument Raised Belatedly or by Others §2.64
(xi) Litigation Protracted Unreasonably §2.65
(xii) Benefits Achieved by Losing Party §2.66
(xiii) Fee Claim Excessive §2.67
(b) Cases Finding Special Circumstances §2.68
b. Prevailing Defendants Entitled to Fees Only When Plaintiff's Case Is Frivolous, Groundless, or Unreasonable §2.69
(1) California Statutes §2.70
(2) Federal Statutes §2.71
(3) Exception: Prevailing Defendants Who Act as Private Attorneys General May Be Entitled to Fee Awards Under CCP §1021.5 §2.72
(4) Exception: Commercial Litigation (Federal Law) §2.73
(5) Exception: Civil Anti-Harassment Statute §2.74
2. Statutes Providing That Court "Shall" Award Fees to Prevailing Party §2.75
3. Statutes Providing Different Standards for Different Parties §2.76
4. Statutes That Specify Particular Parties §2.77
5. When Two Different Statutes Apply §2.78
6. Prevailing Party Statutes With Special Qualifications
a. Civil Code §1717 §2.79
b. Code of Civil Procedure §998 §2.80
c. Government Code §800 §2.81
d. Code of Civil Procedure §1028.5 §2.82
e. Other Statutes §2.83
C. How "Prevailing Party" Is Determined
1. Introduction §2.84
2. Prevailing Party Determined Pragmatically by Impact of Action, Not by Formal Judgment §2.85
3. Plaintiffs Who Achieve "Some Relief" Are Prevailing Parties
a. California Law §2.86
b. Federal Law §2.87
4. Results Measured by Impact of Case as a Whole: Lack of Success at Particular Stages Not Controlling §2.88
a. Exception: CCP §998 §2.89
b. Exception: Interim Fees §2.90
c. Effect of Pending Appeal §2.91
(1) When Action Reversed on Merits §2.92
(2) Effect of Subsequent Developments at Trial Level §2.93
d. No Requirement That Prevailing Party Prove Merits of Fee-Shifting Claim §2.94
(1) California Law
(a) Settled Cases §2.95
(b) Catalyst Cases §2.96
(2) Federal Law §2.97
5. Parties May Not Relitigate Merits §2.98

6. Party May Prevail Even if Some Claims Unsuccessful
a. California Law §2.99
b. Federal Law §2.100
7. Particular Dispositions
a. Relief Obtained on Procedural or Technical Grounds §2.101
b. Relief Obtained on Non-Fee-Shifting Claim §2.102
c. Settlements
(1) California Law §2.103
(2) Federal Law §2.104
d. Preliminary Injunctions
(1) California Law §2.105
(2) Federal Law §2.106
e. Dismissals
(1) Defendant Who Obtains Dismissal Is Ordinarily the Prevailing Party §2.107
(2) Plaintiff May Be Deemed "Successful" Party Even if Case Dismissed
(a) California Law §2.108
(b) Federal Law §2.109
(3) Exception: Court Finds No Prevailing Party §2.110
f. When Action Is "Catalyst" for Defendant's Corrective Behavior
(1) California Law §2.111
(a) Reasonable Effort to Settle §2.112
(b) Action Not Frivolous, Unreasonable, or Groundless §2.113
(c) Causation Is Issue of Fact §2.114
(2) Federal Law: Party May "Prevail" Only if Court Orders Relief §2.115
(a) Preliminary Injunctive or Other Interim Relief §2.116
(b) "Catalyst" Rule Still Applicable to Many Federal Fee-Shifting Statutes §2.117

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## §2.1 I. INTRODUCTION

The prospect of a court-awarded attorney fee plays a significant part in determining a strategy for initiating or defending litigation. Litigation fees and costs can be enormous, sometimes rivaling or exceeding the amount involved on the merits. The rationale for the private attorney general doctrine and most fee statutes is to present a financial "carrot" as an incentive to encourage competent attorneys to undertake litigation that will enforce important rights, as well as a "stick" to encourage defendants to promptly settle meritorious claims or, better yet, to take steps to avoid them altogether.

Similarly, when fees are authorized by contract, a party must consider both the prospect of obtaining reimbursement for his or her own attorney fees if successful and that of having to pay the opponent's fees if not.

Therefore, in planning to initiate or respond to litigation, it is critical to determine whether a statute or a common-law doctrine might provide for some form of fee shifting and who might be eligible for those fees. Those issues are addressed in §§2.2-2.35 of this chapter. Who might be liable for fees is addressed in §§2.36-2.43.

Equally important is recognizing on what terms the eligible party will be *entitled* to fees under the statute, common-law theory, or contractual provision. See §§2.44-2.117, 4.39-4.48, 4.75-4.96, 5.4-5.9. Most private attorney general fee statutes have been interpreted to mean that prevailing plaintiffs are ordinarily entitled to fees unless special circumstances make an award unjust (see §§2.51-2.68, 3.7), but prevailing defendants are entitled to fees only if they can prove that the plaintiff's action was frivolous, unreasonable, or without foundation. See §§2.69-2.71. On the definition of "prevailing party," see §§2.44-2.117.

In commercial cases, *e.g.,* cases under the copyright, patent, and trademark laws, however, the dual standard for determining entitlement to fees does not apply; the factors for determining entitlement to such fees must be applied equally to plaintiffs and defendants. See §2.73.

Parties seeking to recover attorney fees under contractual fee clauses also must deal with significant eligibility and entitlement issues. On contractual fee provisions, see chap 4.

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## II. ELIGIBILITY FOR FEE AWARDS

### §2.2 A. Eligibility Depends on the Statutory Language

Initially, counsel must determine whether there is a fee-shifting statute, doctrine, or contract that is applicable to the litigation. Most statutes are specific to particular causes of action. The Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), for example, provides for fees to the prevailing party "in actions brought under this section." Govt C §12965(b). On fee awards under FEHA, see §§3.80-3.82.

Some statutes are more limited. For example, Lab C §4607 provides for fee awards when an applicant successfully resists an effort to terminate medical treatment, but not for proceedings brought to secure specific medical treatment. *Smith v Workers' Comp. Appeals Bd.* (2009) 46 C4th 272, 280, 92 CR3d 894. On fee awards under Lab C §4607, see §3.97. Other statutes are more general and apply across the board to any action that meets the statutory terms. Prominent examples include CCP §1021.5, the private attorney general statute, which applies to any action that meets its terms, and CCP §998, which can make a party eligible for a fee award who might otherwise not be under the terms of the underlying fee-shifting statute. On CCP §1021.5, see §§3.2-3.79. On CCP §998, see §§2.80, 2.89.

Some statutes set out preconditions for recovering fees, such as the need to make a prelitigation demand (see statutes listed in *Vasquez v State* (2008) 45 C4th 243, 252, 85 CR3d 466) or to plead the request at the initiation of the action (see, *e.g.,* Lab C §218.5).

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### §2.3 1. Claim-Filing Requirements

Code of Civil Procedure §1021.5 expressly states that parties seeking fees against governmental entities under the statute are not required to comply with the claim-filing requirements of Govt C §§900-935.7. Claims based on federal fee-shifting statutes also are exempt from state claim-filing requirements. See *Hacienda La Puente Unified Sch. Dist. v Honig* (9th Cir 1992) 976 F2d 487, 494. See generally *Williams v Horvath* (1976) 16 C3d 834, 129 CR 453.

Similarly, unless the fee-shifting statute expressly requires it, prelitigation settlement demands are not a precondition to the recovery of fees. *Vasquez v State* (2008) 45 C4th 243, 253, 85 CR3d 466; *Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832, 844 (no prelitigation notice requirement under Americans with Disabilities Act (ADA) (42 USC §§12101-12213), 42 USC §12188(a)(1)); *Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122, 1131 (same). See also *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128, 1136 n6 (defendant failed to show that it was listed "public agency").

A different rule, however, applies to fee claims based on the "catalyst theory," *i.e.,* when the lawsuit has caused the defendant to voluntarily afford relief. See §2.111. In catalyst cases, the plaintiff must give the opposing party notice of its claims and a reasonable opportunity to settle the matter before filing the lawsuit. *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 560, 21 CR3d 331. See §§2.111-2.114. The plaintiff can meet this requirement by exhausting required administrative remedies. See *Graham,* 34 C4th at 577.

**NOTE:** This requirement does not apply to noncatalyst fee claims, although prelitigation efforts to settle are relevant to CCP §1021.5's "necessity of private enforcement" element. *Vasquez,* 45 C4th at 257. See §3.66.

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### §2.4 2. Pleading Requirements

Generally, there is no requirement that the complaint mention an intent to seek reasonable attorney fees. See *Washburn v City of Berkeley* (1987) 195 CA3d 578, 583, 240 CR 784; *Committee for Sewer Referendum v Humboldt Bay Wastewater Auth.* (1978) 77 CA3d 117, 125 n7, 143 CR 463, overruled on other grounds in *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 227 n10, 226 CR 265; *T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 64, 112 CR 910. Some statutes, however, require that attorney fees and costs be claimed "upon the initiation of the action." See, *e.g.,* Lab C §218.5 (actions to recover past-due wages or employee benefits).

Nor must the complaint specify the grounds for a fee award. See *Green v Obledo* (1984) 161 CA3d 678, 207 CR 830. Further, a party may seek fees on different grounds from those originally stated (*Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265), even after the court has awarded fees on the original grounds (*Green v Obledo, supra*). But see *Board of Admin. v Wilson* (1997) 57 CA4th 967, 975, 67 CR2d 477 (no fee entitlement when postjudgment assertion of 42 USC §1983 claim surprised and prejudiced defendants). The party may need to spell out the grounds, however, if it claims fees under some statutes, such as Govt C §800(a) (see §§3.91-3.94).

**PRACTICE TIP:** Generally, it is advisable to include a claim for reasonable attorney fees in the prayer, to avoid any later claim of surprise or prejudice. Pleading a claim for statutory fees does not make a one-sided fee provision equally applicable to the other side. See §4.22. Different considerations apply to fee claims based on contractual fee clauses because a claim for contractual fees may entitle the opposing party to a fee award if it wins to which it would otherwise not be entitled. See §§4.44-4.46.

**NOTE:** There is "nothing wrong" with pleading a statutory claim "with the purpose of obtaining attorneys' fees if the claim succeeds." *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1285.

On pleading fee claims generally, see chap 11.

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## §2.5 B. Jurisdictional Requirements

Courts must have jurisdiction over the action to award fees. Compare *Zambrano v INS* (9th Cir 2002) 282 F3d 1145 (under Equal Access to Justice Act (28 USC §2412(d)(1)(A)), when case dismissed for lack of subject matter jurisdiction, court lacked jurisdiction to award fees) with *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 3, 83 CR3d 771 (court retains jurisdiction to award fees to defendants even after defendants dismissed for lack of personal jurisdiction).

When a trial court loses jurisdiction because the case has been appealed or the judgment has become final, however, it retains jurisdiction to award fees. See, *e.g., Maria P. v Riles* (1987) 43 C3d 1281, 1289, 240 CR 872; *Hoover Community Hotel Dev. Corp. v Thomson* (1985) 168 CA3d 485, 487, 214 CR 264.

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### C. Fee-Shifting Statutes Generally Apply to All "Pending" Cases

#### §2.6 1. California Courts

Newly-enacted statutes are generally not given retroactive effect unless expressly made retroactive (CCP §3). However, statutes that are merely procedural are applicable to all pending cases, even if the cause of action arose before the statute's effective date. See *Robertson v Rodriguez* (1995) 36 CA4th 347, 42 CR2d 464.

Statutes that add or amend provisions for attorney fees are almost always applied to pending cases. For example, see:

- *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503 (CCP §1021.5 applicable to pending cases);
- *Kievlan v Dahlberg Elecs.* (1978) 78 CA3d 951, 144 CR 585 (same);
- *Heritage Eng'g Constr. v City of Industry* (1998) 65 CA4th 1435, 77 CR2d 459 (amendment to CCP §998 applied to case pending on appeal);
- *California Hous. Fin. Agency v E.R. Fairway Assocs.* (1995) 37 CA4th 1508, 44 CR2d 591 (amendment to Health & S C §51205 applied to pending case);
- *Robertson v Rodriguez, supra* (CCP §425.16 applied to pending case);
- *Mir v Charter Suburban Hosp.* (1994) 27 CA4th 1471, 1478, 33 CR2d 243 (statute authorizing attorney fee awards in suits challenging health care disciplinary actions applied to pending administrative mandamus proceedings);
- *ARA Living Ctrs.-Pac., Inc. v Superior Court* (1993) 18 CA4th 1556, 1562, 23 CR2d 224 (fee provision in elder abuse statute (Welf & I C §15657) applied to pending cases);
- *Harbor View Hills Community Ass'n v Torley* (1992) 5 CA4th 343, 7 CR2d 96 (amendment to CC §1717, providing that contractual provision permitting recovery of attorney fees must be construed as applying to entire contract, applied to pending case); and
- *People v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 387, 211 CR 501 (attorney fees proper when appeal still pending at time of new statute).

Compare these cases with *Miller v Givens* (1994) 30 CA4th 18, 37 CR2d 1 (award of fees incurred *after* effective date of amendment not retroactive application of amendment). See also *Insurance Co. of N. Am. v Moore* (9th Cir 1986) 783 F2d 1326.

*City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 58 CR3d 218, rejected retroactive application of a city fees ordinance to a case that had been dismissed 5 days before the ordinance became effective.

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## §2.7 2. Federal Courts

Federal courts follow a rule similar to California's regarding retroactivity (see §2.6). See *Bradley v School Bd.* (1974) 416 US 696, 40 L Ed 2d 476, 94 S Ct 2006; *Sethy v Alameda County Water Dist.* (9th Cir 1979) 602 F2d 894. Compare these cases with *Landgraf v USI Film Prods.* (1994) 511 US 244, 128 L Ed 2d 229, 260, 114 S Ct 1483 (portions of Civil Rights Act of 1991, 42 USC §1981a(a), that provide jury trial did not apply to case pending on appeal when Act was enacted; Court distinguished cases involving "procedural" matters like attorney fees). See also *Abu-Sahyun v Palo Alto Unified Sch. Dist.* (9th Cir 1988) 843 F2d 1250 (that retroactive application of fee statute upset defendant's expectations at time of settlement was not "special circumstance" justifying fee denial).

In *Martin v Hadix* (1999) 527 US 343, 144 L Ed 2d 347, 119 S Ct 1998, the Supreme Court held that §803(d)(3) of the Prison Litigation Reform Act of 1995 (42 USC §1997e(d)(3)), which limits attorney fees for postjudgment monitoring, applies to services that were performed *after* the Act's effective date but not to monitoring services performed *before* the effective date.

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## §2.8 D. Eligibility When Merits Fee-Shifting Claim Not Decided

When the court must decide the merits of a claim that triggers a potential fee award under a fee-shifting statute, the fee-shifting statute may nevertheless support an award when all or some of the relief sought on the fee-shifting claim is obtained. This can occur through a settlement (see §§2.103-2.104), by obtaining relief on preliminary procedural or technical grounds (see §2.101), or by obtaining relief on an alternative non-fee-shifting claim that arises from a common nucleus of operative fact with the fee-shifting claim (see §2.102).

Similarly, under California law, a fee award may be available under the "catalyst theory" when the action causes the defendant to voluntarily afford the plaintiff the relief sought. See §2.111. Under federal prevailing party fee-shifting statutes, however, only relief that has some "judicial imprimatur" qualifies the plaintiff as the prevailing party. See §§2.115-2.117.

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## §2.9 E. Eligibility When Multiple Fee-Shifting Statutes Apply

There may be multiple grounds for attorney fee claims and awards. See, *e.g., Amaral v Cintas* (2008) 163 CA4th 1157, 1174, 78 CR3d 572; *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 420, 61 CR3d 295 (fee-shifting provision in Public Safety Officers Procedural Bill of Rights Act (Govt C §3309.5(e)) and CCP §1021.5 not mutually exclusive); *Green v Obledo* (1984) 161 CA3d 678, 683, 207 CR 830.

When the requirements of various fee-shifting statutes conflict, however, the rules of statutory construction, as well as principles of federal supremacy, will determine the controlling statute. See, *e.g., Murillo v Fleetwood Enters., Inc.* (1998) 17 C4th 985, 73 CR2d 682, discussed in §3.105; *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 3, 83 CR3d 771 (although dismissed defendant not entitled to fees under Consumers Legal Remedies Act (former CC §1780(d), now CC §1780(e)), fees allowed under Florida statute); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 872, 71 CR3d 642, discussed in §3.96. See also §§3.98-3.99 (discussing labor statutes preempted by federal law).

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## F. Does the Fee-Shifting Statute Apply in the Forum?

### 1. State Fee-Shifting Statutes in Federal Courts

### §2.10 a. Federal Courts Can Apply State Fee-Shifting Statutes

Federal courts have the power to award attorney fees under state laws. See, *e.g., Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197, 1216 (fees awarded under CC §1717); *CRST Van Expedited, Inc. v Werner Enters., Inc.* (9th Cir 2007) 479 F3d 1099, 1111; *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128, 1137; *Farmers Ins. Exch. v Law Offices of Conrado Joe Sayas, Jr.* (9th Cir 2001) 250 F3d 1234, 1236 (fees awarded under CC §1717); *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371. In *Travelers Cas. & Sur. Co. v PG&E* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199, the court held that federal bankruptcy law does not preclude fee claims in bankruptcy court based on contractual fee clauses, even if the fees were incurred in litigating bankruptcy law.

State fee-shifting statutes do not apply, however, when the complaint raises only federal claims. *Disability Law Ctr., Inc. v Anchorage Sch. Dist.* (9th Cir 2009) 581 F3d 936, 940.

When the parties make fee claims under state law, federal courts must apply state law to determine entitlement to fees and the amount of those fees. See *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607 (fees awarded under California Fair Employment and Housing Act (FEHA) (Govt C §12965(b))); *Mangold v PUC* (9th Cir 1995) 67 F3d 1470, 1478; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552 (fees awarded under CCP §1021.5 and Unruh Act (CC §52(a)). Compare these cases with *Hubbard v SoBreck LLC* (9th Cir 2009) 554 F3d 742, 746 (fee award to successful defendant under CC §55 preempted by Americans with Disabilities Act fee provision (42 USC §12205), which permits fees to defendants only if plaintiff's case frivolous).

**Additional authorities:** *City of Carmel-by-the-Sea v U.S. Dep't of Transp.* (9th Cir 1997) 123 F3d 1142, 1167 (remanding issue of whether plaintiffs entitled to fees under CCP §1021.5 and other statutes); *San Francisco Culinary Bartenders & Serv. Employees Welfare Fund v Lucin* (9th Cir 1996) 76 F3d 295 (defendant entitled to fees under state law for overturning wrongful attachment); *Bouman v Block* (9th Cir 1991) 940 F2d 1211, 1237 (fees awarded under FEHA); *Masson v New Yorker Magazine, Inc.* (9th Cir 1989) 895 F2d 1535, 1547 (fees denied under CCP §1021.7), rev'd on other grounds (1991) 501 US 496, 115 L Ed 2d 447, 111 S Ct 2419; *Keith v Volpe* (CD Cal 1986) 644 F Supp 1317, aff'd (9th Cir 1988) 858 F2d 467, 486 (fees awarded under CCP §1021.5).

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### §2.11 b. Advantages of Obtaining Fees in Federal Court Under State Law

For the most part, there are distinct advantages to obtaining fees under state, as opposed to federal, law. For example, the catalyst theory, which allows a party to be declared the prevailing party when the litigation induces the defendant to take voluntary corrective action, no longer applies to federal prevailing party fee statutes (see §2.115), but does apply to fee-shifting claims under California law (see §2.111). See *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 570, 21 CR3d 331.

Similarly, the standards for calculating the *amount* of fees under state law may be more favorable to the fee-claimant than under federal law. See *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612 (applying more lenient California standards on "partial success reductions"); *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377 (rejecting federal restrictions on contingent risk multipliers).

When it is otherwise appropriate, therefore, adding a state law claim to a complaint in federal court will improve the chances of recovering a fee in the event the defendant voluntarily affords relief because California still applies the catalyst rule, and it certainly will improve the chances of recovering a fee that includes a lodestar enhancement.

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## §2.12 2. Federal Fee-Shifting Statutes in State Courts

Virtually all federal fee-shifting statutes (see §3.130) provide a basis for fee awards in state court as well as federal court. See, *e.g., Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 638 n27, 186 CR 754 (California courts have concurrent jurisdiction over civil rights actions brought under 42 USC §1983); *Choudhry v Free* (1976) 17 C3d 660, 669, 131 CR 654 (fees awarded to prevailing plaintiffs under Voting Rights Act of 1965 (42 USC §1973*l*(e)). See generally *City & County of Los Angeles v Superior Court* (1999) 21 C4th 292, 304 n2, 87 CR2d 441; *Williams v Horvath* (1976) 16 C3d 834, 129 CR 453 (state courts have concurrent jurisdiction with federal courts to enforce federal civil rights protected by statute); *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750; *Brown v Pitchess* (1975) 13 C3d 518, 521, 119 CR 204. See also *Maine v Thiboutot* (1980) 448 US 1, 65 L Ed 2d 555, 100 S Ct 2502; S Rep No. 94-1011, 94th Cong, 2d Sess (1976), reprinted in 1976 US Code Cong & Ad News 5908, 5911.

The following discussion (§§2.13-2.16) briefly highlights the major differences between federal and state fee statutes, as well as some of the reasons for and against claiming fees under federal statutes in state court. A complete review of recent federal authority is beyond the scope of this book. See Derfner & Wolf, Court Awarded Attorney Fees (1983); Conte, Attorney Fee Awards (2d ed 1993); Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (4th ed 2003).

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### §2.13 a. Advantages and Disadvantages of Using Federal Fee Statutes in State Court

**Advantages.** The main advantage of basing a claim for fees in state court on a federal fee-shifting statute is that, unlike a fee award under CCP §1021.5 (the private attorney general statute), a fee award under the federal civil rights acts (*e.g.,* 42 USC §§1983, 1988) does not require that the action benefit a large class of persons; it is appropriate even if only one individual's civil rights are involved. *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424. See §§2.54, 3.54 for further discussion of *Schmid*. Nor does 42 USC §1988 require the fee claimant to show that the "necessity and burden of private enforcement" make a fee award "appropriate," which are requirements under CCP §1021.5; §1988 fees can be awarded even if the individual has a substantial pecuniary interest in the outcome. See, *e.g., Herrington v County of Sonoma* (9th Cir 1989) 883 F2d 739; *Ackerley Communications, Inc. v City of Salem* (9th Cir 1985) 752 F2d 1394.

Another advantage is that federal fee awards are not subject to any legislatively imposed restrictions on the collection of fee awards. See *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 958, 217 CR 621; *Green v Obledo* (1984) 161 CA3d 678, 683, 207 CR 830. See also *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, 746 (state legislature may not limit payment of fee awards under federal law). See generally chap 15 on collection of fee awards.

**Disadvantages.** A major disadvantage of seeking a fee award under federal law in state court is that federal fee-shifting statutes are subject to restrictions on lodestar multipliers that do not apply to state fee-shifting statutes. See *Ketchum v Moses* (2001) 24 C4th 1122, 1137, 104 CR2d 377 (rejecting federal restrictions on contingent risk multipliers); *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612 (applying more lenient California standards on "partial success reductions"). See also §10.18.

Also, the catalyst theory, which allows a party to be declared the prevailing party when the litigation induces the defendant to take voluntary corrective action, no longer applies to federal prevailing party fee statutes (see §2.115), but does apply to fee-shifting claims under California law. See §2.111; *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 570, 21 CR3d 331.

**Similarities.** In many other ways, however, federal and state standards for determining the amount of fees are very similar. See *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750 (applying federal and state standards interchangeably to determination of fee under federal fee-shifting statute). When fees are available under both state and federal law, however, the state fee-calculation standards can be applied to the state fee-shifting statute. See, *e.g., Bouman v Block* (9th Cir 1991) 940 F2d 1211, 1235; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470.

**PRACTICE TIP:** If entitlement to fees on state law grounds is clear, alleging a federal basis adds little and may complicate and confuse matters. If a fee award under state law is in doubt, however, a federal fee statute may be easier to satisfy and therefore is worth alleging, even if the fee award might be lower than under state law.

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### §2.14 b. Federal Claim Need Not Be Decided

Attorney fees may be awarded under federal law even if the court does not explicitly decide the federal claim. *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 204 CR 913. In *Filipino Accountants,* an accountants' association sued the State Board of Accountancy over the state's refusal to grant waivers from licensing requirements for applicants certified as CPAs in the Philippines. After the trial court issued an intended decision favorable to the plaintiffs, the parties entered into a stipulated judgment requiring the state to reevaluate the Filipino CPAs' applications. The stipulated judgment, however, did not contain any finding or admission that federal law had been violated. The court granted plaintiffs' motion for a fee award under both CCP §1021.5 and 42 USC §1988. The state appealed only the fee award under 42 USC §1988 (because such awards were not affected by the Budget Act of 1982 (Stats 1982, ch 326) (see §§15.4-15.6), which restricted only attorney fee payments under CCP §1021.5).

The court of appeal affirmed the award under 42 USC §1988, holding that, even though the stipulated judgment entered by the court did not expressly reach the plaintiffs' federal civil rights claim, the award was appropriate because the federal claim was not "essentially fictitious," "wholly insubstantial," or "obviously frivolous." 155 CA3d at 1035. Therefore, because the plaintiffs' state statutory claims on which the judgment was based arose from the same common nucleus of facts as their federal civil rights claims, they were entitled to a fee award under §1988. See also *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1464, 240 CR 1.

If the federal fee-shifting claim is *lost*, however, it will not support a fee award for a non-fee-shifting claim, even if the claims are related. *McFadden v Villa* (2001) 93 CA4th 235, 113 CR2d 80; *City of Hawaiian Gardens v City of Long Beach* (1998) 61 CA4th 1100, 72 CR2d 134 (denying 42 USC §1988 fees when 42 USC §1983 claim pleaded but dismissed after plaintiff prevailed on state law claim). See also *McMahon v Lopez* (1988) 199 CA3d 829, 839, 245 CR 172.

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### §2.15 c. Federal Fee-Shifting Statute Need Not Be Pleaded

If the complaint supports a federal claim, a California state court may award attorney fees under federal law even if the complaint does not specifically plead a federal statutory cause of action. *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1464, 240 CR 1; *Green v Obledo* (1984) 161 CA3d 678, 682, 207 CR 830; *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 69, 200 CR 322. In *Kreutzer,* the plaintiff sued to invalidate the revocation of his permit to operate an outdoor recreational facility, claiming that the permit had been revoked without a hearing. Immediately after the alternative writ issued, the defendant agreed to provide a hearing. The plaintiff then moved for attorney fees under 42 USC §1988, although no claim for fees under any theory had been made in his petition. The trial court denied fees. The appellate court, although it ultimately denied the petitioner's claim, held that the plaintiff's failure to plead a Civil Rights Act claim or claim for attorney fees under §1988 was not dispositive (see §2.4). The court denied the plaintiff attorney fees, however, on the ground that "special circumstances" justified the trial court's exercise of its discretion to deny fees (see §§2.51-2.52).

Failing to plead a federal claim, however, may ultimately preclude a fee award. In *Board of Admin. v Wilson* (1997) 57 CA4th 967, 975, 67 CR2d 477, the court upheld the trial court's denial of §1988 fees because the plaintiff had neither pled a federal claim nor tried the case on that basis. The court concluded that, in light of the defendant's substantial "standing" defense, raising the 42 USC §1983 claim in a postjudgment motion unfairly surprised and prejudiced the defendant. See also *City of Hawaiian Gardens v City of Long Beach* (1998) 61 CA4th 1100, 72 CR2d 134 (following *Wilson* when §1983 claim pleaded but dismissed after plaintiff prevailed on state law claim).

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### §2.16 d. Fees May Be Claimed Under Both State and Federal Law

Attorney fees may be claimed in the same action under both state and federal law. In *Green v Obledo* (1984) 161 CA3d 678, 207 CR 830, the plaintiffs' action had invalidated state welfare regulations as inconsistent with federal law, and plaintiffs had obtained a fee award against the state of more than $87,000, based on Welf & I C §10962 and CCP §1021.5. Their efforts to collect the award were unsuccessful, however, due to restrictions under the Budget Act of 1982 (Stats 1982, ch 326), which limited the money available for fee awards made under those statutes. See §§15.4-15.6. The plaintiffs moved to compel payment based on their entitlement to fees under 42 USC §1988, to which the Budget Act did not apply, but the trial court denied the motion.

The court of appeal reversed, holding that the plaintiffs were entitled to an award under §1988 and that Budget Act restrictions on fee payments under CCP §1021.5 did not apply to fee awards under federal law. The court held that it was inconsequential that plaintiffs had not specifically cited the underlying federal statutes in their pleadings, because the pleadings included facts that stated a federal cause of action. 161 CA3d at 682. The court also held that plaintiffs were not estopped from enforcing their federal fee claim by not having tendered the federal statute as a ground for the award in their original fee applications. The court found that, because the criteria for calculating attorney fees were the same under both federal and state law (but see §10.18), the defendants had not been disadvantaged by the change in grounds. 161 CA3d at 683. See also *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 204 CR 913.

For a similar ruling affirming an award on federal grounds that was made initially on state grounds, see *Northern Cal. Dist. Council of Laborers v Robles Concrete Co.* (1983) 149 CA3d 289, 196 CR 776 (fee award sustained under Labor Management Relations Act (29 USC §§141-187)).

When the court makes fee awards under both state and federal law, it applies state fee-shifting standards to calculate the amount of fees due under the state statute. *Bouman v Block* (9th Cir 1991) 940 F2d 1211. See also *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (fees claimed and awarded only under state law, although party also prevailed on federal grounds); *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750 (awarding fees under federal law but citing interchangeably to California law).

Prevailing defendants who seek fee awards under federal law in state court also must comply with federal standards for such awards. See, *e.g., County of Butte v Bach* (1985) 172 CA3d 848, 869, 218 CR 613, reaff'd 215 CA3d at 308; *Pyne v Meese* (1985) 172 CA3d 392, 408, 218 CR 87. See §§2.69-2.71.

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## §2.17 3. Trial or Appellate Court

Statutes and equitable doctrines that provide for reasonable attorney fees generally authorize fee awards for both trial and appellate court services. See §9.31. Appellate fees, however, are often claimed in the trial court, although appellate courts have the power to determine these issues if they so choose. See §§12.1-12.9.

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### §2.18 4. Arbitration

Statutory fees are also available in arbitration proceedings. See *Broughton v CIGNA Healthplans* (1999) 21 C4th 1066, 90 CR2d 334 (when statutory claims that include fees are submitted to arbitration, arbitrator has power to award them). See also *Pilimai v Farmers Ins. Exchange Co*. (2006) 39 C4th 133, 142, 45 CR3d 760 (CCP §998 applicable to arbitrations); *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597 (arbitrator has power to determine contractual fees); *Taylor v Van-Catlin Constr.* (2005) 130 CA4th 1061, 30 CR3d 690 (arbitrator did not exceed his authority by awarding attorney fees to contractor under CC §3260, and thus trial court improperly deleted fee award, which was not subject to judicial review); §11.5. On the availability of fees in arbitration proceedings, see chap 14.

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## §2.19 5. Administrative Proceedings

In administrative proceedings, some fee-shifting statutes apply; others do not. See, *e.g., Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 160 CR 124 (administrative agency not authorized to award fees under CCP §1021.5 because it applies only to "actions"; equitable doctrines, however, may be applied), disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728. On the availability of fees in administrative proceedings, see chap 13.

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## G. Is Fee Claimant Eligible for Attorney Fees?

### 1. In Pro Per Attorneys

### §2.20 a. California Law

Attorneys representing themselves in litigation are not eligible to recover attorney fees for their own services under either fee-shifting statutes or contractual fee clauses. In *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241, the supreme court held that a law firm suing in pro per to recover unpaid fees could not recover fees for that litigation because it represented itself. The court based its decision on the dictionary definition of an attorney fee as the consideration a person pays or becomes liable to pay in exchange for legal services, as well as on the unfairness that would result if in pro per attorneys could recover fees but laypersons representing themselves could not (see §2.22).

Subsequent to *Trope,* the supreme court unanimously held that an attorney defending himself or herself in a civil action is not entitled to attorney fees as a sanction against the plaintiff under CCP §128.7, nor is he or she entitled to compensation for lost business. *Musaelian v Adams* (2009) 45 C4th 512, 520, 87 CR3d 475, disapproving *Laborde v Aronson* (2001) 92 CA4th 459, 112 CR2d 119, and *Abandonato v Coldren* (1995) 41 CA4th 264, 268, 48 CR2d 429, which had held that in pro per attorneys could be awarded fees as sanctions. See also *Taheri Law Group v Evans* (2008) 160 CA4th 482, 494, 72 CR3d 847 (fees denied to defendant-attorney who successfully litigated anti-SLAPP motion (CCP §425.16) on own behalf); *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1265, 24 CR3d 818 (in class action, law firm to which named plaintiff-attorney belonged, and closely related law firm, were both disqualified because of potential conflict created by right to recover attorney fees).

Courts have awarded attorney fees, however, to pro per attorneys who also represent other parties. See *Ramona Unified Sch. Dist. v Tsiknas* (2005) 135 CA4th 510, 37 CR3d 381 (upholding fee award to defendant-attorney under anti-SLAPP statute (CCP §425.16) because she had attorney-client relationship with co-defendants); *Farmers Ins. Exch. v Law Offices of Conrado Joe Sayas, Jr.* (9th Cir 2001) 250 F3d 1234, 1238 (fees incurred under CC §1717 when law firms represented each other in fee dispute with mutual client).

Attorneys who are represented by other members of their law firm may also recover fees. See *Gorman v Tassajara Dev. Corp.* (2009) 178 CA4th 44, 95, 100 CR3d 152 (attorney not entitled to fees for representing himself, but law firm of which he was CEO, CFO, president, and secretary entitled to fees for work performed by other members of firm); *Gilbert v Master Washer & Stamping Co.* (2001) 87 CA4th 212, 220, 104 CR2d 461. Attorneys who retain special counsel to assist them may also recover for the assisting attorney's fees. *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1425, 103 CR2d 174.

In *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 522, 94 CR2d 205, the fact that one of the plaintiff's attorneys belonged to the organizational plaintiff and stood to benefit from the decision did not preclude a fee award under CCP §1021.5.

*Trope* also expressly recognized that a court could award attorney fees to a pro per attorney party "under any of the traditional *equitable* exceptions to the American rule, such as the private attorney general, substantial benefit, and common fund theories." 11 C4th at 284. See, *e.g., Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 914, 160 CR 124 (PUC could award common fund fees to nonattorney party because nonattorneys permitted to participate and represent others), disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728.

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### §2.21 b. Federal Law

Under federal law, pro per litigants, whether attorneys or nonattorneys, cannot recover attorney fees under 42 USC §1988. *Kay v Ehrler* (1991) 499 US 432, 113 L Ed 2d 486, 111 S Ct 1435. See also *Elwood v Drescher* (9th Cir 2006) 456 F3d 943 (pro per attorney defendant not entitled to fees for defending frivolous 42 USC §1983 action).

Similarly, in *Ford v Long Beach Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1087, the court held that a student who prevailed under the Individuals with Disabilities Education Act (20 USC §1415(i)(3)(B)) was not entitled to fees for the legal work performed by his attorney-parent. In *Van Duyn v Baker Sch. Dist. 5J* (9th Cir 2007) 481 F3d 770, the court reaffirmed that ruling, but remanded for the award to counsel other than the student's mother.

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### §2.22 2. In Pro Per Nonattorneys

Nonattorneys representing themselves are not eligible to recover attorney fees under statutes or contracts that provide for attorney fees. See *Trope v Katz* (1995) 11 C4th 274, 285, 45 CR2d 241, citing *Jacobson v Simmons Real Estate* (1994) 23 CA4th 1285, 1290, 28 CR2d 699, and other cases; *Atherton v Board of Supervisors* (1986) 176 CA3d 433, 222 CR 56 (nonattorney not entitled to attorney fees under CCP §1021.5); *In re Dormio* (1981) 127 CA3d 788, 179 CR 669 (same). See also *Longval v WCAB* (1996) 51 CA4th 792, 59 CR2d 463 (upholding amendments eliminating fee awards for lay representatives in workers' compensation proceedings and holding that only attorneys licensed in California can recover fees for representing applicants before WCAB). But see *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 914, 160 CR 124 (in quasi-judicial proceeding, PUC had authority to award common fund fees to nonattorney advocating for himself and in representative capacity because PUC regulations authorize nonattorneys to participate and to represent others), disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728.

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### §2.23 3. Nonprofit Law Firms and Pro Bono Attorneys

The fact that the attorneys agreed to represent the successful party at a reduced fee or without charge or were funded by charitable or other sources will not affect eligibility for statutory, contractual, or equitable attorney fees. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 681, 186 CR 589 (attorneys employed by publicly funded legal aid law firms entitled to fees under CCP §1021.5); *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315 (nonprofit law firms funded by charitable contributions entitled to fees under CCP §1021.5); *Moran v Oso Valley Greenbelt Ass'n* (2004) 117 CA4th 1029, 12 CR3d 435 (plaintiff represented without charge by law firm that employed her); *Rosenaur v Scherer* (2001) 88 CA4th 260, 283, 105 CR2d 674 (CCP §425.16 (anti-SLAPP statute) authorized fee award for attorneys who agreed to take on representation at no cost to client); *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605 (legal services corporation attorney entitled to fees under CC §1717), cited with approval in *Marriage of Ward* (1992) 3 CA4th 618, 4 CR2d 365; *Sundance v Municipal Court* (1987) 192 CA3d 268, 274, 237 CR 269 (trial court erred by refusing to award fees for services by volunteer paralegals); *County of Humboldt v Swoap* (1975) 51 CA3d 442, 444, 124 CR 510 (nonprofit law firm entitled to fee award under Welf & I C §10962). See also *Frye v Tenderloin Hous. Clinic, Inc.* (2006) 38 C4th 23, 40 CR3d 221.

Federal law, like California law, expressly recognizes that nonprofit law firms and pro bono attorneys are eligible for statutory attorney fees. See, *e.g., Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541 (litigant represented by legal aid society entitled to attorney fee award under 42 USC §1988); *Dennis v Chang* (9th Cir 1980) 611 F2d 1302, 1305 n4.

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### §2.24 4. Fees Paid by Others

The court may award fees when the successful party's attorney fees have been paid by a third party. See, *e.g., Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 333, 130 CR2d 512 (attorneys paid by plaintiff's employee association entitled to fee award under CCP §1021.5); *International Billing Servs., Inc. v Emigh* (2000) 84 CA4th 1175, 1195, 101 CR2d 532 (citing this book) (fees paid by employer); *Macias v Hartwell* (1997) 55 CA4th 669, 676, 64 CR2d 222 (insurance company's payment of prevailing defendant's fees no bar to fee award under CCP §425.16(c) (anti-SLAPP statute)). See also §§1.21-1.24.

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## §2.25 5. In-House Attorneys

In-house counsel are entitled to recover attorney fees. *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1095, 95 CR2d 198 (litigant represented by in-house counsel "incurs" legal fees within meaning of CC §1717).

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### §2.26 6. Government Attorneys

Public entities are eligible for fee awards under most fee-shifting statutes and contractual fee clauses. See *Lolley v Campbell* (2002) 28 C4th 367, 121 CR2d 571 (quoting this book) (employee represented by labor commissioner in wage dispute entitled to attorney fee award under Lab C §98.2); *City & County of San Francisco v Jen* (2005) 135 CA4th 305, 37 CR3d 454 (affirming $837,604 fee award to county agency for enforcement action under Health & S C §17980.7); *Schroeder v Irvine City Council* (2002) 97 CA4th 174, 194, 118 CR2d 330 (fee awards to government agencies that prevail on anti-SLAPP motions (CCP §425.16) mandatory).

Some statutes expressly preclude fee claims by public entities. See, *e.g.,* Govt C §12965(b) (public entities suing under Fair Employment and Housing Act (FEHA) (Govt C §12965(b)) not eligible for fees). Code of Civil Procedure §1021.5 also bars public entities from claiming fees against private parties but expressly permits them to claim fees in litigation against other public entities. *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 650 n10, 52 CR3d 1 (fees awarded to county in action against state agency). But see *People ex rel Brown v Tehama County Bd. of Supervisors* (2007) 149 CA4th 422, 450, 56 CR3d 558 (California Attorney General, suing on behalf of the People, not entitled to fees under CCP §1021.5 because Attorney General already charged with enforcing state law).

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### §2.27 7. Out-of-State Attorneys

Out-of-state attorneys who are not licensed to practice law in California may or may not be eligible for statutory attorney fees. See *Winterrowd v American Gen. Annuity Ins. Co.* (9th Cir 2009) 556 F3d 815 (in case before district court in California, plaintiffs could recover fees for work of out-of-state attorney, not member of California bar, because he did not physically appear before court, did not sign pleadings, had minimal, nonexclusive contacts with plaintiffs, did not render legal services directly to plaintiffs, and because licensed California lawyer alone remained responsible to plaintiffs) and cases cited therein.

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### §2.28 8. Intervenors

Intervenors who meet the requirements of fee-shifting statutes such as CCP §1021.5 are also entitled to attorney fees. See *Crawford v Board of Educ.* (1988) 200 CA3d 1397, 1407, 246 CR 806, in which the court denied fees on the facts but held that intervenors who "make a clear showing of some unique contribution to the litigation" are entitled to fees under CCP §1021.5. Compare *Crawford* with *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 87, 24 CR3d 72, in which the court distinguished *Crawford* and held that eligibility for fees under §1021.5 may not be based on the relative contributions of private parties, stating, "[a] party who satisfies the criteria for intervention and who contributes to the success of public interest litigation should be entitled to an award of attorneys' fees on the same terms as any other party." *City of Santa Monica* also recognized that eligibility may not be denied based on "an after-the-fact assessment of whether the intervenor's participation was 'necessary' to the successful result achieved." 126 CA4th at 88. On the other hand, the relative contribution of multiple parties may be relevant to a determination of the amount of fees to be awarded. 126 CA4th at 88. See §§9.72-9.77.

In *County of Humboldt v Swoap* (1975) 51 CA3d 442, 124 CR 510, the court affirmed a fee award under Welf & I C §10962 to public benefit recipients who intervened as defendants in a mandamus action brought by the county against the state. The court held that "if the recipient's interests were safeguarded through the assistance of counsel," a fee award is required. 51 CA3d at 445.

The federal cases on which the *Crawford* ruling was based looked only for a substantial, nonduplicative contribution by the intervenor. See, *e.g., Wilder v Bernstein* (2d Cir 1992) 965 F2d 1196, 1201, 1204; *Donnell v U.S.* (DC Cir 1982) 682 F2d 240, 248. Compare those cases with *Sierra Club v Hamilton County Bd. of County Comm'rs* (6th Cir 2007) 504 F3d 634, 643 (Sierra Club a prevailing party even though not a signatory to consent decree); *Seattle Sch. Dist. No. 1 v Washington* (9th Cir 1980) 633 F2d 1338, 1349 (intervenors entitled to fees for work that was justified at that time but which later proved unnecessary. See also *International Rectifier Corp. v Samsung Electronics Co.* (Fed Cir 2005) 424 F3d 1235 (voluntary intervention does not preclude award of fees; case remanded for finding on whether intervenor substantially contributed to resolution of sanctions issue). But see *Savaglio v Wal-Mart Stores, Inc.* (2007) 149 CA4th 588, 602, 57 CR3d 215 (newspaper that filed motion to unseal records was not "de facto intervenor").

Although intervenors should not be able to recover fees for simply riding the coattails of the principal party or duplicating its efforts (see, *e.g., County of Humboldt v Swoap, supra*), that concern is not present when the intervenor divides responsibilities with the original plaintiff (or defendant). Because an intervenor stands in the shoes of the party on whose behalf it intervenes (see, *e.g., U.S. v Board of Educ.* (2d Cir 1979) 605 F2d 573; *Montgomery v Bio-Med Specialties, Inc.* (1986) 183 CA3d 1292, 1296, 228 CR 709), it makes little sense to deny fees to counsel for intervenors who perform work that counsel for the original plaintiff (or defendant) would otherwise have had to perform.

Courts have also used their discretion to award attorney fees to intervenors who have "affirmatively shown that their contribution is separate, distinct, and of a character which was not, could not or would not have been made by counsel for the original plaintiff." *Mann v Superior Court* (1942) 53 CA2d 272, 281, 127 P2d 970. See also *Grant v Hartman Ranch Co.* (1961) 193 CA2d 497, 502, 14 CR 531.

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### §2.29 9. Amicus Curiae

An amicus curiae is not a party to the litigation and therefore is not normally entitled to attorney fees, unless appointed by the court. *Miller-Wohl Co. v Commissioner of Labor & Indus.* (9th Cir 1982) 694 F2d 203. But see *In re Benny* (9th Cir 1996) 81 F3d 91.

A prevailing party may be able to claim fees for time spent preparing an amicus brief in a related case, however, when the outcome of that case could affect the case in chief. See, *e.g., Ramon v County of Santa Clara* (2009) 173 CA4th 915, 925, 93 CR3d 278 (compensating time spent on amicus brief in related case because reasonable and prudent lawyer would have undertaken work to protect client's interest); *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 535; *Hasbrouck v Texaco, Inc.* (9th Cir 1989) 879 F2d 632, 638.

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## §2.30 10. Class Action Objectors

Courts occasionally award fees to class action objectors, but their objections must secure additional benefits for the class. See *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 62, 75 CR3d 413; *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043; *Wininger v. SI Mgmt. L.P.* (9th Cir 2002) 301 F3d 1115.

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## §2.31 H. Who the Fee Belongs to

Whether court-awarded fees belong to the party or, in situations in which the party has not paid a fee or has paid a reduced fee, to the attorney whose work is being compensated, has significant and obvious ramifications for settlement of the case, for control over any fee motion, and for the disposition of any fee award, including taxation of the award (see §§1.21-1.24). On this issue, California law diverges from the majority federal rule, making it imperative to consider under which statute fees might be claimed when undertaking representation in a potential fee-shifting case.

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### §2.32 1. California Law: Court-Awarded Attorney Fees Belong to Attorney

Under California law, when the attorney has not charged the client a fee and there is no written agreement to the contrary, attorney fee awards are properly made to the plaintiffs' attorneys, rather than to the plaintiffs themselves. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 682 n26, 186 CR 589 (CCP §1021.5 fees payable directly to plaintiffs' legal aid law firm); *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809 (Govt C §12965 fee award belonged to attorneys, not client).

Under *Flannery,* an attorney whose client has not authorized a fee motion under CCP §1021.5 may intervene in the action and secure a fee award. *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1513, 43 CR3d 707 (expressly rejecting contrary holding in *Churchill Village LLC v General Elec.* (9th Cir 2004) 361 F3d 566, 579, 139 C4th at 1513).

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### §2.33 2. Federal Law: Court-Awarded Attorney Fees Belong to Party

Under federal law, attorney fees generally belong to the party, not to the attorney, at least in the absence of an assignment of those fees to the attorney. See *Gilbrook v City of Westminster* (9th Cir 1999) 177 F3d 839, 875 (in absence of contractual assignment to counsel, 42 USC §1988 requires attorney fee awards be made directly to prevailing party, with ultimate disposition of award dependant on contract between attorney and client). But see *U.S. ex rel Virani v Jerry M. Lewis Truck Parts & Equip. Inc.* (9th Cir 1996) 89 F3d 574, 577 (beneficial ownership of fee award under False Claims Act (31 USC §§3729-3733) remains, absent contract, with attorneys award is designed to compensate; client's "right" to fees "is really a power to obtain fees for his attorney; the attorneys' right does not come into being until the client exercises that power; the defendant's liability will only arise if that power is exercised").

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## §2.34 I. Eligibility for Fee Award Unaffected by Irregularities in Representation Arrangements

Questions about the attorney's right to represent the prevailing party are irrelevant to the issue of whether statutory fees should be awarded. See, *e.g.,* 42 USC §2996e(b)(1)(B) (client's eligibility for free legal services does not affect disposition of legal proceeding). Federal regulations on whether Legal Services Corporation (LSC) grantees may seek statutory fees are only enforceable by the corporation. *Peretz v Legal Aid Found. of Los Angeles* (2004) 122 CA4th Supp 1, 18 CR3d 863. See also *Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197, 1217 (defendant's argument that LSC grantee ineligible for fees waived by failure to raise in district court).

Likewise, irregularities in the attorney-client fee agreement do not generally affect the attorney's right to collect a statutory fee. *Flannery v Prentice* (2001) 26 C4th 572, 578, 110 CR2d 809. See *U.S. ex rel Virani v Jerry M. Lewis Truck Parts & Equip. Inc.* (9th Cir 1996) 89 F3d 574.

In *Frye v Tenderloin Hous. Clinic, Inc.* (2006) 38 C4th 23, 40 CR3d 221, the California Supreme Court held that the Tenderloin Housing Clinic (THC), a nonprofit corporation whose lawyers represented low-income tenants in housing litigation, was entitled to retain the statutory attorney fees that it had been awarded even though THC had not registered to practice law with the State Bar of California under Corp C §13406(b). The court concluded that the tenant-plaintiff was not entitled to disgorgement of the fees because a nonprofit corporation could practice law under authority other than §13406(b), and the statutory fee would have been unaffected had THC registered. See also *Winterrowd v American Gen. Annuity Ins. Co.* (9th Cir 2009) 556 F3d 815, 825 (permitting fee award to out-of-state attorney because he would have been admitted pro hac vice had he applied).

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## §2.35 III. LIABILITY FOR FEE AWARDS

Liability for attorney fee awards generally is imposed on the nonprevailing or "opposing" party: "Generally speaking, the opposing party liable for attorney fees under §1021.5 has been the defendant person or agency sued, which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation." *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1176, 39 CR3d 788; *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1095, 69 CR3d 184 (rejecting state agency's claim that it was merely a "neutral" state agency performing ministerial tasks and therefore not an "opposing party": "Nothing in *Connerly* [citation] suggests that a public agency cannot be deemed an opposing party liable for attorney fees when its policymaking decisions are challenged and set aside in litigation").

Because many, if not most, fee-shifting statutes are enacted to encourage the litigation of important or specified rights, a losing plaintiff's liability for fees is significantly different than a losing defendant's liability. See §§2.54-2.72. Similar considerations can apply to awards of costs, whether under the costs statute or under CCP §998. See §2.47.

Not all opposing parties are liable for the successful party's fees, however. In *In re Adoption of Joshua S.* (2008) 42 C4th 945, 958, 70 CR3d 372, the court held that under CCP §1021.5, the "opposing party" against whom fees may be awarded "must have done or failed to do something, in good faith or not, that compromised public rights." Otherwise, litigants with limited resources could be penalized for litigating important issues. 42 C4th at 954. See also 42 C4th at 955 n3 (listing 20 cases under §1021.5 that exemplify rule); *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 624, 33 CR3d 817 (declining to impose joint and several liability on city that had not actively opposed petition or on amicus that had supported plaintiff's position); *Earley v Superior Court* (2000) 79 CA4th 1420, 1431, 95 CR2d 57 (denying fee award sought by prevailing defendant against unnamed class members in class action).

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## §2.36 A. Immunity

Occasionally, a party may be immune from an award of fees. See *Kentucky v Graham* (1985) 473 US 159, 165, 87 L Ed 2d 114, 121, 105 S Ct 3099. Immunity from damages, however, does not extend to immunity from fee awards. See *Hutto v Finney* (1978) 437 US 678, 690, 57 L Ed 2d 522, 534, 98 S Ct 2565.

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### §2.37 B. Parties Against Whom No Relief Obtained

Federal cases generally require that some relief be imposed against the liable party. See *Kentucky v Graham* (1985) 473 US 159, 165, 87 L Ed 2d 114, 121, 105 S Ct 3099 (liability for fees, if any, generally follows from liability on merits).

Under California law, however, there is no such absolute rule. See *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569 (awarding CCP §1021.5 fees even though plaintiffs obtained no relief); *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 837, 93 CR2d 193 (upholding appellant's joint and several liability for fees, even though no relief awarded against it). But see *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1176, 39 CR3d 788 (fees should be assessed against those responsible for invalidated policy or practice); *Urbaniak v Newton* (1993) 19 CA4th 1837, 24 CR2d 333 (fee award premature when based solely on reversal of summary judgment); *Selma Auto Mall II v Superior Court* (1996) 44 CA4th 1672, 52 CR2d 599 (in unlawful detainer action, court abused its discretion by conditioning stay of execution on sublessee's furnishing of bond guaranteeing payment of attorney fees for which sublessee had not been found liable).

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## §2.38 C. Real Parties in Interest

Real parties in interest who oppose and lose litigation can be liable for fees. See *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 756, 202 CR 423. However, real parties in interest who essentially serve as amici—*i.e.,* who have no direct interest in the litigation—may not be assessed fees. *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1183, 39 CR3d 788. In these circumstances, the fee award must be paid by the defendant with the power to afford relief, even if it did not actively defend the litigation. 37 C4th at 1183.

*Connerly* was distinguished in *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 161, 67 CR3d 228, in which the court held that the real party in interest developer was an "opposing party" because it had a "direct interest in the litigation, more than merely an ideological or policy interest." It also was distinguished in *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1094, 69 CR3d 184. See also *Choudhry v Free* (1976) 17 C3d 660, 662, 131 CR 654 (fees assessed against real party, even though amicus curiae, rather than respondent or real party, litigated case).

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### §2.39 D. Intervenors

Intervenors who, by intervening, become parties can be held liable for fees. See *Costco Wholesale Corp. v Hoen* (9th Cir 2008) 538 F3d 1128. See also *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1183 n6, 39 CR3d 788.

Federal courts, however, have limited the liability of defendants who intervene to protect their own constitutional or civil rights and who have not been found to have violated the plaintiff's rights. Such "functional plaintiffs" may be assessed fees only if their position is "frivolous, unreasonable, or without foundation." *Independent Fed'n of Flight Attendants v Zipes* (1989) 491 US 754, 105 L Ed 2d 639, 109 S Ct 2732. But compare *Zipes* with *Charles v Daley* (7th Cir 1988) 846 F2d 1057, 1064 (fee award against intervenors upheld in civil rights action because intervenors fully participated in litigation and acted as alter ego of state defendants; plaintiffs had also prevailed against intervenors as to matters in which intervenors claimed to have an interest separate and distinct from those of state defendants). Note that *Charles* still has some validity after *Zipes* because certiorari was denied in *Charles* 4 days after *Zipes* was issued (sub nom *Diamond v Charles* (1989) 492 US 905, 106 L Ed 2d 564, 109 S Ct 3214).

Answering a question left open by *Zipes,* the Ninth Circuit held that successful plaintiffs who are forced to defend a consent decree against a third party attack may be entitled to fees from the *defendant,* even though the plaintiffs and defendant are aligned against the third party. *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163. Compare *San Francisco N.A.A.C.P.* with *Nestande v Watson* (2003) 111 CA4th 232, 4 CR3d 18 (fees denied under CCP §1021.5 to real party in interest who sought fees against county defendant because of its lackluster defense of ballot summary). See also *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1288 (denying fee award against intervenor-defendant who had not violated law). But see *Costco Warehouse Corp.,* 538 F3d at 1136 (*Zipes* inapplicable to fee sought from intervenors opposing injunctions under antitrust law (15 USC §26)).

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## §2.40 E. Amicus Curiae

Fees generally may not be awarded against amici curiae. In *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1183, 39 CR3d 788, the court held that amici curiae, who had entered the case on behalf of the defendant to defend the state's affirmative action statutes but later were designated real parties in interest, could not be held liable for attorney fees awarded to the plaintiff under CCP §1021.5 because amici are not "opposing parties." The court explained that a fee award would discourage amicus participation, contrary to public policy. CA4th at 1183. The court also distinguished cases awarding fees against real parties in interest, reasoning that the real parties in those cases either had direct interests in the litigation that were different from the general public or were co-defendants whose interests intertwined with the main defendant. 37 CA4th at 1180.

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## §2.41 F. Nonparties

On rare occasions, liability for fees can be imposed against a nonparty. For example, when a governmental entity is in fact the real party (*e.g.,* when a government official is sued in an official capacity), fees may be assessed against the governmental entity even though it was not formally a party. See *Hutto v Finney* (1978) 437 US 678, 57 L Ed 2d 522, 98 S Ct 2565. See also *Brandon v Holt* (1985) 469 US 464, 83 L Ed 2d 878, 105 S Ct 873.

Other than sanctions, however, fee liability may not be imposed on the party's attorney. See *Pfingston v Ronan Engineering Co.* (9th Cir 2002) 284 F3d 999 (attorney for an unsuccessful False Claims Act plaintiff may not be ordered to pay defendant's attorney fees, even though plaintiff's action was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" (31 USC §3730(d)(4))). Note that under California's sanctions statutes, the party's attorney may be ordered to pay all or part of any sanctions award. See, *e.g.,* CCP §128.7, discussed in §§6.8-6.28.

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## G. Apportionment Among Multiple Unsuccessful Parties

### §2.42 1. California Law

Under California law, liability for payment of a prevailing party's attorney fees may be imposed on, and apportioned among, the opposing parties, including real parties in interest. See, *e.g., Mejia v City of Los Angeles* (2007) 156 CA4th 151, 161, 67 CR3d 228 (fees assessed 50 percent against city, 50 percent against real party in interest).

If the court does not apportion the award among the liable parties, liability is presumed to be joint and several. *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 837, 93 CR2d 193. See also *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 286 CR 556 (joint and several liability for sanctions imposed on counsel and party); *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 28 n6, 272 CR 227; *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 212, 266 CR 788 (joint and several liability imposed on both real parties in interest); *Huntington Landmark Adult Community Ass'n v Ross* (1989) 213 CA3d 1012, 1024, 261 CR 875 (equal division); *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 250, 261 CR 520 (directing trial court to apportion fees between defendants based on extent of relief obtained against each); *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 240 CR 1.

The party paying a disproportionate share may be entitled to contribution from the other parties. See *Young v Rosenthal* (1989) 212 CA3d 96, 128, 260 CR 369 (when parties subject to joint sanctions award, party paying award is entitled to pro rata contribution from other party against whom sanctions awarded).

In some circumstances, fees may not be apportioned. See *Earley v Superior Court* (2000) 79 CA4th 1420, 1431, 95 CR2d 57 (defendant's fees in unsuccessful class action may not be apportioned among absent class members). See also *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 624, 33 CR3d 817 (declining to impose joint and several liability on city that had not actively opposed petition or on amicus that had supported plaintiff's position); *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 251 CR 530 (reversing costs award imposed pro rata against class members).

The good faith settlement of fees by one defendant cannot limit the award that may be assessed against a nonsettling defendant, nor is it improper for a court to award fees against one defendant for time spent litigating against another. *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 976, 259 CR 599.

**Additional authorities:** *Washburn v City of Berkeley* (1987) 195 CA3d 578, 592, 240 CR 784; *Sundance v Municipal Court* (1987) 192 CA3d 268, 272, 237 CR 269; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 756, 202 CR 423.

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### §2.43 2. Federal Law

Under federal law, liability among defendants for a successful plaintiff's fees is generally joint and several. See, *e.g., Turner v District of Columbia Bd. of Elections & Ethics* (DC Cir 2004) 354 F3d 890. The joint and several liability rule applies even if one of the defendants is immune from fees and even if one of the defendants chooses not to defend the suit; comparative fault is not a valid basis on which to deny fees. *Turner v District of Columbia Bd. of Elections & Ethics, supra.* Only when there are fractionable claims not fairly attributable to one party must fees be apportioned. 354 F3d at 898. See also *Corder v Gates* (9th Cir 1991) 947 F2d 374, 383 (upholding district court's refusal to allocate fees among defendants when time spent by plaintiffs against each defendant was not "grossly unequal" nor was one defendant "dramatically less culpable"), and cases cited therein.

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## IV. ENTITLEMENT TO FEE AWARDS

### A. Must Be "Prevailing" or "Successful" Party

### §2.44 1. Prevailing Party Concept Applies to Most Fee-Shifting Statutes and Theories

Fee-shifting statutes and other legal bases that provide for awards of attorney fees generally award fees only to the "prevailing party," sometimes called the "successful party." See, *e.g.,* CCP §1021.5; Govt C §12965(b). These terms are synonymous. *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 610, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 570, 21 CR3d 331. See *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 663, 46 CR3d 206 ("prevailing party" requirement applies to equitable common fund and substantial benefit doctrines).

Hundreds of California statutes provide for attorney fee awards to the prevailing party. Given that most fee-shifting statutes and theories serve similar purposes, in the absence of an expressed intent otherwise, courts generally interpret the term "prevailing party" uniformly for all such statutes. See, *e.g., Belth v Garamendi* (1991) 232 CA3d 896, 901, 283 CR 829; *People v Roger Hedgecock for Mayor Comm.* (1986) 183 CA3d 810, 228 CR 424; *Thirteen Comm. v Weinreb* (1985) 168 CA3d 528, 214 CR 297. Note that commercial statutes are treated differently than prevailing party statutes enacted to encourage a particular type of litigation. See §2.71. Likewise, fee claims based on contractual fee clauses have their own set of rules. See §§2.79, 4.66-4.88.

Some statutes do specifically define or impose specific qualifications on the prevailing party; those statutes are discussed in §§2.77-2.81. Except as noted, the discussion in the following sections applies generally to all California fee-shifting statutes and equitable theories (see chap 5).

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### §2.45 2. "Prevailing Party" Defined

The definition of "prevailing party" for purposes of fee-shifting statutes is pragmatic and flexible, depending more on the impact of the action than on the manner in which the action is resolved. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 565, 21 CR3d 331 (noting that supreme court has "taken a broad, pragmatic view of what constitutes a 'successful party'"); *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589.

The typical formulation is as follows: "It is settled that 'plaintiffs may be considered "prevailing parties" for attorney's fee purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit.'" *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 153, 50 CR3d 273, quoting *Hensley v Eckerhart* (1983) 461 US 424, 433, 76 L Ed 2d 40, 50, 103 S Ct 1933. See also *Folsom,* 32 C3d at 685 (if party has obtained some relief from "benchmark conditions" challenged in lawsuit and if that relief is attributable in some way to lawsuit, then that party is prevailing party).

It is not necessary that the party obtain the "primary" or "central" relief sought. *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1346, 39 CR3d 550; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245 n10, 261 CR 520. However, a different standard may apply in so-called "catalyst" cases (see §2.109), in which some courts have required that the plaintiff obtain the primary relief sought. See *Marine Forests Soc'y v California Coastal Comm'n* (2008) 160 CA4th 867, 878, 74 CR3d 32; *Lyons v Chinese Hosp. Ass'n, supra* (dicta). Catalyst cases also require prelitigation notice and some demonstration of merit, which are not required in noncatalyst cases. See *Graham,* 34 C4th at 575; §§2.112-2.113.

The federal standard also is a "generous formulation." *Hensley,* 461 US at 433, 43 L Ed 2d at 50. Under federal law, "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Texas State Teachers Ass'n v Garland Indep. Sch. Dist.* (1989) 489 US 782, 791, 103 L Ed 2d 866, 877, 109 S Ct 1486. Winning a significant issue is not enough, however (489 US at 792, 103 L Ed 2d at 877):

> "[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." [Citations] Thus, at a minimum, to be considered a prevailing party within the meaning of §1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

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### §2.46 3. Comparing California and Federal Law

Many of the rules and concepts relevant to determining the prevailing party under California law derive from the rules applicable to federal civil rights fee statutes. As the court noted in *Maria P. v Riles* (1987) 43 C3d 1281, 1290, 240 CR 872:

> Since both this court and the Legislature have relied on federal cases in framing the private attorney general theory, we regard the federal precedent in this area as persuasive.

Because of these similarities, federal cases may still be persuasive, even if these decisions are "no longer viable in the federal realm." *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 934, 154 CR 503. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 567, 21 CR3d 331 (citing lower federal court cases later disapproved by U.S. Supreme Court).

In some aspects, California law is more expansive than federal law in finding that a party has prevailed. See, *e.g., Graham,* 34 C4th at 568 (reaffirming "catalyst theory" under California law, despite U.S. Supreme Court decision abolishing theory for federal fee-shifting statutes). See §§2.109-2.114. See also §§2.13, 2.100, 5.37-5.40, 5.46-5.48 (authorizing fee awards to parties who achieve only conceptual victories).

In others, it appears to be more restrictive. See §2.82. The discussion in this chapter notes where federal and California law diverge.

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### §2.47 4. Prevailing Party for Purposes of Entitlement to Statutory Costs May Not Be Same as for Entitlement to Attorney Fee Award

Even though attorney fees recoverable under a contract, statute, or law are listed as an element of costs (CCP §1033.5(a)(10)), the definitions of "prevailing party" for purposes of attorney fees and statutory costs are *not* the same. See *Sears v Baccaglio* (1998) 60 CA4th 1136, 1142, 70 CR2d 769. This raises the specter of one party being entitled to fees while the other is entitled to statutory costs. See, *e.g., Sears v Baccaglio, supra*. See also *Agnew v State Bd. of Equalization* (2005) 134 CA4th 899, 36 CR3d 464 (prevailing plaintiff denied fees because of additional statutory requirements but still entitled to costs, including expert witness fees under CCP §998).

Code of Civil Procedure §1032(a)(4), which defines "prevailing party" for purposes of statutory costs, reflects the ministerial nature of costs claims, which can arise in every case. For that reason, it is more mechanical than the determination of "prevailing party" for purposes of entitlement to statutory attorney fees, which arises in only a limited number of cases and involves more nuanced issues as to who prevailed. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830; *Gilbert v National Enquirer, Inc.* (1997) 55 CA4th 1273, 64 CR2d 659.

Under §1032(a)(4), a defendant in whose favor a dismissal is entered is the prevailing party for purposes of an award of "costs." *Crib Retaining Walls, Inc. v NBS/Lowry, Inc.* (1996) 47 CA4th 886, 54 CR2d 850 (court could not deny costs to dismissed defendant simply because dismissal resulted from CCP §877.6 good faith settlement order).

For purposes of entitlement to attorney fees, however, a dismissal is not dispositive. See §§2.108-2.109. For example, a plaintiff can "prevail" under fee-shifting statutes if substantive relief has been achieved, even if the case is dismissed for procedural reasons or because it is moot. See, *e.g., Maria P. v Riles* (1987) 43 C3d 1281, 1290, 240 CR 872.

Similarly, a defendant against whom the plaintiff obtains no damages or other relief is the "prevailing party" for a costs award under CCP §1032(a)(4). See, *e.g., Childers v Edwards* (1996) 48 CA4th 1544, 56 CR2d 328 (when plaintiff prevailed on liability but failed to prove damages, defendant was prevailing party for costs award). Further, a plaintiff whose damage award is offset to zero by prior settlements is not the prevailing party for a fees or costs award under §1032(a)(4) ("the party with a net monetary recovery"). *Goodman v Lozano* (2010) 47 C4th 1327, __CR3d__, disapproving *Wakefield v Bohlin* (2006) 145 CA4th 963, 983, 52 CR3d 400. But see *Lewin v Board of Trustees* (1976) 62 CA3d 977, 983, 133 CR 385 (in action dismissed as moot because relief obtained, plaintiff is prevailing party for purposes of award of costs under CCP §§1094.5, 1095). See also §2.85.

Despite the conceptual differences, the party found to have prevailed under the "costs" statute is usually, but not always, the same as the party deemed to have prevailed under fee-shifting statutes. See, *e.g., Chinn v KMR Property Management* (2008) 166 CA4th 175, 190, 82 CR3d 586; *Adler v Vaicius* (1993) 21 CA4th 1770, 1777, 27 CR2d 32 (because fee statute (former CCP §527.6(h)) did not define prevailing party, court used CCP §1032 definition to award fees to defendant who had obtained dismissal); *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543 (same re CC §1794(d)), disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1.

**Additional authorities:** *Hunt v Fahnestock* (1990) 220 CA3d 628, 632, 269 CR 614; *Donald v Cafe Royale, Inc.* (1990) 218 CA3d 168, 184, 266 CR 804; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 251, 261 CR 520; *Public Employees' Retirement Sys. v Winston* (1989) 209 CA3d 205, 211, 258 CR 612; *Bowman v City of Berkeley* (2005) 131 CA4th 173, 183, 31 CR3d 447.

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### §2.48 a. Prevailing Party for Purposes of Entitlement to Appellate Costs Not Same as for Entitlement to Appellate Fees

Just as a party's entitlement to trial court attorney fees is unaffected by determination of entitlement to statutory costs, entitlement to appellate attorney fees is unaffected by the appellate court's determination of appellate costs. See Cal Rules of Ct 8.278; *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 927, 65 CR3d 242; *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 341, 42 CR3d 607.

Appellate costs must be determined in every case and are intended to be mechanically applied. Unless the court orders otherwise, attorney fees are *not* a recoverable appellate cost. Cal Rules of Ct 8.278(d)(2). They also generally depend on the outcome of the case as a whole. See *Yuba Cypress Hous. Partners v Area Developers* (2002) 98 CA4th 1077, 120 CR2d 273. For that reason, they are normally claimed in the trial court on remand. See Cal Rules of Ct 3.1702(c); §12.4.

Given this dichotomy, a party might lose an appeal at an interim stage and be liable for costs on appeal (see Cal Rules of Ct 8.278(a)) but eventually win the case and be entitled to recover attorney fees even for the unsuccessful appeal. See, *e.g., Cabrales v County of Los Angeles* (9th Cir 1991) 935 F2d 1050, 1053; *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517 n15, 43 CR3d 707. Correlatively, a party who was not the prevailing party in the litigation as a whole might win an interim appeal, entitling it to recover appellate costs but not appellate attorney fees. *Snyder v Marcus & Millichap* (1996) 46 CA4th 1099, 54 CR2d 268. See §12.21.

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### §2.49 b. Do Costs Statutes Have Different Standards for Prevailing Plaintiffs and Defendants?

Although many "prevailing party" statutes have been construed to employ different standards for prevailing plaintiffs and defendants (see §§2.50-2.71), whether statutory *costs* are subject to a similar double standard in such cases is not so clear. Compare *Cummings v Benco Bldg. Servs.* (1992) 11 CA4th 1383, 1388, 15 CR2d 53 (prevailing defendant under FEHA (Govt C §12965(b)) entitled to statutory costs only if plaintiff's lawsuit "frivolous, unreasonable, or without foundation"), and *Seever v Copley Press, Inc.* (2006) 141 CA4th 1550, 1561, 47 CR3d 206 (although award of reasonable costs under CCP §998 to FEHA defendant was appropriate, purposes of FEHA and §998 required court to "scale" amount of costs to parties' "respective resources"), with *Perez v County of Santa Clara* (2003) 111 CA4th 671, 3 CR3d 867 (disagreeing with *Cummings* and holding that award of costs to prevailing FEHA defendant does not require finding that plaintiff's lawsuit was "frivolous, groundless, or unreasonable"). See also *Peterson v John Crane, Inc.* (2007) 154 CA4th 498, 514, 65 CR3d 185.

Federal courts have engaged in a similar debate. Compare *Brown v Lucky Stores* (9th Cir 2001) 246 F3d 1182, 1189, with *Martin v California Dep't of Veterans Affairs* (9th Cir 2009) 560 F3d 1042, 1052.

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## B. Types of Prevailing Party Statutes

### §2.50 1. Statutes Providing That Court "May" Award Fees to Prevailing Party

The vast majority of fee-shifting statutes provide that the court "may" award "reasonable attorney fees" to the "prevailing party." On its face, this language appears to make no distinction between prevailing plaintiffs and prevailing defendants, and it also appears to give trial courts broad discretion to award or deny fees. However, when a statutory provision authorizes attorney fees in public interest litigation, courts have construed this language to create very different standards for plaintiffs and defendants, which has the effect of significantly limiting a trial court's discretion to *deny* fees to a prevailing *plaintiff* or to *award* them to a prevailing *defendant*. See §§2.51-2.71.

Provisions that authorize discretionary fee-shifting in other contexts—for example, in commercial litigation—are interpreted differently. See, *e.g., Fogerty v Fantasy, Inc.* (1994) 510 US 517, 127 L Ed 2d 455, 114 S Ct 1023 (when deciding whether to award attorney fees in copyright case, court can consider numerous factors, but must treat plaintiff and defendant evenhandedly). So are fee-shifting statutes that are intended to discourage certain types of litigation practices. See *Martin v Franklin Capital Corp.* (2005) 546 US 132, 163 L Ed 2d 547, 126 S Ct 704 (fees for obtaining remand of removed action under 28 USC §1447(c) require showing that removal lacked objectively reasonable basis); *Lussier v Dollar Tree Stores, Inc.* (9th Cir 2008) 518 F3d 1062 (same; fees denied because defendant's removal arguments not unreasonable given lack of clarity in law). See also *Krug v Maschmeier* (2009) 172 CA4th 796, 803, 91 CR3d 452 (prevailing party language in anti-harassment statute (CCP §527.6) applied on same terms to plaintiffs and defendants); §2.73.

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### a. Prevailing Plaintiffs Ordinarily Entitled to Fees Unless "Special Circumstances" Would Make Award "Unjust"

**§2.51 (1) California Law**

Most statutory fee-shifting provisions are intended to facilitate private attorneys general by making it financially attractive for competent counsel to take cases that vindicate important rights, thereby providing access to the courts for victims of statutory and constitutional violations who could not otherwise afford representation, and facilitating enforcement of the law. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 44, 141 CR 315.

Accordingly, even under fee-shifting statutes that are phrased in discretionary terms (*i.e.,* the court "may" award fees), prevailing plaintiffs in public interest litigation are "ordinarily entitled" to reasonable attorney fees, and fees may be denied only when "special circumstances" would render an award "unjust." See *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 632, 186 CR 754 (CCP §1021.5 requires fully compensatory fee award "unless special circumstances would render such an award unjust"); *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 104, 228 CR 847.

The rule has been applied in a wide variety of statutory contexts. See, *e.g., Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 1405, 245 CR 606 (applying rule to fee claim under FEHA (Govt C §12965(b))), overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19; *Thirteen Comm. v Weinreb* (1985) 168 CA3d 528, 214 CR 297 (applying rule to Political Reform Act and Govt C §§91003, 91012).

In *Common Cause v Stirling* (1981) 119 CA3d 658, 665, 174 CR 200, a Brown Act (Govt C §54960.5) case, the court articulated what appears to be a slightly different standard, holding that the trial court is not required to award fees to every prevailing plaintiff, but must examine all circumstances of the case to determine whether awarding fees would be unjust. In *Moran v Oso Valley Greenbelt Ass'n* (2001) 92 CA4th 156, 161, 111 CR2d 636, the court followed *Common Cause* in interpreting Corp C §8337. In both *Common Cause* and *Moran,* the court placed the burden on the defendant to show that awarding fees to the plaintiff would be unjust. These principles were discussed and analyzed in *Los Angeles Times Communications, LLC v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 5 CR3d 776.

Compare these cases with *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1297 n3, 255 CR 704 (trial court has *no* discretion to deny prevailing plaintiff an attorney fee award if statutory criteria are met). See also *Jones v Tracy Sch. Dist*. (1980) 27 C3d 99, 109, 165 CR 100 (despite use of word "may," fee awards under Lab C §1197.5, California's "equal pay" law, mandatory).

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### §2.52 (2) Federal Law

Under federal law, as under California law, prevailing plaintiffs are "ordinarily entitled" to recover reasonable attorney fees under fee-shifting statutes that use the term "may"; trial courts have discretion to deny a fee award to a prevailing plaintiff only when the defendant can show that "special circumstances would render a fee award unjust." See, *e.g., Hensley v Eckerhart* (1983) 461 US 424, 429, 76 L Ed 2d 40, 48, 103 S Ct 1933, quoting S Rep No. 94-1011, 94th Cong, 2d Sess (1976) p 4, reprinted at 5 US Code Cong & Ad News 5908, 5912 (quoting *Newman v Piggie Park Enters.* (1968) 390 US 400, 402, 19 L Ed 2d 1263, 1266, 88 S Ct 964); *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1126; *Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 648; *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1285; *Borunda v Richmond* (9th Cir 1988) 885 F2d 1384, 1392; *Ackerley Communications, Inc. v City of Salem* (9th Cir 1985) 752 F2d 1394, 1396; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245, 261 CR 520 (applying rule to 42 USC §1988).

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### §2.53 (3) "Special Circumstances" Interpreted Very Narrowly

Under both California and federal law, the "special circumstances" that would render an award "unjust" are very narrowly construed. As the court explained in *Maloney v City of Marietta* (11th Cir 1987) 822 F2d 1023, 1027:

> The special circumstances exception is a judicially created concept, not mentioned in any of the fee award statutes, and therefore "should be narrowly construed so as not to interfere with the congressional purpose in passing such statutes."

Accordingly, when determining whether to award attorney fees in such cases, both California and federal courts construe the special circumstance exception "very narrowly." See, *e.g., Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1126 (courts must "evaluate whether special circumstances exist by asking whether '(1) allowing attorney's fees would further the purposes of [the fee-shifting statute] and (2) whether the balance of equities favors or disfavors the denial of fees.' [Citations] We have stressed that this exception applies only in unusual cases"); *Los Angeles Times Communications, LLC v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 1327, 5 CR3d 776, citing *Ackerley Communications, Inc. v City of Salem* (9th Cir 1985) 752 F2d 1394, 1396. See also cases cited in §2.54. The burden is on the losing party to show that a fee award would be "unjust." *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc*. (1999) 69 CA4th 287, 302, 81 CR2d 456 (interpreting Brown Act (Govt C §§54950-54963; see in particular §54960.5)).

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### §2.54 (a) Most Factors Raised as "Special Circumstances" Rejected

Consistent with the presumption that a prevailing plaintiff will recover a fee award and the concomitant narrow view of "special circumstances" that would make a fee award "unjust," most factors that have been raised as "special circumstances" have been rejected. For example, in *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424, the plaintiff sued a local school district for enforcing a loyalty oath requirement under the Education Code. The trial court declared the loyalty oath statute unconstitutional and awarded the plaintiff her fees under both 42 USC §1988 and CCP §1021.5. The court of appeal upheld the award on both grounds and, in so doing, rejected several defenses offered by the school district:

- That the school district acted in good faith;
- That fees would be paid from the district's limited budget and the burden would fall on the taxpayers;
- That the plaintiff was represented by public interest attorneys and was not required to expend any money herself in pursuing the litigation; and
- That the district did not actively assert the statute's constitutionality.

The following sections discuss some of the factors that fee opponents have claimed constitute "special circumstances."

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### §2.55 (i) Losing Party's "Good Faith"

The losing party's good faith is not a special circumstance justifying the denial of fees. See *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424 (discussed in §2.54); *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 161, 67 CR3d 228 (reaffirming that "good faith" not defense to §1021.5 fee award); *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265 (rejecting city's argument that it was merely defending initiative measure passed by voters). See also *In re Adoption of Joshua S.* (2008) 42 C4th 945, 958, 70 CR3d 372 (reaffirmed that showing of "bad faith" is not requirement for fee award under §1021.5, but that "the party against whom… fees are awarded must have done or failed to do something, in good faith or not, that compromised public rights"); *Krug v Maschmeier* (2009) 172 CA4th 796, 803, 91 CR3d 452 (under anti-harassment statute (CCP §527.6), prevailing party, whether plaintiff or defendant, need not prove "bad faith" to recover fees).

Other cases rejecting good faith as a special circumstance include *Silver Creek, LLC v BlackRock Realty Advisors, Inc.* (2009) 173 CA4th 1533, 1540, 93 CR3d 864 (good faith no defense to fee award under CC §1717); *Los Angeles Times Communications, LLC v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 1333, 5 CR3d 776; *Punsly v Ho* (2003) 105 CA4th 102, 113, 129 CR2d 89; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 261 CR 520 (42 USC §1988; CCP §1021.5); *McMahon v Lopez* (1988) 199 CA3d 829, 836, 245 CR 172 (42 USC §1988); *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1466, 240 CR 1; *Thirteen Comm. v Weinreb* (1985) 168 CA3d 528, 214 CR 297 (Govt C §§91003(a), 91012); *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 754, 202 CR 423. See also *EWAP, Inc. v City of Ontario* (1986) 177 CA3d 1108, 223 CR 422 (42 USC §1988) (neither fact that defendant conceded during discovery that zoning ordinance was unconstitutional, nor that ordinance was never enforced against plaintiff, were special circumstances that would justify denial of fees).

Federal cases apply the same rule; the losing party's "good faith" is not a special circumstance that would justify the denial of fees under private attorney general-type fee-shifting statutes. See, *e.g., Turner v District of Columbia Bd. of Elections & Ethics* (DC Cir 2004) 354 F3d 890 (fees awarded against defendant agency that was required to enforce unconstitutional law, even though defendant refused to defend law and aligned itself with plaintiff); *Bauer v Sampson* (9th Cir 2001) 261 F3d 775, 786 (42 USC §1988) (rejecting as "special circumstances" contentions that case was one of first impression and defendant acted in good faith).

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### §2.56 (ii) Limited Success

The prevailing party's "limited success" is grounds for reducing the fee but not for denying one altogether. *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1345, 39 CR3d 550:

> "[A] party need not prevail on every claim presented in an action in order to be considered a successful party within the meaning of the section." [Citations] Rather, "when a plaintiff is successful within the meaning of the section, the fact that he or she has prevailed on some claims but not on others is a factor to be considered in determining the *amount* of the fee awarded."

Federal law is similar. See *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1128 (rejecting low damages award as "special circumstance"):

> The district court certainly has discretion to reduce an award to a plaintiff who achieved only partial or limited success. But "[t]o deny an award of attorney's fees notwithstanding Plaintiff's clear victory on one of his claims for relief is an abuse of discretion: a reasonable fee… is *not* no fee at all."

But see *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163, 1168 ("special circumstances" found when plaintiffs achieved little by opposing attack on consent decree in related lawsuit and fee award would have required district to pay both sides of litigation). See §10.63 (court may award no fees when relief "technical" or "de minimis" and no public interests served).

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### §2.57 (iii) Lack of Resistance to Action

A party's lack of resistance to the action is generally not a special circumstance. See *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1095, 69 CR3d 184 (rejecting Department of Industrial Relations' claim that it was merely "neutral" state agency performing ministerial tasks and therefore not "opposing party": "Nothing in *Connerly* suggests that a public agency cannot be deemed an opposing party liable for attorney fees when its policymaking decisions are challenged and set aside in litigation"); *Turner v District of Columbia Bd. of Elections & Ethics* (DC Cir 2004) 354 F3d 890 (fees awarded against defendant agency that was required to enforce unconstitutional law, even though defendant refused to defend law and aligned itself with plaintiff). But see *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 624, 33 CR3d 817 (declining to impose joint and several liability on city that had not actively opposed petition).

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### §2.58 (iv) Lack of Prelitigation Notice or Necessity for Suit

With the exception of statutes that require some form of prelitigation notice, the failure to give such notice is not a special circumstance that would make a fee award unjust. *Vasquez v State* (2008) 45 C4th 243, 259, 85 CR3d 466. In *Vasquez,* the supreme court held that under CCP §1021.5, there was no categorical requirement in noncatalyst cases that a party attempt to settle its dispute with the opposing party before filing suit. See §2.112. See also 45 C4th at 252 (citing statutes that require prelitigation notice). Although the issue in *Vasquez* was not framed in terms of "special circumstances," the result is the same: a lack of prelitigation notice or attempt to settle is not a defense to a fee award in noncatalyst cases.

*Vasquez* noted, however, that under CCP §1021.5, trial courts have the equitable discretion to determine "the necessity for private enforcement," and therefore the issue of prelitigation notice and/or an attempt to settle would be relevant to that issue. 45 C4th at 258. Compare *Phipps v Saddleback Valley Unified Sch. Dist.* (1988) 204 CA3d 1110, 1123 n9, 251 CR 720 (fees allowed despite plaintiff's failure to exhaust administrative remedies), and *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1227, 217 CR 125 (plaintiffs' failure to object to city officials' actions at hearings conducted before litigation arose not bar to award of fees, especially if plaintiffs' objections would have been futile, nor was fact that plaintiffs' attorney had spoken in favor of city's plans before challenging them —determinative question is whether suit effectuates state policy), with *Grimsley v Board of Supervisors* (1985) 169 CA3d 960, 966, 213 CR 108 (fees denied because it was "near certainty" that defendants would have complied had prelitigation notice been given). See also *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 530, 96 CR3d 90 (rejecting defendant's claim that it would have provided relief voluntarily).

Federal courts concur. See, *e.g., Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122, 1131 (lack of prelitigation notice not "special circumstance" justifying fee denial).

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### §2.59 (v) Lack of Public Benefit

With the exception of statutes like CCP §1021.5, which explicitly require a showing of public benefit, the absence of a public benefit from the lawsuit is not a special circumstance justifying a fee denial. *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 153, 50 CR3d 273. But see *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc*. (1999) 69 CA4th 287, 302, 81 CR2d 456 (under Brown Act, Govt C §54960.5, lack of public benefit is factor court may consider in determining entitlement to fees).

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### §2.60 (vi) Prevailing Party's Self-Interest/Incentive to Sue

Again, with the exception of CCP §1021.5, which explicitly requires a showing that the burden of private enforcement makes a fee award "appropriate (see §3.61), a party's self-interest or incentive to sue without regard to a possible fee award is not a special circumstance justifying a fee denial. *Los Angeles Times Communications, LLC v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 1334, 5 CR3d 776. See *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1126 ("We have firmly rejected the district court's authority to refuse a reasonable fee under the 'special circumstances' exception simply because it believes it 'would result in a windfall' to a plaintiff"), quoting *Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 648; *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1285 (neither prevailing party's financial resources nor fact that it pled 42 USC §1983 claim to improve prospect of fee award was "special circumstance"); *Ackerley Communications, Inc. v City of Salem* (9th Cir 1985) 752 F2d 1394, 1396 (facts that adult business was motivated to sue by opportunity to obtain financial gain, would have sued regardless of fee statute, and was only beneficiary of decision not "special circumstances"). See also *Bauer v Sampson* (9th Cir 2001) 261 F3d 775, 786 (42 USC §1988) ((rejecting on its facts, without deciding whether it would constitute a "special circumstance," defendant's contention that fee was unnecessary to attract attorney because case generated beneficial publicity); *Hammond v Agran* (2002) 99 CA4th 115, 134, 120 CR2d 646 (same re claim that fee claimant's "animus" toward his opponent was "special circumstance").

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.61 (vii) Prevailing Party's Free or Reduced Cost Representation

### §2.61 (vii) Prevailing Party's Free or Reduced Cost Representation

Free or reduced cost representation is not a special circumstance justifying a fee denial. See, *e.g., Martin v Heckler* (11th Cir 1985) 773 F2d 1145, 1152; *Schmid v Lovette* (1984) 154 CA3d 466, 479, 201 CR 424.

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### §2.62 (viii) Losing Party's Limited Financial Resources

The losing defendant's limited financial resources is not a special circumstance justifying a fee denial. *American Booksellers Ass'n, Inc. v Virginia* (4th Cir 1986) 792 F2d 1261, 1267; *Schmid v Lovette* (1984) 154 CA3d 466, 476, 201 CR 424.

A losing *plaintiff's* financial circumstances are relevant, however. See *Garcia v Santana* (2009) 174 CA4th 464, 476, 94 CR3d 299.

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### §2.63 (ix) Effect on Losing Party's Rights

The alleged impact of a fee award on the fee opponent's rights also has been rejected as a "special circumstance." See *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 163, 67 CR3d 228 (rejecting real party in interest's argument that CCP §1021.5 awards impermissibly infringe on losing party's right to petition government: "The purpose of an award of fees against an unsuccessful opposing party is not to penalize petitioning activity by that party, but to encourage litigation by the successful party making the litigation financially feasible."); *Washburn v City of Berkeley* (1987) 195 CA3d 578, 585, 240 CR 784 (in action finding ballot argument false and misleading, court rejected arguments that fee award (1) was barred by CC §47, which protects statements made in official proceedings from "monetary awards," and (2) violated either First Amendment right to free speech or state constitutional right to petition the government); *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 231, 226 CR 265 (rejecting city's argument that fee award would "chill" exercise of initiative process). See also *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1669, 39 CR2d 189 (rejecting "chill" argument on its facts).

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### §2.64 (x) Winning Argument Raised Belatedly or by Others

The argument that the prevailing party's participation was unnecessary because the court would have reached the same result without it was rejected in *Hull v Rossi* (1993) 13 CA4th 1763, 1768, 17 CR2d 457: "A prospective private attorney general should not have to rely on the prospect that the court will do the right thing without opposition."

In *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 314, 73 CR3d 842, the court held that when two parties obtain the same success in a coordinated proceeding, fees may not be denied to one on the ground that "the other party would have succeeded without them."

In *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1302, 255 CR 704, the court rejected the argument that fees should be denied because the prevailing party reached the winning argument only "belatedly."

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### §2.65 (xi) Litigation Protracted Unreasonably

Unreasonably protracting litigation is not a "special circumstance" justifying a denial of fees, although it is grounds for reducing the fee. *Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122, 1132. See also 20 USC §1415(i)(3)(F) (under Individuals with Disabilities Education Act, unreasonably protracting litigation is grounds for fee reduction).

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.66 (xii) Benefits Achieved by Losing Party

### §2.66 (xii) Benefits Achieved by Losing Party

The losing party's claim that it achieved benefits as a result of the lawsuit is not a circumstance that would justify denying fees to the prevailing party. See *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 96 CR3d 90.

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.67 (xiii) Fee Claim Excessive

### §2.67 (xiii) Fee Claim Excessive

Under California law, fees may be denied entirely if the amount of fees claimed is so excessive that it constitutes a "special circumstance." See *Chavez v City of Los Angeles* (2010) 47 C4th 970, 990, ___ CR3d ___; *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 635, 186 CR 754. Note, however, that the *Chavez* court found it significant that the plaintiff had not shown any benefit to others from the plaintiff's lawsuit. 47 CA4th at 990. See also *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 674, 46 CR3d 206; *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913 (denying fees for fee-related services). Under federal law, this "penalty" for an excessive claim, however, is appropriate only when the fee claim has been made in bad faith or reflects some type of gross misconduct by the claiming party. See, *e.g., Jordan v U.S. Dep't of Justice* (DC Cir 1982) 691 F2d 514, 518.

In the vast majority of cases, even when the fee claim is significantly higher than the court finds reasonable, the correct response is to reduce the claim to a reasonable amount, not to deny the fee altogether. See *Hammond v Agran* (2002) 99 CA4th 115, 133, 120 CR2d 646 (argument that fee request was "outrageously excessive" failed factually). See also *Disabled in Action v Mayor of Baltimore* (4th Cir 1982) 685 F2d 881, 886 (excessive fee claim for specific task should not be denied in its entirety, but only to extent it was excessive).

The Ninth Circuit has not adopted excessive fees as a circumstance that would justify a fee denial. See *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1127 ("this circuit has never held that a court has the discretion to deny an attorney's fee to a prevailing plaintiff under [42 USC] §1988 solely because the court finds the fee request to be so excessive as to shock its conscience"). *Mendez* recognized, however, that the doctrine had been applied in other circuits "only where the fee request appeared to have been made in bad faith, such as billing outrageous numbers of hours on simple matters, or where the plaintiff made no effort to eliminate hours spent on unsuccessful, unrelated claims." The court also rejected "duplication of effort" and "block billing" as grounds for denial of fees. 540 F3d at 1128.

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### §2.68 (b) Cases Finding Special Circumstances

Most cases find that "special circumstances" involve a combination of factors that justify denial. For example, in *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 200 CR 322, the court denied the prevailing plaintiff attorney fees under 42 USC §1988, based on the following combination of special circumstances, many of which, taken alone, do not justify a denial of fees:

- The plaintiff had acted primarily for his own benefit;
- The public benefit was small;
- The plaintiff did not seek fees on a private attorney general theory;
- The defendant had acted in good faith in initially denying the hearing;
- The defendant had agreed to provide relief without knowing about the plaintiff's fee claim; and
- The defendant had shown good faith by settling immediately on issuance of the alternative writ.

See *Chavez v City of Los Angeles* (2010) 47 C4th 970, __ CR3d __ (plaintiff's failure to take advantage of time- and cost-saving features of limited civil case procedures may be considered special circumstance that would render fee award unjust when plaintiff recovers Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) damages in amount that could have been recovered in limited civil case; no abuse of discretion in denying fees in light of plaintiff's minimal success and "grossly inflated" fee request). Note, however, that not all damages awards that could have been rendered in a limited civil case constitute "special circumstances." As *Chavez* dictates, the trial court must "give due consideration to the policies and objectives of the FEHA and determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives." 47 C4th at 976. It also should "consider FEHA's underlying policy of encouraging the assertion of meritorious FEHA claims, and it should evaluate the entire case in light of the information that was known, or should have been known, by the plaintiff's attorney when the action was initially filed and as it developed thereafter," and avoid "hindsight bias" in judging the decision to file in the higher court. 47 C4th at 976. The *Chavez* court also found it significant that the plaintiff had not shown any benefit to others from the plaintiff's lawsuit. 47 C4th at 990. See also *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163, 1168 ("special circumstances" found when plaintiffs achieved little by opposing attack on consent decree in related lawsuit and fee award would have required district to pay both sides of litigation); *Image Tech. Serv. v Eastman Kodak Co.* (9th Cir 1998) 136 F3d 1354 (fees denied to prevailing party's attorneys who were disqualified for ethics violations); *Aho v Clark* (9th Cir 1979) 608 F2d 365; *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 674, 46 CR3d 206; *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913 (denying fees for fee-related services); §2.100 (discussing *Farrar v Hobby* (1992) 506 US 103, 121 L Ed 2d 494, 113 S Ct 566, which authorizes courts to find that a reasonable fee is no fee when the relief obtained is "technical" or "de minimis" and no public purpose is served).

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### §2.69 b. Prevailing Defendants Entitled to Fees Only When Plaintiff's Case Is Frivolous, Groundless, or Unreasonable

When the purpose of a fee-shifting statute is to enable private individuals to enforce important rights or litigate in the public interest, a defendant who prevails is entitled to an award of fees only if the defendant can show that the plaintiff's claim was frivolous, unreasonable, or without foundation. See *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 54 L Ed 2d 648, 98 S Ct 694. The "dual standard" set out in *Christiansburg* recognizes that the primary purpose of most fee-shifting statutes is to encourage private litigation that will enforce important statutory rights; permitting defendants to recover fees when they prevail would chill such lawsuits, undercutting the statute's primary purpose. *Christiansburg Garment Co. v EEOC, supra*. Additionally, unlike losing defendants, plaintiffs who lose have violated no law; thus, awarding fees against losing plaintiffs would not further the enforcement of statutory rights. *Christiansburg Garment Co. v EEOC, supra*. See, *e.g., Peloza v Capistrano Unified Sch. Dist.* (9th Cir 1994) 37 F3d 517, 524 (reversing fee award to defendant because plaintiff's complaint "not entirely frivolous"); *Mitchell v Office of Los Angeles County Superintendent* (9th Cir 1986) 805 F2d 844.

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### §2.70 (1) California Statutes

When determining the entitlement of prevailing defendants to statutory fees in private attorney general type cases, California courts have generally applied the "dual standard" set out in *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 54 L Ed 2d 648, 98 S Ct 694 (see §2.69). See, *e.g., Cummings v Benco Bldg. Servs.* (1992) 11 CA4th 1383, 15 CR2d 53 (Govt C §12965) (fee award to defendant reversed; some evidence supported discrimination claim); *Stephens v Coldwell Banker Commercial Group*, *Inc.* (1988) 199 CA3d 1394, 245 CR 606 (citing *Christiansburg* with approval), overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19.

The *Christiansburg* standard is functionally equivalent to the California standard for frivolous appeals. See §§6.60, 6.62-6.64; *Benson v Greitzer* (1990) 220 CA3d 11, 269 CR 201. It applies even when the defendant's right to fees arises under CCP §998. See *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 949, 84 CR3d 526.

Under this standard, in addition to finding that the lawsuit was frivolous, the court also must consider the plaintiff's ability to pay any fee award to the defendant. See *Young v Exxon Mobil Corp.* (2008) 168 CA4th 1467, 86 CR3d 507 (Govt C §12965(b)) (fee award of $1 to defendant supervisor affirmed; plaintiff's case frivolous as to supervisor, not employer, but employer paid supervisor's fees); *Villanueva v City of Colton* (2008) 160 CA4th 1188, 73 CR3d 343 (Govt C 12965(b)) (fee award to defendant affirmed; although trial court had obligation to consider plaintiff's ability to pay award, plaintiff failed to offer evidence of inability to pay; appellate fees denied because appeal not frivolous); *Rosenman v Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 868 n42, 110 CR2d 903 (Govt C §12965) (requiring specific findings on frivolous and ability to pay standards).

On whether the *Christiansburg* standard applies to statutory *costs,* see §2.49.

**NOTE:** It is not unconstitutional to employ a different standard for plaintiffs and defendants in determining eligibility for attorney fee awards. See *Roa v Lodi Med. Group* (1985) 37 C3d 920, 932 n10, 211 CR 77 (dictum).

**Additional authorities:** *Linsley v Twentieth Century Fox Film Corp.* (1999) 75 CA4th 762, 89 CR2d 429 (Govt C §12965) (fee award to defendant upheld); *Hon v Marshall* (1997) 53 CA4th 470, 62 CR2d 11 (Govt C §12965) (fee award to defendants reversed; defendants were not prevailing parties when case dismissed on jurisdictional grounds); *Bond v Pulsar Video Prods.* (1996) 50 CA4th 918, 925, 57 CR2d 917 (Govt C §12965) (fee award to defendant upheld); *People v Roger Hedgecock for Mayor Comm.* (1986) 183 CA3d 810, 816, 228 CR 424 (Govt C §§91003(a), 91012) (trial court's refusal to award attorney fees to defendant upheld).

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### §2.71 (2) Federal Statutes

The rule that prevailing defendants are entitled to fees only when the plaintiff's claim is frivolous, groundless, or without foundation is well established for federal civil rights statutes. See *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 54 L Ed 2d 648, 98 S Ct 694; *Galen v County of Los Angeles* (9th Cir 2007) 477 F3d 652 (fee award to defendants for plaintiff's post-discovery litigation affirmed in part and reversed in part); *Tutor-Saliba Corp. v City of Hailey* (9th Cir 2006) 452 F3d 1055, 1064 (distinguishing plaintiff's frivolous constitutional claims from nonfrivolous statutory claims); *Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 650 (adopting First Circuit's view that even if some of plaintiff's claims are "frivolous," court retains jurisdiction to deny defendant's request for fees based on consideration of all circumstances of case). The *Christiansburg* standard also applies to state court actions brought under 42 USC §1983. See *Choate v County of Orange* (2000) 86 CA4th 312, 322, 103 CR2d 339; *County of Butte v Bach* (1985) 172 CA3d 848, 869, 218 CR 613, reaff'd 215 CA3d at 308; *Pyne v Meese* (1985) 172 CA3d 392, 405, 218 CR 87.

When a federal statute, such as the Americans with Disabilities Act (ADA) (42 USC §§12101-12213), provides discretionary fees to defendants under the *Christiansburg* standard, it preempts fee awards to defendants under less restrictive state law standards. See *Hubbard v SoBreck LLC* (9th Cir 2009) 554 F3d 742, 746 (fee award to defendant under California's Disabled Persons Act (CC §55) preempted by ADA fee provision). See §2.75.

The *Christiansburg* standard has been applied to a wide variety of fee-shifting provisions. See, *e.g., The Ocean Conservancy, Inc. v National Marine Fisheries Serv.* (9th Cir 2004) 382 F3d 1159 (standard applies to Endangered Species Act (ESA) (16 USC §§1531-1544)); *Marbled Murrelet v Babbitt* (9th Cir 1999) 182 F3d 1091 (same); *Childress v Darby Lumber, Inc.* (9th Cir 2004) 357 F3d 1000 (standard applies to WARN Act (Worker Adjustment and Retraining Notification Act, 29 USC §§2101-2109)); *Lane v Residential Funding Corp.* (9th Cir 2003) 323 F3d 739 (standard applies to Real Estate Settlement Procedures Act (RESPA) (12 USC §§2601-2617)); *Pfingston v Ronan Engineering Co.* (9th Cir 2002) 284 F3d 999 (standard applies to False Claims Act (31 USC §3729)); *Razore v Tulalip Tribes* (9th Cir 1995) 66 F3d 236 (standard applies to Clean Water Act (33 USC §§1251-1382) and Resource Conservation and Recovery Act (42 USC §§6901-6922k)). See also §2.49.

Whether the *Christiansburg* standard applies to statutory *costs* is discussed in *Brown v Lucky Stores* (9th Cir 2001) 246 F3d 1182, 1189.

**Additional authorities:** *Karam v City of Burbank* (9th Cir 2003) 352 F3d 1188; *Brooks v Cook* (9th Cir 1991) 938 F2d 1048. See also *Hughes v Rowe* (1980) 449 US 5, 66 L Ed 2d 163, 101 S Ct 173 (defendants entitled to fees under 42 USC §1988 on showing that plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

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### §2.72 (3) Exception: Prevailing Defendants Who Act as Private Attorneys General May Be Entitled to Fee Awards Under CCP §1021.5

Prevailing defendants who independently meet the requirements of CCP §1021.5 (*i.e.,* who, *as defendants,* have acted as private attorneys general) may be eligible for an award of attorney fees under that statute regardless of whether the plaintiff's action was frivolous. See, *e.g., Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 33 CR3d 817 (fees awarded to real parties in interest who defeated plaintiff's challenge to referendum); *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846 (fees awarded to defendants who successfully resisted county's effort to bill them for the costs of their political protest). See also *In re Adoption of Joshua S.* (2008) 42 C4th 945, 957, 70 CR3d 372 (citing other cases); §3.19 (discussing this line of cases).

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.73 (4) Exception: Commercial Litigation (Federal Law)

### §2.73 (4) Exception: Commercial Litigation (Federal Law)

A different rule applies in commercial cases (*e.g.,* cases under the copyright, patent, and trademark laws), in which the "dual standard" for determining entitlement to fees has been rejected. *Fogerty v Fantasy, Inc.* (1994) 510 US 517, 127 L Ed 2d 455, 114 S Ct 1023. *Fogerty* requires that plaintiffs and defendants be treated alike in such cases.

Under *Fogerty,* entitlement to fees for either side is not automatic. The district court must exercise its discretion and consider such factors as:

> frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence,

510 US at 535 n19, 127 L Ed 2d at 470 n19.

For an application of these factors, see *Fantasy, Inc. v Fogerty* (9th Cir 1996) 94 F3d 553 (affirming fee award to prevailing defendant after remand from Supreme Court). See also *Berkla v Corel Corp.* (9th Cir 2002) 302 F3d 909; *Entertainment Research v Genesis Creative Group* (9th Cir 1997) 122 F3d 1211; *Historical Research v Cabral* (9th Cir 1996) 80 F3d 377. Compare these cases with *Lane v Residential Funding Corp.* (9th Cir 2003) 323 F3d 739 (holding that *Christiansburg,* not *Fogerty,* applies to defendant's fee claim under Real Estate Settlement Procedures Act (RESPA) (12 USC §§2601-2617)).

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.74 (5) Exception: Civil Anti-Harassment Statute

## §2.74 (5) Exception: Civil Anti-Harassment Statute

Under California's civil anti-harassment statute, prevailing defendants are entitled to reasonable attorney fees without having to demonstrate that the plaintiff's case was frivolous or not in good faith. CCP §527.6(i); *Krug v Maschmeier* (2009) 172 CA4th 796, 803, 91 CR3d 452.

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### §2.75 2. Statutes Providing That Court "Shall" Award Fees to Prevailing Party

Fee statutes phrased in mandatory terms (*i.e.,* the court "shall" award fees) generally afford no discretion to deny fees to a prevailing party, whether that party is the plaintiff or the defendant. See, *e.g., Thompson Pac. Constr., Inc. v City of Sunnyvale* (2007) 155 CA4th 525, 557, 66 CR3d 175 (fee awards mandatory to prevailing plaintiffs or defendants under Pub Cont C §7107); *LaChapelle v Toyota Motor Credit* (2002) 102 CA4th 977, 992, 126 CR2d 32 (in consumer suit under Vehicle Leasing Act (CC §2988.9), trial court properly awarded attorney fees to prevailing defendant; note that fee provision states it applies regardless of who brought action, and that although appellate court did not find that plaintiff's suit was frivolous, it strongly implied that it was "unwarranted"); *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 765, 114 CR2d 558 (CC §3068(d)); *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377 (fee awards mandatory to defendants who prevail under anti-SLAPP statute, CCP §425.16); *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (Mobilehome Residency Law (CC §798.85); note that statute expressly provides that prevailing party is party in whose favor judgment is rendered or in whose favor action is dismissed before trial, unless parties agree otherwise).

In *Molski v Arciero Wine Group* (2008) 164 CA4th 786, 790, 79 CR3d 574, the court held that under California's Disabled Persons Act (CC §55), fee awards are mandatory to prevailing plaintiffs *or* defendants. The court contrasted CC §§52 and 54.3(a), which are other statutes available to plaintiffs with disability discrimination claims that provide fees only to plaintiffs, which have more difficult proof requirements. See also *Goodell v Ralph's Grocery Co.* (ED Cal 2002) 207 F Supp 2d 1124 (fee award to defendant mandatory under CC §55). But see *Hubbard v SoBreck LLC* (9th Cir 2009) 554 F3d 742, 746 (fee award to defendant under Disabled Persons Act (CC §55) preempted by "dual standard" ADA fee provision (42 USC §12205). See also *Garcia v Santana* (2009) 174 CA4th 464, 476, 94 CR3d 299 (under Davis-Stirling Act (CC §1354(c)), fee award to prevailing defendant mandatory, but trial court may take into account losing plaintiff's financial circumstances in setting amount of fees).

A plaintiff who prevails under such a statute cannot be denied fees simply because the fee-shifting claim is never reached, or because the defendant prevailed on other non-fee-shifting causes of action. *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 150, 50 CR3d 273.

The courts and the legislature have created numerous exceptions and qualifications to this rule, however.

**Cases providing discretion to find no prevailing party.** Several courts have avoided the fee-shifting statute's mandatory directive by finding that there was no prevailing party in the litigation. See, *e.g., Brawley v J.C. Interiors, Inc.* (2008) 161 CA4th 1126, 1136, 74 CR3d 832 (court has discretion to determine that neither party prevailed in action under CC §3260); *Galan v Wolfriver Holding Corp.* (2000) 80 CA4th 1124, 96 CR2d 112 (prevailing party under CC §1942.4 determined "on practical level"; trial court has discretion to determine that neither party prevailed in action); *Gilbert v National Enquirer, Inc.* (1997) 55 CA4th 1273, 64 CR2d 659 (trial court has discretion to determine that neither party prevailed in action under CC §3344(a)); *Donald v Cafe Royale, Inc.* (1990) 218 CA3d 168, 185, 266 CR 804 (CC §55).

**Cases finding "prevailing party" but awarding little or no fees.** A variant on this theme is *Moran v Endres* (2006) 135 CA4th 952, 37 CR3d 786, which held that when an anti-SLAPP motion under CCP §425.16 accomplished nothing, the trial court may award no fees. *Moran* was distinguished in *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 340, 42 CR3d 607 (defendant entitled to fees when anti-SLAPP motion successfully narrowed scope of litigation, but fees had to be reduced for fees attributable to causes of action that had not been stricken), and *Morrow v Los Angeles Unified Sch. Dist.* (2007) 149 CA4th 1424, 1446, 57 CR3d 885 (defendant's defeat of causes of action for defamation and invasion of privacy not trivial). See also *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 72 CR3d 922. These cases are similar to the *Farrar v Hobby* (1992) 506 US 103, 121 L Ed 2d 494, 113 S Ct 566, line of cases. See §2.100.

Similarly, in *Garcia v Santana* (2009) 174 CA4th 464, 476, 94 CR3d 299, the court held that under the Davis-Stirling Act (CC §1354(c)), a fee award to the prevailing defendant was mandatory, but the trial court could and should take into account the losing plaintiff's financial circumstances in setting the amount of reasonable fees to be awarded.

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### §2.76 3. Statutes Providing Different Standards for Different Parties

Some statutes expressly provide different standards for different parties. These include:

**The anti-SLAPP statute (CCP §425.16(c)(1)).** Fee awards are mandatory to prevailing defendants on a motion to strike under the statute; plaintiffs who defeat motions to strike are entitled to fees only if the motion to strike is "frivolous or is solely intended to cause unnecessary delay." See, *e.g., Schroeder v Irvine City Council* (2002) 97 CA4th 174, 194, 118 CR2d 330 (CCP §425.16 constitutional despite fact that court has no discretion to deny fees when successful defendant is government agency); *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 113 CR2d 625 (fees mandatory even when defendant prevails only partially on CCP §425.16 motion).

**NOTE:** Effective January 1, 2010, under CCP §425.16(c)(2) a prevailing party shall not be entitled to attorney fees in certain specified actions under the Government Code.

**The California Public Records Act (Govt C §6259(d)).** Fee awards are mandatory to prevailing plaintiffs; prevailing defendants are entitled to fees only if the lawsuit is "clearly frivolous." See, *e.g., Belth v Garamendi* (1991) 232 CA3d 896, 283 CR 829 (statutory direction that court "shall" award fees makes fee award mandatory under the California Public Records Act); *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29 (fee awards under California Public Records Act mandatory even to "partially prevailing" plaintiffs).

**The Consumers Legal Remedies Act (CC §1780(e)).** Under CC §1780(e), the court "shall" award fees to prevailing plaintiffs; prevailing defendants are entitled to fees only if the action is not in good faith. See, *e.g., Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 9, 83 CR3d 771 (when plaintiff won on fee-shifting claims but dismissed several non-fee-shifting claims, defendant not "prevailing party" under Consumers Legal Remedies Act (former CC §1780(d), now CC §1780(e)); note, however, that defendant was found entitled to fees under Florida law); *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 151, 50 CR3d 273 (when plaintiff won on fee-shifting claims but dismissed several non-fee-shifting claims, defendant not "prevailing party" under Act); *Corbett v Hayward Dodge, Inc.* (2004) 119 CA4th 915, 14 CR3d 741 (defendant must show that plaintiff's case was "totally without merit").

**California Consumer Credit Reporting Agencies Act (CC §1785.31(d)-(e)).** Under CC §1785.31(d), fee awards are mandatory to prevailing plaintiffs. Debt collector defendants are entitled to fees only if the action is not in good faith. CC §1785.31(e).

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### §2.77 4. Statutes That Specify Particular Parties

Some statutes provide mandatory fees, but only to one party. See, *e.g., D.C. v Harvard-Westlake Sch.* (2009) 176 CA4th 836, 864, 98 CR3d 300 (fees under Tom Bane Civil Rights Act (CC §52.1(h)) and Ralph Civil Rights Act (CC §53(b)(3)) available only to plaintiffs); *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922 (fee awards under Lab C §§226(e), 1194(a), and 2699(g) recoverable only by prevailing employees). Other similar statutes include:

- Labor Code §98.2(b) (only successful respondents entitled to fees); see *Dawson v Westerly Investigations, Inc.* (1988) 204 CA3d Supp 20, 251 CR 633;
- Civil Code §3318 (party who successfully enforces warranty of agent's authority entitled to recover attorney fees as part of statutory damages);
- Individuals with Disabilities Education Act (IDEA) (20 USC §1415(e)(4)(B)) (only prevailing "parents or guardians" of disabled youths entitled to fees); see *County of San Diego v California Special Educ. Hearing Office* (9th Cir 1996) 93 F3d 1458; and
- Health and Safety Code §17980.7(d)(1)); see *City & County of San Francisco v Ballard* (2006) 136 CA4th 381, 400, 39 CR3d 1 (only enforcement agencies in abatement action entitled to fees under statute).

Other statutes forbid certain persons from engaging in specified activities and provide for attorney fees to be awarded if those provisions are violated. See, *e.g., Galbiso v Orosi Pub. Util. Dist*. (2008) 167 CA4th 1063, 1077, 84 CR3d 788 (Brown Act (Govt C §54960.5) provides fees "where it is found that [the defendant] has violated" the Act; even though case resolved by settlement, denial of fees reversed because court of appeal determined that defendant violated statute); *Gunther v Lin* (2006) 144 CA4th 223, 50 CR3d 317 (discussing CC §§52, 54.3(a)), disapproved on other grounds in *Munson v Del Taco, Inc.* (2009) 46 C4th 661, 678, 94 CR3d 685; *Doran v North State Grocery, Inc.* (2006) 137 CA4th 484, 39 CR3d 922 (CC §52(a)); *Engel v Worthington* (1997) 60 CA4th 628, 70 CR2d 526 (CC §52). See also CC §2995.

Statutes specifying a particular party to recover fees do not permit the nonspecified party to recover fees if it prevails. In *Covenant Mut. Ins. Co. v Young* (1986) 179 CA3d 318, 225 CR 861, the appellate court rejected a prevailing defendant's claim for fees under CC §3318, holding that the policy favoring mutuality of fee awards reflected in CC §1717 does not apply to fee awards based on statutes. See also *Alcott v M.E.V. Corp.* (1987) 193 CA3d 797, 800, 238 CR 520; *County of Santa Barbara v David R.* (1988) 200 CA3d 98, 103, 245 CR 836. But see *Brusso v Running Springs Country Club, Inc.* (1991) 228 CA3d 92, 278 CR 758, discussed in §4.46.

Similarly, when a statute provides fees only to one party, fees may not be awarded to another party for work on that statutory claim even if it is done in conjunction with a valid contractual fee-shifting claim. *Wood v Santa Monica Escrow Co.* (2007) 151 CA4th 1186, 1191, 60 CR3d 597; *Carver v Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 118 CR2d 569.

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### §2.78 5. When Two Different Statutes Apply

When two different fee-shifting statutes with different prevailing party standards apply to the same action, the outcome is not so clear. For example, in *Brown v West Covina Toyota* (1994) 26 CA4th 555, 566, 32 CR2d 85, the court held that the two-sided "prevailing party" fee provision in the Rees-Levering Motor Vehicle Sales and Finance Act (CC §2983.4) must be construed so as not to vitiate the one-sided "prevailing buyer" fee provision in the Song-Beverly Consumer Warranty Act (CC §1794(d)). In *Murillo v Fleetwood Enters., Inc.* (1998) 17 C4th 985, 73 CR2d 682, the court held that the one-sided fee-shifting provision in the Song-Beverly Act does not preclude a prevailing seller-defendant from recovering statutory costs under CCP §1032 or §998. The court disapproved *Brown* to the extent it held costs were not recoverable by a prevailing seller, but appeared to support its attorney fee determination. 17 C4th at 996.

In *Phelps v Stostad* (1997) 16 C4th 23, 65 CR2d 360, the court held that even when CCP §1141.21 (no costs to party requesting trial de novo who recovers less than in judicial arbitration) precludes an injured employee from recovering costs in an action against a third party tortfeasor, Lab C §3856 applies to allocate the proceeds of the judgment for the payment of reasonable litigation expenses and attorney fees. Compare *Phelps* and *Bhullar v Tayyab* (1996) 46 CA4th 582, 54 CR2d 17 (statutory direction that court "shall" award fees if party fails to obtain more favorable judgment after requesting trial de novo makes fee award mandatory under CCP §1141.21 (judicial arbitration), even if underlying fee statute is discretionary), with *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526 (prevailing defendant in FEHA action (Govt C §12965(b)) otherwise entitled to postoffer costs under CCP §998 not entitled to postoffer attorney fees unless it met "frivolous, unreasonable" standard applicable to prevailing FEHA defendants), and *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 1532, 78 CR3d 661 (CC §1717(b)(2) trumps CCP §998).

The one-way fee provisions in California's hate crimes laws (CC §§52(b)(3), 52.1) are nonwaivable and trump any contractual two-way fee-shifting provisions. *D.C. v Harvard-Westlake Sch.* (2009) 176 CA4th 836, 865, 98 CR3d 300.

The "dual-standard" prevailing party provision in the Americans with Disabilities Act (ADA) (42 USC §12205) preempts the "two-sided" provision in California's Disabled Persons Act (CC §55), barring a fee award to a defendant absent a showing that the case was "frivolous, groundless, or unreasonable." *Hubbard v SoBreck LLC* (9th Cir 2009) 554 F3d 742, 746.

In an action for overtime wages, the one-sided provisions of Lab C §1194, which grant "employees" the right to fees in successful overtime wage claims, barred an award of fees to the prevailing employer under Lab C §218.5, which awards fees to the "prevailing party" in general actions for wages. *Earley v Superior Court* (2000) 79 CA4th 1420, 95 CR2d 57. The legislature has since amended §218.5 to provide that it does not apply to any action in which fees are recoverable under §1194. Stats 2000, ch 876, §4.

In contrast, two California courts have held that the two-sided "prevailing party" fee provision in California's Consumer Credit Reporting Agencies Act (CC §1785.31(d)) is not preempted by the one-sided "prevailing consumer" fee provision in the Federal Fair Credit Reporting Act (15 USC §§1681n-1681o). *Cisneros v U.D. Registry, Inc*. (1995) 39 CA4th 548, 46 CR2d 233; *Gomon v TRW, Inc.* (1994) 28 CA4th 1161, 34 CR2d 256. The Ninth Circuit Court of Appeals appears to disagree, stating in dicta that the California statute permits fees against consumers only for frivolous lawsuits. *Guimond v Trans Union Credit Info. Co.* (9th Cir 1995) 45 F3d 1329, 1336.

See also *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 3, 83 CR3d 771 (although dismissed defendant not entitled to fees under Consumers Legal Remedies Act (former CC §1780(d), now CC §1780(e)), fees allowed under Florida statute); *Wood v Santa Monica Escrow Co.* (2007) 151 CA4th 1186, 1191, 60 CR3d 597; *Carver v Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 118 CR2d 569 (one-sided fee-shifting statute precludes recovery by prevailing defendant, even if defendant eligible for contractual fee).

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### 6. Prevailing Party Statutes With Special Qualifications

#### §2.79 a. Civil Code §1717

Civil Code §1717, which governs contractual attorney fee awards, provides for fees to the "prevailing party" (CC §1717(a)), which it then defines (CC §1717(b)). On the prevailing party standard in contract actions, see §§4.66-4.90.

The definition of "prevailing party" in CC §1717 does not apply to other fee-shifting statutes. *Kim v Euromotors West/The Auto Gallery* (2007) 149 CA4th 170, 178, 56 CR3d 780 (CC §1717(b)(2) does not bar fee award when prevailing party's right to fees arises under fee-shifting statute); *Heather Farms Homeowners Ass'n v Robinson* (1994) 21 CA4th 1568, 1572, 26 CR2d 758.

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### §2.80 b. Code of Civil Procedure §998

Code of Civil Procedure §998 provides that a party may terminate an opposing party's right to subsequent costs and create its own right to those costs if it tenders an offer that is refused and the opposing party fails to do better than that offer. That provision has been interpreted to apply to attorney fees provided by statute, contract, or law (see CCP §1033.5(a)(10)), as well as statutory costs. See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614. However, §998 does not create an independent right to attorney fees. See *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526 (CCP §998 does not grant greater right to fees than underlying statute; prevailing defendant in FEHA action must meet *Christiansburg* standard); *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 1532, 78 CR3d 661 (CCP §998 does not independently create statutory right to fees (citing this book); CC §1717(b)(2) trumps §998); *Scott Co.*, 20 C4th at 1115 n3.

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.81 c. Government Code §800

### §2.81 c. Government Code §800

Government Code §800 provides that the prevailing complainant in mandamus actions against government entities "may" collect reasonable attorney fees, but only if the respondent government entity's conduct is found to be "arbitrary and capricious." See §§3.91-3.94; *Stirling v ALRB* (1987) 189 CA3d 1305, 235 CR 56 (fees denied to prevailing real party in interest).

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### §2.82 d. Code of Civil Procedure §1028.5

Under CCP §1028.5(a), attorney fees may be awarded to certain parties who prevail against state regulatory agencies, but only if the regulatory actions were "undertaken without substantial justification." See §3.94. See also CCP §1028.5(b). This standard is very similar to that applied to fee claims against the federal government under the Equal Access to Justice Act (see 5 USC §504(a), 28 USC §2412(d)).

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### §2.83 e. Other Statutes

Labor Code §4607 provides that employees who successfully resist an employer's attempt to terminate treatment are entitled to their reasonable attorney fees. In *Smith v Workers' Comp. Appeals Bd.* (2009) 46 C4th 272, 280, 92 CR3d 894, the court held that §4607 does not authorize fees when the employee successfully resists a challenge to specific medical treatments, as opposed to a challenge to the validity of the award itself.

To obtain a fee award under the Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15675), the prevailing plaintiff must establish the defendant's liability under the Act by clear and convincing evidence, including evidence of causation); *Perlin v Fountain View Mgmt, Inc.* (2008) 163 CA4th 657, 666, 77 CR3d 743 (fees denied because plaintiff proved liability only under preponderance of evidence standard).

In *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5, the court applied the fee-shifting provision in the Mobilehome Residency Law (CC §798.85), which expressly provides that a defendant in whose favor the action is dismissed before trial is the prevailing party.

Fees were denied under Corp C §8337 in *Chantiles v Lake Forest II Master Homeowners Ass'n* (1995) 37 CA4th 914, 926, 45 CR2d 1, because the association's refusal to provide records was not "without justification." On the other hand, in *Moran v Oso Valley Greenbelt Ass'n* (2001) 92 CA4th 156, 111 CR2d 636, the trial court found that the defendant association had "wrongfully" denied production of minutes but denied fees under Corp C §8337 without explanation. The court of appeal reversed and remanded, directing the trial court to consider the standards articulated in *Common Cause v Stirling* (1981) 119 CA3d 658, 665, 174 CR 200.

Labor Code §98.2(c) provides fees against the "unsuccessful" appellant in appeals from Labor Commissioner decisions. An employee is considered successful "if the court awards an amount greater than zero." Lab C §98.2(c), as amended by Stats 2003, ch 93, §2. For discussion, see §§2.86, 3.97.

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## C. How "Prevailing Party" Is Determined

### §2.84 1. Introduction

As discussed in §2.85, the definition of "prevailing party" under California law is pragmatic and flexible, depending more on the impact of the action than on the manner in which the action is resolved. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 565, 21 CR3d 331 (noting that court has "taken a broad, pragmatic view of what constitutes a 'successful party'"); *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589. The typical formulation is as follows: "It is settled that 'plaintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit.'" *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 153, 50 CR3d 273, quoting *Hensley v Eckerhart* (1983) 461 US 424, 433, 76 L Ed 2d 40, 103 S Ct 1933, and adding emphasis. See §§2.85-2.87.

The corollary of this broad rule is that, although defendants who obtain a dismissal of the plaintiff's action are generally considered the prevailing party for purposes of statutory costs (see CCP §1032), there are many circumstances in which the defendant obtains a dismissal but the plaintiff is considered the prevailing party for purposes of statutory fees. See §§2.107-2.110.

It is also important to recognize that although California and federal law on "prevailing party" are similar in many ways, they differ on the issue of whether the plaintiff must obtain some judicially sanctioned relief from the defendant. See §§2.111-2.114.

The following sections (§§2.85-2.117) address the various issues raised by the prevailing party standard.

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### §2.85 2. Prevailing Party Determined Pragmatically by Impact of Action, Not by Formal Judgment

Whether a party has prevailed for purposes of an award of fees depends on the impact of the action, not the manner in which the action is resolved. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589. See also *In re Head* (1986) 42 C3d 223, 228, 228 CR 184: "How the party achieves the goal of enforcing the right in question is not determinative of the right to an award of attorney fees under §1021.5. The impact of the litigation is."

If the party has obtained some relief from the conditions originally challenged, and if that relief is attributable in some way to the lawsuit, then that party is the prevailing party. *Folsom v Butte County Ass'n of Gov'ts, supra*. In *Folsom*, the plaintiffs obtained a settlement that obligated defendants to initiate four transit systems to benefit the elderly, the handicapped, and the poor, in return for which plaintiffs would dismiss their suit. The agreement did not mention costs or fees. Plaintiffs' motion for fees under CCP §1021.5 was granted, and defendants appealed, alleging that plaintiffs had not been successful (*i.e.,* were not the prevailing parties), because partial summary judgment had been granted to defendants prior to the settlement.

The court rejected this argument, stating that "the determination of success under section 1021.5 must depend on more than mere appearance." 32 C3d at 685. "The inquiry as to a party's success must be a pragmatic one that may range outside the merits of the underlying dispute.… The critical fact is the impact of the action, not the manner of its resolution." 32 C3d at 685. The court held that, if the impact of the action meets the requirements of §1021.5, a fee award is proper even if the case is won on a preliminary issue or is settled before trial, and the settlement requires plaintiff to dismiss the action.

These principles have been applied in a variety of contexts. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830 (entitlement to fees for tort claim based on broad contractual fee clause determined by language in clause or, if not defined in fee clause, by "pragmatic definition of the extent to which each party has realized its litigation objectives whether by judgment, settlement or otherwise"); *Hsu v Abbara* (1995) 9 C4th 863, 39 CR2d 824 (in determining prevailing party under CC §1717 (see chap 4, especially §4.88), courts should "respect substance rather than form"); *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 929, 65 CR3d 242; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 151, 50 CR3d 273.

As discussed in more detail below, under this rule, a party may be deemed to have prevailed if the results are achieved by a judgment, by settlement, or even by the voluntary corrective action of the defendants, as long as the corrective action was attributable to the lawsuit. See, *e.g., Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 568, 21 CR3d 331; *Maria P. v Riles* (1987) 43 C3d 1281, 240 CR 872; *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 353, 188 CR 873.

**Additional authorities:** *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1346 n9, 39 CR3d 550 (following *Folsom*); *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 622, 33 CR3d 817; *Schmier v Supreme Court* (2002) 96 CA4th 873, 117 CR2d 497 (articulating standard but upholding fee denial on facts); *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 836, 93 CR2d 193; *Sears v Baccaglio* (1998) 60 CA4th 1136, 70 CR2d 769; *Foothill Props. v Lyon/Copley Corona Assoc.* (1996) 46 CA4th 1542, 1555, 54 CR2d 488; *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 17 CR2d 510 (plaintiffs are prevailing parties even though injunctive relief obtained by stipulation in which defendants denied liability); *Leiserson v City of San Diego* (1988) 202 CA3d 725, 735, 249 CR 28 ("the court must critically analyze the surrounding circumstances of the litigation and pragmatically assess the gains achieved by a particular action"); *California Common Cause v Duffy* (1987) 200 CA3d 730, 743, 246 CR 285; *Daniels v McKinney* (1983) 146 CA3d 42, 54, 193 CR 842. See also *Elster v Friedman* (1989) 211 CA3d 1439, 260 CR 148 (plaintiffs were prevailing parties under anti-harassment statute (CCP §527.6), even though stipulated judgment contained mutual restrictions on plaintiffs and defendants, because plaintiffs' conduct was never at issue).

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### 3. Plaintiffs Who Achieve "Some Relief" Are Prevailing Parties

#### §2.86 a. California Law

Under California law, a plaintiff who obtains *any* relief as a result of its action is considered the prevailing party. The applicable test was stated in *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 186 CR 589, which directed trial courts to look at the appropriate benchmark situations sought to be affected by the lawsuit, then to look at how the situations had changed, and then to examine the litigation's role in effecting the changes. 32 C3d at 685 n31. If the plaintiff can show that the litigation "was demonstrably influential" in obtaining a change in the conditions challenged in the lawsuit, then it is the successful party. 32 C3d at 687.

The test is often formulated as follows: "It is settled that 'plaintiffs may be considered "prevailing parties" for attorney's fee purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit.'" *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 153, 50 CR3d 273, quoting *Hensley v Eckerhart* (1983) 461 US 424, 433, 76 L Ed 2d 40, 103 S Ct 1933, and adding emphasis.

This broad test has been repeatedly reaffirmed. See, *e.g., Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331; *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830; *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1346 n9, 39 CR3d 550; *Belth v Garamendi* (1991) 232 CA3d 896, 901, 283 CR 829, and cases cited there. See also §§2.85-2.88.

**NOTE:** In *Smith v Rae-Venter Law Group* (2002) 29 C4th 345, 127 CR2d 516, the California Supreme Court held that on appeal from a decision of the Labor Commissioner, an employee is "unsuccessful" and therefore liable for the employer's fees, unless the amount awarded by the court exceeded the amount awarded by the commissioner. The legislature acted promptly to overturn this decision, amending Lab C §98.2(c) (effective January 1, 2004) to provide that on appeal from a decision of the Labor Commissioner, an employee is the successful party on appeal if "the court awards an amount greater than zero." Stats 2003, ch 93, §2.

Under this standard, plaintiffs need not achieve the primary relief sought or succeed on the "central issue" in the litigation. *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1346, 39 CR3d 550; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245 n10, 261 CR 520. However, a different rule applies in "catalyst" cases. See *Marine Forests Soc'y v California Coastal Comm'n* (2008) 160 CA4th 867, 878, 74 CR3d 32; *Lyons v Chinese Hosp. Ass'n, supra* (dicta); §2.111.

**Court-ordered relief not required.** Under this standard, a party may be awarded fees as the successful party, even if he or she obtains no relief, if the principle on which the lawsuit was brought is vindicated. *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569. *Harbor* concerned an original writ filed by welfare recipients challenging the governor's veto of a welfare statute. The supreme court upheld the petitioner's claim that the governor's line-item veto was invalid because the statute was not an appropriations bill and therefore could not be vetoed as a line item. However, the court also upheld the governor's claim that the bill violated the "single subject" rule. As a result, the court refused to require the state to implement the new statute, effectively denying the petitioners any concrete relief.

Nonetheless, the court held unanimously that the petitioners were the "successful party" under CCP §1021.5 because "the impact of [the court's] decision [was] to vindicate the principle upon which they brought this action, *i.e.,* that the Governor's power to veto legislation cannot be exercised to invalidate a statute which is not part of an appropriations bill." 43 C3d at 1103. See also *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 835, 93 CR2d 193 (fees awarded for enforcing common-law rights to easement for public trail); *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 103, 228 CR 847 (entitlement to fees not dependent on relief ultimately achieved because plaintiff established constitutional right to refuse medical treatment).

Compare those cases with *Leiserson v City of San Diego* (1988) 202 CA3d 725, 249 CR 28, applying a similar rule, but holding that the plaintiff newsman was not the successful party, because the fact that the appellate opinion clarified law on press access to disaster sites was only coincidental to the case. See *Schmier v Supreme Court* (2002) 96

CA4th 873, 117 CR2d 497 (following *Leiserson*).

**Focus on results, not how obtained.** Under this standard, courts must focus on the results accomplished by the lawsuit, not whether plaintiff raised the particular arguments relied on by the court in granting relief. See *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 495, 30 CR3d 202, citing *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 13 n1, 232 CR 697. See also *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 318, 73 CR3d 842; *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1299, 255 CR 704.

The circumstances in which fees can be denied to an otherwise prevailing party are discussed in §§2.51-2.68.

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.87 b. Federal Law

### §2.87 b. Federal Law

Federal courts agree that under federal prevailing party statutes, success on any significant issue qualifies the plaintiff as the prevailing party. See *Farrar v Hobby* (1992) 506 US 103, 109, 121 L Ed 2d 494, 502, 113 S Ct 566; *Hensley v Eckerhart* (1983) 461 US 424, 433, 76 L Ed 2d 40, 50, 103 S Ct 1933.

However, federal courts impose two significant requirements for "success" that California courts have not adopted. First, the plaintiff must show some material alteration of its legal relationship with the defendant. See, *e.g., Citizens for Better Forestry v U.S. Dep't of Agric.* (9th Cir 2009) 567 F3d 1128, 1131. Unlike California law, therefore, purely legal victories that do not require some specific action by the defendant do not qualify the plaintiff as the prevailing party.

Second, there must be some "judicial imprimatur" on the relief obtained by the plaintiff. See *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 605, 149 L Ed 2d 855, 121 S Ct 1835. As a consequence, federal law: (1) does not recognize the catalyst theory for purposes of federal prevailing party statutes (see §2.115), although it does recognize it in other contexts (see §2.117); and (2) it imposes requirements for settled cases that California law does not impose (see §2.104).

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## §2.88 4. Results Measured by Impact of Case as a Whole: Lack of Success at Particular Stages Not Controlling

The prevailing party standard looks at the results achieved by the case as a whole, not by success or failure at any particular stage. See, *e.g., Villa De Las Palmas Homeowners Ass'n v Terifaj* (2004) 33 C4th 73, 94, 14 CR3d 67; *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589 (plaintiffs lost partial summary judgment motion); *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1365, 69 CR3d 250; *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 929, 65 CR3d 242; *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 259 CR 599. Compare these cases with *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 96 CR2d 576 (reversing fee award for challenging return to writ when order granting challenge reversed).

Federal law is similar, if not identical. See *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, 1097 (affirming fee award for work performed after final success in case); *Cabrales v County of Los Angeles* (9th Cir 1991) 935 F2d 1050, 1053; *Emery v Hunt* (8th Cir 2001) 272 F3d 1042, 1047. See also *Commissioner v Jean* (1990) 496 US 154, 110 L Ed 2d 134, 110 S Ct 2316. Success or failure at various stages may affect the amount of any fee award, however. See §§9.43, 9.52.

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### §2.89 a. Exception: CCP §998

The availability of a fee award under CCP §998 creates a significant exception to this rule. Under §998, a party that makes an offer that the opposing party does not better at trial may be entitled to a fee award for the time spent after the offer was made, even though the opposing party won the case (albeit for less than the defendant offered). Correlatively, the party that "won" the case may recover fees only up to the date of the rejected offer. See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1110, 86 CR2d 614, discussed in §2.80. Note that §998 does not create an independent right to fees; the party claiming fees must be entitled to them under the applicable fee-shifting statute. See §2.80.

On §998 offers generally, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

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### §2.90 b. Exception: Interim Fees

In some circumstances, a plaintiff who prevails at an interim stage of the litigation may be entitled to an award of attorney fees without having to wait until the rest of the case is completed. "The fact that the dispute between the parties may continue does not preclude a fee award." *Marks v Clarke* (9th Cir 1996) 102 F3d 1012, 1034, quoting *Animal Lovers Volunteer Ass'n v Carlucci* (9th Cir 1989) 867 F2d 1224. Entitlement to such an award depends on obtaining relief under a fee-shifting statute at an interim stage of the litigation. Although interim fee awards are the exception rather than the rule, when appropriate, they may be required. See, *e.g., Taylor v Westly* (9th Cir 2008) 525 F3d 1288, 1290 (in class action challenging state's escheat process, trial court's denial of interim fees reversed; because of importance of case and disparity in litigation resources between parties, failure to award interim fees would create risk of "starving out" plaintiff that has established meritorious claim). Interim fee awards are more likely to be made when the litigation has gone on for several years and counsel has not been paid. See, *e.g., Taylor v Westly, supra*; *Carpenter v Stephen F. Austin State Univ.* (5th Cir 1983) 706 F2d 608.

To qualify for an interim award, however, the plaintiff must have prevailed on the merits at some interim stage; an interim procedural victory will not suffice. See *Hanrahan v Hampton* (1980) 446 US 754, 757, 64 L Ed 2d 670, 674, 100 S Ct 1987; *Marks v Clarke, supra; Rosenfeld v U.S.* (9th Cir 1988) 859 F2d 717, 720; *Mantolete v Bolger* (9th Cir 1986) 791 F2d 784.

Several reported California decisions involve interim fee awards, although none expressly discusses the issue. See, *e.g., Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 428, 253 CR 426; *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 188 CR 873; *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 213, 266 CR 788 (awarding fees under CCP §1021.5 for writ compelling compliance with preliminary injunction and "ensuing interim injunctive relief proceedings"); *Sundance v Municipal Court* (1987) 192 CA3d 268, 271, 237 CR 269 (fee award not "premature" even though further litigation on merits possible). See also *Hightower v Superior Court* (2001) 86 CA4th 1415, 104 CR2d 209 (arbitrator also may award fees on an interim basis).

Granting interim fees is consistent with the rule that entitlement to fees does not necessarily depend on the ultimate resolution of the action. See §2.93. For example, in *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 228 CR 847, the plaintiff had won an appellate ruling affording him the right to refuse medical treatment. The trial court denied plaintiff's CCP §1021.5 fee application because the issue of his consent to treatment had not yet been resolved. The appellate court reversed, holding that plaintiff's entitlement to fees did not depend on the ultimate resolution of his claim. See §§9.43-9.44. See also *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 241 CR 239 (entitlement to fees not dependent on outcome of plaintiff's damages action); *Boehm v Superior Court* (1986) 178 CA3d 494, 503, 223 CR 716 (fees awarded after reversal of order denying preliminary injunction). Compare these cases with *Bell v Farmers Ins. Exch.* (2001) 87 CA4th 805, 105 CR2d 59 (because Lab C §1194 conditioned attorney fees on "recovery" of wages, interim fees based on a summary adjudication of liability not authorized).

The availability of interim fees also arises under CC §1717. See, *e.g., Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 196 CR 1, and other cases cited in §§4.94-4.95, 11.18-11.19.

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### §2.91 c. Effect of Pending Appeal

Although fees cannot be awarded until the prevailing party can be determined (see §§2.44, 4.91), a party "prevails" if it wins at the trial court level, even if the trial court decision is appealed. See Cal Rules of Ct 3.1702(b)(1) (fee motion for services through judgment in trial court must be served and filed within time provided for notice of appeal); *Bankes v Lucas* (1992) 9 CA4th 365, 11 CR2d 723 (notice of appeal does not prevent trial court from determining attorney fee award claimed as costs); *Nazemi v Tseng* (1992) 5 CA4th 1633, 1639, 7 CR2d 762; *Dameshghi v Texaco Ref. & Mktg.* (1992) 3 CA4th 1262, 1288, 6 CR2d 515, disapproved on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241; *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1546, 1 CR2d 35. See also *Wilkerson v Sullivan* (2002) 99 CA4th 443, 121 CR2d 275 (defendant's entitlement to fee award under anti-SLAPP statute, CCP §425.16, unaffected by plaintiff's dismissal of appeal); *First Sec. Bank v Paquet* (2002) 98 CA4th 468, 475, 119 CR2d 787 (fee award not premature simply because claimant may later be assessed fees or costs).

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### §2.92 (1) When Action Reversed on Merits

If the action is reversed on its merits, the fee award also may be reversed. See, *e.g., National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 96 CR2d 576; *Save Our Residential Env't v City of W. Hollywood* (1992) 9 CA4th 1745, 1750, 12 CR2d 308; *Mapstead v Anchundo* (1998) 63 CA4th 246, 278, 73 CR2d 602 (discussing preliminary injunctions in cases that ultimately are lost on merits).

Partial reversal also may require that the fee award be vacated and remanded. See, *e.g., De Anza Santa Cruz Mobile Estates Homeowners Assoc. v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 114 CR2d 708; *Neecke v City of Mill Valley* (1995) 39 CA4th 946, 46 CR2d 266 (judgment affirmed in part and reversed in part; case remanded to trial court to reconsider whether plaintiff entitled to attorney fees, and if so, in what amount).

In several cases, however, trial court fee awards have been affirmed even though some of the prevailing party's relief was reversed. See, *e.g., In re Lugo* (2008) 164 CA4th 1522, 1547, 80 CR3d 521; *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 1385, 61 CR3d 114 (damages reduced on appeal; fee award affirmed in full); *Armenta v Osmose, Inc.* (2005) 135 CA4th 314, 326, 37 CR3d 460 (same); *LeVine v Weis* (2001) 90 CA4th 201, 214, 108 CR2d 562 (judgments against all four individual defendants reversed on appeal; fee award affirmed in full), disapproved on other grounds in *Wells v One2One Learning Found.* (2006) 39 C4th 1164, 48 CR3d 108; *Kunec v Brea Redevelopment Agency* (1997) 55 CA4th 511, 526, 64 CR2d 143 (merits remanded for modification of injunction; fee award affirmed in full); *Kwan v Mercedes-Benz* (1994) 23 CA4th 174, 192, 28 CR2d 371.

A defendant who obtains a partial reversal on appeal does not necessarily become a prevailing party. See, *e.g., Snyder v Marcus & Millichap* (1996) 46 CA4th 1099, 54 CR2d 268 (defendant who obtained reversal of punitive and emotional distress damages not entitled to appellate fees under CC §1717 or CCP §1021 because plaintiff still obtained net monetary recovery); *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 56 CR2d 33 (despite losing claim for punitive damages on appeal, plaintiff was prevailing party under CC §1717).

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### §2.93 (2) Effect of Subsequent Developments at Trial Level

Once substantive success is achieved, the party may be considered to have prevailed even if further proceedings on the merits remain unresolved. For example, litigants challenging administrative agency decisions are generally "prevailing parties" if they obtain judicial relief requiring the agency to reconsider its decision under proper standards, regardless of whether they ultimately obtain the relief sought. See *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 428, 253 CR 426; *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 188 CR 873; *Bowman v City of Berkeley* (2005) 131 CA4th 173, 177, 31 CR3d 447 (plaintiffs who obtained remand of action to require greater notice in dispute over approval of proposed housing project were "successful parties" even though project was approved following remand); *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 213, 266 CR 788 (awarding fees under CCP §1021.5 for writ compelling compliance with preliminary injunction and "ensuing interim injunctive relief proceedings"); *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 103, 228 CR 847 (entitlement to fees not dependent on relief ultimately achieved because plaintiff established constitutional right to refuse medical treatment).

In many cases, judicial relief does not go to the final outcome of the dispute but focuses on requirements or processes that must be followed to resolve the dispute. In those circumstances, the party successfully enforcing those requirements is the prevailing party. For example, in *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 142 CR 766, the court invalidated a general plan amendment for failure to comply with CEQA and other laws. The county argued that fees were improper because it might still adopt the same plan, but the court of appeal rejected that argument, recognizing that even if the plan was readopted, the "residents of the county would have had the benefit of a reasoned consideration of alternatives to the plan as well as the assurance that relevant state declared policies have not been ignored." 76 CA3d at 248 n7. See also *Acosta v Kerrigan* (2007) 150 CA4th 1124, 1132, 58 CR3d 865 (party who compelled arbitration entitled to fees under CC §1717, regardless of arbitration's outcome); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 11, 54 CR3d 724 (defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause invalid entitled to fees under contractual fee clause and CCP §1021.5, regardless of ultimate outcome of dispute between parties). Compare these cases with *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 96 CR2d 576 (reversing fee award for challenging return to writ when order granting challenge reversed).

Federal law is similar. "The fact that the dispute between the parties may continue does not preclude a fee award." *Marks v Clarke* (9th Cir 1996) 102 F3d 1012, 1034, quoting *Animal Lovers Volunteer Ass'n v Carlucci* (9th Cir 1989) 867 F2d 1224. See *Shalala v Schaefer* (1993) 509 US 292, 125 L Ed 2d 239, 249, 113 S Ct 2625; *Vigil v Leavitt* (9th Cir 2004) 381 F3d 826, 847; *Flores v Shalala* (9th Cir 1995) 49 F3d 562; *Environmental Defense Fund v Reilly* (DC Cir 1993) 1 F3d 1254; *National Wildlife Fed'n v F.E.R.C.* (9th Cir 1989) 870 F2d 542, 544. Compare these cases with *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, 1097 (affirming fee award for work performed after final success in case).

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### §2.94 d. No Requirement That Prevailing Party Prove Merits of Fee-Shifting Claim

When actions are resolved short of a judicial determination of the merits, the fee opponent will often claim that a fee award is improper because the plaintiff's fee-shifting claim was not meritorious. Although courts are understandably reluctant to award fees based on nonmeritorious claims, they are also reluctant to decide the merits of a moot controversy solely to decide whether fees may be awarded. Moreover, because the purpose of fee-shifting statutes is to encourage attorneys to take certain types of cases, not to punish the defendant, a resolution of the ultimate merits of the claim is not necessary to accomplish the fee-shifting statute's purposes. For these reasons, both California and federal fee-shifting statutes have been interpreted to *not* require a final determination of the merits as a precondition to an award of fees. (The issue of whether the parties can *re*litigate the merits in the fee award process is addressed in §2.98.)

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## (1) California Law

### §2.95 (a) Settled Cases

California law generally authorizes fee awards when cases are settled without a finding or admission of liability. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589, and other cases cited in §2.103. Although courts do not have to make a determination of the merits in such cases (but see §2.103), some assessment of the merits may be required simply to ensure that the case was not frivolous. In *Folsom,* the court mentioned both *Nadeau v Helgemoe* (1st Cir 1978) 581 F2d 275, which required a showing of some minimal basis in law for the relief secured, and *Bonnes v Long* (4th Cir 1979) 599 F2d 1316, which did not (see §2.97). 32 C3d at 685. In *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 843, 216 CR 649, the court of appeal recognized the divergence in the two lines of federal cases but did not decide which to apply because the prevailing party's fee claim easily met the more stringent *Nadeau* standard. 170 CA3d at 844.

In *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466, the defendant entered into a stipulated injunction that was enforceable by the court, then claimed that the plaintiff's fee claim had to be interpreted under the catalyst theory because there had been no judicial determination of its liability and it had entered into the settlement "voluntarily." The supreme court rejected that argument, holding that the judgment was the functional equivalent of a consent decree which, even under federal law, qualifies the plaintiff as the prevailing party regardless of any admission of liability. 45 C4th at 260. See *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 604, 149 L Ed 2d 855, 121 S Ct 1835.

In *Engle v Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 68 CR3d 461, the court held that plaintiff was entitled to fees when she recovered relief under a CCP §998 offer and her complaint alleged discrimination under the applicable fee-shifting statute (Govt C §12965(b)), rejecting the defendant's arguments that fees could not be awarded because the fee-shifting claim lacked merit. See also *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 263, 118 CR2d 276 (party obtaining judgment by accepting CCP §998 offer entitled to fees under CC §1717, even though liability under contract never determined); *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 174, 17 CR2d 510 (stipulation disclaiming liability on merits did not preclude fee award).

Similarly, in *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 650 n10, 52 CR3d 1, the court held that in determining whether attorney fees were properly awarded, it would not review the merits of the trial court's finding that the county's lawsuit had a reasonable probability of success. In *Belth v Garamendi* (1991) 232 CA3d 896, 902, 283 CR 829, a Public Records Act (Govt C §6259) case, the court rejected the defendant's argument that the plaintiff must show that he would have prevailed on his claim. Rather, the court held that "one whose lawsuit resulted in the relief he sought must show at most that his claim was not frivolous, unreasonable, or groundless." 232 CA3d at 902 (citing *Wallace*). Compare *Belth* with *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 204 CR 913 (applying insubstantiality test to determine whether fees could be awarded on basis of plaintiffs' unresolved federal civil rights claim). See also *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128, 1137 (noting that CC §55 does not require finding of liability to award fees).

Some statutes, however, appear to condition a fee award on a finding of liability. For example, CC §52(a) imposes attorney fees on "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to [CC §§] 51, 51.5, or 51.6." In *Doran v North State Grocery, Inc.* (2006) 137 CA4th 484, 491, 39 CR3d 922, the court held that to recover fees under CC §52(a), the plaintiff must obtain either a finding of liability or an agreement by defendant to pay fees; acceptance of a CCP §998 offer was not enough. The court also held that the plaintiff had lost any right to establish the defendant's liability. 137 CA4th at 492. *Doran* thus appears inconsistent with established fee jurisprudence, as well as counter to a policy of encouraging settlements; at most, it is limited to the specific and relatively uncommon language in CC §52(a).

Faced with similar statutes, other courts have found the plaintiff entitled to fees in settled cases by determining the defendant's liability under the applicable statute as part of the fee motion process. See *Galbiso v Orosi Pub. Util. Dist*.

(2008) 167 CA4th 1063, 84 CR3d 788 (finding defendant liable under Brown Act (Govt C §54960(a)), which provides fees "where it is found that a legislative body of the local agency violated this chapter"); *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543 (finding that plaintiff had established defendant's liability under fee-shifting statutes), disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1.

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### §2.96 (b) Catalyst Cases

In catalyst cases, the requirement for proving that the claim has some merit was addressed in some depth in *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331. *Graham* held that to recover fees under the catalyst theory, the trial court must find, based on an abbreviated review, that the lawsuit had sufficient merit to show that it was not a nuisance lawsuit, *i.e.,* that it was not "frivolous, unreasonable or groundless," either legally or factually. 34 C4th at 575. This showing "may generally be established during the attorney fee proceeding by declarations, or, at the discretion of the trial court, by an abbreviated evidentiary hearing." 34 C4th at 576 (citing this book). The object of the review is not to determine if the fee-claimant would have won the case, but to "screen out nuisance suits." 34 C4th at 576. See §§2.111-2.114.

In catalyst claims against government agencies, *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 609, 21 CR3d 371, cautioned that "when a government agency is clearly given discretion to choose among a number of courses of action, the fact that it chooses to exercise its discretion in a manner favorable to a plaintiff in a lawsuit filed against it does not mean that its actions were required by law." Thus, the plaintiff in such a suit must prove both that its lawsuit was the catalyst for the agency's course of action, and that its lawsuit was not "frivolous, unreasonable or groundless." See also *Godinez v Schwarzenegger* (2005) 132 CA4th 73, 94, 33 CR3d 270 (remanding catalyst case for determination of whether plaintiff's action had merit).

In *Vasquez v State* (2008) 45 C4th 243, 257, 85 CR3d 466, the court held that when relief was obtained by a stipulated injunction, the catalyst theory was inapplicable, and the party need not prove a prior effort to settle. Presumably, the same principle would apply to the catalyst theory's "merits" requirement.

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### §2.97 (2) Federal Law

Under federal law, which narrowly restricts application of the catalyst theory (see §§2.115-2.116), the meritorious claim issue arises mainly in evaluating settlements. Federal courts have dealt with the issue in two ways: Some federal courts use the standard stated in *Nadeau v Helgemoe* (1st Cir 1978) 581 F2d 275, 279: a plaintiff who prevails by settlement must show that (a) the lawsuit was causally related to securing the relief obtained, and (b) there was some minimal basis in law for the relief secured. The court emphasized that in such cases, however, a trial on the merits is not required. Rather, the only determination on the merits of plaintiff's fee-shifting claim would be to decide whether the claim was "frivolous, unreasonable, or groundless." 581 F2d at 281.

If the plaintiff loses its fee-shifting claim, or if the claim meets the "frivolous, unreasonable, or groundless" standard, no fees will be awarded despite the relief obtained (581 F2d at 281):

> [I]f it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Other federal courts follow the test stated in *Bonnes v Long* (4th Cir 1979) 599 F2d 1316, 1319, under which the court considers only whether the plaintiff's lawsuit led to a favorable result. No determination on the merits is required.

The practical effect of the two tests is similar because the "frivolous, unreasonable, or groundless" standard is relatively easy to meet. See, *e.g., Scurlock v City of Lynn Haven* (11th Cir 1988) 858 F2d 1521, 1528 (equating what later became second part of *Nadeau* test with "insubstantiality" test for determining federal jurisdiction). Compare *Kilgour v City of Pasadena* (9th Cir 1995) 53 F3d 1007, 1011 (implying that no determination of merits is required for cases resolved by settlement), disapproved on other grounds in *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 602, 149 L Ed 2d 855, 861, 121 S Ct 1835, with *Stivers v Pierce* (9th Cir 1995) 71 F3d 732, 752 (stating in dicta that if settlement obtained, plaintiff need only show that claim not "frivolous, unreasonable, or groundless"). See also *Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832, 837.

**NOTE:** In *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, the United States Supreme Court disapproved the catalyst rule for federal prevailing party statutes, holding that a plaintiff who receives relief as a result of the defendant's voluntary change of behavior cannot be considered a prevailing party under those statutes. The Court explicitly approved judgments and consent decrees as forms of judicial relief that will support a prevailing party designation, without indicating any need to evaluate the merits of the plaintiff's fee-shifting claim. 532 US at 604.

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### §2.98 5. Parties May Not Relitigate Merits

When the merits of a case have been finally determined, they may not be relitigated as part of the fee motion. See, *e.g., Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 216 CR 649; *Slayton v Pomona Unified Sch. Dist.* (1984) 161 CA3d 538, 547, 207 CR 705. See also *Center for Biological Diversity v Marina Point Dev. Co.* (9th Cir 2009) 560 F3d 903, 915, and cases cited therein; *Zambrano v INS* (9th Cir 2002) 282 F3d 1145; *Fischel v Equitable Life Assur. Soc.* (9th Cir 2002) 307 F3d 997. But see *McMahon v Lopez* (1988) 199 CA3d 829, 245 CR 172.

Unless the merits have been properly appealed, they may not be challenged on an appeal from the fee award. See *Torres v City of San Diego* (2007) 154 CA4th 214, 222, 64 CR3d 495; *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 650 n10, 52 CR3d 1; *City of Santa Paula v Narula* (2003) 114 CA4th 485, 8 CR3d 75. In *Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832, 837, however, the district court denied the plaintiff's fee motion on the grounds that he lacked standing because the relief he sought had been provided before the litigation commenced. The Ninth Circuit reversed, finding that the plaintiff had adequately alleged standing to pursue other injuries. See also §16.11.

Courts occasionally do decide the merits to determine a right to fees, however. In *McMahon v Lopez* (1988) 199 CA3d 829, 245 CR 172, the plaintiffs obtained a preliminary injunction under 42 USC §1983, but the trial court denied fees. On appeal from the fee denial. the appellate court held that the plaintiffs had not presented a valid §1983 claim on the merits and therefore were properly denied fees. By ruling on the merits of plaintiffs' moot claim rather than simply determining whether it was "frivolous, unreasonable, or groundless," however, *McMahon* seems inconsistent with this line of cases. Compare *McMahon* with *Grano v Barry* (DC Cir 1986) 783 F2d 1104, 1110 (when trial court considered merits in determining plaintiff's entitlement to a preliminary injunction, there is no need to further examine merits of plaintiff's claim), and *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 844, 216 CR 649 (using same analysis as *Grano*). See §§2.103-2.103 (discussing fees for preliminary injunctions in cases that ultimately are lost on merits). See also *Galbiso v Orosi Pub. Util. Dist*. (2008) 167 CA4th 1063, 84 CR3d 788; *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1.

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### 6. Party May Prevail Even if Some Claims Unsuccessful

#### §2.99 a. California Law

A party need not prevail on every claim presented in the case to be entitled to an award of attorney fees. *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 243, 261 CR 520; *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 846, 216 CR 649. Partial success can be enough to justify an award of fees. See *Maria P. v Riles* (1987) 43 C3d 1281, 240 CR 872 (rejecting finding that plaintiffs received only "token" victory); *Harbor v Deukmejian* (1987) 43 C3d 1078, 240 CR 569; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 153, 50 CR3d 273; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1346, 39 CR3d 550; *Bowman v City of Berkeley* (2005) 131 CA4th 173, 177, 31 CR3d 447 (plaintiffs are prevailing parties if they "succeed on *any* significant issue in the litigation which achieves *some* of the benefit the parties sought in bringing suit"); *Ajaxo Inc. v E*Trade Group, Inc.* (2005) 135 CA4th 21, 37 CR3d 221; *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 30 CR3d 202; *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29 (fee awards under California Public Records Act (Govt C §6259) mandatory even to "partially prevailing" plaintiffs as long as relief not "minimal" or "insignificant"); *Hull v Rossi* (1993) 13 CA4th 1763, 17 CR2d 457; *California Common Cause v Duffy* (1987) 200 CA3d 730, 741, 246 CR 285. See also *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 113 CR2d 625 (defendant entitled to fee award under anti-SLAPP statute, CCP §425.16, even though only some of challenged causes of action stricken).

In litigated or settled cases, a party need not obtain the "primary" or "central" relief sought. *Lyons v Chinese Hosp. Ass'n, supra; Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245 n10, 261 CR 520; *Bowman, supra*. However, a different rule appears to apply in "catalyst" cases. See *Marine Forests Soc'y v California Coastal Comm'n* (2008) 160 CA4th 867, 878, 74 CR3d 32; *Lyons v Chinese Hosp. Ass'n, supra*. See §§2.111, 9.44-9.45.

A party's limited success is generally relevant only to the *amount* of fees, not to whether the party is *entitled* to fees: "'Whether an [attorney fee] award is justified and what amount that award should be are two distinct questions, and the factors relating to each must not be intertwined or merged.'" *Graciano*, 144 CA4th at 153, quoting *Flannery v CHP* (1998) 61 CA4th 629, 647, 71 CR2d 632. See also *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 72 CR3d 922; *Bowman*, 131 CA4th at 177 (failure to obtain certain relief "is a factor to be considered in determining the amount of the fee awarded").

In very limited circumstances, courts retain the discretion to deny fees even to a prevailing plaintiff. See §§2.54, 2.75.

A lack of success on some claims also may affect a court's determination of whether the important right or significant benefit criteria under CCP §1021.5 were met. See *Boccato v City of Hermosa Beach* (1984) 158 CA3d 804, 812, 204 CR 727.

**NOTE:** Under CCP §1033(a), in an action that was not brought as a limited civil case, fees may be denied to a plaintiff who prevails on a claim under the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) but recovers only the amount that could have been recovered in a limited civil case. *Chavez v City of Los Angeles* (2010) 47 C4th 970, __ CR3d __.

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### §2.100 b. Federal Law

The federal standard is similar, though not identical, to the California standard (see §2.99). In *Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933, the Court held that a party need not prevail on every claim or even most of them to be considered the prevailing party. Rather, the Court held that the "threshold" standard for determining prevailing party status is a "generous" one: "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 US at 433, 76 L Ed 2d at 50. However, partial success is an important factor in determining the *amount* of any fee award. 461 US at 436, 76 L Ed 2d at 52.

*Hensley*'s "generous" standard was unanimously reaffirmed in *Texas State Teachers Ass'n v Garland Indep. Sch. Dist.* (1989) 489 US 782, 103 L Ed 2d 866, 109 S Ct 1486, in which the Court specifically rejected circuit court opinions holding that fees may be awarded only if the party prevailed on the "central issue" of the case. A party's failure to prevail on the central issue is relevant only to the question of the amount of fees to be awarded—not to entitlement to fees itself. 489 US at 790, 103 L Ed 2d at 876. See also *Park v Anaheim Union High Sch. Dist.* (9th Cir 2006) 464 F3d 1025, 1032 (district court's discretion to deny fees to prevailing plaintiff is "narrow"; plaintiffs need not obtain central relief sought to qualify for fee award); *Webb v Sloan* (9th Cir 2003) 330 F3d 1158; *Richard S. v Department of Dev. Servs.* (9th Cir 2003) 317 F3d 1080; *Ruffin v Great Dane Trailers* (11th Cir 1992) 969 F2d 989.

Federal law differs from California law in requiring that any litigation actually require the defendant to change its behavior in a way that benefits the plaintiff. See *Hewitt v Helms* (1987) 482 US 755, 96 L Ed 2d 654, 107 S Ct 2672 (plaintiff who received favorable statement of law but no formal or informal relief not prevailing party under 42 USC §1988); *Rhodes v Stewart* (1988) 488 US 1, 102 L Ed 2d 1, 109 S Ct 202 (plaintiffs not prevailing parties because they did not benefit from declaratory judgment entered after case became moot); *Citizens for Better Forestry v U.S. Dep't of Agric.* (9th Cir 2009) 567 F3d 1128, 1131. But see *DiLaura v Township of Ann Arbor* (6th Cir 2006) 471 F3d 666, 670.

**NOTE:** California law permits the court to award attorney fees under the private attorney general doctrine when litigation achieves its goals, even though the named plaintiffs do not personally benefit. *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569.

Under federal law, a party who meets the basic requirements for a prevailing party—a judgment or order that alters the relationship between the parties (see §2.87)—is the prevailing party, regardless of how limited the relief. *Farrar v Hobby* (1992) 506 US 103, 115, 121 L Ed 2d 494, 113 S Ct 566. See also *Choate v County of Orange* (2000) 86 CA4th 312, 324, 103 CR2d 339 (construing 42 USC §1988).

Under *Farrar,* however, relief that is so limited that it can be termed "technical" or "de minimis" and that serves no other societal purpose (see 506 US at 122 (concurring opinion of O'Connor, J)), can be grounds for awarding a non-lodestar-based fee or even no fee at all. An award of nominal damages, for example, does not necessarily mean no fees: the court must also consider "the significance of the legal issue on which the plaintiff prevailed, and the public purpose served" by the litigation. *Farrar,* 506 US at 122, 121 L Ed 2d 494 at 510 (concurring opinion of O'Connor, J). See generally *Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 648; *Mercer v Duke Univ.* (4th Cir 2005) 401 F3d 199 (summarizing cases); *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 362; §11.16.

Likewise, when a prevailing party obtains substantial equitable relief or changes in the defendant's conduct, nominal damages do not preclude a substantial attorney fee award. See, *e.g., Parent V.S. v Los Gatos-Saratoga Joint Union High Sch. Dist.* (9th Cir 2007) 484 F3d 1230, 1234 (relief in Individuals with Disabilities Education Act (IDEA) case not de minimis); *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65, 75 (relief obtained at administrative hearing qualifies parents as prevailing parties). See generally §§2.87, 9.49-9.64, 10.54.

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### 7. Particular Dispositions

### §2.101 a. Relief Obtained on Procedural or Technical Grounds

Consistent with the focus on the results achieved, a party may be the prevailing party when that party achieves relief on procedural or technical grounds. The supreme court in *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503, relied on four federal decisions to conclude that (23 C3d at 938):

> the fact that a plaintiff is able to win [the] case on a "preliminary" issue, thereby obviating the adjudication of a theoretically more "important" right, should not necessarily foreclose the plaintiff from obtaining attorney fees under a statutory provision.

In such instances, the trial court, "utilizing its traditional equitable discretion (now codified in CCP §1021.5) must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under a private attorney general theory." 23 C3d at 938.

The rationale underlying this holding is that judicial economy dictates that cases be decided on the simplest grounds raised, and it would be unfair and contrary to legislative intent in enacting fee statutes to deprive a party of attorney fees simply because the court decides the case in the party's favor on a "simpler" or "less important" theory. 23 C3d at 938.

Although *Woodland Hills II* interpreted CCP §1021.5, the private attorney general fee statute, the court observed that the issue "is endemic to the application of numerous statutory attorney fee provisions." 23 C3d at 937. Consequently, the principle quoted above is not limited to fee awards under §1021.5. See, *e.g., Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 217 CR 621 (fees awarded when plaintiffs obtained relief through stay order issued to preserve status quo, without decision on merits). But see *Hon v Marshall* (1997) 53 CA4th 470, 62 CR2d 11 (defendant who obtained summary judgment on jurisdictional grounds not "prevailing party" for purposes of fee award under FEHA (Govt C §12965(b))).

The court may also award fees if the procedural issue itself is important and substantial. See, *e.g., Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 622, 33 CR3d 817 (real parties in interest successfully obtained ruling that Wal-Mart's petition challenging referendum was premature); *Bowman v City of Berkeley* (2005) 131 CA4th 173, 178, 31 CR3d 447 (petitioners won improved notice for land use hearing); *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 30 CR3d 202 (petitioners prevailed by obtaining appellate ruling that administrative record inadequate, regardless of ultimate outcome of CEQA (Pub R C §§21000-21178) challenge).

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### §2.102 b. Relief Obtained on Non-Fee-Shifting Claim

A fee-shifting statute also will support a fee award even when relief is obtained on alternative, non-fee-shifting grounds if the fee-shifting claim (a) is not reached, (b) is not "wholly insubstantial," and (c) arose from the same "common nucleus of operative fact" as the non-fee-shifting claim. *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 1032, 204 CR 913 (citing federal cases and legislative history). See *SC Manufactured Homes, Inc. v Canyon View Estates, Inc.* (2007) 148 CA4th 663, 680, 56 CR3d 79 (denying fees under Mobilehome Residency Law (CC §§798-799.10) because action did not "arise out" of law); *Gerling Global Reinsurance Corp. v Garamendi* (9th Cir 2005) 400 F3d 803, amended (9th Cir 2005) 410 F3d 531, cert denied (2005) 546 US 978, 163 L Ed 2d 462*,* 126 S Ct 563; *Emery v Hunt* (8th Cir 2001) 272 F3d 1042. See also §§2.94-2.97 (discussing showing required on merits of fee-shifting claim).

If the court *rules against* the plaintiff on the fee-shifting claim, however, success on non-fee-shifting grounds will not support a fee award. See, *e.g., McDonald v Doe* (5th Cir 1984) 748 F2d 1055, 1057; *McFadden v Villa* (2001) 93 CA4th 235, 113 CR2d 80. See also *Sole v Wyner* (2007) 551 US 74, 79, 167 L Ed 2d 1069, 1074, 127 S Ct 2188; *Gerling Global Reinsurance Corp. v Garamendi, supra;* §2.97 (discussing effect of adverse decision on fee-shifting claim); §§2.105-2.106 (discussing fees for preliminary injunctions in cases that ultimately are lost on the merits); 2.92 (discussing effect of subsequent reversal on merits).

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### c. Settlements

### §2.103 (1) California Law

Under California law, relief obtained through settlement qualifies a plaintiff as the prevailing party. See, *e.g., Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 671, 686, 186 CR 589; *Santisas v Goodin* (1998) 17 C4th 599, 621, 71 CR2d 830; *Engle v Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 168, 68 CR3d 461; *Kim v Euromotors West/The Auto Gallery* (2007) 149 CA4th 170, 181, 56 CR3d 780; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1345, 39 CR3d 550.

Similarly, acceptance of a CCP §998 offer can qualify a party as the prevailing party if the party otherwise meets the applicable standards. *Engle v Copenbarger & Copenbarger, LLP, supra*; *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276 (plaintiff who accepted §998 offer is prevailing party under CC §1717). A stipulation disclaiming liability on the merits does not preclude an award. See *Planned Parenthood, Inc. v Aakhus, supra*. But see *Doran v North State Grocery, Inc.* (2006) 137 CA4th 484, 39 CR3d 922, discussed in §2.95. See also *Arias v Katella Townhouse Homeowners Ass'n, Inc.* (2005) 127 CA4th 847, 26 CR3d 113 (discussing effects on prevailing party determination of voluntary payments made after rejection of §998 offer); *Ritzenthaler v Fireside Thrift Co.* (2001) 93 CA4th 986, 113 CR2d 579.

In settled cases, unlike "catalyst" cases in which no judicially ordered relief is obtained, the question of causation, *i.e.,* whether the relief obtained was a result of the litigation, should not arise because courts presume that a party who formally, through settlement, agrees to afford another party relief does so because of the lawsuit. See, *e.g., Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832, 844; *Kilgour v City of Pasadena* (9th Cir 1995) 53 F3d 1007, 1010, disapproved on other grounds in *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health Resources* (2001) 532 US 598, 602, 149 L Ed 2d 855, 861, 121 S Ct 1835; *Tyler v Corner Constr. Corp.* (8th Cir 1999) 167 F3d 1202, 1205.

When a party obtains a stipulated injunction, therefore, the case may not be treated as a "catalyst" case, even if the defendant has taken some voluntary steps to resolve the dispute. *Vasquez v State* (2008) 45 C4th 243, 259, 85 CR3d 466 (stipulated injunction "in effect" a consent decree). Likewise, when settlement follows a favorable judicial resolution, the catalyst theory is inapplicable. *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (catalyst theory inapplicable when relief obtained through preliminary injunction, even though action ultimately dismissed as part of later settlement).

In *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 843, 216 CR 649, the court found that the litigation, which ultimately settled, had "set in motion" the process by which relief was obtained. Similarly, in *Godinez v Schwarzenegger* (2005) 132 CA4th 73, 33 CR3d 270, the appellate court reviewed the trial court's fee award under the "catalyst theory" even though the lawsuit had settled after the defendant "voluntarily" changed its regulations. *Wallace* and *Godinez* can be distinguished from the settlement cases in which the courts did not review the award using the "catalyst theory" by recognizing that in *Wallace* and *Godinez,* the relief that gave rise to the fee entitlements was achieved *prior to the settlement* rather than because of the settlements themselves or because of changes apparently required by the settlements.

**Additional authorities:** *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 1032, 204 CR 913; *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 73, 200 CR 322. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 566, 21 CR3d 331 (dicta). Compare these cases with *Heather Farms Homeowners Ass'n v Robinson* (1994) 21 CA4th 1568, 26 CR2d 758 (upholding determination that neither party was "prevailing party" in complicated settlement under CCP §1354, even though defendant obtained dismissal from plaintiff as part of settlement, because neither party prevailed "on a practical level"), and other cases cited in §2.110.

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**§2.104 (2) Federal Law**

Since *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, which abolished the catalyst rule as a basis for attorney fee awards in federal prevailing party fee-shifting statutes (see §2.115), the type of settlement agreement that will qualify a plaintiff as a prevailing party under federal law remains in flux. A settlement memorialized by a consent decree is sufficient. 532 US at 604, 149 L Ed 2d at 862. "Private settlements" are discussed only in a footnote in which the Court distinguished private settlements from "consent decrees," noting that private settlements do not involve as much judicial scrutiny as consent decrees and that there may be no jurisdiction to enforce a private settlement. 532 US at 604 n7, 149 L Ed 2d at 862 n7.

The federal courts have been all over the map on the meaning of this footnote. In *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128, the Ninth Circuit read the footnote as dictum implicitly disapproving private settlements as a basis for designating a plaintiff as a prevailing party, but declined to follow it, holding, on the basis of Ninth Circuit precedent, that a plaintiff who obtains a judicially enforceable settlement, even one resulting in a dismissal, can be designated a prevailing party because the settlement contract provides the plaintiff with relief on the merits and materially alters the relationship between the parties. See also *Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832, 844 n12 (citing *Barrios*); *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65, 77 (relief obtained by enforceable settlement at administrative hearing qualified parents as prevailing parties); *Carbonell v INS* (9th Cir 2005) 429 F3d 894 (district court's order incorporating voluntary stipulation to stay of departure met "judicial sanction" prong of prevailing party test); *Richard S. v Department of Dev. Servs.* (9th Cir 2003) 317 F3d 1080 (plaintiff who obtained preliminary injunction and favorable settlement was prevailing party); *Labotest, Inc. v Bonta* (9th Cir 2002) 297 F3d 892 (when court's final order incorporated settlement agreement that included relief sought in lawsuit, plaintiffs qualified as prevailing parties). But see *P.N. v Seattle Sch. Dist. No. 1* (9th Cir 2007) 474 F3d 1165, 1172 (IDEA case distinguished *Barrios;* fee denied because settlement contained insufficient judicial imprimatur).

On whether some additional showing of the validity of the fee-shifting claim is required, see §§2.94-2.97.

**NOTE:** The California Supreme Court rejected the *Buckhannon* definition of prevailing party and reaffirmed the catalyst rule. See §2.111.

**Additional authorities:** Other cases construing *Buckhannon* to permit an attorney fee award in cases in which the plaintiff obtained a settlement that was not labeled a "consent decree" include *Utility Automation 2000, Inc. v Choctawhatchee Elec. Coop., Inc.* (11th Cir 2002) 298 F3d 1238, 1248 (Fed R Civ P 68 "judgment," while it offers less judicial oversight than consent decree, supports attorney fee award under *Buckhannon* if underlying statute allows attorney fees); *Truesdell v Philadelphia Hous. Auth.* (3d Cir 2002) 290 F3d 159, 165 (settlement memorialized in court order that contained mandatory language and was signed by judge supported conclusion that plaintiff was prevailing party); *American Disability Ass'n v Chmielarz* (11th Cir 2002) 289 F3d 1315 (district court's incorporation of settlement terms into order of dismissal or explicit retention of jurisdiction provides sufficient judicial imprimatur for finding that plaintiff prevailed); *Smyth v Rivero* (4th Cir 2002) 282 F3d 268, 281 (*Buckhannon* permits attorney fee award when plaintiff obtains "functional" consent decree).

Cases narrowly construing *Buckhannon* include *New York State Fed'n of Taxi Drivers, Inc. v Westchester County Taxi & Limousine Comm'n* (2d Cir 2001) 272 F3d 154, 158 (when final order merely dismissed case as moot, private settlement did not confer prevailing party status on plaintiff); *Christina A. v Bloomberg* (8th Cir 2003) 315 F3d 990 (neither court approval of class settlement under Fed R Civ P 23(e) nor district court's class action enforcement jurisdiction was sufficient judicial imprimatur to qualify plaintiffs in class action as prevailing parties).

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### d. Preliminary Injunctions

#### §2.105 (1) California Law

Under California law, a party that obtains a preliminary injunction in a case that later becomes moot or is settled is the prevailing party without having to comply with the additional requirements applicable to fee claims under the catalyst theory. *Vasquez v State* (2008) 45 C4th 243, 257, 85 CR3d 466. See, *e.g., Maria P. v Riles* (1987) 43 C3d 1281, 240 CR 872, discussed in §2.108; *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 256, 55 CR3d 467 (plaintiff who obtained preliminary injunction was prevailing party even though permanent injunction denied because case moot); *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (relief obtained through preliminary injunction qualified plaintiff as prevailing party, even though action ultimately dismissed as part of later settlement).

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### §2.106 (2) Federal Law

Whether a preliminary injunction that later becomes moot qualifies the plaintiff as the prevailing party is still an open question under federal law. In *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, the plaintiff obtained a preliminary injunction preventing the defendant from using certain evidence at an administrative hearing. The case later became moot, precluding the court from issuing a final ruling on the merits of the claim. Relying on *Williams v Alioto* (9th Cir 1980) 625 F2d 845, the Ninth Circuit held that a plaintiff who obtains a preliminary injunction that alters the relationship of the parties has obtained the requisite "judicial imprimatur" to be considered a prevailing party, distinguishing the facts before it from cases in which the plaintiff loses on the merits and the preliminary injunction is dissolved for lack of merit. *Watson*, 300 F3d at 1096. See also *Richard S. v Department of Dev. Servs.* (9th Cir 2003) 317 F3d 1080; *Environmental Protection Info. Ctr. v Pacific Lumber Co.* (ND Cal 2002) 229 F Supp 2d 993, aff'd (9th Cir 2004) 2004 US App Lexis 9099 (unpublished opinion); *Select Milk Producers, Inc. v Johanns* (DC Cir 2005) 400 F3d 939.

In *Sole v Wyner* (2007) 551 US 74, 83, 167 L Ed 2d 1069, 1077, 127 S Ct 2188, the Supreme Court held that a plaintiff who obtains a preliminary injunction but ultimately loses on the merits of his or her claim is not a prevailing party. The Court expressly left open the issue of whether a plaintiff who obtains a preliminary injunction but whose case ends for reasons other than an adverse final decision on his or her claim for permanent injunctive relief is the prevailing party. 551 US at 86, 167 L Ed 2d at 1079.

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### e. Dismissals

### §2.107 (1) Defendant Who Obtains Dismissal Is Ordinarily the Prevailing Party

A defendant who obtains a dismissal is generally, in practical terms, the prevailing party. See *Adler v Vaicius* (1993) 21 CA4th 1770, 27 CR2d 32; *Winick Corp. v Safeco Ins. Co.* (1986) 187 CA3d 1502, 1508, 232 CR 479. For example, a defendant construction lender who successfully defends an action on an invalid stop notice claim is the prevailing party entitled to attorney fees under CC §3176. *Mechanical Wholesale Corp. v Fuji Bank, Ltd.* (1996) 42 CA4th 1647, 50 CR2d 466. See also §§2.47-2.48; *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (Mobilehome Residency Law (CC §798.85) fee provision expressly provides that defendant in whose favor action is dismissed before trial is prevailing party).

There are important exceptions to this rule, however. See §§2.108-2.110.

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### (2) Plaintiff May Be Deemed "Successful" Party Even if Case Dismissed

#### §2.108 (a) California Law

Consistent with the principle that "[t]he critical fact is the impact of the action, not the manner of its resolution" (*Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 684, 186 CR 589), plaintiffs who obtain some of the benefit sought in their lawsuit may be considered the prevailing party even if the defendant ultimately obtains a dismissal. Cases in which dismissals result from settlements are discussed in §2.103. The rule also applies to cases in which a dismissal occurs involuntarily. For example, in *Maria P. v Riles* (1987) 43 C3d 1281, 240 CR 872, the plaintiffs had challenged a state statute that required local school districts to report the names of alien children to the Immigration and Naturalization Service. The trial court issued a preliminary injunction barring enforcement of the statute, which remained in effect for 3 years until the legislature repealed the law. The trial court then dismissed the plaintiff's action for failure to bring it to trial within 5 years but awarded plaintiffs their attorney fees under CCP §1021.5. The court of appeal reversed that award, holding that the dismissal had divested the trial court of jurisdiction to award fees and that plaintiffs' victory had been only "transitory" and "token."

The supreme court reversed, holding that the plaintiffs' action was "precisely the type of public interest lawsuit that the private attorney general doctrine of §1021.5 was intended to foster." 43 C3d at 1293. The court reaffirmed that, because a request for attorney fees is an ancillary and collateral matter distinct from the litigation on the merits, the dismissal for failure to prosecute did not divest the trial court of jurisdiction to hear plaintiffs' fee request. 43 C3d at 1290.

Finding that the plaintiffs had prevailed, the supreme court held that the record amply supported the trial court's finding that the plaintiffs' action had halted enforcement of the statute until the legislature repealed it and thus had "clearly obtained the relief they sought." 43 C3d at 1292. See also *On-Line Power, Inc. v Mazur* (2007) 149 CA4th 1079, 1084, 57 CR3d 698 (dismissal with prejudice pursuant to settlement under CCP §998 was equivalent to judgment; remanded to determine whether plaintiff was prevailing party); *Kim v Euromotors West/The Auto Gallery* (2007) 149 CA4th 170, 56 CR3d 780; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 151, 50 CR3d 273 (plaintiff who won jury verdicts under fee-shifting statutes and then settled was entitled to fees; trial court's determination that each side prevailed because plaintiff also dismissed several other claims reversed).

The same principle applies to plaintiffs whose lawsuits are dismissed as moot because relief is obtained. See *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 256, 55 CR3d 467 (plaintiff who obtained preliminary injunction was prevailing party even though permanent injunction denied because case moot); *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (catalyst theory inapplicable when preliminary injunction led defendant to provide relief sought); *Midpeninsula Citizens for Fair Hous. v Westwood Investors* (1990) 221 CA3d 1377, 1392 n3, 271 CR 99 (remanding moot case to decide whether plaintiff entitled to fees under CCP §1021.5); *Wallace v Consumers Coop. of Berkeley, Inc*. (1985) 170 CA3d 836, 216 CR 649 (trial court's award of attorney fees upheld when administrative proceedings and litigation were "intertwined inextricably"); *Lewin v Board of Trustees* (1976) 62 CA3d 977, 133 CR 385 (plaintiff whose claim favorably mooted is prevailing party for purposes of award of costs).

The same rules apply to catalyst cases under the equitable common-fund and substantial-benefit theories. See *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 668, 46 CR3d 206.

**Additional authorities:** Other cases applying this principle include *Giles v Horn* (2002) 100 CA4th 206, 241, 123 CR2d 735 (reviewing court dismissed moot appeal, but remanded to trial court to determine whether plaintiffs entitled to fees under CCP §1021.5); *Belth v Garamendi* (1991) 232 CA3d 896, 901, 283 CR 829 (defendant's voluntary compliance with plaintiff's request for documents mooted writ petition, but did not preclude finding that plaintiff prevailed); *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 217 CR 621 (although passage of state budget mooted plaintiff's mandate petition, plaintiff was entitled to attorney fees because temporary stay accomplished object of suit). See also *Sagaser v McCarthy* (1986) 176 CA3d 288, 221 CR 746.

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**§2.109 (b) Federal Law**

Dismissals are less likely to lead to fee awards under federal prevailing party statutes. In *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 605, 149 L Ed 2d 855, 863, 121 S Ct 1835, the Court held that a plaintiff can be considered a prevailing party only if the lawsuit has received some "judicial imprimatur" that "materially alters the legal relationship between the parties." In dicta, the Court noted that a settlement memorialized by a consent decree is sufficient (532 US at 604, 149 L Ed 2d at 862) and "private settlements" (presumably settlements that result in dismissal) are not, noting that private settlements do not involve as much judicial scrutiny as consent decrees and there may be no jurisdiction to enforce a private settlement. 532 US at 604 n7, 149 L Ed 2d at 862 n7. See §2.104. Dismissals also often result when a case becomes moot, leading to the issue of whether a preliminary injunction that becomes moot before it can be finally determined constitutes sufficient "judicial imprimatur."

In *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128, the Ninth Circuit construed dictum in *Buckhannon* (532 US at 604 n7, 149 L Ed 2d at 862 n7) as an indication that the Court does not consider private settlements resulting in dismissal sufficient, but declined to follow it. 277 F3d at 1134 n5. Instead, the court of appeals reaffirmed circuit precedent, holding that a plaintiff who obtains a settlement—even one resulting in a dismissal—can be designated a prevailing party because the plaintiff has obtained relief on the merits, and the judicially enforceable settlement materially alters the relationship between the parties. Such a plaintiff, according to the court in *Barrios,* has prevailed not under the "catalyst theory" disapproved in *Buckhannon,* but by obtaining "a legally enforceable instrument." 277 F3d at 1134 n5. The United States Supreme Court denied certiorari in *Barrios*. *California Interscholastic Fed'n v Barrios* (2002) 537 US 820, 154 L Ed 2d 28, 123 S Ct 98. See also *Richard S. v Department of Dev. Servs.* (9th Cir 2003) 317 F3d 1080.

Other lower federal courts also have interpreted *Buckhannon* to permit attorney fee awards when a settlement resulted in dismissal. See, *e.g., American Disability Ass'n v Chmielarz* (11th Cir 2002) 289 F3d 1315 and other cases cited in §2.104. But see *P.N. v Seattle Sch. Dist. No. 1* (9th Cir 2007) 474 F3d 1165, 1172 (IDEA case distinguishing *Barrios;* fee denied because settlement contained insufficient judicial imprimatur).

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### §2.110 (3) Exception: Court Finds No Prevailing Party

The court may also find that the defendant did not prevail on "a practical level." See *Heather Farms Homeowners Ass'n v Robinson* (1994) 21 CA4th 1568, 26 CR2d 758 (appellate court upheld determination that neither party prevailed in settlement under CCP §1354, even though defendant had obtained dismissal from plaintiff). See also *Castro v Superior Court* (2004) 116 CA4th 1010, 10 CR3d 865 (following *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830, and *Heather Farms* in construing CCP §405.38); *Parrot v Mooring Townhomes Ass'n, Inc.* (2003) 112 CA4th 873, 6 CR3d 116 (following *Heather Farms* in construing CC §1354).

**Additional authorities:** *Brawley v J.C. Interiors, Inc.* (2008) 161 CA4th 1126, 1136, 74 CR3d 832; *Damian v Tamondong* (1998) 65 CA4th 1115, 1129, 77 CR2d 262 (following *Heather Farms* in construing CC §2983.4); *Gilbert v National Enquirer, Inc.* (1997) 55 CA4th 1273, 64 CR2d 659 (neither plaintiff nor defendant prevailing party when plaintiff voluntarily dismissed claim under CC §3344 after winning demurrer on that claim; in CC §3344 action, trial court has discretion to determine that neither party prevailed, following *Heather Farms*); *Donald v Cafe Royale, Inc.* (1990) 218 CA3d 168, 185, 266 CR 804 (defendant not prevailing party when plaintiff denied relief only because defendant went out of business; for fee-shifting purposes, neither party prevailed). See §2.103.

On the issue of who prevails under the anti-SLAPP statute (CCP §425.16) when the complaint is dismissed before the special motion to strike can be heard, see §3.114.

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### f. When Action Is "Catalyst" for Defendant's Corrective Behavior

#### §2.111 (1) California Law

Under California law, a plaintiff who obtains no judicial relief and no settlement may still be considered the prevailing party if its lawsuit causes the defendant to voluntarily afford the plaintiff some of the relief sought. In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331, and *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371, the California Supreme Court reaffirmed the "catalyst theory" of entitlement to attorney fees, holding that under California law, plaintiffs are considered "successful" or "prevailing parties" "if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation," even if the lawsuit terminates without any judicial resolution of the merits. *Graham,* 34 C4th at 560. In doing so, the court expressly rejected the United States Supreme Court's contrary ruling in *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835 (see §2.115). *Graham,* 34 C4th at 568.

In *Graham*, the court reviewed California law on the "successful" or "prevailing" party requirement, concluding that the catalyst theory was sound in light of the language of the "successful" or "prevailing" party statutes, their legislative history, and the policies they served:

> We continue to conclude that the catalyst theory, in concept, is sound. The principle upon which the theory is based—that we look to the "impact of the action, not its manner of resolution" [citation]—is fully consistent with the purpose of section 1021.5: to financially reward attorneys who successfully prosecute cases in the public interest, and thereby "'prevent worthy claimants from being silenced or stifled because of a lack of legal resources.'"

34 C4th at 568, quoting *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 683, 186 CR 589. Note that in *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371*,* the court held that the same catalyst fees rules applied to the "prevailing party" requirement in Govt C §12965(b), California's Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996).

*Graham* also noted that a "practical" view of who prevailed is consistent with the standard applied in other fee-shifting contexts. 34 C4th at 571, citing *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830. In *Santisas,* the court held that in the absence of a more specific definition, entitlement to fees for a tort claim based on a broad contractual fee clause would be determined by "pragmatic definition of the extent to which each party has realized its litigation objectives whether by judgment, settlement or otherwise." 17 C4th at 622. See also, *e.g., Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1368, 69 CR3d 250 (plaintiff's litigation "a practical success").

Under *Graham* and *Tipton-Whittingham,* plaintiffs can be the prevailing party even when no judicial relief is obtained and no formal settlement is made with the opposing party if the plaintiff's action was a "catalyst" for voluntary corrective action taken by the defendant. *Graham,* 34 C4th at 560; *Tipton-Whittingham*, 34 C4th at 608. In catalyst cases, however, the plaintiff may have to show that it achieved the "primary" relief it was seeking, as opposed to the "some relief" standard applicable to noncatalyst cases (see §2.86). See *Marine Forests Soc'y v California Coastal Comm'n* (2008) 160 CA4th 867, 878, 74 CR3d 32; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1346, 39 CR3d 550 (dicta).

In *Tipton-Whittingham,* the court cautioned that "[w]hen a government agency is given discretion as to the timing of performing some action, the fact that a lawsuit may accelerate that performance does not by itself establish eligibility for attorney fees." 34 C4th at 609.

*Graham* and *Tipton-Whittingham* also impose two additional requirements for catalyst fees:

- That there be reasonable efforts to settle the matter before litigation (see §2.112); and
- That the lawsuit has sufficient merit to show it was not frivolous, unreasonable, or groundless (see §2.113).

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### §2.112 (a) Reasonable Effort to Settle

To recover fees under a catalyst theory, the plaintiff must make a reasonable effort to settle the matter before litigation is filed. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 577, 21 CR3d 331:

> Awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance that objective and encourages lawsuits that are more opportunistic than authentically for the public good. Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time.

This requirement can be met by pursuing required administrative remedies. *Graham,* 34 C4th at 577. The same requirement applies to catalyst cases under the equitable common-fund and substantial-benefit theories. *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 669, 46 CR3d 206.

*Graham* did not address whether a plaintiff may be excused from this requirement under appropriate circumstances, such as when a presettlement demand would have been futile. *Graham*'s reliance (without discussion) on *Grimsley v Board of Supervisors* (1985) 169 CA3d 960, 966, 213 CR 108, suggests, however, that the reasonable efforts requirement could be met in such a circumstance. In *Grimsley,* plaintiff sought defendant-county's compliance with certain procedural regulations concerning its open-space plan but did not complain about the lack of compliance before the suit. The court analogized plaintiff's failure to seek a solution before litigation to the situation in which a party must first ask a lower court to act before seeking redress by mandate with the appellate court, "unless it appears that the demand would have been futile." 169 CA3d at 966, quoting *Phelan v Superior Court* (1950) 35 C2d 363, 372, 217 P2d 951. Thus, *Graham* implicitly approved of *Grimsley*'s qualification that, in some circumstances, a prelitigation demand would be unnecessary because of its futility.

This conclusion is buttressed by the court's decision in *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466. In *Vasquez,* the court held that the prelitigation settlement requirement did not apply to noncatalyst cases, but that under CCP §1021.5 efforts to settle would be relevant to the "necessity for private enforcement" requirement (see §3.66). In so holding, the court expressly recognized that a claim that settlement efforts would have been futile is "logically relevant" to the issue of necessity for the lawsuit. 45 C4th at 59 n5. See also *Skaff v Meridien N. Am. Beverly Hills, LLC* (9th Cir 2007) 506 F3d 832, 843 (under CCP §1021.5, plaintiff who obtains legally enforceable settlement agreement not required to show prelitigation settlement effort; similarly, no prelitigation notice requirement applies to Americans with Disabilities Act (ADA) (42 USC §§12101-12213), 42 USC §12188(a)(1)).

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**Source:** Civil Litigation/California Attorney Fee Awards/2 Eligibility and Entitlement to Fees/§2.113 (b) Action Not Frivolous, Unreasonable, or Groundless

### §2.113 (b) Action Not Frivolous, Unreasonable, or Groundless

To make a fee award under the catalyst theory, the trial court must find, based on an abbreviated review, that the lawsuit had sufficient merit to show that it was not a nuisance lawsuit, *i.e.,* that it was not "frivolous, unreasonable or groundless," either legally or factually. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 575, 21 CR3d 331. This requirement applies to claims under the equitable common-fund and substantial-benefit theories. See *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 669, 46 CR3d 206. See §§2.94-2.97.

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### §2.114 (c) Causation Is Issue of Fact

Whether an action actually is the catalyst for the changed behavior or causes the result achieved is a factual issue in each case. *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 216 CR 649. In *Wallace,* the reviewing court found substantial evidence supporting the trial court's conclusion that the plaintiffs' lawsuit had caused the suspension of retail milk price regulations, even though the ultimate relief occurred as the result of quasi-legislative action. The trial court could have reasonably concluded from the chronology of events that the litigation "substantially contributed to" or was "demonstrably influential" in the state's decision to hold hearings; hence that "the litigation set in motion the process" that eventually resulted in the relief sought. See also *Godinez v Schwarzenegger* (2005) 132 CA4th 73*,* 91, 33 CR3d 270 (appellate court affirmed trial court's "causation" finding as supported by substantial evidence).

An award of fees is improper if the court finds that the plaintiff's lawsuit was "completely superfluous" in changing the defendant's behavior. *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 353, 188 CR 873.

On causation, see *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1368, 69 CR3d 250; *Stevens v Geduldig* (1986) 42 C3d 24, 37, 227 CR 405; *Suter v City of Lafayette* (1997) 57 CA4th 1109, 1136, 67 CR2d 420; *Belth v Garamendi* (1991) 232 CA3d 896, 283 CR 829 (summarizing cases); *Bjornestad v Hulse* (1991) 229 CA3d 1568, 281 CR 548 (plaintiffs entitled to fees if lawsuit caused legislature to change challenged statute); *Sagaser v McCarthy* (1986) 176 CA3d 288, 221 CR 746 (same). See also *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 968, 259 CR 599 (though chronology of events may permit inference that lawsuit caused defendants to afford relief, court should also consider contrary evidence submitted by defendant); *Grimsley v Board of Supervisors* (1985) 169 CA3d 960, 213 CR 108 (upholding trial court's determination that lawsuit not causative effect); *Boccato v City of Hermosa Beach* (1984) 158 CA3d 804, 811, 204 CR 727 (good results obtained were not result of plaintiff's action, but of Coastal Commission's).

Defendants occasionally raise the issue of causation even when the plaintiff obtained judicial relief or a settlement. A stipulated injunction, however, does not make the matter a "catalyst" case, even when the defendant has taken some voluntary steps to comply with the law. *Vasquez v State* (2008) 45 C4th 243, 259, 85 CR3d 466. See also *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1; *California Common Cause v Duffy* (1987) 200 CA3d 730, 741, 246 CR 285; *Bank of America v Cory* (1985) 164 CA3d 66, 91, 210 CR 351; *Boccato v City of Hermosa Beach, supra*. On causation and settlements, see §2.103.

Unless the trial court's order on the merits is reversed on appeal (see *Mapstead v Anchundo* (1998) 63 CA4th 246, 278, 73 CR2d 602), a causative effect should be presumed when a beneficial result follows a court order because of the general rule that a court will not issue an order without a finding that it is necessary or appropriate. *Kilgour v City of Pasadena* (9th Cir 1995) 53 F3d 1007, 1010, disapproved on other grounds in 532 US at 602. Likewise, a party that obtained a judgment in its favor may not be denied fees for alleged lack of "causal connection" when the plaintiff in a coordinated action also obtained the same relief. *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 318, 73 CR3d 842.

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### §2.115 (2) Federal Law: Party May "Prevail" Only if Court Orders Relief

The "catalyst" approach is no longer available under federal fee-shifting statutes that award fees to the prevailing party. In *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, a sharply divided five-to-four Court narrowed the federal definition of "prevailing party" under federal fee-shifting statutes by eliminating the "catalyst" basis for fee awards. See §2.112. The majority held that for the plaintiff to be a prevailing party, there must be a "judicial imprimatur" on the plaintiff's action.

The lower federal courts have generally concluded that *Buckhannon* applies across the board to federal prevailing party statutes. See, *e.g., Bennett v Yoshina* (9th Cir 2001) 259 F3d 1097 (42 USC §1988); *Perez-Arellano v Smith* (9th Cir 2002) 279 F3d 791 (Equal Access to Justice Act (5 USC §504, 28 USC §2412)). It does not apply, however, to federal fee-shifting statutes that do not base entitlement to fees on a "prevailing party" standard. See §2.117.

On significant Ninth Circuit decisions interpreting *Buckhannon* as it applies to settlements, see §2.104. On preliminary injunctions, see §§2.106, 2.116.

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### §2.116 (a) Preliminary Injunctive or Other Interim Relief

Whether a preliminary injunction that becomes moot before the merits of the case can be finally determined constitutes a sufficient "judicial imprimatur" under *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, remains unsettled. In *Sole v Wyner* (2007) 551 US 74, 167 L Ed 2d 1069, 127 S Ct 2188, the Supreme Court held that a plaintiff who obtains a preliminary injunction but ultimately loses on the merits of his or her claim is not a prevailing party. The Court expressly left open the issue of whether a plaintiff who obtains a preliminary injunction but whose case ends for reasons other than an adverse final decision on his or her claim for permanent injunctive relief is the prevailing party. 551 US at 86, 167 L Ed 2d at 1079. The Ninth Circuit has consistently held that preliminary injunctions do qualify the plaintiff as the prevailing party. See, *e.g., Richard S. v Department of Dev. Servs.* (9th Cir 2003) 317 F3d 1080; *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, 1096; *Environmental Protection Info. Ctr. v Pacific Lumber Co.* (ND Cal 2002) 229 F Supp 2d 993, aff'd (9th Cir 2004) 2004 US App Lexis 9099 (unpublished opinion). See §2.106.

Other types of interim procedural rulings may not constitute sufficient "judicial imprimatur." See *Citizens for Better Forestry v U.S. Dep't of Agric.* (9th Cir 2009) 567 F3d 1128, 1131 (reversal of dismissal on standing and ripeness grounds not sufficient "judicial imprimatur").

On the other hand, administrative decisions on the merits do qualify. See *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65, 75.

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### §2.117 (b) "Catalyst" Rule Still Applicable to Many Federal Fee-Shifting Statutes

The Supreme Court's ruling in *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, abolishing the catalyst theory for federal prevailing party fee-shifting statutes, does not apply to federal fee-shifting statutes that award fees "whenever appropriate" rather than to the "prevailing party." See *Sierra Club v Hamilton County Bd. of County Comm'rs* (6th Cir 2007) 504 F3d 634, 643; *Association of Cal. Water Agencies v Evans* (9th Cir 2004) 386 F3d 879, 884; *Sierra Club v EPA* (DC Cir 2003) 322 F3d 718 (legislative history of Clean Air Act indicates that Congress authorized fee awards for parties that forced defendants to abandon illegal conduct without court order); *Loggerhead Turtle v County Council* (11th Cir 2002) 307 F3d 1318 (*Buckhannon* does not apply to Endangered Species Act (16 USC §§1531-1544)); *Center for Biological Diversity v Norton* (10th Cir 2001) 262 F3d 1077, 1080 n2 (same, dictum); *Southwest Ctr. for Biological Diversity v Carroll* (CD Cal 2001) 182 F Supp 2d 944 (same). Catalyst-based fees also continue to be awarded under equitable doctrines. See *Wininger v SI Mgmt. L.P.* (9th Cir 2002) 301 F3d 1115 (common fund).

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# 3

# Fee-Shifting Statutes

I. INTRODUCTION §3.1

II. PRIVATE ATTORNEY GENERAL DOCTRINE AND CCP §1021.5
- A. Origins of California's Private Attorney General Doctrine §3.2
- B. Private Attorney General Doctrine Defined §3.3
- C. Purposes of Private Attorney General Doctrine §3.4
- D. Codification of Equitable Doctrine in CCP §1021.5 §3.5
  - 1. Section 1021.5 Broadly Construed §3.6
  - 2. When Criteria Met, Fees May Be Denied Only in "Special Circumstances" §3.7
  - 3. Relevance of Federal Private Attorney General Cases §3.8
  - 4. Equitable Doctrine May Still Be Invoked §3.9
- E. Private Attorney General and Substantial Benefit/Common Fund Doctrines Compared §3.10
- F. Section 1021.5's Relationship to Other Fee-Shifting Statutes §3.11
- G. Elements and Scope of CCP §1021.5
  - 1. Text of §1021.5 §3.12
  - 2. The "Successful Party" Requirement §3.13
    - a. Who Is Eligible for Fee Awards Under CCP §1021.5 §3.14
      - (1) Parties Represented by Nonprofit Law Firms §3.15
      - (2) Parties Represented by Pro Bono Attorneys §3.16
      - (3) Public Entities §3.17
      - (4) Intervenors §3.18
      - (5) Defendants and Real Parties in Interest §3.19
      - (6) Amicus Curiae §3.20
      - (7) Class Action Objectors §3.21
      - (8) In Pro Per Attorneys and Parties Not Eligible §3.22
    - b. Who Is Liable for Fee Awards Under CCP §1021.5 §3.23
      - (1) Public Entities §3.24
      - (2) Private Parties §3.25
      - (3) Intervenors and Real Parties in Interest §3.26
      - (4) Amici Curiae §3.27
      - (5) Plaintiffs §3.28
  - 3. The "Action" Requirement §3.29
    - a. Entitlement Based on Impact of Case as a Whole §3.30
    - b. Fees May Be Limited to Work on Portion of Action That Addresses Public Purpose §3.31
    - c. Applicability of Statute to Quasi-Criminal Proceedings §3.32
    - d. Code of Civil Procedure §1021.5 Applies in Federal Court Actions §3.33
    - e. Fee Awards for Work in Administrative Proceedings
      - (1) Fee Awards for Work in Administrative Proceedings That Are Not Intertwined With Court Proceedings §3.34
      - (2) Fee Awards for Administrative Proceedings That Precede Court Actions §3.35
      - (3) Fee Awards for Related Administrative Work During or After Judicial Action §3.36
  - 4. Four Criteria for Award Under CCP §1021.5 §3.37
    - a. Interrelated Nature of Statutory Criteria §3.38
    - b. Enforcement of Important Right Affecting the Public Interest §3.39
      - (1) "Important Right" Interpreted Broadly §3.40
      - (2) New Law Need Not Be Established to Satisfy Important Right Requirement §3.41
      - (3) When Right Vindicated Through Appellate Opinion §3.42
      - (4) Fees May Be Awarded on Unadjudicated Claim of Important Right if Litigation Results in Enforcement of That Right §3.43
      - (5) Fees May Be Denied if Success Is Too Limited §3.44
      - (6) Types of Rights Found Important
        - (a) Rights of Constitutional Dimension §3.45
        - (b) Rights Based on State Statutes §3.46
        - (c) Rights Based on Federal Statutes §3.47
        - (d) Rights Based on Common Law §3.48
        - (e) Rights Based on Administrative Decisions §3.49
    - c. The Significant Benefit Factor §3.50

(1) Standards for Determining Whether a Significant Benefit Has Been Conferred on the General Public or a Large Class of Persons §3.51
(a) Benefits Obtained Need Not Be Actual and Concrete §3.52
(b) Substantial Benefit May Be Implied by Implementation of Fundamental Legislative Policy §3.53
(c) Significance of Benefit May Depend on Importance of Right Vindicated §3.54
(d) No Requirement That Action Create New Law §3.55
(2) Court May Look Outside Formal Record §3.56
(3) Evidence of Number of Persons Affected Useful, But Not Required §3.57
(4) Class Action Not Necessary §3.58
(5) Benefits May Be Conferred by Appellate Opinion §3.59
d. Necessity and Financial Burden of Private Enforcement Requirement §3.60
(1) Determining Whether Private, as Opposed to Public, Enforcement Is Necessary §3.61
(a) Exhaustion Not Required §3.62
(b) Fees May Be Awarded to Private Parties Who Litigate on Same Side as Public Entity §3.63
(2) Determining Whether Litigation Is Necessary in Light of Other Private Lawsuit §3.64
(3) Determining Whether Lawsuit Is Necessary at All §3.65
(4) Determining Whether the Financial Burden of Private Enforcement Makes Fee Award Appropriate
(a) Focus of Financial Burden Requirement Is on Comparing Burden of Bringing Lawsuit to Direct Personal Interest in Case §3.66
(b) Method for Determining Whether Financial Burden Warrants Fee Award §3.67
(c) Which Direct Personal Interests Are Considered
(i) Pecuniary Interests §3.68
(ii) Nonpecuniary Interests §3.69
(d) How the Financial Burden of the Litigation Is Determined
(i) Financial Burden Generally Determined by Actual Cost of Litigation §3.70
(ii) Personal Wealth of Party Claiming Fees Is Irrelevant §3.71
(iii) Free or Reduced Cost Representation Is Irrelevant §3.72
(iv) Fee Award From Common Fund Not Required §3.73
(v) Court May Distinguish Between Time Spent Protecting Private Rather Than Public Interests §3.74
(vi) Cases Finding Party's Financial Burden Disproportionate to Personal Stake §3.75
(vii) Cases Finding That Burden Does Not Transcend Personal Interests §3.76
(viii) When There Is Evidence That Case Brought by Public Interest Organization Was Litigated for Benefit of Particular Individuals §3.77
(5) Fee Claim by Public Entities §3.78
e. Determining Whether Fees Should Be Paid From the Recovery, if Any §3.79

III. ATTORNEY FEE AWARDS UNDER OTHER FEE-SHIFTING STATUTES
A. State Civil Rights Statutes
1. Fair Employment and Housing Act §3.80
a. Cases Awarding Fees to Prevailing Plaintiffs §3.81
b. Cases Awarding Fees to Prevailing Defendants §3.82
2. Unruh Civil Rights Act and Related Statutes §3.83
B. Challenging Government Decision Making and Regulation
1. Review of Public Assistance Determinations (Welf & I C §10962) §3.84
2. Political Reform Act (Govt C §§91003, 91012) §3.85
3. Brown Act (Govt C §§54950-54963) §3.86
4. Public Records Act (Govt C §6259(d)) §3.87
5. Information Practices Act of 1977 (CC §1798.48(b)) §3.88
6. Public Utilities Code (Pub Util C §§1801-1812) §3.89
7. Judicial Review Actions (Govt C §800) §3.90
a. Actions to Appeal or Review "Any Administrative Proceeding" §3.91
b. Arbitrary and Capricious Action or Conduct §3.92
c. Personal Obligation to Pay Fees §3.93
8. Litigation With State Regulatory Agencies (CCP §1028.5) §3.94
9. Taxpayers' Actions (Rev & T C §§7156, 19717) §3.95
C. Labor-Related Actions
1. Review of Labor Commissioner Decisions (Lab C §98.2) §3.96
2. Actions to Recover Wages or Benefits (Lab C §§218.5, 1194, and Others) §3.97
3. Actions to Compel Arbitration Under Collective Bargaining Agreement §3.98
4. School Employee Challenges to Dismissals or Suspensions (Ed C §44944(e)) §3.99
D. Property-Related Actions
1. Tenant Protection Statutes §3.100

2. Eminent Domain Actions (CCP §§1235.140, 1268.610) §3.101
3. Inverse Condemnation Actions (CCP §1036) §3.102
4. Other Property-Related Statutes §3.103
E. Consumer Protection Statutes §3.104
F. City Charters and Ordinances §3.105
G. Personal Injury Statutes
1. Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15675) §3.106
2. Code of Civil Procedure §1021.7 §3.107
3. Civil Actions by Felony Victims (CCP §1021.4) §3.108
4. Anti-Harassment Actions (CCP §527.6) §3.109
H. SLAPP Suits (CCP §425.16(c))
1. Special Motion to Strike SLAPP Lawsuits §3.110
2. Anti-SLAPP Provision Broadly Construed §3.111
3. Prevailing Party's Mandatory Right to Attorney Fees §3.112
4. Effect of Dismissal While Anti-SLAPP Motion Is Pending §3.113
5. Effect of Dismissal Before Anti-SLAPP Motion Is Made §3.114
6. Prevailing Plaintiff's Right to Fee Award for Defeating Motion §3.115
7. Determining the Amount of Fees Under CCP §425.16
a. Lodestar Adjustment Method Applies §3.116
b. Fees Limited to Work on Anti-SLAPP Motion §3.117
c. Effect of Partial Success on Motion §3.118
8. Applicable Procedures §3.119
9. Appellate Considerations §3.120
I. Business Litigation Statutes
1. Mutual Public Benefit Nonprofit Corporations (Corp C §8337) §3.121
2. Commercial Appropriation Statute (CC §3344(a)) §3.122
3. Cartwright Act (Bus & P C §16750(a)) §3.123
4. Uniform Trade Secrets Act (CC §3426.4) §3.124
5. Public Contract Code §7107(f) §3.125
6. Payment Disputes Between Contractor and Subcontractor (CC §3260) §3.126
7. False Claims Act (Govt C §12650) §3.127
J. Interpleader Statute (CCP §386.6) §3.128

IV. FEDERAL FEE-SHIFTING STATUTES §3.129

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## §3.1 I. INTRODUCTION

The principal exceptions to the American Rule that each party must pay his or her own attorney fees (CCP §1021, discussed in §§1.2-1.5) involve fee-shifting statutes. The number of such statutes has proliferated since the mid-1970s. The language and purposes of those statutes generally have much in common, though each statute must be examined separately for its own nuances and differences.

This chapter examines California's omnibus private attorney general fee-shifting statute, CCP §1021.5 (see §§3.2-3.80) and other fee-shifting statutes in §§3.81-3.130. It is important to recognize that many statutes besides CCP §1021.5 can be described as private attorney general statutes, *i.e.,* they were enacted to encourage parties and attorneys to litigate issues the legislature believed required greater enforcement in the courts. On the eligibility and entitlement factors that generally apply to these statutes, see chap 2.

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## II. PRIVATE ATTORNEY GENERAL DOCTRINE AND CCP §1021.5

### §3.2 A. Origins of California's Private Attorney General Doctrine

California's equitable private attorney general doctrine has its roots in federal law. See *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 42, 141 CR 315 (doctrine grounded largely on federal case law). Although *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612, rejected the private attorney general doctrine as a matter of federal law because it lacked statutory authorization, *Serrano III* rejected *Alyeska*'s reasons for disapproving the doctrine, noting in particular that the federal court's concern about which statutes would be considered important enough to warrant private attorney general fees was not present when, as in *Serrano III*, fundamental constitutional rights were at stake. 20 C3d at 46. Accordingly, after considering the factors set out in the federal case law and commentaries, the *Serrano III* court exercised its equitable powers and approved an award of attorney fees under the private attorney general doctrine to two public interest law organizations for securing a decision that the state's school financing system violated the California Constitution's equal protection guaranty. 20 C3d at 46.

While *Serrano III* was pending, the legislature enacted CCP §1021.5. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 624 n1, 186 CR 754. The *Serrano IV* court described CCP §1021.5 as the California legislature's reaction to *Alyeska*. 32 C2d at 632 n14. For text of CCP §1021.5, see §3.12.

For an excellent discussion of the origins of the doctrine, see McDermott & Rothschild, *The Supreme Court of California 1976-1977—Foreword: The Private Attorney General Rule and Public Interest Litigation in California*, 66 Cal L Rev 138 (1978).

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## §3.3 B. Private Attorney General Doctrine Defined

*Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 44, 141 CR 315, described the fundamental premises of the private attorney general doctrine:

> In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts. Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative. Because the issues involved in such litigation are often extremely complex and their presentation time-consuming and costly, the availability of representation of such public interests by private attorneys acting pro bono publico is limited. Only through the appearance of "public interest" law firms funded by public and foundation monies, argue plaintiffs and amici, has it been possible to secure representation on any large scale. The firms in question, however, are not funded to the extent necessary for the representation of all such deserving interests, and as a result many worthy causes of this nature are without adequate representation under present circumstances. One solution, so the argument goes, within the equitable powers of the judiciary to provide, is the award of substantial attorneys' fees to those public-interest litigants and their attorneys (whether private attorneys acting pro bono publico or members of "public interest" law firms) who are successful in such cases, to the end that support may be provided for the representation of interests of similar character in future litigation.

Although the parameters of the doctrine have been clarified and refined, this basic definition remains the fundamental rationale for private attorney general fee-shifting statutes, including CCP §1021.5. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 565, 21 CR3d 331.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.4 C. Purposes of Private Attorney General Doctrine

## §3.4 C. Purposes of Private Attorney General Doctrine

Courts have expressed several different purposes of the private attorney general doctrine that follow from its basic rationale (see §3.3). The California Supreme Court has repeatedly recognized the doctrine's purposes:

> The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of fundamental public policies… and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.

*Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 933, 154 CR 503, citing *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 43, 141 CR 315. "'[T]he fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases.'" *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 565, 21 CR3d 331, quoting *Maria P. v Riles* (1987) 43 C3d 1281, 1289, 240 CR 872. See also *Vasquez v State* (2008) 45 C4th 243, 250, 85 CR3d 466; *In re Head* (1986) 42 C3d 223, 228, 228 CR 184 ("Both the language of §1021.5 and the history of the private attorney general doctrine which it codifies reflect a legislative purpose of encouraging the initiation of actions to vindicate statutory and constitutional rights, as well as important public policies, in circumstances in which the expense of litigation would otherwise deter private parties from doing so"); *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 683, 186 CR 589 (focus of statute is "enabling suits by those otherwise unable to pursue the litigation, or deterring misconduct").

In *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 632, 186 CR 754, the court stated that: "[a] central function [of the private attorney general theory] is 'to call public officials to account and to insist that they enforce the law.'" 32 C3d at 632. However, private parties are also subject to fees under this doctrine. See *Graham v DaimlerChrysler Corp.*, *supra;* §3.25.

The courts of appeal also have expressed their views of the purposes of the doctrine. For example, in *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 839, 112 CR2d 284, the court recognized the pivotal role played by private attorney general statutes:

> This court is sensitive to the need to encourage "private attorneys general" willing to challenge injustices in our society. Adequate fee awards are perhaps the most effective means of achieving this salutary goal. Courts should not be indifferent to the realities of the legal marketplace or unduly parsimonious in the calculation of such fees.

See *Bowman v City of Berkeley* (2005) 131 CA4th 173, 176, 31 CR3d 447 ("statute's purpose is to encourage public interest litigation that might otherwise be too costly to pursue"); *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 24 CR3d 72 (eligibility of intervenors should be analyzed in light of statute's purposes; see §2.28); *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1414, 1 CR2d 459 (fees are awarded under private attorney general doctrine to "encourage public interest litigation by offering the 'bounty' of a court-ordered fee" (citing *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 10, 232 CR 697)), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 244, 261 CR 520; *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1302, 255 CR 704 ("The policy [underlying §1021.5], simply stated, is one of 'rewarding the effectuation of significant policy'"); *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1468, 240 CR 1; *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1226, 217 CR 125 (when local agency fails to enforce state law, private suits are "the only practical way to effectuate the policy, so attorney's fee awards are appropriate").

Fee awards under §1021.5 focus on encouraging important litigation, not punishing wrongdoers: "[F]ees granted under the private attorney general theory are not intended to punish those who violate the law but rather to ensure that those who have acted to protect public interest will not be forced to shoulder the cost of litigation." *San Bernardino Valley Audubon Soc'y v County of San Bernadino* (1984) 155 CA3d 738, 756, 202 CR 423, quoted with approval in *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 161, 67 CR3d 228.

Other private attorney general fee-shifting statutes, such as CCP §425.16, the anti-SLAPP statute, express similar

purposes: "Fee-shifting simply requires the party that creates the costs to bear them." *Equilon Enters. v Consumer Cause, Inc.* (2002) 29 C4th 53, 62, 124 CR2d 507 (interpreting CCP §425.16). Statutory fees do not make a party "liable" for filing a lawsuit, nor are they intended to "punish" the fee opponent. *Bernardo v Planned Parenthood Fed'n* (2004) 115 CA4th 322, 361, 9 CR3d 197, citing *Equilon Enters. v Consumer Cause, Inc., supra*. See also *Marron v Superior Court* (2003) 108 CA4th 1049, 1064, 134 CR2d 358 (fee award under Welf & I C §15657 in elder abuse cases is incentive for attorneys to take type of case requiring greater private enforcement). On CCP §425.16, see §§3.111-3.121.

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### §3.5 D. Codification of Equitable Doctrine in CCP §1021.5

While *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, was pending before the supreme court, California enacted CCP §1021.5, which provides explicit statutory authority for court-awarded attorney fees under a private attorney general theory. See §3.2. For text of §1021.5, see §3.12.

The statute also "codifies the courts' 'traditional equitable discretion' concerning attorney fee.... [W]ithin the statutory parameters courts retain considerable discretion." *Vasquez v State* (2008) 45 C4th 243, 251, 85 CR3d 466, quoting *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 938, 154 CR 503.

The principal differences between the equitable private attorney general doctrine and CCP §1021.5 are:

- Section 1021.5 applies to a broader range of cases than the equitable doctrine: "When other statutory criteria are satisfied, the section explicitly authorizes such an award 'in any action which has resulted in the enforcement of *an important right affecting the public interest,'* regardless of its source—constitutional, statutory or other." *Woodland Hills II*, 23 C3d at 925. The equitable doctrine has been applied only to constitutional violations.
- Section 1021.5 applies only to judicial actions and related proceedings; the equitable doctrine provides authority for fees based on quasi-judicial administrative proceedings as well (see *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728). See §3.6. See also §2.19.

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### §3.6 1. Section 1021.5 Broadly Construed

Code of Civil Procedure §1021.5 generally has been broadly construed. For example, in *In re Head* (1986) 42 C3d 223, 226, 228 CR 184, the court held that fees may be awarded in habeas corpus proceedings that meet the statutory criteria, regardless of "the label or procedural device by which the action is brought." The court also stated that "[o]ur construction of section 1021.5 ensures that the legislative purpose will not be frustrated by a restriction of the availability of attorney fee awards where the restriction is not clearly mandated by the language of the statute." 42 C3d at 233. See also *Vasquez v State* (2008) 45 C4th 243, 254, 85 CR3d 466 (refusing to require prelitigation settlement demand in noncatalyst cases); *Maria P. v Riles* (1987) 43 C3d 1281, 1293, 240 CR 872 (plaintiff's action to enjoin enforcement of state statute requiring school districts to report names of alien children to federal immigration authorities was "precisely the type of public interest lawsuit that the private attorney general doctrine of section 1021.5 was intended to foster," even though case was ultimately dismissed under former CCP §583 after legislature repealed unlawful statute).

On the other hand, in *In re Adoption of Joshua S.* (2008) 42 C4th 945, 949, 70 CR3d 372, the court held that §1021.5 fee awards are inappropriate when the losing party "has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public."

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### §3.7 2. When Criteria Met, Fees May Be Denied Only in "Special Circumstances"

When the criteria for a fee award under CCP §1021.5 are met, fees may be denied only if the opponent can show that "special circumstances would render an award "unjust." See, *e.g., Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 632, 186 CR 754; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1344, 39 CR3d 550 (same). See §§2.51-2.68. Thus, for example, the opposing party's "good faith" is no defense to a fee award. See, *e.g., Schmid v Lovette* (1984) 154 CA3d 466, 475, 201 CR 424. Similarly, lack of bad faith or inappropriate conduct by either party is not a relevant factor for determining entitlement to fees under §1021.5. *Punsly v Ho* (2003) 105 CA4th 102, 114, 129 CR2d 89.

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### §3.8 3. Relevance of Federal Private Attorney General Cases

The California Supreme Court has stated that, because CCP §1021.5 is based on federal authorities that predated *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612 (see §3.2), those authorities may serve as reliable guides in construing §1021.5 even though they may no longer be good law under federal standards. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 934, 154 CR 503. When arguing the meaning of terms under §1021.5, therefore, counsel may wish to cite to federal private attorney general cases that predate *Alyeska*. See, *e.g., Rich v City of Benicia* (1979) 98 CA3d 428, 159 CR 473. But see *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1152, 74 CR3d 81 (rejecting contention that legislature intended to adopt pre-*Alyeska* federal rule on expert witness fees). Many of the pre-*Alyeska* federal decisions are analyzed in law review articles, including Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv L Rev 849 (1975); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 22 U Pa L Rev 636 (1974); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 NYU L Rev 301 (1973).

*Woodland Hills II* also relied heavily on decisions interpreting the Civil Rights Attorney's Fees Awards Act of 1976 (42 USC §1988). 23 C3d at 937. See also S Rep. No. 94-1011, 94th Cong, 2d Sess (1976), reprinted in 1976 US Code Cong & Ad News 5908 (discussing federal cases that underlie statute). In *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 634, 186 CR 754, the court relied on these decisions in holding that §1021.5 authorized compensation for fee-related services, noting that the federal statute used similar language, served similar purposes, and reflected "time-tested workability." Again, California courts have relied on these post-*Alyeska* federal decisions even when they no longer are considered good law under federal standards. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 567, 21 CR3d 331 (citing numerous federal decisions applying catalyst theory, even though U.S. Supreme Court subsequently found theory invalid).

It is critical to recognize, however, that despite the similarities, California law is independent of federal law and therefore subject to independent interpretations of the meaning of similarly worded statutes. See *Serrano IV*, 32 C3d at 639 n29 ("Federal decisions rest in part on evidence of congressional intent… for which there is no California parallel. We envision an independent state rule."); *Graham*, 34 C4th at 567 (rejecting U.S. Supreme Court's ruling on the "catalyst" theory), discussed in §2.111-2.114.

The relationship between state and federal fee-shifting law is discussed in greater detail in §1.12 and §§2.10-2.16.

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### §3.9 4. Equitable Doctrine May Still Be Invoked

Despite the codification of the private attorney general doctrine in CCP §1021.5, the equitable private attorney general doctrine may still be invoked as a separate basis for a fee award. In *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 960, 217 CR 621, the court stated that codification of the California private attorney general doctrine in CCP §1021.5 did not eliminate the judiciary's equitable authority to award fees under the doctrine. See also *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1462 n12, 240 CR 1. But see *City of Carmel-by-the-Sea v Board of Supervisors* (1986) 183 CA3d 229, 227 CR 899. The continuing existence of a separate equitable doctrine may be significant in situations in which §1021.5 has been held not to apply, such as certain administrative proceedings (see §13.2).

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## §3.10 E. Private Attorney General and Substantial Benefit/Common Fund Doctrines Compared

**The common fund doctrine.** The relationship between the private attorney general doctrine under CCP §1021.5 and the common fund doctrine was examined in *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. *Beasley* upheld a fee award under §1021.5, even though damages in excess of $5 million had been recovered for the plaintiff class. Analyzing plaintiffs' claim under the criteria and purposes of §1021.5, particularly the "financial burden" and "payment out of recovery" factors, the court held that the existence of a common fund from which attorney fees could be paid did not preclude an award of fees under §1021.5. 235 CA3d at 1412. See §§3.68, 3.74-3.80. *Beasley* also rejected the argument that awarding fees from the fund would encourage plaintiffs to litigate more efficiently, holding that any such benefit "is eclipsed by §1021.5's purpose of encouraging public interest litigation." 235 CA3d at 1417 n3.

*Beasley*'s holding expressly rejected *Bank of America v Cory* (1985) 164 CA3d 66, 89, 210 CR 351, an action to recover dormant bank accounts, in which the court reversed a fee award under CCP §1021.5 because a common fund was available. *Beasley* found that *Cory* "provided no meaningful analysis" of whether §1021.5 could be applied in a potential common fund situation. *Beasley*, 235 CA3d at 1407. Compare *Cory* with *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 878, 71 CR3d 642 (tax refund action did not create common fund). For further discussion of the differences between the private attorney general and common fund doctrines, see chap 5.

**The substantial benefit doctrine.** The relationship between the private attorney general doctrine and the substantial benefit doctrine was examined in *Braude v Automobile Club* (1986) 178 CA3d 994, 223 CR 914. *Braude* held that CCP §1021.5, rather than the substantial benefit doctrine, applied to a suit to enforce rights to fair election procedures for members of a nonprofit organization. The court noted that the private attorney general doctrine is broader than the substantial benefit doctrine because: (1) it allows an award of fees even when the benefit is conceptual or doctrinal but not actual and concrete; and (2) because it is not based on unjust enrichment principles, the effectuation of a statutory or constitutional purpose may be sufficient basis for the award (178 CA3d at 1011, quoting *Rich v City of Benicia* (1979) 98 CA3d 428, 433, 159 CR 473):

> The private attorney general theory is predicated upon achievement of benefits substantial from the viewpoint of the general public but too ephemeral from the standpoint of individual beneficiaries to warrant application of the substantial benefit theory. While the substantial benefit theory is based in concepts of unjust enrichment, the private attorney general theory seeks (without regard to material gain) to encourage vindication of strong public policies by private lawsuit.

For further discussion of the differences between the private attorney general and the common fund and substantial benefit doctrines, see §5.44 and chap 5 generally.

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## §3.11 F. Section 1021.5's Relationship to Other Fee-Shifting Statutes

Fee awards under CCP §1021.5 may be combined with awards based on other statutes or theories. See, *e.g., MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 54 CR3d 724 (defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause invalid entitled to fees under contractual fee clause and CCP §1021.5); *Green v Obledo* (1984) 161 CA3d 678, 685, 207 CR 830; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552 (fees awarded under CCP §1021.5 and Unruh Act (CC §52(a)).

Fees also may be awarded under §1021.5 even if a narrower fee-shifting statute also applies to the action. *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 872, 71 CR3d 642 (Rev & T C §19717 not exclusive source of fees for successful tax refund action); *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 420, 61 CR3d 295 (fee-shifting provision in Public Safety Officers Procedural Bill of Rights Act (Govt C §3309.5(e)) and CCP §1021.5 not mutually exclusive).

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## G. Elements and Scope of CCP §1021.5

### §3.12 1. Text of CCP §1021.5

The full text of CCP §1021.5 reads:

> 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. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.
>
> Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v Priest*, 20 C3d 25, 49.

The following sections will discuss each aspect of the requirements under §1021.5 for establishing eligibility for an award of fees.

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### §3.13 2. The "Successful Party" Requirement

The issue of who is the "successful party" is covered in §§2.44-2.49. The terms "successful party" (used in CCP §1021.5) and "prevailing party" (used in most other fee-shifting statutes) are synonymous. *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 610, 21 CR3d 371; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 570, 21 CR3d 331.

Courts have taken a "broad, pragmatic view" of what constitutes a successful party. See §§2.44-2.49. Generally, a party is successful under §1021.5 if it achieves some relief from the benchmark conditions challenged in the lawsuit. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 687, 186 CR 589, discussed in §2.85. See *Maria P. v Riles* (1987) 43 C3d 1281, 1292, 240 CR 872 (successful party is party that "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit"); *Graham*, 34 C4th at 565; *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 649, 52 CR3d 1; *Bowman v City of Berkeley* (2005) 131 CA4th 173, 178, 31 CR3d 447 (quoting *Graham*). See also *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 318, 73 CR3d 842 (party that obtains judgment may not be denied fees simply because plaintiff in coordinated lawsuit obtained same relief); *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1368, 69 CR3d 250 (plaintiff's litigation "a practical success").

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## §3.14 a. Who Is Eligible for Fee Awards Under CCP §1021.5

Other than public entities (see §3.17), CCP §1021.5 imposes no restrictions on who can be the successful party. Nonetheless, because the major purpose of §1021.5 fee awards is to attract attorneys to take on important public interest cases and, in appropriate circumstances, such fees may be paid directly to those attorneys (see §§2.20-2.33), the issue of which *parties* may recover §1021.5 fees often involves which *attorneys* may recover them.

Courts have addressed the issues discussed in §§3.15-3.22.

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### §3.15 (1) Parties Represented by Nonprofit Law Firms

Nonprofit law firms are entitled to recover fees under the private attorney general doctrine and CCP §1021.5 even though their clients have incurred no obligation to pay fees and/or they have received charitable funding to bring such lawsuits. See *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 47, 141 CR 315; *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 681, 186 CR 589.

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### §3.16 (2) Parties Represented by Pro Bono Attorneys

Private attorneys who represent clients on a pro bono basis (*i.e.*, without charge to them) or for discounted fees are also entitled to fees under CCP §1021.5. See, *e.g., Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 47, 141 CR 315 (entitlement to fees unaffected by fact that plaintiffs under no obligation to pay attorneys fees); *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 755, 202 CR 423.

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### §3.17 (3) Public Entities

Code of Civil Procedure §1021.5 expressly provides that public entities are ineligible for fee awards under the statute, except in suits against other public entities: "With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor." See Stats 1993, ch 645 (permitting public entities to recover fees in actions against other government entities); *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (fees awarded to county in action against state agency); *City of Hawaiian Gardens v City of Long Beach* (1998) 61 CA4th 1100, 72 CR2d 134; *City of Carmel-by-the-Sea v Board of Supervisors* (1986) 183 CA3d 229, 227 CR 899; *People v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 211 CR 501. The origins and purposes of the amendment permitting public entities to recover fees from other public entities is discussed in *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 313, 73 CR3d 842. Note that under *State Water Resources Control Bd*., a party that is otherwise entitled to a fee award under §1021.5 may not be denied fees because it has litigated alongside a public entity that has itself recovered fees under §1021.5. 161 CA4th at 318.

A different rule may apply to suits brought in the name of the People of the State of California. In *People ex rel Brown v Tehama County Bd. of Supervisors* (2007) 149 CA4th 422, 456, 56 CR3d 558, the court noted in dicta that government entities could recover fees under §1021.5 from other public entities, but held that the Attorney General, suing on behalf of the People, could not be entitled to fees under §1021.5 because the Attorney General is already charged with enforcing state law. The court also held that §1021.5 did not entitle the People to fees based on the defendant's bad faith conduct in the litigation; such fees had to be claimed as sanctions under CCP §128.5 (see §§6.29-6.39). 149 CA4th at 450.

**NOTE:** The State of California may, however, recover reasonable attorney fees in numerous other types of cases, including the various statutory enforcement actions listed in CCP §1021.8. See Stats 2003, ch 159, §4.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.18 (4) Intervenors

### §3.18 (4) Intervenors

Intervenors who meet CCP §1021.5's requirements are entitled to attorney fees on the same basis as other parties. See *Crawford v Board of Educ.* (1988) 200 CA3d 1397, 1407, 246 CR 806, in which the court denied fees on the facts but held that intervenors who "make a clear showing of some unique contribution to the litigation" are entitled to fees under CCP §1021.5. Compare *Crawford* with *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 87, 24 CR3d 72, in which the court distinguished *Crawford* and held that eligibility for fees under §1021.5 may not be based on the relative contributions of private parties, stating, "[a] party who satisfies the criteria for intervention and who contributes to the success of public interest litigation should be entitled to an award of attorneys' fees on the same terms as any other party."

*City of Santa Monica* also recognized that eligibility may not be denied based on "an after-the-fact assessment of whether the intervenor's participation was 'necessary' to the successful result achieved." 126 CA4th at 88. See also *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 317, 73 CR3d 842 (examining entitlement when multiple parties seek same relief). But see *Savaglio v Wal-Mart Stores, Inc.* (2007) 149 CA4th 588, 603, 57 CR3d 215 (denying fees to newspaper that intervened to unseal records under Cal Rules of Ct 2.551(h)(2)).

The relative contribution of multiple parties, however, may be relevant to a determination of the *amount* of fees to be awarded. 126 CA4th at 88.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.19 (5) Defendants and Real Parties in Interest

### §3.19 (5) Defendants and Real Parties in Interest

Unlike many fee-shifting statutes that provide fees to the "successful" or "prevailing" party, CCP §1021.5 provides fees only to a "successful party" who meets the statutory criteria. Thus, although a defendant or real party in interest who prevails under the more typical fee-shifting statute may be entitled to fees if it meets the demanding "frivolous, groundless, or unreasonable" standard discussed in §2.69, the language of §1021.5 provides no similar right.

However, a prevailing defendant or real party who independently meets the requirements of §1021.5 (*i.e.,* who has acted as a private attorney general) may be eligible for an award of attorney fees even if the plaintiff's action cannot be shown to be frivolous. Cases in which appellate courts have held that a successful defendant or real party was entitled to fees under §1021.5 include:

- *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 54 CR3d 724 (fees awarded to defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause invalid);
- *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 33 CR3d 817 (fees awarded to real parties in interest who defeated plaintiff's challenge to referendum); *Wal-Mart* was expressly cited with approval in *In re Adoption of Joshua S.* (2008) 42 C4th 945, 957, 70 CR3d 372;
- *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646 (fees awarded to city council candidate who successfully defended challenge to his voter's pamphlet statement for part of case that resulted in clarifying meaning of Elec C §13307);
- *County of San Diego v Lamb* (1998) 63 CA4th 845, 73 CR2d 912 (fees awarded to defendant who defeated county's attempt to recoup AFDC payments made to her minor daughter);
- *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 36 CR2d 456 (fees awarded to newspaper forced to defend against city's civil action to enforce an unconstitutional ordinance);
- *Hull v Rossi* (1993) 13 CA4th 1763, 17 CR2d 457 (fees awarded to ballot argument sponsors who defended their argument against meritless challenge);
- *City of Sacramento v Drew* (1989) 207 CA3d 1287, 255 CR 704 (fees awarded to successful defendant in city's action to validate tax assessment district, even though court suggested successful argument);
- *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272 (fees awarded to nominal defendants who aligned themselves with plaintiffs);
- *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846 (fees awarded to defendants who successfully resisted county's effort to bill them for costs of their political protest); and
- *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 216 CR 649 (fees awarded to prevailing defendant/cross-complainant whose action led to repeal of invalid state regulation).

This line of cases was cited with approval in *In re Adoption of Joshua S.* (2008) 42 C4th 945, 957, 70 CR3d 372.

Cases holding that a successful defendant was not entitled to fees under §1021.5 include:

- *Walker v Countrywide Home Loan* (2002) 98 CA4th 1158, 1179, 121 CR2d 79 (defendant may not be awarded fees under CCP §1021.5 for successfully defending against claim under unfair competition law (Bus & P C §17200));
- *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 1571 n7, 46 CR2d 667 (fees denied to defendant distributor of anti-abortion leaflets because he failed to show that defense of libel action conferred benefit on anyone but himself); and
- *Woodland Hills Homeowners Org. v Los Angeles Community College Dist.* (1990) 218 CA3d 79, 266 CR 767 (fees denied to defendant church in litigation involving merely private property interests).

In many cases, CCP §425.16, the anti-SLAPP statute (see §§3.108-3.118), may be a more pertinent basis for defendants to claim fees. See *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 1571 n7, 46 CR2d 667.

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### §3.20 (6) Amicus Curiae

Amicus curiae generally are not entitled to fees under fee-shifting statutes, including CCP §1021.5, because they are not "parties." See *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1177, 39 CR3d 788. A successful party may be able to claim fees for time spent preparing an amicus brief, however, in a related case whose outcome could affect the case in chief. See, *e.g., Ramon v County of Santa Clara* (2009) 173 CA4th 915, 924, 93 CR3d 278; *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 535; *Hasbrouck v Texaco, Inc.* (9th Cir 1989) 879 F2d 632, 638.

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### §3.21 (7) Class Action Objectors

Although successful class action objectors occasionally are awarded fees under common fund principles (see §2.30), they have not fared as well under CCP §1021.5. In *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Mkts., Inc.* (2005) 127 CA4th 387, 25 CR3d 514, a successful objector to a class action settlement who had been denied leave to intervene was not entitled to fees under §1021.5 because he was not an essential party to the litigation; merely assisting the court by objection to settlement was not a basis for fees, although he might have been entitled to fees under the common fund doctrine. 127 CA4th at 403 (distinguishing *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1302, 255 CR 704).

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### §3.22 (8) In Pro Per Attorneys and Parties Not Eligible

For the same reasons that they are not eligible for fee awards under other fee-shifting statutes, in pro per attorneys and laypersons would appear to be ineligible for fee awards under CCP §1021.5. But see *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 913, 160 CR 124 (nonattorneys eligible for fees under equitable private attorney general doctrine for administrative proceedings that do not require licensed attorney), disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728.

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### §3.23 b. Who Is Liable for Fee Awards Under CCP §1021.5

Code of Civil Procedure §1021.5 permits fees "against one or more opposing parties." See *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1176, 39 CR3d 788; *Nestande v Watson* (2003) 111 CA4th 232, 238, 4 CR3d 18. With the exception of public entities, which may not recover fees from private parties (see §3.17), the text of the statute does not limit or define who those "opposing parties" may be, nor does it address any allocation of fees among them.

The issue of how to allocate fees among multiple parties found liable for them is addressed in §§9.79-9.81. Other issues that have arisen over the term "opposing parties" are discussed in §§3.24-3.28.

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### §3.24 (1) Public Entities

Code of Civil Procedure §1021.5 expressly provides that public entities may be liable for fee awards under §1021.5 without any requirement for filing a government claim: "With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor." See §2.3. This comports with the stated purposes of §1021.5. See §3.4.

By the statute's express terms, public entities may also be liable for fees in actions brought by other public entities. See, *e.g., County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1; §3.17.

Under §1021.5, even courts may be liable for fees. See, *e.g., Cruz v Superior Court* (2004) 120 CA4th 175, 14 CR3d 917 (original writ challenging trial court's fee waiver practices); *Rhyne v Municipal Court* (1980) 113 CA3d 807, 824, 170 CR 312 (municipal court ordered to provide attorneys to anyone charged with crime that could result in confinement). The fees are payable by the court, not the individual judge. *Lezama v Justice Court* (1987) 190 CA3d 15, 23, 235 CR 238.

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### §3.25 (2) Private Parties

Private parties may also be liable for CCP §1021.5 fees. See *In re Adoption of Joshua S.* (2008) 42 C4th 945, 70 CR3d 372; *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331; *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900; *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1356, 39 CR3d 550; *Punsly v Ho* (2003) 105 CA4th 102, 113, 129 CR2d 89. The court may not award fees, however, when the losing party "has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public." *In re Adoption of Joshua S.*, 42 C4th at 949.

**Additional authorities:** *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 175, 17 CR2d 510; *Hull v Rossi* (1993) 13 CA4th 1763, 1767, 17 CR2d 457; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 250, 261 CR 520; *Washburn v City of Berkeley* (1987) 195 CA3d 578, 591, 240 CR 784; *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 203, 228 CR 847; *Braude v Automobile Club* (1986) 178 CA3d 994, 1101, 223 CR 914; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 756, 202 CR 423 (plaintiff's fees allocated in part to private developer defendant).

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### §3.26 (3) Intervenors and Real Parties in Interest

Intervenors and real parties in interest who serve essentially as "opposing parties" may be held liable for fees under CCP §1021.5. See, *e.g., Washburn v City of Berkeley* (1987) 195 CA3d 578, 240 CR 784, and other cases cited in *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1180, 39 CR3d 788. In *Connerly*, however, the supreme court held that fees could not be awarded against advocacy groups that entered the litigation as amici curiae on behalf of the defendant state agency to defend the state's affirmative action statutes but later were designated real parties in interest and actively participated in the litigation. The court held that they were not "opposing parties" within the meaning of CCP §1021.5 because their conduct did not precipitate the litigation, they had only an ideological interest in defending the state's statutes, and the state had not defended itself. 37 C4th at 1172.

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### §3.27 (4) Amici Curiae

Typically, amici curiae are not subject to fee awards because they are not "parties." *Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 1177, 39 CR3d 788. In *Connerly,* the court held that fees could not be awarded against advocacy groups that entered the litigation as amici curiae on behalf of the defendant state agency to defend the state's affirmative action statutes, even though they later were designated real parties in interest and actively litigated the case. The court found that they were not "opposing parties" within the meaning of CCP §1021.5 because their conduct did not precipitate the litigation, they had only an ideological interest in defending the state's statutes, and the state had not defended itself but had paid all of plaintiff's fee award. 37 C4th at 1172.

An "opposing party" may be liable for the cost of opposing an amicus curiae brief filed on its behalf. See, *e.g., Ramon v County of Santa Clara* (2009) 173 CA4th 915, 925, 93 CR3d 278. In *Connerly*, for example, the State of California paid the plaintiff's entire fee award, including the portion improperly assessed against the amicus. 37 C4th at 1175 n3. The opposing party may also be assessed fees for the successful party's work on an amicus brief in a related case. See, *e.g., Ramon*, 173 CA4th at 924, and other cases cited in §9.15.

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### §3.28 (5) Plaintiffs

Fees also may be assessed against plaintiffs when the defense of the litigation meets the criteria for a fee award under CCP §1021.5. See, *e.g.*, *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 216 CR 649, and other cases cited in §3.19.

When fees are sought against plaintiffs, protecting access to the courts becomes a factor. In *In re Adoption of Joshua S.* (2008) 42 C4th 945, 70 CR3d 372, the court contrasted CCP §1021.5 with the American rule, one purpose of which is to not discourage poor litigants from engaging in important but uncertain litigation. In reviewing numerous §1021.5 cases, the court found that the losing party "had done something more than prosecute or defend a private lawsuit, but instead had engaged in conduct that in some way had adversely affected the public interest." 42 C4th at 954.

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### §3.29 3. The "Action" Requirement

Code of Civil Procedure §1021.5 applies to "any action" that meets the statutory criteria. When applied to litigation in courts, this language is interpreted broadly. See, *e.g., In re Head* (1986) 42 C3d 223, 233, 228 CR 184 ("Our construction of section 1021.5 ensures that the legislative purpose will not be frustrated by a restriction of the availability of attorney fee awards where the restriction is not clearly mandated by the language of the statute."). In contrast, courts have held that the statute does not apply to nonjudicial proceedings (unless tied to judicial proceedings). See *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 910, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728. See §§3.30-3.36.

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### §3.30 a. Entitlement Based on Impact of Case as a Whole

Entitlement to fees under CCP §1021.5 is based on the impact of the case as a whole. See *Punsly v Ho* (2003) 105 CA4th 102, 114, 129 CR2d 89 (quoting this book). In *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754, the court rejected the defendant's contention that compensation for fees incurred in defending a previous fee award had to independently meet the requirements of §1021.5. The court held instead that fees for fee-related services follow from the award on the merits, just as an award of fees for an appeal is available whenever an award for trial court services is available. 32 C3d at 637. The fee motion was merely "a collateral matter, ancillary to the main cause. [Citations.] It 'seeks what is due because of the judgment.'" 32 C3d at 637. See §12.1. See also *Savaglio v Wal-Mart Stores, Inc.* (2007) 149 CA4th 588, 603, 57 CR3d 215 (denying fees under §1021.5 for newspaper's motion to unseal records under Cal Rules of Ct 2.551(h) because entitlement to fees based on outcome of case as whole, not ancillary motion); *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Mkts., Inc.* (2005) 127 CA4th 387, 25 CR3d 514 (denying fees to class action objectors).

Interim rulings, however, may provide a basis for fees in some cases. See, *e.g., Bowman v City of Berkeley* (2005) 131 CA4th 173, 31 CR3d 447 (plaintiffs' failure to halt challenged project on remand did not abrogate prevailing party status they had obtained for vindicating their rights to fair hearing); *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 495 n8, 30 CR3d 202 (fee award based on prior appellate opinion); *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 102, 228 CR 847. See also §3.31.

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### §3.31 b. Fees May Be Limited to Work on Portion of Action That Addresses Public Purpose

Whether a party is entitled to fees under CCP §1021.5 is not an "all or nothing" proposition. When the purposes of the litigation are partly public and partly personal, a partial subsidy of the litigation (for the portion of the action that addresses the public issues) may be appropriate. See *Saleeby v State Bar* (1985) 39 C3d 547, 574, 216 CR 367; *Hammond v Agran* (2002) 99 CA4th 115, 126, 120 CR2d 646; *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 94 CR2d 205; *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 1128, 71 CR2d 1; *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 9, 232 CR 697, discussed in §§3.42, 3.49, 3.56, 3.67. The trial court has considerable discretion in making this determination. See *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 955, 83 CR2d 89.

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### §3.32 c. Applicability of Statute to Quasi-Criminal Proceedings

Attorney fees may be awarded under CCP §1021.5 in quasi-criminal proceedings, including habeas corpus proceedings. In *In re Head* (1986) 42 C3d 223, 228 CR 184, the court upheld a fee award to prison inmates who filed a petition for habeas corpus, challenging the state's work furlough procedures. The defendant argued that §1021.5 did not apply because habeas corpus petitions had their origins in the Penal Code, and §1021.5 had been held not to apply to criminal defendants (see *Fogelson v Municipal Court* (1981) 120 CA3d 858, 175 CR 64). The court rejected that argument, noting that the legislature enacted §1021.5 to encourage actions brought to vindicate important rights that would otherwise go unaddressed. The inmates' action in *Head* met that standard, even if the form of the proceeding had its basis in the Penal Code. The court stated (42 C3d at 230):

> The label affixed to the pleading by which the action is initiated is not helpful [in determining whether] section 1021.5… applies to these actions when initiated by petition for writ of habeas corpus.

Consistent with *Head*, fees have been awarded in other cases arising from criminal proceedings. See, *e.g., Olney v Municipal Court* (1982) 133 CA3d 455, 184 CR 78 (fees awarded for obtaining writ of mandate requiring municipal court to allow criminal defendants to appear at certain hearings through counsel). Compare *Olney* with *Marini v Municipal Court* (1979) 99 CA3d 829, 160 CR 465 (trial court award of fees for successful suit invalidating local program for drinking drivers reversed on ground that litigation was essentially self-serving).

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### §3.33 d. Code of Civil Procedure §1021.5 Applies in Federal Court Actions

Code of Civil Procedure §1021.5 applies in federal courts as a remedy for violations of state law. See, *e.g., Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552 (fees awarded under CCP §1021.5 and Unruh Act (CC §52(a))); *City of Carmel-by-the-Sea v U.S. Dep't of Transp.* (9th Cir 1997) 123 F3d 1142, 1167 (remanding issue of whether plaintiffs entitled to fees under CCP §1021.5 and other statutes); *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (fees awarded under CCP §1021.5 and Govt C §12965(b)); *Keith v Volpe* (CD Cal 1986) 644 F Supp 1317, aff'd (9th Cir 1988) 858 F2d 467, 486 (fees awarded under CCP §1021.5). See also §§2.10-2.11.

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### e. Fee Awards for Work in Administrative Proceedings

### §3.34 (1) Fee Awards for Work in Administrative Proceedings That Are Not Intertwined With Court Proceedings

Code of Civil Procedure §1021.5 does not authorize administrative agencies, as opposed to courts, to award fees for work performed before those agencies. *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 910, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728. Nor is a *court* authorized under CCP §1021.5 to award attorney fees in a case resolved entirely at the administrative level. See *Hospital Sys. v Office of Statewide Health Planning & Dev.* (1994) 25 CA4th 1686, 30 CR2d 922 (§1021.5 authorizes fees only on motion, *i.e.,* in conjunction with pending court matter, and if there is no such matter, there can be no fee award).

**NOTE:** Administrative agencies may award fees under the equitable common fund doctrine. *Consumers Lobby Against Monopolies*, 25 C3d at 913. Similar reasoning would seem to empower an administrative agency to award fees under the equitable private attorney general doctrine as well. See *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1462 n12, 240 CR 1. See also §§5.54-5.59, 13.2-13.15.

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### §3.35 (2) Fee Awards for Administrative Proceedings That Precede Court Actions

Under both federal and California law, courts may award attorney fees for work performed in administrative proceedings that precede litigation to the extent that the administrative work is useful and of a type ordinarily necessary to court action. See *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1459, 240 CR 1. See also §§13.16-13.18.

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### §3.36 (3) Fee Awards for Related Administrative Work During or After Judicial Action

Attorney fees under CCP §1021.5 are available for administrative work that occurs in the course of a judicial action, is intertwined with the action, and is useful and necessary for its resolution, without having to independently satisfy the requirements of §1021.5. See, *e.g., Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 779, 118 CR2d 629; *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 847, 216 CR 649. Compare *Wallace* with *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 575, 30 CR2d 581, and *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 972, 259 CR 599. See *Pennsylvania v Delaware Valley Citizens' Council for Clean Air* (*Delaware Valley I)* (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088. See also §§13.19-13.20.

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### §3.37 4. Four Criteria for Award Under CCP §1021.5

In addition to being the "successful party," a party seeking fees under CCP §1021.5 must satisfy four criteria set out in the statute:

- That the action resulted in the enforcement of an important right affecting the public interest;
- That the action conferred a significant benefit on the general public or a large class of persons;
- That the necessity and financial burden of private enforcement were such as to make a fee award "appropriate", and
- That, in the interests of justice, the fee should not be paid out of the recovery.

To the extent that an action fulfills each of these four criteria, a fee award may be required. See §§2.50, 3.7.

In considering these criteria, courts must "assess the litigation realistically and determine from a practical perspective whether [the statutory] criteria have been met." *Bowman v City of Berkeley* (2005) 131 CA4th 173, 177, 31 CR3d 447, quoting *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 511, 94 CR2d 205.

Note that similar criteria are utilized in CCP §425.17, which creates an exception to the anti-SLAPP statute (CCP §425.16) for public interest cases. See *Club Members for an Honest Election v Sierra Club* (2008) 45 C4th 309, 318, 86 CR3d 288 (explaining similarities and differences in two statutes); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1098 n7, 69 CR3d 184, citing *Northern Cal. Carpenters Reg'l Council v Warmington Hercules Assoc.* (2004) 124 CA4th 296, 20 CR3d 918. See also §§3.111-3.121.

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### §3.38 a. Interrelated Nature of Statutory Criteria

The statutory criteria under CCP §1021.5 are, to some extent, interrelated. See *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 319, 193 CR 900 (discussed in detail in §3.54), in which the court held that the more fundamental and important the right vindicated, the less the showing that is necessary to establish that a large class of persons benefits from the enforcement of that right.

Similarly, in both *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697, and *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81, the appellate court recognized that the financial burden criterion is interrelated with the other criteria under §1021.5 (235 CA3d at 1415):

> If public benefits are very significant, it is more important to encourage litigation, and thus it may be appropriate to award fees under section 1021.5 "even in situations where the litigant's own expected benefits exceed its actual cost by a substantial margin." [Citations.] In contrast, if public benefits are modest, "the courts should award fees only where the litigant's own expected benefits do not exceed its costs by very much (or possibly are even less than the costs of the litigation)."

*Beasley* also recognized that the "financial burden" criterion is directly related to the "interests of justice" criterion: a finding that "in the interests of justice" attorney fees should not be paid out of the recovery depends on a finding that the financial burden of the litigation warrants an award of fees. 235 CA3d at 1415. Thus, *Beasley* upheld a fee award under CCP §1021.5 even though the plaintiff class recovered damages in excess of $5 million. See also *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1354, 39 CR3d 550 (recognizing that criteria "interrelated," but holding that trial court erred by weighing only public benefit against personal stake).

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### §3.39 b. Enforcement of Important Right Affecting the Public Interest

Code of Civil Procedure §1021.5 provides no concrete standard or test against which a court may decide whether the right vindicated in a particular case is sufficiently "important" to justify a fee award. Instead, the trial court "must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under a private attorney general theory." *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 938, 154 CR 503. More specifically, courts are directed to realistically assess the "strength" or "societal importance" of that right by its relationship to the achievement of fundamental legislative goals. 23 C3d at 935. See also *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1417, 1 CR2d 459 (whether important public interest at stake requires "an examination of the subject matter of the action—*i.e.,* whether the right involved was of sufficient societal importance"), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81.

The phrase "important right" as used in CCP §1021.5 is not confined to any one subject or field. Fees may be awarded under §1021.5 in various settings. *Woodland Hills II* expressly cited as examples actions involving inhumane prison conditions, racial discrimination, the rights of mental patients, legislative reapportionment, and environmental protection. 23 C3d at 936. *Woodland Hills II* also suggested that enforcing the public's right to real property subdivisions that conform to a general plan constitutes an important right within the meaning of §1021.5. 23 C3d at 936. The court also noted with approval the grant of attorney fees under the private attorney general theory in *La Raza Unida v Volpe* (ND Cal 1972) 57 FRD 94, aff'd (9th Cir 1973) 488 F2d 559, which involved the statutory right to a hearing prior to a freeway's elimination of public parkland and the statutory right of relocation for displaced residents.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.40 (1) 'Important Right' Interpreted Broadly

### §3.40 (1) "Important Right" Interpreted Broadly

Under CCP §1021.5, the concept of "important rights" has generally been broadly interpreted. Although not every statutory violation involves an "important right" (*Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 935, 154 CR 503), courts frequently reject attempts to characterize rights in their most narrow or personal light, as the following cases show:

- *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 530, 96 CR3d 90 (reversing trial court's determination that action seeking documents used to conduct search for public corporation CEO did not involve important right; findings that case "same as any other discovery order" and only involved "political wrangling" rejected).
- *City of Los Angeles v 2000 Jeep Cherokee* (2008) 159 CA4th 1272, 1279, 72 CR3d 252 (action establishing that city's automobile forfeiture provision preempted by state law involved important right; city's claim that only right vindicated was "the right to use a vehicle for prostitution without threat of forfeiture" rejected).
- *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 17 CR2d 510 (injunction obtained against abortion protesters not only vindicated real property trespass laws, as defendants alleged, but also constitutional right to privacy).
- *Hull v Rossi* (1993) 13 CA4th 1763, 1769, 17 CR2d 457 (defense of ballot arguments vindicated important rights, even if challenges to ballot arguments were "minor, inconsequential, and a 'piffle,'" because fee award discourages lawsuits intended to chill political participation).
- *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1417, 1 CR2d 459 (class action attacking credit card overcharges appropriately characterized as consumer protection action, not merely action to vindicate private rights of cardholders, as bank alleged), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81.
- *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697 (action forcing city to meet and confer with employee representatives before imposing $5 parking fee involved important right because it enforced city's duty to comply with decisions of local board).

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### §3.41 (2) New Law Need Not Be Established to Satisfy Important Right Requirement

A lawsuit need not establish new law to satisfy the important right requirement. The enforcement of a previously established "important right" also qualifies for a fee award. *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900; *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 422, 61 CR3d 295; *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1084, 241 CR 239 (lawsuit affirming competent adult patient's right to refuse medical treatment enforced important right by both confirming applicability of existing precedent and emphasizing that right exists regardless of motive); *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424. See also *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 866, 223 CR 846 (following *Press*).

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### §3.42 (3) When Right Vindicated Through Appellate Opinion

When the case has resulted in a published appellate opinion, *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 8, 232 CR 697, held that the determination of whether an important right has been vindicated is a question of law, and an appellate court is generally in a better position to assess the importance of the right vindicated than the trial court if it is the appellate court's opinion that determined the right. See also *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 427, 253 CR 426. But see *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1081, 241 CR 239 (trial court in better position to make determination).

Likewise, an appellate court's decision to publish its opinion on the merits is, in light of the rules governing publication (Cal Rules of Ct 8.1100-8.1125), "strong evidence" that an important right is involved. *Los Angeles Police Protective League*, 188 CA3d at 12.

In *In re Adoption of Joshua S.* (2008) 42 C4th 945, 958, 70 CR3d 372, the court held that "whether litigation generates important appellate precedent is a factor courts may consider in determining whether the litigation can be said to enforce an important right affecting the public interest." Fees were denied in that case, however, because the court also held that CCP §1021.5 fee awards are inappropriate in cases in which the losing party "has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public." 42 C4th at 949.

**Additional authorities:** *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1516, 43 CR3d 707; *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 494, 30 CR3d 202; *Punsly v Ho* (2003) 105 CA4th 102, 112, 129 CR2d 89; *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 94 CR2d 205; *County of San Diego v Lamb* (1998) 63 CA4th 845, 73 CR2d 912.

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### §3.43 (4) Fees May Be Awarded on Unadjudicated Claim of Important Right if Litigation Results in Enforcement of That Right

Code of Civil Procedure §1021.5 does not require a favorable judicial determination on the "important right" that is the basis for the fee award. In some circumstances, even when the party prevails only on rights that are not considered "important," if the result is achievement of the ends sought through the unadjudicated "important right," fees may be awarded. In *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 936, 154 CR 503, the court held that a party who prevails on a technical ground may recover fees when an important right affecting the public interest is alleged but not adjudicated, and the litigation resulted in the enforcement of that right. The unadjudicated "important right," however, must have some degree of merit. 23 C3d at 938, citing federal cases that interpreted the Civil Rights Attorney's Fees Awards Act of 1976 (42 USC §1988). The court particularly noted *White v Beal* (ED Pa 1978) 447 F Supp 788, in which the test applied was whether the plaintiff's fee claim was "insubstantial" and whether the plaintiff's fee and non-fee claims arose from a "common nucleus of operative fact." The "substantiality" referred to was the test used to determine pendent jurisdiction in the federal courts, which requires that the fee claim be not "wholly insubstantial," "obviously frivolous," "plainly unsubstantial," or "obviously without merit." See *Hagans v Levine* (1974) 415 US 528, 536, 39 L Ed 2d 577, 587, 94 S Ct 1372.

Under this rule, if the claim involving the important right is not "insubstantial" and if the decided claim arises from "a common nucleus of fact," the court should award fees. *Woodland Hills II*, 23 C3d at 937. See also *Lucchesi v City of San Jose* (1980) 104 CA3d 323, 163 CR 700.

Courts apply a similar rule when success is achieved by settlement without final adjudication of the parties' rights. In settled cases, some courts require a showing similar to the *Woodland Hills II* standard; others impose no "merits" requirement at all. See §§2.94-2.97. See, *e.g., Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589; *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 1031, 204 CR 913 (discussed in §2.95). Compare these cases with *Balch Enters. v New Haven Unified Sch. Dist.* (1990) 219 CA3d 783, 795, 268 CR 543 (§1021.5 fees denied to developer who successfully challenged school facilities fee because lawsuit won on procedural grounds only and public issues raised by plaintiff lacked merit). Similarly, under California law, an important right may be enforced when a lawsuit has induced the opposing party to take voluntary corrective action, *i.e.,* in "catalyst" cases. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 567, 21 CR3d 331; *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 352, 188 CR 873. In these cases, the trial court must determine that the plaintiff's lawsuit "is not 'frivolous, unreasonable or groundless'… in other words that its result was achieved 'by threat of victory, not by dint of nuisance and threat of expense.'" *Graham*, 34 C4th at 575 (determination trial court must make "not unlike the determination it makes when asked to issue a preliminary injunction, i.e., not a final decision on the merits but a determination at a minimum that 'the questions of law or fact are grave and difficult'"). See §2.111-2.117..

**CAUTION:** A defendant's voluntary corrective action is no longer a basis for awarding attorney fees under federal prevailing party statutes. For discussion, see §§2.115-2.117.

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### §3.44 (5) Fees May Be Denied if Success Is Too Limited

When the party achieves only minimal success, courts occasionally have denied fees on the basis that the lawsuit did not enforce an important right. See, *e.g., Schmier v Supreme Court* (2002) 96 CA4th 873, 117 CR2d 497; *Balch Enters. v New Haven Unified Sch. Dist.* (1990) 219 CA3d 783, 795, 268 CR 543 (plaintiff prevailed on technicality); *Miller v California Comm'n on Status of Women* (1985) 176 CA3d 454, 222 CR 225 (civil rights claim was without merit); *Grimsley v Board of Supervisors* (1985) 169 CA3d 960, 213 CR 108 (right involved was not important even though it served to alert county to procedural necessity). See also *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Mkts., Inc.* (2005) 127 CA4th 387, 25 CR3d 514 (objector to class action settlement did not vindicate important right by preventing settlement, although he might have been entitled to fees under common fund doctrine).

But compare those cases with *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 246, 261 CR 520, which reversed a denial of fees to plaintiffs who successfully challenged the county's involvement with a discriminatory men's group, even though plaintiffs had failed to achieve their primary objective, and *Bowman v City of Berkeley* (2005) 131 CA4th 173, 178, 31 CR3d 447, which distinguished *Miller v California Comm'n on Status of Women, supra,* and held that a substantial benefit occurred when an appellate ruling required greater notice for approval of a housing project even though the project was later approved.

Generally speaking, any lack of success should be reflected in either a finding that the litigation did not confer a significant public benefit (see §§3.50-3.60), or in the determination of the amount of fees to be awarded (see §9.49).

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### (6) Types of Rights Found Important

### §3.45 (a) Rights of Constitutional Dimension

The "determination that the public policy vindicated is one of constitutional stature… establishes the first of the three elements requisite to the award (*i.e.,* the relative societal importance of the public policy vindicated)." *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 46 n18, 141 CR 315. Although *Serrano III* applied the equitable private attorney general doctrine, on which CCP §1021.5 was based, the court subsequently adopted the same language in a §1021.5 case, *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 318, 193 CR 900.

In *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569, the court found that "clarifying the extent of the Governor's veto power and emphasizing the inviolability by the Legislature of the one-subject rule" involved the enforcement of important rights. In *In re Adoption of Joshua S.* (2008) 42 C4th 945, 958, 70 CR3d 372, the court cited *Harbor* with approval, stating that "§1021.5 award[s] can involve rights or benefits that are somewhat intangible, such as clarifying important constitutional principles."

Other cases holding that the vindication of constitutional rights constitutes litigation enforcing "important rights affecting the public interest" include:

- *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 167, 188 CR 104 ("we have no doubt that the right to be free from the deprivation of private property interests in an arbitrary manner may rise to the level of an 'important right affecting the public interest'").
- *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 531, 96 CR3d 90 (enforcing public's constitutional right to open government).
- *City of Los Angeles v 2000 Jeep Cherokee* (2008) 159 CA4th 1272, 1279, 72 CR3d 252 (establishing that city's automobile forfeiture provision preempted by state law).
- *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 878, 71 CR3d 642 (establishing that tax on out-of-state businesses unconstitutional).
- *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 54 CR3d 724 (establishing that arbitration clause deprived defendant of constitutional right to jury trial).
- *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707 (enforcing ability to obtain stay vindicated constitutional right to approve or reject legislation by referendum).
- *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 623, 33 CR3d 817 (enforcing electorate's constitutional right to vote on referendum).
- *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 100 CR2d 491 (enforcing state employees' right of privacy).
- *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 36 CR2d 456 (enjoining city's attempt to enforce unconstitutional ordinance restricting distribution of certain written materials).
- *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 171, 17 CR2d 510 (enforcing patrons' constitutional right to privacy).
- *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 245, 261 CR 520 (enforcing constitutional rights of equal protection and freedom from government involvement in invidious discrimination).
- *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265 (action challenging initiative limiting campaign expenditures vindicated fundamental constitutional rights).
- *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1216 n4, 217 CR 125 (enforcing laws that express legislative intent to implement and extend state constitutional right (in this case, access to navigable waters) vindicates important right).
- *Slayton v Pomona Unified Sch. Dist.* (1984) 161 CA3d 538, 551, 207 CR 705 (enforcing both constitutional and statutory rights that afforded students and parents fair disciplinary proceedings).
- *Schmid v Lovette* (1984) 154 CA3d 466, 477, 201 CR 424 (plaintiff's successful challenge to loyalty oath

requirement vindicated important right).

- *Daniels v McKinney* (1983) 146 CA3d 42, 50, 193 CR 842 (establishing constitutional exercise privileges for county jail inmates).

Some constitutional rights might be considered too "unimportant" to qualify for a fee award, but such holdings are rare. See *Bruno v Bell* (1979) 91 CA3d 776, 786, 154 CR 435 (court denied fees because, among other things, constitutional right (of having highway property rental income remain in state highway fund) was neither important nor necessarily in public's interest). When the outcome of the case does not clearly vindicate or enforce a constitutional right, such as free speech, the court is justified in denying an attorney fee award. *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 46 CR2d 667 (defendant's defense of action had no impact on his lawful activities, and therefore did not enforce an important right).

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.46 (b) Rights Based on State Statutes

### §3.46 (b) Rights Based on State Statutes

Code of Civil Procedure §1021.5 fees may be awarded when a litigant has successfully vindicated an important statutory right as long as the other criteria mentioned in §3.37 are satisfied. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503. Thus, for example, in *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 186 CR 589, the court held that plaintiffs had vindicated legislative intent by achieving a diversion of transportation funds from roads and highways to public transit systems, as the legislature required in the Transportation Development Act (Govt C §§29530-29536), and thus had furthered fundamental legislative goals. 32 C3d at 684.

The statutory rights found "important" under §1021.5 include:

**Police officers' rights.** In *Baggett v Gates* (1982) 32 C3d 128, 143, 185 CR 232, discussed in §3.58, the court held that the procedural rights and protections stated in the Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313) were matters of statewide concern, and thus plaintiffs' actions vindicating those rights were sufficiently important to justify an attorney fee award. *Baggett* spawned a long line of cases to similar effect. See *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 61 CR3d 295; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 130 CR2d 512; *Aguilar v Johnson* (1988) 202 CA3d 241, 247 CR 909; *Mounger v Gates* (1987) 193 CA3d 1248, 1258, 239 CR 18; *Henneberque v City of Culver City* (1985) 172 CA3d 837, 218 CR 704.

**Employee/labor rights.** In *People ex rel Seal Beach Police Officers Ass'n v City of Seal Beach* (1984) 36 C3d 591, 205 CR 794, the court implicitly found that public employees' rights under the Meyers-Milias-Brown Act (Govt C §§3500-3511) are important rights under CCP §1021.5. Other cases also found employee rights important. See, *e.g., Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1098, 69 CR3d 184 (right to prevailing wages under Lab C §§1720-1861 is important right); *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 64 CR3d 327 (rights under Lab C §2802 are important rights). See also *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466 (rights under Pen C §2717.8 and Lab C §§1197, 3351(e)); *Herr v Nestle, Inc.* (2003) 109 CA4th 779, 135 CR2d 477 (age discrimination action brought under Bus & P C §17200 and other statutes); *Giles v Horn* (2002) 100 CA4th 206, 242, 123 CR2d 735 (action challenging county's contracting out of certain labor, in violation of state law and county charter; matter remanded for determination of whether plaintiffs entitled to fees under CCP §1021.5). But see *Roybal v Governing Bd. of the Salinas City Elementary Sch. Dist.* (2008) 159 CA4th 1143, 1148, 72 CR3d 146.

**Consumer rights.** In *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1418, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81, the court held that a class action to enforce CC §1671(d)'s restrictions on liquidated damages "is appropriately characterized as a consumer protection action" and that such actions "have long been judicially recognized to be vital to the public interest." See also *Colgan v Leatherman Tool Group, Inc.* (2006) 135 CA4th 663, 703, 38 CR3d 36 (enforcement of California consumer protection laws an important right affecting public interest); *Krumme v Mercury Ins. Co.* (2004) 123 CA4th 924, 20 CR3d 485 (Bus & P C §17200 action challenging defendant's placement of insurance through brokers who were not appointed agents); *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 954, 83 CR2d 89 (unfair competition action under Bus & P C §17200 challenging workers' compensation fund's case reserve and claims handling policies and practices); *Consumers Union, Inc. v Alta-Dena Certified Dairy* (1992) 4 CA4th 963, 977, 6 CR2d 193 (Bus & P C §§17200 and 17500 action challenging milk labeling practices).

**Actions to recover public benefits.** In *Saleeby v State Bar* (1985) 39 C3d 547, 216 CR 367, the court held that the action vindicated "important rights" by securing fair and adequate procedures for making claims under the State Bar's Client Security Fund. See also *County of San Diego v Lamb* (1998) 63 CA4th 845, 73 CR2d 912 (enforcing proper interpretation of Welf & I C §11350 to establish who must reimburse county for amounts paid to dependent child); *County of Orange v Carl D.* (1999) 76 CA4th 429, 90 CR2d 440 (same); *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 86 CR2d 575 (enforcing rights under state's program for indemnification of crime victims (decided under former Govt C §§13950-13969.5; now see Govt C §§13950-13966)).

**Access to government.** See, *e.g., Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 530, 96 CR3d

90 (action under Corp C §6334 seeking documents used to conduct search for public corporation CEO); *Cruz v Superior Court* (2004) 120 CA4th 175, 14 CR3d 917 (original writ challenging trial court's fee waiver practices); *Ligon v State Personnel Bd.* (1981) 123 CA3d 583, 592, 176 CR 717 (action invalidating respondent's use of policy memorandum because it had not been promulgated in compliance with Administrative Procedure Act (Govt C §§11370-11529)).

**Election law rights.** See, *e.g., Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Hull v Rossi* (1993) 13 CA4th 1763, 17 CR2d 457; *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707 (vindication of stay provisions in Elec C §9241). See also *In re Adoption of Joshua S.* (2008) 42 C4th 945, 957 n4, 70 CR3d 372 (discussing, without deciding, whether *Hammond* is distinguishable from *Joshua S.* because "election law litigation inherently implicates public rights").

**Environmental and land use actions.** See, *e.g., Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 253 CR 426; *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 96 CR3d 362; *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 67 CR3d 228; *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 30 CR3d 202; *Bowman v City of Berkeley* (2005) 131 CA4th 173, 177, 31 CR3d 447 (fair hearing rights in planning approval process are "important rights" supporting fee award); *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 94 CR2d 205; *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 71 CR2d 1; *Hewlett v Squaw Valley Ski Corp.* (1997) 54 CA4th 499, 543, 63 CR2d 118 (awarding fees when forestry practices were unfair competition under Bus & P C §17200, cited in *Stop Youth Addiction, Inc. v Lucky Stores, Inc.* (1998) 17 C4th 553, 576, 71 CR2d 731); *Sierra Club v Contra Costa County* (1992) 10 CA4th 1212, 1224, 13 CR2d 182; *Beach Colony II, Ltd. v California Coastal Comm'n* (1985) 166 CA3d 106, 111, 212 CR 485 (precedent-setting decision under California Coastal Act (Pub Res C §§30001-30900) involved important right); *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 202 CR 423 (rejecting county's argument that, because it had not "totally disregarded" CEQA requirements, plaintiffs had not vindicated important right); *Schwartz v City of Rosemead* (1984) 155 CA3d 547, 202 CR 400 (strong state policy expressed in CEQA is important right); *Rich v City of Benicia* (1979) 98 CA3d 428, 159 CR 473; *City of Carmel-by-the-Sea v U.S. Dep't of Transp.* (9th Cir 1997) 123 F3d 1142, 1168 (remanding issue of whether plaintiffs entitled to fees under CCP §1021.5 and other statutes). See also *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 52 CR3d 1 (action to enforce county's procedural rights under Williamson Act (Govt C §§51200-51207)).

**Additional authorities:** *Punsly v Ho* (2003) 105 CA4th 102, 112 n4, 129 CR2d 89 (family law rights may qualify, citing *Lamb, supra*); But see *In re Adoption of Joshua S.* (2008) 42 C4th 945, 952, 70 CR3d 372, discussed in §3.42.

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### §3.47 (c) Rights Based on Federal Statutes

Code of Civil Procedure §1021.5 authorizes fee awards in actions that result in the enforcement of federal statutory rights. In *Maria P. v Riles* (1987) 43 C3d 1281, 1293, 240 CR 872, the court held that the plaintiffs had vindicated important rights by protecting the confidentiality of school records and the right of schoolchildren to equal educational opportunity as provided under federal law. In *AFL-CIO v Employment Dev. Dep't* (1979) 88 CA3d 811, 822, 152 CR 193, the court awarded fees under §1021.5 in an action upholding unemployed workers' rights to receive prompt payments under the Social Security Act (42 USC §§301-1397mm). See also *Camp v Swoap* (1979) 94 CA3d 733, 156 CR 600 (court invalidated state AFDC regulations as incompatible with federal Social Security Act and governing federal regulations; case remanded for reconsideration of §1021.5 issue); *Land v Anderson* (1997) 55 CA4th 69, 63 CR2d 717 (fees awarded under §1021.5 and Welf & I C §10962 for enforcing rights under federal foster care statutes).

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### §3.48 (d) Rights Based on Common Law

The fee authorization encompassed by CCP §1021.5 extends to common law rights: It applies in any action that enforces an important right "regardless of its source—constitutional, statutory or *other*." *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 925, 154 CR 503 (emphasis added). Examples include: *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 833, 93 CR2d 193 (fees awarded for enforcing common-law rights to easement for public trail); *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, *8 (common law negligence action challenging lack of warnings for use of Tasers). See also *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 954, 83 CR2d 89 (challenge to fund's case reserve and claims handling policies and practices based on fraud and Bus & P C §17200; unapportioned fee award for entire action affirmed).

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### §3.49 (e) Rights Based on Administrative Decisions

A government entity's obligation to comply with an administrative decision can be an "important right" in determining fee awards under the private attorney general doctrine. In *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 12, 232 CR 697, the appellate court awarded fees to a police officers' association that had succeeded in invalidating a $5 parking charge imposed on city employees who used a city-leased lot. The appellate court rejected the trial court's view that the underlying right involved was "too narrow" and did not justify an award of fees under CCP §1021.5, holding that the issue was not simply the $5 charge, but the city's obligation to comply with the decisions of its own Employee Relations Board, which "implicate[d] the enforceability of decisions made by a wide variety of municipal agencies, commissions and boards." See also *Simpson v Unemployment Ins. Compensation Appeals Bd.* (1986) 187 CA3d 342, 354, 231 CR 690 (§1021.5 fee award based on administrative decision overturned because ruling on merits reversed); *Gunn v Employment Dev. Dep't* (1979) 94 CA3d 658, 156 CR 584 (fees awarded for action against administrative agency that upheld plaintiff's right of privacy in refusing to answer certain agency questions).

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### §3.50 c. The Significant Benefit Factor

The second general requirement for an award of attorney fees under CCP §1021.5 is that the lawsuit confer a significant benefit, either pecuniary or nonpecuniary, on the general public or a large class of persons. See *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 939, 154 CR 503.

Unlike the "substantial benefit" equitable doctrine discussed in chap 5, the "significant benefit" under the private attorney general doctrine need not be tangible or concrete but may be recognized from the effectuation of a fundamental policy. *Woodland Hills II, supra; Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 42, 141 CR 315. See §3.53.

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## §3.51 (1) Standards for Determining Whether a Significant Benefit Has Been Conferred on the General Public or a Large Class of Persons

The trial court determines the significance of the benefit, as well as the size of the class receiving the benefit, "from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 939, 154 CR 503. Using the trial court's "traditional equitable discretion," this realistic assessment must be decided "from a practical perspective" on the facts of each case. *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 103, 228 CR 847; *Lucchesi v City of San Jose* (1980) 104 CA3d 323, 336, 163 CR 700.

Like the important right factor, courts have not narrowly construed the substantial benefit factor. See, *e.g., RiverWatch v County of San Diego* (2009) 175 CA4th 768, 781, 96 CR3d 362 ("the extent of the public benefit need not be great to justify an attorney fee award" under CCP §1021.5).

The benefited class need not be specifically identified. See *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 876 n19, 71 CR3d 642 (CCP §1021.5 does not require that class of persons benefited be "readily ascertainable"). Nor is it limited to the parties. 159 CA4th at 876 (action need not result in significant benefits to plaintiffs, but "to many *persons*, whether plaintiffs or not").

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### §3.52 (a) Benefits Obtained Need Not Be Actual and Concrete

The significant benefits that justify a fee award under CCP §1021.5 may be doctrinal and conceptual in nature; counsel need not show that actual and concrete benefits were conferred. See *Braude v Automobile Club* (1986) 178 CA3d 994, 1013, 223 CR 914. See also *In re Adoption of Joshua S.* (2008) 42 C4th 945, 958, 70 CR3d 372 ("§1021.5 award[s] can involve rights or benefits that are somewhat intangible, such as clarifying important constitutional principles").

In *Braude,* the trial court found that although the plaintiff's lawsuit had led to significant reforms in the elections procedures for the nonprofit Automobile Club, as well as for all nonprofit corporations throughout the state, the lawsuit had not conferred an important right or significant benefit on a large class of persons because the members and directors of the defendant Automobile Club had been indifferent to the entire lawsuit. The appellate court reversed, holding that there was no requirement that the members of the Automobile Club actually receive any concrete benefit from the lawsuit. Rather, because the benefits were doctrinal or conceptual in nature, it was irrelevant whether the plaintiffs themselves actually received any tangible benefit from the lawsuit. 178 CA3d at 1013.

Similarly, in *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569, the court held that petitioners had conferred a significant benefit on the general public "in clarifying the extent of the Governor's veto power and emphasizing the inviolability by the Legislature of the one-subject rule," even though the petitioners themselves obtained no benefit from the decision.

In *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265, the court affirmed a fee award for an action challenging a Berkeley initiative limiting campaign expenditures that was not decided on the merits until long after the initial "campaign" to which the plaintiffs had sought to make contributions was over. Nonetheless, the court held that the plaintiffs had "vindicated fundamental constitutional rights that will now be directly enjoyed by many in future Berkeley elections and indirectly enjoyed by society as a whole." 181 CA3d at 229.

In *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 96 CR3d 362, an environmental challenge to a proposed landfill project, the defendant complained that the lawsuit had done nothing more than assert defects in the environmental review process that were "unlikely to change the… project." The court of appeal rejected that argument, holding that the defects involved "important environmental consideration[s]," that careful review and analysis would benefit public agencies and members of the public living near the project, and that members of the public would benefit from being permitted to provide "additional input on remand." 175 CA4th at 782.

See also *In re Adoption of Joshua S.* (2008) 42 C4th 945, 957 n4, 70 CR3d 372 (noting that "election law litigation inherently implicates public rights"); *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 532, 96 CR3d 90 (reversing trial court's determination that action seeking documents used to conduct search for public corporation CEO did not confer significant benefit, following *Braude*); *Bowman v City of Berkeley* (2005) 131 CA4th 173, 179, 31 CR3d 447 (substantial benefit found when appellate ruling required greater notice for approval of housing project, even though project approved).

In contrast, the court in *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 1570, 46 CR2d 667, denied the defendant attorney fees because the defense of the action only "marginally involved" First Amendment issues, and the "equivocal results" obtained did not benefit anyone other than the defendant. See also *Baxter v Salutary Spotsclubs, Inc.* (2004) 122 CA4th 941, 19 CR3d 317; *Schmier v Supreme Court* (2002) 96 CA4th 873, 117 CR2d 497; *Ryan v California Interscholastic Fed'n* (2001) 94 CA4th 1033, 114 CR2d 787.

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### §3.53 (b) Substantial Benefit May Be Implied by Implementation of Fundamental Legislative Policy

A substantial benefit may be found when a lawsuit leads to implementation of a fundamental legislative policy. For example, in *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 684, 186 CR 589, the supreme court held that the settlement achieved by plaintiffs, which diverted transportation funds from roads and highways to public transit needs, "vindicated legislative intent and thus benefited not only those who are transit-dependent in Butte County, but the citizenry as a whole." For further discussion of *Folsom,* see §§2.86, 2.95, 3.72.

In *Maria P. v Riles* (1987) 43 C3d 1281, 1293, 240 CR 872, the court found that plaintiffs had conferred a significant benefit on themselves and similarly situated schoolchildren by enforcing their right to confidentiality of school records mandated by federal law, as well as their constitutional right to equal educational opportunities.

In *Saleeby v State Bar* (1985) 39 C3d 547, 574, 216 CR 367, the petitioner's original writ secured significant reforms in the State Bar's administration of its Client Security Fund. The court found that, although no applicant would receive a specific sum as a result of the decision, a large class of persons would benefit by the establishment of fair procedures under the fund. The court concluded that these benefits would affect "a significant number of persons interested in a significant sum of money," noting that 247 claims had been filed in 1983 and $841,345 paid to fund applicants in 1984.

This rule has frequently been invoked in environmental actions, many of which award fees for requiring public entities to consider important environmental objectives, regardless of any "on the ground" changes. See, *e.g., Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 253 CR 426; *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 782, 96 CR3d 362; and other cases cited in §3.46. See also *Coalition for Los Angeles County Planning in the Public Interest v Board. of Supervisors* (1977) 76 CA3d 241, 248 n7, 142 CR 766.

**Additional authorities:** *People ex rel Seal Beach Police Officers Ass'n v City of Seal Beach* (1984) 36 C3d 591, 205 CR 794; *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 531, 96 CR3d 90; *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707; *Colgan v Leatherman Tool Group, Inc.* (2006) 135 CA4th 663, 703, 38 CR3d 36 (plaintiff's lawsuit caused defendant to change advertising practices and enjoined misleading representations); *Bowman v City of Berkeley* (2005) 131 CA4th 173, 179, 31 CR3d 447; *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1305, 255 CR 704 (avoidance of $7,448,320 in unlawful levies constituted significant benefit to large class of persons); *Compton Community College Fed'n of Teachers v Compton Community College Dist.* (1985) 165 CA3d 82, 97, 211 CR 231. But see *Christward Ministry v County of San Diego* (1993) 13 CA4th 31, 50, 16 CR2d 435.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.54 (c) Significance of Benefit May Depend on Importance of Right Vindicated

### §3.54 (c) Significance of Benefit May Depend on Importance of Right Vindicated

In *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503, the court suggested that whether the benefit is determined to be significant may depend on the importance of the right vindicated: The more important the right vindicated, the more the court will presume that a large number of persons have been affected, and vice versa. See §3.38.

That approach was specifically adopted in *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900, which held that, when an action vindicates fundamental constitutional principles of great magnitude, such as freedom of speech, the court presumes that the general public benefits even if only a few individuals are directly involved.

In *Press*, successful plaintiffs were proponents of an initiative measure to secure their rights to gather signatures in front of the defendant's supermarket. *Press* held that, even though such rights are individual, their enforcement benefits society as a whole because only by protecting each individual's right will "society's general interests in these rights be secured." 34 C3d at 319. The court distinguished *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 188 CR 104, which held that a beachfront property owners' action to remove a public access condition from a permit allowing them to build a seawall did not confer a "significant benefit" on a large class, on two grounds: (1) although constitutional principles were involved in *Pacific Legal Found.* as well, the private property interests in that case were not as fundamental as the equal protection rights vindicated in *Serrano v Priest* (1976) 18 C3d 728, 135 CR 345, or the free speech rights vindicated in *Press* (34 C3d at 320 n7), and (2) only the plaintiffs' personal pecuniary interests were advanced by the lawsuit in *Pacific Legal Found.,* while the plaintiffs in *Press* had no personal pecuniary interest and, by enforcing their constitutional rights, created a benefit for society as a whole.

Alternatively, *Press* held that a "large class of persons" in fact benefited because the plaintiffs demonstrated that the injunction they obtained, though it applied to only one supermarket location, enabled them to gain access to additional shopping centers throughout the state. 34 C3d at 320. The court also held that, even if only one supermarket location were at issue, the 3000 persons who signed plaintiffs' petition, as well as the other individuals who were educated about the initiative or were encouraged to support it, constituted a large class of persons. Compare *Press* with *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 1570, 46 CR2d 667 (fees denied because defense of action only "marginally involved" First Amendment issues and "equivocal results" obtained did not benefit anyone other than defendant), and *Concerned Citizens of La Habra v City of La Habra* (2005) 131 CA4th 329, 333, 31 CR3d 599 (affirming trial court's findings that significant benefit not shown because CEQA violation only a "tiny blemish").

In *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424, the court relied expressly on *Press* in holding that a substantial benefit had been conferred on a large class of persons by plaintiff's action to enjoin a school district from requiring a loyalty oath. Even though only one person challenged the loyalty oath, the court found that, because the defendant school district had stated its intent to continue enforcing the requirement in the future, a large class of persons benefited. 154 CA3d at 478.

*Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1468, 240 CR 1, reaffirmed that the enforcement of fundamental constitutional rights per se confers a significant benefit on society as a whole: "Since the case litigated the constitutional right to the accommodation of religious beliefs in the employment context, it conferred a benefit on the general public." Note that the court of appeal actually decided *Best* on statutory grounds, but found alternatively that it would have found a constitutional violation had statutory grounds not existed and that the constitutional and statutory claims were based on the same nucleus of operative facts. 193 CA3d at 1464.

*Sokolow v County of San Mateo* (1989) 213 CA3d 231, 246, 261 CR 520, reaffirmed the same principle. The court held that litigation enforcing fundamental rights to equal protection and freedom from sex discrimination "necessarily confers a 'significant benefit' on society as a whole, as well as on the direct victims of sexual discrimination." The court recognized that the plaintiff's action would "deter other governmental entities from undertaking similar activities." See also *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 782, 96 CR3d 362 (action involved "important environmental consideration[s]"); *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 532, 96 CR3d 90

(obtaining access to documents used to conduct search for public corporation CEO achieved "fundamental legislative goal"); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1097, 69 CR3d 184; *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 10, 54 CR3d 724; *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 36 CR2d 456.

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### §3.55 (d) No Requirement That Action Create New Law

An action need not create new law to satisfy the substantial benefit requirement. See §3.41. In *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900, the supreme court rejected the defendant's contention that an action that merely enforces a previous landmark decision does not confer a significant benefit on the general public or a large class of persons. The court held that the enforcement of well-defined, existing obligations had consistently been the basis for an award of fees and that the scope of CCP §1021.5 could not be so narrowly construed, because rights secured in landmark cases would be meaningless without subsequent lawsuits to enforce them. 34 C3d at 318.

Similarly, in *City of Los Angeles v 2000 Jeep Cherokee* (2008) 159 CA4th 1272, 1280, 72 CR3d 252, the court held that the defendant had conferred a significant benefit by establishing that the city's automobile forfeiture provision was preempted by state law, even though the definitive appellate ruling occurred in a different case. See also *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 782, 96 CR3d 362; *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 422, 61 CR3d 295; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 335, 130 CR2d 512; *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 241 CR 239; *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846; *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424.

Likewise, it is no defense to a fee award that the relief obtained was based on relief others obtained in a coordinated lawsuit. *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 318, 73 CR3d 842.

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### §3.56 (2) Court May Look Outside Formal Record

In making a "realistic assessment" of the impact of the action, courts frequently go outside the formal record. For example, in *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697, the court held that an action that enforced a local Employee Relations Board decision requiring the city to "meet and confer" with employee representatives before imposing a $5 parking fee on city employees using a city-leased parking lot benefited a large class of persons because it affected all city employees whose rights are established by similar boards. The court also noted that deciding whether a large class of persons benefits by a particular decision is often a "value judgment" that appellate courts are "well situated to make." 188 CA3d at 9.

In some cases, however, the courts will decline to make such an assessment in the absence of evidence that others will benefit. See, *e.g., Concerned Citizens of La Habra v City of La Habra* (2005) 131 CA4th 329, 333, 31 CR3d 599; *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1170, 74 CR2d 510; *Flannery v CHP* (1998) 61 CA4th 629, 71 CR2d 632; *Angelheart v City of Burbank* (1991) 232 CA3d 460, 285 CR 463.

**Additional authorities:** *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 320, 193 CR 900, discussed in §3.54; *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, *11 (common law negligence action challenging lack of warnings for use of Tasers conferred significant benefit because verdict caused other law enforcement agencies to change policies, and because it either will cause manufacturer to issue warnings or "specter" of liability will be conceptual benefit to public); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 876, 71 CR3d 642 (successful tax refund action provided precedent by which other businesses could claim similar refunds and led FTB to establish refund process that could result in $150 million for 3000 businesses); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1097, 69 CR3d 184 (right to proper interpretation of prevailing wage law conferred significant benefit on large class of persons even though only seven workers directly affected because precedent "likely to affect other projects and other trades"); *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 654, 52 CR3d 1 (action to enforce county's procedural rights under Williamson Act conferred significant benefit, both for county residents and because of impact on future state agency decisions); *Protect Our Water v County of Merced* (2005) 130 CA4th 488, 495, 30 CR3d 202 (fee award based on directive that agency prepare adequate administrative record for CEQA actions); *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1362, 100 CR2d 491 (action enjoining Caltrans's off-duty drug testing policy benefited all state employees who might be subject to drug testing); *Hull v Rossi* (1993) 13 CA4th 1763, 1769, 17 CR2d 457 (even though changes in ballot argument were minor, defendants conferred significant benefit by discouraging ballot challenges aimed at chilling political participation); *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (individual age discrimination actions confer significant benefit because defendant and other agencies deterred from similar discriminatory practices in future); *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 246, 261 CR 520 (recognizing that plaintiff's action would "deter other governmental entities from undertaking similar activities"); *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 867, 223 CR 846.

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### §3.57 (3) Evidence of Number of Persons Affected Useful, But Not Required

Although evidence of the number of persons affected may be useful when the benefits are primarily monetary, "numbers seldom tell the full story." *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 9, 232 CR 697. "[E]vidence of the size of the population benefited by a private suit is not always required." *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 171, 17 CR2d 510. In *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 71 CR3d 642, an individual tax refund action based on the unconstitutionality of a state tax, the court noted that CCP §1021.5 does not require that the class of persons benefited be "readily ascertainable." 159 CA4th at 876 n19. In *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1362, 100 CR2d 491, the court held that an action enjoining Caltrans's off-duty drug testing policy benefited all employees in the state who might be subject to drug testing.

**NOTE:** Abuse of discretion is the standard of review for trial court rulings on the significance of the benefit. *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 158, 67 CR3d 228. Legal issues are reviewed de novo, but factual determinations must be affirmed "absent a showing that there is no reasonable basis in the record for the award." *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 776, 96 CR3d 362.

**Additional authorities:** *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 320, 193 CR 900, discussed in §3.54; *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 532, 96 CR3d 90 (reversing trial court's determination that action seeking documents used to conduct search for public corporation CEO did not confer significant benefit); *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, *11, discussed in §3.45; *City of Los Angeles v 2000 Jeep Cherokee* (2008) 159 CA4th 1272, 1280, 72 CR3d 252 (action establishing that city's automobile forfeiture provision preempted by state law conferred significant benefit, considering impact on all persons (*e.g.,* co-owners, lienholders) affected by forfeiture); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1097, 69 CR3d 184 (right to proper interpretation of prevailing wage law conferred significant benefit on large class of persons even though only seven workers directly affected because precedent "likely to affect other projects and other trades"); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 10, 54 CR3d 724 (defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause deprived him of constitutional right to jury trial conferred significant benefit because of constitutional nature of right enforced and because bank would be deterred from enforcing arbitration clause as to others); *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 835, 93 CR2d 193 (lawsuit enforcing common-law easement rights to segment of public trail conferred significant benefit because "a chain is only as strong as its weakest link" and lawsuit would have "strong deterrent effect" on other landowners who might want to block other segments of trail); *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 954, 83 CR2d 89 (injunction against workers' compensation carrier affecting "some 250,000 employers"); *Slayton v Pomona Unified Sch. Dist.* (1984) 161 CA3d 538, 207 CR 705 (court presumed that lawsuit benefited all future parents and children at school). But see *Suter v City of Lafayette* (1997) 57 CA4th 1109, 1136, 67 CR2d 420 (whether partially successful action challenging local gun control ordinance conferred significant benefit on large class of persons was factual issue to be determined by trial court).

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### §3.58 (4) Class Action Not Necessary

A class or representative action is *not* necessary to establish a significant benefit. For example, in *Baggett v Gates* (1982) 32 C3d 128, 185 CR 232, the court held that plaintiffs' litigation had conferred a significant benefit on the general public because enforcement of the Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313) should help maintain stable relations between police officers and their employers and thus ensure effective law enforcement, which would benefit the entire citizenry of the state. Note that the petitioners in *Baggett* sought only individual writs for the two officers affected; the lawsuit was not brought as a class action or any other type of representative action. *Baggett* was followed in *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 421, 61 CR3d 295; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 130 CR2d 512; *Aguilar v Johnson* (1988) 202 CA3d 241, 247 CR 909; *Mounger v Gates* (1987) 193 CA3d 1248, 1258, 239 CR 18; *Henneberque v City of Culver City* (1985) 172 CA3d 837, 218 CR 704.

Likewise, in *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 71 CR3d 642, an individual tax refund action based on the unconstitutionality of a state tax, the court noted that even though the case had not been brought as a class action, it would allow other taxpayers to claim refunds, thereby establishing a significant benefit. 159 CA4th at 876.

**Additional authorities:** *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 578, 21 CR3d 331 (significant benefit conferred in putative class action that was dismissed as moot before determination of class certification); *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, *11 (individual damages action based on Taser manufacturer's failure to warn of dangers); *City of Los Angeles v 2000 Jeep Cherokee* (2008) 159 CA4th 1272, 1280, 72 CR3d 252 (individual defense to forfeiture action which established that city's automobile forfeiture provision was preempted by state law); *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 16, 64 CR3d 327 (action that recovered damages for 209 FedEx drivers satisfied significant benefit factor); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 10, 54 CR3d 724 (successful individual challenge to bank's arbitration clause conferred significant benefit even if not precedential because bank would be deterred from enforcing arbitration clause against others); *Bowman v City of Berkeley* (2005) 131 CA4th 173, 178, 31 CR3d 447; *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 86 CR2d 575 (individual writ of mandate requiring agency administering program for indemnification of crime victims (decided under former Govt C §§13950-13969.5; now see Govt C §§13950-13966)) to subpoena full crime reports); *County of San Diego v Lamb* (1998) 63 CA4th 845, 73 CR2d 912 (fees awarded to prevailing defendant in action for reimbursement of welfare payments made to daughter); *California Common Cause v Duffy* (1987) 200 CA3d 730, 749, 246 CR 285 (action halting sheriff's unlawful involvement in judicial retention election benefited entire public, not only opponents of cause sheriff supported; fact that sheriff's position won at polls irrelevant because need for private enforcement often greatest when minority positions at issue); *Washburn v City of Berkeley* (1987) 195 CA3d 578, 585, 240 CR 784 (lawsuit striking portions of ballot argument as false and misleading was of "obvious" benefit to public, given importance of ballot arguments in electoral process). See also *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646 (same). Compare those cases with *Simpson v Unemployment Ins. Compensation Appeals Bd.* (1986) 187 CA3d 342, 354, 231 CR 690 (individual writ of mandate from denial of disability benefits affected large class of persons, but fee award reversed because merits reversed).

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### §3.59 (5) Benefits May Be Conferred by Appellate Opinion

An action that enforces only the party's own interests will not qualify for fees under CCP §1021.5. See, *e.g., Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 167, 188 CR 104; *Roybal v Governing Bd. of the Salinas City Elementary Sch. Dist.* (2008) 159 CA4th 1143, 1149, 72 CR3d 146; *Planned Parenthood v City of Santa Maria* (1993) 16 CA4th 685, 20 CR2d 391; *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 1569, 46 CR2d 667. Compare *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 100 CR2d 491 (union joined with individual to challenge state agency's off-duty drug testing policy), and *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (individual age discrimination actions confer significant benefit because defendant and other agencies deterred from similar discriminatory practices in future), with *Flannery v CHP* (1998) 61 CA4th 629, 71 CR2d 632 (record did not support finding that individual discrimination action conferred significant benefit on others, disagreeing with *Crommie*), and *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1170, 74 CR2d 510 (following *Flannery*). See also *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 533, 96 CR3d 90 (rejecting argument that action seeking documents used to conduct search for public corporation CEO benefited only plaintiffs). Determining whether interests are "personal" or "public" is not always predictable. See §§3.67-3.78.

The interests and conduct of the losing party may also be relevant. See *In re Adoption of Joshua S.* (2008) 42 C4th 945, 956, 70 CR3d 372 (fees inappropriate against "individual who has done nothing to curtail a public right other than raise an issue in the context of private litigation that results in important legal precedent").

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### §3.60 d. Necessity and Financial Burden of Private Enforcement Requirement

To award attorney fees under CCP §1021.5, the court must also determine that the necessity and burden of private enforcement make a fee award "appropriate." As this requirement has evolved, it raises four general issues when private parties seek fees: (1) whether private, as opposed to public, enforcement was necessary, discussed in §§3.62-3.64; (2) whether the lawsuit was necessary in light of a lawsuit brought by another party, discussed in §3.65; (3) whether a lawsuit was necessary at all, discussed in §3.66; and (4) whether the financial burden of private enforcement warrants a fee award, discussed in §§3.67-3.80.

When public entities seek fees from other public entities, the statute also requires that the entity claiming fees make the same showing: that "the necessity and financial burden of [ ] enforcement… by one public entity against another public entity, are such as to make the award appropriate." CCP §1021.5. See §§3.66-3.80.

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### §3.61 (1) Determining Whether Private, as Opposed to Public, Enforcement Is Necessary

Parties claiming fees under CCP §1021.5 must show the need for private, as opposed to public, enforcement of important statutory rights. When an action is brought against governmental agencies, the need for private enforcement is clear. See, *e.g., Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 941, 154 CR 503.

Private enforcement may also be "necessary," and result in an award of attorney fees, when a private party is forced to defend an action brought by a public entity that raises constitutional issues. For example, in *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 36 CR2d 456, the court awarded fees to a commercial newspaper that had to defend itself against enforcement of an ordinance restricting door-to-door distribution of certain categories of written materials. The court said that the newspapers "had little choice but to bear the cost of vindicating their rights as well as the rights of others whose protected activities are restricted by the terms of the unconstitutional ordinance." 31 CA4th at 44. See also *County of San Luis Obispo v. Abalone Alliance* (1986) 178 CA3d 848, 868, 223 CR 846.

Whether enforcement is "private" or "public" depends on the nature of the parties to the action, not the funding source for their attorneys. In *Daniels v McKinney* (1983) 146 CA3d 42, 50, 193 CR 842, county jail inmates brought an action to obtain a minimum of three hours' exercise per week. The plaintiffs were represented by private attorneys but, on the first day of their hearing, the trial court offered to appoint the public defender to represent them. The plaintiffs declined that offer. After the plaintiffs successfully obtained the minimum exercise requirement they sought, the trial court denied their request for attorney fees on the ground that "private" enforcement was not necessary because the public defender would have represented them without charge. The court of appeal reversed, holding that the trial court had abused its discretion in denying fees. Private enforcement was necessary because no government agency had acted to protect the plaintiffs' rights and they had to act on their own behalf. Thus, even if the public defender had represented the plaintiffs, the court implied that the action would have been "private," not public. 146 CA3d at 52.

See also *People ex rel Brown v Tehama County Bd. of Supervisors* (2007) 149 CA4th 422, 456, 56 CR3d 558 (when California Attorney General's office sues public entity on behalf of "the People," fee award under §1021.5 improper because not acting in capacity of "private attorney general"; other public entities, however, may qualify).

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### §3.62 (a) Exhaustion Not Required

There is no requirement that a private party attempt to obtain public enforcement before filing a lawsuit for which fees will be sought; the private enforcement requirement limits fees only when private enforcement is demonstrably unnecessary. See *Committee to Defend Reprod. Rights v A Free Pregnancy Ctr.* (1991) 229 CA3d 633, 642, 280 CR 329, discussed in §3.62. For example, in *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 240 CR 1, the defendant claimed that because the plaintiff originally filed his discrimination claim with the California Department of Fair Employment and Housing (DFEH), which might have prosecuted it for him, private enforcement was unnecessary. The court rejected that argument, finding no evidence that the DFEH could, or would, have pursued the claim and noting that "as a practical matter, public agencies cannot be expected to take every meritorious case." 193 CA3d at 1468.

In one circumstance, however, a party may be obligated to at least attempt to obtain public representation. In *Schwartz v City of Rosemead* (1984) 155 CA3d 547, 202 CR 400, the court found that the plaintiff's failure to timely serve his pleadings on the California Attorney General, as required by the California Environmental Quality Act and former CCP §389.6 (now see CCP §388), was fatal to his claim that the lawsuit was necessary because timely service might have convinced the Attorney General to carry the burden of the lawsuit. The court held that, although strict compliance with the notice requirement is not always required, the plaintiff did not justify his failure to comply.

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### §3.63 (b) Fees May Be Awarded to Private Parties Who Litigate on Same Side as Public Entity

Private enforcement may be considered "necessary" even when a governmental entity also files suit. For example, in *Hewlett v Squaw Valley Ski Corp.* (1997) 54 CA4th 499, 545, 63 CR2d 118, the court held that private enforcement was necessary because the local officials, who had filed suit, lacked the resources to successfully prosecute the action. In *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 624, 33 CR3d 817, fees were awarded to the real parties in interest because the respondent city took no position on the litigation, and the real parties did all the work to defeat it.

In *Committee to Defend Reprod. Rights v A Free Pregnancy Ctr.* (1991) 229 CA3d 633, 280 CR 329, plaintiffs, without first contacting the district attorney, began their action against a clinic that fraudulently advertised that it was a medical facility offering abortion counseling. The district attorney later filed a similar but not identical action, and the two actions were consolidated for trial. On appeal, the court held that neither the fact that plaintiffs did not first contact the district attorney's office before filing suit nor the fact that the district attorney later filed its own similar lawsuit precluded an award of attorney fees to plaintiffs. Rather, in deciding whether the private party is entitled to fees, the court must determine whether the party: (1) advanced significant facts or legal theories that the court adopted and that did not duplicate those advanced by the public entity; and (2) produced substantial evidence significantly contributing to the judgment and not duplicative of or cumulative to that produced by the public entity. 229 CA3d at 642.

In *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 73 CR3d 842, several environmental organizations and public water agencies sought mandamus relief to require implementation of a water plan designed to protect salmon. The court summarized the *Committee to Defend* test as follows: "If a public entity and a private party prosecute important public interest litigation together—whether in the same action, consolidated actions, or (as here) coordinated actions—and obtain the same success, the right of the private party to an award of attorney fees under §1021.5 depends on whether the private party rendered services that were necessary and significant to achieving that success." 161 CA4th at 314.

The *Committee to Defend* test does not apply, however, if the public entity is awarded fees under CCP §1021.5. Reasoning that the public water agencies were not acting as public attorney generals but as private ones because they had been awarded §1021.5 fees, *State Water Resources* held that the water agencies' willingness to litigate should not deprive the private organizations of fees: "[W]here (as here) a public entity receives fees under §1021.5 for succeeding in important public interest litigation, a private party who succeeded alongside that public entity cannot be denied a similar award of fees simply because the success might have been achieved by the public entity acting alone." 161 CA4th at 317.

The *Committee to Defend* test was applied in *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1348, 39 CR3d 550. In *Lyons*, the court held that even though a parallel prosecution by the district attorney had achieved a stipulated injunction, the trial court had erred in denying fees because the plaintiff had initiated the case, actively sought government intervention, and done the bulk of the investigation, and the government agency would not have taken action without these efforts; the court also noted that the plaintiff had obtained different relief than the governmental agency. 136 CA4th at 1348.

In *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 30 CR2d 581, after applying the two *Committee to Defend* factors, the trial court found that the private party neither offered nonduplicative theories nor produced nonduplicative evidence that contributed significantly to the judgment. The appellate court affirmed and rejected the private party's contention that the trial court should have considered two additional factors, *i.e.,* whether similar results would have been obtained "but for" his contribution, and whether private counsel provided substantial assistance to the state. Not only had the party failed to suggest the individual factors to the trial court, thus waiving them, the "but for" consideration was subsumed within the trial court's determination that the dispositive legal issues in the lawsuit were fully advanced by the state. The court rejected the second factor of "substantial assistance" because it would undercut the "necessary activity" test to make it mere "helpful activity." 25 CA4th at 573. Compare the standard in *Ciani* and *Committee to Defend* with that generally applied in cases in which intervenors seek fees. See §2.28.

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### §3.64 (2) Determining Whether Litigation Is Necessary in Light of Other Private Lawsuit

In *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 87, 24 CR3d 72, the court held that the necessity of private enforcement factor does not involve the relative contributions of private parties: "A party who satisfies the criteria for intervention and who contributes to the success of public interest litigation should be entitled to an award of attorneys' fees on the same terms as any other party." Accordingly, the court rejected a "but for" test for determining necessity. 126 CA4th at 86, citing *Hewlett v Squaw Valley Ski Corp.* (1997) 54 CA4th 499, 545, 63 CR2d 118. Eligibility may not be denied on "an after-the-fact assessment of whether the intervenor's participation was 'necessary' to the successful result achieved." 126 CA4th at 88. The court did recognize, however, that the relative contribution of multiple parties is relevant to the determination of the amount of fees that may be awarded. 126 CA4th at 88. See §9.73.

In *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 314, 73 CR3d 842, the court expanded on *Stewart,* stating the rule as follows: "If two private parties prosecute important public interest litigation together and obtain the same success, neither party's services can be deemed unnecessary simply because the other party would have succeeded without them."

Likewise, in coordinated cases (161 CA4th at 319 n8):

> the trial court must fairly weigh the extent to which the services of [the party claiming fees] contributed to the success achieved in *their* action, not just the success achieved in the coordinated actions as a whole. Moreover, as a guiding principle, the trial court must keep in mind that the success the [party claiming fees] achieved is not to be discounted simply because the [parties in the coordinated suit] achieved a similar success.

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### §3.65 (3) Determining Whether Lawsuit Is Necessary at All

In *Vasquez v State* (2008) 45 C4th 243, 251, 85 CR3d 466, the court rejected the state's argument that the "necessity for private enforcement" element of CCP §1021.5 required a party claiming fees to have made a prelitigation settlement demand in "noncatalyst" cases (*i.e.,* cases resolved by settlement or judicial decree). See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 561, 21 CR3d 331 (imposing requirement in catalyst cases under §1021.5), and *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371 (imposing requirement in catalyst cases under FEHA (Govt C §12965(b)).

While not requiring a prelitigation settlement demand in noncatalyst cases, the court did hold that prelitigation efforts to settle are relevant to whether a lawsuit is "necessary": "[A] court, in exercising its equitable discretion concerning attorney fees under section 1021.5, properly takes into consideration whether the party seeking fees attempted to resolve its dispute before resorting to litigation." 45 C4th at 257.

The crux of the *Vasquez* ruling recognized that courts have to consider many factors (45 C4th at 251):

> [The necessity of private enforcement] language does not expressly or by necessary implication require that the plaintiff have attempted to settle the dispute; it requires, instead, only that the court determine that private enforcement was sufficiently necessary to justify the award. To be sure, failed attempts to settle can help to demonstrate that litigation was necessary, but the absence of settlement attempts does not logically or necessarily demonstrate the contrary. Depending on the circumstances of the case, attempts to settle may have been futile, exigent circumstances may have required immediate resort to judicial process, or prior efforts to call the problem to the defendant's attention—perhaps by other parties or in other proceedings—may have been rebuffed. The language of section 1021.5 is sufficiently flexible to permit courts to consider these and all other relevant circumstances in determining whether private enforcement was sufficiently necessary to justify awarding fees.

See *Vasquez*, 45 C4th at 257 ("Awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance [§1021.5's] objective and encourages lawsuits that are more opportunistic than authentically for the public good" (quoting *Graham*, 34 C4th at 577)); 45 C4th at 258 (defendant's prompt correction of minor errors can indicate lawsuit unnecessary); 45 C4th at 259 n5 ("the claim that settlement efforts would have been futile is logically relevant to a trial court's determination of the question whether private enforcement was sufficiently necessary to justify an award of fees").

See also *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 533, 96 CR3d 90 (noting "there is not a whit of evidence" that defendant would have provided relief if lawsuit not filed).

Other cases have addressed the argument that the lawsuit was not "necessary" to obtain the result achieved. In *City of Sacramento v Drew* (1989) 207 CA3d 1287, 255 CR 704, for example, the court rejected the city's argument that the defendant was not entitled to fees because the trial court would have reached the conclusion it did without the defendant's participation; the court held that the "necessity… of private enforcement [requirement] has to do with the *absence* of a *public* advocate [and] has nothing to do with the 'causal' relationship between the efforts of the private attorney general and his success in the lawsuit." 207 CA3d at 1299.

In *Punsly v Ho* (2003) 105 CA4th 102, 115, 129 CR2d 89, the court found a lawsuit over grandparent rights was necessary, even though the family law statutes encourage mediation. See also *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 657, 52 CR3d 1 (rejecting state's argument that lawsuit did not cause it to change its policies); *Hull v Rossi* (1993) 13 CA4th 1763, 1769, 17 CR2d 457 (denial of fees on ground that court would have reached same result without aid of party's attorneys was "clearly speculative" and an abuse of discretion); *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 13 n1, 232 CR 697 (not necessary that party raise argument that vindicates important right).

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### (4) Determining Whether the Financial Burden of Private Enforcement Makes Fee Award Appropriate

### §3.66 (a) Focus of Financial Burden Requirement Is on Comparing Burden of Bringing Lawsuit to Direct Personal Interest in Case

The determination of whether the burden of private enforcement warrants an award of fees "focuses on the financial burdens and incentives involved in bringing the lawsuit." *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 321, 193 CR 900.

An award on the "private attorney general" theory is appropriate when the cost of the claimant's legal victory transcends his personal interest; that is, when the need to pursue the lawsuit placed a burden on the plaintiff "out of proportion to his individual stake in the matter." *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 941, 154 CR 503 (quoting *County of Inyo v City of Los Angeles* (1978) 78 CA3d 82, 89, 144 CR 71). "A court generally determines whether the litigation places a disproportionate burden on the individual by comparing the expected value of the litigation at the time it was commenced with the costs of litigation." *In re Adoption of Joshua S.* (2008) 42 C4th 945, 952, 70 CR3d 372, citing *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 9, 232 CR 697.

For example, in *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 39 CR3d 550, the plaintiff sued a property owner for asbestos removal from the defendant's property, and claimed both damages and injunctive relief. The plaintiff lost the damages claim in arbitration but obtained an injunction requiring removal of the asbestos. The trial court denied the plaintiff's fee claim under CCP §1021.5, finding that the achievement of the public benefit did not outweigh the plaintiff's individual stake. The court of appeal reversed, holding that "the private financial burden test does not require a comparison of public benefits achieved to the plaintiff's personal stake in the case.… [I]t mandates a comparison between the estimated value of the plaintiff's individual stake in the action (which may be nonpecuniary) and the cost of the litigation." 136 CA4th at 1354. The court concluded that even though the plaintiff did not recover damages, the cost of the litigation far outweighed the realistic pecuniary recovery; and the plaintiff pursued injunctive relief even after damages had been denied. But see *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1415, 1 CR2d 459 ("If public benefits are very significant, it is more important to encourage litigation, and thus it may be appropriate to award fees under §1021.5 'even in situations where the litigant's own expected benefits exceed its actual costs by a substantial margin.'"), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. See also *Hammond v Agran* (2002) 99 CA4th 115, 126, 120 CR2d 646 (comparing "disproportionality of the claimant's stake in the litigation to the public result").

The burden of litigation outweighed the party's personal stake for part of the case in *Hammond* (burden of litigating scope of Elections Code exceeded party's stake; "reputational" stake and "animus" toward opponent rejected as defenses). Note that the continuing validity of *Hammond* was raised but not decided in *In re Adoption of Joshua S.,* 42 C4th at 957 n4. See also *Bradley v Perrodin* (2003) 106 CA4th 1153, 1165, 131 CR2d 402 (distinguishing *Hammond* when fees connected to candidate's election to public office did not transcend candidate's personal interest in election); *Bowman v City of Berkeley* (2005) 131 CA4th 173, 182, 31 CR3d 447 (affirming fee award when only 2 of 40 contributors lived in proximity to challenged project).

In *In re Adoption of Joshua S.*, the court examined the difficulties of determining a party's nonpecuniary interest in litigation. 42 C4th at 953. Ultimately, however, the court did not rule on this issue, finding instead that §1021.5 fee awards are inappropriate in cases in which the losing party "has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public." 42 C4th at 949.

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### §3.67 (b) Method for Determining Whether Financial Burden Warrants Fee Award

The accepted method for determining whether the financial burden of litigation merits an award of fees was analyzed at length in *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697. The court of appeal held that the trial court must first quantify the monetary benefits obtained by the litigants themselves. This figure must then be discounted by the "probability of success" at the time the crucial litigation decisions were made. For example, if the litigants obtained $10,000 but there was only a 30-percent chance of success at the outset, a rational litigant could not be expected to proceed without the prospect of a court-awarded fee unless the expected cost of the litigation was substantially below $3000. Once the litigant's stake is determined, the court must assess the actual cost of the litigation and compare the two figures to make the (188 CA3d at 9)

> value judgment whether it is desirable to offer the bounty of a court awarded fee in order to encourage litigation of the sort involved in [the] case.... [A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.

Finally, the court must factor in the benefits to others. To encourage private attorney general actions, courts should be more willing to award fees when the benefits to others are substantial, even if the litigants' financial stake is also greater. 188 CA3d at 10.

The California Supreme Court specifically cited this test in *In re Adoption of Joshua S.* (2008) 42 C4th 945, 958, 70 CR3d 372: "A court generally determines whether the litigation places a disproportionate burden on the individual by comparing the expected value of the litigation at the time it was commenced with the costs of litigation." 42 C4th at 952, citing *Los Angeles Police Protective League.*

In reviewing the facts before it, the court in *Los Angeles Police Protective League* rejected the city's argument that a labor union could never, because of its function and resources, qualify for a fee award under CCP §1021.5. Instead, the court held that the financial stake of the union's members was not sufficiently great to justify the fees expended in defending the city's appeal, and it thus awarded fees to the union for the appellate portion of the case. See also *Mounger v Gates* (1987) 193 CA3d 1248, 1260, 239 CR 18. Compare *Mounger* with *Wang v Division of Labor Standards Enforcement* (1990) 219 CA3d 1152, 1161, 268 CR 669 (discussed in §3.95).

The same analysis was followed in *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. In *Beasley,* the court held that plaintiffs were entitled to a fee award under CCP §1021.5 even though they had obtained a $5.2 million judgment for the class of bank card customers who had been overcharged fees on their credit cards. The court compared plaintiffs' actual recovery ($5,227,617), discounted by the probability of success (50 percent), with the lodestar figure found to be reasonable by the trial court ($1,391,724). Finding it to be a close question whether the estimated value exceeded "by a *substantial margin* the actual litigation costs" (235 CA3d at 1416, quoting *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 10, 232 CR 697), the court affirmed the trial court's award because "the public benefits from the litigation are so significant that an award of fees under §1021.5 is appropriate." 235 CA3d at 1417. See also *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 955, 83 CR2d 89 (comparing compensatory damages prayed for with attorney fees incurred, and disregarding large punitive damages award).

In *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1351, 39 CR3d 550, the court of appeal reversed a denial of fees because the trial court failed to consider the plaintiff's pecuniary recovery in relation to the likelihood of success.

In *Satrap v PG&E* (1996) 42 CA4th 72, 49 CR2d 348, the court found that, as opposed to the actual recovery, the trial court could rely on evidence of the plaintiff's "realistic expectations" in the form of settlement offers made during trial in determining whether plaintiff's personal stake in the litigation was disproportionate to the cost of litigation.

*Satrap* was expressly distinguished in *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, which involved a civil rights/wrongful death action against the City of Salinas and the manufacturer of Taser stun guns. The plaintiffs recovered $153,500 from the manufacturer and claimed fees under §1021.5. In finding that the plaintiffs had not met the burden of private enforcement requirement, the district court

distinguished *Satrap,* holding that this was not a case in which the plaintiffs had significantly overestimated the value of their case and that the plaintiffs were faced with the substantial risk of recovering no fees at all. The court concluded, therefore, that it would not look to the damages requested but to the "actual recovery," which "is the best measure of the action's expected value." 2009 US Dist Lexis 10096 at *18.

**Additional authorities:** *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 165 CR 514; *Lucchesi v City of San Jose* (1980) 104 CA3d 323, 163 CR 700; *Marini v Municipal Court* (1979) 99 CA3d 829, 160 CR 465; *Rich v City of Benicia* (1979) 98 CA3d 428, 159 CR 473; *Gunn v Employment Dev. Dep't* (1979) 94 CA3d 658, 156 CR 584. See also *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 657 n12, 52 CR3d 1 (party's failure to object in trial court on financial burden grounds forfeited right to appeal on that issue).

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### (c) Which Direct Personal Interests Are Considered

### §3.68 (i) Pecuniary Interests

Which "direct personal interests" courts must consider when comparing the burden of the litigation has been extensively debated. Initially, courts looked only to financial interests; when the successful party had no pecuniary interest in the outcome of the litigation, this requirement was fulfilled. See *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 321, 193 CR 900. *Press* was followed in *Slayton v Pomona Unified Sch. Dist.* (1984) 161 CA3d 538, 552, 207 CR 705, and *Phipps v Saddleback Valley Unified Sch. Dist.* (1988) 204 CA3d 1110, 251 CR 720.

The financial interest also had to be a direct result of the litigation; speculative financial rewards that would follow from the litigation were not considered. See, *e.g., Baggett v Gates* (1982) 32 C3d 128, 143, 185 CR 232, and the line of cases following it, discussed in §3.58; *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1098, 69 CR3d 184 (fees appropriate in union's action to enforce state prevailing wage law, even though precedential effect would benefit all union members statewide, because cost outweighed immediate recovery by litigants); *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1362, 100 CR2d 491 (fees appropriate in challenge to state agency's drug testing policy for employees because neither union nor members secured immediate pecuniary benefit), cited with approval in *In re Adoption of Joshua S.* (2008) 42 C4th 945, 955 n3, 70 CR3d 372; *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 71 CR2d 1 (upholding fee award in CEQA action because, although four of six petitioners had financial interest, obtaining environmental impact report produced "no direct pecuniary benefit" and any "future monetary advantage… is speculative").

The relevant financial interest is the party's "individual stake" in the action, not the anticipated economic benefits to others. For instance, in *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265, cited with approval in *In re Adoption of Joshua S.*, 42 C4th at 955 n3, the court held that, although an association of property owners may initially have been *motivated* to challenge a law limiting campaign contributions by their own economic interests in defeating a rent control initiative, the burden of the litigation was disproportionate to their individual stakes. The critical inquiry, the court held, is whether the plaintiffs "had an *individual stake* that was out of proportion to the costs of the litigation." 181 CA3d at 231. See also *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1305, 255 CR 704 (defendant's stake in invalidating formation of special tax district ($920) was disproportionate to cost of enforcing that interest on behalf of himself and everyone else in district); *AFL-CIO v Employment Dev. Dep't* (1979) 88 CA3d 811, 822, 152 CR 193.

In class actions, however, courts will look to the *class* stake. *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1418, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. See also *California Licensed Foresters Ass'n v State Bd. of Forestry* (1994) 30 CA4th 562, 570, 35 CR2d 396.

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### §3.69 (ii) Nonpecuniary Interests

More recently, courts have held that nonpecuniary interests may preclude a fee award under CCP §1021.5 if they are strong enough to have motivated the party to pursue the lawsuit regardless of its financial burden. See *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 516, 94 CR2d 205; *Williams v San Francisco Bd. of Permit Appeals* (1999) 74 CA4th 961, 971, 88 CR2d 565. See also *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646.

Not all interests that would motivate a lawsuit are disqualifying, however. *Families Unafraid* makes clear that any disqualifying nonfinancial interest must be "specific, concrete and significant, *and* these attributes must be based on *objective* evidence." 79 CA4th at 516. Neither a "subjective, vaguely grounded aesthetic interest, even if 'heart-felt,'" nor a "mere abstract interest in aesthetic integrity or environmental preservation" will suffice to block an award. *Families Unafraid, supra*.

Similarly, a "nimby" (not in my backyard) lawsuit is not automatically disqualified from a §1021.5 fee award simply because the plaintiffs may have selfish motives (*Families Unafraid, supra*):

> [I]f [petitioners'] "nimby" argument were valid, the private enforcement of environmental laws would be threatened. The fact is that "nimby" plaintiffs are often at the forefront of private environmental enforcement in the public interest. CEQA enforcement is built on such private enforcement. [Citations] The legal landscape is littered with so-called "nimby" plaintiffs who have been awarded attorney fees under section 1021.5 for enforcing environmental laws, or who have been given the opportunity to seek such an award….. Section 1021.5, by its design, forces "nimby" parties to look beyond their parochial interests to the greater public good.

In *Families Unafraid*, the court examined the plaintiffs' alleged financial interests, finding that the trial court had erred in deciding that they justified the heavy burden of the lawsuit. The matter was remanded to determine whether the plaintiffs' nonfinancial interests were disqualifying. 79 CA4th at 522. See also dissenting opinion of Judge Sims (79 CA4th at 525), citing this book.

*RiverWatch v County of San Diego* (2009) 175 CA4th 768, 781, 96 CR3d 362, examined this issue in some depth. In that case, the court accepted the plaintiff Pala Band's assertion that it had no financial interests in challenging a landfill project on adjacent land, and that it had acted to protect sacred burial sites as well as to raise concerns about the project's impact on air and water quality. The court found that the concern for sacred sites was not disqualifying because it affected a broader group of Native Americans than the Pala Band. 175 CA4th at 777. Likewise, the court distinguished *Christward Ministry v County of San Diego* (1993) 13 CA4th 31, 50, 16 CR2d 435, which found a church's interest in preserving its view disqualifying, on the grounds that *Christward* involved only the use of its own property, not broader values. 175 CA4th at 780.

In *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 24 CR3d 72, the court held that an initiative sponsor's ideological interest in enforcing the initiative did not disqualify it from fees, citing *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900, and other cases involving ballot initiatives; the trial court erred in finding that the requirement had not been met because the sponsor had intervened in an existing lawsuit rather than filing its own.

Numerous cases also have held that motivation to file suit irrespective of the possibility of a fee award is not disqualifying. See, *e.g., Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 942, 154 CR 503; *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 321 n11, 193 CR 900 ("That plaintiffs' personal interests in the outcome of the oil profits initiative were sufficient to induce them to bring this action is irrelevant"); *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 173, 17 CR2d 510 (fees awarded even though plaintiff had "sufficient business motive" to file suit).

Similarly, a party's "motive" is not the determinative factor. See *Satrap v PG&E* (1996) 42 CA4th 72, 77, 49 CR2d 348 ("We agree that appellant's subjective motivation for bringing the lawsuit is not a controlling factor in determining whether a Code of Civil Procedure section 1021.5 fee award is appropriate."). See also *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 16, 64 CR3d 327; *Citizens Against Rent Control*, 181 CA3d at 230. Compare cases cited in §3.77.

**NOTE:** The issue of whether a fee applicant may be denied fees under CCP §1021.5 "due to his or her nonpecuniary interest, not rooted in economic gain or averting economic loss, in the object of the litigation" is currently before the California Supreme Court in *Conservatorship of Whitley* (review granted Supreme Court Case No. (review granted Oct. 22, 2009, S175855; superseded opinion at 2009 Cal App Unpub Lexis 5983)). *Whitley* was an action brought by Whitley's sister/conservator which established important precedent on the appropriate procedures for determining the placement of developmentally disabled persons under the Lanterman Developmental Disabilities Services Act (Welf & I C §§4500-4867). *Conservatorship of Whitley* (2007) 155 CA4th 1447, 66 CR3d 808.

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### (d) How the Financial Burden of the Litigation Is Determined

### §3.70 (i) Financial Burden Generally Determined by Actual Cost of Litigation

The financial burden of the litigation is generally measured by its actual cost. See *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1415, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81; *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, *16. Some cases mention "anticipated costs" in dicta but in fact look to the *actual* costs. See, *e.g.*, *California Licensed Foresters Ass'n v State Bd. of Forestry* (1994) 30 CA4th 562, 570, 35 CR2d 396.

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### §3.71 (ii) Personal Wealth of Party Claiming Fees Is Irrelevant

In determining whether parties have satisfied the financial burden requirement, it is irrelevant that the parties are financially able to bear the cost of the litigation. *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265; *Schmid v Lovette* (1984) 154 CA3d 466, 201 CR 424; *AFL-CIO v Employment Dev. Dep't* (1979) 88 CA3d 811, 822, 152 CR 193.

The test used in *AFL-CIO* was whether the burden of the litigation was too great for any individual claimant to carry. The court held that the burden was too great and awarded fees to the AFL-CIO and the United Steelworkers of America. See also *Gunn v Employment Dev. Dep't* (1979) 94 CA3d 658, 156 CR 584 (court took into consideration that appeal was prosecuted in forma pauperis in granting fee award under CCP §1021.5). Compare *Gunn* with *California Licensed Foresters Ass'n v State Bd. of Forestry* (1994) 30 CA4th 562, 35 CR2d 396 (although association's financial resources held irrelevant to fee entitlement, in order to determine its stake in suit, court aggregated interests of its members because their interests were inseparable from association's).

On the other hand, in *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503, the court stated that plaintiffs may submit evidence about their fiscal resources. 23 C3d at 942. Presumably, the purpose of doing so would be to show the extent of their individual stake in the matter.

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### §3.72 (iii) Free or Reduced Cost Representation Is Irrelevant

That a party is represented by counsel who are working for free or for a reduced charge is irrelevant to deciding entitlement to (or the amount of) a fee award under CCP §1021.5. In *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 186 CR 589, defendants argued that an award under §1021.5 was improper because the successful plaintiffs had been represented by publicly funded legal services organizations and did not bear the financial burden of the litigation. They also argued that, because plaintiffs were represented by law firms that received public funding, plaintiffs' lawsuit did not constitute "private enforcement." The court rejected these arguments, noting that the purposes of the private attorney general doctrine would be far better served by allowing fees to publicly funded attorneys than by denying them. 32 C3d at 683. See also *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1351, 39 CR3d 550 (irrelevant that plaintiff represented on contingency); *Punsly v Ho* (2003) 105 CA4th 102, 113, 129 CR2d 89; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 130 CR2d 512 (fees paid by employee association); *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 94 CR2d 205; *Schmid v Lovette* (1984) 154 CA3d 466, 479, 201 CR 424. On calculating award for publicly funded attorneys, see §§9.95-9.96.

For another variation on this issue, see *Daniels v McKinney* (1983) 146 CA3d 42, 193 CR 842, in which the defendant argued that the financial burden of private enforcement was insufficient to invoke CCP §1021.5 because the public defender would have represented the plaintiffs without charge. The court rejected this argument, finding that the public defender was not available to represent the plaintiffs. The court expressly declined to decide whether the public defender's office would have been entitled to a fee award under §1021.5 if it had represented the plaintiffs. 146 CA3d at 52 n6.

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### §3.73 (iv) Fee Award From Common Fund Not Required

Even if the litigation results in the creation of a common fund, the court need not order that the prevailing party's attorney fees be paid from that fund. *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. In *Beasley*, the defendant had argued that plaintiffs' fees should be awarded from the common fund recovered by the class, citing *Bank of America v Cory* (1985) 164 CA3d 66, 210 CR 351. The *Beasley* court rejected that argument, holding that *Cory*'s summary rejection of fees under CCP §1021.5 in cases in which a common fund has been created must give way to the more "meaningful analysis" used in *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697. 235 CA3d at 1413.

*Beasley* summarized the rule promulgated in *Los Angeles Police Protective League* as follows (235 CA3d at 1415):

> If the estimated value of a class action common fund recovery, determined as of the time the vital litigation decisions were being made, does not exceed actual litigation costs by a substantial margin, the financial burden of private enforcement is such as to make it appropriate to award attorney fees under section 1021.5. In contrast, if estimated value is substantially more than actual litigation costs, there should be no award under section 1021.5 unless public benefits are very significant.

*Beasley* also rejected the defendant's argument that fees should be awarded from the fund because it would encourage plaintiffs to litigate more efficiently, holding that any such benefit "is eclipsed by §1021.5's purpose of encouraging public interest litigation." 235 CA3d at 1417 n3. See also §3.10.

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### §3.74 (v) Court May Distinguish Between Time Spent Protecting Private Rather Than Public Interests

Courts may distinguish between attorney time devoted to securing personal rights and time devoted to protecting a public interest. In *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503, the court noted that, under CCP §1021.5, if the plaintiffs' financial gain in a case warrants placing a portion of the attorney fee burden on them, §1021.5's broad language and the theory underlying the private attorney general concept would permit the court to shift only an appropriate portion of the fees to the losing party or parties. 23 C3d at 942.

Similarly, in *Saleeby v State Bar* (1985) 39 C3d 547, 216 CR 367, the court noted that the petitioner had sought to secure personal rights and a specific sum of money from the State Bar's Client Security Fund, as well as general reforms of the fund procedures. Because the petitioner's personal interest was involved, the court found that it "may be appropriate to determine what portion of the fees should be attributed to issues transcending that personal interest and what part should be deemed to arise out of petitioner's individual claim." 39 C3d at 574. The court reserved jurisdiction to consider the amount of fees to be paid to petitioner. See also *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707 (fees awarded only for merits appeal and subsequent fee-related work, including fee appeal); *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1354, 39 CR3d 550 (discussing relationship between damages and injunctive relief claims when awarding fees); *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 94 CR2d 205; *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 71 CR2d 1; *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.75 (vi) Cases Finding Party's Financial Burden Disproportionate to Personal Stake

### §3.75 (vi) Cases Finding Party's Financial Burden Disproportionate to Personal Stake

If the party claiming fees has a pecuniary interest in the outcome of the lawsuit, the issue is whether the financial burden placed on the party is out of proportion to its personal stake in the lawsuit. In *Baggett v Gates* (1982) 32 C3d 128, 185 CR 232, a suit by two police officers challenging reassignment to a lower-paying position without a proper hearing under the Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313), the court noted that, although the lawsuit enforced basic procedural rights, it might not have resulted in any pecuniary benefit to the plaintiffs; therefore, it held, the financial burden requirement was met. 32 C3d at 143. *Baggett* was followed in *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 423, 61 CR3d 295. For further discussion of *Baggett,* see §3.58.

The court in *Henneberque v City of Culver City* (1985) 172 CA3d 837, 218 CR 704, followed *Baggett,* noting that "the financial burden of prosecuting this case through two writ proceedings and two appeals clearly is 'out of proportion' to the economic benefit Henneberque now stands to gain." 172 CA3d at 847. See also *People ex rel Seal Beach Police Officers Ass'n v City of Seal Beach* (1984) 36 C3d 591, 602, 205 CR 794; *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 16, 64 CR3d 327 (requirement satisfied because plaintiff pursued action to recover employee business expenses "not only on behalf of himself but on behalf of a class comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers"; note that class recovered more than $5 million, and counsel's lodestar was more than $5.56 million). See also *City of Los Angeles v 2000 Jeep Cherokee* (2008) 159 CA4th 1272, 1279, 72 CR3d 252, discussed in §3.67; *Schmid v Lovette* (1984) 154 CA3d 466, 479, 201 CR 424 (simplicity of litigation does not eliminate burden).

The reviewing court used a similar analysis in *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 130 CR2d 512, holding that the financial burden of bringing the action, which established the right to an administrative appeal from a district procedure that resulted in the placement of adverse material in employee personnel files, exceeded the plaintiffs' personal stake. Even though they had a personal interest in obtaining such a hearing, there was no guarantee that they would ever obtain any financial benefit. 106 CA4th at 332.

Even if plaintiffs are motivated by their own economic interests, if the burden of litigation is disproportionate to their individual stakes, and the other requirements of the statute are met, fees may be awarded under CCP §1021.5. In *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265, the court rejected the city's argument that the prevailing association of property owners was not entitled to fees for striking down a measure limiting campaign contributions. The court held that, although the plaintiffs may initially have been motivated by their own economic interests in defeating a rent control initiative, the burden of the litigation was disproportionate to their individual stakes. The court noted that any economic benefit to the plaintiffs as property owners was both indirect and speculative, depending on the outcome of the rent control initiative that was not at issue in the lawsuit. It also noted that the plaintiffs continued their battle over campaign contribution limitations long after rent control was enacted. The critical inquiry, the court held, is whether the plaintiffs "had an *individual stake* that was out of proportion to the costs of the litigation." 181 CA3d at 231. See *e.g., Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1098, 69 CR3d 184; *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 159, 67 CR3d 228; *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707.

Two other examples of a court's finding that the prevailing parties' burden transcended their personal financial stakes are *Christensen v Superior Court* (1987) 193 CA3d 139, 239 CR 143, and *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 868, 223 CR 846. In *Christensen*, the court held that, although the prevailing minor in an action challenging the local court's policy of restricting minors' investments to non-fixed term investments had a financial interest in securing a higher rate of return for his investment, that amount was insufficient to justify the cost of the action. Therefore, the court held that an award of attorney fees was appropriate. In *County of San Luis Obispo v Abalone Alliance, supra,* the court found that, because the prevailing parties were motivated to defend the county's lawsuit by their political as well as their economic goals, the cost of their legal victory transcended their personal economic interest in the litigation. See also *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 10, 54 CR3d 724;

*Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors, supra*; *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 36 CR2d 456.

**Additional authorities:** *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 100 CR2d 491 (finding that neither union nor members secured pecuniary benefit from action challenging state agency's drug testing policy); *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 86 CR2d 575 (cost of action to enforce proper procedures under state's program for indemnification of crime victims (decided under former Govt C §§13950-13969.5; now see Govt C §§13950-13966)) greatly exceeded plaintiff's pecuniary interest); *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 955, 83 CR2d 89 (comparing compensatory damages prayed for with attorney fees incurred, and disregarding large punitive damages award); *County of San Diego v Lamb* (1998) 63 CA4th 845, 73 CR2d 912; *Hull v Rossi* (1993) 13 CA4th 1763, 17 CR2d 457; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 261 CR 520; *City of Sacramento v Drew* (1989) 207 CA3d 1287, 255 CR 704 (defendant's stake in invalidating formation of special tax district ($920) was disproportionate to cost of enforcing that interest on behalf of himself and everyone else in district); *California Common Cause v Duffy* (1987) 200 CA3d 730, 750, 246 CR 285; *Heston v City of Salinas* (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096, *17.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.76 (vii) Cases Finding That Burden Does Not Transcend Personal Interests

### §3.76 (vii) Cases Finding That Burden Does Not Transcend Personal Interests

Even when important rights and significant benefits are enforced, however, courts may find that CCP §1021.5 was not intended to reward litigants motivated by their own pecuniary interests who only coincidentally protect the public interest, and thus deny fees based on a finding that the financial burden of private enforcement did not transcend their personal interests. See, *e.g., Roybal v Governing Bd. of the Salinas City Elementary Sch. Dist.* (2008) 159 CA4th 1143, 1151, 72 CR3d 146; *Ryan v California Interscholastic Fed'n* (2001) 94 CA4th 1033, 114 CR2d 787; *Flannery v CHP* (1998) 61 CA4th 629, 71 CR2d 632; *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1170, 74 CR2d 510 (following *Flannery*); *Beach Colony II, Ltd. v California Coastal Comm'n* (1985) 166 CA3d 106, 114, 212 CR 485. The line between these cases and those discussed in §§3.67-3.68 is not always clear.

In rejecting a fee claim under CCP §1021.5, *Schwartz v City of Rosemead* (1984) 155 CA3d 547, 202 CR 400, discussed this issue at some length. In *Schwartz,* the plaintiff sought to enjoin construction of a cogeneration electrical plant adjacent to his residence. Although the court found the plaintiff's claim meritorious and enjoined construction of the plant pending an environmental assessment under the California Environmental Quality Act (CEQA), it denied attorney fees because plaintiff failed to satisfy the requirement of showing that the financial burden of private enforcement warranted an award. The court looked at several factors—primarily the fact that plaintiff's home was worth $700,000 and that estimated damages would be $100,000 if the plant were built. Comparing these damages to his fee claim of $22,000, the court found that the trial court was correct in finding that his fees "were not out of proportion to his individual stake in this matter." 155 CA3d at 554. The court held that, regardless of whether it considered the result of the lawsuit or the plaintiff's motivation in bringing the lawsuit, the trial court did not abuse its discretion in finding that any public benefit achieved was merely incidental to the plaintiff's personal interest in having the cogeneration plant moved farther away from his property. See also *Caloca v County of San Diego* (2002) 102 CA4th 433, 447, 126 CR2d 3 (when three petitioners had concrete personal and pecuniary stake, trial court could reasonably conclude that $32,000 in fees incurred did not transcend their interest in litigation).

Other cases finding that the financial burden did not transcend the litigants' personal interests include:

- *Jobe v City of Orange* (2001) 88 CA4th 412, 419, 105 CR2d 782 (private attorney general fees properly denied to real party in interest private school that incurred fees in defending its permission to expand its facilities; school could not show that the "cost of its legal victory transcended its personal interest").
- *Pacific Mut. Life Ins. Co. v State Bd. of Equalization* (1996) 41 CA4th 1153, 49 CR2d 99 (reversing fee award when plaintiffs sought over $600,000 but spent only $168,338; "obviously, plaintiffs brought this suit for their own 'strong personal economic interest'").
- *California Licensed Foresters Ass'n v State Bd. of Forestry* (1994) 30 CA4th 562, 35 CR2d 396 (cost per member of bringing suit small compared with members' economic interest in suit; fee award reversed).
- *Planned Parenthood v City of Santa Maria* (1993) 16 CA4th 685, 20 CR2d 391 (plaintiff failed to show that litigation "transcended" personal financial interests and imposed "financial burden disproportionate to its stake in the matter").
- *Luck v Southern Pac. Transp. Co.* (1990) 218 CA3d 1, 267 CR 618 (fees denied plaintiff who won $485,042 wrongful termination verdict).
- *Wallis v Farmers Group, Inc.* (1990) 220 CA3d 718, 740, 269 CR 299, disapproved in part on other grounds in *Dore v Arnold Worldwide, Inc.* (2006) 39 C4th 384, 394 n2, 46 CR3d 668; *Austin v Board of Retirement* (1989) 209 CA3d 1528, 1535, 258 CR 106; *Save Oxnard Shores v California Coastal Comm'n* (1986) 179 CA3d 140, 224 CR 425; *Terminal Plaza Corp. v City & County of San Francisco* (1986) 177 CA3d 892, 223 CR 379.

In *In re Adoption of Joshua S.* (2008) 42 C4th 945, 70 CR3d 372, the court held that the incidental establishment of important legal precedent in private litigation does not justify §1021.5 fees when the losing party "has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public." 42 C4th at 949.

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### §3.77 (viii) When There Is Evidence That Case Brought by Public Interest Organization Was Litigated for Benefit of Particular Individuals

When a party opposing an attorney fee award under the private attorney general statute (CCP §1021.5) has produced evidence suggesting that a public interest organization litigating the action is doing so for the benefit of nonlitigants, the court may allow the opposing party to conduct limited discovery. *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 250, 100 CR2d 725. The scope of permissible discovery must be determined on a case-by-case basis, and any discovery order must not impermissibly infringe on the associational privacy rights of third parties. *Save Open Space Santa Monica Mountains, supra.*

In *Save Open Space,* the plaintiff-nonprofit organization sought attorney fees under CCP §1021.5 after successfully opposing a proposed land development in a particular canyon area. In opposing the fee motion, the real party in interest sought to discover the financial obligations and contributions of canyon residents to the organization's litigation fund, based on evidence it had presented showing the possibility that the litigation was being financed to benefit nonparty individuals. The appellate court agreed that limited discovery could be conducted to determine whether: (1) the organization litigated the action for and at the direction of specific individuals; and (2) those individuals had a private interest in the outcome that would preclude a §1021.5 fee award. Finding that the trial court's order was too intrusive, the appellate court ordered the trial court to conduct an in-camera review of relevant documents and end its inquiry if none of the donations to the litigation fund were significantly and substantially large. If any donations were substantial, then the court was ordered to require the organization to provide it with information about whether the significant donors owned or had an interest in any of the property in or around the canyon area. Only if there were substantial donors with such an interest was the court to direct the organization to give real parties the donors' names and addresses, and disclosure was to be limited to those with a need to know, for the purpose of the litigation only. 84 CA4th at 255.

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### §3.78 (5) Fee Claim by Public Entities

When a government entity seeks fees from another government entity, it must show the necessity and burden of "private" enforcement. See *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 656, 52 CR3d 1. In *People ex rel Brown v Tehama County Bd. of Supervisors* (2007) 149 CA4th 422, 453, 56 CR3d 558, the court held that the California Attorney General, suing on behalf of "the People," was not entitled to fees under §1021.5 because, unlike political subdivisions of the state or other public entities, it was not acting in the capacity of a "private attorney general." The court stated, however, that for other another public entity to recover fees, it must be "pursuing litigation that was in the interests of a greater segment of the public than its own constituents." 149 CA4th at 456.

In *County of Colusa,* the court affirmed the trial court's finding that the county's lawsuit was necessary, rejecting the state defendants' arguments that the lawsuit did not cause it to change its policies. 145 CA4th at 657. Because the state did not raise the "financial burden" issue in the trial court, it was deemed forfeited. 145 CA4th at 657 n12.

In contrast, fees were denied in *City of Hawaiian Gardens v City of Long Beach* (1998) 61 CA4th 1100, 1113, 72 CR2d 134. The court of appeal found that the burden of the litigation was not great in comparison to the benefit to the residents of Hawaiian Gardens.

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### §3.79 e. Determining Whether Fees Should Be Paid From the Recovery, if Any

The requirement in CCP §1021.5(c) that the court must determine whether fees "should not in the interest of justice be paid out of the recovery, if any," applies only in cases in which there has been a financial recovery. *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1355, 39 CR3d 550. This rule tends to mirror the "financial burden" requirement discussed in §3.67. If the financial stakes for the party are so significant that it would be in the interests of justice to require that party to pay its own fee, then the lawsuit probably would not meet the financial burden requirement. For that reason, this clause is seldom an issue in §1021.5 fee cases. See, *e.g., Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1417, 1 CR2d 459 ("interest of justice" issue depended on resolution of "financial burden" issue), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81. See also *Choi v Orange County Great Park Corp.* (2009) 175 CA4th 524, 534, 96 CR3d 90; *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 955, 83 CR2d 89 (upholding fee award, despite large punitive damages award, because "jury decided to award punitive damages without regard to the potential attorney fee award").

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## III. ATTORNEY FEE AWARDS UNDER OTHER FEE-SHIFTING STATUTES

### A. State Civil Rights Statutes

### §3.80 1. Fair Employment and Housing Act

California's Fair Employment and Housing Act (FEHA), which prohibits discrimination in housing and employment, provides for an award of attorney and expert witness fees to the prevailing private party in actions brought under that Act. Govt C §12965(b). "[S]ection 12965 fees are intended to provide 'fair compensation to the attorneys involved in the litigation at hand and encourage [ ] litigation of claims that in the public interest merit litigation.'" *Flannery v Prentice* (2001) 26 C4th 572, 584, 110 CR2d 809. See also *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 610, 21 CR3d 371 (in light of similar language and purposes, court would look to cases interpreting CCP §1021.5 to interpret Govt C §12965(b)).

Administrative proceedings under FEHA are also encompassed within Govt C §12965(b). The Fair Employment and Housing Commission (FEHC) has discussed at some length the standards it will apply to such claims. See *American Airlines* (1983) FEHC Dec No. 83-15, FEHC Precedential Decisions CEB 15 (Cal CEB 1982-1983); *Louis Cairo* (1984) FEHC Dec No. 84-04, FEHC Precedential Decisions CEB 3 (Cal CEB 1984-1985).

Note that employment-related claims also may be brought under other California statutes, including CC §§51.7 and 52.1 (civil rights claims). See, *e.g., Stamps v Superior Court* (2006) 136 CA4th 1441, 39 CR3d 706, discussed in §3.84.

**Additional authorities:** *Herr v Nestle, Inc.* (2003) 109 CA4th 779, 135 CR2d 477 (affirming fee award of $1,788,159, plus appellate fees, in action brought under FEHA and Bus & P C §17200); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 74 CR2d 510 (reversing multiplier awarded under FEHA); *Flannery v CHP* (1998) 61 CA4th 629, 71 CR2d 632 (same); *Hon v Marshall* (1997) 53 CA4th 470, 62 CR2d 11 (defendant who obtained summary judgment on jurisdictional grounds not "prevailing party" for purposes of fee award under FEHA); *Shaw v City of Sacramento* (9th Cir 2001) 250 F3d 1289 (plaintiff not entitled to attorney fees after jury found discrimination but also found plaintiff voluntarily released all claims in employment agreement); *Bouman v Block* (9th Cir 1991) 940 F2d 1211 (upholding fee award under FEHA in employment discrimination class action); *Noyes v Kelly Servs.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437 (reverse religious discrimination action).

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.81 a. Cases Awarding Fees to Prevailing Plaintiffs

## §3.81 a. Cases Awarding Fees to Prevailing Plaintiffs

Significant decisions on fee awards to prevailing plaintiffs under the Fair Employment and Housing Act (FEHA) include:

- *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371 (catalyst theory applicable to FEHA actions);
- *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809 (absent proof of enforceable agreement to contrary, attorney fees awarded under Govt C §12965(b) belong to attorneys who labored to earn them);
- *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 83 CR3d 306 (request for expert witness fees under Govt C §12965(b) timely if filed within same time constraints applicable to noticed motion for attorney fees);
- *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 430, 69 CR3d 1 (disability, age, and retaliation action; full fee awarded although plaintiff prevailed on only two of eight causes of action);
- *Nichols v City of Taft* (2007) 155 CA4th 1233, 1244, 66 CR3d 680 (sexual harassment action; lodestar multiplier intended to compensate for higher rates of out-of-town counsel reversed because trial court failed to find that hiring local counsel was impracticable);
- *Horsford v Board of Trustees* (2005) 132 CA4th 359, 395, 33 CR3d 644 (three-plaintiff race discrimination action; reversing trial court fee award that rejected requests for lodestar enhancement based on contingent risk, preclusion of employment, and delay in payment and failed to "fully compensate counsel");
- *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 428, 124 CR2d 250 (addressing effect of informal settlement offers and unsuccessful causes of action, and holding that risk multipliers must be considered in every contingent FEHA case);
- *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 447, 94 CR2d 143 (affirming $470,000 fee award even though plaintiff recovered only $37,500 and lost some causes of action; record showed that trial court considered "entire course of the litigation");
- *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 16 CR2d 787 (affirming $450-per-hour fee award), disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109;
- *Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 1406, 245 CR 606 (holding, among other things, that prevailing plaintiffs are entitled to fees on appeal unless special circumstances would render an award unjust: "There is no reason to require the plaintiff to pay the fees out of his recovery. The public policy provided in the antidiscrimination statutes is to encourage suits which protect or bring about benefits to a broad group of citizens"), disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19;
- *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607 (addressing effect of low damages award on fee (see §§8.26, 8.28, 9.3, 9.57, 9.78));
- *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (awarding 2.0 multiplier under FEHA and CCP §1021.5 in two-plaintiff age discrimination action against PUC); and
- *Leuzinger v County of Lake* (ND Cal, Mar. 30, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843 (awarding 2.0 multiplier under FEHA in disability discrimination action against county).

**NOTE:** Under CCP §1033(a), in an action that was not brought as a limited civil case, fees may be denied to a plaintiff who prevails on a claim under the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) but recovers only an amount that could have been recovered in a limited civil case. *Chavez v City of Los Angeles* (2010) 47 C4th 970, __CR3d__.

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### §3.82 b. Cases Awarding Fees to Prevailing Defendants

In contrast to prevailing plaintiffs, prevailing defendants under the Fair Employment and Housing Act FEHA are entitled to fees only if the court finds the plaintiff's action to be frivolous, groundless, or unreasonable. See, *e.g., Cummings v Benco Bldg. Servs.* (1992) 11 CA4th 1383, 15 CR2d 53 (denying fees and costs to prevailing defendant because plaintiffs' lawsuit not "frivolous, unreasonable, or groundless"); *Rosenman v Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 110 CR2d 903 (following *Cummings*); *Bond v Pulsar Video Prods.* (1996) 50 CA4th 918, 57 CR2d 917 (upholding fee award to prevailing defendant when trial court found plaintiff's claims frivolous, without foundation, and in bad faith); *Delaney v Superior Fast Freight* (1993) 14 CA4th 590, 600, 18 CR2d 33 (fee award to defendant properly denied, even though plaintiff dropped arguably frivolous FEHA claim, because plaintiff's other claims based on same injury not frivolous).

Even if the action meets this test, the court must also consider the financial circumstances of the plaintiff. See, *e.g., Young v Exxon Mobil Corp.* (2008) 168 CA4th 1467, 86 CR3d 507 (affirming $1 fee award to defendant supervisor in disability discrimination action against employer and supervisor; FEHA action was found to be frivolous against supervisor but not against employer, who incurred, was liable for, and paid all fees; no abuse of discretion in refusing to award fees to defendant who did not incur or pay them, when award would benefit another defendant not entitled to fee award); *Villanueva v City of Colton* (2008) 160 CA4th 1188, 73 CR3d 343 (affirming fee award to prevailing defendant under FEHA in religious discrimination action against city that trial court found was unfounded, unreasonable, and frivolous; fee award not abuse of discretion based on trial court's failure to consider plaintiff's ability to pay because plaintiff offered no evidence of inability to pay). See also §2.78.

Whether a defendant's right to costs, as opposed to fees, is subject to the same standard is in dispute. Compare *Cummings* and *Seever v Copley Press, Inc.* (2006) 141 CA4th 1550, 1561, 47 CR3d 206 (although award of reasonable costs under CCP §998 to FEHA defendant was appropriate, purposes of FEHA required court to "scale" amount of costs to parties' "respective resources"), with *Perez v County of Santa Clara* (2003) 111 CA4th 671, 3 CR3d 867 (disagreeing with *Cummings* and holding that award of *costs* to prevailing FEHA defendant does not require finding that plaintiff's lawsuit was "frivolous, groundless, or unreasonable").

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### §3.83 2. Unruh Civil Rights Act and Related Statutes

The Unruh Civil Rights Act (CC §§51, 51.5) and CC §51.6 (from the Gender and Tax Repeal Act of 1995) prohibit business establishments from discriminating against, boycotting or blacklisting, or refusing to buy from, contract with, sell to, or trade with any person on the basis of sex, race, color, religion, ancestry, national origin, or disability of the person, or the person's partners, members, or business associates because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics. See also the Americans with Disabilities Act (42 USC §§12101-12213). Civil Code §51.9 establishes liability for sexual harassment. Anyone denying rights under those sections is liable for attorney fees as well as damages under CC §52(a) and (b)(3). See *Engel v Worthington* (1997) 60 CA4th 628, 70 CR2d 526; *Pines v Tomson* (1984) 160 CA3d 370, 206 CR 866.

Several related statutes also involve the enforcement of civil rights. Under CC §52.1, any aggrieved individual may bring a civil suit against anyone who tries to interfere with the exercise or enjoyment of the individual constitutional rights of another. In addition to damages and equitable relief, the court has the authority to award the petitioner or plaintiff reasonable attorney fees. CC §52.1(h). In *Stamps v Superior Court* (2006) 136 CA4th 1441, 39 CR3d 706, the court held that CC §§51.7 and 52.1 (protection from violence and intimidation) are not part of the Unruh Civil Rights Act, and that employment-related claims may be brought under these sections. In such cases, fees may be awarded under CC §52(b)(3). 136 CA4th at 1457.

Civil Code §55 provides that for lawsuits brought under the access provisions of the California Disabled Persons Act (CDPA) (CC §§54-55.3), CC §§54 and 54.1, the "prevailing party… shall be entitled to recover reasonable attorney's fees." Both *Molski v Arciero Wine Group* (2008) 164 CA4th 786, 790, 79 CR3d 574, and *Goodell v Ralph's Grocery Co.* (ED Cal 2002) 207 F Supp 2d 1124 held that this provision, unlike the Americans with Disabilities Act (ADA) (42 USC §§12101-12213) or FEHA, makes fee awards to prevailing defendants mandatory, without requiring that the plaintiff's lawsuit be found frivolous, groundless, or unreasonable.

The Ninth Circuit Court of Appeals, however, has held that, to the extent that CC §55 authorizes fees to a prevailing defendant on nonfrivolous CDPA claims that parallel nonfrivolous ADA claims, it is preempted by the one-sided fee provision in the ADA (42 USC §12205). *Hubbard v SoBreck LLC* (9th Cir 2009) 554 F3d 742, 746.

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## B. Challenging Government Decision Making and Regulation

### §3.84 1. Review of Public Assistance Determinations (Welf & I C §10962)

Welfare and Institutions Code §10962 provides that applicants for, or recipients of, public social services may, within 1 year after receiving notice of the state's final decision, file a petition with the superior court under CCP §1094.5 to review the entire proceedings, and that the applicant or recipient "shall be entitled to reasonable attorney fees and costs. if he obtains a decision in his favor."

The purpose of Welf & I C §10962 is to enable needy persons to establish through judicial proceedings their right to statutory public benefits. See, *e.g., Le Blanc v Swoap* (1976) 16 C3d 741, 129 CR 304 (awarding fees for successful appeal that preserved benefits but denying fees for work in supreme court that occurred only because petitioner sought more favorable legal precedent).

Section 10962 must be liberally construed to effectuate the program's purpose. Welf & I C §11000; *Tripp v Swoap* (1976) 17 C3d 671, 685, 131 CR 789, overruled on other grounds in *Frink v Prod* (1982) 31 C3d 166, 181 CR 893. A benefit applicant or recipient who, by administrative mandamus, successfully attacks the agency's decision to reduce or terminate benefits is entitled to attorney fees under §10962. *Roberts v Brian* (1973) 30 CA3d 427, 431, 106 CR 360.

In *County of Humboldt v Swoap* (1975) 51 CA3d 442, 124 CR 510, the court awarded fees to recipients who successfully intervened in a county mandamus action, cautioning that "the courts should insure that [an intervenor] recipient's legal representative is not compensated for making a merely nominal appearance or by duplicating the efforts of the Attorney General in representing the director." 51 CA3d at 445. Similarly, in *County of Alameda v Lackner* (1978) 79 CA3d 274, 144 CR 840, fees were awarded in a successful appeal from a denial of a motion to intervene at the trial level. See also *Silberman v Swoap* (1975) 50 CA3d 568, 571, 123 CR 456 (affirming fee award in CCP §1085 mandate action brought to require state to issue administrative decision under Welf & I C §10962); *Land v Anderson* (1997) 55 CA4th 69, 63 CR2d 717.

Recipients who do not proceed through the normal route of a "fair hearing" and subsequent administrative mandamus action, but whose actions meet the statute's broad purposes, are also entitled to fees under Welf & I C §10962. For example, fees may be recovered in class actions attacking benefit regulations, even if only some named plaintiffs follow the procedures outlined in Welf & I C §10962. *Hypolite v Carleson* (1975) 52 CA3d 566, 125 CR 221. See also *Green v Obledo* (1984) 161 CA3d 678, 207 CR 830 (trial court awarded fees under Welf & I C §10962, CCP §1021.5, and 42 USC §1988).

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### §3.85 2. Political Reform Act (Govt C §§91003, 91012)

Reasonable attorney fees are recoverable under the Political Reform Act (Govt C §§81000-91014). Govt C §§91003, 91012. See, *e.g., Kunec v Brea Redev. Agency* (1997) 55 CA4th 511, 526, 64 CR2d 143 (prevailing on every issue not necessary for "prevailing party" status); *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272 (lodestar method of calculating fees applies to actions brought under Govt C §91003); *People v Roger Hedgecock for Mayor Comm.* (1986) 183 CA3d 810, 228 CR 424 (defendants entitled to fees under Act only if plaintiff's claim "frivolous, unreasonable, or groundless"); *Thirteen Comm. v Weinreb* (1985) 168 CA3d 528, 214 CR 297 (same prevailing party standards apply to Act as apply to civil rights statutes).

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.86 3. Brown Act (Govt C §§54950-54963)

### §3.86 3. Brown Act (Govt C §§54950-54963)

Successful actions under the Brown Act (Govt C §§54950-54963) qualify for reasonable attorney fees. See, *e.g., Galbiso v Orosi Pub. Util. Dist*. (2008) 167 CA4th 1063, 84 CR3d 788; *Los Angeles Times Communications, LLC v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 5 CR3d 776; *Bell v Vista Unified Sch. Dist.* (2000) 82 CA4th 672, 688, 98 CR2d 263; *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc.* (1999) 69 CA4th 287, 81 CR2d 456; *Common Cause v Stirling* (1981) 119 CA3d 658, 174 CR 200.

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### §3.87 4. Public Records Act (Govt C §6259(d))

The California Public Records Act (Govt C §§6250-6276.48) mandates an award of reasonable attorney fees to plaintiffs who prevail under the Act. Govt C §6259(d). See *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1393, 84 CR3d 754; *Galbiso v Orosi Pub. Util. Dist.* (2008) 167 CA4th 1063, 1084, 84 CR3d 788; *Belth v Garamendi* (1991) 232 CA3d 896, 283 CR 829. See also *Rogers v Superior Court* (1993) 19 CA4th 469, 23 CR2d 412. Whether a plaintiff has "prevailed" is determined by the same standards that apply to actions under CCP §1021.5 and other fee-shifting statutes. *Belth*, 232 CA3d at 901. See also *Galbiso*, 167 CA4th at 1085 (plaintiff prevails under Govt C §6529(d) when action results in defendant releasing copy of previously withheld document; when public agency effectively denies access to all public records, lawsuit to remedy problem constitutes claim that "certain public records" are being improperly withheld within meaning of §6529).

If the plaintiff has prevailed, a fee award is mandatory as long as the relief is not "minimal" or "insignificant." *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29. See also *Bernardi*, 167 CA4th at 1398 (no requirement that lodestar amount be reduced in strict proportion to ratio of successful to unsuccessful public record requests); *Motorola Communication & Electronics, Inc. v State* (1997) 55 CA4th 1340, 64 CR2d 477. Appellate fees also are recoverable under the Act. *Bernardi*, 167 CA4th at 1399; *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 781, 192 CR 415.

Section 6259(d) also mandates an award of reasonable attorney fees to the public agency if the court finds that the plaintiff's case is clearly frivolous. See *Bernardi*, 167 CA4th at 1393.

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### §3.88 5. Information Practices Act of 1977 (CC §1798.48(b))

The Information Practices Act of 1977 (CC §§1798-1798.78) provides fees to individuals who successfully enforce the Act. CC §1798.48(b). See *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 446, 78 CR2d 913.

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## §3.89 6. Public Utilities Code (Pub Util C §§1801-1812)

The Public Utilities Code provides for fee awards to parties who intervene on the public's behalf in PUC proceedings and make a substantial contribution to the proceedings. Pub Util C §§1801-1812. See *Utility Reform Network v PUC* (2008) 166 CA4th 522, 82 CR3d 791; *Southern Cal. Edison Co. v PUC* (2004) 117 CA4th 1039, 12 CR3d 441.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.90 7. Judicial Review Actions (Govt C §800)

## §3.90 7. Judicial Review Actions (Govt C §800)

Government Code §800(a) authorizes an award of reasonable attorney fees in civil actions brought "to appeal or review the award, finding, or other determination of any administrative proceeding." Section §800(a) limits the amount of the fee award to $7500 (computed at a maximum of $100 per hour). See *Reeves v City of Burbank* (1979) 94 CA3d 770, 156 CR 667 (upholding prior ceiling).

The statute states three conditions for eligibility for a fee award:

- The complainant must prevail against a public entity or official in an action to appeal or review an "administrative proceeding" under state law;
- The administrative award, finding, or determination must have been the result of arbitrary or capricious action or conduct; and
- The complainant must be "personally obligated" to pay the attorney fees.

Entitlement to fees under Govt C §800 is determined as part of the decision on the merits in the civil action. *Plumbing, Heating & Piping Employers Council v Quillin* (1976) 64 CA3d 215, 225, 134 CR 332. Therefore, the factual determination of whether the defendant's conduct was arbitrary and capricious must be made before an appeal has become final. 64 CA3d at 225. But see *In re John K.* (1985) 170 CA3d 783, 798, 216 CR 557 (directing trial court to award fees under Govt C §800 without prior determination on issue by trial court); *Civil Serv. Ass'n v San Francisco Redev. Agency* (1985) 166 CA3d 1222, 1227, 213 CR 1 (same).

Some defendants have argued that the dollar limit of Govt C §800(a) is a ceiling on the amount that can be awarded against government bodies under any entitlement theory. The court rejected this contention in *Card v Community Redev. Agency* (1976) 61 CA3d 570, 583, 131 CR 153. Similarly, a fee application under Ed C §44944(e) (discussed in §3.99), which provides for an award of reasonable attorney fees to school employees who prevail in administrative hearings, is not governed by the standards or limitations of Govt C §800. *Fontana Unified Sch. Dist. v Burman* (1988) 45 C3d 208, 225, 246 CR 733. See also *Board of Educ. v Commission on Prof. Competence* (1980) 102 CA3d 555, 162 CR 590 (when certified teacher successfully defended statutory action by board to remove him, and §44944(e) provided attorney fees and costs to a prevailing employee, teacher's claim for fees was governed by that section); *Gunn v Employment Dev. Dep't* (1979) 94 CA3d 658, 156 CR 584 (fees denied under Govt C §800 but awarded under CCP §1021.5).

Fee awards for civil actions brought by small businesses challenging actions taken by state licensing or regulatory agencies are governed by CCP §1028.5 (discussed in §3.95), not Govt C §800. CCP §1028.5(g).

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### §3.91 a. Actions to Appeal or Review "Any Administrative Proceeding"

Courts have split on whether fees may be awarded under Govt C §800(a) for actions brought to review administrative actions other than formal administrative hearings.

The absence of a formal hearing on which a CCP §1094.5 action could be based was found not to preclude a Govt C §800 fee award in *Forrest v Trustees of Cal. State Univ. & Colleges* (1984) 160 CA3d 357, 206 CR 595. In *Forrest,* the petitioner was a discharged school employee who filed a grievance that the school administration denied as untimely. He then obtained a writ of mandate under CCP §1085 from the trial court, requiring that his grievance be heard. The trial court awarded him fees under Govt C §800, and the district appealed, arguing that §800 applied only to actions under CCP §1094.5 brought to review formal administrative hearings. The court of appeal affirmed the trial court's decision, holding (160 CA3d at 368):

> There is no rationale for limiting section 800 to "appeal or review" from a formal administrative hearing. It is a remedial statute designed to enable employees to seek relief in the courts against arbitrary or capricious action by public entities or officers, and as such, should be liberally construed.

However, several courts have rejected applications for fees under Govt C §800 that did not involve appeals from rulings of administrative law judges under CCP §1094.5. See *Kistler v Redwoods Community College Dist.* (1993) 15 CA4th 1326, 1336, 19 CR2d 417 (citing relevant cases); *Sullivan v Calistoga Joint Unified Sch. Dist.* (1991) 228 CA3d 1313, 279 CR 529 (fees denied because petition was for peremptory writ of mandate under CCP §1085, not CCP §1094.5); *Los Angeles Police Protective League v City of Los Angeles* (1985) 166 CA3d 55, 65, 212 CR 251 (fees denied because writ brought to compel enforcement of hearing decision, not to challenge it; overruled on other grounds in *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 253 CR 426); *California Teachers Ass'n v Cory* (1984) 155 CA3d 494, 515, 202 CR 611 (original writ in court of appeal to compel transfer of funds into State Teachers' Retirement Fund).

In an attempt to reconcile this conflict, *Kistler* found that, although the broad dicta in *Forrest* was incorrect, the result was correct because the plaintiff had a right to an administrative hearing that would have been held but for the defendant's illegal actions. 15 CA4th at 1336. Presumably, the *Kistler* court would also disagree with *Leslie's Pool Mart, Inc. v Department of Food & Agric.* (1990) 223 CA3d 1524, 273 CR 373, which held that, if no administrative hearing occurred, fees may not be awarded under Govt C §800, even if the failure to hold a hearing was unconstitutional. The court in *Leslie's* had acknowledged the "irony" that fees could be awarded under §800 if a hearing is held and the determination is arbitrary and capricious, but may not be awarded if a hearing is unconstitutionally denied.

A corollary of the holdings in *Kistler* and the other decisions requiring an actual administrative ruling as a prerequisite to fees under §800 is that only the party seeking review of an adverse administrative decision can be the prevailing "complainant" under Govt C §800. *Stirling v ALRB* (1987) 189 CA3d 1305, 235 CR 56 (denying fees to prevailing real party in interest). But see *Richardson v Board of Supervisors* (1988) 203 CA3d 486, 496, 250 CR 1 (noting that courts "appear to have authorized" fees to be paid to employee associations joining with their members in mandate proceedings).

See also *Olson v Hickman* (1972) 25 CA3d 920, 102 CR 248 (Govt C §800 extends to administrative proceedings taken under county charter).

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### §3.92 b. Arbitrary and Capricious Action or Conduct

The requirement that an agency's actions must be "arbitrary or capricious" before fees can be awarded under Govt C §800(a) (see §3.91) has been construed as requiring the trial court to find that the agency's actions are "wholly arbitrary and capricious." See *Halaco Eng'g Co. v South Cent. Coast Regional Comm'n* (1986) 42 C3d 52, 78, 227 CR 667. See also *Santos v DMV* (1992) 5 CA4th 537, 7 CR2d 10. But see *Abshear v Teachers' Retirement Bd.* (1991) 231 CA3d 1629, 282 CR 833 (fee award affirmed when defendant's conduct not supported by "a fair and substantial reason").

Though the trial court has discretion to determine whether conduct is "arbitrary and capricious," *Campbell v Residential Rent Stabilization & Arbitration Bd.* (1983) 142 CA3d 123, 130, 190 CR 829, reversed a denial of fees under Govt C §800. The appellate court found that, because no substantial evidence supported the administrative agency's actions, the decision appeared to be based in part on passion or prejudice. See also *Apte v Regents of Univ. of Cal.* (1988) 198 CA3d 1084, 244 CR 312 (decision to terminate professor made without considering crucial evidence constitutes arbitrary and capricious action; fees under §800 upheld). If, however, the agency's position is wrong but not arbitrary, fees will be denied. *Evans v Unemployment Ins. Appeals Bd.* (1985) 39 C3d 398, 421, 216 CR 782; G*illiland v Medical Bd. of Cal.* (2001) 89 CA4th 208, 220, 106 CR2d 863; *Seghesio v County of Napa* (1982) 135 CA3d 371, 185 CR 224.

An administrative decision may be arbitrary or capricious under Govt C §800(a) even if it is initially sustained by the trial court. On at least two occasions, the court of appeal has simultaneously reversed the trial court's decision on the merits and ordered an award of fees under §800. See *In re John K.* (1985) 170 CA3d 783, 798, 216 CR 557; *Civil Serv. Ass'n v San Francisco Redev. Agency* (1985) 166 CA3d 1222, 1227, 213 CR 1.

Other cases addressing claimed arbitrary or capricious action include:

- *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 256, 55 CR3d 467 (plaintiff who obtained preliminary injunction entitling daughter to play on team was prevailing party, even though permanent injunction denied because case moot);
- *Marlow v Orange County Human Servs. Agency* (1980) 110 CA3d 290, 167 CR 776 (failure to swear witnesses at administrative hearing, although entitling petitioner to writ of mandate, not arbitrary or capricious action under Govt C §800);
- *Adler v Los Angeles Unified Sch. Dist.* (1979) 98 CA3d 280, 159 CR 528 (school district's denial of grievance hearing to probationary teacher violated constitution, but not wholly arbitrary or capricious, because plaintiff no longer employed by district);
- *Gunn v Employment Dev. Dep't* (1979) 94 CA3d 658, 156 CR 584 (department's actions followed usual administrative procedure; although they violated petitioner's constitutional rights, they were not "entirely arbitrary and capricious—that is, conduct lacking any reasonable basis whatsoever");
- *Marin Hosp. Dist. v Department of Health* (1979) 92 CA3d 442, 154 CR 838 (Department of Health regulation, although inconsistent with governing statute, did not completely lack rational support, and thus was not arbitrary and capricious);
- *Amador Valley Secondary Educators Ass'n v Newlin* (1979) 88 CA3d 254, 151 CR 724 (fact that actions taken were not illegal did not mean they were not arbitrary); and
- *Midstate Theaters, Inc. v Board of Supervisors* (1975) 46 CA3d 204, 119 CR 894 (even actions taken in good faith may be held arbitrary and capricious).

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### §3.93 c. Personal Obligation to Pay Fees

The Govt C §800(a) requirement that petitioner be personally obligated to pay fees was met in *Forrest v Trustees of Cal. State Univ. & Colleges* (1984) 160 CA3d 357, 368, 206 CR 595, because petitioner was obligated to pay dues to the union that gave him free representation. Compare *Forrest* with *Richardson v Board of Supervisors* (1988) 203 CA3d 486, 250 CR 1, in which the appellate court reversed an order awarding attorney fees to both an individual and his employee organization and remanded for a determination of whether they were personally obligated to pay the fees being claimed.

The "personal obligation" issue has arisen in numerous other contexts, and the requirement generally is met if an attorney-client relationship has been established, even if the services are provided without charge. See, *e.g., Marriage of Ward* (1992) 3 CA4th 618, 4 CR2d 365 (fees under family law statutes awardable to attorney who represented party without charge); *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605 (same result as to contractual fees under CC §1717). See also §§2.20-2.30.

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### §3.94 8. Litigation With State Regulatory Agencies (CCP §1028.5)

In CCP §1028.5, California enacted a weaker version of the federal Equal Access to Justice Act (see 5 USC §504(a); 28 USC §2412(d)). Section 1028.5 makes fees available in civil actions between small businesses or licensees and the state agencies regulating them. If the business or licensee is the prevailing party, it may recover reasonable litigation expenses, including attorney fees, of up to $7500. CCP §1028.5(b).

Fees are available only for contesting regulatory actions "undertaken without any substantial justification." See *Wang v Division of Labor Standards Enforcement* (1990) 219 CA3d 1152, 268 CR 669, upholding a fee award of $7500 under §1028.5 and rejecting the argument that the respondent state agency was not a "regulatory agency" exercising a "regulatory function." The court held that, in assessing civil penalties authorized by Lab C §1021.5, the agency was exercising a regulatory function within the meaning of CCP §1028.5.

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### §3.95 9. Taxpayers' Actions (Rev & T C §§7156, 19717)

Attorney fees also may be awarded for successful litigation under the "California Taxpayers' Bill of Rights," Rev & T C §7156(c)(2)(A). Under this section, the plaintiff must show that it is the prevailing party, either by substantially prevailing on the amount in controversy or by substantially prevailing on the most significant issue or set of issues, and that the State's position in the litigation was not "substantially justified." See *Agnew v State Bd. of Equalization* (2005) 134 CA4th 899, 36 CR3d 464. In an action under the Taxpayers' Bill of Rights Act (Rev & T C §§7080-7099.1), the state may not set off taxes owed or claimed to be owed against a fee award under Rev & T C §7156. *Garg v State Bd. of Equalization* (1997) 53 CA4th 199, 61 CR2d 376.

In *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 872, 71 CR3d 642, an action establishing the invalidity of former Rev & T C §17942, the court rejected the FTB's arguments that the requirements for plaintiff's fee award under the private attorney general statute, CCP §1021.5, were not met, holding that Rev & T C §19717 is not the exclusive source of a fee award in a tax refund action.

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## C. Labor-Related Actions

### §3.96 1. Review of Labor Commissioner Decisions (Lab C §98.2)

Under Lab C §98.2, successful respondents, but not successful appellants, may recover their reasonable attorney fees in actions brought to review decisions of the Labor Commissioner. Lab C §98.2(c). See, *e.g., Henry v Amrol, Inc.* (1990) 222 CA3d Supp 1, 272 CR 134; *Ghory v Al-Lahham* (1989) 209 CA3d 1487, 257 CR 924; *Dawson v Westerly Investigations, Inc.* (1988) 204 CA3d Supp 20, 251 CR 633. This provision also authorizes fee awards to the Labor Commissioner when the commissioner represents the claimant without charge under Lab C §98.4. *Lolley v Campbell* (2002) 28 C4th 367, 121 CR2d 571 (quoting this book).

Effective January 1, 2004, the successful party on appeal from a Labor Commissioner award is the employee "if the court awards an amount greater than zero." Lab C §98.2(c), as amended by Stats 2003, ch 93, §2. This amendment reversed the decision of the California Supreme Court in *Smith v Rae-Venter Law Group* (2002) 29 C4th 345, 367, 127 CR2d 516, which held that an appellant-employer that improved its position on appeal was not unsuccessful under Lab C §98.2(c) and thus was not liable for the employee's attorney fees. The amendment restored the pre-*Rae-Ventner* rule as articulated in *Cardenas v Mission Indus.* (1991) 226 CA3d 952, 277 CR 247; *Triad Data Servs. v Jackson* (1984) 153 CA3d Supp 1, 15, 200 CR 418. See Stats 2003, ch 93, Digest AB 223.

The interplay between Lab C §98.2 and other fee-shifting statutes also has been addressed. In *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 1378, 61 CR3d 114, the court affirmed a fee award under Lab C §1194 to an employee who successfully appealed an adverse Labor Commissioner decision, finding no conflict with Lab C §98.2, which awards fees only to successful respondents in such appeals. The court distinguished *Dawson v Westerly Investigations, Inc., supra,* on the grounds that the *Dawson* court had not considered fee eligibility under §1194.

In *Sampson v Parking Serv. 2000 Com., Inc.* (2004) 117 CA4th 212, 215, 11 CR3d 595, the court held that an employee who prevailed in an employer's appeal of a Labor Commissioner ruling was entitled to fees for the judicial proceeding under Lab C §98.2 but was not entitled to fees for the administrative proceeding under Lab C §1194 because that statute did not provide fees for administrative proceedings.

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### §3.97 2. Actions to Recover Wages or Benefits (Lab C §§218.5, 1194, and Others)

**Labor Code §218.5.** Labor Code §218.5 provides that attorney fees "shall" be awarded to the prevailing party in actions brought "for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." The statute applies to salaried as well as hourly employees. *On-Line Power, Inc. v Mazur* (2007) 149 CA4th 1079, 1086, 57 CR3d 698. It does not apply to actions brought by the Labor Commissioner. Lab C §218.5. Note that, unlike other fee-shifting statutes (see §11.1), §218.5 specifically requires the party claiming fees to have requested attorney fees and costs "upon the initiation of the action."

*Earley v Superior Court* (2000) 79 CA4th 1420, 95 CR2d 57, addressed the interplay between the more general "prevailing party" standard in §218.5 and the one-sided provision in Lab C §1194 ("employees" have the right to fees in successful overtime wage claims). *Earley* held that in a lawsuit for overtime wages, the more specific one-way provision in §1194 barred an award of fees to the prevailing employer under Lab C §218.5. 79 CA4th at 1429. To reflect the holding in *Earley*, the legislature amended Lab C §218.5, operative January 1, 2001, to state that §218.5 does not apply to any action for which attorney fees are recoverable under Lab C §1194. See Stats 2000, ch 876, §§4, 11.

**Labor Code §1194.** An employee who sues to recover unpaid minimum wages or overtime compensation is entitled to reasonable attorney fees under Lab C §1194. See, *e.g., Armenta v Osmose, Inc.* (2005) 135 CA4th 314, 37 CR3d 460. In *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 1378, 61 CR3d 114, the court affirmed a fee award under Lab C §1194 to an employee who successfully appealed an adverse Labor Commissioner decision, finding no conflict with Lab C §98.2, which awards fees only to successful respondents in such appeals.

In *Sampson v Parking Serv. 2000 Com., Inc.* (2004) 117 CA4th 212, 11 CR3d 595, the court held that an employee who prevailed in an employer's appeal of a Labor Commissioner ruling was entitled to fees for the judicial proceeding under Lab C §98.2 but was not entitled to fees for the administrative proceeding under Lab C §1194.

In *Bell v Farmers Ins. Exch.* (2001) 87 CA4th 805, 105 CR2d 59, the court held that Lab C §1194 did not authorize an award of interim attorney fees based on a summary adjudication of liability. In a later opinion, *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544, the court noted that counsel had been awarded a fee equal to 25 percent of the fund recovered, plus a statutory fee under Lab C §1194, to be credited against the common fund fee.

**Labor Code §1197.5 (Equal Pay Act).** See *Jones v Tracy Sch. Dist.* (1980) 27 C3d 99, 109, 165 CR 100, which includes an excellent discussion of the private attorney general purposes of fee-shifting statutes in the employment context.

**Labor Code §2699.** Under Lab C §2699, aggrieved employees may recover reasonable attorney fees in actions to recover civil penalties on behalf of themselves and other current or former employees against whom violations have been committed. Lab C §2699(g). See *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 593, 72 CR3d 922 (also awarding fees under Lab C §§226(e) and 1194(a)).

**Labor Code §4607 (Workers' compensation).** Labor Code §4607 authorizes fee awards to employees who successfully resist proceedings to terminate medical treatment, but not to employees who successfully challenge denial of specific treatment requests. *Smith v Workers' Comp. Appeals Bd.* (2009) 46 C4th 272, 280, 92 CR3d 894.

**Municipal ordinances.** Some municipal ordinances regulate labor and provide fee awards for their enforcement. See, *e.g., Amaral v Cintas* (2008) 163 CA4th 1157, 1174, 78 CR3d 572 (fee award to employees based, in part, on fee-shifting provision of Hayward's Living Wage Ordinance (Hayward Mun C §§2.14.010-2.14.080)).

**NOTE:** The Federal Employers' Liability Act (FELA) (45 USC §§51-60) preempts some state labor statutes. See, *e.g., Miller v Union Pac. R.R. Co.* (2007) 147 CA4th 451, 459, 53 CR3d 893 (federal law controls availability of expert witness fees in state court FELA action and does not authorize award to prevailing plaintiff under CCP §998.). See also *Warehouse, Processing, Distribution Workers Union, Local 26 v Hugo Neu Proler Co*. (1998) 65 CA4th 732, 746, 76 CR2d 814, discussed in §3.99.

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## §3.98 3. Actions to Compel Arbitration Under Collective Bargaining Agreement

Labor Code §1128 provides for fee awards in actions to compel arbitration under a collective bargaining agreement. Note, however, that federal labor law has been held to preempt the fee provision in Lab C §1128. *Warehouse, Processing, Distribution Workers Union, Local 26 v Hugo Neu Proler Co*. (1998) 65 CA4th 732, 746, 76 CR2d 814. See *Miller v Union Pac. R.R. Co.* (2007) 147 CA4th 451, 53 CR3d 893 (federal law controls availability of expert witness fees in state court FELA action and preempts CCP §998).

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### §3.99 4. School Employee Challenges to Dismissals or Suspensions (Ed C §44944(e))

School employees who successfully challenge a dismissal or suspension are entitled to reasonable attorney fees incurred at both the administrative and judicial levels. Ed C §44944(e). See, *e.g., Fontana Unified Sch. Dist. v Burman* (1988) 45 C3d 208, 225, 246 CR 733. See also *Roybal v Governing Bd. of the Salinas City Elementary Sch. Dist.* (2008) 159 CA4th 1143, 1152, 72 CR3d 146 (fees denied because Ed C §44944 inapplicable to layoffs under §44955). *Russell v Thermalito Union Sch. Dist.* (1981) 115 CA3d 880, 883, 176 CR 1; *Board of Educ. v Commission on Prof. Competence* (1980) 102 CA3d 555, 562, 162 CR 590 (fees available even though union represented teacher without charge).

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## D. Property-Related Actions

### §3.100 1. Tenant Protection Statutes

Many statutes designed to protect tenants provide for reasonable attorney fees to the prevailing party. These include:

- **Civil Code §789.3(d) (Utility shutoffs and lockouts).** The prevailing party in an action alleging an unlawful utility shutoff or lockout is entitled to reasonable attorney fees under CC §789.3(d). See, *e.g., Camacho v Schaefer* (1987) 193 CA3d 718, 238 CR 609.
- **Civil Code §798.85** (**Mobilehome Residency Law**)**.** Under the Mobilehome Residency Law (MRL) (CC §§798-799.11), the prevailing party is entitled to reasonable attorney fees in any action "arising out of" the MRL. CC §798.85. Section 798.85 also specifies that unless the parties agree otherwise, a party prevails if it obtains either a judgment or a dismissal in its favor. See *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (under MRL, defendant in whose favor action is dismissed before trial is prevailing party); *Palmer v Agee* (1978) 87 CA3d 377, 150 CR 841 (fees awarded to mobilehome resident who successfully raised MRL as defense to unlawful detainer action); *De Anza Santa Cruz Mobile Estates Homeowners Assoc. v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 922, 114 CR2d 708. But see *SC Manufactured Homes, Inc. v Canyon View Estates, Inc.* (2007) 148 CA4th 663, 680, 56 CR3d 79 (fees denied in commercial action because action did not "arise out" of MRL).
- **Civil Code §1942.4(b)** (**Breach of warranty of habitability).** The prevailing party in an action arising out of the landlord's breach of the warranty of habitability is entitled to fees under CC §1942.4(b)(2). See, *e.g., Galan v Wolfriver Holding Corp.* (2000) 80 CA4th 1124, 1127, 96 CR2d 112. See also CCP §1174.2.
- **Civil Code §1942.5(g) (Retaliatory eviction).** Actions for retaliatory eviction under CC §1942.5 provide for reasonable attorney fees to the prevailing party. CC §1942.5(g). Section 1942.5(g) requires that fees be requested on the initiation of the action. See *Rich v Schwab* (1998) 63 CA4th 803, 818, 75 CR2d 170 (tenants who moved in response to retaliatory rent increase entitled to fees under "retaliatory eviction" provisions of CC §1942.5).
- **Municipal ordinances.** Parties may also be entitled to fees under municipal ordinances regulating landlord-tenant relations. See, *e.g., Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 759, 90 CR3d 181 (provisions in Oakland's Just Cause for Eviction Ordinance (Oakland Mun C §§8.22.300-8.22.390) allowing prevailing tenants to obtain reasonable attorney fees not preempted by CCP §1021; city ordinance may authorize fee award). See also San Francisco Rent Stabilization and Arbitration Ordinance §37.9(f).
- **Other bases.** Landlord-tenant actions that confer a significant benefit on a large class of persons may also qualify for fees under CCP §1021.5. See, *e.g., Arietta v Mahon* (1982) 31 C3d 381, 182 CR 770. See §§3.51-3.60.

Landlord-tenant actions also frequently involve contractual fee provisions. See chap 4. They also occasionally involve consumer protection statutes. See §3.105.

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### §3.101 2. Eminent Domain Actions (CCP §§1235.140, 1268.610)

Code of Civil Procedure §§1235.140 and 1268.610 provide for the award of reasonable attorney fees in eminent domain proceedings to defendants who obtain full or partial dismissals or who obtain final judgments defeating, in whole or in part, attempts to acquire their property. See, *e.g., City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606; *People ex rel Dep't of Transp. v Yuki* (1995) 31 CA4th 1754, 37 CR2d 616. See also CCP §1250.410. See generally Condemnation Practice in California §1.10 (3d ed Cal CEB 2005).

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### §3.102 3. Inverse Condemnation Actions (CCP §1036)

Reasonable attorney fees for trial and appellate proceedings are available to successful plaintiffs in inverse condemnation actions under CCP §1036. The issue of how to calculate those fees has generated substantial litigation. See, *e.g., Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 950, 218 CR 839, and cases cited there. See also *Andre v City of W. Sacramento* (2001) 92 CA4th 532, 111 CR2d 891.

Section 1036 also authorizes attorney fees and reasonable litigation expenses for the time spent enforcing an inverse condemnation judgment. *Downen's Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 CA4th 856, 103 CR2d 644. See §§9.27, 15.15.

On condemnation generally, see Condemnation Practice in California §§3.8, 17.15 (3d ed Cal CEB 2005).

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### §3.103 4. Other Property-Related Statutes

**Civil Code §1354 (Common interest developments).** Civil Code §1354 authorizes fee awards to the prevailing party in actions to enforce the governing documents. CC §1354(c). In *Parrot v Mooring Townhomes Ass'n, Inc.* (2003) 112 CA4th 873, 6 CR3d 116, the court held that §1354's prevailing party language (common interest development covenants and restrictions) must be construed on a practical level when the plaintiff homeowners dismissed their lawsuit without prejudice after being denied a preliminary injunction. In *Villa De Las Palmas Homeowners Ass'n v Terifaj* (2004) 33 C4th 73, 94, 14 CR3d 67, the court affirmed that plaintiff association was the prevailing party because it "achieved its main litigation objective" by obtaining an injunction against the defendant. See also *Arias v Katella Townhouse Homeowners Ass'n, Inc.* (2005) 127 CA4th 847, 26 CR3d 113 (fees awarded under both CC §§1354 and 1717; effects of voluntary payments made after rejection of CCP §998 offer on prevailing party determination discussed); *Salaway v Ocean Towers Hous. Corp.* (2004) 121 CA4th 664, 672, 17 CR3d 427 (fee award denied because plaintiff's action not based on governing documents, as required by former CC §1354(f) (see now CC §1354(c)), even though defendant won case based on those documents).

In determining the reasonable fee to be awarded against the losing plaintiff-tenant, the court may consider the losing party's financial circumstances and the impact of the award on that party, among other circumstances. *Garcia v Santana* (2009) 174 CA4th 464, 476, 94 CR3d 299. *Garcia* reversed a fee award of zero, however, because the trial court had not considered all the relevant circumstances.

**Health and Safety Code §17980.7(d)(1) (Enforcement of state housing law).** In *City & County of San Francisco v Jen* (2005) 135 CA4th 305, 37 CR3d 454, the court affirmed a $837,604 fee award to plaintiffs under Health & S C §17980.7(d)(1) for its enforcement action against a property owner whose unauthorized construction endangered nearby residents. In *City & County of San Francisco v Ballard* (2006) 136 CA4th 381, 400, 39 CR3d 1, the court held that the prevailing defendant was not entitled to fees under Health & S C §17980.7(d)(1) because it is a one-way statute that allows fees only to enforcement agencies, nor under Health & S C §17980.7(c)(11) because that statute, although two-way, applies only to receivership proceedings.

Compare *Ballard* with *City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 58 CR3d 218 (local ordinance that provided fees only to city in nuisance abatement action invalid under Govt C §38773.5(b), which requires that such statutes award fees to prevailing party), discussed in §3.106.

**Government Code §25845 (Nuisance abatement).** In *County of Sacramento v Sandison* (2009) 174 CA4th 646, 95 CR3d 30, the county unsuccessfully attempted to enforce an injunction to abate a nuisance through a contempt proceeding, and the trial court awarded fees to the prevailing defendant under a provision in the parties' settlement agreement. The appellate court held that Govt C §25845(d), which limits the amount of any fee award to the reasonable fees incurred by the county, applies only when fees are sought under an ordinance enacted under authority of §25845, not when they are sought pursuant to a contract (*e.g.,* the settlement agreement). 174 CA4th at 651.

**Civil Code §3496 (Drug house abatement).** In drug house abatement actions under CC §3496, the court may award the "prevailing party" costs, including the costs of investigation and reasonable attorney fees; such costs include the salaries and overhead expenses of government attorneys, police officers, and technicians involved in investigating the case. *City of Oakland v McCullough* (1996) 46 CA4th 1, 53 CR2d 531.

**Code of Civil Procedure §405.38 (Expungement of lis pendens).** In *Castro v Superior Court* (2004) 116 CA4th 1010, 10 CR3d 865, the court held that the "prevailing party" language of CCP §405.38 (expunging notice of lis pendens) must be construed on a practical level when the lis pendens is withdrawn pending the motion to expunge it.

**Code of Civil Procedure §1021.9 (Trespass to agricultural land).** The prevailing plaintiff in an action for damages resulting from a trespass to agricultural land is entitled to reasonable attorney fees under CCP §1021.9. See, *e.g., Starrh & Starrh Cotton Growers v Aera Energy LLC* (2007) 153 CA4th 583, 608, 63 CR3d 165.

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**Source:** Civil Litigation/California Attorney Fee Awards/3 Fee-Shifting Statutes/§3.104 E. Consumer Protection Statutes

## §3.104 E. Consumer Protection Statutes

The purpose of fee-shifting provisions in consumer laws is to encourage the enforcement of consumer rights, regardless of the low damages that might be involved. As the court said in *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 817, 50 CR3d 731, quoting *Murillo v Fleetwood Enters., Inc.* (1998) 17 C4th 985, 994, 73 CR2d 682:

> "By permitting prevailing buyers to recover their attorney fees in addition to costs and expenses, our Legislature has provided injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible."

Accordingly, many consumer protection statutes provide for reasonable attorney fees. These include:

- The Retail Installment Sales Act (CC §1811.1). See *Morgan v Reasor Corp.* (1968) 69 C2d 881, 73 CR 398.
- The Rees-Levering Motor Vehicle Sales and Finance Act (also known as the Automobile Sales Finance Act) (CC §2983.4). See *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 50 CR3d 273; *Damian v Tamondong* (1998) 65 CA4th 1115, 77 CR2d 262; *Winters v Security Pac. Nat'l Bank* (1975) 49 CA3d 510, 122 CR 619; *Leaf v Phil Rauch, Inc.* (1975) 47 CA3d 371, 120 CR 749. See also *Brown v West Covina Toyota* (1994) 26 CA4th 555, 556, 32 CR2d 85, discussed below.
- The Song-Beverly Consumer Warranty Act (CC §1794). See, *e.g., Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 94 CR3d 802; *Dominguez v American Suzuki* (2008) 160 CA4th 53, 72 CR3d 354; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 50 CR3d 731; *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1 (also awarding fees under the Consumers Legal Remedies Act (CC §1780(d))); *Music Acceptance Corp. v Lofing* (1995) 32 CA4th 610, 39 CR2d 159; *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 37 CR2d 149; *Kwan v Mercedes-Benz* (1994) 23 CA4th 174, 28 CR2d 371.
- The Home Equity Sales Contract Act (CC §1695.7). See *Boquilon v Beckwith* (1996) 49 CA4th 1697, 1721, 57 CR2d 503.
- The Rosenthal Fair Debt Collection Practices Act (CC §§1788-1788.33). See *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 95 CR3d 880 (award to plaintiff); *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 94 CR2d 448 (award to plaintiffs); *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 114 CR2d 558 (award to defendants).
- The Consumers Legal Remedies Act (CC §1780(d)). See *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 9, 83 CR3d 771 (fee award to prevailing defendant requires finding that plaintiff proceeded in subjective bad faith); *Kim v Euromotors West/The Auto Gallery* (2007) 149 CA4th 170, 178, 56 CR3d 780; *Corbett v Hayward Dodge, Inc.* (2004) 119 CA4th 915, 14 CR3d 741; *Hayward v Ventura Volvo* (2003) 108 CA4th 509, 133 CR2d 514; *America Online, Inc. v Superior Court* (2001) 90 CA4th 1, 38 n16, 108 CR2d 699; *Reveles v Toyota by the Bay, supra.*
- The Vehicle Leasing Act (CC §2985.7). See *LaChapelle v Toyota Motor Credit* (2002) 102 CA4th 977, 993, 126 CR2d 32.
- The Consumer Credit Reporting Agencies Act (CC §1785.31(e)). California courts have held that the two-sided "prevailing party" fee provision in the California Consumer Credit Reporting Agencies Act (CC §1785.31(d)) is not preempted by the one-sided "prevailing consumer" fee provision in the Federal Fair Credit Reporting Act (15 USC §§1681n-1681o). *Gomon v TRW, Inc.* (1994) 28 CA4th 1161, 34 CR2d 256; *Cisneros v U.D. Registry, Inc*. (1995) 39 CA4th 548, 46 CR2d 233. The Ninth Circuit Court of Appeals appears to disagree, stating in dicta that the California Act permits fees against consumers only for frivolous lawsuits. *Guimond v Trans Union Credit Info. Co.* (9th Cir 1995) 45 F3d 1329.

**NOTE:** Under CC §1785.31(f), if the plaintiff seeks and obtains injunctive relief only to compel compliance with the Consumer Credit Reporting Agencies Act, court costs and attorney fees are awarded under CCP §1021.5.

The interplay between these statutes can be tricky. In *Brown v West Covina Toyota* (1994) 26 CA4th 555, 556, 32 CR2d 85, the court held that because the plaintiff-buyer sued only under the Song-Beverly Act, which provides fees and costs only to successful buyers, and not under the Rees-Levering Act, which provides for two-way fee shifting, the prevailing defendant-seller could not recover fees and costs.

Subsequently, in *Murillo v Fleetwood Enters., Inc.* (1998) 17 C4th 985, 73 CR2d 682, the court held that the one-sided fee-shifting provision in the Song-Beverly Act does not preclude a prevailing seller-defendant from recovering statutory *costs* under CCP §998 or §1032. The court disapproved *Brown* to the extent it held that costs were not recoverable by a prevailing seller, but supported its attorney fee determination. 17 C4th at 996. See §2.78.

In *Broughton v CIGNA Healthplans* (1999) 21 C4th 1066, 1086, 90 CR2d 334, the court held that, when a claim under a consumer statute is submitted to arbitration, the arbitrator has the power to award fees provided by the statute, and stated that "the availability of fees to prevailing plaintiffs is integral to making the [legislation] an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute."

Federal consumer protection statutes contain comparable fee-shifting provisions. See, *e.g., Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973 (Fair Debt Collection Practices Act (15 USC §1692k(a)(3)).

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### §3.105 F. City Charters and Ordinances

City charters may also provide for attorney fees. See *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 759, 90 CR3d 181 (Oakland unjust eviction ordinance allowing prevailing tenants to obtain reasonable attorney fees not preempted by CCP §1021; city ordinance may authorize fee award); *Amaral v Cintas* (2008) 163 CA4th 1157, 1174, 78 CR3d 572 (fee award based, in part, on fee-shifting provision of Hayward living wage ordinance); *City of Santa Paula v Narula* (2003) 114 CA4th 485, 8 CR3d 75; *Brennan v Board of Supervisors* (1984) 153 CA3d 193, 200 CR 192 (San Francisco City Charter provision allowed attorney fees in taxpayer actions against city). See also *Torres v City of San Diego* (2007) 154 CA4th 214, 226, 64 CR3d 495 (fee award based on municipal resolution); *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 378, 261 CR 318, 338 (dicta noting power of local board to award attorney fees under rent control ordinance).

In *City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 1536, 58 CR3d 218, the court held that a city ordinance providing fees only to the city in litigation to abate a nuisance conflicted with state law (Govt C §38773.5), which requires that any such fee provision be reciprocal. The court also rejected the city's attempt to apply a new ordinance that did not become effective until after the underlying litigation was dismissed. 149 CA4th at 1537.

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## G. Personal Injury Statutes

### §3.106 1. Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15675)

Plaintiffs who successfully enforce the Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15675) are entitled to reasonable attorney fees. Welf & I C §15657. See *Delaney v Baker* (1999) 20 C4th 23, 26, 82 CR2d 610; *Wood v Jamison* (2008) 167 CA4th 156, 164, 83 CR3d 877 (financial abuse action); *Perlin v Fountain View Mgmt, Inc.* (2008) 163 CA4th 657, 666, 77 CR3d 743 (fee award under §15657 requires proof of liability, including causation, by clear and convincing evidence); *Wood v Santa Monica Escrow Co.* (2007) 151 CA4th 1186, 1191, 60 CR3d 597 (prevailing defendants not entitled to fees); *Marron v Superior Court* (2003) 108 CA4th 1049, 1064, 134 CR2d 358 (enhanced remedies recoverable against public entity). See also *Covenant Care, Inc. v Superior Court* (2004) 32 C4th 771, 11 CR3d 222 (discussing purpose and scope of statute).

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### §3.107 2. Code of Civil Procedure §1021.7

Code of Civil Procedure §1021.7 provides fees to defendants in bad faith actions against police officers and in libel or slander actions involving peace officers acting in their official capacities. See *Martin v Szeto* (2004) 32 C4th 445, 9 CR3d 687 (explaining scope of statute and overruling *Planned Protective Servs. v Gorton* (1988) 200 CA3d 1, 245 CR 790); *Salazar v Upland Police Dep't* (2004) 116 CA4th 934, 11 CR3d 22.

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### §3.108 3. Civil Actions by Felony Victims (CCP §1021.4)

Code of Civil Procedure §1021.4. provides fees to plaintiffs who prevail in tort actions for damages arising from the commission of a felony for which the defendant has been convicted, such as drunk driving or white-collar crimes. See, *e.g., Insurance Co. of N. Am. v Moore* (9th Cir 1986) 783 F2d 1326; *Wood v McGovern* (1985) 167 CA3d 772, 213 CR 498.

Under CCP §1021.4, numerous factors not normally relevant under fee-shifting statutes, such as the guilt or innocence of the "victim" and the malice or negligence of the defendant, may be considered in determining the prevailing plaintiff's entitlement to fees and the amount of those fees. *Sommers v Erb* (1992) 2 CA4th 1644, 1651, 4 CR2d 52.

Because the defendant has been convicted of a felony, fee awards under §1021.4 may be difficult to collect. In *Baker v Mid-Century Ins. Co.* (1993) 20 CA4th 921, 25 CR2d 34, the court held that a drunk driver's automobile insurance company was not liable for the accident victim's attorney fees under §1021.4, citing the policy against insuring for intentional misconduct. See dicta to the same effect in *Vaillette v Fireman's Fund Ins. Co.* (1993) 18 CA4th 680, 689 n7, 22 CR2d 807.

See also *In re Imran Q.* (2008) 158 CA4th 1316, 1320, 71 CR3d 121 (under Welf & I C §730.6, which provides for restitution to compensate juvenile offender's victim, "economic losses" includes legal fees victim incurred to collect restitution).

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### §3.109 4. Anti-Harassment Actions (CCP §527.6)

California's anti-harassment statute, CCP §527.6, allows fee awards to the prevailing party. CCP §527.6(i). See, *e.g., Adler v Vaicius* (1993) 21 CA4th 1770, 27 CR2d 32 (defendants were prevailing parties under §527.6 when plaintiff voluntarily dismissed complaint without prejudice, even though plaintiff had previously obtained temporary restraining order); *Elster v Friedman* (1989) 211 CA3d 1439, 260 CR 148 (plaintiffs were prevailing parties under §527.6, even though stipulated judgment restricted both plaintiffs and defendants, because plaintiffs' conduct was never at issue).

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## H. SLAPP Suits (CCP §425.16(c))

### §3.110 1. Special Motion to Strike SLAPP Lawsuits

Code of Civil Procedure §425.16 provides a remedy to parties subjected to SLAPP lawsuits ("strategic lawsuits against public participation"). Under CCP §425.16, a lawsuit arising from any act of a defendant that was (1) in furtherance of the defendant's right of petition or free speech, and (2) in connection with a public issue is subject to a special motion to strike unless the plaintiff establishes that there is a probability that the plaintiff will prevail on the claim.

Under CCP §425.16(c), defendants who win anti-SLAPP motions are entitled to a mandatory award of reasonable attorney fees. See *Ketchum v Moses* (2001) 24 C4th 1122, 1141, 104 CR2d 377; *Raining Data Corp. v Barrenechea* (2009) 175 CA4th 1363, 1375, 97 CR3d 196 (prevailing cross-defendant awarded fees); *Premier Med. Mgmt. Sys., Inc. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 77 CR3d 695 (trial court and appellate fees awarded to prevailing defendants).

Government entities may also utilize the statute. See, *e.g., Schroeder v Irvine City Council* (2002) 97 CA4th 174, 118 CR2d 330, discussed in §3.113; *Bradbury v Superior Court* (1996) 49 CA4th 1108, 57 CR2d 207 (county officials could bring anti-SLAPP motion in deputy sheriff's lawsuit based on officials' written and verbal communications concerning plaintiff's handling of investigation).

Plaintiffs who defeat anti-SLAPP motions are entitled to their fees under §425.16(c) if the motion was "frivolous or solely intended to cause unnecessary delay." See *Haneline Pac. Props., LLC v May* (2008) 167 CA4th 311, 320, 83 CR3d 919 (no fees awarded to prevailing plaintiff that failed to develop argument that anti-SLAPP motion was "frivolous" or intended to cause "unnecessary delay"); *Olsen v Harbison* (2005) 134 CA4th 278, 35 CR3d 909 (sanctions awarded for frivolous appeal from late anti-SLAPP motion). See §3.116.

The procedural requirements for a motion under CCP §425.16 are discussed in *American Humane Ass'n v Los Angeles Times Communications* (2001) 92 CA4th 1095, 112 CR2d 488, and *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 129 CR2d 892 (time for filing notice of motion to strike under CCP §425.16(f) is mandatory).

**NOTE:** The anti-SLAPP statute has been applied to state law claims made in federal court. *Thomas v Fry's Electronics, Inc.* (9th Cir 2005) 400 F3d 1206; *U.S. ex rel Newsham v Lockheed Missiles & Space Co.* (9th Cir 1999) 171 F3d 1208, 1217; *Kearney v Foley & Lardner* (SD Cal, Mar. 18, 2008, No. 05-CV-2112) 2008 US Dist Lexis 21115, citing *Lockheed Missiles*. See also *Restaino v Bah (In re Bah)* (BAP 9th Cir 2005) 321 BR 41, 46 (anti-SLAPP statute applies to pendent state law claims in bankruptcy court).

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### §3.111 2. Anti-SLAPP Provision Broadly Construed

In keeping with the legislature's directive to construe the anti-SLAPP statute broadly (see CCP §425.16(e)(4)), the California Supreme Court has rejected constructions that would narrow the law. See *Briggs v Eden Council for Hope & Opportunity* (1999) 19 C4th 1106, 81 CR2d 471 (when statement that is subject of plaintiff's cause of action was made in connection with official proceeding, defendant not required to make separate showing that it pertains to public issue); *Equilon Enters. v Consumer Cause, Inc.* (2002) 29 C4th 53, 124 CR2d 507 (defendant not required to show that lawsuit was brought with intent to chill exercise of defendant's speech or petition rights). On the breadth of CCP §425.16, see also *Bernardo v Planned Parenthood Fed'n* (2004) 115 CA4th 322, 9 CR3d 197 (rejecting constitutional challenges to statute); *Sipple v Foundation for Nat'l Progress* (1999) 71 CA4th 226, 83 CR2d 677.

**Code of Civil Procedure §425.17.** In CCP §425.17, the legislature created an exemption from the anti-SLAPP law for certain "public interest lawsuits" and actions involving commercial speech. See *Club Members for an Honest Election v Sierra Club* (2008) 45 C4th 309, 318, 86 CR3d 288; *Major v Silna* (2005) 134 CA4th 1485, 36 CR3d 875; *Foundation for Taxpayer & Consumer Rights v Garamendi* (2005) 132 CA4th 1375, 34 CR3d 368; *Northern Cal. Carpenters Reg'l Council v Warmington Hercules Assoc.* (2004) 124 CA4th 296, 300, 20 CR3d 918. The criteria set out in §425.17 are similar but not identical to those used to determine entitlement to fees under CCP §1021.5. See *Club Members for an Honest Election*, 45 C4th at 318 (lawsuit must be "solely in the public interest"); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1098 n7, 69 CR3d 184.

**Code of Civil Procedure §425.18.** Under CCP §425.18, special procedures and rules are provided for litigants whose actions were dismissed under the anti-SLAPP statute and who then are sued for malicious prosecution and abuse of process (a SLAPPback suit). See *Soukup v Law Offices of Herbert Hafif* (2006) 39 C4th 260, 46 CR3d 638 (construing CCP §425.18). For example, the mandatory attorney fee provision in §425.16(c) is inapplicable to a special motion to strike a SLAPPback action subject to §425.18. CCP §425.18(c); *Hutton v Hafif* (2007) 150 CA4th 527, 539, 59 CR3d 109 (fees may not be imposed against plaintiff when special motion to strike SLAPPback action granted).

**NOTE:** One court has suggested that prior cases awarding attorney fees to defendants under the private attorney general statute (CCP §1021.5) should more appropriately be considered under the anti-SLAPP statute. *Family Planning Specialists Med. Group, Inc. v Powers* (1995) 39 CA4th 1561, 1567 n5, 46 CR2d 667.

**Additional authorities:** *Russell v Foglio* (2008) 160 CA4th 653, 73 CR3d 87; *Yu v Signet Bank/Virginia* (2002) 103 CA4th 298, 126 CR2d 516; *White v Lieberman* (2002) 103 CA4th 210, 126 CR2d 608 (malicious prosecution action brought against attorney who filed original lawsuit subject to anti-SLAPP statute); *Macias v Hartwell* (1997) 55 CA4th 669, 64 CR2d 222 (libel action for statements made in union election flyer subject to anti-SLAPP motion); *Lafayette Morehouse, Inc. v Chronicle Publishing Co.* (1995) 39 CA4th 1379, 46 CR2d 542; *Evans v Unkow* (1995) 38 CA4th 1490, 45 CR2d 624; *Ludwig v Superior Court* (1995) 37 CA4th 8, 43 CR2d 350; *Robertson v Rodriguez* (1995) 36 CA4th 347, 42 CR2d 464.

For more on the anti-SLAPP statute, see Making and Opposing Special Motions to Strike Under the California Anti-SLAPP Statute (Cal CEB Action Guide February 2007). See also Bader & Goldowitz, *California's Powerful Anti-SLAPP Statute: Litigating After Briggs v Eden Council for Hope & Opportunity*, 21 CEB Civ LR 82 (May 1999).

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### §3.112 3. Prevailing Party's Mandatory Right to Attorney Fees

Attorney fee awards to defendants who prevail on their anti-SLAPP motions are mandatory under CCP §425.16(c) (the court "shall" award fees). See *Ketchum v Moses* (2001) 24 C4th 1122, 1141, 104 CR2d 377. In *Schroeder v Irvine City Council* (2002) 97 CA4th 174, 118 CR2d 330, the court held that fee awards to government agencies that prevail on anti-SLAPP motions are mandatory, just as they are for private parties, and rejected the plaintiff's argument that mandating fee awards to government agencies without requiring a showing of frivolousness chills the plaintiff's right to seek redress of grievances. See also *Bernardo v Planned Parenthood Fed'n* (2004) 115 CA4th 322, 9 CR3d 197 (following *Schroeder*).

A fee award under §425.16 is proper when the prevailing party's attorney has agreed to represent him or her without charge. *Rosenaur v Scherer* (2001) 88 CA4th 260, 287, 105 CR2d 674. See §§3.15-3.16. A defendant-attorney who wins an anti-SLAPP motion is not entitled to fees for representing himself. *Taheri Law Group v Evans* (2008) 160 CA4th 482, 494, 72 CR3d 847. In *Ramona Unified Sch. Dist. v Tsiknas* (2005) 135 CA4th 510, 37 CR3d 381, however, the court upheld a fee award to a defendant-attorney under §425.16 because she had an attorney-client relationship with her co-defendants. Similarly, a pro per defendant who obtains a dismissal under CCP §425.16 with the assistance of specially appearing retained counsel is entitled to fees for that counsel's services. *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1425, 103 CR2d 174.

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### §3.113 4. Effect of Dismissal While Anti-SLAPP Motion Is Pending

A party filing a SLAPP suit may not avoid liability under CCP §425.16 by dismissing the complaint while the §425.16 motion to strike is pending. *Liu v Moore* (1999) 69 CA4th 745, 751, 81 CR2d 807; *Coltrain v Shewalter* (1998) 66 CA4th 94, 77 CR2d 600. See also *White v Lieberman* (2002) 103 CA4th 210, 126 CR2d 608 (trial court must decide anti-SLAPP motion even if it has sustained demurrer to complaint without leave to amend); *Kyle v Carmon* (1999) 71 CA4th 901, 84 CR2d 303 (although court cannot strike complaint after voluntary dismissal with prejudice, it may award attorney fees if motion to strike has merit); *Pfeiffer Venice Props. v Bernard* (2002) 101 CA4th 211, 123 CR2d 647 (defendants entitled to determination of merits of anti-SLAPP motion even after trial court dismissed complaint).

Similarly, a party filing a meritless notice of appeal cannot avoid fees for appellate work incurred by the prevailing party by dismissing its appeal. *Wilkerson v Sullivan* (2002) 99 CA4th 443, 121 CR2d 275. See also *City of Los Angeles v Animal Defense League* (2006) 135 CA4th 606, 627, 37 CR3d 632 (mootness of pending appeal did not deprive prevailing party of trial or appellate fees).

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### §3.114 5. Effect of Dismissal Before Anti-SLAPP Motion Is Made

If the party filing a SLAPP suit dismisses the complaint before the defendant makes an anti-SLAPP motion, the defendant cannot recover fees or costs under CCP §425.16(c). *S.B. Beach Props. v Berti* (2006) 39 C4th 374, 379, 46 CR3d 380 (filing of viable anti-SLAPP motion is statutory prerequisite to fee recovery under §425.16).

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### §3.115 6. Prevailing Plaintiff's Right to Fee Award for Defeating Motion

Under CCP §425.16(c), the plaintiff who succeeds in defeating the defendant's special motion to strike may obtain fees under CCP §128.5 if the anti-SLAPP motion was frivolous or intended solely to cause unnecessary delay. *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 1391, 129 CR2d 892. In *Decker*, the reviewing court overturned the trial court's fee award to the plaintiffs, holding that the defendant's anti-SLAPP motion was not "totally and completely without merit." 105 CA4th at 1393. See also *Haneline Pac. Prop., LLC v May* (2008) 167 CA4th 311, 320, 83 CR3d 919 (no fee award to plaintiff who failed to develop argument that anti-SLAPP motion was frivolous or intended to cause unnecessary delay); *Foundation for Taxpayer & Consumer Rights v Garamendi* (2005) 132 CA4th 1375, 34 CR3d 368.

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## 7. Determining the Amount of Fees Under CCP §425.16

### §3.116 a. Lodestar Adjustment Method Applies

With the exception of the limitations discussed in §3.118, the same lodestar adjustment method that applies to other private attorney general fee-shifting statutes applies to fee awards under CCP §425.16. *Ketchum v Moses* (2001) 24 C4th 1122, 1137, 104 CR2d 377. See also *Church of Scientology v Wollersheim* (1996) 42 CA4th 628, 658, 49 CR2d 620, disapproved on other grounds in *Equilon Enters. v Consumer Cause, Inc.* (2002) 29 C4th 53, 68 n5, 124 CR 507. *Ketchum* also contains numerous other rulings on fee calculation. See chaps 8, 10-11, 15-16.

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### §3.117 b. Fees Limited to Work on Anti-SLAPP Motion

A defendant may recover fees only for the motion to strike, not for the entire litigation. *Christian Research Inst. v Alnor* (2008) 165 CA4th 1315, 1320, 81 CR3d 866; *Lafayette Morehouse, Inc. v Chronicle Publishing Co.* (1995) 39 CA4th 1379, 46 CR2d 542. See also *Christian Research Inst.*, 165 CA4th at 1329 (trial court did not abuse its discretion in severely curtailing number of hours in fee award when fee claim was inflated with multitude of time entries pertaining to non-anti-SLAPP matters, undermining credibility of other entries). But see *Kearney v Foley & Lardner* (SD Cal, Mar. 18, 2008, No. 05-CV-2112) 2008 US Dist Lexis 21115 (defendant who succeeded in striking all plaintiff's state claims under CCP §425.16 and dismissing all plaintiff's federal claims by separate motion to dismiss entitled to reasonable fees under §425.16 for both motion to strike and motion to dismiss to extent it was premised on common issues of fact and law: "[B]ecause defendant achieved the dismissal of all of plaintiff's claims—both state and federal claims on some of the same or similar legal grounds—awarding defendant all of his attorneys' fees associated with the right to petition would advance the public policy underlying the anti-SLAPP statute,"… "to allow early dismissal of meritless first amendment cases").

The amount of fees found reasonable in each case may vary significantly. Compare *Premier Med. Mgmt. Sys., Inc. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 77 CR3d 695, with *Maughan v Google Tech., Inc.* (2006) 143 CA4th 1242, 49 CR3d 861. See also *Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist.* (2003) 106 CA4th 1219, 1248, 132 CR2d 57 (rejecting challenge to $55,900 fee award); *Metabolife Int'l, Inc. v Wornick* (SD Cal 2002) 213 F Supp 2d 1220 (awarding more than $318,000 for successful anti-SLAPP motion, including appellate and fee-related services).

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### §3.118 c. Effect of Partial Success on Motion

A defendant who succeeds in striking some but not all causes of action challenged by its anti-SLAPP motion is entitled to fees under CCP §425.16; lack of complete success should be accounted for in determining the amount of fees, not entitlement to fees for the successful challenges. *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 113 CR2d 625. But see *Moran v Endres* (2006) 135 CA4th 952, 37 CR3d 786 (defendant who struck only one of many causes of action challenged and essentially accomplished nothing not "successful" and therefore not entitled to fees). *Endres* was distinguished in *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 340, 42 CR3d 607 (defendant entitled to fees when anti-SLAPP motion successfully narrowed scope of litigation, although fees had to be reduced for fees attributable to causes of action that had not been stricken), and *Morrow v Los Angeles Unified Sch. Dist.* (2007) 149 CA4th 1424, 1446, 57 CR3d 885 (defeating causes of action for defamation and invasion of privacy not trivial).

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### §3.119 8. Applicable Procedures

On the timing applicable to fee motions under CCP §425.16(c), see *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 468, 59 CR3d 839. See also *Olsen v Harbison* (2005) 134 CA4th 278, 288, 35 CR3d 909 (request must be made to trial court; fees cannot be awarded to the plaintiff when request first made on appeal).

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## §3.120 9. Appellate Considerations

Code of Civil Procedure §425.16(c) also authorizes appellate fees. *Rosenaur v Scherer* (2001) 88 CA4th 260, 287, 105 CR2d 674 (statute authorizing attorney fee award at trial court level includes appellate attorney fees unless statute specifically provides otherwise). See, *e.g., City of Santa Monica v Stewart* (2005) 126 CA4th 43, 91, 24 CR3d 72 (defendant entitled to appellate fees for successful appeal from denial of anti-SLAPP motion).

When an order granting a special motion to strike disposes of the entire case against a defendant, a subsequent order awarding attorney fees to that defendant is appealable under CCP §904.1(a)(2) as an order made after judgment and must be appealed within 60 days after notice of its entry is served. *Melbostad v Fisher* (2008) 165 CA4th 987, 995, 81 CR3d 354.

An appeal from a judgment awarding a prevailing defendant attorney fees under §425.16(c) does not automatically stay enforcement of the award under CCP §§916-917.1. Rather, the SLAPP plaintiff must file an appropriate appeal bond or undertaking under the money judgment exception to the automatic stay rule (CCP §917.1(a)(1)). See *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1426, 103 CR2d 174; §§15.10-15.12.

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## I. Business Litigation Statutes

### §3.121 1. Mutual Public Benefit Nonprofit Corporations (Corp C §8337)

In actions to inspect the records of mutual benefit nonprofit corporations, the court may award attorney fees to the prevailing party under Corp C §8337 "if the court finds the failure of the corporation to comply with a proper demand.... was without justification." See *Chantiles v Lake Forest II Master Homeowners Ass'n* (1995) 37 CA4th 914, 926, 45 CR2d 1; *Moran v Oso Valley Greenbelt Ass'n* (2001) 92 CA4th 156, 111 CR2d 636.

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### §3.122 2. Commercial Appropriation Statute (CC §3344(a))

The commercial appropriation statute (CC §3344) provides fees to the prevailing party in actions to enforce the statute. CC §3344(a). See, *e.g., Gilbert v National Enquirer, Inc.* (1997) 55 CA4th 1273, 64 CR2d 659 (denying fee award).

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### §3.123 3. Cartwright Act (Bus & P C §16750(a))

The Cartwright Act (Bus & P C §§16720-16770), California's antitrust statute, provides fees to the prevailing *plaintiff* in actions to enforce the statute. Bus & P C §16750(a). See *Carver v Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 118 CR2d 569 (denying fees under §16750(a) to successful defendant). See also *Carver v Chevron U.S.A., Inc.* (2004) 119 CA4th 498, 14 CR3d 467 (determining fees when successful defense of Cartwright Act claims, for which only plaintiff could recover fees, was combined with successful defense of contract claims, for which defendant could recover fees; see §2.78).

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### §3.124 4. Uniform Trade Secrets Act (CC §3426.4)

California's Uniform Trade Secrets Act (UTSA) (CC §§3426-3426.11) provides fees if a claimed trade secret violation is made or resisted in bad faith or if a willful or malicious appropriation is found. CC §3426.4. See *CytoDyn of N.M., Inc. v Amerimmune Pharm., Inc.* (2008) 160 CA4th 288, 300, 72 CR3d 600 (CC §3426.4 authorizes fee award for bad faith claim of misappropriation of trade secrets, not for bad faith claim of misappropriation of patents or trademarks); *Yield Dynamics, Inc. v TEA Sys. Corp.* (2007) 154 CA4th 547, 578, 66 CR3d 1 (CC §3426.4 requires that plaintiff acted for improper motive in bringing and pursuing action); *Gemini Aluminum Corp. v California Custom Shapes, Inc.* (2002) 95 CA4th 1249, 116 CR2d 358 (awarding fees under CC §3426.4); *CRST Van Expedited, Inc. v Werner Enters., Inc.* (9th Cir 2007) 479 F3d 1099.

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### §3.125 5. Public Contract Code §7107(f)

On fees awarded in an action under Pub Cont C §7107(f), see *Thompson Pac. Constr., Inc. v City of Sunnyvale* (2007) 155 CA4th 525, 66 CR3d 175 (fee award to defendant city under Pub Cont C §7107(f)).

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### §3.126 6. Payment Disputes Between Contractor and Subcontractor (CC §3260)

Attorney fees are available to the prevailing party in actions for the collection of wrongfully withheld retention proceeds under CC §3260(g). See *Brawley v J.C. Interiors, Inc.* (2008) 161 CA4th 1126, 1136, 74 CR3d 832; *Murray's Iron Works, Inc. v Boyce* (2008) 158 CA4th 1279, 1299, 71 CR3d 317 (fee award under CC §3260.1 reversed because §3260.1 did not apply; court expressed no view whether §3260.1 supports fee award in dispute over contractually agreed progress payment); *Taylor v Van-Catlin Constr.* (2005) 130 CA4th 1061, 30 CR3d 690; *Denver D. Darling v Controlled Env't Constr. Inc.* (2001) 89 CA4th 1221, 1241, 108 CR2d 213 (fee award under CC §3260(g) available only when contractor withholds retention proceeds payment beyond specified time periods and without cause). See also *Murray's Iron Works, Inc. v. Boyce* (2008) 158 CA4th 1279, 1299 n14, 71 CR3d 317. The court has discretion to determine that there is no prevailing party. *Brawley*, 161 CA4th at 1137.

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### §3.127 7. False Claims Act (Govt C §12650)

On fees awarded under the False Claims Act (Govt C §12560), see *LeVine v Weis* (2001) 90 CA4th 201, 108 CR2d 562, disapproved on other grounds in *Wells v One2One Learning Found.* (2006) 39 C4th 1164, 1197, 48 CR3d 108.

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### §3.128 J. Interpleader Statute (CCP §386.6)

On fees awarded under CCP §386.6, see, *e.g., Wells Fargo Bank v Zinnel* (2004) 125 CA4th 393, 22 CR3d 750; *Canal Ins. Co. v Tackett* (2004) 117 CA4th 239, 11 CR3d 626.

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## §3.129 IV. FEDERAL FEE-SHIFTING STATUTES

The availability of attorney fee awards has been recognized as an integral and essential component under federal civil rights laws. S Rep. No. 94-1011, 94th Cong, 2d Sess (1976), reprinted in 1976 US Code Cong & Ad News 5908. As a result, most federal civil rights acts now provide for attorney fees, and most of those statutes are enforceable in state court actions. See §§1.12, 2.12-2.16.

For examples of California cases construing 42 USC §1988, which authorizes fee awards in any action or proceeding brought to enforce 42 USC §§1981, 1982, 1983, 1985, 1986, Title IX (20 USC §§1681-1688), or Title VI (42 USC §2000d-1-2000d-4-(4)), see *City & County of Los Angeles v Superior Court* (1999) 21 C4th 292, 304 n2, 87 CR2d 441; *Donovan v Poway Unified Sch. Dist.* (2008) 167 CA4th 567, 627, 84 CR3d 285; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750; *Choate v County of Orange* (2000) 86 CA4th 312, 103 CR2d 339).

Issues pertaining to federal statutes are discussed throughout this book, however, full discussion of federal fee-shifting statutes is beyond its scope. See instead Derfner & Wolf, Court Awarded Attorney Fees (1983); Conte, Attorney Fee Awards (2d ed 1993); Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (4th ed 2003).

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# 4

# Fee Awards Based on Contractual Fee Clauses

I. OVERVIEW OF ATTORNEY FEE AWARDS BASED ON CONTRACTUAL CLAUSES
- A. Contracting Parties May Provide for Attorney Fee Awards in Actions Between Them §4.1
- B. Civil Code §1717 Governs Fee Awards for Contract Causes of Action §4.2
- C. Parties May Also Agree to Fee-Shifting for *Noncontract* Causes of Action, Which Are Not Governed by CC §1717 §4.3
- D. Contract-Based Fees Available for Services Performed in Many Forums
  - 1. Trial Courts §4.4
  - 2. Appellate Courts §4.5
  - 3. Arbitrations §4.6
  - 4. Federal Courts §4.7
- E. Contract-Based Fees and Statutory Fees May Both Apply to Action §4.8

II. SCOPE OF RIGHTS UNDER CC §1717
- A. Text of CC §1717 §4.9
- B. Purposes of CC §1717
  - 1. Protect Weaker Party's Rights §4.10
  - 2. Establish Uniform Treatment of Contractual Fee Clauses §4.11
- C. Broad Reach of CC §1717 §4.12
  - 1. Civil Code §1717 Makes Unilateral Fee Provisions Reciprocal §4.13
    - a. Reciprocity Applies to Litigation Expenses if Contract So Provides §4.14
    - b. Reciprocity Not Applicable to *Noncontract* Fee Claims Based on Broad Fee-Shifting Clauses §4.15
  - 2. Fee Provision Applies to Entire Contract §4.16
  - 3. CC §1717 Applies to All Parties to Contract §4.17
  - 4. Civil Code §1717 Applies to Contracts Containing Bilateral Fee Clause §4.18
  - 5. Rights Under CC §1717 May Not Be Waived §4.19
  - 6. Contract Language May Limit Right to Fees §4.20
  - 7. Courts Apply Equitable Principles to Contractual Fee Claims §4.21
  - 8. Civil Code §1717 Does Not Apply to Fee Requests Under Other Fee-Shifting Statutes §4.22
  - 9. Fees Recovered Under CC §1717 Are Offset Against Damages Opposing Party Recovers on Noncontract Claims §4.23
  - 10. Civil Code §1717 Not Applicable if Contract Subject to Preemptive Federal Law §4.24
- D. Contract-Based Fee Awards for *Noncontract* Causes of Action
  - 1. Parties May Agree That Under CCP §1021, Attorney Fees Are Also Available for *Noncontract* Causes of Action §4.25
  - 2. Language of Fee Clause Determines Whether It Applies to Noncontract Claims §4.26
  - 3. Civil Code §1717 Inapplicable to Fee Claims Based on Noncontract Causes of Action §4.27
    - a. Reciprocity Not Required §4.28
    - b. Party May Be Entitled to Fees Even if It Did Not Prevail "on the Contract" §4.29
    - c. Party May Be Entitled to Fees Despite Voluntary Dismissal §4.30

III. ELIGIBILITY FOR ATTORNEY FEES UNDER CONTRACTUAL PROVISIONS §4.31
- A. Does the Contractual Fee-Shifting Provision Apply to the Action?
  - 1. Attorney Fee Provision Usually Applies to Entire Contract and All Parties to Contract §4.32
  - 2. Multiple Contracts
    - a. When Multiple Contracts Are Involved, Fees May Be Awarded if Related Document Contains Fee-Shifting Clause §4.33
    - b. Examples of Cases Involving Multiple Contracts §4.34
  - 3. Attorney Fees May Be Available Even if Underlying Contract Held Invalid or Nonexistent §4.35
    - a. If Entire Contract Unenforceable Because of Illegality §4.36
    - b. If Contract Enforceable But Contains Some Illegal Terms §4.37
- B. Does Contractual Fee-Shifting Provision Apply to Party?
  - 1. Party to Litigation May Not Be Signator to Contract §4.38
  - 2. Fees May Be Awarded to or Against Persons Who Were Not Signators to Contract §4.39
    - a. If Nonsignator "Stands in the Shoes" of Party to Contract §4.40
    - b. If Nonsignator Is Effectively a Party to Contract §4.41
    - c. Awards to Nonsignators

(1) Nonsignator Can Be "Prevailing Party" Eligible for Attorney Fees §4.42
(2) Examples of Cases Applying Rule Permitting Nonsignator to Be "Prevailing Party" §4.43
d. Awards *Against* Nonsignators to Contract
(1) General Rule: Nonsignators Who Would Be Entitled to Fees if They Prevailed Are Liable for Fees if They Do Not Prevail §4.44
(2) Split of Authority Regarding Nonsignators Who Claim Fees But Would Not Be Entitled to Them if They Prevailed §4.45
(3) Examples of Cases Awarding Fees Against Nonsignators §4.46
(4) Examples of Cases Refusing to Award Fees Against Nonsignators §4.47
(5) Special Rule for Sureties §4.48
C. Is the Action "on a Contract"? §4.49
1. Considerations in Determining Whether Action Is "on a Contract" §4.50
a. Examples of Cases Finding Action "on a Contract" §4.51
b. Examples of Cases Finding Action Not "on a Contract" §4.52
2. Finding That Action Is Not "on a Contract" Does Not Preclude Fee Award Under Broadly Worded Fee Clause §4.53
D. Other Eligibility Issues
1. Contractual Limitations §4.54
2. Estoppel
a. Party Who Claimed Attorney Fees Under Contractual Provision Is Not Estopped From Later Disputing Provision's Applicability §4.55
b. Estoppel Cannot Be Basis for Awarding Fees in Absence of Independent Right to Recover Fees §4.56
3. Indemnity Agreements
a. Nature of Indemnity Agreements Generally §4.57
b. Indemnity Agreements and Contractual Attorney Fees §4.58
4. Parties Represented Without Charge
a. Represented Parties Eligible for Fees Even When Represented Without Charge §4.59
b. Exception for Self-Represented Attorneys and Nonattorneys §4.60
c. Determining Amount of Fees When Parties Represented Without Charge §4.61
5. Fees for Enforcing Judgment
a. Contractual Fee Awards Include Fees Incurred Enforcing Judgment §4.62
b. Enforcement Fees Available for Wide Variety of Enforcement Activities §4.63
6. Choice of Law Provisions §4.64
E. Eligibility Issues Affecting Contract-Based Fees for *Noncontract* Causes of Action §4.65

IV. ENTITLEMENT TO ATTORNEY FEES UNDER CONTRACTUAL FEE CLAUSES
A. Civil Code §1717 Provides Fees to the "Party Prevailing on the Contract" §4.66
1. Determining the "Party Prevailing on the Contract" §4.67
a. "Prevailing Party" Under CC §1717 Not Necessarily Same as "Prevailing Party" for Purposes of Costs Under CCP §1032 §4.68
b. Party That Recovers "Greater Relief on the Contract" Is Entitled to Fees §4.69
c. Definition of "Prevailing Party" Cannot Be Altered by Contract §4.70
d. Prevailing Party Determination Guided by Equitable Considerations §4.71
(1) Court Compares Relief Awarded With Parties' Objectives, Demands, and Positions §4.72
(2) Court's Discretion Limited in Case of "Simple, Unqualified Win" §4.73
e. Only One Prevailing Party Per Contract §4.74
f. In Disputes Involving Multiple Contracts with Fee-Shifting Clauses, Prevailing Party Is Determined for Each Contract §4.75
g. Defendant Need Not Obtain Affirmative Relief to Be Prevailing Party §4.76
h. Examples of Cases Determining Prevailing Party §4.77
2. "Prevailing Party" in Particular Situations
a. Defendant's Tender of Sums Due at Time of Answer §4.78
b. Code of Civil Procedure §998 Offers
(1) Code of Civil Procedure §998 Generally §4.79
(2) If Defendant's Offer Exceeds Plaintiff's Recovery §4.80
(3) If Plaintiff Accepts CCP §998 Offer §4.81
c. Recovery of Less Than Jurisdictional Limit §4.82
d. Voluntary Dismissal
(1) Under CC §1717, There Is No Prevailing Party in Case of Voluntary Dismissal §4.83
(2) Rule Does Not Apply to Contract-Based Fees for Noncontract Causes of Action §4.84
(3) Rule Does Not Apply to Other Fee-Shifting Statutes §4.85
(4) Effect of Settlement §4.86
(5) Rule Does Not Apply to Involuntary Dismissals, Including Dismissals for Failure to Prosecute §4.87

e. Court May Determine That No Party Has Prevailed §4.88
3. Prevailing Party Under Contractual Fee Provisions That Apply to Noncontract Causes of Action
a. Prevailing Party Defined by Language of Contract §4.89
b. Definition When Contract Silent §4.90
B. Timing of Prevailing Party Determination
1. General Rule: Entitlement to Fees Based on Outcome of Case as a Whole §4.91
2. Prevailing Party Determination Is Made by Trial Court §4.92
3. Arbitrations §4.93
4. Orders for Interim Relief
a. Order Compelling Arbitration §4.94
b. Other Interim Orders §4.95
5. Enforcing Prior Judgment §4.96
C. Entitlement to Fees When Noncontract Claims Combined With Contract Claims §4.97
1. General Rule: Prevailing Party Entitled to Fees Only for Work on Contract Claims, Unless Inextricably Intertwined With Work on Noncontract Claims §4.98
2. Work on Common Issues or Overlapping Claims §4.99
3. Work That Contributes to Success of Contract Claims §4.100
4. Fees for Work on Noncontract Claims Recoverable if Contract So Provides §4.101

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## I. OVERVIEW OF ATTORNEY FEE AWARDS BASED ON CONTRACTUAL CLAUSES

### §4.1 A. Contracting Parties May Provide for Attorney Fee Awards in Actions Between Them

Written contracts frequently provide that, in the event of litigation (or arbitration) between the parties, a specified party or the "prevailing party" is entitled to an award of reasonable attorney fees. Code of Civil Procedure §1021 specifically authorizes such contractual agreements for fee-shifting awards: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Contractual clauses that provide for the winning party to recover attorney fees from the losing party in the event of litigation are referred to as "fee-shifting clauses." On fee-shifting statutes, see chaps 2-3.

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## §4.2 B. Civil Code §1717 Governs Fee Awards for Contract Causes of Action

Fee awards for enforcing contracts that include fee-shifting clauses are governed by CC §1717. Section 1717 has two primary features:

- It provides a reciprocal right to attorney fees for all contract based actions when a dispute is based on a contract containing an attorney fee clause, even when the clause purports to provide fees only to one party (CC §1717(a); see, *e.g., Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 128, 158 CR 1); and
- It defines who is the prevailing party in actions to enforce a contract (CC §1717(b); see, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830).

This chapter discusses the provisions of CC §1717 in detail. The full text of §1717 is in §4.9. The purpose and reach of CC §1717's reciprocity provisions are discussed in §§4.10-4.24. Its "prevailing party" provisions are discussed in §§4.66-4.88.

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### §4.3 C. Parties May Also Agree to Fee-Shifting for *Noncontract* Causes of Action, Which Are Not Governed by CC §1717

The parties to a contract may agree that the prevailing party may recover attorney fees not only for work on contract causes of action but also for work attributable to tort and other noncontract claims. *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830, citing *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154 ("parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract"); *Lerner v Ward* (1993) 13 CA4th 155, 161, 16 CR2d 486. For the fee clause to apply to noncontract claims, its language must be broad enough to clearly show that the parties intended it to do so. See §4.26.

When fees are requested under a contractual fee-shifting clause for work on noncontract claims, CC §1717 does not apply *to those claims*. *Santisas v Goodin* (1998) 17 C4th 599, 615, 71 CR2d 830 ("If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims"). Thus, the provisions of CC §1717, such as those providing reciprocity and defining "prevailing party" (see §4.2), do not apply to fee claims for services on tort and other noncontract claims.

On contract-based fees for *noncontract* causes of action, see §§4.26-4.31.

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## D. Contract-Based Fees Available for Services Performed in Many Forums

### §4.4 1. Trial Courts

Contractual attorney fee claims are most often made for work performed in trial courts. Generally, fees are available for trial court work, subject to the normal eligibility and entitlement issues that arise in connection with CC §1717, discussed in this chapter. Some contractual fee clauses, however, may limit the availability of fees even for trial court work. On contract language that may limit the right to fee shifting, see §4.20.

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## §4.5 2. Appellate Courts

A contractual provision for attorney fees impliedly authorizes an award for services rendered on appeal as well as for services rendered in the trial court. *Serrano v Unruh* (1982) 32 C3d 621, 637, 186 CR 754; *Wilson v Wilson* (1960) 54 C2d 264, 272, 5 CR 317; *Mitchell v Exhibition Foods, Inc.* (1986) 184 CA3d 1033, 1049, 229 CR 535. One court has held, however, that such fees are available only if the underlying judgment includes a contract-based fee award. *Imperial Bank v Pim Elec., Inc.* (1995) 33 CA4th 540, 557, 39 CR2d 432 (denying appellate fees because plaintiff had not been awarded fees for underlying action).

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### §4.6 3. Arbitrations

Unless expressly limited, a contractual fee provision also authorizes fees for services performed in arbitration. See, *e.g., Tate v Saratoga Sav. & Loan Ass'n* (1989) 216 CA3d 843, 856, 265 CR 440. On fees in arbitration, see chap 14.

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## §4.7 4. Federal Courts

Contractual fee-shifting clauses are commonly enforced in federal court litigation. See, *e.g., Barrientos v 1801-1825 Morton LLC* (9th Cir 2009) 583 F3d 1197, 1216. When fees are claimed under a contract governed by California law, California law applies to the determinations of both entitlement to fees and the amount of those fees. See, *e.g., Barrientos*, 583 F3d at 1217.

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### §4.8 E. Contract-Based Fees and Statutory Fees May Both Apply to Action

In some cases, both a contractual fee-shifting clause and a *statutory* fee-shifting clause (other than CC §1717) may apply to an action. See, *e.g., Weber v Langholz* (1995) 39 CA4th 1578, 1585, 46 CR2d 677 (one-sided attorney fee provision in federal Truth in Lending Act (15 USC §1640(a)(3)) does not preempt application of reciprocal fee provision in CC §1717); *Brusso v Running Springs Country Club, Inc.* (1991) 228 CA3d 92, 101, 278 CR 758 (CC §1717 and Corp C §800 not mutually exclusive).

Generally, fees may be claimed under all available grounds. See, *e.g., Palmer v Shawback* (1993) 17 CA4th 296, 300, 21 CR2d 575; *Green v Obledo* (1984) 161 CA3d 678, 683, 207 CR 830. Some fee-shifting statutes, however, have been held to preempt or supersede contractual rights. See §4.24.

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## II. SCOPE OF RIGHTS UNDER CC §1717

### §4.9 A. Text of CC §1717

The full text of CC §1717 is set out below, including cross-reference to the discussion of each paragraph in this book.

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

The paragraph above is discussed in §§4.12-4.22, 4.66-4.88.

> Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

The paragraph above is discussed in §§4.16, 4.32.

> Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

The paragraph above is discussed in chap 9 (Determining the Lodestar) and chap 11 (Claiming and Opposing Trial Court Fees).

> Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

The paragraph above is discussed in §4.19.

> (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

The paragraph above is discussed in §§4.69-4.70, 4.88.

> (2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

The paragraph above is discussed in §§4.83-4.87.

> Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.
> Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated.

The two paragraphs above are discussed in §4.78.

> (c) In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

The paragraph above is discussed in §§4.23, 4.69.

**NOTE:** As with other fee-shifting statutes (see §2.6), amendments to CC §1717 have been held to apply to all pending cases. In *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 258 CR 473, the court applied the then-current version of §1717 to the parties' appeal—not the version in effect when the motion for fees was filed in the trial court. The effect of amendments to §1717 is discussed in *U.S. for Use & Benefit of Reed v Callahan* (9th Cir 1989) 884 F2d 1180, 1184.

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## B. Purposes of CC §1717

### §4.10 1. Protect Weaker Party's Rights

Civil Code §1717 reflects the legislature's recognition that the parties to a contract frequently have unequal bargaining power, which has resulted in contractual fee provisions that entitles only the stronger party to recover its attorney fees in the event of a dispute. To rectify this inequity, the legislature created a reciprocal right to attorney fees under CC §1717 whenever a contract provides the right to any party. See, *e.g., Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 128, 158 CR 1; *Santisas v Goodin* (1998) 17 C4th 599, 611, 71 CR2d 830. The statute is part of an overall legislative policy to assist persons who are in a disadvantageous contractual bargaining position by protecting their right to recover attorney fees. *T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 112 CR 910.

In light of this purpose, under CC §1717, "equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction." *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1091, 95 CR2d 198, quoting *International Indus., Inc. v Olen* (1978) 21 C3d 218, 224, 145 CR 691. See also *Reynolds Metals Co. v Alperson, supra* (purposes of CC §1717 require that it be interpreted to provide reciprocal remedy for nonsignatory defendant, sued on a contract as if he were party to it, when plaintiff would clearly be entitled to attorney fees should he prevail in enforcing the contractual obligation against defendant).

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### §4.11 2. Establish Uniform Treatment of Contractual Fee Clauses

In addition to protecting the weaker party's rights, CC §1717 reflects other legislative purposes, notably uniform treatment for fee awards in contract actions and consistency with statutory fees. See *Santisas v Goodin* (1998) 17 C4th 599, 615, 71 CR2d 830. For example, in *Santisas*, the supreme court reviewed the legislative history and purposes of CC §1717(b)(2) (providing that there is no "prevailing party" for purposes of §1717 when lawsuit is voluntarily dismissed or dismissed under settlement) and held that this language overrides conflicting contractual provisions, such as those allowing recovery in case of voluntary dismissal or defining "prevailing party" as including parties in whose favor a dismissal has been entered.

**NOTE:** These policies, however, are restricted to fee claims under CC §1717 and do not apply to *noncontract* or statutory fee claims. *Santisas*, 17 C4th at 617; *Reynolds*, 25 C3d at 129. On contract-based fee claims for noncontract claims, see §§4.25-4.30. See also §§4.84-4.85 (rule that there is no prevailing party under CC §1717 in case of voluntary dismissal generally does not apply to contract-based fees for noncontract causes of action or to other fee-shifting statutes).

**Additional authorities:** For other cases discussing the legislative purposes of CC §1717, see, *e.g., Hsu v Abbara* (1995) 9 C4th 863, 872, 39 CR2d 824; *Trope v Katz* (1995) 11 C4th 274, 45 CR2d 241; *International Indus., Inc. v Olen* (1978) 21 C3d 218, 223, 145 CR 691; *Pacific Custom Pools, Inc. v Turner Constr. Co.* (2000) 79 CA4th 1254, 1268, 94 CR2d 756; *Coast Bank v Holmes* (1971) 19 CA3d 581, 597 n3, 97 CR 30.

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## §4.12 C. Broad Reach of CC §1717

The most basic application of CC §1717 is to provide a reciprocal right to attorney fees when a dispute is based on a contract containing an attorney fee clause that benefits only one party. Section 1717 has, however, been interpreted to allow attorney fee awards based on contractual fee clauses in a broad range of situations, including lawsuits that are:

- Based on documents that do not contain fee-shifting clauses but are related to a contract that does (see §4.33);
- Involving parties who were not signators to the contract that contains a fee-shifting clause but may be eligible or liable for fees nonetheless (see §§4.39-4.48);
- Based on contracts that contain bilateral attorney fee clauses (see §4.18);
- Based on invalid contracts or contracts that contain illegal terms (see §§4.35-4.37).

Section 1717 has been held *not* to provide a right to fees in several circumstances, including but not limited to when:

- The entire contract is illegal (see §4.36);
- The fee-shifting clause requires a mediation or arbitration that has not been attempted (see §4.20);
- The contract is subject to preemptive federal labor laws (see §4.24);
- A fee-shifting statute (other than §1717) provides for fees to only one party (see §4.22);
- A fee claim is based on a *noncontract* cause of action that is joined with a contract cause of action (see §§4.25-4.30).

**NOTE:** In this last circumstance, CC §1717 does not apply to the fee claim for the noncontract cause of action. However, fees under the contract may nevertheless be available to the party claiming them. See §§4.25-4.30 4.65, 4.97-4.101.

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### §4.13 1. Civil Code §1717 Makes Unilateral Fee Provisions Reciprocal

As noted in §4.10, the principal purpose of CC §1717 is to make unilateral attorney fee provisions in contracts reciprocal. Under §1717(a), when the contract provides that attorney fees and costs will be awarded either to a particular party or to the prevailing party, the prevailing party is entitled to recover attorney fees regardless of whether that party was the party specified in the contract. CC §1717(a). See *Santisas v Goodin* (1998) 17 C4th 599, 611, 71 CR2d 830.

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### §4.14 a. Reciprocity Applies to Litigation Expenses if Contract So Provides

Civil Code §1717 also creates a reciprocal right to *litigation expenses* beyond statutory costs when the contract provides for the recovery of such expenses by any party. *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 492, 54 CR2d 888 (relying on express reference in CC §1717(a) (first paragraph) to attorney fees "and costs"). Note, however, that unlike statutory costs or attorney fees, such expenses must be pleaded and proved at trial. See *First Nationwide Bank v Mountain Cascade, Inc.* (2000) 77 CA4th 871, 878, 92 CR2d 145.

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### §4.15 b. Reciprocity Not Applicable to *Noncontract* Fee Claims Based on Broad Fee-Shifting Clauses

Despite the strong policies favoring reciprocal fee-shifting clauses in contracts (see §4.10), the courts have held that CC §1717 does *not* create a reciprocal right to attorney fees for tort or other noncontract claims that are based on a broad contractual fee-shifting clause. *Topanga & Victory Partners LLP v Toghia* (2002) 103 CA4th 775, 127 CR2d 104 (prevailing defendant in tort action, who was not signator to contract, could not recover attorney fees even though contractual attorney fee provision included noncontract causes of action; mutuality applies only to contract claims under CC §1717); *Moallem v Coldwell Banker Commercial Group, Inc.* (1994) 25 CA4th 1827, 31 CR2d 253. On contractual right to fees for noncontract claims, see §4.25-4.30.

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### §4.16 2. Fee Provision Applies to Entire Contract

Under CC §1717(a) (second paragraph), if a contract contains an attorney fee clause, that clause is deemed to apply to the *entire* contract, unless each party to the contract was represented by counsel during the contract's negotiation and execution, and the fact of that representation is stated in the contract.

This section was intended to prevent attempts to avoid CC §1717's mutuality rules and represents the legislature's express intention to overrule *Sciarrotta v Teaford Custom Remodeling, Inc.* (1980) 110 CA3d 444, 167 CR 889. In *Sciarrotta,* the court had held that despite §1717's reciprocity requirement, a fee provision that entitled the contractor to recover fees if it had to sue to collect "the contract price" did not apply to the property owner's action for breach of the contractual promise to build a sound house. The legislature then amended §1717(a) to apply any action on any provision of the contract, regardless of limiting language in the fee clause (unless the limiting language was separately negotiated by counsel). See Stats 1983, ch 1073; *Sears v Baccaglio* (1998) 60 CA4th 1136, 1147, 70 CR2d 769; *Milman v Shukhat* (1994) 22 CA4th 538, 545, 27 CR2d 526 (legislation intended to overrule *Sciarrota*).

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### §4.17 3. CC §1717 Applies to All Parties to Contract

Civil Code §1717's provisions apply to both the unnamed and the named party in the contract fee clause. Regardless of seemingly contrary contract language, therefore, fees are recoverable under CC §1717 even if the prevailing party is not the party specified in the contract. *Pacific Custom Pools, Inc. v Turner Constr. Co.* (2000) 79 CA4th 1254, 1268, 94 CR2d 756. For example, in *Beeman v Burling* (1990) 216 CA3d 1586, 1607, 265 CR 719, a lease provided fees only in cases brought by the landlord. The court of appeal held that based on the reciprocity clause in §1717(a) (first paragraph), this provision also applied to an action brought by the tenant.

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/§4.18 4. Civil Code §1717 Applies to Contracts Containing Bilateral Fee Clause

## §4.18 4. Civil Code §1717 Applies to Contracts Containing Bilateral Fee Clause

Civil Code §1717 also applies to contracts containing bilateral attorney fee clauses (*i.e.,* clauses that expressly apply to all parties to the contract). See *Santisas v Goodin* (1998) 17 C4th 599, 614 n8, 71 CR2d 830 (disapproving *Honey Baked Hams, Inc. v Dickens* (1995) 37 CA4th 421, 43 CR2d 595, to extent inconsistent with this conclusion). As a result, all of CC §1717's provisions—such as those concerning voluntary dismissal (CC §1717(b)(2); see §§4.83-4.87) and defining "prevailing party" (see §§4.66-4.77) apply to such contracts. *Santisas v Goodin, supra*.

**Additional authorities:** *Sears v Baccaglio* (1998) 60 CA4th 1136, 70 CR2d 769; *Meadows v Lee* (1985) 175 CA3d 475, 485, 221 CR 22; *Hadley v Krepel* (1985) 167 CA3d 677, 682, 214 CR 461; *Beneficial Standard Prop., Inc. v Scharps* (1977) 67 CA3d 227, 136 CR 549.

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### §4.19 5. Rights Under CC §1717 May Not Be Waived

Civil Code §1717(a) (fourth paragraph) provides that the contracting parties may not waive CC §1717's provisions affording a reciprocal right to attorney fees. This antiwaiver provision applies to all the provisions of §1717.

For example, in *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605, the fee clause required the prevailing party to have actually incurred fees and prohibited recovery of fees not actually charged. The court held that because the tenant was the only party likely to use free or reduced-cost counsel, the agreement favored the party with stronger bargaining power, and thus was, in effect, a prohibited waiver under CC §1717(a). See also *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830 (parties cannot agree in fee clause to override §1717(b)(2), which provides that there is no "prevailing party" in case of voluntary dismissal); *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 265, 118 CR2d 276 (fee provision that conflicts with "prevailing party" definition under CC §1717 is void). On CC §1717's voluntary dismissal provisions, see §§4.83-4.87.

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### §4.20 6. Contract Language May Limit Right to Fees

The parties to a contract may also limit entitlement to fees in various ways that are unaffected by CC §1717. These include:

- **Limit fees to selected proceedings.** See, *e.g., Kalai v Gray* (2003) 109 CA4th 768, 135 CR2d 449 (fees recoverable only by prevailing party in arbitration).
- **Limit fees to party that recovers "final judgment."** See *People ex rel Dep't of Corps. v Speedee Oil Change Sys., Inc.* (2007) 147 CA4th 424, 54 CR3d 225 (intervenor who successfully obtained reversal of fee award against it was not prevailing party under contract because fee clause provided fees only to the party that obtained "final judgment"). Note that in *Speedee Oil*, the contractual definition of "prevailing party" was consistent with CC §1717's definition. See *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 265, 118 CR2d 276 (fee provision that conflicts with "prevailing party" definition under CC §1717 is void).
- **Limit fees to parties that engage in prelitigation effort to mediate.** See, *e.g., Frei v Davey* (2004) 124 CA4th 1506, 1520, 22 CR3d 429 (prevailing party who refused prelitigation request to mediate is barred from recovering attorney fees under standard residential form purchase agreement), and cases cited therein; *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362.

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### §4.21 7. Courts Apply Equitable Principles to Contractual Fee Claims

If the construction and application of a contractual fee clause are uncertain or could lead to oppressive results if literally applied, the court may be guided by equitable principles and the form of the judgment is not necessarily controlling. See *International Indus., Inc. v Olen* (1978) 21 C3d 218, 145 CR 691. For example, a contract provision that required one party to pay the other's attorney fees regardless of who necessitated the action or who prevailed "would be contrary to public policy as encouraging—and in fact indemnifying—vexatious or frivolous litigation." *Ecco-Phoenix Elec. Corp. v Howard J. White, Inc.* (1969) 1 C3d 266, 272, 81 CR 849.

On the other hand, there are limits to a court's equitable powers. When a contract awards attorney fees to the prevailing party and one party has obtained a "simple, unqualified win," the court has no discretion under CC §1717 to find that there was no party prevailing on the contract, nor may it invoke equitable considerations, *e.g.,* the parties' behavior during settlement negotiations or discovery proceedings, to deny fees to the winning party. *Hsu v Abbara* (1995) 9 C4th 863, 877, 39 CR2d 824; *DiMarco v Chaney* (1995) 31 CA4th 1809, 37 CR2d 558. On the limits of the court's discretion in determining the prevailing party under CC §1717, see §§4.71-4.73, 4.88.

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### §4.22 8. Civil Code §1717 Does Not Apply to Fee Requests Under Other Fee-Shifting Statutes

Civil Code §1717 applies only to fee requests based on *contractual* fee-shifting clauses, not to *statutory* fee-shifting provisions.

For example, CC §1717's reciprocity provisions (CC §1717(a); see §4.13) do not extend to statutes that specify that only one of the parties has the right to recover fees. *Wood v Santa Monica Escrow Co.* (2007) 151 CA4th 1186, 1191, 60 CR3d 597 (legislative intent in enacting one-sided fee-shifting statutes would be frustrated by application of CC 1717's reciprocity). *Wood v Santa Monica Escrow Co., supra*. See also *Carver v Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 142, 118 CR2d 569; *Moallem v Coldwell Banker Commercial Group, Inc.* (1994) 25 CA4th 1827, 31 CR2d 253; *Covenant Mut. Ins. Co. v Young* (1986) 179 CA3d 318, 324, 225 CR 861.

Likewise, the prohibition against fees in cases that are voluntarily dismissed (CC §1717(b)(2); see §§4.83-4.87) does not apply to other fee-shifting statutes. *Kim v Euromotors West/The Auto Gallery* (2007) 149 CA4th 170, 178, 56 CR3d 780 (CC §1717(b)(2) does not bar fee award when prevailing party's right to fees arises under fee-shifting statute). See also *Heather Farms Homeowners Ass'n v Robinson* (1994) 21 CA4th 1568, 1572, 26 CR2d 758 (prevailing party definition in CC §1717 inapplicable to fee request under CC §1354).

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## §4.23 9. Fees Recovered Under CC §1717 Are Offset Against Damages Opposing Party Recovers on Noncontract Claims

Under CC §1717(c), attorney fees recovered by the party prevailing on a contract cause of action must be set off against any damages recovered by the adverse party on any *non*contract cause of action.

Subsection (c) states that if the fee award on the contract cause of action is greater than the damages award under the noncontract causes of action, then the prevailing party on the contract cause of action is entitled to a new judgment in its favor. If the contract fees are less than the noncontract damages, then the contract fees are to be deducted from the noncontract damages owed.

Damages recovered by the party prevailing on a contract cause of action may also be reduced by any attorney fees recovered by the adverse party on a different contract. See *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 491, 54 CR2d 888 (action involved multiple, independent contracts, each of which provided for fees).

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### §4.24 10. Civil Code §1717 Not Applicable if Contract Subject to Preemptive Federal Law

Civil Code §1717 has been held not to provide a right to fees when the contract is subject to preemptive federal laws.

**Labor Management Relations Act.** Fees were held not to be available under CC §1717 in federal or state court actions brought to enforce collective bargaining agreements that contain a fee clause, because such clauses are preempted by the Labor Management Relations Act (29 USC §185(a)), which allows fees to the prevailing party only when the losing party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Slurry Seal v Laborers Int'l Union* (9th Cir 2001) 241 F3d 1142; *Moore v Local 569, Int'l Bd. of Elec. Workers* (9th Cir 1995) 53 F3d 1054; *Carpenters Health & Welfare Trust Fund v Acme Indus., Inc.* (1990) 224 CA3d 187, 273 CR 519.

**FDIC.** Similarly, in *Notrica v FDIC* (9th Cir 1993) 2 F3d 961, the court held that because suits involving the rights of the Federal Deposit Insurance Corporation (FDIC) arise under federal law, and because neither the FDIC nor its predecessor had ever signed a contract containing an attorney fee provision with the plaintiff or his predecessor, CC §1717 did not apply and did not entitle the FDIC to fees.

**Exception for Legal Services Corporation grantees.** In contrast to the cases cited above, federal regulations prohibiting Legal Services Corporation grantees from recovering statutory fees may only be enforced by the corporation and do not prohibit courts from awarding grantees contract-based fees. *Peretz v Legal Aid Found. of Los Angeles* (2004) 122 CA4th Supp 1, 18 CR3d 863.

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## D. Contract-Based Fee Awards for *Noncontract* Causes of Action

### §4.25 1. Parties May Agree That Under CCP §1021, Attorney Fees Are Also Available for *Noncontract* Causes of Action

By its terms, CC §1717 applies only to actions "on a contract" and to fees "which are incurred to enforce that contract." As such, it does not apply to fees incurred to enforce tort or other *noncontract* claims. *Santisas v Goodin* (1998) 17 C4th 599, 615, 71 CR2d 830. Therefore, when suits for breach of contract join tort or other noncontract claims, such as claims for fraud or breach of fiduciary duty, CC §1717 does not provide a right to fees for time spent exclusively on those claims.

Starting with *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154, however, the courts have held that under CCP §1021, the parties to a contract may agree that the prevailing party in *any* litigation between them will be entitled to attorney fees, not only for causes of action based on contract, to which CC §1717 applies, but also for causes of action not sounding in contract, such as tort causes of action, to which CC §1717 does not apply. See *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830 (provision in real estate sales contract for fees to "the prevailing party" in event of legal action "arising out of the execution of this agreement or the sale" included tort claims; provision in CC §1717 barring fee awards when case voluntarily dismissed inapplicable to such claims); *Gil v Mansano* (2004) 121 CA4th 739, 743, 17 CR3d 420. Thus, a broadly worded attorney fee clause may support a fee award to the prevailing party in a tort action: "parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." *Gil*, 121 CA4th at 743 (citations omitted). See also *Palmer v Shawback* (1993) 17 CA4th 296, 299, 21 CR2d 575.

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### §4.26 2. Language of Fee Clause Determines Whether It Applies to Noncontract Claims

Whether a prevailing party is entitled to recover attorney fees for *noncontract* claims (see §4.25) depends on the language of the contractual attorney fee provision, *i.e.,* whether the type of claim is within the scope of the provision. *Santisas v Goodin* (1998) 17 C4th 599, 602, 71 CR2d 830; *Gil v Mansano* (2004) 121 CA4th 739, 743, 17 CR3d 420; *Thompson v Miller* (2003) 112 CA4th 327, 4 CR3d 905.

The language of the clause must be broad enough to clearly show that the parties intended the contractual fee clause to apply to noncontract claims. For examples of such language in attorney fee clauses, compare, *e.g., Lerner v Ward* (1993) 13 CA4th 155, 158, 16 CR2d 486 (contract providing for fee award "[i]n any action or proceeding arising out of this agreement" deemed sufficiently broad to cover noncontract claims), and *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1277, 66 CR3d 725 (contract providing for fees "[i]f civil action is instituted in connection with this Agreement" deemed sufficiently broad to cover noncontract claims), with *Casella v SouthWest Dealer Servs., Inc.* (2007) 157 CA4th 1127, 1161, 69 CR3d 445 (contract provision broadly applicable to "any legal action" arising under agreement, but then limiting recovery to those "incurred in enforcing or attempting to enforce any of the terms, covenants or conditions" does not apply to tort claims because they do not "enforce" contract), and *Hasler v Howard* (2004) 120 CA4th 1023, 1027, 16 CR3d 217 (contract applying only to actions "regarding the obligation to pay compensation" under listing agreement deemed insufficiently broad to cover noncontract claims).

**Additional authorities:** *Jones v Union Bank* (2005) 127 CA4th 542, 548, 25 CR3d 783; *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 54 CR2d 541; *Kelley v Bredelis* (1996) 45 CA4th 1819, 1833, 53 CR2d 536; *Kim v Kang* (9th Cir 1998) 154 F3d 996, 1000 (no fees for broker who successfully defended claims against it when underlying contract provided for fees only in litigation instituted to collect sums owed to broker); *Loube v Loube* (1998) 64 CA4th 421, 428, 74 CR2d 906 (legal malpractice action not within scope of narrowly drawn fee clause); *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 75 CR2d 376 (tort actions not within scope of contractual fee provision); *Moallem v Coldwell Banker Commercial Group, Inc.* (1994) 25 CA4th 1827, 31 CR2d 253 (nonsignator assignee of landowner had no right to fees in tort action against broker when underlying contract between landowner and broker specified that only broker could recover fees); *Super 7 Motel Assoc. v Wang* (1993) 16 CA4th 541, 20 CR2d 193 (nonsignator real estate broker denied fees in successful defense of action based on tort of fraud, even though underlying contract between buyer and seller contained broad fee clause); *Palmer v Shawback* (1993) 17 CA4th 296, 21 CR2d 575; *3250 Wilshire Blvd. Bldg. v W.R. Grace & Co.* (9th Cir 1993) 990 F2d 487.

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### §4.27 3. Civil Code §1717 Inapplicable to Fee Claims Based on Noncontract Causes of Action

When a contractual fee-shifting provision applies to both contract claims and noncontract claims (see §§4.25-4.26), CC §1717 applies *only* to the contract claims. See, *e.g., Moallem v Coldwell Banker Commercial Group, Inc.* (1994) 25 CA4th 1827, 1832, 31 CR2d 253 ("Fairly or not," tort litigants are "denied… the benefits of section 1717"). This has several critical consequences, which are discussed in the following sections (§§4.28-4.30).

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### §4.28 a. Reciprocity Not Required

Unlike contractual provisions awarding fees for contract claims, provisions awarding fees on noncontract claims do not have to be reciprocal. See CC §1717(a); *Moallem v Coldwell Banker Commercial Group, Inc.* (1994) 25 CA4th 1827, 1832, 31 CR2d 253. When a one-sided contractual fee provision encompasses both tort and contract causes of action, reciprocity will be read into the provision only to the extent that it applies to claims on the contract. 25 CA4th at 1831. Although the court in *Moallem* recognized that there are sound public policy reasons for extending the mutuality requirements of §1717 to tort claims arising out of the contract, it was bound by the statutory language, which limits its applicability to attorney fees "incurred to enforce that contract," *i.e.,* claims on the contract. 25 CA4th at 1832.

As a result of there being no reciprocity, nonsignators are generally not entitled to fees under these clauses. See, *e.g., Topanga & Victory Partners v Toghia* (2002) 103 CA4th 775, 127 CR2d 104 (nonsignator defendant not entitled to fees for successfully defending tort action; mutuality applies only to contract claims under CC §1717); *Super 7 Motel Assoc. v Wang* (1993) 16 CA4th 541, 20 CR2d 193 (although underlying contract involved broad fee clause, prevailing defendant in tort action based on contract was not party to contract and not entitled to attorney fees under contract); *Sweat v Hollister* (1995) 37 CA4th 603, 43 CR2d 399, disapproved on other grounds in *Sanstisas v Goodin* (1998) 17 C4th 599, 609 n5, 71 CR2d 830 (following *Super 7 Motel Assoc. v Wang, supra*). On nonsignators' eligibility for contractual attorney fees for contract claims, see §4.39.

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### §4.29 b. Party May Be Entitled to Fees Even if It Did Not Prevail "on the Contract"

The prevailing party on the noncontract action may recover fees even if it did not "prevail" on the contract claim under CC §1717: A party who prevails on tort claims may be deemed the prevailing party even though that party did not prevail "on the contract." In *Adam v DeCharon* (1995) 31 CA4th 708, 37 CR2d 195, for example, the plaintiffs lost on their contract claim but prevailed on their related tort claim. Although they were not "prevailing parties" under CC §1717, the court held that they may have been entitled to fees because the contractual attorney fee provision was broad enough to encompass noncontract causes of action.

The opposite also is true: Under CC §1717, a party may recover fees for winning the contract claim even if its defeat on the noncontract claims result in a net loss. See §4.69.

On CC §1717's "prevailing party" provisions, see §4.66-4.77. On determining the prevailing party under contractual fee provisions that apply to noncontract causes of action, see §§4.89-4.90.

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### §4.30 c. Party May Be Entitled to Fees Despite Voluntary Dismissal

The prevailing party on the noncontract action may recover fees even though the lawsuit has been voluntarily dismissed. In *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830, the supreme court held that the defendants were entitled to attorney fees after the plaintiff voluntarily dismissed an action including claims based on breach of contract and tort. The defendant was not entitled to attorney fees on the breach of contract causes of action because CC §1717(b)(2) provides that there is no "prevailing party" when there is a voluntary dismissal. However, because CC §1717 did not apply to the tort causes of action, the defendant could be considered the prevailing party on those claims. 17 C4th at 619.

On CC §1717's voluntary dismissal provisions, see §§4.83-4.87.

**Additional authorities:** *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 1074, 60 CR3d 580 (broad contractual fee clause in lease applied to dismissed unlawful detainer action to remove tenant holding over because action sounded in tort); *Silver v Boatwright Home Inspection, Inc.* (2002) 97 CA4th 443, 118 CR2d 475 (even though pretrial dismissal of contract claims precluded court from finding that plaintiffs prevailed on contract under CC §1717, trial court, in determining whether plaintiffs were prevailing parties on noncontract claims, could properly consider whether plaintiffs had achieved their litigation objectives).

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## §4.31 III. ELIGIBILITY FOR ATTORNEY FEES UNDER CONTRACTUAL PROVISIONS

When a party seeks recovery of reasonable attorney fees under a contractual fee-shifting clause, the initial issue that arises is whether the party is eligible for fees under the contract. Several issues must be considered in making this determination, including whether the contractual fee-shifting clause applies to the action (see §§4.32-4.37), whether it applies to the party claiming fees and the party from whom they are claimed (see §§4.38-4.48), and whether the action is "on a contract" for purposes of CC §1717 (see §§4.49-4.53).

Other issues that might affect a party's eligibility for fees include restrictions in the contract itself (see §4.54); whether the party is estopped from claiming fees (see §§4.55-4.56); whether the contract is an indemnity agreement (see §§4.57-4.58); and whether the party was represented without charge (see §§4.59-4.61). Issues may also arise concerning the availability of fees for enforcing the judgment (see §§4.62-4.63) and concerning the effect of a contract's choice of law provision (see §4.64).

Finally, eligibility issues may arise concerning contract-based fees for *noncontract* causes of action (see §4.65).

On eligibility for fees for work in arbitration, see chap 14.

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## A. Does the Contractual Fee-Shifting Provision Apply to the Action?

### §4.32 1. Attorney Fee Provision Usually Applies to Entire Contract and All Parties to Contract

Civil Code §1717(a) (second paragraph) provides that any attorney fee clause is deemed to apply to the *entire* contract, unless each party to the contract was represented by counsel during the contract's negotiation and execution, and the fact of that representation is stated in the contract. See §4.16.

Likewise, parties may not avoid CC §1717's reciprocity requirement by limiting the fee clause to lawsuits filed by a particular party. See §4.17

Note that, as with all of CC §1717's provisions, these rules may not apply to fee claims based on broadly worded fee clauses that provide for fees on *noncontract* causes of actions. See §§4.25-4.30.

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### 2. Multiple Contracts

### §4.33 a. When Multiple Contracts Are Involved, Fees May Be Awarded if Related Document Contains Fee-Shifting Clause

When the transaction between the parties is expressed in several documents, and only one of those documents contains a fee-shifting clause, the documents are generally construed as one contract (see CC §1642) and the fee clause is applied even if the action is to enforce a document that does not contain a fee-shifting clause. See *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 325, 282 CR 354 (upholding fee award even though one of several documents was found void).

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### §4.34 b. Examples of Cases Involving Multiple Contracts

- A carrier was found entitled to fees under CC §1717 based on fee clauses in its invoices and bills of lading, even though its action was based on PUC regulatory tariffs that were not a part of the parties' express agreement. *South Bay Transp. Co. v Gordon Sand Co.* (1988) 206 CA3d 650, 661, 253 CR 753. Those tariffs were deemed to be part of the contract.
- A fee clause in a declaration of restrictions supplementing a condominium's covenants, conditions, and restrictions (CC&Rs) allows the condominium association to recover fees for enforcing the CC&Rs. See *Mackinder v OSCA Dev. Co.* (1984) 151 CA3d 728, 738, 198 CR 864. See also *Brusso v Running Springs Country Club, Inc.* (1991) 228 CA3d 92, 278 CR 758; *Huntington Landmark Adult Community Ass'n v Ross* (1989) 213 CA3d 1012, 1023, 261 CR 875. Compare those cases with *Brittalia Ventures v Stuke Nursery Co.* (2007) 153 CA4th 17, 62 CR3d 467 (buyer prevailing on contract without fee clause could not obtain fees by defeating contract with fee clause); *Paul v Schoellkopf* (2005) 128 CA4th 147, 26 CR3d 766 (fee clause in escrow instructions did not apply to breach of contract action between seller and buyer not involving escrow instructions); *Pilcher v Wheeler* (1992) 2 CA4th 352, 3 CR2d 533 (attorney fee clause in construction contract entered into by partnership and contractor did not apply to dispute based on partnership agreement).
- The guarantor of a note containing an attorney fee provision may be liable for the plaintiff's fees even if the guaranty agreement itself contains no fee clause. *Niederer v Ferreira* (1987) 189 CA3d 1485, 1505, 234 CR 779. See also *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 282 CR 354.

**Additional authorities:** *El Dorado Irrig. Dist. v Traylor Bros.* (ED Cal, Feb. 12, 2007, No. CIV. S-03-949) 2007 US Dist Lexis 14440 (contractual fee award based on fee clause in performance bond, which was incorporated into contract); *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc.* (2002) 96 CA4th 598, 117 CR2d 390; *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 379, 258 CR 473; *Neptune Soc'y Corp. v Longanecker* (1987) 194 CA3d 1233, 1250, 240 CR 117; *Ganey v Doran* (1987) 191 CA3d 901, 912, 236 CR 787.

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### §4.35 3. Attorney Fees May Be Available Even if Underlying Contract Held Invalid or Nonexistent

A party claiming fees under a contractual fee-shifting clause is entitled to attorney fees under CC §1717 even if it prevails by showing that the contract is inapplicable, invalid, unenforceable, or nonexistent, if the other party would have been entitled to fees had it prevailed. *Santisas v Goodin* (1998) 17 C4th 599, 611, 71 CR2d 830; *Hsu v Abbara* (1995) 9 C4th 863, 39 CR2d 824. This rule furthers CC §1717's purpose of mutuality of remedy: If one party would have been entitled to attorney fees if it had prevailed, then the other is entitled to attorney fees when it prevails, even if that party successfully asserted that there was no contract. *Santisas v Goodin, supra*.

There is no requirement that defendant in a breach of contract action prove the existence of a contract in order to recover attorney fees. *Cano v Glover* (2006) 143 CA4th 326, 331, 48 CR3d 871 (plaintiff alleged existence of contract; defendant entitled to fees after prevailing at pleading stage). The applicability of estoppel principles to contractual fee claims is discussed in §§4.55-4.56.

Whether attorney fees may be granted on the basis of a contract that is held unenforceable depends on whether the contract is void because it is (1) illegal, or (2) invalid for other reasons, as discussed in the following two sections.

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### §4.36 a. If Entire Contract Unenforceable Because of Illegality

If the entire contract is void for illegality, attorney fees are unavailable. *Geffen v Moss* (1975) 53 CA3d 215, 125 CR 687 (court refused to apply attorney fee provision in contract when contract found to be illegal). See also, *e.g., Bovard v American Horse Enters., Inc.* (1988) 201 CA3d 832, 843, 247 CR 340 (mutuality concerns are inapplicable, and no fees are awardable, when entire contract containing fee clause is illegal and contrary to public policy).

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### §4.37 b. If Contract Enforceable But Contains Some Illegal Terms

If the contract is enforceable despite having some illegal terms, fees may be awarded under the contract. As long as a contract containing an attorney fee clause is not found to be entirely void, the party prevailing in litigation on that contract will be entitled to attorney fees even if the court holds the contract to be generally invalid. In *South Bay Transp. Co. v Gordon Sand Co.* (1988) 206 CA3d 650, 253 CR 753, a fee recovery under CC §1717 was upheld despite the fact that the contract between the plaintiff/carrier and the defendant/shipper contained illegal terms. The court held that the operative fact was that the carrier recovered on the contract because the contract (but not its illegal terms) had been enforced. As the court explained in *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1082, 120 CR2d 273, effective deterrence is better served by allowing the party who establishes the invalidity of the contract to collect fees; by contrast, the party who created the invalidity should be estopped from asserting that invalidity as a defense to the fee award. See also *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 282 CR 354.

**Additional authorities:** Compare *Care Constr., Inc. v Century Convalescent Ctrs., Inc.* (1976) 54 CA3d 701, 126 CR 761 (fee awarded even though court held that lease containing fee clause was invalid), and *Star Pac. Invs., Inc. v Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 176 CR 546 (attorney fee award based on void and canceled note and deed of trust upheld), with *City & County of San Francisco v Union Pac. R.R. Co.* (1996) 50 CA4th 987, 58 CR2d 1 (attorney fee provision in canceled lease enforceable).

More recent cases following the rule stated in *Care Constr.* include *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 8, 54 CR3d 724; *Korech v Hornwood* (1997) 58 CA4th 1412, 68 CR2d 637; *Milman v Shukhat* (1994) 22 CA4th 538, 545, 27 CR2d 526; *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1547, 1 CR2d 35; *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 272 CR 535; *Balistreri v Nevada Livestock Prod. Credit Ass'n* (1989) 214 CA3d 635, 644, 262 CR 862; *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 207 CR 508 (discussed in §4.45); *Smith v Krueger* (1983) 150 CA3d 752, 198 CR 174; *Berge v International Harvester Co.* (1983) 142 CA3d 152, 190 CR 815.

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## B. Does Contractual Fee-Shifting Provision Apply to Party?

### §4.38 1. Party to Litigation May Not Be Signator to Contract

In many disputes involving contracts that contain fee clauses, one or more parties to the lawsuit are not signators to the contract itself. In these cases, the issue arises whether nonsignators who prevail in litigation involving such contracts are entitled to attorney fees under CC §1717(a), and conversely, whether nonsignators who lose such litigation can be held liable for fees under the contractual fee clause.

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/§4.39 2. Fees May Be Awarded to or Against Persons Who Were Not Signators to Contract

## §4.39 2. Fees May Be Awarded to or Against Persons Who Were Not Signators to Contract

As discussed in §§4.40-4.48, the courts have generally ruled that, if a prevailing signator would be entitled to fees against a nonprevailing nonsignator, then the nonsignators are entitled to attorney fees if they (the nonsignators) prevail.

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### §4.40 a. If Nonsignator "Stands in the Shoes" of Party to Contract

In determining whether fees may be awarded to or against nonsignators, courts first look to whether the nonsignator "stands in the shoes" of one of the parties to the contract; if the party does stand in the shoes of a signator, then the fee-shifting clause will be equally applicable to that party. See, *e.g., Texas Commerce Bank v Garamendi* (1994) 28 CA4th 1234, 1245, 34 CR2d 155 (insurance commissioner appointed conservator of insolvent insurer liable for contractual attorney fees because he "step[ped] into the shoes" of insurer). Compare *Texas Commerce Bank* with *Notrica v FDIC* (9th Cir 1993) 2 F3d 961 (no attorney fees to nonsignator under CC §1717 when FDIC was not signator to contract and federal law controls). See also *Employers Mut. Liab. Ins. Co. v Tutor-Saliba Corp.* (1998) 17 C4th 632, 640, 71 CR2d 851 (subcontractor's workers' compensation carrier that sued general contractor to recover compensation benefits paid to the subcontractor's employee was bound by express attorney fees provision in contract between general contractor and subcontractor; citing with approval *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 54 CR2d 541).

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### §4.41 b. If Nonsignator Is Effectively a Party to Contract

Fees also may be awarded when the third party is effectively considered a party to the contract even though it is a nonsignator. For example, in *Pacific Preferred Props., Inc. v Moss* (1999) 71 CA4th 1456, 84 CR2d 500, the trial court denied the sellers' motion for attorney fees on the ground that the brokers were not parties to the contract. However, the court of appeal held that the attorney fee provision in the sales contract "unambiguously includes the broker within the ambit of its benefit provisions and its performance obligation." 71 CA4th at 1462. The court held that, when the brokers supplied the contracts to the buyers and sellers, they manifested an intent to pay attorney fees in ensuing litigation if they did not prevail.

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### c. Awards to Nonsignators

### §4.42 (1) Nonsignator Can Be "Prevailing Party" Eligible for Attorney Fees

A party who has not signed a contract can be a "prevailing party" on that contract and thus be entitled to a fee award under the attorney fee clause of that contract as provided by CC §1717. See *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1 (nonsignator can be prevailing party). On determining the "prevailing party" under CC §1717, see §§4.65-4.87.

The precise question presented in *Reynolds* was whether the pre-1982 version of §1717 permitted a fee award to a defendant sued as a party to a contract, even though that defendant was not a signator to the contract. The court concluded, among other things, that:

- Civil Code §1717 was enacted to establish mutuality of remedy when a contractual provision made recovery of attorney fees available for only one party, and to prevent "oppressive use of one-sided attorney's fee provisions" (25 C3d at 128);
- The purposes of CC §1717 required that it be interpreted to provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he or she were a party to it, when the plaintiff would clearly have been entitled to fees if he or she had prevailed (25 C3d at 128); and
- The statutory right to fees should be no greater than the contractual right, so that a contractual limitation on the amount of fees also must be applied reciprocally (25 C3d at 130).

The language of CC §1717 under which *Reynolds* was decided has not been significantly changed by later amendments to §1717; thus, *Reynolds* remains good law.

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/§4.43 (2) Examples of Cases Applying Rule Permitting Nonsignator to Be 'Prevailing Party'

### §4.43 (2) Examples of Cases Applying Rule Permitting Nonsignator to Be "Prevailing Party"

*Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1 (discussed in §4.42 above) has been applied in several different circumstances.

- In *Super 7 Motel Assoc. v Wang* (1993) 16 CA4th 541, 20 CR2d 193, the court denied fees to a nonsignator real estate broker in the successful defense of fraud action arising from real estate transactions, even though the underlying contract between the buyer and the seller contained a broad fee clause. See also, *Sessions Payroll Mgmt., Inc. v Noble Constr. Co.* (2000) 84 CA4th 671, 101 CR2d 127. Compare *Super 7* with *Pacific Preferred Props., Inc. v Moss* (1999) 71 CA4th 1456, 84 CR2d 500 (attorney fee provision in sales contract "unambiguously" included broker within ambit of benefit provisions and performance obligation; when brokers supplied contracts to buyers and sellers they manifested intent to pay attorney fees in ensuing litigation if they did not prevail).
- In *Meadows v Lee* (1985) 175 CA3d 475, 221 CR 22, the plaintiff and the seller/defendant had a "back-up agreement" for the purchase of the seller/defendant's property; the agreement contained a fee clause. The plaintiff sued the seller/defendant as well as the eventual purchaser of the property, claiming breach of the agreement. The defendants prevailed, and the court awarded fees under CC §1717 to both the seller/defendant and the eventual purchaser, even though the latter was not a party to the back-up agreement. See also *Niederer v Ferreira* (1987) 189 CA3d 1485, 1505, 234 CR 779, discussed in §4.33; *Montgomery v Bio-Med Specialties, Inc.* (1986) 183 CA3d 1292, 228 CR 709.
- In *Smith v Krueger* (1983) 150 CA3d 752, 198 CR 174, the purchasers of a home that the sellers had secured by deed of trust containing an attorney fees provision were held entitled to fees under CC §1717 when they sued the beneficiaries of the deed to cancel the acceleration clause.
- In *Lewis v Alpha Beta Co.* (1983) 141 CA3d 29, 189 CR 840, a tenant of a shopping center sued a cotenant and the landlord for enforcement of a covenant in the plaintiff's lease agreement giving him the exclusive right to sell liquor in the center. Both the plaintiff/tenant's and the defendant/cotenant's lease agreements with their landlord contained a reciprocal attorney fee provision. The court held that, because both the plaintiff's and the defendant/cotenant's leases contained attorney fee provisions, the policies served by CC §1717 should allow the plaintiff to recover its fees from the cotenant, even though the plaintiff's lease provided fees only as against the landlord.
- In *Saucedo v Mercury Sav. & Loan Ass'n* (1980) 111 CA3d 309, 168 CR 552, the court awarded attorney fees under CC §1717 to the plaintiffs, who successfully enjoined enforcement of a due-on-sale clause even though they could not have been held liable for attorney fees under their grantors' purchase money note and deed of trust. The court reasoned that the trustee or the beneficiary, or both, would have been entitled to attorney fees under the deed of trust had they prevailed, and therefore, as a practical matter, in order to protect their equity the plaintiffs would have had to pay the attorney fees. This situation was held sufficient to justify application of the remedial reciprocity established by §1717. See also *Wilhite v Callihan* (1982) 135 CA3d 295, 185 CR 215 (following *Saucedo*); *Dell Merk, Inc. v Franzia* (2005) 132 CA4th 443, 33 CR3d 694 (following *Saucedo* and *Wilhite*).
- In *Clar v Cacciola* (1987) 193 CA3d 1032, 238 CR 726, the court distinguished *Saucedo v Mercury Sav. & Loan Ass'n, supra,* and *Wilhite v Callihan, supra*. *Clar* involved an action between holders of competing deeds of trust, both of which contained attorney fee clauses; the court refused to award the prevailing defendant fees under either deed, noting the complete lack of privity between the competing trustees as to the fee clauses. The court distinguished *Saucedo* and *Wilhite* on the ground (among others) that, unlike those cases, the defendant in *Clar* would not have been responsible for the plaintiff's attorney fees had the plaintiff prevailed. Compare *Clar* with *Passanisi v Merit-McBride Realtors, Inc.* (1987) 190 CA3d 1496, 1509 n9, 236 CR 59.

**Additional authorities:** Other cases finding nonsignators entitled to fees include *International Rectifier Corp. v*

*Samsung Elec. Co.* (Fed Cir 2005) 424 F3d 1235, 1242; *Pueblo Radiology Med. Group, Inc. v Gerlach* (2008) 163 CA4th 826, 77 CR3d 880 (defendants sued as alter ego of corporation were entitled to attorney fees under contract when they prevailed on alter ego issue; award of attorney fees was not premature, even though breach of contract issue had not been tried, because determination that defendants were not corporation's alter egos effectively ended case); *Loduca v Polyzos* (2007) 153 CA4th 334, 343, 62 CR3d 780 (property owner was intended beneficiary of contract between subcontractor and general contractor); *Superior Gunite v Ralph Mitzel, Inc.* (2004) 117 CA4th 301, 12 CR3d 423 (fees awarded to assignee of contractual claim); *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 1574, 272 CR 535 (defendant who successfully resisted specific performance suit entitled to fees because plaintiff would have been entitled to them had he won); *Flynn v Page* (1990) 218 CA3d 342, 348, 266 CR 830; *Korech v Hornwood* (1997) 58 CA4th 1412, 1419, 68 CR2d 637 (property owner entitled to fees in action by subcontractor on contract with general contractor even though owner not a party to contract); *First Sec. Bank v Paquet* (2002) 98 CA4th 468, 119 CR2d 787.

Other cases in which fees were denied to nonsignators include *Artesia Med. Dev. Co. v Regency Assoc.* (1989) 214 CA3d 957, 266 CR 657, discussed further in §4.52 (fees denied to party in wrongful possession of real property under invalid assignment of lease that had been declared forfeited, on ground (among others) that party was not in privity with landlord); *Notrica v FDIC* (9th Cir 1993) 2 F3d 961 (fees denied to prevailing federal agency because not signator to contract and because CC §1717 not part of federal law).

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### d. Awards *Against* Nonsignators to Contract

### §4.44 (1) General Rule: Nonsignators Who Would Be Entitled to Fees if They Prevailed Are Liable for Fees if They Do Not Prevail

Although a nonsignator can be awarded fees in the circumstances described above, a nonsignator's assertion to a right to fees under CC §1717 can be a two-edged sword. Generally, the courts have held that if a nonsignator claims fees under a contract and would be entitled to a fee award if victorious, then the nonsignator is liable to pay the opposing party's fees if it does not prevail. On cases addressing this issue, see §§4.45-4.48.

On the applicability of estoppel principles to contractual fee claims generally, see §§4.55-4.56.

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### §4.45 (2) Split of Authority Regarding Nonsignators Who Claim Fees But Would Not Be Entitled to Them if They Prevailed

The authorities are split on whether a nonsignator who claims fees under a contract but does not prevail is liable for fees if the nonsignator would not, in fact, be entitled to fees even if victorious.

**Equitable estoppel view.** One line of cases holds that a nonsignator who claims fees under a contract is equitably estopped from denying liability for fees if another party prevails on the contract. In *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 207 CR 508, the plaintiffs sued for specific enforcement of an agreement to purchase real property. Their complaint sought fees under CC §1717, based on the alleged written agreement between the plaintiff/husband and the defendant; the plaintiff/wife also sought fees, although she had not signed the contract. The trial court found for the defendant, holding that there was no contract between the parties (because the plaintiffs had never accepted the agreement) and denied the defendant's motion for fees on the ground that CC §1717 did not apply, because no enforceable contract existed.

The court of appeal reversed, holding that, if the plaintiffs rely on a contractual provision to assert a claim for fees, the prevailing defendant may claim fees under the contract, even if the contract is otherwise unenforceable. The court also held that the same rule applied to the nonsignatory plaintiff. Because she had relied on the contractual provision to claim fees, the prevailing defendant was entitled to fees from her under the same provision. See also *Rainier Nat'l Bank v Bodily* (1991) 232 CA3d 83, 282 CR 926; *Jones v Drain* (1983) 149 CA3d 484, 196 CR 827 (prevailing defendant in breach of contract action was entitled to fees under CC §1717, even though the plaintiff had not been party to contract on which it had sued, and its cause of action was essentially frivolous). *Jones* was also cited with approval in *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 1574, 272 CR 535.

**Alternate view: *Leach v Home Sav. & Loan Ass'n*.** *Leach v Home Sav. & Loan Ass'n* (1986) 185 CA3d 1295, 230 CR 553, seriously questioned the rulings in both *Jones v Drain, supra,* and *Manier v Anaheim Bus. Ctr. Co., supra*. In *Leach,* a trust beneficiary sued the former trustee and various lenders to the trust, claiming that the trustee lacked authority to encumber the trust. The plaintiff asked for attorney fees in her complaint, presumably based on the contracts between the trustee and the lenders. The lenders prevailed and moved for attorney fees under CC §1717. The court held, however, that the defendants could not invoke §1717 unless the plaintiff would *actually* have been entitled to fees against them if she had prevailed; the mere fact that she claimed fees against them was insufficient by itself to invoke the mutuality provisions of §1717. The court expressly refused to follow the broad language of *Jones* and *Manier,* finding them inconsistent with *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1 (discussed in §4.42), to the extent they permit a fee award against a party who would not *actually* have been entitled to fees had that party prevailed. See also *Curry v Moody* (1995) 40 CA4th 1547, 48 CR2d 627.

The court cited *Leach* with approval in *Wilson's Heating & Air Conditioning v Wells Fargo Bank* (1988) 202 CA3d 1326, 1333 n7, 249 CR 553, in which the court denied fees to a subcontractor who sought to apply the fee provisions in its contract with the defendant owner/general contractors to the codefendant bank, which had foreclosed on its loan to the owner.

**Additional authorities:** *Abbett Elec. Corp. v California Fed. Sav. & Loan Ass'n* (1991) 230 CA3d 355, 281 CR 362; *Alhambra Redev. Agency v Transamerica Fin. Servs.* (1989) 212 CA3d 1370, 1380, 261 CR 248. See generally *Real Prop. Servs. Corp. v City of Pasadena* (1994) 25 CA4th 375, 382, 30 CR2d 536 (summarizing rule and cases).

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### §4.46 (3) Examples of Cases Awarding Fees Against Nonsignators

***Brusso v Running Springs*.** In an interesting application of the rules of *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1 (discussed in §4.42), *Jones v Drain* (1983) 149 CA3d 484, 196 CR 827, and *Leach v Home Sav. & Loan Ass'n* (1986) 185 CA3d 1295, 230 CR 553 (discussed in §4.44), the court in *Brusso v Running Springs Country Club, Inc.* (1991) 228 CA3d 92, 278 CR 758, upheld an award of fees against nonsignatory plaintiffs. The plaintiffs in *Brusso* were minority shareholders who filed a derivative action against the defendant corporation and certain majority shareholders and officers alleging, among other things, that the individual defendants had breached certain contracts (which contained attorney fee clauses) entered between them and the corporation. Defendants prevailed on the complaint, and the trial court awarded fees against the individual plaintiffs even though several of them had not signed the documents containing fee clauses. The court of appeal upheld the award on two grounds:

First, because the corporation (which had signed the contracts) would have been entitled to fees had it successfully sued the individual defendants, those defendants are entitled to fees for their successful defense of the contract action. The court, citing *Jones,* held that it would be inequitable to allow the plaintiffs to file an action on behalf of the corporation based on the contracts but not be subject to the fee clauses in those contracts.

Second, the court cited the rule of *Reynolds* and *Leach* that one can recover attorney fees under the contract only if one party would have been liable for fees under that contract had the other party prevailed. The court held that the defendants met this requirement because, had they lost, they would have been obligated to pay the corporation damages and fees under the contract, thus creating a benefit to the corporation in the form of a common fund from which the plaintiffs could have recovered their fees under the substantial benefit theory.

***Real Prop. Servs. Corp. v City of Pasadena.*** In *Real Prop. Servs. Corp. v City of Pasadena* (1994) 25 CA4th 375, 382, 30 CR2d 536, the court held that the city was entitled to attorney fees incurred in defending against a suit brought by a sublessee movie theater operator as a third party beneficiary of a lease between the city and a developer. The court reasoned that, even though the sublessee was not a signatory to the lease, it would have been entitled to attorney fees had it prevailed on the breach of lease claim, and therefore, under CC §1717, the city was entitled to fees when it prevailed.

Other cases discussing awarding fees against nonsignators include:

- *Exarhos v Exarhos* (2008) 159 CA4th 898, 72 CR3d 409 (decedent's successor in interest liable for contractual attorney fees in suit against bank because he had control of litigation and would have been entitled to fees, citing *Heppler v J.M. Peters Co.* (1999) 73 CA4th 1265, 87 CR2d 497, and *California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc.* (2002) 96 CA4th 598, 117 CR2d 390);
- *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1082, 25 CR3d 39 (fees awarded against plaintiffs/contract assignees who claimed right to fees under assignor's contract with defendant);
- *Abdallah v United Sav. Bank* (1996) 43 CA4th 1101, 51 CR2d 286 (nonsignator plaintiff liable for fees on loss if entitled to fees on victory);
- *Texas Commerce Bank v Garamendi* (1994) 28 CA4th 1234, 34 CR2d 155 (fees awarded under CC §1717 to claimants who challenged designation of priority status made by insurance commissioner acting as conservator of insolvent insurer);
- *Santa Clara Sav. & Loan Ass'n v Pereira* (1985) 164 CA3d 1089, 211 CR 54 (fees awarded under CC §1717 to trustee who enforced due-on-sale clause in deed of trust after nonsignatory purchaser refused to provide credit information); and
- *Berge v International Harvester Co.* (1983) 142 CA3d 152, 190 CR 815 (fees awarded under sales contract against defendant credit company that had purchased contract from seller; court found credit company to have been "a party" to contract).

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### §4.47 (4) Examples of Cases Refusing to Award Fees Against Nonsignators

Several cases have refused to award fees against nonsignatory parties.

- In *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325, the court refused to award fees against plaintiff realtor who claimed to be a third party beneficiary of a commission agreement to which defendant lessor was one of two signatories. The fee provision in the agreement limited fees to litigation between the signatories. The other signator to the agreement was not a party to either the action brought by the realtor, who prayed for fees under the agreement, or the cross-action brought by the lessor, who sought the fee award. Because no part of the proceeding fell within the fee clause, the realtor could not have recovered its fees had it prevailed on its claim, and the lessor had no reciprocal right to fees under CC §1717(a). 162 CA4th at 902.
- In *Sherwood Partners, Inc. v EOP-Marina Bus. Ctr., LLC* (2007) 153 CA4th 977, 62 CR3d 896, the court refused to award fees against the assignee of a lease who had sued for the benefit of creditors, not for itself, even though the assignee had pled a claim for fees.
- In *Glynn v Marquette* (1984) 152 CA3d 277, 199 CR 306, the plaintiff obtained a judgment for specific performance of a land sale contract after the seller breached the contract by conveying the land to a third party. Although the contract between the plaintiff and the seller provided for attorney fees, plaintiff's fee claim against the third party was denied because that party was not a signator to the contract. The court distinguished *Reynolds* as applying only to defendants sued under a contract *as if they were signators. Glynn* appears to be irreconcilable with *Santa Clara Sav. & Loan Ass'n v Pereira* (1985) 164 CA3d 1089, 211 CR 54. See §4.46. For a decision in which the court cited and followed *Glynn,* see *Selma Auto Mall II v Superior Court* (1996) 44 CA4th 1672, 52 CR2d 599.
- In *Plemon v Nelson* (1983) 148 CA3d 720, 196 CR 190 (discussed in §4.52), the court denied fees to a nonsignatory cross-defendant under a contract relied on in the cross-complaint. *Plemon* appears to be based, however, on the court's perception that the action was primarily a tort action and that the contract was asserted only "defensively."

For a case in which the court applied *Reynolds,* but nevertheless denied an award of fees to a nonsignatory plaintiff, see *Sessions Payroll Mgmt., Inc. v Noble Constr. Co.* (2000) 84 CA4th 671, 101 CR2d 127 (when nonsignatory plaintiff brings action against signatory defendant on contract that contains attorney fees provision and signatory defendant prevails, signatory defendant is entitled to attorney fees only if nonsignatory plaintiff would have been entitled to fees had he or she prevailed).

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### §4.48 (5) Special Rule for Sureties

A special rule applies to sureties' exposure to attorney fees on their bonds. A fee clause in the underlying contract does not entitle a prevailing obligee under a surety bond to recover damages and attorney fees in excess of the penal sum of the bond unless the surety contract expressly so provides. *Lawrence Tractor Co. v Carlisle Ins. Co.* (1988) 202 CA3d 949, 249 CR 150. This rule applies even if the bond itself contains a fee clause. *Hartford Acc. & Indem. Co. v Indus. Acc. Co.* (1932) 216 C 40, 50, 13 P2d 699. But if the surety chooses to litigate rather than to settle or to deposit the amount of its bond in court, then it must bear the risk that it will lose at trial and have to pay court costs even if those costs exceed the amount of the bond. *Harris v Northwestern Nat'l Ins. Co.* (1992) 6 CA4th 1061, 8 CR2d 234.

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### §4.49 C. Is the Action "on a Contract"?

Civil Code §1717 applies only to "action[s] on a contract." CC §1717(a). See also CC §1717(b)(1) (prevailing party under CC §1717 is party "who recovered a greater relief in the action on the contract"). A recurring issue in determining a party's eligibility for contractual attorney fees is whether CC §1717 applies to actions or causes of action that involve or arise out of a contract but seek noncontractual relief.

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## §4.50 1. Considerations in Determining Whether Action Is "on a Contract"

It is difficult to definitively draw from case law any general rule regarding what actions and causes of action will be deemed to be "on a contract" for purposes of CC §1717. The courts have held that §1717 applies only to actions that contain "at least one" contract claim. *Santisas v Goodin* (1998) 17 C4th 599, 615, 71 CR2d 830.

An action is more likely to be found "on a contract" for purposes of CC §1717 if the agreement is broad in scope or if the main thrust of the litigation is based on the contract. See, *e.g.*, *Star Pac. Invs., Inc. v Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 463, 176 CR 546 (action to rescind a contract was "on a contract" under former CC §1717; fee clause was broadly worded ("in any action in which the beneficiary of the deed appears")).

In contrast, when the fee clause is narrowly limited to actions brought to "enforce" the contract, the assertion of a contract defense to a tort action does not invoke CC §1717. See, *e.g., Gil v Mansano* (2004) 121 CA4th 739, 745, 17 CR3d 420, citing *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 75 CR2d 376.

In keeping with the trend in decisional law to give more weight to the substance of an action than to its form, courts determining whether the action is "on a contract" for purposes of CC §1717 often look beyond the parties' characterization of the action. See *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 377, 258 CR 473 (in determining whether party prevailed "on the contract," "the court should consider the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery"). See also *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1546, 1 CR2d 35.

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/§4.51 a. Examples of Cases Finding Action 'on a Contract'

### §4.51 a. Examples of Cases Finding Action "on a Contract"

- In *Kangarlou v Progressive Title Co.* (2005) 128 CA4th 1174, 27 CR3d 754, the court held that a tort action for breach of fiduciary duties that arose under an escrow agreement was "on a contract."
- In *Fairchild v Park* (2001) 90 CA4th 919, 927, 109 CR2d 442, the court held that a claim based on the warranty of habitability implied in every residential lease was "on a contract," even though it could also be pled as a tort action; after a finding of liability, the tenants could elect "to go forward on a contract theory to recover attorney's fees."
- In *Beeman v Burling* (1990) 216 CA3d 1586, 1608, 265 CR 719, the court found that a wrongful eviction action alleging negligence, constructive eviction, fraud, and violation of a rent control ordinance (arising from the wrongful eviction of the plaintiff/tenant) was an action "upon the lease" for purposes of awarding attorney fees under CC §1717. The court held that the suit "fundamentally was based upon the lease" because the plaintiff had sought compensation for the landlord's wrongful interference with the respondent's occupation and enjoyment of the leased premises. From the face of the opinion, it appears that the tenant did not allege breach of the lease.
- Compare *Beeman* and *Fairchild* with *Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 1076, 60 CR3d 580 (despite plaintiff/sublessor's voluntary dismissal, contractual fee clause broad enough to permit defendant/sublessee to recover fees in action to remove it for holding over because action sounded in tort). See §4.53.
- In *Wong v Davidian* (1988) 206 CA3d 264, 253 CR 675, the court held that an action to modify the terms of a contract is an action "on a contract" for purposes of CC §1717.
- In *Shadoan v World Sav. & Loan Ass'n* (1990) 219 CA3d 97, 107, 268 CR 207, the court held that the prevailing defendant was entitled to fees under CC §1717(a) in an action challenging the prepayment clause in a loan agreement as unconscionable and an unfair business practice. The court found that the lawsuit was (at least in part) an action on the contract, even though the plaintiffs had neither requested fees nor maintained that their action was on the contract. Compare *Shadoan* with *Walker v Countrywide Home Loans, Inc.* (2002) 98 CA4th 1158, 1179, 121 CR2d 79, which distinguished *Shadoan* and denied the prevailing defendants fees under CC §1717 because the plaintiffs raised only unfair competition claims under Bus & P C §§17200-17210, which contain no attorney fee provision.
- In *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1059, 235 CR 813, the court held that failure to plead a contract cause of action did not preclude a fee recovery under CC §1717, because the defendant was aware of the plaintiff's shift to a contract theory and the case was tried on both contract and negligence theories. See also *Lerner v Ward* (1993) 13 CA4th 155, 16 CR2d 486; *Perry v Robertson* (1988) 201 CA3d 333, 247 CR 74; *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442 (following *Perry*).
- In *Jones v Drain* (1983) 149 CA3d 484, 196 CR 827, the court held, based on an estoppel rationale, that a prevailing defendant was entitled to fees because the plaintiff had claimed entitlement under a contract, even though the plaintiff was not a signator to the contract and his contract claim was frivolous. See also *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 508, 207 CR 508; §§4.39-4.48. Compare *Jones* and *Manier* with *Sweat v Hollister* (1995) 37 CA4th 603, 43 CR2d 399, disapproved on other grounds in *Sanstisas v Goodin* (1998) 17 C4th 599, 609 n5, 71 CR2d 830. The applicability of estoppel principles to contractual fee claims is also discussed in §§4.44-4.48 and §§4.55-4.56.

**Additional authorities:** *Kachlon v Markowitz* (2008) 168 CA4th 316, 348, 85 CR3d 532 (equitable claims for declaratory relief and injunctive relief, and to quiet title, arising out of deed of trust provisions, were "on a contract"); *City & County of San Francisco v Union Pac. R.R. Co.* (1996) 50 CA4th 987, 58 CR2d 1 (declaratory relief action to determine rights under lease was "on the contract"); *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 55 CR2d 640 (same); *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 56 CR2d 33 (time spent on conversion cause of action that was based on safety deposit box agreement between parties and that contained fee clause was action on

contract under CC §1717); *Texas Commerce Bank v Garamendi* (1994) 28 CA4th 1234, 34 CR2d 155; *Milman v Shukhat* (1994) 22 CA4th 538, 545, 27 CR2d 526 (declaratory relief action was "on contract"); *Palmer v Shawback* (1993) 17 CA4th 296, 21 CR2d 575; *Lerner v Ward* (1993) 13 CA4th 155, 16 CR2d 486; *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154; *3250 Wilshire Blvd. Bldg. v W.R. Grace & Co.* (9th Cir 1993) 990 F2d 487. Compare these cases with *Super 7 Motel Assoc. v Wang* (1993) 16 CA4th 541, 20 CR2d 193 (fees denied to nonsignator for tort action based on fraud even though underlying transaction involved broad fee clause); *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 707, 75 CR2d 376 (when settlement of declaratory relief action based on contract results in dismissal, CC §1717(b)(2) bars fee award even though contract provides for fees in settled cases).

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### §4.52 b. Examples of Cases Finding Action Not "on a Contract"

- In *Aozora Bank, Ltd. v 1333 North California Blvd.* (2004) 119 CA4th 1291, 15 CR3d 340, the court held that the attorney fee clause in the parties' contract, which contained a nonrecourse provision, did not apply to an action for waste, which was a stated exception to the nonrecourse provision.
- In *Artesia Med. Dev. Co. v Regency Assoc.* (1989) 214 CA3d 957, 266 CR 657, the appellate court held that, in an unlawful detainer action, a party in wrongful possession of real property under an invalid assignment of a lease that had been declared forfeited was not entitled to fees under CC §1717 because, among other reasons, the action to evict that party was not based on that contract.
- In *Plemon v Nelson* (1983) 148 CA3d 720, 196 CR 190, the court refused to award fees under CC §1717 to a prevailing plaintiff in an action brought against a pilot and the company from whom the pilot rented the plane. The court found that the plaintiff's action was based on negligence, not contract, and therefore §1717 did not apply. It had a harder time with the plaintiff's claim for fees arising from the pilot's cross-complaint that asserted rights under a contract between the pilot and the rental company that contained an attorney fee clause. However, the court denied the plaintiff fees for defending the cross-complaint, finding that the assertion of the contract was essentially defensive and that the action remained primarily a tort action. Compare *Plemon* with *Washington v Baenziger* (ND Cal 1987) 673 F Supp 1478, 1484 (although fees are not recoverable under §1717 in tort action for fraud arising out of a contract, fees are recoverable for contractual rescission and restitution claims based on same fraud).
- In *Stout v Turney* (1978) 22 C3d 718, 730, 150 CR 637, the supreme court held that a tort action for fraud arising out of a contract was not an action "on the contract" within the meaning of former CC §1717. For cases distinguishing *Stout* on this issue, see, *e.g.*, *Perry v Robertson* (1988) 201 CA3d 333, 342, 247 CR 74; *Star Pac. Invs., Inc. v Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 460, 176 CR 546. Compare *Stout* with *Schoolcraft v Ross* (1978) 81 CA3d 75, 82, 146 CR 57, in which the court awarded fees under §1717 to a party who prevailed on the basis of an implied covenant in a deed of trust that contained an attorney fees clause.

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### §4.53 2. Finding That Action Is Not "on a Contract" Does Not Preclude Fee Award Under Broadly Worded Fee Clause

A finding that the action is not "on the contract," however, is dispositive only of eligibility for attorney fees *under CC §1717*. Under the line of cases following *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154 (see §4.25-4.27), however, a party may still be entitled to reasonable attorney fees for actions that are not "on the contract" if the fee clause can be interpreted to provide for such awards. Eligibility for fees in these circumstances is discussed more fully in §4.65. In such instances, the fee award is not governed by the standards stated in CC §1717, but by the terms of the parties' agreement and CCP §1021. See also §§4.25-4.27.

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## D. Other Eligibility Issues

### §4.54 1. Contractual Limitations

Parties to a contract may agree to certain provisions that can limit a party's eligibility for attorney fees under the contract; courts have upheld limitations that, unlike a one-sided attorney fee provision, do not reflect one party's superior bargaining position. These include agreements to limit fees to parties that engage in prelitigation mediation (see, *e.g., Frei v Davey* (2004) 124 CA4th 1506, 1520, 22 CR3d 429; *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362), and to limit fees to certain types of proceedings, such as arbitration (see, *e.g., Kalai v Gray* (2003) 109 CA4th 768, 135 CR2d 449). See also §4.20.

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## 2. Estoppel

### §4.55 a. Party Who Claimed Attorney Fees Under Contractual Provision Is Not Estopped From Later Disputing Provision's Applicability

A plaintiff who claims eligibility for attorney fees based on the alleged breach of a contract that contains an attorney fees provision is not judicially estopped from contending that the provision does not authorize a fee award after the defendant prevails. *M. Perez Co. v Base Camp Condominiums Ass'n No. One* (2003) 111 CA4th 456, 3 CR3d 563, disapproving earlier decision in *International Billing Servs., Inc. v Emigh* (2000) 84 CA4th 1175, 101 CR2d 532. Compare *Jones v Union Bank* (2005) 127 CA4th 542, 548, 25 CR3d 783 (party who won fees before reversal estopped from denying opponent's right to fees); *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1082, 25 CR3d 39 (plaintiffs'/contract assignees' claim to fees under assignor's contract with defendant cited as evidence that fee clause applied to them).

**NOTE:** In *M. Perez Co. v Base Camp Condominiums Ass'n No. One, supra,* the court indicated that a different rule may apply in litigation over the right to fees. 111 CA4th at 470 (indicating that plaintiff who is not entitled to fees for underlying litigation may be entitled to contractual fees for successfully defending against defendant's fee claim).

In *Hasler v Howard* (2004) 120 CA4th 1023, 16 CR3d 217, the appellate court affirmed the trial court's denial of fees to the defendant when plaintiff had voluntarily dismissed his claim, finding that the contractual fee clause was not broad enough to encompass the plaintiff's causes of action. Following that decision, the *plaintiff* moved for an award of fees under *Hsu v Abbara* (1995) 9 C4th 863, 865, 39 CR2d 824, for obtaining "a simple, unqualified win" on appeal since defendant would have been entitled to fees if he had prevailed on his fee motion. The trial court awarded fees, and defendant appealed. In *Hasler v Howard* (2005) 130 CA4th 1168, 30 CR3d 714, the court of appeal reversed, finding that the contract did not allow either party to recover fees and a "prevailing party is not entitled to fees simply because the opposing party requested them."130 CA4th at 1171.

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### §4.56 b. Estoppel Cannot Be Basis for Awarding Fees in Absence of Independent Right to Recover Fees

If a party claiming attorney fees has no independent right to recover them, then estoppel cannot be the basis for imposing an attorney fee award against that party. *Sessions Payroll Mgmt., Inc. v Noble Constr. Co.* (2000) 84 CA4th 671, 101 CR2d 127.

In *Sessions,* the plaintiff, a nonsignatory, sued the defendants for breach of an alleged third party beneficiary contract between defendants that contained an attorney fee provision. Plaintiff's complaint claimed attorney fees. After dismissing plaintiff's action, the trial court awarded defendant fees under CC §1717, but the appellate court reversed. Because the contract specifically disclaimed any intention to create any rights in third parties and confined the right to fees to the parties to the agreement, the nonsignatory plaintiff could not have recovered fees even if it had prevailed on its third party beneficiary claim, and thus defendant could not claim fees against plaintiff. Estoppel alone could not be the basis for fees: "The mere allegation in a complaint that the plaintiff is entitled to receive attorney fees does not provide a sufficient basis for awarding them to the opposing party if the plaintiff does not prevail." 84 CA4th at 682.

**Additional authorities:** *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 897, 76 CR3d 325; *Sherwood Partners, Inc. v EOP-Marina Bus. Ctr., LLC* (2007) 153 CA4th 977, 983, 62 CR3d 896; *Topanga & Victory Partners LLP v Toghia* (2002) 103 CA4th 775, 787, 127 CR2d 104 (distinguishing *International Billing Servs., Inc. v Emigh* (2000) 84 CA4th 1175, 101 CR2d 532).

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### 3. Indemnity Agreements

### §4.57 a. Nature of Indemnity Agreements Generally

In an indemnity agreement, one party agrees to save another from the legal consequences of an act, usually by agreeing to pay any damages, costs, expenses, and attorney fees that the indemnitee becomes obligated to pay to third persons. See CC §§2772-2784.5; *Myers Bldg. Indus., Ltd. v Interface Technology, Inc.* (1993) 13 CA4th 949, 968, 17 CR2d 242. For example, the indemnitee might be held "free and harmless from any loss, damage, liability, cost or expense that may arise during or be caused in any way by such use or occupancy of the property" (*County of San Joaquin v Stockton Swim Club* (1974) 42 CA3d 968, 971, 117 CR 300), or from claims, damages, losses, and expenses, including attorney fees, arising from the negligence of the indemnitor (*Hillman v Leland E. Burns, Inc.* (1989) 209 CA3d 860, 257 CR 535). See §7.24 for discussion of attorney fees as damages in indemnity cases.

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### §4.58 b. Indemnity Agreements and Contractual Attorney Fees

Indemnity clauses (discussed above in §4.57), by themselves, do not provide attorney fees to the indemnitee or indemnitor in an action to enforce the indemnity agreement. *Building Maintenance Serv. Co. v AIL Sys., Inc.* (1997) 55 CA4th 1014, 64 CR2d 353. See also *Carr Bus. Enters., Inc. v City of Chowchilla* (2008) 166 CA4th 14, 20, 82 CR3d 128 (standard contractual indemnity clause did not create reciprocal rights to fees, despite reference to performance of work under contract). Attorney fees are recoverable under CC §1717 only if a separate attorney fees provision is included in the indemnity agreement. *Hillman v Leland E. Burns, Inc.* (1989) 209 CA3d 860, 870, 257 CR 535. See, *e.g., Erickson v R.E.M. Concepts, Inc*. (2005) 126 CA4th 1073, 1082, 25 CR3d 39. But see *Bramalea Cal. Inc. v Reliable Interiors, Inc.* (2004) 119 CA4th 468, 14 CR3d 302.

The fees that are recoverable are only those incurred to enforce the indemnity agreement, or, by reason of mutuality, to defend such an action; the fees that were incurred against a third party are damages, not fees recoverable as costs, and are not subject to CC §1717's mutuality or other provisions. See, *e.g., Continental Heller Corp. v Amtech Mechanical Servs., Inc.* (1997) 53 CA4th 500, 508, 61 CR2d 668. The *Continental Heller Corp.* court held, however, that a clause that provided for indemnity against "any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any breach" of the contract entitled the prevailing party to fees for the indemnity action. See also *Torres v City of San Diego* (2007) 154 CA4th 214, 225, 64 CR3d 495.

A fee award based on a separate provision in the indemnity agreement may include fees incurred to establish nonliability in the underlying action, when it is part of the defense to an indemnification action. See *Baldwin Builders v Coast Plastering Corp.* (2005) 125 CA4th 1339, 24 CR3d 9.

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/ 4. Parties Represented Without Charge/§4.59 a. Represented Parties Eligible for Fees Even When Represented Without Charge

## 4. Parties Represented Without Charge

### §4.59 a. Represented Parties Eligible for Fees Even When Represented Without Charge

Although CC §1717(a) refers to the fees that are "incurred" to enforce the contract, the courts uniformly hold that parties are eligible for fees even if they have been represented without charge or their fees have been paid by a third party. See *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198 (term "incur" used in CC §1717(a) should be interpreted broadly, and thus corporation represented by in-house counsel may recover fees), and cases cited below.

Accordingly, the right to recover fees under CC §1717 cannot be waived by inserting language into the agreement that if the attorney does not charge the client a fee, no fees are recoverable.. *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 11, 270 CR 605. See also §2.23..

The following are examples of situations in which courts have rejected the argument that a losing party in a contract dispute should not have to pay attorney fees if the prevailing party did not, in fact, have to pay its own attorney fees.

- **Representation by public interest organization.** See *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 11, 270 CR 605.
- **Fees paid by employer.** See *International Billing Servs., Inc. v Emigh* (2000) 84 CA4th 1175, 101 CR2d 532.
- **Fees paid by co-counsel or to party's law firm.** See *Gilbert v Master Washer & Stamping Co.* (2001) 87 CA4th 212, 104 CR2d 461 (attorney represented by other members of law firm may recover fees); *Farmers Ins. Exch. v Law Offices of Conrado Joe Sayas, Jr.* (9th Cir 2001) 250 F3d 1234 (attorney fees incurred by two law firms that jointly represented client and later represented each other in fee dispute with client; attorney-client relationship existed between the law firms, each firm was obligated to pay the other for specific amount of fees incurred in underlying actions, and there were distinct interests between attorney and client).
- **Fees paid by insurer.** See *Staples v Hoefke* (1987) 189 CA3d 1397, 1408, 235 CR 165. A different rule may apply, however, to fees claimed as damages. In *Bramalea Cal. Inc. v Reliable Interiors, Inc.* (2004) 119 CA4th 468, 14 CR3d 302, the court held that an indemnitee cannot recover, as damages, from the indemnitor fees already paid by the indemnitee's insurer.
- **Representation by in-house counsel.** *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1093, 95 CR2d 198, citing with approval *Garfield Bank v Folb* (1994) 25 CA4th 1804, 31 CR2d 239.
- **Contingency fee agreement.** The courts also have rejected the argument that CC §1717 fees may be denied because the prevailing parties had a contingent fee agreement with their attorney. *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442.

For other examples of this principle in the statutory fee-shifting context, see §§2.23-2.30. This line of cases was solidly reaffirmed in *Lolley* v *Campbell* (2002) 28 C4th 367, 121 CR2d 571. See also *Moran v Oso Valley Greenbelt Ass'n* (2004) 117 CA4th 1029, 12 CR3d 435 (following *Lolley* in case in which plaintiff was represented without charge by law firm that employed her).

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### §4.60 b. Exception for Self-Represented Attorneys and Nonattorneys

An attorney who represents himself or herself is not eligible for a fee award under CC §1717. *Trope v Katz* (1995) 11 C4th 274, 45 CR2d 241. But see *Mix v Tumanjan Dev. Corp.* (2002) 102 CA4th 1318, 126 CR2d 267 (self-represented attorney who retained outside law firm to advise him was entitled to recover for its services, even though firm did not appear as attorney of record). The same rule applies to nonattorneys who represent themselves. See §6.21.

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### §4.61 c. Determining Amount of Fees When Parties Represented Without Charge

Historically, the courts distinguished the issue of a party's eligibility for fees when represented without charge from the issue of the amount of fees due under contracts or statutes that award fees "incurred." Those distinctions, however, are no longer valid.

For example, in *San Dieguito Partnership v Joint Powers Auth.* (1998) 61 CA4th 910, 72 CR2d 91, the court of appeal held that under a contract providing that the prevailing party would be entitled to the fees "incurred," the trial court abused its discretion by awarding a fee that was higher than the party was obligated to pay its attorneys. In dicta, the court questioned the reasoning of *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605, in light of *Trope v Katz* (1995) 11 C4th 274, 45 CR2d 241.

However, in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198, the supreme court expressly disapproved *San Dieguito Partnership* on this point (22 C4th at 1097 n5), and twice cited *Beverly Hills Prop.* with approval. 22 C4th at 1095, 1096. Thus, the current rule is that the court is not required to base the fee award on the amount of fees paid by the prevailing party but must base the award on the market value of the work. See §§9.93-9.94.

Note, however, that a different rule may apply in determining the fees that the plaintiff is obligated to *pay* its attorney. See, *e.g., Beard v Goodrich* (2003) 110 CA4th 1031, 1036, 2 CR3d 160 (attorney representing successful party in contract case that settled on appeal entitled only to contingent fee called for by retainer agreement, not court-awarded fee extinguished by lump-sum settlement; distinguishing *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809 (see §§1.21-1.25)).

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### 5. Fees for Enforcing Judgment

#### §4.62 a. Contractual Fee Awards Include Fees Incurred Enforcing Judgment

Under CCP §§685.040 and 685.070(a)(6), attorney fees incurred in enforcing a judgment are recoverable as costs. These statutory provisions, enacted in 1992, resolved a split of authority as to whether such fees were recoverable. See *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 881, 88 CR3d 250.

At least one court has held, however, that such fees are available only if the underlying judgment includes a contract-based fee award. *Imperial Bank v Pim Elec., Inc.* (1995) 33 CA4th 540, 557, 39 CR2d 432 (denying appellate fees because plaintiff had not been awarded fees for underlying action).

In *Chelios v Kaye* (1990) 219 CA3d 75, 268 CR 38, decided before the 1992 amendment, the court had held that fees could not be awarded for postjudgment actions to collect on the judgment because all contractual rights merged into the judgment, and actions to collect on such a judgment are not actions on the contract. The court noted certain exceptions to this rule, however: See 219 CA3d at 80 n5. Accord *Hambrose Reserve, Ltd. v Faitz* (1992) 9 CA4th 129, 11 CR2d 638, disapproved on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241. Compare *Hambrose* and *Chelios* with *Rainier Nat'l Bank v Bodily* (1991) 232 CA3d 83, 282 CR 926, and *Share v Casiano Bel-Air Homeowners Ass'n* (1989) 215 CA3d 515, 263 CR 753.

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### §4.63 b. Enforcement Fees Available for Wide Variety of Enforcement Activities

The availability of a further contractual fee award for time spent enforcing the underlying judgment is not limited to pure "collection" efforts. For example, in *Globalist Internet Technol., Inc. v Reda* (2008) 167 CA4th 1267, 1276, 84 CR3d 725, the court held that attorney fees expended by the judgment creditor in successfully defending an action by the judgment debtor are recoverable under CCP §685.040. Similarly, in *Ajida Technol., Inc. v Roos Instruments, Inc.* (2001) 87 CA4th 534, 552, 104 CR2d 686, the court held that a contract providing for fees incurred in arbitration also authorized fees for the subsequent trial court and appellate proceedings to enforce the arbitration award. See also *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 29 CR3d 810 (contractual fees awarded for defeating original writ that challenged postjudgment discovery order).

Fees may also be awarded for time spent in federal bankruptcy court protecting or securing a judgment in which contract-based fees have been awarded. See *Travelers Cas. & Sur. Co. v PG&E* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199 (federal bankruptcy law does not disallow fee claims based on contracts solely because fees were incurred litigating bankruptcy law); *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 88 CR3d 250; *Circle Star Ctr. Assocs., LP v Liberate Technols.* (2007) 147 CA4th 1203, 1209, 55 CR3d 232.

This is consistent with the general rule that a right to recover attorney fees includes the right to recover fees for enforcing or defending the underlying judgment. See §§9.24-9.27.

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### §4.64 6. Choice of Law Provisions

The courts have reached conflicting results on whether the California policy favoring reciprocity in recovering fees takes precedence over the choice of law provisions in the parties' contracts. Compare *ABF Capital Corp. v Grove Props. Co.* (2005) 126 CA4th 204, 23 CR3d 803 (because California had materially greater interest in enforcing its equitable rules for access to its courts, CC §1717 applied despite New York choice of law contract provision under which reciprocity not permitted), with *ABF Capital Corp. v Berglass* (2005) 130 CA4th 825, 30 CR3d 588 (applying New York law, court denied fees).

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## §4.65 E. Eligibility Issues Affecting Contract-Based Fees for *Noncontract* Causes of Action

As noted in §§4.25-4.30, the parties to a contract may agree that the prevailing party may recover attorney fees not only for causes of action based on the contract, but also for tort and other noncontract claims. *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830, citing *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154, and *Lerner v Ward* (1993) 13 CA4th 155, 16 CR2d 486.

The language of the fee clause in the contract must be broad enough to clearly show that the parties intended that it apply to noncontract claims. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 602, 71 CR2d 830, and other cases cited and discussed in §4.26. To recover fees under such a broadly worded clause, many of the eligibility issues are the same as those that apply to fee claims under CC §1717: The contract must apply to the lawsuit (see §§4.32-4.37); it must apply to the party claiming fees and the party against whom fees are claimed (see §§4.38-4.48); and any special qualifications as to forum (see §4.64) or other preconditions must be met (see §4.54).

There are, however, significant eligibility differences between claims under such broadly worded provisions, to which CC §1717 does not apply, and fee claims under CC §1717. These differences include: reciprocity is not required; the party claiming fees need not prevail on the contract cause of action; and fees may be awarded even if the lawsuit has been voluntarily dismissed. For discussion of these differences, see §§4.27-4.30. See, *e.g., Moallem v Coldwell Banker Commercial Group, Inc.* (1994) 25 CA4th 1827, 1832, 31 CR2d 253; *Adam v DeCharon* (1995) 31 CA4th 708, 37 CR2d 195. In addition, different definitions of who is the "prevailing party" may apply. See §§4.89-4.90.

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## IV. ENTITLEMENT TO ATTORNEY FEES UNDER CONTRACTUAL FEE CLAUSES

### §4.66 A. Civil Code §1717 Provides Fees to the "Party Prevailing on the Contract"

Under CC §1717(a), when a contract provides for an award of attorney fees, the party "prevailing on the contract" is entitled to those fees. Under §1717(b)(1), the "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." Entitlement to fees under these provisions is discussed in §§4.67-4.77.

Section 1717 also contains qualifications to the "prevailing party" standard that is not found in other fee-shifting statutes: First, and most significantly, the statute expressly provides that there can be no "prevailing party" when the case has been voluntarily dismissed or dismissed pursuant to settlement. CC §1717(b)(2). Application of CC §1717's "prevailing party" standards in this and other particular situations—*i.e.,* when a party has made an offer to compromise under CCP §998 or when the defendant has tendered the sums due at the time of the answer—is discussed in §§4.78-4.88.

Second, CC §1717(b)(1) expressly provides that the court may determine that no party has prevailed for purposes of §1717. See §4.88.

**NOTE:** Note that CC §1717(b)(1)'s definition of "the party prevailing on the contract" does not apply to fee requests based on contractual fee-shifting clauses that allow the parties to recover fees for *noncontract* claims; in those cases, the prevailing party is determined by the language of the contract. See *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830; and other cases cited and discussed in §§4.25-4.30. On the "prevailing party" determination in these circumstances, see §§4.89-4.90.

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## §4.67 1. Determining the "Party Prevailing on the Contract"

Determining which party is the prevailing party for purposes of entitlement to a fee award under CC §1717 is not always simple. Some of the basic rules that should be kept in mind in making this determination are set out in §§4.68-4.77.

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### §4.68 a. "Prevailing Party" Under CC §1717 Not Necessarily Same as "Prevailing Party" for Purposes of Costs Under CCP §1032

Even though contract-based attorney fees are "costs" (see CCP §1033.5(a)(10)), it is critical to recognize that the determination of the "prevailing party" for purposes of CCP §1032 (the costs statute) is not the same as the determination of the "party prevailing on the contract" under CC §1717. *Santisas v Goodin* (1998) 17 C4th 599, 606, 71 CR2d 830; *Building Maintenance Serv. Co. v AIL Sys., Inc.* (1997) 55 CA4th 1014, 1020, 64 CR2d 353; *Berkla v Corel Corp.* (9th Cir 2002) 302 F3d 909. The relationship between the two prevailing party standards was examined extensively in *Sears v Baccaglio* (1998) 60 CA4th 1136, 1142, 70 CR2d 769. For a discussion of the "net monetary recovery" issue under CCP §1032 (recovery of costs), see *Michell v Olick* (1996) 49 CA4th 1194, 57 CR2d 227.

Note that if fees are sought under a contractual provision authorizing fees for *noncontract* claims and the contract does not define the "prevailing party," the courts are directed to look to whether the parties reached their litigation objectives by settlement, judgment, or other means. See, *e.g., Silver v Boatwright Home Inspection, Inc.* (2002) 97 CA4th 443, 452, 118 CR2d 475 (citing *Santisas*). See also §§4.89-4.90. On "prevailing party" under fee-shifting statutes, see §§2.44-2.49.

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### §4.69 b. Party That Recovers "Greater Relief on the Contract" Is Entitled to Fees

Civil Code §1717 defines the "party prevailing on the contract" as "the party who recovered a greater relief in the action on the contract." CC §1717(b)(1). Thus, if one party prevails "on the contract" but the opposing party prevails on the *noncontract* claims, the party prevailing "on the contract" may be awarded its attorney fees for work on the contract action even if it suffers a net loss. See *Hsu v Abbara* (1995) 9 C4th 863, 877, 39 CR2d 824; CC §1717(c).

For a good discussion of the factors underlying the prevailing party determination, see, *e.g., Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 400, 112 CR2d 99. See also *Hsu v Abbara, supra* (reversing denial of fees to party that obtained "simple, unqualified win" on contract claim); *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276 (party that accepts CCP §998 offer is "prevailing party" under CC §1717).

**Additional authorities:** *FDIC v Dintino* (2008) 167 CA4th 333, 357, 84 CR3d 38 (when defendant defeats recovery by plaintiff on sole contract claim in action, defendant is prevailing party under CCP §1717 as a matter of law); *Ajaxo Inc. v E*Trade Group Inc.* (2005) 135 CA4th 21, 37 CR3d 221; *Foothill Props. v Lyon/Copley Corona Assoc.* (1996) 46 CA4th 1542, 1554, 54 CR2d 488 (*Hsu* rule applies even though plaintiff won one minor cause of action on which no relief was granted); *DiMarco v Chaney* (1995) 31 CA4th 1809, 37 CR2d 558; *Deane Gardenhome Ass'n v Denktas* (1993) 13 CA4th 1394, 1398, 16 CR2d 816; *Smith v Krueger* (1983) 150 CA3d 752, 198 CR 174.

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### §4.70 c. Definition of "Prevailing Party" Cannot Be Altered by Contract

The statutory definition of "prevailing party" under CC §1717 "is mandatory and cannot be altered or avoided by contract." *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 707, 75 CR2d 376. See, *e.g., Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276 ("prevailing party" under CC §1717(b)(1) entitled to fees despite more restrictive contract language).

**NOTE:** A contractual provision authorizing fees for *noncontract* claims is subject to any definition of "prevailing party" in the contract. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 622, 71 CR2d 830. If the contract does not define the "prevailing party," the courts should exercise the discretion afforded under CCP §§1032 and 1033.5, and should consider the reasons for any dismissal and whether the parties have reached their litigation objectives by settlement, judgment, or other means. *Silver v Boatwright Home Inspection, Inc.* (2002) 97 CA4th 443, 118 CR2d 475. On determining the prevailing party under contractual fee provisions that apply to noncontract causes of action, see §§4.89-4.90.

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/§4.71 d. Prevailing Party Determination Guided by Equitable Considerations

### §4.71 d. Prevailing Party Determination Guided by Equitable Considerations

In *Hsu v Abbara* (1995) 9 C4th 863, 877, 39 CR2d 824, the court held that

> in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by "equitable considerations." For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective.

Thus, "greater relief… on the contract" does not necessarily mean greater *monetary* relief. *Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 112 CR2d 99; *Sears v Baccaglio* (1998) 60 CA4th 1136, 70 CR2d 769.

Note that under CC §1717(b)(1), the court is empowered to find that no party has prevailed for purposes of §1717. See §4.88.

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### §4.72 (1) Court Compares Relief Awarded With Parties' Objectives, Demands, and Positions

To determine the prevailing party on the contract under CC §1717, the trial court is to "compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." *Hsu v Abbara* (1995) 9 C4th 863, 876, 39 CR2d 824. The court determines the prevailing party only when the contract claims have been finally resolved and only by "a comparison of the extent to which each party has succeeded and failed to succeed in its contentions." 9 C4th at 876.

Following *Hsu*, the court in *Sears v Baccaglio* (1998) 60 CA4th 1136, 1154, 70 CR2d 769 held that, in the event one party receives earlier payments, settlements, insurance proceeds, or other recovery, the court "has discretion to determine whether the party required to pay a nominal net judgment is nevertheless the prevailing party" under CC §1717.

"Greater relief" also was interpreted in *Pirkig v Dennis* (1989) 215 CA3d 1560, 1568, 264 CR 494, in which the court held that real estate purchasers who had obtained a jury verdict establishing their broker's liability for negligent misrepresentation were the prevailing parties under §1717 and CCP §1032 (the costs statute), even though they recovered no damages from the broker because of a setoff of settlement payments that the plaintiffs received from other defendants. The court noted that the plaintiffs established the broker's liability, established damages as a result of that fact (albeit damages already paid by other defendants), and received a substantial sum in settlement with other defendants. See also *Public Employees' Retirement Sys. v Winston* (1989) 209 CA3d 205, 211, 258 CR 612. Compare *Public Employees' Retirement Sys.* with *Jones v Union Bank* (2005) 127 CA4th 542, 549, 25 CR3d 783 (settlements with other defendants did not affect prevailing party status of defendant bank, which defeated plaintiff's action).

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### §4.73 (2) Court's Discretion Limited in Case of "Simple, Unqualified Win"

In determining the prevailing party for purposes of CC §1717, when one party obtains a "simple, unqualified win," the court should not admit other factors, such as the parties' behavior during settlement or discovery proceedings, into the equation, because to do so would "convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a formless, limitless attack on the ethics and character of every party who seeks attorney fees under section 1717." *Hsu v Abbara* (1995) 9 C4th 863, 877, 39 CR2d 824, citing *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 235 CR 813. See, *e.g., Arias v Katella Townhouse Homeowners Ass'n, Inc.* (2005) 127 CA4th 847, 26 CR3d 113 (plaintiff was prevailing party even though damages far less than requested).

Arbitration proceedings are subject to the same rules, but the availability of judicial review of a decision denying fees is limited. *Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 94 CR2d 603. On recovery of fees in arbitration proceedings, see chap 14.

For further discussion of *Hsu,* see §4.88.

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### §4.74 e. Only One Prevailing Party Per Contract

Generally speaking, there can be only one prevailing party under a contract. See *Harvard Inv. Co. v Gap Stores, Inc.* (1984) 156 CA3d 704, 715, 202 CR 891. The contract action should not be divided into separate issues for purposes of determining the prevailing party, nor should it be divided into stages. Rather, the court must look at the overall success of the parties. *Harvard Inv. Co. v Gap Stores. Inc., supra*. For example, a party who appeals from a final judgment but obtains only a partial victory, *e.g.,* the appellate court reduces the amount of judgment against the party but does not reverse it, is not entitled to fees on appeal because the opposing party remains the party who prevailed in the overall lawsuit. *Snyder v Marcus & Millichap* (1996) 46 CA4th 1099, 54 CR2d 268. See also *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 56 CR2d 33 (despite reversal of punitive damages award on appeal, plaintiff who was ultimately awarded damages in excess of $200,000 was prevailing party on contract).

On determining entitlement to fees when a dispute involves multiple contracts containing fee clauses, see §4.75. See also §4.88 (court may determine that no party prevailed).

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### §4.75 f. In Disputes Involving Multiple Contracts with Fee-Shifting Clauses, Prevailing Party Is Determined for Each Contract

When an action involves multiple contracts, each of which provides for attorney fees, the prevailing party will be determined as to each contract regardless of who prevails in the overall action. *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 491, 54 CR2d 888; *Hunt v Fahnestock* (1990) 220 CA3d 628, 630, 269 CR 614.

Under the unusual facts of *Hunt,* the court held that attorney fees should be awarded to the defendants for successfully resisting the plaintiff's efforts to judicially foreclose on one piece of property, even though the plaintiff obtained judicial foreclosure on another piece, because each piece of property was subject to a separate fee clause. In *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co., supra*, the court followed *Hunt,* holding that in litigation between a general contractor and its surety, the agreements at issue were separate contracts with different victors and that "[w]hen an action involves multiple, independent contracts, each of which provides for attorney fees, the prevailing party for purposes of CC §1717 must be determined as to each contract regardless of who prevails in the overall action."

In *Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 112 CR2d 99, the court held that the plaintiffs/borrowers in a class action brought against GMAC challenging provisions in a standard sales agreement collectively constituted the prevailing party even though each class member had a separate contract. The court distinguished *Arntz* on the ground that it involved multiple, independent contracts. 92 CA4th at 401.

**NOTE:** The *Hunt* situation should be distinguished from one in which attorney fees are awarded under documents that can be construed as a single contract, only one of which contains an attorney fee clause. On fees in actions on documents related to a contract, see §4.33. In that situation, the court awards fees based on the single fee clause, because it construes the multiple documents as one contract.

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### §4.76 g. Defendant Need Not Obtain Affirmative Relief to Be Prevailing Party

A defendant who successfully defends a contract action is the prevailing party even though, as the defendant, it obtains no affirmative relief. *Foothill Props. v Lyon/Copley Corona Assoc.* (1996) 46 CA4th 1542, 54 CR2d 488. That the plaintiff obtained judgment on one minor cause of action or obtained an award of sanctions did not change the defendant's prevailing party status because no relief was granted on the contract cause of action. 46 CA4th at 1554. See also *FDIC v Dintino* (2008) 167 CA4th 333, 357, 84 CR3d 38 (when defendant defeats recovery by plaintiff on sole contract claim in action, defendant is prevailing party under CCP §1717 as a matter of law).

In *People ex rel Dep't of Corps. v Speedee Oil Change Sys., Inc.* (2007) 147 CA4th 424, 431, 54 CR3d 225, however, the court held that an intervenor who successfully obtained a reversal of a fee award against it was not the prevailing party under the contract because the fee clause provided fees only to the party that obtained "final judgment."

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**Source:** Civil Litigation/California Attorney Fee Awards/4 Fee Awards Based on Contractual Fee Clauses/§4.77 h. Examples of Cases Determining Prevailing Party

### §4.77 h. Examples of Cases Determining Prevailing Party

- In a dispute between a contractor and its subcontractor, the supreme court upheld the trial court's determination that the plaintiff was the "prevailing party" under CC §1717, and thereby entitled to its pre-CCP §998 offer attorney fees, when it recovered $442,054 in damages on its contract claim, even though it sought to prove more than $2 million in damages at trial and failed to exceed the defendant's CCP §998 offer. *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614. See also *Arias v Katella Townhouse Homeowners Ass'n, Inc.* (2005) 127 CA4th 847, 26 CR3d 113 (plaintiff was prevailing party even though damages far less than requested). (On determining the prevailing party when there has been a CCP §998 offer, see §§4.79-4.81.)
- In *Sears v Baccaglio* (1998) 60 CA4th 1136, 70 CR2d 769, the plaintiff paid the defendant $112,000 under a lease guaranty, then brought an action for breach of contract to have the guaranty declared revoked. The court found that the contract was valid and that the plaintiff was liable based on the contract, but that the defendant had already obtained more than the total amount of damages from the plaintiff and other sources. Although the defendant had to pay the plaintiff the excess, he was entitled to attorney fees because the court rejected the plaintiff's effort to disavow the contract, which was the principal issue in the case.
- On the other hand, a plaintiff who wins on liability but fails to prove any damages obtains no relief on the contract and is not the "prevailing party"; on the contrary, the *defendants* are the prevailing parties and are entitled to fees under the contract. *Childers v Edwards* (1996) 48 CA4th 1544, 56 CR2d 328 (distinguishing *Pirkig v Dennis* (1989) 215 CA3d 1560, 1568, 264 CR 494, because the plaintiff in *Pirkig* proved both liability and damages).
- In *Korech v Hornwood* (1997) 58 CA4th 1412, 68 CR2d 637, the plaintiff, a subcontractor, brought an action to foreclose a mechanic's lien and added a contract cause of action against the general contractor and the owners, apparently for the sole purpose of obtaining attorney fees under the contract. The plaintiff prevailed on the foreclosure, but the court found no contract between the plaintiff and the defendant-owners. Accordingly, even though the plaintiff obtained payment for his work through the foreclosure, the defendant-owners won the contract cause of action and were the prevailing parties under CC §1717. 58 CA4th at 1422.
- In *Milman v Shukhat* (1994) 22 CA4th 538, 27 CR2d 526, a declaratory relief action between real estate investors, the defendants prevailed by proving that their signatures on the purported contracts were forged. In holding that the defendants were entitled to attorney fees, the court noted that the action "involved" a contract and that, even though the defendants "prevailed" by successfully arguing the contract's nonexistence, they were entitled to fees because the plaintiffs would have been entitled to fees if the forgery defense had been rejected. See §4.35.
- In *Haire v Stevenson* (1987) 196 CA3d 1249, 242 CR 433, a group of tenants sued their landlords for breach of their lease. The landlords countered with an unlawful detainer action and the two actions were consolidated. After a jury trial, the tenants recovered over $100,000 on their claims, plus nearly $50,000 in costs. The landlords recovered almost $19,000 on their claims and then claimed more than $25,000 in attorney fees under the fee clause in the lease. The trial court awarded the landlords their fees, but the court of appeal reversed, holding that, under the prior version of CC §1717, the landlords were not the prevailing parties, because the net judgment was not "in their favor." *Haire* is consistent with the current version of CC §1717(b)(1), which defines the prevailing party as "the party who recovered a greater relief in the action on the contract."
- In *Lewis v Alpha Beta Co.* (1983) 141 CA3d 29, 189 CR 840, the court gave another twist to the meaning of "prevailing on the contract," awarding fees to a litigant whose suit against a cotenant and their mutual landlord resulted in a successful cross-complaint by the landlord against the cotenant. The court awarded fees to the plaintiff tenant to be paid by the cotenant, even though the final judgment was in the landlord's favor only, because the judgment, in effect, gave the plaintiff the remedy he sought. The court also noted that, but for the trial court's decision to accept proof out of order, the plaintiff tenant would have been entitled to recover attorney fees from the landlord, who in turn could have recovered fees from the cotenant. The appellate court found that

the trial court's holding avoided unnecessary circuitousness.

**Additional authorities:** *Profit Concepts Mgmt., Inc. v Griffith* (2008) 162 CA4th 950, 76 CR3d 396; *Resolution Trust Corp. v Midwest Fed. Sav. Bank* (9th Cir 1993) 36 F3d 785; *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276; *Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 112 CR2d 99; *Jackson v Homeowners Ass'n* (2001) 93 CA4th 773, 113 CR2d 363. See also *Biren v Equality Emergency Med*. *Group, Inc.* (2002) 102 CA4th 125, 139, 125 CR2d 325; *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 56 CR2d 33; *Snyder v Marcus & Millichap* (1996) 46 CA4th 1099, 54 CR2d 268 (plaintiff who had net recovery was prevailing party, even though judgment amount was reduced on appeal). For a discussion of the "net monetary recovery" issue under CCP §1032 (recovery of costs), see *Michell v Olick* (1996) 49 CA4th 1194, 57 CR2d 227.

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## 2. "Prevailing Party" in Particular Situations

### §4.78 a. Defendant's Tender of Sums Due at Time of Answer

In an action for contract damages, a plaintiff who obtains a judgment for damages is normally considered the prevailing party and is therefore entitled to an award of attorney fees under CC §1717(a). However, CC §1717(b)(2) (second and third paragraphs) permits a defendant to tender a sum in settlement and be deemed the prevailing party if the tendered sum equals or exceeds the amount awarded to plaintiff as damages under the contract.

**NOTE:** Because CC §1717(a) mandates an award of fees to a prevailing party, complying with this procedure can be very advantageous to the defendant. If the defendant follows the procedures noted below, and the plaintiff does not obtain an award greater than the amount of the deposit, the court *must* award the defendant attorney fees.

For a defendant to be deemed the prevailing party under CC §1717 (CC §1717(b)(2) (second paragraph)) even if judgment is rendered for the plaintiff, the following conditions must be met:

- Defendant tenders to plaintiff before filing the answer the amount to which plaintiff is "entitled";
- Defendant alleges that tender in the answer;
- Defendant pays that sum into court; and
- Plaintiff's judgment is not greater than the amount of the deposit.

Either party may apply to the court for an order that the deposit be placed in an insured, interest-bearing account. If the sum is greater than the amount the plaintiff obtains by judgment, then the interest earned on the deposit will be allocated pro rata to the parties. CC §1717(b)(2) (third paragraph).

The legislative intent behind this fee-shifting provision appears to be similar to that behind CCP §998 (discussed in §§4.79-4.81): to give the parties a greater incentive to settle their action and to reward a party who makes a settlement offer that (in hindsight) is clearly reasonable. The following statutes contain similar fee-shifting provisions: CC §1811.1 (actions on contracts or installment accounts subject to the Unruh Act (CC §§1801-1812.20)); CC §2983.4 (actions on contracts or purchase orders subject to the Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.6)); and CCP §1025.

Correlatively, although a demand for the amount due may be required for a party to claim attorney fees under a promissory note, such a requirement does not apply to a promisee claiming fees as a defendant or as a cross-complainant. *All-West Design, Inc. v Boozer* (1986) 183 CA3d 1212, 1225, 228 CR 736.

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### b. Code of Civil Procedure §998 Offers

### §4.79 (1) Code of Civil Procedure §998 Generally

Entitlement to fees under contract-based fee clauses can be dramatically altered by a party's offer to settle under CCP §998. Generally, under CCP §998, "costs" may be shifted when an offer has been made in writing at least 10 days before the beginning of trial or arbitration. Section 998(c)(1) provides that if a defendant makes such an offer and it is not accepted, and the plaintiff then fails to obtain a more favorable judgment or award, the plaintiff cannot recover costs incurred after the offer was made and must pay the defendant's costs from the time of the offer. Further, in any action other than an eminent domain action, the court or arbitrator may require the plaintiff to pay the defendant's expert witness fees actually incurred and reasonably necessary in preparation for or during trial or arbitration. CCP §998(d). In addition, CCP §998(e) provides that costs, from the time of the offer, awarded to defendant under §998(c) are to be deducted from any damages awarded in favor of the plaintiff.

In determining which party is the prevailing party under §998, the trial court should consider that portion of plaintiff's attorney fees that were incurred before defendant's §998 offer. *Harvard Inv. Co. v Gap Stores, Inc.* (1984) 156 CA3d 704, 713, 202 CR 891. See also *Adam v DeCharon* (1995) 31 CA4th 708, 37 CR2d 195 (applying same rule to parties' contract-based entitlement to fees for tort claim).

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### §4.80 (2) If Defendant's Offer Exceeds Plaintiff's Recovery

The relationship between CCP §998 and the parties' rights to pre- and postoffer attorney fees under CC §1717 was examined in *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1112, 86 CR2d 614. In that case, the supreme court concluded that the plaintiff, which was the prevailing party under CC §1717 but had not exceeded the defendant's CCP §998 offer, was entitled to its *preoffer* attorney fees and costs, but not its *postoffer* attorney fees and costs, and that the defendant was entitled to its *postoffer* fees and costs. Thus, the defendant was entitled to recover at least some its fees, even though it had not recovered the "greater relief on the contract" under CC §1717. See also *Biren v Equality Emergency Med. Group, Inc.* (2002) 102 CA4th 125, 140, 125 CR2d 325 (following *Scott*).

However, the fee-shifting provisions of CCP §998 do not supersede CC §1717(b)(2), which provides that there is no prevailing party if the plaintiff voluntarily dismisses the action (see §§4.83-4.87). *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 1532, 78 CR3d 661. Allowing §998 to avoid the reach of §1717(b)(2) would defeat that subsection's purpose—to encourage parties to dismiss meritless contract litigation. *Ford Motor Co. v Hunsberger, supra.* See also §2.80.

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### §4.81 (3) If Plaintiff Accepts CCP §998 Offer

An offer under CCP §998 is an offer to allow judgment to be taken in the specified amount. CCP §998(b). Accordingly, a party who accepts a §998 offer can be the prevailing party under CC §1717, even though there is no determination of liability under the contract. *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276.

Likewise, a party who accepts a §998 offer that fails to address fees and costs may claim fees under CC §1717. *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 184, 82 CR3d 586 (CCP §998 offer that is silent on attorney fees "cannot reasonably be interpreted to exclude recovery of fees and costs by the prevailing party"); *Ritzenthaler v Fireside Thrift Co.* (2001) 93 CA4th 986, 113 CR2d 579. See also *Elite Show Servs., Inc. v Staffpro, Inc.* (2004) 119 CA4th 263, 14 CR3d 184 (CCP §998 offer valid even though it left fees to be determined by court and cut off fees at certain date).

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### §4.82 c. Recovery of Less Than Jurisdictional Limit

The plaintiff's recovery of a judgment that could have been rendered in a court of lesser jurisdiction does not bar an award of fees under CC §1717. *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1059, 235 CR 813. The relationship between CC §1717 and CCP §1033(a) (at that time permitting trial court to deny costs if plaintiff failed to obtain jurisdictional minimum) also was examined in *Dorman v DWLC Corp.* (1995) 35 CA4th 1808, 42 CR2d 459 (trial court ordered to consider amount and nature of costs and fees incurred before exercising discretion under CCP §1033(a)), and *Korech v Hornwood* (1997) 58 CA4th 1412, 1418, 68 CR2d 637.

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### d. Voluntary Dismissal

### §4.83 (1) Under CC §1717, There Is No Prevailing Party in Case of Voluntary Dismissal

Under CC §1717(b)(2), if the action is voluntarily dismissed or dismissed pursuant to a settlement, there is no prevailing party on the contract for purposes of §1717. The history and purposes of this provision are discussed in *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830, and *International Indus., Inc. v Olen* (1978) 21 C3d 218, 145 CR 691.

This rule does not apply, however, to fee claims for *noncontract* causes of action based on broad contractual fee clauses. *Santisas,* 17 C4th at 609. (On contract-based fee claims for noncontract causes of action, see §§4.25-4.27.) In that situation, when the contract provides for attorney fees to the "prevailing party," the defendant generally would be considered the prevailing party if the action is voluntarily dismissed by plaintiff before trial. 17 C4th at 609 n5 (expressly disapproving *Sweat v Hollister* (1995) 37 CA4th 603, 611 n7, 43 CR2d 399, on this point). See §4.84.

**NOTE:** Civil Code §1717(b)(2) means that, unlike other fee-shifting statutes (discussed in §2.85), the form of the judgment is important in contract actions. A plaintiff may dismiss its contract action at any time before the judgment or verdict and thereby thwart the defendant's anticipated fee claim for the contract action. Moreover, if the parties agree to dismissal as part of a settlement, unless fees are expressly provided for in the settlement, there is no entitlement to fees for the party who obtains the greater relief on the contract through the settlement. See *Jackson v Homeowners Ass'n* (2001) 93 CA4th 773, 113 CR2d 363 (CC §1717 permits fees when settlement calls for dismissal after certain actions taken, including attorney fee motion).

The rule against awarding fees in dismissed cases is strictly applied. For example, in *Hasler v Howard* (2004) 120 CA4th 1023, 16 CR3d 217, the appellate court affirmed the trial court's denial of fees to the defendant when the plaintiff had voluntarily dismissed his claim, finding that the contractual fee clause was not broad enough to encompass the plaintiff's causes of action. Following that decision, the *plaintiff* moved for an award of fees, under *Hsu v Abbara* (1995) 9 C4th 863, 865, 39 CR2d 824, for obtaining "a simple, unqualified win" on appeal because the defendant would have been entitled to fees if he had prevailed. The trial court awarded fees; defendant appealed. In *Hasler v Howard* (2005) 130 CA4th 1168, 30 CR3d 714, the court of appeal reversed, finding that the contract did not allow either party to recover fees and a "prevailing party is not entitled to fees simply because the opposing party requested them."130 CA4th at 1171. See also, *e.g., Topanga & Victory Partners LLP v Toghia* (2002) 103 CA4th 775, 782 n3, 127 CR2d 104 (CC §1717(b)(2) applies even if case dismissed after trial begun).

**Additional authorities:** *Marina Glencoe v Neue Sentimental Film AG* (2008) 168 CA4th 874, 877, 85 CR3d 800 (when contract provides that prevailing party is entitled to attorney fees and plaintiff dismisses action with prejudice after trial starts, defendant is not entitled to attorney fees under §1717 as prevailing party); *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 1531, 78 CR3d 661 (CC §1717(b)(2) "trumps" CCP §998; if plaintiff voluntarily dismisses action, defendant may not recover attorney fees under CCP §998) (discussed in §4.80).

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### §4.84 (2) Rule Does Not Apply to Contract-Based Fees for Noncontract Causes of Action

As noted in the previous section, a voluntary dismissal does not bar an award of fees to the prevailing party in a tort or other noncontract action or claim in which entitlement to fees is based on a broad contractual fee provision, because such causes of action are not governed by CC §1717. *Santisas v Goodin* (1998) 17 C4th 599, 617, 619, 71 CR2d 830. *Santisas* also expressly disapproved *Ryder v Peterson* (1996) 51 CA4th 1056, 59 CR2d 562, and *Jue v Patton* (1995) 33 CA4th 456, 39 CR2d 364, to the extent these cases are inconsistent with this conclusion. 17 C4th at 622 n9.

The *Santisas* court's ruling on dismissals of noncontract claims has been applied in, *e.g., Drybread v Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 1070, 60 CR3d 580, *Carver v Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 118 CR2d 569, and *Silver v Boatwright Home Inspection, Inc.* (2002) 97 CA4th 443, 118 CR2d 475.

*Santisas* also expressly approved the holding in *Rosen v Robert P. Warmington Co.* (1988) 201 CA3d 939, 247 CR 635. *Santisas*, 17 C4th at 622 n9. In *Rosen,* the court had denied attorney fees following the dismissal of an action asserting both contract and tort claims arising from a real property lease agreement. *Santisas* approved *Rosen,* holding that the attorney fee provision at issue in *Rosen*, unlike the one at issue in *Santisas*, was narrowly drawn to cover only contract claims. *Santisas v Goodin, supra*. See also *Chase Manhattan Mortgage Corp. v Lessel* (1997) 55 CA4th 10, 64 CR2d 113; *Flynn v Page* (1990) 218 CA3d 342, 348, 266 CR 830.

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### §4.85 (3) Rule Does Not Apply to Other Fee-Shifting Statutes

Civil Code §1717(b)(2) applies only to contractual fee claims and not to statutes authorizing fee awards. Thus, a voluntary dismissal generally does not bar a fee award under a fee-shifting statute other than CC §1717. See, *e.g., Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (denying contractual fees in light of *Santisas v Goodin* (1998) 17 C4th 599, 617, 619, 71 CR2d 830, but awarding fees under the Mobilehome Residency Law (CC §798.85), which expressly provides that a defendant in whose favor action is dismissed before trial is prevailing party).

Similarly, for example, sanctions may be awarded under CCP §128.7 or §128.5 even after the plaintiff has voluntarily dismissed the action. *West Coast Dev. v Reed* (1992) 2 CA4th 693, 3 CR2d 790. See also *Kyle v Carmon* (1999) 71 CA4th 901, 84 CR2d 303, and *Coltrain v Shewalter* (1998) 66 CA4th 94, 77 CR2d 600 (fees under CCP §425.16); *Damian v Tamondong* (1998) 65 CA4th 1115, 77 CR2d 262 (fees under CC §2983.4).

**NOTE:** Many fee-shifting statutes, however, provide fees only to the plaintiff or require a defendant to show that the plaintiff's case was frivolous or groundless. See §§2.69-2.74.

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### §4.86 (4) Effect of Settlement

Civil Code §1717(b)(2) also provides that fees may not be awarded after a dismissal "pursuant to a settlement of the case." However, a settlement that does not result in a dismissal does not invoke §1717(b)(2). See *Share v Casiano Bel-Air Homeowners Ass'n* (1989) 215 CA3d 515, 523, 263 CR 753. See also *Torrey Pines Bank v Hoffman* (1991) 231 CA3d 308, 282 CR 354. Compare *Torrey Pines Bank* with *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 707, 75 CR2d 376 (when settlement results in dismissal, §1717(b)(2) bars fee award even though contract provides for fees in settled cases).

However, §1717(b)(2) does not bar a settlement that conditions dismissal on the payment of any costs or fees awarded by the court. *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1. See *Jackson v Homeowners Ass'n* (2001) 93 CA4th 773, 113 CR2d 363.

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### §4.87 (5) Rule Does Not Apply to Involuntary Dismissals, Including Dismissals for Failure to Prosecute

By its terms, CC §1717(b)(2) applies only to "voluntary" dismissals and dismissals pursuant to settlement. Presumably, it therefore does not apply to involuntary dismissals. See *Elms v Builders Disbursements, Inc.* (1991) 232 CA3d 671, 283 CR 515.

For purposes of §1717(b)(2), a dismissal for failure to prosecute is not a voluntary dismissal. Because dismissal of an action for failure to come to trial within 5 years is a final disposition of substantive rights, the defendant in an action on a contract providing for attorney fees is entitled to recover fees after the dismissal. *Elms v Builders Disbursements, Inc.* (1991) 232 CA3d 671, 283 CR 515.

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### §4.88 e. Court May Determine That No Party Has Prevailed

Another important qualification to the "prevailing party" standard found in CC §1717 is that, even though the terms of §1717(a) are mandatory (the prevailing party "shall" be entitled to recover its fees), that language is modified by §1717(b)(1), which states that the court "may also determine that there is no party prevailing on the contract for purposes of this section." Thus, the trial court's discretion to determine the prevailing party under §1717(b)(1) includes the power to determine that *no* party has prevailed on the contract.

This power is not unlimited, however. Under §1717(b)(1), the court has no discretion to deny fees to a party that is clearly the prevailing party. *Hsu v Abbara* (1995) 9 C4th 863, 876, 39 CR2d 824. Rather, the court may exercise its discretion to find no prevailing party only when the results of the litigation are mixed, *i.e.,* when the opposing litigants could each legitimately claim some success in the litigation. *Hsu v Abbara, supra*. See §§4.71-4.73.

In *Hsu,* for example, the plaintiffs sued for specific enforcement of an alleged real estate sale contract containing an attorney fees provision. The trial court granted defendant sellers' motion for judgment on the complaint, concluding that no such contract was ever formed, but denied them attorney fees. After examining the "no prevailing party" rule at some length, the California Supreme Court reversed, holding that defendants were entitled to fees as a matter of law because CC §1717(b)(1) does not permit a trial court to deny fees to a party that has obtained a "simple, unqualified win" on the only contract claim litigated in the action. *Hsu v Abbara, supra*.

For an example of a determination that there is no prevailing party, see *Nasser v Superior Court* (1984) 156 CA3d 52, 202 CR 552. In *Nasser,* which was decided before the 1988 amendment to CC §1717 authorizing a court to find no prevailing party, the petitioner/tenant and his landlord had been unable to agree on the terms of an option to renew the tenant's lease. The tenant asked the court to validate the option and set the rent at a certain sum. The trial court validated the option, but it set the rent approximately 20 percent higher than the tenant had sought, and it denied tenant fees on that cause of action. The court of appeal affirmed, holding that a trial court has the discretion to find that neither party prevailed and to refuse to award fees to either party. The appellate court cited *Kytasty v Godwin* (1980) 102 CA3d 762, 162 CR 556, to the effect that "the judgment 'must be considered good news and bad news as to each of the parties,'" and held that the trial court acted within its discretion in denying fees to either party. 156 CA3d at 60. The *Nasser* court also ruled that the trial court's award to the petitioner of his costs under former CCP §1032(c) (which required a finding that he was the prevailing party under CCP §1032) did not automatically entitle him to be considered the prevailing party under the former version of CC §1717(b)(1), even though the reverse would have been true: *i.e.,* a finding that he prevailed under §1717 would have required a finding that he prevailed for purposes of §1032.

**Additional authorities:** *McLarand, Vasquez & Partners, Inc. v Downey Sav. & Loan Ass'n* (1991) 231 CA3d 1450, 1456, 282 CR 828 (no prevailing party when plaintiff lost on complaint and defendant lost on cross-complaint; prevailing party for purposes of award under CCP §1032 is not necessarily prevailing party under CC §1717, because court has authority under §1717 to find neither party has prevailed) (see §4.68).

Both *Nasser* and *Kytasty* were cited with apparent approval in *Hsu v Abbara* (1995) 9 C4th 863, 874, 39 CR2d 824. Compare *Nasser* with *Trustees of Cent. States v Golden Nugget, Inc.* (CD Cal 1988) 697 F Supp 1538, 1553. See also *Estate of Drummond v Drummond* (2007) 149 CA4th 46, 54, 56 CR3d 691 (interim procedural nature of victory on appeal justified finding that no party prevailed on contract); *Biren v Equality Emergency Med. Group, Inc.* (2002) 102 CA4th 125, 125 CR2d 325; *Hilltop Inv. Assoc. v Leon* (1994) 28 CA4th 462, 33 CR2d 552 (result of case was a "draw"; court did not abuse its discretion in finding that neither party prevailed for purposes of awarding fees under §1717). See also §§2.47-2.49.

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### 3. Prevailing Party Under Contractual Fee Provisions That Apply to Noncontract Causes of Action

#### §4.89 a. Prevailing Party Defined by Language of Contract

As discussed in §§4.25-4.27, parties to a contract may agree that the prevailing party in any litigation between them will be entitled to attorney fees, not only for causes of action based on contract but also for tort and other noncontract causes of action. When the claim for fees is based on a noncontract claim authorized by a contractual fee clause, the prevailing party is determined first by the language of the contractual fee clause rather than under the provisions of CC §1717. *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830.

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### §4.90 b. Definition When Contract Silent

If the contract offers no definition of "prevailing party," then the court "may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." *Santisas v Goodin* (1998) 17 C4th 599, 622, 71 CR2d 830. Other courts have looked to the discretion afforded under CCP §§1032 and 1033.5, including the reasons for any dismissal and whether the parties have reached their litigation objectives by settlement, judgment, or other means. See, *e.g., Silver v Boatwright Home Inspection, Inc.* (2002) 97 CA4th 443, 118 CR2d 475; see §2.44 for discussion of prevailing party under statutes other than CC §1717.

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## B. Timing of Prevailing Party Determination

### §4.91 1. General Rule: Entitlement to Fees Based on Outcome of Case as a Whole

Under CC §1717, there can be no prevailing party until final disposition of the parties' substantive rights and an assessment of their overall successes. *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 186 CR 695. In *Bank of Idaho,* the party seeking fees succeeded only in reversing the trial court's dismissal of its action and in obtaining a remand for further proceedings. The court refused to allow fees for what it characterized as a "side trip to the appellate court." 137 CA3d at 17.

The need for a "final" determination on the merits does not mean that a court must wait to determine the prevailing party until all possible appeals have been decided: "prevailing party" status is generally determined after judgment in the trial court. See *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1547, 1 CR2d 35; *Tate v Saratoga Sav. & Loan Ass'n* (1989) 216 CA3d 843, 857, 265 CR 440. If the merits are reversed, the fee award also may be reversed and fees awarded to the appellant. See *Melamed v City of Long Beach* (1993) 15 CA4th 70, 84, 18 CR2d 729. See also §§2.91-2.93.

**Additional authorities:** *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 928, 65 CR3d 242; *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 28, 272 CR 227 (summary denial of writ taken to court of appeal does not entitle party opposing writ to fees under CC §1717; determination of prevailing party must await final disposition of case); *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 196 CR 1.

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### §4.92 2. Prevailing Party Determination Is Made by Trial Court

The discretion to determine the prevailing party under CC §1717 rests with the trial court, and a party disputing a request for fees must raise its objections in the trial court, not for the first time on appeal. *Fineberg v Niekerk* (1985) 175 CA3d 935, 221 CR 106.

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### §4.93 3. Arbitrations

Generally, the arbitrator determines the prevailing party for purposes of an award of contractual attorney fees for work performed in the arbitration. In doing so, arbitrators have greater discretion than trial courts, although that discretion is not unlimited. Compare *DiMarco v Chaney* (1995) 31 CA4th 1809, 1815, 37 CR2d 558 (arbitrator lacked discretion to deny fees to defendant who prevailed under CC §1717; superior court properly ordered arbitrator to make fee award, but arbitrator was to decide amount of award), with both *Moshonov v Walsh* (2000) 22 C4th 771, 779, 94 CR2d 597 (distinguishing *DiMarco* because arbitrator determined that successful claims were not within contractual fee clause), and *Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 788, 94 CR2d 603 (distinguishing *DiMarco* because arbitrators did not determine existence or nonexistence of prevailing party).

On contractual limitations on eligibility for attorney fees, see §4.54. On procedures for claiming and opposing fees for work in arbitration, see chap 14.

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### 4. Orders for Interim Relief

### §4.94 a. Order Compelling Arbitration

The courts have struggled over whether an order compelling a party to arbitrate qualifies the party compelling arbitration as the prevailing party under a contractual fee clause. In *Lachkar v Lachkar* (1986) 182 CA3d 641, 227 CR 501, the court held, following *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 186 CR 695 (discussed in §4.91), that merely obtaining an order compelling arbitration does not qualify a party as the prevailing party under CC §1717, because there has been no determination of the parties' substantive rights.

However, in *Acosta v Kerrigan* (2007) 150 CA4th 1124, 1132, 58 CR3d 865, the court held that the party that compelled arbitration as required by the contract was entitled to fees under CC §1717, regardless of the arbitration's outcome, and that the fee motion should be decided by the trial court, not the arbitrator. See *Otay River Constructors v San Diego Expressway* (2008) 158 CA4th 796, 799, 70 CR3d 434 (same); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 11, 54 CR3d 724 (defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause was invalid entitled to fees under contractual fee clause and CCP §1021.5, regardless of ultimate outcome of dispute between parties). See also *Turner v Schultz* (2009) 175 CA4th 974, 980, 96 CA3d 659 (following reasoning of *Acosta* and *Otay River Contractors* and determining that trial court properly awarded attorney fees to party who successfully fought action to stay arbitration, even though it was not yet known which party would prevail in arbitration).

**Additional authorities:** *Hightower v Superior Court* (2001) 86 CA4th 1415, 104 CR2d 209 (arbitrator may award interim fees); *Green v Mount Diablo Hosp. Dist.* (1989) 207 CA3d 63, 76, 254 CR 689. See also *California Teachers Ass'n v Governing Bd.* (1984) 161 CA3d 393, 207 CR 659, in which fees were awarded to the party that had been compelled to arbitrate because it effectively received a favorable judgment on the merits in the arbitration proceedings.

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### §4.95 b. Other Interim Orders

Citing the one final judgment rule, the court in *Day v Papadakis* (1991) 231 CA3d 503, 282 CR 548, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743 n11, 29 CR2d 804, vacated a fee award made to a defendant who had obtained summary judgment on the plaintiff's complaint, because the defendant's cross-complaint was still pending.

On the other hand, in *Cole v BT&G, Inc.* (1983) 141 CA3d 995, 190 CR 690, fees were granted to a party who successfully set aside a confession of judgment although the underlying breach of contract issue was still unresolved. Unlike the situation in *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 186 CR 695 (discussed in §4.91), a final, appealable judgment had been entered on the validity of the confession of judgment that determined the party's substantive rights.

Likewise, in *First Sec. Bank v Paquet* (2002) 98 CA4th 468, 119 CR2d 787, the court held that a fee motion based on the plaintiffs' successful defeat of a defendant's cross-complaint was not premature even though the plaintiffs were potentially liable for the defendant's attorney fees on the as yet unresolved complaint. See also *Pueblo Radiology Med. Group, Inc. v Gerlach* (2008) 163 CA4th 826, 830, 77 CR3d 880 (parties who defeated plaintiff's alter ego claims entitled to fees even though contract claims remained to be tried because alter ego rulings determined their nonliability under contract); *Profit Concepts Mgmt., Inc. v Griffith* (2008) 162 CA4th 950, 955, 76 CR3d 396 (defendant who obtained dismissal for lack of personal jurisdiction was prevailing party under contract).

In *Kroff v Larson* (1985) 167 CA3d 857, 213 CR 526, an attorney sued to recover costs advanced to a personal injury client who had discharged the attorney. The trial court held, and the court of appeal affirmed, that the attorney's action was premature because, under the contract, costs could not be recovered until the client obtained a recovery. The court of appeal held that the client/defendant was the prevailing party on appeal and entitled to fees for that appeal under CC §1717, even though the attorney's claim for costs had in effect only been deferred, not finally decided. But see *Estate of Drummond* (2007) 149 CA4th 46, 54, 56 CR3d 691 (interim procedural nature of victory on appeal justified finding that no party prevailed on contract).

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### §4.96 5. Enforcing Prior Judgment

Services performed to enforce a prior judgment that included a contractual fee award also may be compensable regardless of whether the party obtains formal relief in the enforcement action. Attorney fees can be awarded in a contempt proceeding even if the matter is settled without any contempt finding, if the proceeding is pursued as a vehicle to enforce a judgment on a contract containing an attorney fee clause. *Share v Casiano Bel-Air Homeowners Ass'n* (1989) 215 CA3d 515, 263 CR 753 (stipulated settlement of contempt proceeding brought to enforce prior consent judgment based on development's covenants, codes, and restrictions; remanded for determination of whether plaintiffs obtained enough relief to be prevailing parties). On eligibility for fees for enforcing judgment, see §§4.62-4.63.

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### §4.97 C. Entitlement to Fees When Noncontract Claims Combined With Contract Claims

Just as with statutory fee-shifting (see chaps 2-3), a party entitled to contractual fees is not necessarily entitled to *all* the fees reasonably incurred in the action if the action also involves claims not governed by the fee-shifting clause. On which fees are recoverable when fee-shifting claims are combined with non-fee-shifting claims, generally, see §§4.25-4.30, 4.65. On how fees are calculated when fee claims are combined with nonfee claims, see §§9.65-9.69; the specific issues that arise in contract cases are discussed in §§4.98-4.101, below.

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## §4.98 1. General Rule: Prevailing Party Entitled to Fees Only for Work on Contract Claims, Unless Inextricably Intertwined With Work on Noncontract Claims

When claims based on a contract are combined with tort or other claims that are not fee claims, fees are available *only* for work done on the contract claims (except as provided by the parties' agreement; see below in §4.101). *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1. Fees may be awarded for that work, however, if the claims for relief are so intertwined that it would be impracticable to separate the attorney's time into compensable and noncompensable units. See, *e.g., Cruz v Ayromloo* (2007) 155 CA4th 1270, 1277, 66 CR3d 725; *Abdallah v United Sav. Bank* (1996) 43 CA4th 1101, 1111, 51 CR2d 286 (defense of contract, tort, and RICO (18 USC §§1961-1968) claims so intertwined that separation of time "impracticable, if not impossible" to achieve).

**Additional authorities:** *Las Palmas Assoc. v Las Palmas Ctr. Assoc.* (1991) 235 CA3d 1220, 1 CR2d 301; *Shadoan v World Sav. & Loan Ass'n* (1990) 219 CA3d 97, 268 CR 207.

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### §4.99 2. Work on Common Issues or Overlapping Claims

Time spent on common issues or overlapping claims also is compensable. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1; *Korech v Hornwood* (1997) 58 CA4th 1412, 1422, 68 CR2d 637 (fees for issues common to successful breach of contract defense and unsuccessful mechanics' lien foreclosure defense properly awarded under contractual attorney fees clause). For example, in *Shadoan v World Sav. & Loan Ass'n* (1990) 219 CA3d 97, 268 CR 207, the court distinguished between an action brought by a party seeking relief on interrelated theories (for which attorney fees would not be apportioned) and an action brought by what the court termed "essentially two parties"—*i.e.,* the same party suing in both a personal capacity on the contract and in a representative capacity under Bus & P C §17200—on interrelated theories (for which the court held that apportionment of fees is proper). 219 CA3d at 109.

**Additional authorities:** *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1276, 66 CR3d 725; *Carver v Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 118 CR2d 569; *Nazemi v Tseng* (1992) 5 CA4th 1633, 7 CR2d 762; *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 1574, 272 CR 535; *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 235 CR 813; *Trustees of Cent. States v Golden Nugget, Inc.* (CD Cal 1988) 697 F Supp 1538, 1555. Compare *Royster Constr. Co. v Urban W. Communities* (1995) 40 CA4th 1158, 47 CR2d 684.

**NOTE:** A different rule applies when fees are claimed as damages. See §7.4.

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### §4.100 3. Work That Contributes to Success of Contract Claims

Parties prevailing on the contract claim also may be entitled to compensation for time spent on noncontract claims that *contributes* to the success of the contract claim. For example, in *Finalco, Inc. v Roosevelt* (1991) 235 CA3d 1301, 3 CR2d 865, the court held that a plaintiff who prevailed on its action to enforce a note containing a fee clause was also entitled to fees for time spent defending against the defendant's cross-complaint based on securities fraud because defeat of the cross-complaint was essential to recovery on the complaint. See also *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1085, 25 CR3d 39 (time spent on non-fee-shifting claims determinative of fee-shifting claims and thus compensable).

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### §4.101 4. Fees for Work on Noncontract Claims Recoverable if Contract So Provides

If the noncontract claim also is a fee-shifting claim, then fees may be recovered under that claim. Entitlement to fees for those claims, however, is not determined by CC §1717, but by the rules applicable to those claims. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 617, 71 CR2d 830. See also §§4.25-4.30, 4.53, 4.65.

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# 5

# Attorney Fee Awards Based on Equitable Theories

I. ATTORNEY FEES AWARDABLE UNDER EQUITABLE THEORIES TO PARTIES WHO PREVAIL BY JUDGMENT OR SETTLEMENT
- A. Equitable Theories for Obtaining Fee Awards
  - 1. General Rule Against Fee Awards in Absence of Statutory or Contractual Authorization §5.1
  - 2. Equitable Exceptions in California §5.2
  - 3. Equitable Exceptions in Federal Courts §5.3
- B. Court Has Broad Discretion to Award Fees When Acting in Equity §5.4
- C. Conditions Under Which Court May Award Fees Under Equitable Doctrines
  - 1. Fee Claimant Must Be Prevailing Party and Must Establish Elements of Applicable Doctrine §5.5
  - 2. Fees May Be Awarded When Action Concluded by Settlement §5.6
  - 3. Fees May Be Awarded When Litigation Results in Corrective Action §5.7
  - 4. In Limited Circumstances, Fees May Be Awarded When Relief Obtained Before Lawsuit Filed §5.8
  - 5. Equitable Doctrines Apply to Administrative Proceedings §5.9

II. THE COMMON FUND EQUITABLE EXCEPTION
- A. Common Fund Doctrine Requires Passive Beneficiaries to Bear Share of Litigation Costs §5.10
- B. Requirements for Award Under Common Fund Doctrine §5.11
  - 1. Identifiable Fund §5.12
  - 2. Fund Results From the Litigation §5.13
  - 3. Beneficiaries, Not Defendant, Must Pay Fees §5.14
  - 4. Additional Considerations §5.15
    - a. Court's Control Over Fund §5.16
    - b. "Special Circumstances" §5.17
- C. Comparing Common Fund Fee Awards to Statutory Fee Awards
  - 1. Common Fund Awards May Result in Larger Fees Than Statutory Awards §5.18
  - 2. Common Fund Award May Be Combined With Statutory Award §5.19
  - 3. Only Beneficiaries of Fund May Appeal §5.20
- D. Comparing Common Fund Doctrine to Private Attorney General Doctrine §5.21
  - 1. Cases Rejecting Use of Private Attorney General Statute or Doctrine When Common Fund Available §5.22
  - 2. Cases Awarding Fees Under Private Attorney General Statute Despite Availability of Common Fund §5.23
- E. Comparing Common Fund Doctrine to Substantial Benefit Doctrine §5.24
- F. Constructive Common Fund Doctrine §5.25
- G. Codification of Common Fund/Equitable Apportionment Doctrine §5.26
  - 1. Labor Code §3856 §5.27
  - 2. Labor Code §3860(e) §5.28
  - 3. Equitable Apportionment Does Not Apply When Each Party Retains Counsel and Each Counsel Actively Participates §5.29
  - 4. Equitable Apportionment Does Not Apply to County's Recovery of Lien for Medical Services to Indigent Patient §5.30
  - 5. Calculating Fees in Common Fund Cases §5.31

III. THE SUBSTANTIAL BENEFIT EQUITABLE EXCEPTION
- A. Substantial Benefit Doctrine Provides Fees When Cost Can Be Shifted to Those Benefited §5.32
- B. Requirements of Substantial Benefit Doctrine §5.33
  - 1. Suit Must Be Litigated in a Representative Capacity and Confer Benefits on Ascertainable Class
    - a. Representative Capacity §5.34
    - b. Ascertainable Class §5.35
    - c. Examples of Cases Litigated in a Representative Capacity on Behalf of Ascertainable Class §5.36
  - 2. Benefits Conferred Must Be Actual and Concrete §5.37
    - a. Either Pecuniary or Nonpecuniary Benefits May Qualify §5.38
    - b. Bringing Defendant Into Conformity With Existing Law Does Not Qualify §5.39
    - c. Stare Decisis Benefits Do Not Qualify §5.40
  - 3. Court Must Be Able to Spread Fees Proportionately Among Those Benefited §5.41
    - a. Fees May Be Recovered When Either Plaintiff or Defendant Has Benefited, if Fees Recoverable

From Benefits §5.42
b. Examples §5.43
C. Comparing Substantial Benefit and Private Attorney General Doctrines §5.44
1. Differences in Types of Benefits Obtained §5.45
a. Substantial Benefit Doctrine Applies Only When Benefit Is Concrete §5.46
b. Private Attorney General Doctrine May Apply When Benefits Are Less Concrete §5.47
c. Doctrines May Be Combined §5.48
2. Differences in Amount of Fees That May Be Awarded
a. Lodestar Method Not Required §5.49
b. Fees Limited by Benefits Recovered §5.50
c. Fees for Fee-Related Services §5.51
D. Examples of Cases Considering Substantial Benefit Doctrine
1. Cases Awarding Fees Under Substantial Benefit Doctrine §5.52
2. Cases Denying Fees Under Substantial Benefit Doctrine §5.53

IV. THE PRIVATE ATTORNEY GENERAL EQUITABLE EXCEPTION
A. Nature of Equitable Private Attorney General Doctrine
1. Court's Inherent Equitable Power §5.54
2. Purpose of Doctrine §5.55
B. Doctrine Not Available Under Federal Law §5.56
C. Comparing Equitable and Statutory (CCP §1021.5) Private Attorney General Doctrines
1. Equitable Doctrine Remains Viable §5.57
2. Code of Civil Procedure §1021.5 Applies to Statutory as Well as Constitutional Rights §5.58
3. Equitable Doctrine May Apply When CCP §1021.5 Not Available §5.59

V. CHART: COMPARING COMMON FUND, SUBSTANTIAL BENEFIT, AND PRIVATE ATTORNEY GENERAL THEORIES §5.60

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# I. ATTORNEY FEES AWARDABLE UNDER EQUITABLE THEORIES TO PARTIES WHO PREVAIL BY JUDGMENT OR SETTLEMENT

## A. Equitable Theories for Obtaining Fee Awards

### §5.1 1. General Rule Against Fee Awards in Absence of Statutory or Contractual Authorization

The general rule in California is that the prevailing party may not recover its reasonable attorney fees from the losing party without statutory or contractual authorization. CCP §1021, discussed in §1.2. Both the California and federal courts, however, have recognized certain equitable exceptions to this general rule.

In California, these equitable exceptions are fully described and analyzed in, *e.g., Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 35, 141 CR 315, *Quinn v State* (1975) 15 C3d 162, 168, 124 CR 1, and *D'Amico v Board of Med. Examiners* (1974) 11 C3d 1, 24, 112 CR 786. See also *Bauguess v Paine* (1978) 22 C3d 626, 636, 150 CR 461 (noting that "court has moved cautiously in expanding the nonstatutory bases on which awards of attorney's fees may be predicated").

For analysis of the equitable exceptions under federal law, see generally, *e.g., Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612; *Sprague v Ticonic Nat'l Bank* (1939) 307 US 161, 83 L Ed 1184, 59 S Ct 777.

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## §5.2 2. Equitable Exceptions in California

California courts have recognized three equitable exceptions:

- **The common fund** doctrine, discussed in §§5.10-5.30;
- **The substantial benefit** doctrine, discussed in §§5.32-5.53; and
- **The private attorney general** doctrine, discussed in §§5.54-5.59.

**NOTE:** The private attorney general theory has also been codified in California (CCP §1021.5, discussed in chap 3), as have some types of common fund awards (see §§5.26-5.28).

A fourth equitable exception—the "bad faith" or "vexatious litigant" exception, which is viable in the federal courts (see §5.3)—has not been recognized by the California courts. See *D'Amico v Board of Med. Examiners* (1974) 11 C3d 1, 27, 112 CR 786 (declining to consider equitable exception permitting award of attorney fees as sanction for opposing party's vexatious and oppressive conduct); *Bauguess v Paine* (1978) 22 C3d 626, 636, 150 CR 461. The California courts have repeatedly held that trial courts lack the equitable power to impose attorney fees as sanctions. See *Bauguess v Paine* (1978) 22 C3d 626, 637, 150 CR 461; *Clark v Optical Coating Lab., Inc.* (2008) 165 CA4th 150, 163, 80 CR3d 812 (trial court lacked inherent authority to grant attorney fees as sanctions for misconduct leading to mistrial); *Sheller v Superior Court* (2008) 158 CA4th 1697, 1711, 71 CR3d 207. Numerous statutory provisions, discussed in chap 6, however, do provide that right. See, *e.g.,* CCP §1218(a) (person found guilty of civil contempt may be ordered to pay attorney fees of party initiating contempt proceeding).

In certain types of cases, attorney fees may also be awarded as damages. See chap 7. In those circumstances, however, the fees generally must be pleaded and proved at trial rather than claimed by post-trial motion. See §§7.1-7.2.

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### §5.3 3. Equitable Exceptions in Federal Courts

The federal courts have rejected the private attorney general equitable doctrine, but do recognize the common fund and substantial benefit doctrines, as noted in §5.2. See *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612.

In addition, federal courts have the power under federal law to assess attorney fees as a sanction for bad faith conduct on the part of the defendant. See, *e.g., Bell v School Bd.* (4th Cir 1963) 321 F2d 494, 500 (awarding attorney fees based on defendant's "long continued pattern of evasion and obstruction"); *Cato v Parham* (ED Ark 1968) 293 F Supp 1375, 1378. This includes the power to impose fees against a party found guilty of civil contempt. See *Perry v O'Donnell* (9th Cir 1985) 759 F2d 702. As noted in §5.2, California has codified that rule in CCP §1218(a).

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## §5.4 B. Court Has Broad Discretion to Award Fees When Acting in Equity

California courts have broad inherent equitable powers to define and shape equitable bases for awarding attorney fees. See, *e.g., Serrano v Priest* (1977) 20 C3d 25, 35, 141 CR 315; *Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 323, 72 CR 146. Statutory fees, too, are interpreted in light of equitable principles, but are subject to the limits of statutory language and legislative intent. See*, e.g., Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466 (rejecting requirement that plaintiff must have attempted to settle dispute before litigation in non-catalyst cases); *Trope v Katz* (1995) 11 C4th 274, 284, 45 CR2d 241 (although pro se litigants may be entitled to recover attorney fees under equitable doctrines, they are not entitled to recover under CC §1717).

Generally, as discussed in §§5.5-5.8, the courts have adopted the same standards for determining entitlement to fees under the equitable doctrines as they have in other fee-shifting contexts. See chap 3 (statutes), chap 4 (contracts).

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## C. Conditions Under Which Court May Award Fees Under Equitable Doctrines

### §5.5 1. Fee Claimant Must Be Prevailing Party and Must Establish Elements of Applicable Doctrine

To obtain fees under one of the equitable doctrines, the fee claimant must be the "prevailing" or "successful" party, and also must meet the other requirements of the particular doctrine. See *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 674, 46 CR3d 206 (denying fees for failure to make prelitigation demand in catalyst case (see §5.7) and for equitable reasons); *Johnson v Tago, Inc.* (1986) 188 CA3d 507, 518, 233 CR 503 (reversing fee award under substantial benefit doctrine because plaintiffs not yet shown to be prevailing parties and benefits not yet secured, noting that CCP §1021 precludes award until elements met: "the law, in the form of [§1021], has not yet yielded its primacy to equity"). On definition of prevailing party, see §2.45.

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### §5.6 2. Fees May Be Awarded When Action Concluded by Settlement

As with statutory fees, fees may be awarded under equitable fee doctrines when actions are concluded by settlement as well as by court judgment. See, *e.g., Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 325, 72 CR 146 (fees may be awarded under substantial benefit doctrine in shareholder's derivative action concluded by settlement rather than judgment). See also *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 28, 97 CR2d 797 (recognizing that "constructive common fund" may result in settled cases).

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### §5.7 3. Fees May Be Awarded When Litigation Results in Corrective Action

Fees may be awarded under equitable doctrines if the litigation results in a defendant's taking "voluntary" corrective action. See, *e.g., Lewis v Anderson* (9th Cir 1982) 692 F2d 1267; *Northington v Davis* (1979) 23 C3d 955, 960 n2, 154 CR 524. This is sometimes referred to as the "catalyst theory." See generally §§2.111-2.117; see also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331 (preserving "catalyst theory" as basis for awarding statutory attorney fees). See, *e.g., Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 675, 46 CR3d 206 (denying fees based on catalyst theory for failure to make prelitigation demand and for equitable reasons); *Jordan v DMV* (2002) 100 CA4th 431, 449, 123 CR2d 122 (arbitrator's fee award based on common fund doctrine was incompatible with equitable underpinnings of doctrine because fund was created voluntarily by state; taxpayers, not beneficiaries, would bear financial burden).

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### §5.8 4. In Limited Circumstances, Fees May Be Awarded When Relief Obtained Before Lawsuit Filed

Occasionally, a fund or benefit may be created without the necessity of a lawsuit. The federal courts have awarded fees under equitable doctrines in such cases, at least when the court has jurisdiction over the fund created. See *Wininger v SI Mgmt. L.P.* (9th Cir 2002) 301 F3d 1115, 1120 (trial court's jurisdiction over settlement fund in combination with broad equitable powers gave it authority to award fees to plaintiff's counsel for services performed before litigation began).

The California courts have not specifically addressed this issue. The California Supreme Court has held, however, that based on unjust enrichment principles, an administrative agency could apply the equitable common fund doctrine to award fees to a nonattorney for quasi-judicial administrative proceedings. See *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 914, 160 CR 124, discussed in §5.9.

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### §5.9 5. Equitable Doctrines Apply to Administrative Proceedings

The equitable fee doctrines also apply in quasi-judicial administrative proceedings. *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 160 CR 124. In *Consumers Lobby*, the California Public Utilities Commission was held to have the power to award attorney fees and costs to the prevailing party in quasi-judicial reparation proceedings under an equitable (*i.e.,* "common fund") theory, but no power to award fees for quasi-legislative rate-setting procedures or under CCP §1021.5, which applies only to judicial proceedings. 25 C3d at 909. See also *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1456, 240 CR 1 (finding "no reason" why holding in *Consumers Lobby* should not apply equally to equitable private attorney general doctrine, and holding that legislature did not intend to intend to deprive a *court* of power to award fees under CCP §1021.5 for administrative proceedings that were intertwined with litigation).

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## II. THE COMMON FUND EQUITABLE EXCEPTION

### §5.10 A. Common Fund Doctrine Requires Passive Beneficiaries to Bear Share of Litigation Costs

The common fund doctrine is perhaps the most venerable equitable exception to the rule against fee-shifting. See *Sprague v Ticonic Nat'l Bank* (1939) 307 US 161, 83 L Ed 1184, 59 S Ct 777 (approving what has become known as common fund doctrine). See also Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv L Rev 1597 (1974). Based on the principle of preventing unjust enrichment, this doctrine provides that, when a litigant's efforts create or preserve a fund from which others derive benefits, the litigant may require those passive beneficiaries to bear a fair share of the litigation costs by paying those costs directly out of the fund. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 35, 141 CR 315; *Quinn v State* (1975) 15 C3d 162, 167, 124 CR 1; *Winslow v Harold G. Ferguson Corp.* (1944) 25 C2d 274, 153 P2d 714.

The common fund exception is grounded in the historic power of equity to permit the trustee of a fund or property (or a party preserving or recovering a fund for the benefit of others, as well as himself or herself) to recover costs, including attorney fees, from the fund created. Those costs and fees are paid out of the fund or property itself, or directly from the other parties enjoying the benefit, and *not* by the opposing party. *Serrano III, supra; Estate of Stauffer* (1959) 53 C2d 124, 132, 346 P2d 748.

Common fund attorney fees have a first priority from the fund, and may even be taken from any share of the fund that is payable to other creditors. *Winslow v Harold G. Ferguson Corp.* (1944) 25 C2d 274, 285, 153 P2d 714.

**Additional authorities:** *Sanders v City of Los Angeles* (1970) 3 C3d 252, 263, 90 CR 169; *Rider v County of San Diego* (1992) 11 CA4th 1410, 14 CR2d 885; *Bank of America v Cory* (1985) 164 CA3d 66, 210 CR 351; *Melendres v City of Los Angeles* (1975) 45 CA3d 267, 119 CR 713.

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## §5.11 B. Requirements for Award Under Common Fund Doctrine

The California courts have identified three requirements for an award of fees under the common fund doctrine, discussed below in §§5.12-5.14). The federal cases discuss slightly different considerations. See §5.15.

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## §5.12 1. Identifiable Fund

For attorney fees to be available under the common fund doctrine, the plaintiff must have effected the creation or recovery of an identifiable fund of money from which attorney fees may be paid. See, *e.g., Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 37, 141 CR 315); *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Mkts., Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514.

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### §5.13 2. Fund Results From the Litigation

A second requirement for application of the common fund doctrine is that the fund must be created by or result from the litigation, even though the beneficiaries need not be parties to the lawsuit. See, *e.g., Glendale City Employees' Ass'n, Inc. v City of Glendale* (1975) 15 C3d 328, 341 n19, 124 CR 513; *Jordan v DMV* (2002) 100 CA4th 431, 446, 123 CR2d 122; *Bank of America v Cory* (1985) 164 CA3d 66, 90, 210 CR 351.

**NOTE:** There is also some authority that fees may be based on a fund created through *pre*litigation activities by lawyers (see *Wininger v SI Mgmt. L.P.* (9th Cir 2002) 301 F3d 1115, 1120), and by work in a quasi-judicial administrative proceeding (see *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 160 CR 124). See §§5.8-5.9.

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### §5.14 3. Beneficiaries, Not Defendant, Must Pay Fees

A third requirement for application of the common fund doctrine is that the beneficiaries, not the defendant, must pay the fees. See, *e.g., Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 35, 141 CR 315; *Jordan v DMV* (2002) 100 CA4th 431, 446, 123 CR2d 122.

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### §5.15 4. Additional Considerations

The federal courts phrase the requirements of the common fund doctrine slightly differently. The following formulation is typical: "[Common fund fees may be awarded when:] (1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can be accurately traced, and (3) the fee can be shifted with some exactitude to those benefiting." *Paul, Johnson, Alston & Hunt v Graulty* (9th Cir 1989) 886 F2d 268, 271. See also *Boeing Co. v Van Gemert* (1980) 444 US 472, 478, 62 L Ed 2d 676, 100 S Ct 745. The California trial courts generally consider these requirements as well.

In addition, two other factors also are considered, as discussed in the following two sections.

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### §5.16 a. Court's Control Over Fund

In addition to the requirements set out above, many courts also look to the court's ability to control the fund as one of the elements that justifies awarding attorney fees under the common fund doctrine. See, *e.g.*, *Boeing Co. v Van Gemert* (1980) 444 US 472, 478, 62 L Ed 2d 676, 100 S Ct 745 ("Jurisdiction over the fund involved in the litigation allows a court to prevent [unjust enrichment of those who benefit by the litigation without contributing to its cost] by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."). See also, *e.g., Paul, Johnson, Alston & Hunt v Graulty* (9th Cir 1989) 886 F2d 268, 271.

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### §5.17 b. "Special Circumstances"

Even in cases in which all the requirements discussed in §§5.12-5.14) are met, serious inequities in the proposed fee award may constitute a "special circumstance" that would justify denial or reduction of the fee. See *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 674, 46 CR3d 206.

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## C. Comparing Common Fund Fee Awards to Statutory Fee Awards

### §5.18 1. Common Fund Awards May Result in Larger Fees Than Statutory Awards

Whether the fee is awarded under a fee-shifting statute or under the common fund doctrine can be very significant because the methods for determining the *amount* of fees awardable under the two doctrines can vary substantially.

Statutory fees must be calculated using the lodestar-adjustment method. (See chaps 8-9 on determining and adjusting the lodestar.) Common fund fees, however, can sometimes be calculated using a percentage-of-the-fund method, which can result in fees that the courts might be reluctant to grant under the lodestar-adjustment method. See, *e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615; *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544; *Craft v County of San Bernardino* (CD Cal 2008) 624 F supp 2d 1113, 1116. See §5.49.

There also are differences in standing to challenge the fees, both in the trial court and on appeal (see §5.20), and potentially in the ability to recover fees for fee-related services (see §5.51).

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### §5.19 2. Common Fund Award May Be Combined With Statutory Award

Common fund fee awards and statutory fee awards are not mutually exclusive. In appropriate circumstances, fees may be granted under both an applicable statute, payable by the defendant, and the common fund doctrine, payable by the beneficiaries. See *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544 (noting that counsel had been awarded common fund fee equal to 25 percent of fund recovered (which had not been appealed) plus statutory fees under Lab C §1194 (to be credited toward the common fund fee) that were the subject of separate, pending appeal); *Staton v Boeing* (9th Cir 2003) 327 F3d 938, 967 (applicability of fee-shifting statute poses no bar to common fund fee). In these circumstances, the statutory fees can be made a part of the common fund, thus reducing the burden on the beneficiaries. See, *e.g., Staton v Boeing, supra*.

Alternatively, a statutory fee may be awarded for some of the work and a common fund fee awarded for other parts of the case. Under CCP §1021.5, for example, fees may be awarded only when "such fees should not in the interest of justice fees be paid out of the recovery, if any." When some of the work is devoted to broader public purposes and some to securing a fund for the class of beneficiaries, a combined award may accomplish both the statute's private attorney general purpose and its recognition that in the interest of justice, some fees should be paid out of the recovery. See §3.31.

Combining common fund and statutory fees can be particularly desirable to plaintiffs' attorneys because of the different methods used to calculate the amount of fees due under each theory. See §§5.49-5.51.

**NOTE:** That common fund fee awards and statutory fee awards may be combined comports with the general rule that parties may claim fees under any applicable statute or theory. See §11.1.

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### §5.20 3. Only Beneficiaries of Fund May Appeal

Fee awards paid from a common fund differ significantly from fee awards paid by defendants over and above the recovery because, in the case of a common fund fee award, the defendant has no standing to appeal the award. See *Sanders v City of Los Angeles* (1970) 3 C3d 252, 263, 90 CR 169. Only beneficiaries of the fund, usually in the form of class action objectors, may appeal a common fund award. See *Sanders v City of Los Angeles, supra* (defendants have no standing to appeal attorney fee award, because it did not increase their liability; rather, parties aggrieved are members of class for whom action was brought and out of whose recoveries fees will be paid). Compare *Sanders* with *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1808, 56 CR2d 483 (recognizing class members' standing to appeal attorney fees).

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## §5.21 D. Comparing Common Fund Doctrine to Private Attorney General Doctrine

In some cases, the litigation, although very significant in its monetary consequences, has not led to an actual fund from which the fees can be paid. In those cases, fees are more appropriate under CCP §1021.5. In *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 36, 141 CR 315, for example, the court denied fees under the common fund doctrine because, although the judgment required equalization of spending in California schools, it did not require any particular level of expenditure; no identifiable fund of money was created, nor did the plaintiffs seek their fees from the legislative appropriation. Thus, the court held that the private attorney general doctrine, rather than the common fund doctrine, was the appropriate basis for the fee award. See also *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 878, 71 CR3d 642 (individual tax refund action, which resulted in the tax being declared unconstitutional and Franchise Tax Board establishing refund process, did not create common fund from which attorney fee could be paid); *Jordan v DMV* (2002) 100 CA4th 431, 449, 123 CR2d 122.

In other cases, when litigation has resulted in significant monetary relief, the court will decide to award fees under CCP §1021.5 (the private attorney general statute) rather than from the fund. See §3.73.

Examples of both these situations are discussed below.

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## §5.22 1. Cases Rejecting Use of Private Attorney General Statute or Doctrine When Common Fund Available

- The first case to consider whether fees should be awarded under the common fund doctrine or CCP §1021.5 was *Bank of America v Cory* (1985) 164 CA3d 66, 210 CR 351. In *Cory*, an action to recover dormant bank accounts, the court held that because the fund was adequate to pay the award, the fee award could not be based on §1021.5, which provides for fees only when "fees should not in the interest of justice be paid out of the recovery, if any." The court reasoned that, when a common fund exists, those who are entitled to share in it must bear their share of the litigation cost.
- In *Rider v County of San Diego* (1992) 11 CA4th 1410, 1422, 14 CR2d 885, plaintiff taxpayer successfully enjoined a county's collection of an illegally imposed sales tax increase. Because the illegal taxes had been preserved in a separate fund and not spent, the court found that compensating plaintiff's attorneys out of that fund was a "precise 'fit' within the 'common fund theory.'" 11 CA4th at 1423 (quoting *Cory*, 164 CA3d at 90). Correlatively, the court held that a fee award under CCP §1021.5 was improper because, "in the interest of justice," the plaintiff's fee should be paid out of the recovery, *i.e.,* the illegally collected taxes. *Rider,* 11 CA4th at 1422.
- See also *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 160 CR 124 (PUC lacked power to award fees under CCP §1021.5 because administrative proceeding not an "action," but common fund doctrine could be applied); *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 661, 46 CR3d 206 (examining relationship between CCP §1021.5 and equitable common fund theory, and rejecting fee award on both equitable bases); *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 173 CR 248 (common fund doctrine, not §1021.5, applied to shareholder damages action).

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## §5.23 2. Cases Awarding Fees Under Private Attorney General Statute Despite Availability of Common Fund

- *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1148, 74 CR3d 81, distinguished and came to a different conclusion than *Bank of America v Cory* (1985) 164 CA3d 66, 210 CR 351 (discussed in §5.22, above) on the issue of whether fees should be awarded under the common fund doctrine or CCP §1021.5. In *Beasley,* the plaintiffs recovered a multimillion dollar fund. The court found that *Cory* had not meaningfully analyzed whether CCP §1021.5 could be applied in some situations in which the plaintiffs had recovered a large monetary fund. It then analyzed plaintiffs' claim under the criteria and purposes of §1021.5, particularly the "financial burden" and "payment out of the recovery" factors, and held that plaintiffs' claim met the §1021.5 criteria. 235 CA3d at 462. See §3.37. The court also rejected the defendant's argument that requiring plaintiffs' attorneys to claim their fees from a common fund would require them to litigate more "efficiently," holding that any such effect "is eclipsed by §1021.5's purpose of encouraging public interest litigation." 235 CA3d at 1417 n3.
- In *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 878, 71 CR3d 642, the court held that an individual tax refund action, which resulted in the tax being declared unconstitutional and the Franchise Tax Board establishing a refund process, did not create a common fund from which the plaintiff's fee could be paid. Instead, the court upheld the trial court's fee award under CCP §1021.5.
- See also *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 16, 64 CR3d 327 (plaintiff class recovered $5 million; fee award under CCP §1021.5 upheld).

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## §5.24 E. Comparing Common Fund Doctrine to Substantial Benefit Doctrine

The differences between the common fund doctrine and the substantial benefit doctrine are set out in *Serrano v Priest* (1977) 20 C3d 25, 35, 141 CR 315. They are also analyzed in *Vincent v Hughes Air W., Inc.* (9th Cir 1977) 557 F2d 759, 768 n7.

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## §5.25 F. Constructive Common Fund Doctrine

A "constructive common fund" is created when a class action defendant agrees as part of a settlement to pay the plaintiffs' attorney fees, over and above the relief afforded to the class. The parties may agree to the amount of the fees, subject to the court's approval, or they may leave the amount to be determined by the court.

Although in a strict sense the plaintiffs' fees in these circumstances are not paid out of the recovery as they are in a pure common fund case, the courts recognize that they are essentially part of one payment that the defendant has agreed to make to settle the case. See *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 97 CR2d 797 (recognizing "constructive common fund" doctrine developed in federal courts).

Under federal law, the effect of recognizing a "constructive common fund" is to allow the court to base the award on a percentage of the recovery, thus allowing a lodestar "multiplier" that might not otherwise be permitted. 82 CA4th at 33. Under California law, although the courts do not permit a "pure" percentage-of-the-fund award in statutory fee cases, the size of the recovery may be taken into consideration in determining the *size* of the lodestar multiplier to be applied. 82 CA4th at 39. On calculating the award and lodestar adjustments, see §§8.11-8.20, 10.16-10.30.

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**Source:** Civil Litigation/California Attorney Fee Awards/5 Attorney Fee Awards Based on Equitable Theories/§5.26 G. Codification of Common Fund/Equitable Apportionment Doctrine

## §5.26 G. Codification of Common Fund/Equitable Apportionment Doctrine

The common fund doctrine has been codified in circumstances that require an "equitable apportionment" of attorney fees. Under the "equitable apportionment" doctrine, "one who expends attorneys' fees in winning a suit that creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." *Quinn v State* (1975) 15 C3d 162, 167, 124 CR 1; *Steinberg v Allstate Ins. Co.* (1990) 226 CA3d 216, 221, 277 CR 32. The codifications of this doctrine are described in §§5.27-5.29.

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## §5.27 1. Labor Code §3856

The "equitable apportionment" doctrine, which is a subset of the common fund doctrine, is codified in Lab C §3856. See *Quinn v State* (1975) 15 C3d 162, 169, 124 CR 1; *Crampton v Takegoshi* (1993) 17 CA4th 308, 317, 21 CR2d 284 (citing equitable common fund doctrine as basis for Lab C §3856), disapproved on other grounds in *Phelps v Stostad* (1997) 16 C4th 23, 34, 65 CR2d 360. Labor Code §3856 provides that in actions maintained against third parties for injuries to a worker, when the employer has already paid workers' compensation benefits for the worker's injury, the worker's attorney may be entitled to be compensated out of the employer's recovery as well as out of the employee's for services rendered in recovering reimbursement of benefits for the employer, and vice versa.. See *Gapusan v Jay* (1998) 66 CA4th 734, 78 CR2d 250; *Phelps v Stostad* (1997) 16 C4th 23, 65 CR2d 360 (plaintiff worker who failed to obtain more favorable judgment in trial de novo following arbitration not entitled to costs incurred after arbitration under CCP §1141.21(a)(ii), but allocation of judgment under Lab C §3856 unaffected).

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### §5.28 2. Labor Code §3860(e)

In *Summers v Newman* (1999) 20 C4th 1021, 86 CR2d 303, the supreme court followed the reasoning in *Quinn v State* (1975) 15 C3d 162, 168, 124 CR 1 (construing Lab C §3856; see §5.27), and held that under Lab C §3860(e), when both the employee's and the employer's attorneys actively participate in the litigation, the fees awarded to the employer's attorney and the employer's prorata share of other litigation costs must be deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for its workers' compensation expenses. Moreover, the reasonable value of the attorney's services is measured by the value of that work for his or her client.

*Summers* was followed and extended in *Draper v Aceto* (2001) 26 C4th 1086, 113 CR2d 61, in which the court held that the employee could not recover any of her fees from the employer's share, even if the employer's reimbursable expenses exceeded the employee's recovery.

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### §5.29 3. Equitable Apportionment Does Not Apply When Each Party Retains Counsel and Each Counsel Actively Participates

The equitable apportionment doctrine does not apply when each party has retained counsel and each counsel has actively prosecuted the case or actively participated in creating the settlement. See, *e.g., Gapusan v Jay* (1998) 66 CA4th 734, 745, 78 CR2d 250; *Kindt v Otis Elevator Co.* (1995) 32 CA4th 452, 456, 38 CR2d 121; *Kaplan v Industrial Indem. Co.* (1978) 79 CA3d 700, 709, 145 CR 219. The correct standard does not ask whether counsel minimally participated in the case, but rather whether counsel actively participated in the creation of the settlement fund. *Luque v Herrera* (2000) 81 CA4th 558, 562, 96 CR2d 853. See also Lab C §3856(c).

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### §5.30 4. Equitable Apportionment Does Not Apply to County's Recovery of Lien for Medical Services to Indigent Patient

The potentially broad reach of the equitable apportionment doctrine was narrowed considerably in *City & County of San Francisco v Sweet* (1995) 12 C4th 105, 48 CR2d 42. In *Sweet,* the California Supreme Court held that the equitable apportionment doctrine did not apply to the county's recovery of a lien for medical services out of an indigent plaintiff's settlement. The supreme court distinguished *Quinn v State* (1975) 15 C3d 162, 167, 124 CR 1, on two grounds: First, in *Quinn*, the third party's recovery depended on the success of the plaintiff, while in *Sweet*, the plaintiff owed a debt to the county regardless of the outcome of his lawsuit; and second, in *Quinn*, relevant legislation supported the claim for apportionment of fees, while in *Sweet*, the legislature appeared to mandate full recovery of the lien. On *Quinn*, see §5.27.

**Additional authorities:** *Lovett v Carrasco* (1998) 63 CA4th 48, 55, 73 CR2d 496 (applying *Sweet* to case involving private lienholder); *Day v Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 119 CR2d 606 (following *Sweet* and *Lovett*).

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## §5.31 5. Calculating Fees in Common Fund Cases

As noted in §5.18, the amount of fees that may be awarded under the common fund doctrine may differ significantly from the amount that may be awarded under contractual fee clauses or fee-shifting statutes. On standards that apply in calculating the award in common fund cases, and the differences in the amounts of awards, see §§8.11-8.20. See also §§5.49-5.51.

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## III. THE SUBSTANTIAL BENEFIT EQUITABLE EXCEPTION

### §5.32 A. Substantial Benefit Doctrine Provides Fees When Cost Can Be Shifted to Those Benefited

The substantial benefit doctrine is a modern derivative of the common fund doctrine; it extends the common fund doctrine to litigation that has not resulted in a pecuniary recovery but has resulted in substantial benefit to an identifiable class of persons. See *Braude v Automobile Club* (1986) 178 CA3d 994, 1005, 223 CR 914. It permits a court to make a discretionary award of attorney fees to a litigant who has sued in a representative capacity, when (1) the litigant's efforts have resulted in the creation of a substantial, actual, and concrete benefit, either pecuniary or nonpecuniary; (2) the benefit redounds to members of an "ascertainable class"; and (3) the court's jurisdiction over the subject matter makes possible an award that will spread the costs proportionately among the members of that class. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 943, 154 CR 503; see also, *e.g., Save El Toro Ass'n v Days* (1979) 98 CA3d 544, 548, 159 CR 577. Like the common fund doctrine, the substantial benefit doctrine rests on the principle that those who have been unjustly enriched at another's expense should, in some circumstances, bear their fair share of the costs incurred in producing the benefits they have obtained.

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## §5.33 B. Requirements of Substantial Benefit Doctrine

The requirements of the substantial benefit doctrine are set out in, *e.g., Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 943, 154 CR 503, *Braude v Automobile Club* (1986) 178 CA3d 994, 1005, 223 CR 914, and *Save El Toro Ass'n v Days* (1979) 98 CA3d 544, 548, 159 CR 577. See also *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 662, 46 CR3d 206. Although the doctrine does overlap with the other equitable doctrines in some ways (see chart in §5.60), it has certain specific requirements, which are set out below in §§5.34-5.43.

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## 1. Suit Must Be Litigated in a Representative Capacity and Confer Benefits on Ascertainable Class

### §5.34 a. Representative Capacity

An award of attorney fees is permitted under the substantial benefit theory when the litigant, proceeding in a representative capacity, obtains a decision that confers a benefit on members of an ascertainable class, which "may include plaintiffs or defendants." *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 38, 40 n10, 141 CR 315.

The suit need not be brought as a class action. See *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 248, 142 CR 766.

Taxpayer suits, by their "very nature," meet the requirement of being brought in a representative capacity. See *Card v Community Redev. Agency* (1976) 61 CA3d 570, 583, 131 CR 153.

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### §5.35 b. Ascertainable Class

Fees have been denied under the substantial benefit doctrine when there is no "ascertainable class" that will benefit from the litigation and help pay its cost. See, *e.g., Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 578, 30 CR2d 581 (no ascertainable class received benefit from additional conditions placed on development of historic site).

For example, the substantial benefit doctrine was found not to apply to a series of actions by one shareholder against another, involving their closely held corporations, because there was no clearly identifiable class of persons who would benefit from the lawsuit. *Baker v Pratt* (1986) 176 CA3d 370, 380, 222 CR 253.

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### §5.36 c. Examples of Cases Litigated in a Representative Capacity on Behalf of Ascertainable Class

Fees have been awarded under the substantial benefit doctrine in cases brought by:

- **Corporate shareholders** (see *Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 72 CR 146).
- **Taxpayers** (see *Card v Community Redev. Agency* (1976) 61 CA3d 570, 131 CR 153; *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 81 CR 683; see also *County of Riverside v City of Murrieta* (1998) 65 CA4th 616, 628, 76 CR2d 606 (distinguishing *Card* in denying fees to county)).
- **Individuals seeking broad declaratory and mandamus relief** (see *Mandel v Hodges* (1976) 54 CA3d 596, 127 CR 244).
- **Union members seeking to reform union** (see *Hall v Cole* (1973) 412 US 1, 36 L Ed 2d 702, 93 S Ct 1943).

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### §5.37 2. Benefits Conferred Must Be Actual and Concrete

The substantial benefit requirement has been construed to require a benefit to the persons or entities that will pay the fees that is "actual and concrete," not "conceptual or doctrinal." See *Braude v Automobile Club* (1986) 178 CA3d 994, 1006, 223 CR 914 (collecting and analyzing cases). The benefits must be concrete and flow directly from the court's decision. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 41, 141 CR 315. See also *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 578, 30 CR2d 581 (denying fees under substantial benefit doctrine because benefits not substantial).

For example, the benefits may consist of the savings that result from preventing the illegal expenditure of public funds. *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 996, 165 CR 514 (preventing expenditure of taxpayer funds without valid Environmental Impact Report is concrete benefit, regardless of whether project ultimately approved). See also *Lewis v Anderson* (9th Cir 1982) 692 F2d 1267 (even though plaintiff voluntarily dismissed suit, it resulted in substantial benefit, *i.e.,* prompting corporation to seek shareholder ratification of stock option grants); *Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 324, 72 CR 146 (substantial benefit in shareholder derivative action included changes in corporate management).

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### §5.38 a. Either Pecuniary or Nonpecuniary Benefits May Qualify

The substantial benefit doctrine may be applied in actions in which the benefits are either pecuniary or nonpecuniary, as long as they are of such concrete and clearly substantial value that those sharing in the benefits should contribute to their costs. See, *e.g., Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 324, 72 CR 146 (stockholders' derivative action in which fees were awarded under the substantial benefit theory), cited with approval in *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 946, 154 CR 503.

In *Fletcher*, the substantial benefit conferred by the litigation included "immediate changes in the corporate management." 266 CA2d at 325. Compare *Fletcher* with *Braude v Automobile Club* (1986) 178 CA3d 994, 1006, 223 CR 914 (increasing members' opportunities to participate in nonprofit corporation's election process held not to be actual and concrete, but potential, conceptual, intangible, and doctrinal in nature), discussed in §5.47, and *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 578, 30 CR2d 581 (preservation of materials for historical purposes, restrictions on future development, and enhanced informal historical marker found to be minimal). See also *Lewis v Anderson* (9th Cir 1982) 692 F2d 1267 (even though plaintiff voluntarily dismissed suit, it resulted in substantial benefit, *i.e.,* prompting corporation to seek shareholder ratification of stock option grants).

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### §5.39 b. Bringing Defendant Into Conformity With Existing Law Does Not Qualify

To satisfy the requirements of the substantial benefit doctrine, courts have held that the benefits conferred must be something more than bringing the defendant into conformity with existing law. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 947, 154 CR 503); *Save El Toro Ass'n v Days* (1979) 98 CA3d 544, 549, 159 CR 577 ("Because the substantial benefits doctrine rests on the principle of preventing unjust enrichment, the effectuation of constitutional or statutory policy, without more, is not a sufficient basis to award attorney's fees under this theory").

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### §5.40 c. Stare Decisis Benefits Do Not Qualify

That the litigation establishes a legal principle that may affect future litigation does not entitle the attorney who has obtained the initial victory to collect attorney fees under the substantial benefit doctrine from those who may, through stare decisis, obtain the benefit of the decision in future cases. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 946, 154 CR 503 ("doctrine of stare decisis has never been viewed as sufficient justification for permitting an attorney to obtain fees from all those who may, in future cases, utilize a precedent he has helped to secure"); *Northington v Davis* (1979) 23 C3d 955, 961, 154 CR 524; *Save El Toro Ass'n v Days* (1979) 98 CA3d 544, 551, 159 CR 577.

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### §5.41 3. Court Must Be Able to Spread Fees Proportionately Among Those Benefited

The third requirement of the substantial benefit doctrine is that the court's jurisdiction over the parties and subject matter must allow the court to spread the cost of the plaintiff's fees proportionately among those benefited by the lawsuit. See, *e.g., Northington v Davis* (1979) 23 C3d 955, 965, 154 CR 524 (fees may be partially payable from expenditures saved taxpayers); *Card v Community Redev. Agency* (1976) 61 CA3d 570, 583, 131 CR 153 (fees paid by taxing agency that benefited from lawsuit); *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 202, 81 CR 683 (fees paid from property taxes to be collected). Compare *Card* with *County of Riverside v City of Murrieta* (1998) 65 CA4th 616, 628, 76 CR2d 606 (denying fees and distinguishing *Card*), and *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 578, 30 CR2d 581 (benefits "did not increase anyone's revenues, did not reduce anyone's expenses, and did not create a fund for the benefit of any recognizable group").

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### §5.42 a. Fees May Be Recovered When Either Plaintiff or Defendant Has Benefited, if Fees Recoverable From Benefits

Despite some earlier language to the contrary, the California Supreme Court in both *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 40 n10, 141 CR 315, and *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 944, 154 CR 503, specifically rejected the argument that fee awards under the substantial benefit theory should be limited to situations in which the defendant against whom the fees are awarded has itself directly benefited from the litigation. Instead, fees may be awarded when either the plaintiffs *or* the defendants have benefited, so long as the fees may be recovered from those who benefited. 23 C3d at 944.

Compare *Woodland Hills II* with *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 112, 173 CR 248 (fees available under common fund doctrine, not substantial benefit doctrine, because action did not benefit defendant corporation or majority shareholders). See also *Card v Community Redev. Agency* (1976) 61 CA3d 570, 582, 131 CR 153 (fees paid by taxing agencies that benefited from lawsuit). Compare *Card* with *County of Riverside v City of Murrieta* (1998) 65 CA4th 616, 628, 76 CR2d 606 (denying fees and distinguishing *Card*). See also *Robbins v Alibrandi* (2005) 127 CA4th 438, 448, 25 CR3d 387 (benefit of avoiding further litigation in shareholder derivative action does not support fee award under substantial benefit doctrine).

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**Source:** Civil Litigation/California Attorney Fee Awards/5 Attorney Fee Awards Based on Equitable Theories/§5.43 b. Examples

### §5.43 b. Examples

- *Northington v Davis* (1979) 23 C3d 955, 965, 154 CR 524 (fees may be partially payable from expenditures saved taxpayers);
- *Robbins v Alibrandi* (2005) 127 CA4th 438, 25 CR3d 387 (fees spread among corporate shareholders who benefited from changes in corporate practices);
- *Card v Community Redev. Agency* (1976) 61 CA3d 570, 131 CR 153 (fees spread among local taxing agencies that benefited from lawsuit);
- *Mandel v Hodges* (1976) 54 CA3d 596, 127 CR 244 (fees spread among state taxpayers who benefited from work paid for by state);
- *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 81 CR 683 (fees spread among taxpayers who benefit from increased tax collections);
- *Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 72 CR 146 (fees spread among corporate shareholders who benefited from changes in corporate practices).

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**Source:** Civil Litigation/California Attorney Fee Awards/5 Attorney Fee Awards Based on Equitable Theories/§5.44 C. Comparing Substantial Benefit and Private Attorney General Doctrines

## §5.44 C. Comparing Substantial Benefit and Private Attorney General Doctrines

The differences between the substantial benefit doctrine and the private attorney general doctrine, as codified in CCP §1021.5, are subtle but significant.

Initially, the two doctrines are based on different policies: The private attorney general doctrine is based on a policy of encouraging attorneys to litigate cases involving important rights (see chap 3), while the substantial benefit doctrine is based on a policy of preventing unjust enrichment (see §5.32). See *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 945, 154 CR 503. See also *Braude v Automobile Club* (1986) 178 CA3d 994, 1005, 223 CR 914; *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 661, 46 CR3d 206 (discussing relationship between §1021.5 and equitable substantial benefit theory).

They also differ in the types of benefits that must be obtained for each to apply (see §§5.46-5.47) and in the amount of fees that may be obtained (see §§5.49-5.51).

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## §5.45 1. Differences in Types of Benefits Obtained

The substantial benefit and private attorney general doctrines differ on the types of benefits that must be obtained for the doctrines to be applicable. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 945, 154 CR 503.

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### §5.46 a. Substantial Benefit Doctrine Applies Only When Benefit Is Concrete

Because the substantial benefit doctrine rests on the principle of preventing unjust enrichment, it requires that the action have created or preserved a substantial, concrete benefit to other persons. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 945, 154 CR 503. See §§5.37-5.40.

For example, in *Northington v Davis* (1979) 23 C3d 955, 962, 154 CR 524, the court held that an $11,000 fee award could not be justified solely on the substantial benefit theory because it was out of proportion to the $9600 in public funds saved by the litigation. Under unjust enrichment principles, however, the trial court could properly conclude that a reasonable *portion* of those savings should be made available to compensate plaintiffs' attorneys at least partially out of the savings that result from preventing the illegal expenditure of public funds. See also *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 996, 165 CR 514 (preventing expenditure of taxpayer funds without valid Environmental Impact Report is concrete benefit, regardless of whether project ultimately approved). Compare *Northington* and *Friends* with *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 42, 141 CR 315 (fees awarded under private attorney general doctrine rather than substantial benefit doctrine because litigation produced no actual or concrete benefits); *Braude v Automobile Club* (1986) 178 CA3d 994, 1005, 223 CR 914 (same). See also *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 578, 30 CR2d 581.

In *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Mkts., Inc.* (2005) 127 CA4th 387, 404 n10, 25 CR3d 514, the court held that although an objector to a class action settlement who had been denied leave to intervene was not entitled to fees under CCP §1021.5, he might have been entitled to fees under the substantial benefit theory.

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### §5.47 b. Private Attorney General Doctrine May Apply When Benefits Are Less Concrete

Because it is intended to promote the vindication of important rights affecting the public interest, the private attorney general doctrine may be applied when the litigation produces less tangible benefits to others, particularly when the benefits derive from "the effectuation of constitutional or statutory policy, without more," *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 944, 154 CR 503.

These differences were examined at length in *Braude v Automobile Club* (1986) 178 CA3d 994, 1005, 223 CR 914. *Braude* held that because the plaintiffs had vindicated rights of a doctrinal and conceptual nature (*i.e.,* the statutory rights of members of a nonprofit automobile club to fair election procedures), fees should be awarded under the private attorney general doctrine, not the substantial benefit doctrine. The court noted that under the substantial benefit doctrine, the benefits obtained must be "actual and concrete," and the court must be in a position to spread the costs of the attorney fees among those benefited. 178 CA3d at 1006. As the court also noted, no such requirements exist under CCP §1021.5. 178 CA3d at 1011.

**Additional authorities:** *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 42, 141 CR 315 (fees awarded under private attorney general doctrine rather than substantial benefit doctrine because litigation produced no actual or concrete benefits); *Save El Toro Ass'n v Days* (1979) 98 CA3d 544, 551, 159 CR 577 (substantial benefit doctrine not applicable because litigation resulted only in "stare decisis benefits" and effectuation of statutory policy; on remand trial court should consider award under private attorney general theory); *Rich v City of Benicia* (1979) 98 CA3d 428, 432, 159 CR 473 (substantial benefit doctrine not applicable because benefit obtained was essentially effectuation of statutory policy; private attorney general theory applicable).

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### §5.48 c. Doctrines May Be Combined

Both *Northington v Davis* (1979) 23 C3d 955, 961, 154 CR 524, and *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 996, 165 CR 514, make clear that when both concrete *and* conceptual benefits are obtained, the prevailing party may be entitled to fees under both the substantial benefit and private attorney general doctrines so that the court can award fees that are "fully commensurate with the time spent." *Friends*, 106 CA3d at 996.

Likewise, in some circumstances, fees may be awarded on both equitable and statutory grounds. See *Staton v Boeing* (9th Cir 2003) 327 F3d 938, 967 (applicability of fee-shifting statute poses no bar to common fund fee), discussed in §5.19. See also *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544; *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 203, 81 CR 683 (no inconsistency between equity-based award paid out of future benefits recovered and statutory right to fees based on city charter).

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## 2. Differences in Amount of Fees That May Be Awarded

### §5.49 a. Lodestar Method Not Required

The substantial benefit and private attorney general doctrines may also differ in the amount of fees that can be recovered. For example, as with fees awarded under the common fund doctrine (see §5.18), fees awarded under the substantial benefit doctrine may be based on a "contingent" or "percentage" basis rather than on the lodestar method. *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 203, 81 CR 683. Compare *Knoff* with *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 109, 173 CR 248 (rejecting plaintiffs' argument that percentage fee required in common fund case). On calculating the award and use of the lodestar method, see §§8.11-8.20.

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### §5.50 b. Fees Limited by Benefits Recovered

Unlike fee awards under the private attorney general doctrine, which are not limited by the amount of concrete benefits received (see chap 3), fees under the substantial benefit doctrine are limited by the amount of benefits recovered. See *Northington v Davis* (1979) 23 C3d 955, 961, 154 CR 524 ($11,000 fee award could not be justified solely on substantial benefit theory, because it was out of proportion to $9600 in public funds saved by litigation); *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 996, 165 CR 514 (substantial benefit rule authorizes fees only to extent the fees bear reasonable relation to litigation's benefits).

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### §5.51 c. Fees for Fee-Related Services

Some federal courts have indicated that fees may not be awarded for work performed in seeking a fee award under the common fund or substantial benefit doctrines. See, *e.g., Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1299 (time spent obtaining attorney fee award noncompensable in common fund case); *Lindy Bros. Builders v American Radiator & Standard Sanitary Corp.* (Lindy II) (3d Cir 1976) 540 F2d 102, 111 (same). See also *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 626, 186 CR 754 (noting that cases denying fees for fee-related services were under common fund or substantial benefit theories, and thus were inapplicable to private attorney general statute); §9.16.

In contrast, some federal courts have held that fees for fee-related services *are* recoverable under equitable theories, because otherwise opposing parties could dilute the value of the fee award by forcing the prevailing attorneys into performing uncompensated work. See *Pawlak v Greenawalt* (3d Cir 1983) 713 F2d 972, 984, and *Kinney v IBEW* (9th Cir 1991) 939 F2d 690, 693, both of which hold that fees for fee-related services are proper in common benefit cases.

**NOTE:** In the author's view, the latter cases make the better argument. Any concern about excessive compensation for fee-related services can be dealt with when determining the amount of those fees. See §§9.16-9.23.

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## D. Examples of Cases Considering Substantial Benefit Doctrine

### §5.52 1. Cases Awarding Fees Under Substantial Benefit Doctrine

Cases awarding fees under the substantial benefit doctrine include:

- *Northington v Davis* (1979) 23 C3d 955, 961, 154 CR 524 ($11,000 fee award could not be justified solely on substantial benefit theory because it was out of proportion to the $9600 in public funds saved by litigation; under unjust enrichment principles, however, trial court could properly conclude that reasonable *portion* of those savings should be made available to at least partially compensate plaintiffs' attorneys; benefits may also consist of savings that result from preventing illegal expenditure of public funds);
- *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 165 CR 514 (plaintiffs prevented illegal expenditure of public funds by enjoining project based on invalid EIR);
- *Card v Community Redev. Agency* (1976) 61 CA3d 570, 131 CR 153 (plaintiffs obtained judgment declaring city ordinance purporting to amend an existing redevelopment plan invalid, making tax revenues available to various local taxing agencies);
- *Mandel v Hodges* (1976) 54 CA3d 596, 127 CR 244 (plaintiff successfully challenged state's practice of allowing employees to take time off with pay on Good Friday; substantial benefit found in future savings of funds formerly paid for work not performed);
- *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 203, 81 CR 683 (plaintiff's class action secured writ of mandate rectifying deficiencies in property tax assessments, resulting in greater tax revenues; trial court awarded fees as percentage of increased taxes recovered, based on city charter provision; appellate court affirmed as proper exercise of court's equitable power, citing *Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 72 CR 146);
- *Fletcher v A.J. Indus.* (1968) 266 CA2d 313, 72 CR 146 (corporate derivative action; plaintiffs secured beneficial changes in corporate management and procedures).

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## §5.53 2. Cases Denying Fees Under Substantial Benefit Doctrine

Cases denying fees under the substantial benefit doctrine include:

- *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 154 CR 503 (benefits obtained not actual and concrete; case remanded for evaluation of entitlement to fees under CCP §1021.5);
- *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 42, 141 CR 315 (benefits obtained not actual and concrete; fees awarded under private attorney general theory);
- *Avikian v WTC Fin. Corp.* (2002) 98 CA4th 1108, 120 CR2d 243 (substantial benefit fees properly denied to shareholders on equitable grounds);
- *Rider v County of San Diego* (1992) 11 CA4th 1410, 1426, 14 CR2d 885 (government agency obtained no decision resulting in substantial benefit);
- *Johnson v Tago, Inc.* (1986) 188 CA3d 507, 517, 233 CR 503 (interim fee award in corporate proxy fight reversed as "premature" because neither "prevailing party" nor "substantial benefit" could be ascertained until conclusion of litigation);
- *Baker v Pratt* (1986) 176 CA3d 370, 380, 222 CR 253 (fees under substantial benefit theory denied in series of actions by one shareholder against another, involving their closely held corporations, because there was no clearly identifiable class of persons who would benefit from the lawsuit);
- *Braude v Automobile Club* (1986) 178 CA3d 994, 223 CR 914 (no recovery under substantial benefit doctrine because benefits obtained not actual and concrete; but plaintiffs could recover under CCP §1021.5);
- *Save El Toro Ass'n v Days* (1979) 98 CA3d 544, 551, 159 CR 577 (same);
- *Rich v City of Benicia* (1979) 98 CA3d 428, 433, 159 CR 473 (same).

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## IV. THE PRIVATE ATTORNEY GENERAL EQUITABLE EXCEPTION

### A. Nature of Equitable Private Attorney General Doctrine

### §5.54 1. Court's Inherent Equitable Power

Under the equitable private attorney general doctrine, California state courts can exercise their inherent equitable authority and award fees to litigants who successfully pursue public interest litigation that vindicates important constitutional rights. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 43, 141 CR 315.

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### §5.55 2. Purpose of Doctrine

Unlike the equitable common fund and substantial benefit doctrines, which are based on unjust enrichment principles, the purpose of the equitable private attorney general doctrine is to encourage suits that enforce a strong public policy and benefit a broad class of people by awarding substantial attorney fees to those who successfully bring such suits. *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 933, 154 CR 503, citing *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 43, 141 CR 315.

For example, in *Serrano III,* the court approved an award of attorney fees under the equitable private attorney general doctrine to two public interest law organizations for securing a decision that the state's school financing system violated the California Constitution's equal protection guaranty. 20 C3d at 46.

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## §5.56 B. Doctrine Not Available Under Federal Law

Although the federal courts recognize the equitable common fund and substantial benefit doctrines, they reject the equitable private attorney general doctrine, requiring instead statutory authorization. *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612.

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## C. Comparing Equitable and Statutory (CCP §1021.5) Private Attorney General Doctrines

### §5.57 1. Equitable Doctrine Remains Viable

By enacting CCP §1021.5, the legislature has provided explicit statutory authority for court-awarded attorney fees under a private attorney general theory. The equitable doctrine still exists, however. See *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1462 n12, 240 CR 1 (noting that doctrine might permit court to award fees for administrative-level work); *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 960, 217 CR 621. But see *City of Carmel-by-the-Sea v Board of Supervisors* (1986) 183 CA3d 229, 255, 227 CR 899.

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### §5.58 2. Code of Civil Procedure §1021.5 Applies to Statutory as Well as Constitutional Rights

A major difference between the equitable and statutory doctrines is that the equitable doctrine has been applied only to the enforcement of constitutional rights, while CCP §1021.5 applies to the enforcement of both important statutory rights and constitutional rights. "When other statutory criteria are satisfied, the section explicitly authorizes such an award 'in any action which has resulted in the enforcement of *an important right affecting the public interest,'* regardless of its source—constitutional, statutory or other." *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 925, 154 CR 503.

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### §5.59 3. Equitable Doctrine May Apply When CCP §1021.5 Not Available

Because the equitable doctrine still exists despite the enactment of CCP §1021.5, it may be invoked in some circumstances in which fees are not available under §1021.5. Some examples are:

**Administrative proceedings.** Fees may not be awarded under §1021.5 for administrative proceedings that do not result in court "actions." See *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 910, 160 CR 124. They might, however, be awarded under the equitable private attorney doctrine. *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1462 n12, 240 CR 1. See §5.9.

**Government agencies.** Generally, government agencies may not receive fee awards under CCP §1021.5, except in suits against other government entities. Whether a court might award a government agency fees under the equitable doctrine remains unresolved. But see *People ex rel Cooper v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 386, 211 CR 501; *City of Carmel-by-the-Sea v Board of Supervisors* (1986) 183 CA3d 229, 255, 227 CR 899.

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## §5.60 V. CHART: COMPARING COMMON FUND, SUBSTANTIAL BENEFIT, AND PRIVATE ATTORNEY GENERAL THEORIES

The common fund, substantial benefit, and private attorney general theories overlap to some extent, as explained above. The following chart briefly summarizes their similarities and differences.

| *Characteristic* | *Common Fund* | *Substantial Benefit* | *Private Attorney General* |
|---|---|---|---|
| Litigation must directly result in creation or preservation of common fund of money | yes | no | no |
| Doctrine is intended to prevent unjust enrichment of those benefiting from lawsuit | yes | yes | no |
| Fees may be assessed against defendants | no | yes | yes |
| The benefit of plaintiff's action may be nonpecuniary | no | yes | yes |
| The benefits obtained must be actual and concrete | yes | yes | no |
| The court must be in a position to spread the cost of attorney fees to those who benefit from the litigation | yes | yes | no |
| Plaintiff's action must vindicate an important public policy | no | no | yes |
| Plaintiff's action must be of significant benefit to the general public or a large class of persons | no | no | yes |
| The necessity and burden of private enforcement are taken into account in determining whether to make the award | no | no | yes |
| Fee award can be made to public entity | yes | yes | limited |
| Fee award may be made for success at administrative proceedings | yes | yes | limited |
| Attorney fee award may be based on lodestar method or on percentage of the fund method | yes | yes | no |
| Fees may be awarded for work related to obtaining fees | maybe | maybe | yes |

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# 6

# Attorney Fees Awarded as Sanctions

I. INTRODUCTION
A. Attorney Fees as Sanctions: General Considerations §6.1
B. Must Have Specific Statutory Basis §6.2

II. SANCTIONS FOR ACTIONS BROUGHT WITHOUT REASONABLE CAUSE AND/OR IN BAD FAITH §6.3
A. Actions Under Government Claims Act or for Indemnity/Contribution (CCP §1038) §6.4
B. Actions Against Peace Officers (CCP §1021.7) §6.5
C. Actions for Misappropriation of Trade Secrets (CC §3426.4) §6.6
D. Actions Brought by Vexatious Litigants (CCP §§391-391.7) §6.7

III. SANCTIONS FOR GENERAL LITIGATION CONDUCT: CCP §§128.5 AND 128.7 §6.8
A. Code of Civil Procedure §128.7: Litigation Sanctions in Actions Filed Since January 1, 1995 §6.9
1. Code of Civil Procedure §128.7 Based on Fed R Civ P 11 §6.10
2. When CCP §128.7 Sanctions Are Available
a. Requirements of §128.7
(1) Applies to Every Pleading, Petition, Motion, and "Similar Paper" That Must Be Signed by Attorney or Unrepresented Party §6.11
(2) Does Not Apply to Discovery Motions §6.12
(3) Party Seeking Sanctions Must Comply With Safe Harbor Provision §6.13
(4) Dismissal Does Not Moot Sanctions Motion §6.14
(5) Sanctions Available if Document Does Not Meet Three Conditions §6.15
(a) Document Not for "Improper Purpose" §6.16
(b) Arguments Warranted by Law §6.17
(c) Factual Contentions or Denials Supportable §6.18
b. Sanctions Also Available for Improper Sanctions Motions §6.19
3. Elements of CCP §128.7 Sanctions Award
a. Who May Be Sanctioned §6.20
b. Who May Recover Sanctions
(1) Pro Per Litigants May Not Recover Attorney Fees §6.21
(2) Contingent Fee Cases §6.22
c. Court Must Explain Basis for Sanctions It Imposes §6.23
d. Amount of Attorney Fees Court May Award §6.24
4. Procedures for Obtaining Sanctions Under CCP §128.7
a. Separate Noticed Motion §6.25
b. Safe Harbor Period §6.26
c. Coordination of Hearing Dates to Meet Safe Harbor Requirements §6.27
d. Court's Own Motion §6.28
B. Code of Civil Procedure §128.5: Sanctions in Actions Filed Before 1995 and in Anti-SLAPP Motions §6.29
1. Circumstances in Which CCP §128.5 Sanctions Are Available
a. Standard for Determining Bad Faith Actions or Frivolous Tactics §6.30
b. Both Frivolousness *and* Bad Faith Are Required Under CCP §128.5 §6.31
c. Sanctions Award Mandatory if Court Finds Anti-SLAPP Motion Frivolous or Intended Solely for Delay §6.32
2. Elements of CCP §128.5 Sanctions Award
a. Fees May Be Awarded Against Client, Attorney, or Both §6.33
b. Court Must State Reasons for Imposing Sanctions §6.34
c. Amount of Fees Awardable §6.35
d. Period for Which Fees May Be Awarded §6.36
e. Sanctions May Not Be Imposed for Costs or Expenses Unrelated to the Litigation §6.37
f. Fees May Be Available for Time Spent Obtaining Sanctions §6.38
g. Procedure for Obtaining CCP §128.5 Sanctions §6.39
C. Factors That May Affect Entitlement to Fees Awarded as Sanctions §6.40
1. Type of Case
a. Political Office Controversy §6.41
b. Judicial Challenge §6.42
c. In Lieu of Malicious Prosecution Action §6.43

d. Administrative Proceedings §6.44
e. Contractual Arbitration Proceedings §6.45
2. Parties' Status
a. Public Entity §6.46
b. Client §6.47
c. Former Party §6.48
d. Pro Per Litigant §6.49
e. Convicted Felon §6.50

IV. DISCOVERY SANCTIONS; CCP §§2023.010-2023.040
A. Permissive Discovery Sanctions §6.51
B. Mandatory Discovery Sanctions §6.52
C. Safe Harbor for Sanctions for Electronically Stored Information §6.53
D. How to Obtain Discovery Sanctions §6.54
E. Availability of Discovery Sanctions Under Federal Law §6.55

V. OTHER SANCTION STATUTES
A. Violation of Local Rules (CCP §575.2) §6.56
B. Contempt Proceedings (CCP §1218(a)) §6.57
C. No Attorney Fees as Sanctions for Bad Faith Affidavits in Summary Judgment Motions (CCP §437c(i)) §6.58
D. No Attorney Fees as Sanctions for Trial Continuance (CCP §1024) §6.59

VI. FRIVOLOUS APPEALS (CCP §907 AND CAL RULES OF CT 8.276(a)) §6.60
A. Only a Party May Seek Sanctions §6.61
B. Sanctions Awardable When Appeal Is Frivolous or Taken Solely for Purposes of Delay
1. The Subjective "Motive" Standard §6.62
2. The Objective "Frivolous" Standard §6.63
3. Relationship Between Subjective and Objective Standards §6.64
C. Sanctions Awardable for Partially Frivolous Appeals §6.65
D. Appellate Sanctions for Appeal of Sanctions Order Determined Independently of Trial Court Sanctions §6.66
E. Sanctions for Frivolous Appeal May Not Be Recovered in Subsequent Bad Faith Action §6.67
F. Fees May Be Awarded Against Client, Attorney, or Both §6.68
G. Amount of Sanctions §6.69
1. Amount of Sanctions May Include Cost to Court System §6.70
2. Other Factors Determining Amount of Sanctions §6.71
H. Examples of Fee Awards as Sanctions for Frivolous Appeals §6.72
I. How to Obtain Sanctions for a Frivolous Appeal §6.73

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# I. INTRODUCTION

## §6.1 A. Attorney Fees as Sanctions: General Considerations

Many California statutes and court rules explicitly provide that sanctions may be imposed on a party for its litigation conduct, based in whole or in part on the attorney fees incurred by an opposing party as a result of that conduct.

Some provisions award fees for the entire action. See §§6.3-6.7. Some provide sanctions for specific papers, conduct, or arguments in a variety of circumstances. See §§6.9-6.50 (sanctions for general litigation conduct, CCP §§128.7, 128.5), 6.51-6.55 (discovery sanctions), 6.56-6.59 (violation of local rules; contempt proceedings), 6.60-6.73 (appellate sanctions).

It is important to recognize that fee awards as sanctions are based on a different rationale than other fee awards: They are not intended to encourage certain types of litigation, to compensate one side for its costs under agreement or statute, or to prevent unjust enrichment; rather, they are intended to discourage and deter certain types of litigation conduct. As a result, the fees awarded may not be fully compensatory, or the sanctions may include "damages" not available on other fee-shifting bases.

Seeking fees as sanctions also presents different strategic issues than seeking other types of fees, primarily because sanctions generally arise while the litigation is ongoing. Their principal purpose, of course, is to discourage abusive litigation tactics, and they may well have that effect. They also create a record that may be cited later in the litigation when statutory or contractual fees are sought. The considerations as to whether to seek sanctions are very different than when statutory or contractual attorney fees are available to one or both parties.

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## §6.2 B. Must Have Specific Statutory Basis

Attorney fee awards are available as sanctions for an opposing party's or attorney's conduct in a variety of contexts. It is important to recognize, however, that there must be a specific statutory basis for any award of attorney fees as sanctions.

Most importantly, trial courts lack the equitable power to award attorney fees as sanctions in the absence of a specific statutory mandate. *Bauguess v Paine* (1978) 22 C3d 626, 150 CR 461; *Clark v Optical Coating Laboratory, Inc.* (2008) 165 CA4th 150, 164, 80 CR3d 812; *Sheller v Superior Court* (2008) 158 CA4th 1697, 1711, 71 CR3d 207. See also *New Albertsons, Inc. v Superior Court* (2008) 168 CA4th 1403, 1431, 86 CR3d 457 (trial court's inherent power to control litigation does not support sanctions in absence of egregious conduct or conduct violating statute).

The Judicial Council also lacks that authority. Thus, despite the broad language of Cal Rules of Ct 2.30(b), courts do not have authority under the Rules of Court alone to award fees as sanctions against a party. *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 371, 70 CR2d 449. In *Trans-Action*, after counsel for defendants had allegedly repeatedly violated in limine orders during trial, resulting in a mistrial, the trial court held counsel in contempt, and then, under former Cal Rules of Ct 227(b) (now Cal Rules of Ct 2.30(b)), ordered counsel to pay the plaintiffs' $50,000 in attorney fees incurred because of the mistrial.

The appellate court, after thoroughly reviewing the existing sanction statutes (CCP §§128.5, 128.7, 177.5, 1209, and 1218) and the history of sanctions in California, concluded that although the language in former Cal Rules of Ct 227(b) (now Cal Rules of Ct 2.30(b)) appears to give trial courts an independent basis for sanctions, the rule fails to provide the safeguards and limits found in sanction statutes enacted by the legislature and to that extent is invalid. The court concluded that the trial court had no authority for this type of sanction award and was limited to those fees that could be awarded under the contempt statutes (CCP §1218). 60 CA4th at 371.

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.3 II. SANCTIONS FOR ACTIONS BROUGHT WITHOUT REASONABLE CAUSE AND/OR IN BAD FAITH

## §6.3 II. SANCTIONS FOR ACTIONS BROUGHT WITHOUT REASONABLE CAUSE AND/OR IN BAD FAITH

Several statutes provide for the award of attorney fees when actions are brought without reasonable cause and/or in bad faith.

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## §6.4 A. Actions Under Government Claims Act or for Indemnity/Contribution (CCP §1038)

Under CCP §1038, a party may be awarded fees in actions brought under the California Government Claims Act or for express or implied indemnity when the court grants a dismissal, summary judgment, or other motion for early termination, and the court finds that the action was not brought "with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law." CCP §1038(a). Section 1038 expressly provides that "defense costs" include attorney fees, as well as expert fees. CCP §1038(b).

"Defense costs" are recoverable if the plaintiff lacks *either* reasonable cause *or* good faith. *Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr.* (1998) 19 C4th 851, 80 CR2d 803 (resolving split in districts). See, *e.g., Carroll v State* (1990) 217 CA3d 134, 265 CR 753 (fees proper when plaintiff unjustifiably refused to dismiss action against government entity and employee); *Curtis v County of Los Angeles* (1985) 172 CA3d 1243, 1246, 218 CR 772. But see *Clark v Optical Coating Laboratory, Inc.* (2008) 165 CA4th 150, 184, 80 CR3d 812 (although ultimately reversed, trial court's denial of original defense summary judgment motion established "reasonable cause" for purposes of §1038).

If the sanctioned party appeals the CCP §1038 award, the trial court may also award attorney fees on the appeal, even if the appeal is not frivolous. *Gonzales v ABC Happy Realty, Inc.* (1997) 52 CA4th 391, 60 CR2d 566.

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## §6.5 B. Actions Against Peace Officers (CCP §1021.7)

Under CCP §1021.7, in any lawsuit for damages against a peace officer brought for acts committed in the performance of his or her duties, or against the public entity employing the peace officer, or for libel or slander under CC §45 or §46, fees may be awarded to the successful defendant if the court finds the plaintiff's action was not "filed or maintained in good faith and with reasonable cause." The same standards used to determine entitlement to fees under CCP §1038 apply to awards under CCP §1021.7. *Salazar v Upland Police Dep't* (2004) 116 CA4th 934, 949, 11 CR3d 22, relying heavily on *Carroll v State* (1990) 217 CA3d 134, 265 CR 753.

Section 1021.7 applies only to actions in which peace officers are parties and in which their official duties are involved; it does not apply to libel and slander actions that do not involve police officers. *Martin v Szeto* (2004) 32 C4th 445, 9 CR3d 687; *Planned Protective Servs. v Gorton* (1988) 200 CA3d 1, 245 CR 790. It does contain a reciprocity element, however, because it applies both to suits against police officers *and* to bad faith actions for libel and slander brought *by* police officers or their employers. See *Martin*, 32 C4th at 451 n7 (disapproving assertion in *Planned Protective Servs. v Gorton* that §1021.7 applies only when peace officer or peace officer's public employer is a *defendant*).

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## §6.6 C. Actions for Misappropriation of Trade Secrets (CC §3426.4)

Attorney fees also may be awarded as a sanction for a bad faith claim of misappropriation, or for a bad faith motion to terminate an injunction or a bad faith opposition to that motion, or for a "willful and malicious appropriation." CC §3426.4. See *Gemini Aluminum Corp. v California Custom Shapes, Inc.* (2002) 95 CA4th 1249, 116 CR2d 358 (discussing standards); *Vacco Industries, Inc. v Van Den Berg* (1992) 5 CA4th 34, 6 CR2d 602 (discussing willful and malicious standard, prevailing party issue, and procedure for claiming fees).

Section 3426.4 does not apply to patent and trademark claims. *CytoDyn of New Mexico, Inc. v Amerimmune Pharmaceuticals, Inc.* (2008) 160 CA4th 288, 300, 72 CR3d 600.

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## §6.7 D. Actions Brought by Vexatious Litigants (CCP §§391-391.7)

The vexatious litigant statutes, CCP §§391-391.7, provide that a vexatious litigant may be required to post security sufficient to cover the defendant's "reasonable expenses, including attorney's fees." CCP §391(c). This provides an independent basis for recovering attorney fees, regardless of whether the defendant has any other basis for recovering fees. *Singh v Lipworth* (2005) 132 CA4th 40, 33 CR3d 178.

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## §6.8 III. SANCTIONS FOR GENERAL LITIGATION CONDUCT: CCP §§128.5 AND 128.7

Code of Civil Procedure §128.7, the current sanctions statute aimed at general litigation conduct (discussed in §§6.9-6.28), applies in suits filed on or after January 1, 1995; CCP §128.5 (discussed in §§6.29-6.39) applies in suits filed before that date (CCP §128.5(b)(1)). See *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 807, 11 CR3d 298. The procedures and standards of §128.5 also continue to apply to frivolous motions to strike under the anti-SLAPP statute (CCP §425.16). CCP §425.16(c)(1). See, *e.g., Doe v Luster* (2006) 145 CA4th 139, 143, 51 CR3d 403; *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 1392, 129 CR2d 892 (superseded by statute on other grounds (see Stats 2005, ch 535, §3)).

Section 128.5 authorizes sanctions, including attorney fees, for bad faith "actions or tactics." Section 128.7 is more limited; its focus is more on deterring the offending party than on compensating the offended party. See, *e.g., Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 368, 70 CR2d 449. Section 128.7 authorizes fees as sanctions only for the filing or advocacy of groundless claims in signed pleadings and other papers. It also provides a "safe harbor" period for alleged violations (see §6.13), while §128.5 does not.

**Additional authorities:** For an excellent review of CCP §§128.5 and 128.7, see *Levy* v *Blum* (2001) 92 CA4th 625, 112 CR2d 144, and *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 70 CR2d 449.

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## §6.9 A. Code of Civil Procedure §128.7: Litigation Sanctions in Actions Filed Since January 1, 1995

Code of Civil Procedure §128.7 effectively makes the signature by an attorney or unrepresented party on a pleading or other similar paper a certification "to the best of the person's knowledge, information, and belief" that the action has merit. CCP §128.7(a)-(b). Under §128.7, before presenting a pleading or similar paper, counsel must make reasonable efforts to ensure that (1) it is not being presented primarily for an improper purpose; (2) the claims, defenses, and other legal contentions are warranted; and (3) the allegations and other factual contentions have evidentiary support and the denials of factual contentions are warranted on the evidence or based on a lack of information or belief. CCP §128.7(b)(1)-(4).

Section 128.7(b) sets out requirements that parties and their attorneys must meet when presenting papers to the court (see §§6.11-6.18). Papers are "presented" to the court by signing, filing, submitting, or later advocating them. CCP §128.7(b). Violations of the requirements of §128.7, *e.g.,* a finding that a paper has been presented primarily for an improper purpose, may give rise to liability for sanctions, including attorney fees. See CCP §128.7(d).

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## §6.10 1. Code of Civil Procedure §128.7 Based on Fed R Civ P 11

With few differences (see §6.16), CCP §128.7 tracks Fed R Civ P 11. Like Rule 11, CCP §128.7 is designed to make litigants stop and think before they file a pleading. See Senate Committee on Judiciary Report on AB 3594, p 4 (Aug. 16, 1994).

When interpreting language in CCP §128.7 that is the same as that in Rule 11, California courts may look to federal decisions interpreting Rule 11. See *Guillemin v Stein* (2002) 104 CA4th 156, 128 CR2d 65; *Scripps Mem. Hosp. v California Employment Comm'n* (1944) 24 C2d 669, 677, 151 P2d 109; *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 422, 73 CR2d 655 (federal law "important" in applying "safe harbor" provision (CCP §128.7(c)(1))).

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/ 2. When CCP §128.7 Sanctions Are Available/ a. Requirements of §128.7/§6.11 (1) Applies to Every Pleading, Petition, Motion, and 'Similar Paper' That Must Be Signed by Attorney or Unrepresented Party

### 2. When CCP §128.7 Sanctions Are Available

### a. Requirements of §128.7

### §6.11 (1) Applies to Every Pleading, Petition, Motion, and "Similar Paper" That Must Be Signed by Attorney or Unrepresented Party

Under CCP §128.7, every pleading, petition, written notice of motion, or similar paper must be signed by at least one attorney of record in the attorney's individual name, or by the party if he or she is unrepresented, and state the signer's address and telephone number, if any. An unsigned paper must be stricken unless the omission is corrected promptly after being called to the attention of the attorney or the party. CCP §128.7(a).

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### §6.12 (2) Does Not Apply to Discovery Motions

Code of Civil Procedure §128.7 specifically does not apply to disclosures and discovery requests, responses, objections, or motions. CCP §128.7(g). On discovery sanctions, see §§6.51-6.55.

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.13 (3) Party Seeking Sanctions Must Comply With Safe Harbor Provision

### §6.13 (3) Party Seeking Sanctions Must Comply With Safe Harbor Provision

A party moving for sanctions under CCP §128.7 initially serves but does not file the notice of motion. Under this safe harbor provision (see §§6.26-6.27), the sanctions motion may be filed only if the challenged paper, claim, or contention is not withdrawn or appropriately corrected within 21 days after service of the notice of motion. CCP §128.7(c)(1); *Eichenbaum v Alon* (2003) 106 CA4th 967, 972, 131 CR2d 296.

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### §6.14 (4) Dismissal Does Not Moot Sanctions Motion

Sanctions may be awarded under CCP §128.7 even if the offending complaint is voluntarily dismissed with prejudice after the sanctions motion is filed. *Eichenbaum v Alon* (2003) 106 CA4th 967, 131 CR2d 296.

A plaintiff who voluntarily dismisses a complaint during the safe harbor period, however, will avoid sanctions altogether. See *Hart v Avetoom* (2002) 95 CA4th 410, 414, 115 CR2d 511 ("the 'purpose of section 128.7 is to deter frivolous filings, not to punish parties.… This purpose is forwarded by allowing the offending party to avoid sanctions altogether by appropriately correcting the sanctionable conduct after being alerted to the violation.'"). By voluntarily dismissing the action, the plaintiff has "withdrawn" the challenged claim for purposes of CCP §128.7(c)(1). *Hart v Avetoom, supra* ("It is difficult to imagine a more 'appropriate correction' than voluntary dismissal.").

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### §6.15 (5) Sanctions Available if Document Does Not Meet Three Conditions

By "presenting" any document to which CCP §128.7 applies (see §6.11)—*i.e.,* by signing, filing, submitting, or later advocating it to the court—an attorney or unrepresented party certifies that, to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the conditions set out in CCP §128.7(b)(1)-(4) are met. CCP §128.7(b). See §§6.16-6.18 for discussion of these conditions. The attorney or unrepresented party is subject to sanctions for violation of this certification. CCP §128.7(c); *Levy* v *Blum* (2001) 92 CA4th 625, 636, 112 CR2d 144.

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### §6.16 (a) Document Not for "Improper Purpose"

Under CCP §128.7(b)(1), the attorney or unrepresented party presenting a document to the court certifies that the document is not being presented primarily for an improper purpose, *e.g.,* to harass or to cause unnecessary delay or needless increase in litigation costs. Unlike Fed R Civ P 11, CCP §128.7(b)(1) does not authorize sanctions when a document is presented to the court (or an argument is later made to the court) for "any" improper purpose, but only if it is presented "primarily" for an improper purpose. See *Clark v Optical Coating Laboratory, Inc.* (2008) 165 CA4th 150, 179, 80 CR3d 812 (case supported by enough evidence to sustain favorable jury verdict neither lacked "evidentiary support" nor was prosecuted "primarily for an improper purpose" for purposes of §128.7). This difference may be significant for those charged with sanctions under §128.7(b)(1).

See also, *e.g., Coastal Transfer Co. v Toyota Motor Sales* (9th Cir 1987) 833 F2d 208, 212 (discussing federal improper purpose rule); *Hudson v Moore Bus. Forms, Inc.* (9th Cir 1987) 836 F2d 1156, 1163 (prayer for relief may be frivolous or for improper purpose).

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### §6.17 (b) Arguments Warranted by Law

Under CCP §128.7(b)(2), the attorney or unrepresented party presenting a document to the court certifies that the claims, defenses, and other legal contentions in the document are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or for the establishment of new law.

In ruling on sanctions motions under Fed R Civ P 11, the federal courts use an objective test to determine whether the presenter of a document made a reasonable inquiry into the law and facts before filing it, taking into account all the circumstances of the case. See, *e.g., Hendrix v Naphtal* (9th Cir 1992) 971 F2d 398, 401 ("Blind reliance on a lay client's ability to decide the legal question of domicile does not constitute a reasonable inquiry under Rule 11"); *Zaldivar v City of Los Angeles* (9th Cir 1986) 780 F2d 823, 829, disapproved on other grounds in *Cooter & Gell v Hartmarx Corp.* (1990) 496 US 384, 110 L Ed 2d 359, 110 S Ct 1005. Because California courts may look to federal decisions interpreting Rule 11 (see §6.10), it seems likely that under CCP §128.7, too, the test for reasonable inquiry will be an objective one. See, *e.g., Bockrath v Aldrich Chem. Co.* (1999) 21 C4th 71, 82, 86 CR2d 846 (§128.7 case stating that, in products liability case, it is "sharp practice" to implead defendants unless plaintiff "actually believes" there is reasonable medical probability that defendant's product was substantial factor in causing plaintiff's harm. "The actual-belief standard requires more than a hunch, a speculative belief, or wishful thinking: it requires a well-founded belief. We measure the truthfinding inquiry's reasonableness under an objective standard, and apply this standard both to attorneys and to their clients" (citing *Business Guides v Chromatic Comm. Enters.* (1991) 498 US 533, 548, 112 L Ed 2d 1140, 111 S Ct 922)). See also *Burkle v Burkle* (2006) 144 CA4th 387, 399, 50 CR3d 436; *Guillemin v Stein* (2002) 104 CA4th 156, 167, 128 CR2d 65.

**NOTE:** The objective test used under CCP §128.7 contrasts with that under §128.5, which courts have held requires conduct that is both subjectively and objectively unreasonable. See §6.31.

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.18 (c) Factual Contentions or Denials Supportable

### §6.18 (c) Factual Contentions or Denials Supportable

Under CCP §128.7(b)(3), the attorney or unrepresented party presenting a document to the court certifies that the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Correlatively, any denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief (CCP §128.7(b)(4)).

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### §6.19 b. Sanctions Also Available for Improper Sanctions Motions

If a sanctions motion under CCP §128.7 is brought "primarily for an improper purpose," *e.g.,* to harass, cause unnecessary delay, or needlessly increase the cost of litigation, the motion itself is subject to a motion for sanctions. CCP §128.7(h). See *Day v Collingwood* (2006) 144 CA4th 1116, 1130, 50 CR3d 903. Section 128.7(h) expressly states the legislature's intent that the courts "vigorously use" this authority to "deter that improper conduct or comparable conduct by others similarly situated."

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### 3. Elements of CCP §128.7 Sanctions Award

#### §6.20 a. Who May Be Sanctioned

Under CCP §128.7(c), a court may impose sanctions on the attorneys, law firms, or parties who have violated CCP §128.7(b) or are responsible for the violation. Absent exceptional circumstances, a law firm is jointly responsible for violations committed by partners, associates, and employees. CCP §128.7(c)(1).

The court may not impose monetary sanctions against a represented party for making frivolous legal contentions in violation of CCP §128.7(b)(2). CCP §128.7(d)(1).

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### b. Who May Recover Sanctions

### §6.21 (1) Pro Per Litigants May Not Recover Attorney Fees

Self-represented attorneys may not recover their own attorney fees as sanctions under CCP §128.7. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (disapproving *Abandonato v Coldren* (1995) 41 CA4th 264, 48 CR2d 429, and *Laborde v Aronson* (2001) 92 CA4th 459, 112 CR2d 119). The court reasoned that the words "incur" and "attorney's fees" in §128.7 imply "an agency relationship under which the client and the party are not one and the same, and out of which the attorney expects remuneration." 45 C4th at 517.

The same reasoning would appear to apply to a self-represented nonattorney seeking compensation for time and effort expended. See 45 C4th at 520. See also *Argaman v Ratan* (1999) 73 CA4th 1173, 1180, 86 CR2d 917 (discovery sanctions case involving self-represented attorney; recognizing that self-represented nonattorney litigants may not recover award for their time and effort).

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### §6.22 (2) Contingent Fee Cases

Whether sanctions may be awarded in a contingency fee case may be open to some debate. In *Marriage of Adams* (1997) 52 CA4th 911, 60 CR2d 811 (construing CCP §128.5), the trial court awarded sanctions for the expenses incurred by plaintiff's attorney as a result of defendant's attorney's bad faith tactics to delay an order of examination. Plaintiff and her attorney had a contingency fee arrangement and defendant argued that plaintiff had not "incurred" her attorney's expenses because of the contingency arrangement. The court of appeal held that the terms of the fee agreement between attorney and client were not relevant to whether sanctions should be awarded under CCP §128.5, citing the analogous situation of a party in pro per in *Abandonato v Coldren* (1995) 41 CA4th 264, 48 CR2d 429, and upheld the trial court order. 52 CA4th at 915. *Abandonato*, which upheld an award of attorney fees to a self-represented attorney as a sanction under CCP §128.5, was disapproved in *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (see §6.21); however, *Musaelian* specifically distinguished the situation of parties represented on a contingency fee basis from that of self-represented parties, noting that under a contingency fee arrangement attorney fees are "incurred." 45 C4th at 520.

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### §6.23 c. Court Must Explain Basis for Sanctions It Imposes

When imposing sanctions under CCP §128.7, "the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed." CCP §128.7(e). Section 128.5 contains similar language: An order imposing sanctions must be written and must "recite in detail the conduct or circumstances justifying the order." CCP §128.5(c). For cases discussing this requirement under §128.5, see §6.34.

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### §6.24 d. Amount of Attorney Fees Court May Award

The court may award "appropriate" sanctions. CCP §128.7(c). Sanctions are limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. CCP §128.7(d). See *Hart v Avetoom* (2002) 95 CA4th 410, 414, 115 CR2d 511 (sanctions under §128.7 not designed to be punitive but rather to promote compliance with the statutory standards of conduct); *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 368, 70 CR2d 449 (focus of §128.7 "is on deterring the offending party, not compensating the offended party"). They may include directives of a nonmonetary nature, an order to pay a penalty into court, or an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation. CCP §128.7(d).

In awarding sanctions, the court must consider whether the party seeking sanctions "has exercised due diligence." CCP §128.7(c). In addition, §128.7 sanctions are discretionary; if the court finds a violation, it "may" impose sanctions, but is not required to. CCP §128.7(c).

Discussing the amount of sanctions that may be "appropriate" under Fed R Civ P 11(c), the Notes of the Advisory Committee on the 1993 Amendments to Rule 11 say:

> The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.
>
> Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations [*i.e.,* paper submitted for improper purpose], deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement.

On the relevance of Fed R Civ P 11 to CCP §128.7, see §6.10.

The court may also award to the party prevailing on the sanctions motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion itself. CCP §128.7(c)(1).

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/ 4. Procedures for Obtaining Sanctions Under CCP §128.7/§6.25 a. Separate Noticed Motion

### 4. Procedures for Obtaining Sanctions Under CCP §128.7

### §6.25 a. Separate Noticed Motion

If a party or an attorney violates CCP §128.7, the other party may move for sanctions. A separate sanctions motion is required; it may not be included as an additional prayer for relief in another motion. On timing of the sanctions motion filed in conjunction with other pleadings, see §6.27.

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### §6.26 b. Safe Harbor Period

The notice of motion for sanctions should be *served* as required by CCP §1010 (service of notices), but it may not be *filed* if the challenged document is withdrawn or appropriately corrected within 21 days after service or within another time period set by the court. CCP §128.7(c)(1). Service of the motion initiates a 21-day "hold" or "safe harbor" period. This safe harbor provision gives attorneys the opportunity to withdraw the allegedly offending allegation or document. See *Hart v Avetoom* (2002) 95 CA4th 410, 115 CR2d 511; *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 422, 73 CR2d 655. If the pleading is withdrawn during the safe harbor period, the motion for sanctions may not be filed with the court; if it is not withdrawn during that period, the motion for sanctions may then be filed. *Malovec v Hamrell* (1999) 70 CA4th 434, 442, 82 CR2d 712. Sanctions may still be awarded even if the offending complaint is voluntarily dismissed with prejudice after the sanctions motion is filed. *Eichenbaum v Alon* (2003) 106 CA4th 967, 131 CR2d 296.

Strict compliance with the 21-day safe harbor period is required. The full 21 days must be provided before the court can award sanctions, absent a court order shortening time on the sanctions motion. *Li v Majestic Indus. Hills LLC* (2009) 177 CA4th 585, 99 CR3d 334 (party not entitled to sanctions based on underlying motion if court hears underlying motion less than 21 days after service of notice of sanctions motion). A letter to opposing party expressing an intent to seek sanctions does not substitute for service of a notice of motion under 128.7 and will not operate to start the clock running on the safe harbor period. *Martorana v Marlin & Saltzman* (2009) 175 CA4th 685, 700, 96 CR3d 172.

A plaintiff who voluntarily dismisses a complaint after the safe harbor period has begun but before the sanctions motion is filed will avoid sanctions altogether. *Hart v Avetoom* (2002) 95 CA4th 410, 414, 115 CR2d 511. By voluntarily dismissing the action, the plaintiff has "withdrawn" the challenged claim under CCP §128.7(c)(1). *Hart v Avetoom, supra*. Conversely, the court may award sanctions if the voluntary dismissal comes after the sanctions motion is filed. *Eichenbaum v Alon* (2003) 106 CA4th 967, 973, 131 CR2d 296.

On timing of the sanctions motion filed in conjunction with other pleadings, see §6.27.

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### §6.27 c. Coordination of Hearing Dates to Meet Safe Harbor Requirements

If a party seeks sanctions based on an underlying motion and that underlying motion is pending at the time it serves notice of a motion for sanctions under CCP §128.7, the moving party must still provide the 21-day safe harbor period. *Li v Majestic Indus. Hills LLC* (2009) 177 CA4th 585, 95 CR3d 334. If the hearing on the underlying motion is scheduled for less than 21 days after service of the notice of motion for sanctions, the party seeking sanctions should request either (1) a continuance of the hearing on the motion, or (2) an order shortening time to file its sanctions motion. *Li,* 177 CA4th at 595. Absent such relief, resolution of the underlying motion before expiration of the safe harbor period could deprive the party who filed the offending motion of the full 21-day safe harbor period.

A sanctions motion that has been filed but not served before a dispositive ruling on the merits of the action is not moot as long as the ruling was made after the expiration of the 21-day safe harbor period. *Day v Collingwood* (2006) 144 CA4th 1116, 1129, 50 CR3d 903. In *Day*, the defendant served a sanctions motion asserting that the action against him was frivolous while his motion for summary judgment was pending. The trial court granted the summary judgment motion after expiration of the 21-day safe harbor period, and the defendant then filed the sanctions motion. Because the safe harbor provision was satisfied, the sanctions motion was not moot. 144 CA4th at 1129. A trial court retains jurisdiction to consider a sanctions motion that is filed postjudgment. 144 CA4th at 1126.

Further, an order sustaining a demurrer without leave to amend does not bar CCP §128.7 sanctions unless the order has been reduced to judgment before the sanctions motion is served and filed. *Banks v Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 CA4th 949, 954, 118 CR2d 803 (defendant timely served sanctions motion and waited until safe harbor period passed; case discusses procedure for seeking sanctions for frivolous complaint as well as demurrer challenging complaint).

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### §6.28 d. Court's Own Motion

On its own motion, the court may issue an order describing the specific conduct that appears to violate CCP §128.7 and directing the offending attorney or party to show cause why it has not violated the section. CCP §128.7(c)(2).

Section 128.7's safe harbor provision (see §6.26) applies to motions for sanctions initiated by the court as well as those initiated by a party, and the court must provide an opportunity for the "challenged paper, claim, defense, contention, allegation, or denial" to be withdrawn or appropriately corrected within 21 days after service of the order to show cause. CCP §128.7(c)(2); *Malovec v Hamrell* (1999) 70 CA4th 434, 440, 82 CR2d 712.

Monetary sanctions may not be awarded on the court's own motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. CCP §128.7(d)(2).

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## §6.29 B. Code of Civil Procedure §128.5: Sanctions in Actions Filed Before 1995 and in Anti-SLAPP Motions

Under CCP §128.5, a court has the power to order a party or the party's attorney to pay reasonable expenses, including attorney fees, incurred "as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." CCP §128.5(a).

As noted in §6.8, CCP §128.5 applies in proceedings initiated before January 1, 1995. CCP §128.5(d)(1). (Section 128.7 (discussed in §§6.9-6.28) applies to all complaints filed or proceedings initiated on or after that dare; see *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 11 CR3d 298.) Very few cases filed before 1995 remain in litigation; thus, application of §128.5 in this situation is increasingly rare.

However, CCP §128.5 does continue to apply to sanctions for frivolous anti-SLAPP motions to strike under CCP §425.16: If the court finds that an anti-SLAPP motion "is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." CCP §425.16(c)(1). See *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 1392, 129 CR2d 892 ("the reference to section 128.5 in [§425.16(c)] means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute"). The supreme court agreed with this aspect of *Decker* in *Olmstead v Arthur J. Gallagher & Co.* (2004) 32 C4th 804, 817, 11 CR3d 298. See also, *e.g., Doe v Luster* (2006) 145 CA4th 139, 143, 51 CR3d 403; *Moore v Shaw* (2004) 116 CA4th 182, 199, 10 CR3d 154.

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## 1. Circumstances in Which CCP §128.5 Sanctions Are Available

### §6.30 a. Standard for Determining Bad Faith Actions or Frivolous Tactics

Even technically correct conduct can be in bad faith and therefore the basis for sanctions if it fails to respect the legitimate interests of fellow members of the bar, the judiciary, or the administration of justice. See, *e.g., Tenderloin Hous. Clinic, Inc. v Sparks* (1992) 8 CA4th 299, 10 CR2d 371; *West Coast Dev. v Reed* (1992) 2 CA4th 693, 3 CR2d 790, and cases cited at 2 CA4th at 702 ("[the courts] appear to be approaching a consensus on the morality of litigation tactics which requires that counsel, even if on technically correct legal ground, not take action which unreasonably or unnecessarily injures the opposing counsel or party").

In the context of an anti-SLAPP motion under CCP §425.16, frivolousness means that the motion is "totally and completely without merit"; that is, "any reasonable attorney would agree such motion is totally devoid of merit." *Moore v Shaw* (2004) 116 CA4th 182, 199, 10 CR3d 154. See also, *e.g., Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 469, 59 CR3d 839; *Foundation for Taxpayer & Consumer Rights v Garamendi* (2005) 132 CA4th 1375, 1388, 34 CR3d 368; *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 1392, 129 CR2d 892 (reversing sanctions because "record does not disclose… any evidence that [defendant] brought [anti-SLAPP] motions solely to cause unnecessary delay or to harass plaintiffs").

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### §6.31 b. Both Frivolousness *and* Bad Faith Are Required Under CCP §128.5

In cases involving frivolous actions or tactics, most courts also require a finding of bad faith as a condition of sanctions under CCP §128.5. See *West Coast Dev. v Reed* (1992) 2 CA4th 693, 3 CR2d 790. See also *Dolan v Buena Eng'rs* (1994) 24 CA4th 1500, 1506, 29 CR2d 903; *Shelton v Rancho Mortgage & Inv. Corp.* (2002) 94 CA4th 1337, 115 CR2d 82 (following *Dolan*). The party seeking sanctions must show *both* bad faith, *i.e.,* inappropriate conduct, vexatious tactics, or improper motive (sometimes called "subjective bad faith"), and a frivolous action or tactic (sometimes called "objective bad faith"). See also, *e.g., Llamas v Diaz* (1990) 218 CA3d 1043, 267 CR 427. "Our study of the legislative history of [CCP §]128.5, from its inception in 1981, through two amendments in 1984 and 1985, convinces us there must be an assessment of *subjective* bad faith in addition to finding [that] a particular action or tactic was frivolous." 218 CA3d at 1047.

The earlier cases read the requirements of CCP §128.5 in the disjunctive, justifying sanctions on a showing of frivolousness (*i.e.,* "objective" bad faith) even in the absence of an improper motive or conduct (*i.e.,* "subjective bad faith"). See, *e.g., Finnie v Town of Tiburon* (1988) 199 CA3d 1, 12, 244 CR 581; *Weisman v Bower* (1987) 193 CA3d 1231, 238 CR 756.

Note that prosecution of a frivolous action may itself be evidence from which a finding of subjective bad faith may be made. *West Coast Dev. v Reed, supra; Llamas v Diaz, supra*. Note also that bad faith does not require a finding of evil motive, but can be based on a finding that the action or conduct went beyond appropriate behavior or violated standards for professional conduct of lawsuits. *West Coast Dev. v Reed* (1992) 2 CA4th 693, 702, 3 CR2d 790.

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### §6.32 c. Sanctions Award Mandatory if Court Finds Anti-SLAPP Motion Frivolous or Intended Solely for Delay

Under the terms of CCP §425.16, if an anti-SLAPP motion is denied and the court finds that the motion was frivolous or solely intended to cause unnecessary delay, the court *must* award costs and reasonable attorney fees to the plaintiff under CCP §128.5. CCP §425.16(c). See, *e.g., Doe v Luster* (2006) 145 CA4th 139, 143, 51 CR3d 403. *Foundation for Taxpayer & Consumer Rights v Garamendi* (2005) 132 CA4th 1375, 1387, 34 CR3d 368.

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## 2. Elements of CCP §128.5 Sanctions Award

### §6.33 a. Fees May Be Awarded Against Client, Attorney, or Both

Under CCP §128.5, fees may be awarded against a party, the party's attorney, or both. In *Ellis v Roshei Corp.* (1983) 143 CA3d 642, 192 CR 57, the court awarded fees under §128.5 against an attorney who proceeded with a demurrer at his client's insistence, despite his adversary's willingness to stipulate to resolve the issue raised by the demurrer. See also *Wong v Davidian* (1988) 206 CA3d 264, 271, 253 CR 675, affirming sanctions against an attorney for failing to notify either the court or opposing counsel of his inability to attend the hearing.

Imposing sanctions against counsel, however, may be somewhat difficult in light of *Luke v Baldwin-United Corp.* (1985) 167 CA3d 664, 213 CR 654. In *Luke,* the trial court imposed sanctions against the defendant and its attorneys for filing a frivolous motion to quash, and the law firm appealed. The appellate court reversed, finding that fees should not have been awarded against the law firm because, among other reasons, the attorney-client privilege prevented the firm from exonerating itself, and there was no way to allocate responsibility between counsel and their client.

**WARNING:** Although *Luke* may make the imposition of sanctions somewhat less likely, most courts regularly impose and uphold sanctions against attorneys.

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### §6.34 b. Court Must State Reasons for Imposing Sanctions

An order awarding sanctions under CCP §128.5 must "recite in detail the conduct or circumstances justifying the order." CCP §128.5(c). Failure to do so may require that the matter be remanded to the trial court. *West Coast Dev. v Reed* (1992) 2 CA4th 693, 3 CR2d 790 (trial court's brief oral recitation of reasons for imposing sanctions held inadequate, though appellate court stated that it would have upheld order as harmless error if law had allowed). Merely stating that a particular action was frivolous, without further elaboration, is insufficient. *Decker v U. D. Registry, Inc.* (2003) 105 CA4th 1382, 1392, 129 CR2d 892 (anti-SLAPP motion); *Staples v Hoefke* (1987) 189 CA3d 1397, 1418, 235 CR 165. See also *Morin v Rosenthal* (2004) 122 CA4th 673, 682, 19 CR3d 149 (anti-SLAPP motion).

The requirement that reasons be specified is not jurisdictional, however. A failure to object to the lack of specificity constitutes a waiver of the requirement. *Andrus v Estrada* (1995) 39 CA4th 1030, 46 CR2d 300.

Due process requires adequate notice of an intent to impose sanctions and an opportunity to respond before findings are made. See *Eby v Chaskin* (1996) 47 CA4th 1045, 55 CR2d 517; *Bergman v Rifkind & Sterling, Inc.* (1991) 227 CA3d 1380, 1387, 278 CR 583.

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### §6.35 c. Amount of Fees Awardable

The amount of fees that may be awarded under CCP §128.5 is left to the court's discretion. *McFarland v City of Sausalito* (1990) 218 CA3d 909, 267 CR 412.

In setting the amount of a fee award under §128.5, the court is not bound by the traditional factors such as hours spent and results obtained. *Tenderloin Hous. Clinic, Inc. v Sparks* (1992) 8 CA4th 299, 10 CR2d 371. Because the purpose of sanctions under §128.5 is to control improper resort to the judicial process, the award is not subject to the strict accounting that is required for compensatory fee awards. *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 272 CR 535. The court in *On* further held that CCP §128.5(a), authorizing fee awards incurred "as a result of bad faith actions," required "only a causal relationship between the offending legal action and the expenses incurred by the opposing party." 222 CA3d at 1577.

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### §6.36 d. Period for Which Fees May Be Awarded

Attorney fees under CCP §128.5 may be awarded for both the period during which the injured party's attorney became attorney of record and the period before the injured party's attorney became the attorney of record. *West Coast Dev. v Reed* (1992) 2 CA4th 693, 706, 3 CR2d 790. See also *Frank Annino & Sons Constr. v McArthur Restaurants, Inc.* (1989) 215 CA3d 353, 263 CR 592 (sanctions may be awarded to dismissed defendant).

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### §6.37 e. Sanctions May Not Be Imposed for Costs or Expenses Unrelated to the Litigation

Sanctions may not include compensation for a party's losses that are not litigation-related costs or expenses. *Brewster v Southern Pac. Transp. Co.* (1991) 235 CA3d 701, 1 CR2d 89 (damages suffered because of plaintiff's bad faith actions not compensable as sanctions). *Brewster* was distinguished in *Tenderloin Hous. Clinic, Inc. v Sparks* (1992) 8 CA4th 299, 10 CR2d 371, in which the court allowed sanctions that included the cost of counsel's transatlantic plane fare and the value of vacation time lost when she was forced to attend a deposition that easily could have been rescheduled.

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### §6.38 f. Fees May Be Available for Time Spent Obtaining Sanctions

It may be possible to obtain an award of fees for the time counsel spent in obtaining sanctions against the opposing party or counsel. In *Brewster v Southern Pac. Transp. Co.* (1991) 235 CA3d 701, 1 CR2d 89, the court affirmed a fee award for the time spent obtaining sanctions, while expressly reserving the issue of whether such fees are generally available, noting that appellant had only raised the issue of whether the amount of fees awarded was reasonable. 235 CA3d at 716 n4. See *Gonzales v ABC Happy Realty, Inc.* (1997) 52 CA4th 391, 60 CR2d 566 (under CCP §1038 (see §6.4), successful defense of sanctions award on appeal entitles party to reasonable attorney fees for appellate work, even if appeal not frivolous; relying on "general rule that statutory attorney fee provisions are interpreted to apply to attorney fees on appeal unless the statute specifically provides otherwise"; 52 CA4th at 395 n4). See §9.18. But see *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1181, 230 CR 289, and other cases cited in §6.66.

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### §6.39 g. Procedure for Obtaining CCP §128.5 Sanctions

The procedure for claiming fees under CCP §128.5 is provided in the statute itself, which states that fees "shall not be imposed except on notice contained in a party's moving or responding papers; or [on] the court's own motion, after notice and opportunity to be heard." CCP §128.5(c).

Adequate notice must be given before sanctions can be imposed. In *Lesser v Huntington Harbor Corp.* (1985) 173 CA3d 922, 219 CR 562, the trial court granted a nonsuit and also found the action to be frivolous under CCP §128.5. It then set a hearing on the fee amount of sanctions for the next day. The court of appeal reversed the award, finding that the plaintiff had not been given an adequate opportunity to fully present his case on the §128.5 issue. See also *Eby v Chaskin* (1996) 47 CA4th 1045, 55 CR2d 517; *Bergman v Rifkind & Sterling, Inc.* (1991) 227 CA3d 1380, 278 CR 583. Compare these cases with *Brewster v Southern Pac. Transp. Co.* (1991) 235 CA3d 701, 716, 1 CR2d 89; *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1435, 240 CR 297.

In contrast, in *Marriage of Quinlan* (1989) 209 CA3d 1417, 1422, 257 CR 850, the court held that a separate and later hearing date for a sanctions motion is not always required; if the party against whom sanctions are requested has adequate notice of the specific grounds for the motion and an opportunity to respond, a request for sanctions can be made and heard on the same day.

The plaintiff's motion for sanctions for a frivolous anti-SLAPP motion under CCP §425.16(c) must be made to the trial court; fees cannot be awarded to the plaintiff when the request is first made on appeal. *Olsen v Harbison* (2005) 134 CA4th 278, 288, 35 CR3d 909.

The time limits for filing such a motion do not begin to run until entry of judgment at the conclusion of the litigation. *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 468, 59 CR3d 839. See also *Doe v Luster* (2006) 145 CA4th 139, 144, 51 CR3d 403 (for party seeking attorney fees, "it would seem better practice to defer the fee application until the motion to strike has been decided since the fees and costs actually incurred can be determined only after the hearing").

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## §6.40 C. Factors That May Affect Entitlement to Fees Awarded as Sanctions

The type of case or the parties' status may affect whether the court will award sanctions or the size of the award, as discussed below in §§6.41-6.45.

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### 1. Type of Case

### §6.41 a. Political Office Controversy

In *California War Veterans for Justice v Hayden* (1986) 176 CA3d 982, 990, 222 CR 512, the plaintiffs' action to disqualify the defendant from holding political office was brought in the face of 100 years of overwhelming contrary precedent. The appellate court denied the defendant's request for fees, however, because it was "mindful that the chilling effect of sanctions should be avoided wherever possible, especially in a suit involving controversy over political office." Although *Hayden* concerned sanctions for a frivolous appeal (see §§6.60-6.61), its reasoning seems to apply equally to sanctions sought under CCP §§128.5 and 128.7.

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.42 b. Judicial Challenge

### §6.42 b. Judicial Challenge

Sanctions can be imposed for a frivolous challenge to a judge under CCP §170.1. *Estate of Di Grazia* (1993) 13 CA4th 681, 16 CR2d 621, disapproved on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751 (sanctions ordered to reimburse county for attorney fees incurred in defending judge from frivolous challenge).

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### §6.43 c. In Lieu of Malicious Prosecution Action

Sanctions may be imposed in lieu of a malicious prosecution action, even though the result is to deny the sanctioned party a jury trial. *Andrus v Estrada* (1995) 39 CA4th 1030, 46 CR2d 300 (construing CCP §128.5).

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### §6.44 d. Administrative Proceedings

The availability of sanctions may be limited in administrative proceedings. In *Sam Andrews' Sons v ALRB* (1988) 47 C3d 157, 253 CR 30, the court held that the ALRB lacked the power to award fees to parties in administrative proceedings under the Agricultural Labor Relations Act (Lab C §§1140-1140.4), even if their positions were frivolous or in bad faith, without express statutory authority or a common-law exception to CCP §1021, which prohibits awards of attorney fees absent statutory or contractual authorization. See especially footnote 10 of that opinion.

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### §6.45 e. Contractual Arbitration Proceedings

In *Thompson v Jespersen* (1990) 222 CA3d 964, 968, 272 CR 132, the court expressed doubt about the applicability of CCP §128.5 to contractual arbitration proceedings. On the other hand, an arbitrator can award sanctions under CCP §128.5 when the parties' agreement empowers the arbitrator to award "any remedy or relief" available under California law. *David v Abergel* (1996) 46 CA4th 1281, 54 CR2d 443.

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## 2. Parties' Status

### §6.46 a. Public Entity

In *Atchison, T. & S.F. Ry. v Stockton Port Dist.* (1983) 140 CA3d 111, 189 CR 208, the court held that monetary sanctions under CCP §128.5 should only be granted to a public entity "in the clearest of cases." The plaintiff in *Atchison* had filed suit before conducting discovery to avoid the 6-month statute of limitations under Govt C §945.6(a)(1) and had not even served the complaint on the defendant. After some discovery, the plaintiff dismissed its action. The court held that in these circumstances the trial court abused its discretion in awarding fees under §128.5. See also *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 275 CR 594 (government entity could not recover attorney fees under §128.5, because city employee's wrongful termination action not in bad faith).

The court in *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 230 CR 289, held that fees were properly awarded under CCP §128.5 to the defendant district and defendant director when the plaintiff unjustifiably refused to dismiss the action. See also *Bach v McNelis* (1989) 207 CA3d 852, 255 CR 232 (sanctions awarded to judges sued for allegedly illegal judge assignment policy and for violations of Political Reform Act of 1974 (Govt C §§81000-81016)); *Pyne v Meese* (1985) 172 CA3d 392, 218 CR 87 (fees awarded to State of California, Department of Motor Vehicles, and DMV director, who were among defendants in action challenging DMV's seizure of plaintiffs' vehicles for failure to pay registration fees).

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### §6.47 b. Client

Under CCP §128.7(d)(1), the court may not impose monetary sanctions against a represented party for making frivolous legal contentions in violation of CCP §128.7(b)(2). Such sanctions are authorized against an attorney or an unrepresented party. See CCP §128.7(b).

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### §6.48 c. Former Party

A trial court has jurisdiction to award sanctions to a defendant who was dismissed from the action by the plaintiff and is therefore no longer a party. *Frank Annino & Sons Constr. v McArthur Restaurants, Inc.* (1989) 215 CA3d 353, 263 CR 592 (decided under CCP §128.5).

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### §6.49 d. Pro Per Litigant

Self-represented attorneys may not recover their own attorney fees as sanctions under CCP §128.7. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (disapproving *Abandonato v Coldren* (1995) 41 CA4th 264, 48 CR2d 429 (upholding award of attorney fees to self-represented attorney as sanction for plaintiff's bad faith tactics under CCP §128.5), and *Laborde v Aronson* (2001) 92 CA4th 459, 112 CR2d 119 (upholding award under CCP §128.7)). *Musaelian*'s reasoning would also appear to apply to a self-represented nonattorney seeking compensation for time and effort expended. 45 C4th at 520. See §6.21.

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### §6.50 e. Convicted Felon

Under CCP §128.7, the court may assess punitive damages in addition to sanctions, if it determines that (1) the plaintiff is a convicted felon who is suing the victim or certain other parties for the felon's injuries arising from the felonious act itself, and (2) the plaintiff was guilty of fraud, oppression, or malice in maintaining the action. CCP §128.7(f).

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## IV. DISCOVERY SANCTIONS; CCP §§2023.010-2023.040

### §6.51 A. Permissive Discovery Sanctions

Under certain circumstances enumerated in CCP §§2023.010-2023.040, a court may order a monetary sanction, including attorney fees, for misuse of the discovery process. Section 2023.010 provides that the following are misuses of the discovery process:

- Persisting, over objection and without substantial justification, in attempt to obtain something outside the scope of permissible discovery;
- Using a discovery method without following proper procedures;
- Causing unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;
- Failing to respond or submit to authorized discovery;
- Unmeritoriously objecting to discovery without substantial justification;
- Evasively responding to discovery;
- Disobeying a court order to respond to discovery;
- Unsuccessfully making or opposing a motion to compel or limit discovery without substantial justification; and
- Failing to confer with opposing counsel or party to resolve informally discovery disputes (regardless of outcome of dispute).

The court may order (among other sanctions) payment of reasonable expenses, including attorney fees, against any person who is guilty of such conduct, or any attorney advising such conduct. The court may also impose this sanction for unsuccessfully asserting that another has misused the discovery process. CCP §2023.030.

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## §6.52 B. Mandatory Discovery Sanctions

Several of the Code of Civil Procedure sections governing discovery specifically provide that sanctions may be granted under CCP §§2023.010-2023.040. See, *e.g.,* CCP §§2025.410(d), 2030.290(c), 2030.300(d), 2030.310(d). As to those provisions, CCP §2023.030(a) provides that the court *shall* impose that monetary sanction unless it finds substantial justification or other circumstances that would make imposition of a sanction unjust. Other sections governing discovery contain their own mandatory sanction provisions. See, *e.g.,* CCP §2033.420; *Miller v American Greetings Corp.* (2008) 161 CA4th 1055, 1066, 74 CR3d 776 (awarding costs of proof for denying requests for admission improper under CCP §2033.420 when appellants could have reasonably entertained good faith (albeit mistaken) belief they could prevail).

For in-depth discussion of discovery sanctions, see California Civil Discovery Practice §§15.86-15.116 (4th ed Cal CEB 2006).

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.53 C. Safe Harbor for Sanctions for Electronically Stored Information

### §6.53 C. Safe Harbor for Sanctions for Electronically Stored Information

The Electronic Discovery Act (EDA) (Stats 2009, ch 5) amended the Civil Discovery Act (CCP §§2016.010-2036.050) to establish discovery procedures to obtain electronically stored information (ESI). Although existing law permits or requires the court to order sanctions in certain circumstances (see §§6.51-6.52), the EDA added a safe harbor provision for ESI. Absent exceptional circumstances, a court must not impose monetary sanctions for failure to provide ESI that has been "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." See CCP §§1985.8(l), 2031.060(i), 2031.300(d), 2031.310(j), 2031.320(d).

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## §6.54 D. How to Obtain Discovery Sanctions

The request for sanctions is made on notice to all affected persons after an opportunity for hearing. CCP §2023.030. See *London v Dri-Honing Corp.* (2004) 117 CA4th 999, 12 CR3d 240 (explaining procedures that may be followed). The notice must specify the type of sanction sought and must be accompanied by a supporting memorandum and a declaration. CCP §2023.040. See, *e.g., Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855 (sanctions awardable to party represented by pro bono attorney; amount based on "reasonable value of legal services rendered"). For further discussion of discovery sanctions, see California Civil Discovery Practice (4th ed Cal CEB 2006).

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## §6.55 E. Availability of Discovery Sanctions Under Federal Law

Discovery sanctions are also available under federal law. See Fed R Civ P 37(d), (g); *Henry v Gill Indus.* (9th Cir 1993) 983 F2d 943.

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## V. OTHER SANCTION STATUTES

### §6.56 A. Violation of Local Rules (CCP §575.2)

Attorney fees as sanctions may be awarded under CCP §575.2 for violation of local rules. In *Rietveld v Rosebud Storage Partners* (2004) 121 CA4th 250, 16 CR3d 791, the court upheld sanctions for failure to meaningfully participate in judicial arbitration, citing a local rule that allowed attorney fees to be imposed for such a failure.

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### §6.57 B. Contempt Proceedings (CCP §1218(a))

Any person found guilty of contempt may be fined and, in addition, may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney fees and costs incurred in connection with the contempt proceeding. CCP §1218(a). See also *Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc.* (1997) 60 CA4th 352, 370, 70 CR2d 449, for discussion of this sanction statute.

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## §6.58 C. No Attorney Fees as Sanctions for Bad Faith Affidavits in Summary Judgment Motions (CCP §437c(i))

Sanctions for bad faith affidavits in summary judgment motions may not include attorney fees. *Collins v Department of Transp.* (2003) 114 CA4th 859, 8 CR3d 132.

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.59 D. No Attorney Fees as Sanctions for Trial Continuance (CCP §1024)

### §6.59 D. No Attorney Fees as Sanctions for Trial Continuance (CCP §1024)

The statutory directive in CCP §1024 that a party seeking continuance of a trial pay the opposing party's "expenses" does not include attorney fees. *Levine v Pollack* (1995) 37 CA4th 129, 43 CR2d 491.

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## §6.60 VI. FRIVOLOUS APPEALS (CCP §907 AND CAL RULES OF CT 8.276(a))

Code of Civil Procedure §907, in conjunction with Cal Rules of Ct 8.276(a), authorizes the reviewing court to add "damages as may be just" to the costs on appeal if it finds that the appeal is frivolous or was taken solely to delay. These "damages" may include the appellee's reasonable attorney fees. See, *e.g.*, *Young v Rosenthal* (1989) 212 CA3d 96, 134, 260 CR 369 (sanctions under CCP §907 and former Cal Rules of Ct 26(a) properly measured by attorney fees incurred in responding to frivolous appeals).

The statutory and constitutional underpinnings of the rule stated in §907, as well as some general guidelines, are stated in *Marriage of Flaherty* (1982) 31 C3d 637, 183 CR 508. *Flaherty* held that an appeal may be frivolous because it was taken for an improper motive or because it would appear to be without merit to a reasonable attorney.

Fees for a frivolous appeal may also be awarded under CCP §425.16(c) by the trial court. *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 461, 59 CR3d 839 ("trial court's authority to award fees and costs under [§425.16(c)] includes authority to award fees incurred in responding to an appeal of an order granting or denying a special motion to strike, or of an order awarding attorney fees in connection with such motion").

**Additional authorities:** *Banks v Dominican College* (1995) 35 CA4th 1545, 42 CR2d 110; *Bank of Cal. v Varakin* (1990) 216 CA3d 1630, 265 CR 666; *Bach v County of Butte* (1989) 215 CA3d 294, 263 CR 565; *Young v Rosenthal* (1989) 212 CA3d 96, 260 CR 369; *Zimmerman v Drexel Burnham Lambert, Inc.* (1988) 205 CA3d 153, 252 CR 115; *McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1985) 176 CA3d 480, 222 CR 228.

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### §6.61 A. Only a Party May Seek Sanctions

Only a party to an appeal may seek sanctions for a frivolous appeal. *Bovard v American Horse Enters.* (1988) 201 CA3d 832, 843, 247 CR 340 (attorney who had substituted out was not party to appeal and therefore lacked standing to seek sanctions for frivolous appeal).

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## B. Sanctions Awardable When Appeal Is Frivolous or Taken Solely for Purposes of Delay

### §6.62 1. The Subjective "Motive" Standard

The subjective standard for determining whether an appeal is frivolous or was taken solely to delay considers the motives of the party or attorney. If the only purpose of the appeal appears to have been delay, the standard is satisfied and sanctions are appropriate. Thus, even if a colorable claim is presented, sanctions may be awarded if clear and convincing evidence shows that delay was the appeal's sole purpose. *San Bernardino Community Hosp. v Office of Statewide Health Planning & Dev.* (1986) 187 CA3d 457, 470, 231 CR 673. For an example of an act deemed to show subjective intent to pursue a frivolous appeal, see *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 286 CR 556, in which the appellant had submitted forged documents to the court and then minimized the seriousness of having done so.

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### §6.63 2. The Objective "Frivolous" Standard

The objective standard looks at the appeal from a reasonable person's perspective. Fees are appropriate under that standard "when any reasonable attorney would agree that the appeal is totally and completely without merit." *Marriage of Flaherty* (1982) 31 C3d 637, 650, 183 CR 508.

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### §6.64 3. Relationship Between Subjective and Objective Standards

The subjective "motive" standard and the objective "frivolous" standards are interrelated. As stated in *Marriage of Flaherty* (1982) 31 C3d 637, 649, 183 CR 508, "the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." See also *Evans v CenterStone Dev. Co.* (2005) 134 CA4th 151, 35 CR3d 745 (sanctions based on numerous unreasonable violations of appellate rules); *Kim v Walker* (1989) 208 CA3d 375, 256 CR 223.

**Additional authorities:** *Johnson v Lewis* (2004) 120 CA4th 443, 15 CR3d 507; *Westphal v Wal-Mart Stores, Inc.* (1998) 68 CA4th 1071, 1080, 81 CR2d 46; *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1075, 275 CR 594; *McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1985) 176 CA3d 480, 490, 222 CR 228; *Maple Props. v Harris* (1984) 158 CA3d 997, 205 CR 532.

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### §6.65 C. Sanctions Awardable for Partially Frivolous Appeals

Sanctions may be awarded for an appeal that is only partially frivolous, if the frivolous claims are a significant and material part of the appeal. *People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 17 CR2d 19; *Bach v McNelis* (1989) 207 CA3d 852, 255 CR 232; *Maple Props. v Harris* (1984) 158 CA3d 997, 1010, 205 CR 532.

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### §6.66 D. Appellate Sanctions for Appeal of Sanctions Order Determined Independently of Trial Court Sanctions

Sanctions on appeal after an unsuccessful appeal of trial court sanctions under CCP §128.5 or §437c(j) must be judged independently from the trial court's determination of bad faith. See *Tenderloin Hous. Clinic, Inc. v Sparks* (1992) 8 CA4th 299, 10 CR2d 371 (affirming trial court award but denying sanctions for appeal); *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1181, 230 CR 289 (same). See also *McFarland v City of Sausalito* (1990) 218 CA3d 909, 913, 267 CR 412; *Frank Annino & Sons Constr. v McArthur Restaurants, Inc.* (1989) 215 CA3d 353, 359, 263 CR 592 (appeal passed "brows-a-wrinkle" test); *Bach v McNelis* (1989) 207 CA3d 852, 255 CR 232; *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 244 CR 581 (sanctions imposed under former Cal Rules of Ct 26 (now Cal Rules of Ct 8.272; see also Cal Rules of Ct 8.276) for filing frivolous appeals); *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1439, 240 CR 297. But see *Gonzales v ABC Happy Realty, Inc.* (1997) 52 CA4th 391, 60 CR2d 566 (under CCP §1038, successful defense of sanctions award on appeal entitles party to reasonable attorney fees for appellate work, even if appeal not frivolous); §6.38.

The sanctioned party's tactics or actions in the trial court, however, may influence the appellate court's view of the appeal. See *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 286 CR 556.

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**Source:** Civil Litigation/California Attorney Fee Awards/6 Attorney Fees Awarded as Sanctions/§6.67 E. Sanctions for Frivolous Appeal May Not Be Recovered in Subsequent Bad Faith Action

## §6.67 E. Sanctions for Frivolous Appeal May Not Be Recovered in Subsequent Bad Faith Action

Damages for a frivolous appeal may not be awarded in a subsequent "bad faith" action against the appellant's insurer who made the frivolous appeal. *Coleman v Gulf Ins. Group* (1986) 41 C3d 782, 226 CR 90. The only remedy for such conduct is to request sanctions under CCP §907.

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### §6.68 F. Fees May Be Awarded Against Client, Attorney, or Both

Like sanctions at trial under CCP §§128.5 and 128.7, sanctions in the appellate court under CCP §907 may be assessed against the party, the party's attorney, or both, depending on the court's assessment of fault. See *Harris v Sandro* (2002) 96 CA4th 1310, 1316, 117 CR2d 910 (imposing sanctions jointly and severally against client and attorneys, although sanctions denied against attorney who performed no work in connection with appeal); *Evans v CenterStone Dev. Co.* (2005) 134 CA4th 151, 35 CR3d 745; *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 286 CR 556 (joint and several liability imposed); *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 275 CR 594 (sanctions against attorney only).

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### §6.69 G. Amount of Sanctions

The amount of sanctions under CCP §907 must be consistent with the purposes for which they are imposed, which is to discourage frivolous appeals and compensate the respondents for their loss due to delay. Thus, when the defendant in a $10 million class action filed a frivolous appeal from the judgment, the court ordered it and its counsel to pay as sanctions the interest earned on the $10 million while the appeal was pending. *McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1985) 176 CA3d 480, 492, 222 CR 228. See also, *e.g., Pollock v University of S. Cal.* (2003) 112 CA4th 1416, 6 CR3d 122 ($17,000 in sanctions ordered; $1000 prior sanction in trial court); *Marriage of Mason* (1996) 46 CA4th 1025, 1028, 54 CR2d 263 (request for sanctions for frivolous appeal treated as request for attorney fees on appeal); *Say & Say v Castellano* (1994) 22 CA4th 88, 95, 27 CR2d 270 ($25,000); *Papadakis v Zelis* (1992) 8 CA4th 1146, 1150, 11 CR2d 411 ($20,000).

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### §6.70 1. Amount of Sanctions May Include Cost to Court System

The cost to the court system may also be included. In *Bank of Cal. v Varakin* (1990) 216 CA3d 1630, 1640, 265 CR 666, the court assessed sanctions that included both respondents' attorney fees and $25,000 payable to the court. In *Bach v County of Butte* (1989) 215 CA3d 294, 312, 263 CR 565, an additional $2500 sanction was imposed "to compensate for the expense of processing, reviewing and deciding a frivolous appeal." See also, *e.g., Olsen v Harbison* (2005) 134 CA4th 278, 35 CR3d 909; *Pierotti v Torian* (2000) 81 CA4th 17, 96 CR2d 553; *Westphal v Wal-Mart Stores, Inc.* (1998) 68 CA4th 1071, 1082, 81 CR2d 46 (sanctions of $11,000 payable to opposing party and $2500 payable to court); *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 17, 244 CR 581 (sanctions amount based on respondent's costs and attorney fees; sanctions imposed of $14,000, plus $2324 to court).

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## §6.71 2. Other Factors Determining Amount of Sanctions

The court in *Maple Props. v Harris* (1984) 158 CA3d 997, 1011, 205 CR 532, listed the factors it considered in assessing $20,000 in sanctions for a frivolous appeal, including: the "nature and extent of the [frivolous] claims on appeal"; the "protracted length of [the] litigation and the delay in the resolution of the appeal"; the "chilling effect" the appeal had on the respondents' rights; the respondent's legal costs in defending the frivolous appeal; the "undue burden" on the court; and the "need to deter [such] conduct in the future."

In *Bank of Cal. v Varakin* (1990) 216 CA3d 1630, 1640, 265 CR 666, the court considered a further factor in determining the amount of sanctions: the sanctioned parties' financial worth.

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### §6.72 H. Examples of Fee Awards as Sanctions for Frivolous Appeals

- *Evans v CenterStone Dev. Co.* (2005) 134 CA4th 151, 168, 35 CR3d 745 (monetary sanctions for unreasonable violations of former Cal Rules of Ct 14(a)(1)(B)-(C) and 14(a)(2)(C) (now Cal Rules of Ct 8.204), including numerous violations of rules pertaining to appellate briefs);
- *Pierotti v Torian* (2000) 81 CA4th 17, 31, 96 CR2d 553 (appellant did not support all statements of fact in briefs with citations to record (former Cal Rules of Ct 15(a); now see Cal Rules of Ct 8.204(a)(1)(C)) and did not confine statement to matters in record on appeal (former Cal Rules of Ct 13; now see Cal Rules of Ct 8.204(a)(2)(C)));
- *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1079, 275 CR 594 (sanctions of $7916.67 imposed for respondent's fees and costs, plus $2324 to court);
- *Bank of America v Henkin* (1986) 185 CA3d 919, 230 CR 113 (penalty of $1500 imposed for frivolous appeal);
- *California War Veterans for Justice v Hayden* (1986) 176 CA3d 982, 990, 222 CR 512 (although appeal might be viewed as patently frivolous and sanctions may properly be imposed in case involving political controversy, sanctions denied to avoid chilling effect in suit involving controversy over political office), discussed in §6.41;
- *Corona v Lundigan* (1984) 158 CA3d 764, 769, 204 CR 846 (penalties of $4000, in addition to costs, imposed for frivolous appeal);
- *Maple Props. v Harris* (1984) 158 CA3d 997, 1011, 205 CR 532 (sanctions of $20,000 imposed for respondent's fees, in addition to costs on appeal);
- But see *Armitage v Decker* (1990) 218 CA3d 887, 908 n4, 267 CR 399 (sanctions should be applied "most sparingly to deter only the most egregious conduct").

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## §6.73 I. How to Obtain Sanctions for a Frivolous Appeal

The procedures for obtaining an award of fees as sanctions for a frivolous appeal are set out in Cal Rules of Ct 8.276(b). Rule 8.276(b) requires a party seeking sanctions for a frivolous appeal to file a motion requesting sanctions at the time a motion to dismiss the appeal is filed, or no later than 10 days after the appellant's reply brief is due. See *Bak v MCL Financial Group, Inc.* (2009) 170 CA4th 1118, 1127, 88 CR3d 800 (failure to comply with procedural requirements of Rule 8.276(b) is grounds for denial of request for sanctions on appeal).

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# 7

# Fees as Damages

I. ATTORNEY FEES RECOVERABLE AS DAMAGES
A. Attorney Fees Available as Damages in Some Cases §7.1
B. Nonstatutory Costs and Expert Witness Fees May Also Be Recoverable by Parties' Agreement §7.2

II. TYPES OF ACTIONS IN WHICH ATTORNEY FEES ARE GENERALLY SOUGHT AS DAMAGES §7.3
A. "Tort of Another" Doctrine: Fees as Damages When Tortfeasor's Action Causes Suit By or Against Third Party §7.4
1. Doctrine May Apply Even if Tortfeasor and Third Party Are Joined in Action §7.5
2. Doctrine May Apply Even if Plaintiff Loses Case Against Third Party §7.6
3. Examples of Doctrine §7.7
4. Circumstances in Which Doctrine Does Not Apply §7.8
B. *Brandt* Fees: Fees as Damages When Insurance Benefits Denied in Bad Faith §7.9
1. *Brandt* Fees Available Only if Denial of Benefits Is in Bad Faith §7.10
2. *Brandt* Fees Not Available for Bad Faith Denial of Contract §7.11
C. Limitations on Fees Recoverable Under "Tort of Another" Doctrine and *Brandt* §7.12
1. Under "Tort of Another" Doctrine, Fees Limited to Those Incurred Against Third Party; Fees Incurred Against Tortfeasor Not Recoverable as Damages §7.13
2. Under *Brandt,* Fees Limited to Those Incurred to Prove Bad Faith Denial of Benefits §7.14
3. Calculating Fees in Contingent Fee Cases §7.15
4. Appellate Fees §7.16
5. Assignment of Right to *Brandt* Fees §7.17
D. False Imprisonment §7.18
E. Malicious Prosecution §7.19
F. Legal Malpractice Actions §7.20
G. Attorney's Suit Against Client to Recover Fees §7.21
H. Insured's Suit Against Insurer for Wrongful Failure to Defend §7.22
I. Indemnification Proceedings §7.23
J. Other Actions §7.24

III. ACTIONS FOR WHICH ATTORNEY FEES MAY *NOT* BE RECOVERED AS DAMAGES §7.25
A. Insurer's Good Faith Failure to Defend §7.26
B. Misrepresentation by Agent §7.27
C. Responding to Extortionate Demands §7.28
D. Attorney's Attempt to Collect or Retain Unreasonable Fees §7.29
E. Some Indemnity Agreements §7.30
F. Suit Against Fiduciary §7.31
G. City's Nontortious Denial of Claim of Damage §7.32
H. Attorney Fees May Be Considered for Other Purposes §7.33

IV. PROCEDURE FOR SEEKING FEES AS DAMAGES §7.34

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# I. ATTORNEY FEES RECOVERABLE AS DAMAGES

## §7.1 A. Attorney Fees Available as Damages in Some Cases

Attorney fees are normally awarded only to compensate a prevailing party for attorney fees incurred in pursuing the action (see chaps 2-5) or as sanctions for improper behavior (see chap 6). This type of fee-shifting is an exception to the "American rule," codified in CCP §1021, which generally provides that each party will bear its own fees and costs in the absence of an agreement or statute to the contrary. See §1.2. In certain types of actions, however, attorney fees may be awarded as a *component of damages,* to be pleaded and proven at trial. In such cases there is no recovery of "attorney fees qua attorney fees." *Brandt v Superior Court* (1985) 37 C3d 813, 817, 210 CR 211.

Under this theory, attorney fees are recoverable as damages resulting from a tort in the same way that medical fees are recoverable as damages in a personal injury action. *Brandt*, 37 C3d at 817; *Sooy v Peter* (1990) 220 CA3d 1305, 1310, 270 CR 151. See also *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 505, 198 CR 551 (characterizing "tort of another" doctrine as equitable exception to CCP §1021, then rejecting broad right to fees as damages for breach of fiduciary duty); *Manning v Sifford* (1980) 111 CA3d 7, 10, 168 CR 387.

Thus, fees sought as damages are subject to different substantive and procedural rules than apply in fee-shifting cases. This chapter discusses those rules.

**NOTE:** Attorney fees *as damages* are not an exception to CCP §1021. As the court explained in *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 621, 30 CR 821, "we are not dealing with 'the measure and mode of compensation of attorneys' but with damages wrongfully caused by defendant's improper actions." See also *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211, discussed in §7.9-7.17; *Burnaby v Standard Fire Ins. Co.* (1995) 40 CA4th 787, 47 CR2d 326; *McGregor v Paul Revere Life Ins. Co.* (9th Cir 2004) 369 F3d 1099.

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## §7.2 B. Nonstatutory Costs and Expert Witness Fees May Also Be Recoverable by Parties' Agreement

Expert witness fees and other types of expenses that are not recoverable as statutory costs but are sought under a broadly worded contractual provision also are treated as damages and must be pleaded and proved at trial; this rule applies whether the expenses are sought by plaintiffs or defendants. *Carwash of America-PO LLC v Windswept Ventures No. 1* (2002) 97 CA4th 540, 544, 118 CR2d 536, and cases cited therein.

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## §7.3 II. TYPES OF ACTIONS IN WHICH ATTORNEY FEES ARE GENERALLY SOUGHT AS DAMAGES

The types of actions in which fees may be recovered as damages generally fall into three categories:

- The "tort of another" doctrine, *i.e.,* when the tort of one party requires another to bring or defend a lawsuit against a third person;
- An action in which attorney fees are sought as a component of damages for the cause of action alleged, *e.g.,* false imprisonment or malicious prosecution; and
- An action by an attorney against a client for a reasonable or agreed-on fee.

See *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 425, 152 CR 31 (citing *Huber v Shedoudy* (1919) 180 C 311, 314, 181 P 63); *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620, 30 CR 821.

Under any of these circumstances, the attorney fees must be pleaded and proven at trial like any other item of damages, unless there has been a stipulation or contrary order. *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211. See also *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 678 n16, 186 CR 589 (noting that attorney fees awardable under statute are normally sought as costs after judgment, and distinguishing situations in which fees sought as damages are part of the cause of action, rather than incident to it). See generally 7 Witkin, California Procedure, *Judgment* §§151-158 (5th ed 2008).

The following sections (§§7.4-7.24) discuss the types of actions in which the courts have recognized a right to recover attorney fees as damages. It should be noted here that in *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 507, 198 CR 551, the court characterized the "tort of another" doctrine as an "exception to the general American rule" embodied in CCP §1021, and stated that it has "moved cautiously" in expanding judicial exceptions to CCP §1021. Given this level of caution, it is not likely that the court will readily expand the list of the types of actions in which attorney fees are available as damages.

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## §7.4 A. "Tort of Another" Doctrine: Fees as Damages When Tortfeasor's Action Causes Suit By or Against Third Party

Under the "tort of another" doctrine (also called the "third party tort" doctrine), attorney fees may be awarded in certain instances when a party commits a wrongful act that he or she can reasonably foresee would cause another to defend or prosecute a lawsuit involving a third party: "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620, 30 CR 821.

The attorney fees recoverable from the tortfeasor are those incurred litigating against the third party, not those incurred litigating against the tortfeasor. In such cases there is no recovery of "attorney fees qua attorney fees." *Brandt v Superior Court* (1985) 37 C3d 813, 817, 210 CR 211 (noting that this "may make the identification of allowable fees more sophisticated," and comparing fees recoverable under doctrine to medical fees recoverable in personal injury action). See *Sooy v Peter* (1990) 220 CA3d 1305, 1310, 270 CR 151 (in these cases "attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action").

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### §7.5 1. Doctrine May Apply Even if Tortfeasor and Third Party Are Joined in Action

The "tort of another" doctrine is available even when both the third party and the party whose conduct necessitated the filing of the lawsuit are joined in the same action: "In the usual case, the attorney's fees will have been incurred in connection with a prior action; but there is no reason why recovery of such fees should be denied simply because the two causes (the one against the third person and the one against the party whose breach of duty made it necessary for the plaintiff to sue the third person) are tried in the same court at the same time." *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 621, 30 CR 821. See also *Third Eye Blind, Inc. v Near North Entertainment Ins. Servs., LLC* (2005) 127 CA4th 1311, 1326, 26 CR3d 452; *Washington v Baenziger* (ND Cal 1987) 673 F Supp 1478, 1484.

The doctrine may not be available, however, when the plaintiff has simply sued two or more defendants for the same torts and won, and then "singl[es] out" one defendant for imposition of attorney fees, as the one whose conduct "caused" plaintiff to have to bring suit. See *Vacco Indus. v Van Den Berg* (1992) 5 CA4th 34, 57, 6 CR2d 602. Nor does the "tort of another" doctrine provide an exonerated defendant with the right to recover fees from the liable defendant. See *Watson v Department of Transp.* (1998) 68 CA4th 885, 893, 80 CR2d 594.

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### §7.6 2. Doctrine May Apply Even if Plaintiff Loses Case Against Third Party

Although the "tort of another" doctrine is triggered when a tortious act causes a party to bring or defend a lawsuit, it does not depend on the outcome of that third party lawsuit. The attorney fees required to bring or defend that lawsuit are damages in an action against the original tortfeasor, even if the action against the third party is lost. See *Sindell v Gibson, Dunn & Crutcher* (1997) 54 CA4th 1457, 1470, 63 CR2d 594; *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 507, 198 CR 551.

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### §7.7 3. Examples of Doctrine

The facts in *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 198 CR 551, illustrate the applications and limitations of the "tort of another" doctrine. The plaintiff was a prospective buyer of real property, the defendant was his broker, and the codefendant was the prospective seller. Plaintiff initiated the lawsuit after the broker had misrepresented to the plaintiff the seller's willingness to accept the plaintiff's offer. The plaintiff sued the broker for misrepresentation and the seller for specific performance, but he won only his claim against the broker. The trial court awarded the plaintiff his attorney fees, but the supreme court reversed in part. The court allowed the plaintiff to recover from the broker/defendant the fees the plaintiff incurred in his unsuccessful action against the seller. The court held that, even though the plaintiff's action against the seller was unsuccessful, the cost of bringing that action was a foreseeable, consequential result of the defendant/broker's misrepresentation, and therefore was recoverable from the defendant/broker as damages. However, the court reversed the award of fees for services incurred in plaintiff's action against his broker.

*Gray* was followed in *Heckert v MacDonald* (1989) 208 CA3d 832, 256 CR 369, in which the court held that sellers of an apartment building who had been sued for fraud because of the tortious acts of their codefendant broker were entitled to an award of attorney fees from the broker for defending the action. The court refused to award them fees, however, because the additional profits vendors received as a result of the broker's fraud exceeded their attorney fees. 208 CA3d at 838.

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### §7.8 4. Circumstances in Which Doctrine Does Not Apply

The "tort of another" rule does not apply if the party claiming fees is not "compelled or required" to bring or defend the action, or if the need to bring a suit was, to some measurable degree, the fault of the party requesting fees. *UMET Trust v Santa Monica Med. Inv. Co.* (1983) 140 CA3d 864, 189 CR 922. See also *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 534, 53 CR2d 24 (because city's denial of damages claim was not tortious act, denial was not basis for fees under "tort of another" doctrine).

Further, the rule does not apply in every multidefendant case in which one alleged tortfeasor is absolved. See *Watson v Department of Transp.* (1998) 68 CA4th 885, 892, 80 CR2d 594.

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## §7.9 B. *Brandt* Fees: Fees as Damages When Insurance Benefits Denied in Bad Faith

An offshoot of the "tort of another" doctrine (see §7.4) was recognized in *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211. The supreme court held that the fees incurred in an action for breach of contract against an insurance company when it unreasonably refuses to pay benefits due are an element of the plaintiff's damages. Fees are limited to the amounts spent in obtaining the insured amount; fees incurred in related causes of action based on the insurer's bad faith failure to pay are not awardable.

The court in *Brandt* analogized such actions to the third party tort cases discussed in *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 198 CR 551 (see §7.7), as well as to false arrest and malicious prosecution cases. *Brandt*, 37 C3d at 817. The theory of these cases is not that they are exceptions to CCP §1021 (the general statute providing that each party normally pays its own attorney fees), but that they involve claims for damages proximately caused by the defendant's bad faith behavior. See §7.1.

**Additional authorities:** *Brandt v Superior Court, supra,* was followed in *White v Western Title Ins. Co.* (1985) 40 C3d 870, 221 CR 509, and *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 235 CR 813. Compare those cases with *Insurance Co. of N. Am. v Moore* (9th Cir 1986) 783 F2d 1326. See also *Schneider v Friedman, Collard, Poswall & Virga* (1991) 232 CA3d 1276, 283 CR 882; *Wallis v Farmers Group, Inc.* (1990) 220 CA3d 718, 740, 269 CR 299, disapproved in part on other grounds in *Dore v Arnold Worldwide, Inc.* (2006) 39 C4th 384, 394 n2, 46 CR3d 668; *Mouchette v Board of Educ.* (1990) 217 CA3d 303, 317, 266 CR 1, disapproved on other grounds in *Caldwell v Montoya* (1995) 10 C4th 972, 984 n6, 42 CR2d 842.

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### §7.10 1. *Brandt* Fees Available Only if Denial of Benefits Is in Bad Faith

The court in *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211 (see §7.9), emphasized that *Brandt* fees are available *only* when the withholding of insurance benefits is in bad faith. A nontortious but erroneous withholding will not subject the defendant to a claim for fees. 37 C3d at 819. See also §7.14.

**Additional authorities:** *United Servs. Auto. Ass'n v Dalrymple* (1991) 232 CA3d 182, 283 CR 330; *California Fair Plan Ass'n v Politi* (1990) 220 CA3d 1612, 270 CR 243; *Northbrook Excess & Surplus Ins. Co. v Coastal Rescue Sys. Corp.* (1986) 182 CA3d 763, 771, 227 CR 639; *Fuhrman v California Satellite Sys.* (1986) 179 CA3d 408, 225 CR 140, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638; *CNA Cas. v Seaboard Sur. Co.* (1986) 176 CA3d 598, 222 CR 276; *Zurich Ins. Co. v Killer Music, Inc.* (9th Cir 1993) 998 F2d 674; *Hangarter v Paul Revere Life Ins. Co.* (ND Cal 2002) 236 F Supp 2d 1069, aff'd in part and rev'd in part on other grounds in *Hangarter v Provident Life & Acc. Ins. Co.* (9th Cir 2004) 373 F3d 998.

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### §7.11 2. *Brandt* Fees Not Available for Bad Faith Denial of Contract

In *Palmer v Ted Stevens Honda, Inc.* (1987) 193 CA3d 530, 539 n4, 238 CR 363, the court declined to expand *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211, to actions based on the bad faith denial of a contract. See also *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 507, 198 CR 551 (noting that court has "moved cautiously in expanding the nonstatutory bases on which awards of attorney's fees may be predicated").

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## §7.12 C. Limitations on Fees Recoverable Under "Tort of Another" Doctrine and *Brandt*

The fees available under the "tort of another" doctrine may be substantially more limited than those recoverable under contractual fee clauses or fee-shifting statutes. On the subject generally, see Note, *Attorney's Fee Recovery in Bad Faith Cases: New Directions for Change*, 57 S Cal L Rev 503 (1984).

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## §7.13 1. Under "Tort of Another" Doctrine, Fees Limited to Those Incurred Against Third Party; Fees Incurred Against Tortfeasor Not Recoverable as Damages

The only fees recoverable as damages under the "tort of another" doctrine are the fees incurred bringing or defending an action against a third party; the fees incurred to prove the *tortfeasor's* liability are not recoverable as damages. This may lead to some difficult allocation issues, particularly in cases in which the tortfeasor and the third party are joined in the same action. See, *e.g., Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 621, 30 CR 821; *Third Eye Blind, Inc. v Near North Entertainment Ins. Servs., LLC* (2005) 127 CA4th 1311, 1325, 26 CR3d 452.

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### §7.14 2. Under *Brandt,* Fees Limited to Those Incurred to Prove Bad Faith Denial of Benefits

Under *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211, compensable fees are limited to those *necessarily incurred to obtain benefits that had been denied in bad faith*. They do not include fees incurred to pursue *other* tort damages, such as claims for fraud or for punitive damages. If the denial of benefits and the tort issues are tried together, the trier of fact must apportion the fees between them. Thus, fees are limited to the work done obtaining the insured amount; work done obtaining other damages, such as punitive damages, is not compensable. Failure to segregate litigation expenses for which fees are not awardable can be fatal to the entire request for fees. See *Slottow v American Cas. Co.* (9th Cir 1993) 10 F3d 1355, 1362. In other contexts, however, courts have given claimants who fail initially to apportion fees another opportunity to do so. See, *e.g., Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 621, 30 CR 821.

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### §7.15 3. Calculating Fees in Contingent Fee Cases

In *Cassim v Allstate Ins. Co.* (2004) 33 C4th 780, 16 CR3d 374, the court explained how *Brandt* fees (see *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211; §7.9) were to be calculated when the plaintiff was represented on a contingent fee basis. The court rejected Allstate's contention that the fee should be equal to the contingent percentage, applied to the contract damages; it also rejected the plaintiff's contention that the fee should be equal to the contingent percentage, applied to all the damages (*i.e.,* including noncontract and punitive damages). Instead, the court held that the trial court must determine the number of hours devoted exclusively to the contract recovery, add to that a portion of the time spent on common contract and noncontract issues (as determined by the trial court), divide that by the total hours, and then apply the resulting percentage to the total contingent fee that the plaintiff was obligated to pay. It is the plaintiff's burden to demonstrate the proper allocation. 33 C4th at 811.

In *Zurich Ins. Co. v Killer Music, Inc.* (9th Cir 1993) 998 F2d 674, the court held that even if the insured is entitled to its fees incurred to defend itself (as damages for the insurer's bad faith failure to defend), the insured is not entitled under CC §2778 to the fees it incurs in a separate action brought against the insurer seeking to make the insurer defend the insured or reimburse it for attorney fees incurred in defending against the third party's claims. See also *Carroll v Hanover Ins. Co.* (1968) 266 CA2d 47, 50, 71 CR 868.

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### §7.16 4. Appellate Fees

*Brandt* fees (see *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211; §7.9) have been held to include fees incurred defending the judgment that secured the wrongfully withheld benefits against an insurer's appeal. *Baron v Fire Ins. Exch.* (2007) 154 CA4th 1184, 1198, 65 CR3d 502, citing *McGregor v Paul Revere Life Ins. Co.* (9th Cir 2004) 369 F3d 1099, 1101 ("We are convinced that if the California Supreme Court were to address this issue, it would hold that *Brandt* fees are recoverable for fees incurred in defending against an insurer's appeal"). See also *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1101, 234 CR 835. The same rationale would seem to apply to fees for appellate services for obtaining the wrongfully withheld benefits if the trial court had denied the plaintiff's claim.

In the "tort of another" context, the same rationale would seem to support the recovery of appellate fees as damages when those fees were caused by the need to bring or defend an appeal against a third party.

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### §7.17 5. Assignment of Right to *Brandt* Fees

In *Essex Ins. Co. v Five Star Dye House, Inc.* (2006) 38 C4th 1252, 45 CR3d 362, the California Supreme Court held that an insured can assign its rights under *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211 (see §7.9) to recover the fees it incurred to obtain insurance policy benefits that the insurer denied in bad faith. The court overruled *Xebec Dev. Partners, Ltd. v National Union Fire Ins. Co.* (1993) 12 CA4th 501, 15 CR2d 726, insofar as it was inconsistent with this conclusion. 38 C4th at 1265 n4.

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## §7.18 D. False Imprisonment

Attorney fees are awardable as an element of damages in actions for false imprisonment. See *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 425, 152 CR 31 (citing *Huber v Shedoudy* (1919) 180 C 311, 314, 181 P 63).

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## §7.19 E. Malicious Prosecution

Attorney fees are awardable as an element of damages in actions for malicious prosecution. See *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 425, 152 CR 31 (citing *Huber v Shedoudy* (1919) 180 C 311, 314, 181 P 63).

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## §7.20 F. Legal Malpractice Actions

Attorney fees are awardable as damages in legal malpractice actions, when the malpractice has caused the plaintiff to have to bring or defend a lawsuit involving a third party. See, *e.g., Sindell v Gibson, Dunn & Crutcher* (1997) 54 CA4th 1457, 1470, 63 CR2d 594; *Roberts v Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 CA3d 104, 111, 128 CR 901.

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## §7.21 G. Attorney's Suit Against Client to Recover Fees

Attorney fees are awardable as an element of damages in actions for fees owed by the client to the attorney in a prior action, when the attorney brings a new action against the client to recover those fees. See 1 Witkin, California Procedure, *Attorneys* §§208-219 (5th ed 2008). In the absence of a fee-shifting clause in the retainer agreement, however, the client may not recover as damages the fees that the client incurs successfully defending against the lawyer's attempt to collect or retain an unreasonable fee, nor may the lawyer collect the fees incurred in the collection action itself. On actions for which attorney fees may not be recovered as damages, see §§7.25-7.32.

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**Source:** Civil Litigation/California Attorney Fee Awards/7 Fees as Damages/§7.22 H. Insured's Suit Against Insurer for Wrongful Failure to Defend

## §7.22 H. Insured's Suit Against Insurer for Wrongful Failure to Defend

Attorney fees are awardable as an element of damages in an action to recover attorney fees paid out because of an insurer's wrongful refusal to defend the underlying suit. *State v Pacific Indem. Co.* (1998) 63 CA4th 1535, 75 CR2d 69.

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## §7.23 I. Indemnification Proceedings

Attorney fees are awardable as an element of damages in actions for damages in indemnification proceedings. See *Gribaldo, Jacobs, Jones & Assoc. v Agrippina Versicherunges A.G.* (1970) 3 C3d 434, 447, 91 CR 6; *Hillman v Leland E. Burns, Inc.* (1989) 209 CA3d 860, 257 CR 535. But see *Davis v Air Technical Indus.* (1978) 22 C3d 1, 6, 148 CR 419 (in claim for implied indemnity, plaintiff must bear own attorney fees incurred in defense of its own alleged wrongdoing).

**NOTE:** Code of Civil Procedure §1021.6 provides a statutory basis for fees, obtainable by noticed motion, when an indemnitee has been required to defend an action because of the tort of the indemnitor. See *Wilson, McCall & Daoro v American Qualified Plans, Inc*. (1999) 70 CA4th 1030, 83 CR2d 192. On CCP §1021.6, see §16.20. Depending on the language of the attorney fee clause in the indemnity agreement, the prevailing party may also be able to recover, as costs, the attorney fees incurred in the action enforcing the indemnity agreement in addition to the fees incurred in defense of the underlying claims. *Continental Heller Corp. v Amtech Mechanical Servs., Inc.* (1997) 53 CA4th 500, 508, 61 CR2d 668. See §§4.57-4.58.

**Additional authorities:** *Watson v Department of Transp.* (1998) 68 CA4th 885, 80 CR2d 594; *Fidelity Mortgage Trustee Serv. v Ridgegate E. Homeowners Ass'n* (1994) 27 CA4th 503, 32 CR2d 521.

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**Source:** Civil Litigation/California Attorney Fee Awards/7 Fees as Damages/§7.24 J. Other Actions

## §7.24 J. Other Actions

In addition to the types of proceedings listed in §§7.4-7.23, attorney fees are also awardable as damages in the following types of actions (7 Witkin, California Procedure, *Judgment* §158 (5th ed 2008)):

- Attorney fees for ordinary or extraordinary services payable from the estate in probate proceedings;
- Allowance to trustee from trust estate as reimbursement for fees incurred in administering trust;
- Fees for services rendered to a public corporation in receivership or liquidation;
- In a workers' compensation action, employer is entitled to retain reasonable fees incurred in pursuing third party tortfeasor;
- Allowance to landlord of fees in action brought by innocent improver to remove fixtures; and
- Deposit as security for costs and fees or action on a statutory attachment or injunction bond.

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## §7.25 III. ACTIONS FOR WHICH ATTORNEY FEES MAY *NOT* BE RECOVERED AS DAMAGES

Attorney fees are *not* allowable as damages in the situations discussed in §§7.26-7.32, although they are similar or related to some of those discussed in §§7.3-7.24, in which fees are allowable as damages.

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## §7.26 A. Insurer's Good Faith Failure to Defend

Fees incurred in actions against insurers for good faith but erroneous failure to defend are not allowable as damages (though fees incurred in insured's action against third party may be awardable as damages). See *Twentieth Century-Fox Film Corp. v Harbor Ins. Co.* (1978) 85 CA3d 105, 114, 149 CR 313; *Carroll v Hanover Ins. Co.* (1968) 266 CA2d 47, 50, 71 CR 868. Compare these cases with *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211 (see §7.9).

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### §7.27 B. Misrepresentation by Agent

Fees incurred because an entity's agent makes misrepresentations that lead plaintiff to wrongfully sue the entity are not allowable as damages; the entity is not considered a "third party" for this purpose. See *Golden W. Baseball Co. v Talley* (1991) 232 CA3d 1294, 284 CR 53. Compare *Golden W. Baseball* with *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 198 CR 551, cited in §7.7.

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### §7.28 C. Responding to Extortionate Demands

Fees incurred in responding to defendant's extortionate demands are not allowable as damages. *Fuhrman v California Satellite Sys.* (1986) 179 CA3d 408, 426, 225 CR 140, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638 (citing CCP §1021; distinguishing *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211, discussed in §7.9).

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### §7.29 D. Attorney's Attempt to Collect or Retain Unreasonable Fees

Fees incurred fighting against an attorney's attempt to collect or retain unreasonable fees are not allowable as damages. *Schneider v Friedman, Collard, Poswall & Virga* (1991) 232 CA3d 1276, 1281, 283 CR 882 (discussed in 7 Witkin, California Procedure, *Judgment* §157 (5th ed 2008)).

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### §7.30 E. Some Indemnity Agreements

Fees incurred to enforce an indemnity agreement are not allowable as damages, if the language of the agreement does not provide for such attorney fees or only provides for attorney fees arising out of or resulting from the performance of the work that gave rise to the underlying claim. *Continental Heller Corp. v Amtech Mechanical Servs., Inc.* (1997) 53 CA4th 500, 508, 61 CR2d 668; *Building Maintenance Serv. Co. v AIL Sys., Inc.* (1997) 55 CA4th 1014, 64 CR2d 353.

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### §7.31 F. Suit Against Fiduciary

Fees incurred in successfully suing a defendant who stands in a fiduciary relationship to the plaintiff are not allowable as damages. That exception had been implied in *Walters v Marler* (1978) 83 CA3d 1, 30, 147 CR 655, but the supreme court disapproved it, stating that it would move cautiously before approving any further judicial exceptions to CCP §1021. *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 507, 198 CR 551.

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### §7.32 G. City's Nontortious Denial of Claim of Damage

Fees incurred because of a city's nontortious denial of plaintiffs' claim for damages caused by the crash of a city truck are not allowable as damages. *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 534, 53 CR2d 24. See §7.8.

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### §7.33 H. Attorney Fees May Be Considered for Other Purposes

Even if attorney fees are not available as damages, they may still be taken into account in assessing punitive damages. See *Jacobson v Delta Airlines, Inc.* (9th Cir 1984) 742 F2d 1202, 1208 n5. The Ninth Circuit has held, however, that in civil rights actions the jury may not be informed of the plaintiff's right to a fee award under 42 USC §1988. *Brooks v Cook* (9th Cir 1991) 938 F2d 1048, 1050.

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## §7.34 IV. PROCEDURE FOR SEEKING FEES AS DAMAGES

Unless the parties stipulate otherwise, a claim for attorney fees under the "tort of another" doctrine or *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211, must be pleaded and proved to the trier of fact, not asserted by posttrial motion. *Hsu v Abbara* (1995) 9 C4th 863, 39 CR2d 824, citing *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211; *Vacco Indus. v Van Den Berg* (1992) 5 CA4th 34, 56, 6 CR2d 602. *Brandt* suggests that it would be preferable for the parties stipulate to a posttrial motion to the judge to determine those fees because:

- The final measure of fees would then be available, and
- The judge has greater expertise in evaluating legal fees.

*Brandt v Superior Court, supra*.

Note that the same procedure applies to claims for nonstatutory costs and expert fees that are sought under a contract permitting the recovery of such costs. See §7.2.

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# 8

# Methods of Fee Calculation

I. FEE CALCULATION METHODS: LODESTAR-ADJUSTMENT; PERCENTAGE OF RECOVERY; AMOUNT SET BY STATUTE, RULE, OR AGREEMENT §8.1
A. Lodestar-Adjustment Method Defined §8.2
B. Primacy of Lodestar-Adjustment Method §8.3
1. Fee-Shifting Statutes §8.4
2. Contractual Fees §8.5
3. Other Cases Demonstrating Primacy of Lodestar-Adjustment Method §8.6
4. When Use of Lodestar-Adjustment Method Less Likely §8.7
5. Common Fund and Substantial Benefit Cases §8.8
6. Use of Percentage Fee as Factor in or Cross-Check to Lodestar-Based Fee §8.9
7. Federal Law §8.10
C. Calculating the Award in Common Fund and Substantial Benefit Cases Using Lodestar-Adjustment Method Versus Percentage-of-Fund Method §8.11
1. California Law
a. Goal Is Reasonable Fee Under Circumstances §8.12
b. No Preference Expressed §8.13
c. Percentage-of-Recovery Method Best Used When Amount of Fund Is Certain or Easily Calculable §8.14
d. Lodestar-Adjustment Method Used as Cross-Check to Fee Determined By Percentage-of-Fund Method §8.15
2. Federal Law
a. Goal Is Reasonable Fee Under Circumstances §8.16
b. Preference for Percentage-Based Fees §8.17
c. Twenty-Five-Percent "Benchmark" in Common Fund Cases §8.18
d. Lodestar-Adjustment Method Still Used, Either as Primary Method or Cross-Check §8.19
e. Class Actions Involving "Coupon Recovery" §8.20
D. Fees Awarded as Sanctions §8.21
E. Fees Set by Statute §8.22
F. Fees Set by Court Schedule §8.23
G. Fees Set by Agreement §8.24

II. LODESTAR-BASED FEE AWARDS GENERALLY NOT LIMITED BY AMOUNT OF DAMAGES RECOVERED: NO RULE OF "PROPORTIONALITY"
A. Relationship Between Relief Awarded and Fee Claim §8.25
B. California Law §8.26
C. Federal Law
1. Fee Awards Generally Not Limited by Damages Amount §8.27
2. Exception in Federal Civil Rights Cases for "Technical" or "De Minimis" Victories §8.28

III. IMPACT OF FEE AGREEMENT WITH CLIENT
A. Effect of Contingent Fee Agreements on Lodestar-Based Fees
1. Issues Raised by Contingent Fee Agreement §8.29
2. Lodestar Method Should Be Used Even if Counsel's Representation Is on Contingent Fee Basis §8.30
a. Cases Establishing Primacy of Lodestar Method §8.31
b. Awards Based on Quantum Meruit §8.32
c. Award Based on Contingent Fee Contract, Supported by Lodestar-Adjustment Factors §8.33
d. Lodestar-Adjustment Method Is Standard in Large Damage Cases §8.34
B. Effect of Contingent Fee Agreements in Statutory Fee Cases §8.35
1. California Cases §8.36
2. Federal Cases §8.37
C. Effect of Contingent Fee Agreement in Cases Using Percentage-of-Recovery Method §8.38

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## §8.1 I. FEE CALCULATION METHODS: LODESTAR-ADJUSTMENT; PERCENTAGE OF RECOVERY; AMOUNT SET BY STATUTE, RULE, OR AGREEMENT

Establishing the amount of "reasonable" attorney fees is often more contentious and difficult than establishing entitlement to the award. Both the California and federal courts, however, have generally settled on the "lodestar-adjustment" method: Courts must first calculate the "lodestar," which is the number of hours reasonably spent multiplied by the reasonable hourly rate for each billing professional; that figure may then be adjusted upward (usually called a "multiplier") or downward (a "negative multiplier"), based on other factors that go into the determination of reasonable attorney fees in the relevant legal marketplace, particularly contingent risk and/or the fact that exceptionally good or poor results were obtained. The multiplier is then used to increase the lodestar, in which event the multiplier will be a number greater than 1, or to reduce the lodestar figure, in which event the multiplier will be less than 1. On calculating the multiplier, see chap 10.

Another method used by the courts is the percentage-of-recovery method. Under this method, which is used most often in common fund and substantial benefit cases (see chap 5), the court determines a reasonable attorney fee as a percentage of the fund recovered.

In addition, attorney fees may be based on amounts set by statute, rule, or agreement between the parties.

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**Source:** Civil Litigation/California Attorney Fee Awards/8 Methods of Fee Calculation/§8.2 A. Lodestar-Adjustment Method Defined

## §8.2 A. Lodestar-Adjustment Method Defined

**Calculating the lodestar.** The California Supreme Court defined the lodestar-adjustment method for determining the amount of reasonable attorney fees in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315. Under *Serrano III,* a lodestar figure must first be calculated by multiplying the number of hours reasonably spent by each billing professional (*i.e.*, attorney, paralegal, law clerk, legal assistant) multiplied by the reasonable hourly rate for each biller. 20 C3d at 48. On calculating the lodestar, see chap 9.

**Adjusting the lodestar.** After making this calculation, the court may then consider other factors that may adjust—either increase or reduce—the lodestar amount. *Serrano III, supra*. See also *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1095, 95 CR2d 198 (lodestar figure "may … be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided"). On adjusting the lodestar, see chap 10.

**Factors considered in adjusting the lodestar.** Factors that the courts have considered in adjusting the lodestar amount include: the novelty and complexity of the issues and the skill displayed in presenting them; the results obtained by the litigation; the contingent nature of the award (note that this factor may *not* be considered in determining fees under most federal fee-shifting statutes (see §§10.45-10.46)); the extent to which the litigation precluded the attorney from other employment; whether the fee award will be paid by the taxpayers; the source of funding of the attorneys; whether the money would accrue not to individual attorneys, but to public interest organizations; and whether the law firms involved have shared equally in the success of the litigation. See *Serrano III*, 20 C3d at 48. See also *Ketchum v Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377; *PLCM Group, Inc.,* 22 C4th at 1096. The "results obtained" and "the continuing obligations of counsel" also are appropriate factors to consider. *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 835, 112 CR2d 284.

These factors are not exclusive. There is "no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." *Thayer v Wells Fargo Bank, supra*. However, the court may not use the same factors to justify both the lodestar itself and a lodestar adjustment. See *Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822, 50 CR3d 731.

Regardless of the factors applied, the resulting fee "must bear some reasonable relationship to the lodestar figure." *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 324, 193 CR 900. See, *e.g., Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 879, 71 CR3d 642 (reversing multiplier of 16).

On factors that justify increase or decrease of the lodestar and how that adjustment is made, see chap 10.

**NOTE:** Consideration and use of multipliers under federal law differs from California law. On the more restricted use of multipliers under federal law, and a comparison with California law, see §§10.16-10.30.

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## §8.3 B. Primacy of Lodestar-Adjustment Method

The primacy of the lodestar-adjustment method was prescribed in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48 n23, 141 CR 315, which holds that determining the lodestar is the "starting point" of every fee award. As the court explained, the "objectivity" necessitated by calculation of the lodestar figure is "vital":

> The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

*Serrano III, supra*, quoting *City of Detroit v Grinnell Corp.* (2d Cir 1974) 495 F2d 448, 470. See also *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 322, 193 CR 900; *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 111, 173 CR 248 ("favorable public perception and the prestige of the legal profession and our system of justice requires a formula for computation which can be objectively measured").

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## §8.4 1. Fee-Shifting Statutes

The requirement that the lodestar method be used to calculate reasonable attorney fees under fee-shifting statutes was reaffirmed in *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900, and *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754. *Press v Lucky Stores* held that "determination and use of the lodestar figure is extremely important" and "fundamental" and that the trial court's discretion "must be based on the lodestar adjustment method." 34 C3d at 322.

In *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377, the court reaffirmed the primacy of the lodestar method for all fee-shifting statutes, holding that it was properly applied under the anti-SLAPP statute (CCP §425.16). The court found that because the statute referred to the prevailing party's entitlement to "attorney fees and costs," without indicating any restrictions on how they are to be calculated, it would "presume that the Legislature intended courts use the prevailing lodestar adjustment method." 24 C4th at 1136. The court "emphasized," however, that "we are not mandating a blanket 'lodestar only' approach; every fee-shifting statute must be construed on its own merits and nothing in *Serrano* jurisprudence suggests otherwise." *Ketchum v Moses, supra*.

However, in light of the wide variety of fee-shifting statutes that have applied the lodestar method, with the court's apparent approval (24 C4th at 1134), it is not clear in what circumstances other methods would be appropriate. See *Chacon v Litke* (Jan. 19, 2010, A122026) 2010 Cal App Lexis 159, *45 (lodestar-adjustment method required for fee award under San Francisco rent stabilization ordinance (citing this book)); *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 347, 95 CR3d 880 (lodestar-adjustment method applicable to consumer actions under Robbins-Rosenthal Fair Debt Collection Practices Act (CC §1788.30(c)), even though statute specifies that fees be "based on time necessarily expended"); *Robertson v Fleetwood Travel Trailers, Inc.* (2006) 144 CA4th 785, 817, 50 CR3d 731 (lodestar-adjustment method applicable to consumer actions under Song-Beverly Act (CC §1794(d)), even though statute specifically states that fees must be "based on actual time expended, determined by the court to have been reasonably incurred by the buyer"); *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 622, 98 CR2d 388.

In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 578, 21 CR3d 331, the California Supreme Court reaffirmed the primacy of the lodestar method in the context of determining that lodestar enhancements could be applied to fee-related services. For further discussion of *Graham*, see, *e.g.,* §§10.19, 10.33, 10.44, 10.50.

**Additional authorities:** *Flannery v Prentice* (2001) 26 C4th 572, 584, 110 CR2d 809 (lodestar method used under FEHA (Govt C §12965)); *Maria P. v Riles* (1987) 43 C3d 1281, 1294, 240 CR 872; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 154, 50 CR3d 273; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 33 CR3d 644; *Davis v City of San Diego* (2003) 106 CA4th 893, 903, 131 CR2d 266; *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 94 CR2d 143; *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 71 CR2d 1; *Rebney v Wells Fargo Bank* (1991) 232 CA3d 1344, 1349, 284 CR 113; *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 217 CR 125. Compare these cases with *Sommers v Erb* (1992) 2 CA4th 1644, 1651, 4 CR2d 52 (court approved fee request based on one-third contingent fee that attorneys would have been entitled to under contract with plaintiff).

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### §8.5 2. Contractual Fees

The lodestar method is also "presumably reasonable" when applied to contractual fees under CC §1717, but "in exceptional circumstances, the trial court is not precluded from using other methodologies." *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1097, 95 CR2d 198. See *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1172, 23 CR3d 335 (contractual fees under stock redemption agreement properly based on lodestar method, even though amount was more than client incurred under contingency fee agreement); *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 227 CR 804 (lodestar-based fee, including enhancement of "2, 3, 4, or otherwise," within court's discretion; cited with approval in *PLCM Group, Inc. v Drexler, supra*).

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### §8.6 3. Other Cases Demonstrating Primacy of Lodestar-Adjustment Method

Courts have held that the lodestar-adjustment method must be used in many diverse areas including:

- **Inverse condemnation actions:** *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 953, 218 CR 839; *Aetna Life & Cas. Co. v City of Los Angeles* (1985) 170 CA3d 865, 881, 216 CR 831; but see *Andre v City of W. Sacramento* (2001) 92 CA4th 532, 111 CR2d 891 (CCP §1036 limits attorney fees to amount "actually incurred," *i.e.,* the amount actually owed by the client);
- **Eminent domain actions:** *People ex rel Dep't of Transp. v Yuki* (1995) 31 CA4th 1754, 37 CR2d 616; *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606;
- **Actions under the Fair Employment and Housing Act:** *Flannery v Prentice* (2001) 26 C4th 572, 584, 110 CR2d 809; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 394, 33 CR3d 644; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470;
- **Actions under the Political Reform Act (Govt C §§81000-91014):** *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272;
- **Actions under the Information Practices Act of 1977 (CC §§1798-1798.78):** *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 448, 78 CR2d 913; and
- **Actions under the California Public Records Act (Govt C §§6250-6276.48):** *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1393, 84 CR3d 754.

See also *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1275, 66 CR3d 725 (lodestar method applied instead of local court guidelines); *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc.* (1999) 69 CA4th 287, 302, 81 CR2d 456 (applying *Serrano IV* principles to fee award under Brown Act (Govt C §§54950-54963; see in particular Govt C §54960.5)); *Cortez v Bootsma* (1994) 27 CA4th 935, 33 CR2d 20 (local court rule may not limit factors used to determine reasonable attorney fee); *People v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 389, 211 CR 501 (applying lodestar principles to CC §3496). Compare these cases with *Glendora Community Redev. Agency v Demeter* (1984) 155 CA3d 465, 202 CR 389, discussed in §8.33.

Some older cases have held that the lodestar method is required only for "private attorney general" type actions, as opposed to commercial or contractual actions. See, *e.g., Fed-Mart Corp. v Pell Enters.* (1980) 111 CA3d 215, 222, 168 CR 525 (distinguishing *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, and holding that fees awarded under Corp C §317 (indemnification of corporate agents in certain circumstances) need not be based on lodestar method). *Fed-Mart* appears to have been overtaken by subsequent precedent (see §§8.3-8.5) establishing the primacy of the lodestar method; alternatively, *Fed-Mart* may be limited to its somewhat esoteric statutory context.

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### §8.7 4. When Use of Lodestar-Adjustment Method Less Likely

Fee awards based on a percentage of the recovery are more frequently used when the fee is paid out of a common fund rather than by the defendant. See *Consumer Privacy Cases* (2009) 175 CA4th 545, 558, 96 CR3d 127; *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615; *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1270, 24 CR3d 818. See §§8.8-8.20. But see *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1809, 56 CR2d 483 (questioning whether percentage method permissible in California class actions). See also §§5.10-5.31 (on the common fund doctrine). Similarly, when fees are awarded as sanctions, the lodestar method is not always used. See §8.21.

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## §8.8 5. Common Fund and Substantial Benefit Cases

The lodestar-adjustment method of calculating the fee amount may be used in cases under the common fund doctrine (see §§5.10-5.31) or the substantial benefit doctrine (see §5.32-5.53). See *Robbins v Alibrandi* (2005) 127 CA4th 438, 451, 25 CR3d 387 (using lodestar method to determine whether settled fee in shareholder derivative action was "in the same range" as fee awardable under substantial benefit doctrine); *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269. See also *Consumer Privacy Cases* (2009) 175 CA4th 545, 558, 96 CR3d 127 (common fund; discussed more fully below in §8.12); *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 254, 110 CR2d 145. The issue of which method the courts will use in such cases is discussed below in §§8.11-8.15.

When both statutory fees and common fund fees are applicable to the same case, they both may be utilized in some cases. See *Staton v Boeing Co.* (9th Cir 2003) 327 F3d 938, 967; *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544 (counsel awarded common fund fee equal to 25 percent of fund recovered, plus statutory fee under Lab C §1194, credited against common fund fee; latter award subject of separate appeal).

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### §8.9 6. Use of Percentage Fee as Factor in or Cross-Check to Lodestar-Based Fee

In *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 49, 97 CR2d 797, the court of appeal held that the lodestar-adjustment method must be the starting point in determining the fee award in "constructive common fund" cases (*i.e.,* cases in which the merits and fees are separately negotiated but essentially constitute one "common fund"); however, it also held that when the class recovery can readily be "monetized," a relevant factor to consider in adjusting the lodestar to reflect fees in the legal marketplace is the percentage-based fee that a lawyer taking the case on a contingent basis might expect. See chap 10; on particular factors considered in adjusting the lodestar, see §10.3.

Other examples of this use of a percentage approach include *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413, and *Consumer Privacy Cases* (2009) 175 CA4th 545, 558, 96 CR3d 127. In *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615, the court cross-checked the percentage-based fee against a lodestar-based fee.

**Additional authorities:** *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 882, 71 CR3d 642 (use of percentage-based fee as enhancement factor limited to class or representative actions); *In re Vitamins Cases* (2003) 110 CA4th 1041, 1060, 2 CR3d 358 (applying *Lealao*); *Staton v Boeing Co.* (9th Cir 2003) 327 F3d 938, 974 (suggesting that, when injunctive relief accounts for "significant part" of fees expended, calculating lodestar—either as basis for common fund fee or as cross-check—is particularly useful in helping court determine whether fee is reasonable); *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 111, 173 CR 248 (size of fund relevant in determining complexity of attorney's work, as well as quality).

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### §8.10 7. Federal Law

Like California law, federal law also generally requires use of the lodestar method in statutory fee cases. See, *e.g., Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 978, 982 (fee awards must be based on lodestar method as "determined on the facts of each case"; award for fee-related services must also be based on lodestar method). Note that when federal courts determine reasonable fees under state law, they apply state law. *Mangold v PUC* (9th Cir 1995) 67 F3d 1470, 1478.

Common fund cases, however, are treated differently (see §§8.16-8.19), as are individual Social Security Act cases involving recoveries of past-due benefits (see *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142.

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**Source:** Civil Litigation/California Attorney Fee Awards/8 Methods of Fee Calculation/§8.11 C. Calculating the Award in Common Fund and Substantial Benefit Cases Using Lodestar-Adjustment Method Versus Percentage-of-Fund Method

## §8.11 C. Calculating the Award in Common Fund and Substantial Benefit Cases Using Lodestar-Adjustment Method Versus Percentage-of-Fund Method

In common fund cases, and to a lesser extent in substantial benefit cases, courts are generally presented with the choice of using either the lodestar-adjustment or the percentage-of-fund method for calculating fees. Under the percentage-of-fund method, the court simply awards the plaintiffs' attorneys a percentage of the fund recovered in the litigation that is sufficient to provide them with a reasonable fee. Whichever method is used, however, the courts increasingly require a "cross-check" against the other method to ensure the reasonableness of the fee. See §§8.9, 8.12.

Which method to use, and in what kind of cases this choice is presented, varies somewhat between the California state courts and the federal courts.

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### 1. California Law

### §8.12 a. Goal Is Reasonable Fee Under Circumstances

In *Consumer Privacy Cases* (2009) 175 CA4th 545, 557, 96 CR3d 127, the court examined the two different methodologies—lodestar-adjustment and percentage of fund—in the context of a "clear sailing" fee settlement (*i.e.,* a class settlement specifying a set amount for the class and agreeing not to oppose a fee of up to a specified amount, to be paid in addition to the class recovery; see 175 CA4th at 553). The court summarized the California rule as follows:

> Regardless of whether attorney fees are determined using the lodestar method or awarded based on a "percentage-of-the-benefit" analysis under the common fund doctrine, "[t]he ultimate goal… is the award of a 'reasonable' fee to compensate counsel for their efforts, irrespective of the method of calculation."… [*Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1270, 24 CR3d 818.] It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace. [*Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 65, 75 CR3d 413.]

175 CA4th at 557.

The California courts have permitted recovery on a percentage basis in numerous common fund cases. See, *e.g., Sanders v City of Los Angeles* (1970) 3 C3d 252, 261, 90 CR 169 (supreme court upheld award of attorney fees equal to 25 percent of approximate amount of monies wrongfully withheld from city employees' paychecks); *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 63, 75 CR3d 413. See also *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1270, 24 CR3d 818 (noting that although awards in common fund cases are based on percentage basis, ultimate goal is reasonable fee to compensate counsel); *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544 (counsel awarded common fund fee equal to 25 percent of fund recovered, plus statutory fee under Lab C §1194, credited against common fund fee; latter award subject of separate appeal); *Melendres v City of Los Angeles* (1975) 45 CA3d 267, 284, 119 CR 713 (court affirmed award of attorney fees for litigation that resulted in obtaining retroactive pay award for Los Angeles city employee; fees computed at between 5 and 7½ percent of total retroactive pay obtained). But see *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1809, 56 CR2d 483 (questioning whether percentage method valid in California class actions, and reversing fee award because even if method valid, it was improper when amount of settlement not certain or easily calculable).

Scrutiny of the fee is required even when it is paid by the class. See *Consumer Privacy Cases* (2009) 175 CA4th 545, 555, 96 CR3d 127 (recognizing that when settlement is reached, interests of class counsel and class may diverge). Because the class, not the defendant, pays the fee, the defendant has no standing to appeal a common fund fee award to the plaintiff. *Sanders v City of Los Angeles* (1970) 3 C3d 252, 263, 90 CR 169.

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### §8.13 b. No Preference Expressed

Although many federal courts have expressed a preference for the percentage-of-fund method in common fund cases (see §8.17), the California courts have not expressed such a preference. In *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 50, 97 CR2d 797, the court compared the merits of percentage-based fees with lodestar-based fees in the context of "constructive common fund" (see §§5.25, 8.9) cases. The court concluded that under California law, the lodestar method is required in "constructive common fund" cases (see §5.25). *Lealao,* 82 CA4th at 49.

*Lealao* also held, however, that "in cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate," a trial court may adjust the basic lodestar by applying a positive or negative multiplier when "necessary to insure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." 82 CA4th at 49. In making that adjustment, the trial court must consider not only the size of the recovery, including individual recoveries, but also the need to encourage settlement, reward attorneys for maximizing their clients' recoveries, and promote the private enforcement necessary to vindicate many legal rights. 82 CA4th at 52. See also *In re Vitamins Cases* (2003) 110 CA4th 1041, 1060, 2 CR3d 358.

The *Lealao* court did not expressly decide whether, under California law, purely percentage-based fees could be awarded in pure common fund actions, citing *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1809, 56 CR2d 483 (questioning validity of percentage method for California class actions and reversing fee because, even if percentage method permissible, use was improper when true value of settlement could not be ascertained until at least 1 year later). *Lealao* did note, however, that in common fund situations, the entire fund available to the class, including unclaimed funds, could be used to calculate the fee. 82 CA4th at 51.

Subsequent to *Lealao*, however, several courts have indicated that the percentage-of-fund method is permissible under California law. See *Consumer Privacy Cases* (2009) 175 CA4th 545, 557, 96 CR3d 127; *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615; *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1270, 24 CR3d 818; *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 254, 110 CR2d 145 ("Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method."). Given the long and well-accepted history of percentage-based fees in common fund cases, and the availability of judicial oversight to ensure reasonableness, there seems little reason to believe that the California Supreme Court would find them unacceptable. See also *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 882, 71 CR3d 642 (use of percentage-based fee as enhancement factor limited to class or representative actions).

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### §8.14 c. Percentage-of-Recovery Method Best Used When Amount of Fund Is Certain or Easily Calculable

The percentage method of determining attorney fees in common fund cases is generally used only when the amount of the fund is certain or easily calculable. Compare *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 49, 97 CR2d 797 (percentage of fund may be referred to "in cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate"), with *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1809, 56 CR2d 483 (because true value of settlement could not be determined until 1-year period had expired, court erred in using percentage rather than lodestar method to set fees). For examples of cases in which the courts have found, explicitly or implicitly, "a reasonable degree of certainty," see *Consumer Privacy Cases* (2009) 175 CA4th 545, 558, 96 CR3d 127; *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615; *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413.

Note that under federal law, less objective results like injunctive relief can be considered when determining a percentage-based fee, not by attempting to quantify the value of that relief but by adjusting the percentage awarded. See *Staton v Boeing Co.* (9th Cir 2003) 327 F3d 938, 974.

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### §8.15 d. Lodestar-Adjustment Method Used as Cross-Check to Fee Determined By Percentage-of-Fund Method

As under federal law (see §8.19), the courts may cross-check a percentage-based fee against a lodestar-based fee to determine if the former is reasonable. See, *e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615 (cross-checking percentage-based award by noting that multiplier of 2.52 is "fair and reasonable"). Compare *Sutter Health* with *Glendora Community Redev. Agency v Demeter* (1984) 155 CA3d 465, 202 CR 389 (fee based on attorney's 25-percent contingent fee agreement with client reasonable in light of numerous factors bearing on reasonableness under lodestar-adjustment method, discussed in §8.33).

**PRACTICE TIP:** To demonstrate a reasonable basis for a fee claimed under the percentage-of-fund method, counsel should document their lodestar figures to show that the percentage is not grossly disproportionate to the lodestar. In common fund cases, these are often submitted in summary or declaration form, without submission of full time records. See, *e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615, and other cases cited in §9.83. If the amount is grossly disproportionate, counsel must be prepared to justify the award. On the other hand, if counsel's fees, calculated by the lodestar method, would significantly exceed a standard percentage of the fund, *e.g.,* 25 percent in federal court (see §8.18), then counsel should consider petitioning to have the fee set by the lodestar method instead.

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## 2. Federal Law

### §8.16 a. Goal Is Reasonable Fee Under Circumstances

Like California state courts (see §§8.12-8.15), the Ninth Circuit has indicated that whatever the method used to determine fees in the common fund setting, the goal is to arrive at a reasonable fee. *In re Washington Pub. Power Supply Sys. Secs. Litig.* (9th Cir 1994) 19 F3d 1291, 1295. The fundamental principle in awarding fees out of common funds, whether by the percentage or lodestar method, is that they be reasonable under the circumstances. *In re Washington Pub. Power Supply Sys. Secs. Litig., supra*. See also *Florida v Dunne* (9th Cir 1990) 915 F2d 542 (amount of fees to be awarded in common fund case may be determined either under lodestar method or based on percentage of fund created). In *Dunne*, the Ninth Circuit held that the trial court should select the most reasonable method under the circumstances and further held that, in making such a determination, the trial court must also consider the effect on the fund of any pending fee requests by other attorneys. 915 F3d at 545. Although the court was concerned that almost three-quarters of the fund could end up being distributed in attorney fees (915 F3d at 546), it did not hold that that result would necessarily be improper.

When both statutory fees and common fund fees are applicable to the same case, they both may be utilized in some cases. See *Staton v Boeing Co.* (9th Cir 2003) 327 F3d 938, 967.

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### §8.17 b. Preference for Percentage-Based Fees

Some federal circuit courts, including the Third, Eleventh, and DC Circuits, require use of the percentage method in common fund cases. See, *e.g., In re Washington Pub. Power Supply Sys. Secs. Litig.* (9th Cir 1994) 19 F3d 1291, 1295 n3 (citing cases). See also, *e.g.*, *In re AT&T Corp. Secs. Litig.* (3d Cir 2006) 455 F3d 160, 164.

In the Ninth Circuit, there is no presumption that either the lodestar or the percentage method is proper in a common fund case; instead, selection of the best method in the circumstances is left to the trial court's discretion. *In re Washington Pub. Power Supply Sys. Secs. Litig.,* 19 F3d at 1296 (no presumption favors either percentage or lodestar method in common fund cases). Some Ninth Circuit panels, however, have indicated a preference for setting fees based on a percentage of the recovery rather than the lodestar method. See, *e.g., In re Pacific Enter. Sec. Litig.* (9th Cir 1995) 47 F3d 373, 379; *Torrisi v Tucson Elec. Power Co.* (9th Cir 1993) 8 F3d 1370, 1376; *Paul, Johnson, Alston & Hunt v Graulty* (9th Cir 1989) 886 F2d 268.

There are two main reasons that some courts prefer using a percentage of the recovery to determine reasonable attorney fees: (1) The percentage-of-recovery method relieves the court, and to a lesser extent the prevailing party, of the onus of proving and making the determinations required under the lodestar method (see *Court Awarded Attorney Fees*, Report of the Third Circuit Task Force (1985) 108 FRD 237); although some showing of these factors is often required as a cross-check, the showing made and findings required are more abbreviated than when fees are based on the lodestar method (see §8.19); and (2) it allows the prevailing party's attorneys to recover a fee that, despite limitations on multipliers imposed on fee awards under federal fee-shifting statutes (see §§10.22-10.30), reflects such factors as contingent risk, exceptional results, and the like, which are relevant to determining reasonable attorney fees in the legal marketplace. See, *e.g., In re Rite Aid Corp. Secs. Litig.* (3d Cir 2005) 396 F3d 294, 302 (holding that "sliding scale" not required in "mega fund" cases and 25-percent award (4.07 multiplier) was justified by awards in similar cases, significant risks of nonrecovery or nonpayment, skill and efficiency, complexity, duration, time-consuming nature, and absence of significant objections; but remanding case because trial court improperly calculated lodestar cross-check by blending rates only of senior partners, not all billers); *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043; *In re Pacific Enter. Sec. Litig.* (9th Cir 1995) 47 F3d 373; *Torrisi v Tucson Elec. Power Co.* (9th Cir 1993) 8 F3d 1370 (fee award under percentage method approximately 2.5 times lodestar figure); *Craft v County of San Bernardino* (CD Cal 2008) 624 F Supp 2d 1113, 1116; *In re Ames Dep't Stores, Inc. Debenture Litig.* (SD NY 1993) 835 F Supp 147 (percentage recovery approximately twice lodestar (multiplier of 2.0)).

An additional rationale for the percentage recovery method is that it comports with the common expectation of parties who are represented on a contingent fee basis. See *Staton v Boeing Co.* (9th Cir 2003) 327 F3d 938, 970 (trial court has special fiduciary duty to protect interests of class in common fund cases because fees come out of class recovery and because fee award is "equitable substitute for private fee arrangements").

Some courts have found that use of the lodestar approach in common fund cases has created incentives for wasteful litigiousness and rejected it in favor of the percentage-of-recovery method. See, *e.g., In re Activision Secs. Litig.* (ND Cal 1989) 723 F Supp 1373. One court met this problem directly by requiring competitive bidding among counsel seeking to represent the plaintiffs. It ordered that any firm wishing to represent the plaintiffs in a class action (with potential damages in the tens or hundreds of millions of dollars) would have to submit an in camera application to the court, stating its qualifications and specifying the percentage of any recovery that it would charge as fees and costs. See *In re Oracle Secs. Litig.* (ND Cal 1990) 132 FRD 538. But see *Herrgott v U.S. Dist. Court* (9th Cir 2002) 306 F3d 726 (granting writ of mandate because, in selecting lead plaintiff in consolidated securities case, trial court passed over plaintiffs with greatest financial stake in litigation based solely on fact that their attorneys were charging considerably more than attorneys for another plaintiff).

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### §8.18 c. Twenty-Five-Percent "Benchmark" in Common Fund Cases

Although 25 percent of the common fund has been established as a "benchmark" for attorney fees in common fund cases (see *Torrisi v Tucson Elec. Power Co.* (9th Cir 1993) 8 F3d 1370), the benchmark will not be used if it will not result in a reasonable fee. In *In re Washington Pub. Power Supply Sys. Secs. Litig.* (9th Cir 1994) 19 F3d 1291, the court upheld use of the lodestar method because the settlement amount was so huge that it "magnified beyond all reasonable limits the margin of error inherent in a percentage fee award." 19 F3d at 1297. Because there is no necessary correlation between a particular percentage and a reasonable fee, to pick a percentage without reference to all circumstances of the case, including the size of the fund, would be like picking a number out of the air. 19 F3d at 1297.

On the other hand, fee awards exceeding the benchmark may also be reasonable in light of such factors as the complexity and risk of the particular case. See, *e.g., Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043 (affirming $27 million fee award calculated as 28 percent of fund recovered); *Williams v MGM-Pathe Communications Co.* (9th Cir 1997) 129 F3d 1026 (directing trial court to award plaintiff's counsel 33 percent of funds preserved rather than of funds actually claimed by class members); *In re Pacific Enter. Sec. Litig.* (9th Cir 1995) 47 F3d 373 (affirming 33-percent fee award).

See generally Comment, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions*, 50 UCLA L Rev 879 (Feb. 2003).

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### §8.19 d. Lodestar-Adjustment Method Still Used, Either as Primary Method or Cross-Check

As long as the final result is reasonable, the lodestar method may still be used in federal common fund cases. In *Fischel v Equitable Life Assur. Soc.* (9th Cir 2002) 307 F3d 997 (remanded to increase multiplier to 2 by *Fischel v Equitable Life Assur. Soc.* (9th Cir 2004) 2004 US App Lexis 7421 (unpublished opinion)), the trial court's decision to use the lodestar method was upheld, largely because the case settled early. See also *Wininger v SI Mgmt. L.P.* (9th Cir 2002) 301 F3d 1115; *Florida v Dunne* (9th Cir 1990) 915 F2d 542; *Hanlon v Chrysler Corp.* (9th Cir 1998) 150 F3d 1011, 1029; *Roberts v Texaco, Inc.* (SD NY 1997) 979 F Supp 185 (awarding 5.5 multiplier under common fund theory). Because the defendant has no pecuniary interest in a fee taken from the plaintiffs' recovery, however, the courts have recognized a heightened duty to scrutinize the fee application. See *Court Awarded Attorney Fees*, Report of the Third Circuit Task Force (1985) 108 FRD 237, 255. On this issue, see also *Sanders v City of Los Angeles* (1970) 3 C3d 252, 263, 90 CR 169 (defendant has no standing to appeal fee award to plaintiff from common fund).

**NOTE:** *Fischel v Equitable Life Assur. Soc'y, supra,* also is instructive on the procedure used in creating the common fund; because the defendant indicated during the litigation that it would repay the class "voluntarily," the court ordered a percentage of the repayment set aside for a future common fund award.

Even when the percentage method is used to calculate the fee, the reasonableness of the fee often is cross-checked against the lodestar. See, *e.g., In re Rite Aid Corp. Secs. Litig.* (3d Cir 2005) 396 F3d 294 (remanding 25-percent award (constituting 4.07 multiplier) because trial court improperly calculated lodestar when performing lodestar cross-check; full-blown lodestar inquiry not required for cross-check, time summaries may be used, and although multipliers need not fall in prescribed range, comparable multipliers may be considered); *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043 (affirming $27 million fee award that equaled multiplier of 3.65). *Craft v County of San Bernardino* (CD Cal 2008) 624 F Supp 2d 1113, 1125 (finding 25 percent of fund recovered (constituting 5.2 multiplier) reasonable).

**Additional authorities:** For other cases discussing the lodestar method, see *Staton v Boeing Co.* (9th Cir 2003) 327 F3d 938 (discussing lodestar- versus percentage-based fees when fee-shifting statute and common fund both available as basis of fee award); *Wininger v SI Mgmt. L.P.* (9th Cir 2002) 301 F3d 1115 (lodestar method required).

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### §8.20 e. Class Actions Involving "Coupon Recovery"

In class actions that provide for the recovery of coupons by class members, the Class Action Fairness Act of 2005 (28 USC §§1711-1715) requires that federal court fee awards must be based on "the value of the coupons to class members that are redeemed," as opposed to those simply made available. 28 USC §1712(a). If a portion of the coupon recovery is not used to determine fees, the fee award must be based "on the amount of time class counsel reasonably expended working on the action." 28 USC §1712(b)(1). On setting fees under the Act, see §10.29.

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## §8.21 D. Fees Awarded as Sanctions

When fees are awarded as sanctions (see chap 6), the lodestar method is not necessarily followed because sanctions are considered damages of which the cost of legal counsel is only one component. See, *e.g., Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1079, 275 CR 594; *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 28, 272 CR 227; *Finnie v Town of Tiburon* (1988) 199 CA3d 1, 244 CR 581; *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1438, 240 CR 297; *Maple Props. v Harris* (1984) 158 CA3d 997, 1011, 205 CR 532, discussed in §6.71. See also *Banks v Manos* (1991) 232 CA3d 123, 283 CR 318. As a matter of practice, however, most sanctions requests are based on a lodestar-type presentation, *i.e.,* the number of hours spent on the proceeding multiplied by an hourly rate.

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## §8.22 E. Fees Set by Statute

Some statutes expressly specify the amount of fees to be awarded. See, *e.g.,* Govt C §§800 (suit challenging determination of administrative proceeding), 13957.7(g) (compensation of crime victims from state restitution fund); 42 USC §406(b) (in Social Security disability cases, court may award fee up to 25 percent of past-due benefits).

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### §8.23 F. Fees Set by Court Schedule

Some California courts have adopted schedules setting the fee amount in contract cases based on the judgment amount. These schedules are useful for only the most routine cases, however, and courts permit higher awards on a proper showing. See, *e.g., Cruz v Ayromloo* (2007) 155 CA4th 1270, 1275, 66 CR3d 725; *Korech v Hornwood* (1997) 58 CA4th 1412, 68 CR2d 637; *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 680 n6, 251 CR 178.

**Additional authorities:** *Cortez v Bootsma* (1994) 27 CA4th 935, 33 CR2d 20 (local rule limiting fee award to amount plaintiff agreed to pay attorney void because conflicted with court's discretion to award reasonable fee under Lab C §3709); *Contractors Labor Pool, Inc. v Westway Contractors, Inc.* (1997) 53 CA4th 152, 168, 61 CR2d 715 (same); *Estate of Baum* (1989) 209 CA3d 744, 257 CR 566 (probate court's power to award fees for extraordinary services not limited by fees set in inverse condemnation action brought by estate). See also *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 154, 50 CR3d 273 (error to base hourly rates on local rule setting rate for expert witnesses).

In contested matters, the fees set in the schedules are generally too low to fully compensate the prevailing party. In that situation, fees exceeding the scheduled amount can be awarded on a proper showing. Counsel seeking such fees bear the burden of proof. CCP §1033.5(c)(5). Counsel should check with the clerk of the relevant court to learn whether the court has adopted a fee schedule.

See Apps E-G for sample declarations.

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### §8.24 G. Fees Set by Agreement

Occasionally the parties to a contract will agree to the amount of fees that may be awarded to the prevailing party. The author is not aware of any case law determining whether such agreements are enforceable. Under the general principles applicable to fee-shifting clauses, such agreements would seem to be binding so long as the clause was freely negotiated, the agreed-on fees were reasonable, and the provision was not inconsistent with CC §1717, whose protections are not waivable. See chap 4. On the other hand, such agreements may be viewed as usurping the power of the trial court to determine reasonable fees and/or permitting unreasonable fees to be awarded.

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## II. LODESTAR-BASED FEE AWARDS GENERALLY NOT LIMITED BY AMOUNT OF DAMAGES RECOVERED: NO RULE OF "PROPORTIONALITY"

### §8.25 A. Relationship Between Relief Awarded and Fee Claim

The amount of damages awarded does not limit fee awards derived by the lodestar method. The relationship between the relief awarded and the plaintiffs' fee claim was thoroughly analyzed by the United States Supreme Court in *City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686. In *Rivera,* the plaintiffs won a jury verdict of $33,350 in a police brutality action under 42 USC §1983. Applying *Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933, the district court awarded $245,000 in fees, expressly finding that plaintiffs' claims were all based on a common core of facts; that the claims on which they did not prevail were closely related to the claims on which they did prevail; that the time devoted to the claims on which they did not prevail could not reasonably be separated from those on which they did prevail; that they had achieved excellent results; and that the number of hours spent was "fair and reasonable" and "reflected sound legal judgment under the circumstances."

The Supreme Court affirmed the district court's award. In doing so, a plurality of the Court rejected the city's argument that, in a civil rights action for damages, the fees awarded must be proportionate to the damages obtained. Instead, the Court reaffirmed *Hensley*'s lodestar approach, reasoning that the fee award in a civil rights action for damages cannot be judged solely by the monetary recovery obtained but must also take into account the nonpecuniary public benefit served by the litigation. Five of the justices rejected the notion that the plaintiffs' fee should be limited to a percentage of the monetary recovery, recognizing that Congress had implicitly found that such private tort-type fee arrangements were inadequate to attract competent counsel to civil rights cases. Finally, the plurality opinion of four justices noted that the safeguards under the *Hensley* approach were adequate to ensure against excessive or unreasonable fees. The Court reaffirmed the same principles in *Blanchard v Bergeron* (1989) 489 US 87, 103 L Ed 2d 67, 109 S Ct 939, in unanimously holding that the percentage fee called for in the prevailing party's contingent fee contract could not set an upper limit on fee awards under federal fee-shifting statutes. See §8.37.

These principles were recognized in *County of Los Angeles v Superior Court* (1999) 21 C4th 292, 304 n2, 87 CR2d 441:

> Even a small award of compensatory damages in a federal civil rights lawsuit can justify a substantial amount of attorney fees [citation]. The United States Supreme Court has expressly acknowledged that the deterrent effect of such fee awards on civil rights violators is "by no means inconsequential." [Citation] Together with compensatory and punitive damages, attorney fee awards serve to assure "that agents of the State will not deliberately ignore [constitutional] rights." [Citation]

The no-proportionality rule also was thoroughly examined in *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 419, 69 CR3d 750 (citing federal and state law interchangeably in approving $1.1 million fee award under 42 USC §1988, even though damages were only $30,300).

Despite this rule, there are situations in which the amount of damages recovered plays a significant role in determining the amount of fees awarded. See §§8.26, 8.28, 9.49, 10.37.

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**Source:** Civil Litigation/California Attorney Fee Awards/8 Methods of Fee Calculation/§8.26 B. California Law

### §8.26 B. California Law

California courts have adopted a similar but not identical rule to the federal rule that the amount of damages generally does not limit fee awards derived by the lodestar method. (The federal case law is discussed in §§8.25, 8.27.)

Interpreting the fee-shifting provision in California's Fair Employment and Housing Act (FEHA), Govt C §12965(b), the Ninth Circuit held in *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612, that consistent with the statute's purposes, "a trial court does not under California law abuse its discretion simply by awarding fees in an amount higher, even very much higher, than the damages awarded, where successful litigation causes 'conduct which the FEHA was enacted to deter [to be] exposed and corrected'" (quoting *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143). See also *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 419, 69 CR3d 750 (citing federal and state law interchangeably in approving $1.1 million fee award under Title VII, even though damages were only $30,300); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1175, 74 CR2d 510 (noting that because fee statute "does not limit fees to a percentage of the plaintiff's recovery, the attorney who takes such a case can anticipate receiving full compensation for every hour spent litigating a claim against even the most polemical opponent").

The same principle has been applied in numerous other statutory contexts. See, *e.g., Hayward v Ventura Volvo* (2003) 108 CA4th 509, 516, 133 CR2d 514 (fee award not limited to amount "incurred" under contingent fee contract; "fee provision allows consumers to pursue remedies in cases where.… the compensatory damages are relatively modest"); *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731 (following *Hayward*). See also, *e.g., Peak-Las Positas Partners v Bollag* (2009) 172 CA4th 101, 113, 90 CR3d 775; *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1276, 75 CR3d 413 (contract case); *Thompson Pac. Constr., Inc. v City of Sunnyvale* (2007) 155 CA4th 525, 557, 66 CR3d 175 (fee award to city under Pub Cont C §7107); *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 164, 50 CR3d 273; *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90 (noting that to limit fee by damages would allow recalcitrant opponent to deprive prevailing party of reasonable fee). See also *Jones v Tracy Sch. Dist.* (1980) 27 C3d 99, 118, 165 CR 100.

As with federal law (see §8.27), there are exceptions to this rule. First, under CCP §1033(a), a court of unlimited jurisdiction has discretion to deny or reduce a fee award if the case could have been brought in a court of limited jurisdiction. *Chavez v City of Los Angeles* (2010) 47 C4th 970, 982, __ CR3d __ (applying rule to fee claim under FEHA). Note, however, that the court must "give due consideration to the policies and objectives of the FEHA and determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives." 47 C4th at 986. It also should "consider FEHA's underlying policy of encouraging the assertion of meritorious FEHA claims, …. evaluate the entire case in light of the information that was known, or should have been known, by the plaintiff's attorney when the action was initially filed and as it developed thereafter," and avoid "hindsight bias" in judging the decision to file in the higher court. *Chavez v City of Los Angeles, supra*. The *Chavez* court noted, too, that the plaintiff did not show any broad public impact or significant benefit to anyone other than himself from the suit. 47 C4th at 990.

Second, a court has discretion to deny or reduce the fee award if "special circumstances" would render the fee award requested "unjust." *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 639, 186 CR 754. Under this rule, "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." *Chavez v City of Los Angeles*, 47 C4th at 990, quoting *Serrano IV*, 32 C3d at 635. See §10.53.

*Chavez* also cites the Supreme Court's decision in *Farrar v Hobby* (1992) 506 US 103, 115, 121 L Ed 2d 494, 113 S Ct 566, for the proposition that "'[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief… the only reasonable fee is usually no fee at all.'" 47 C4th at 989. Note that *Farrar* excepts cases that vindicate significant legal issues or serve some public purpose, a factor the court in *Chavez* expressly recognizes was not shown in that case. *Chavez,* 47 C4th at 990. *Farrar* is discussed in §8.28.

**Additional authorities:** *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143 (affirming $470,000 fee award when plaintiff recovered only $37,500; under lodestar method, "party who qualifies for a fee should recover for all hours reasonably spent unless special circumstances would render an award unjust"); *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1; *Engel v Worthington* (1997) 60 CA4th 628, 635, 70 CR2d 526 (although

plaintiff with only $250 in damages claimed $80,875 in fees, court noted that he "may well be entitled to every penny of the requested fee award"); *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 241 CR 239; *Camacho v Schaefer* (1987) 193 CA3d 718, 723, 238 CR 609; *Ganey v Doran* (1987) 191 CA3d 901, 236 CR 787 (affirming $11,500 fee award under CC §1717 when recovery was only $6900); *Niederer v Ferreira* (1987) 189 CA3d 1485, 1507, 234 CR 779 (following *City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686, discussed in §8.25); *Drouin v Fleetwood Enters.* (1985) 163 CA3d 486, 493, 209 CR 623. See also *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 37 CR2d 149; *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470; *Vacco Indus. v Van Den Berg* (1992) 5 CA4th 34, 6 CR2d 602. Compare these cases with *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922.

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## C. Federal Law

### §8.27 1. Fee Awards Generally Not Limited by Damages Amount

Numerous federal cases exemplify the rule that the amount of damages generally does not limit fee awards. In addition to the cases cited in §8.25, see, *e.g., Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 190 (discussing rationale for fully compensatory fee awards in cases with low statutory damages); *Mercer v Duke Univ.* (4th Cir 2005) 401 F3d 199 (affirming $380,000 fee award where relief obtained was "extremely limited" ($1 in punitive damages)); *Lytle v Carl* (9th Cir 2004) 382 F3d 978, 988 (fee award more than three times damages); *Childress v Darby Lumber, Inc.* (9th Cir 2004) 357 F3d 1000 (fee award more than double damages); *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899 (affirming $508,606 fee award that was more than five times damages awarded); *Thomas v NFL Players Ass'n* (DC Cir 2001) 273 F3d 1124 (damages of $73,390; fee award of $338,000). But see *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097, 1103. See also §8.37.

**Additional authorities:** *Quaratino v Tiffany & Co.* (2d Cir 1999) 166 F3d 422, 426; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359 (abuse of discretion for court to disregard lodestar and tie fee award to "low" ($17,500) damages award); *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550 (fee award of $66,535 affirmed when damages only $1); *Wallace v Mulholland* (7th Cir 1992) 957 F2d 333, 339 (no correspondence required between degree of plaintiff's financial recovery and amount of attorney fee award); *Corder v Gates* (9th Cir 1991) 947 F2d 374 ($90,333 fees awarded when damages only $24,006); *Hasbrouck v Texaco, Inc.* (9th Cir 1989) 879 F2d 632, 638 (fee award exceeded damages recovered); *Quesada v Thomason* (9th Cir 1988) 850 F2d 537 (fee award under 42 USC §1988 should not be reduced because amount of damages recovered was small); *Thorne v El Segundo* (9th Cir 1986) 802 F2d 1131, 1143 (reaffirming rule of *City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686, discussed in §8.25). See also *Civitello v 1st Credit of Am., LLC* (ND Cal, May 21, 2007, No. C 05-04944 WHA) 2007 US Dist Lexis 46620 ($98,924 fee awarded in individual consumer action in which plaintiff recovered only $3240.80).

**NOTE:** California courts also strongly reaffirm this principle as a matter of federal law. See *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 419, 69 CR3d 750 (citing federal and state law interchangeably in approving $1.1 million fee award when damages were only $30,300); *County of Los Angeles v Superior Court* (1999) 21 C4th 292, 304 n2, 87 CR2d 441 (even small damages awards may justify substantial fees). On California case law, see §8.26.

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### §8.28 2. Exception in Federal Civil Rights Cases for "Technical" or "De Minimis" Victories

In *Farrar v Hobby* (1992) 506 US 103, 121 L Ed 2d 494, 113 S Ct 566, the Supreme Court held, 5-4, that when the plaintiff prevails, but the victory is only "technical" or "de minimis" (because plaintiff won only nominal damages in a police misconduct action, in which he had demanded $17 million), the plaintiff may be awarded a very low fee or no fee at all. In her concurring opinion that provided the fifth and thus controlling vote, Justice O'Connor noted that, even when the court awards only nominal damages, a larger fee might be appropriate if the plaintiff wins on a significant issue or serves a public purpose. 506 US at 121, 121 L Ed 2d at 510. Finding no such purpose or issue in this case, however, the Court upheld a zero fee award to the plaintiff.

In *Chavez v City of Los Angeles* (2010) 47 C4th 970, 982, __ CR3d __, the court cited *Farrar* for the proposition that proposition that "'[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief… , the only reasonable fee is usually no fee at all.'" 47 C4th at 989. The court also noted, however, that the plaintiff failed to show that the judgment he had received had any broad public impact or benefited anyone other than himself, and that the grounds on which he prevailed were unrelated to any of his unsuccessful claims. 47 C4th at 990. *Chavez* also requires courts to consider the purposes of the underlying statute and not to engage in "hindsight bias" before determining that no fee, or a greatly reduced fee, should be awarded. 47 C4th at 986. Compare *Chavez* with *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612, in which the Ninth Circuit held that California law on "limited success" was less restrictive than federal law.

*Farrar* also was held to bar a fee award under federal law in *Choate v County of Orange* (2000) 86 CA4th 312, 103 CR2d 339. In *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922, the court applied a *Farrar*-type analysis to award the plaintiff a token ($500) attorney fee.

The federal courts have generally strictly construed the situations in which *Farrar* would be applied. For example, in *Mercer v Duke Univ.* (4th Cir 2005) 401 F3d 199, the court, discussing *Farrar,* affirmed a $380,000 fee award despite "extremely limited" relief of $1 in punitive damages. The right being enforced—eliminating discrimination under Title IX—was an important public right, and even though plaintiff did not seek declaratory or injunctive relief, the case would "serve as guidance to other schools facing similar issues." 401 F3d at 203. Also, plaintiff's motive in bringing suit was irrelevant because success must be based on relief sought, not which issue was "most important" to plaintiff. 401 F3d at 205.

Likewise, in *Estate of Enoch v Tienor* (7th Cir 2009) 570 F3d 821, 823, the court held that *Farrar* was not applicable to cases in which the plaintiffs recover more than nominal damages, even if there is a large discrepancy between the amount demanded and the amount recovered: "In cases which involve more than a nominal award, we have rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought or that the fee award might, in fact, be more than the plaintiff's recovery." See also, *e.g., Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1124; *Ollis v HearthStone Homes, Inc.* (8th Cir 2007) 495 F3d 570, 576 (recovery of nominal damages of $1 did not bar attorney fee award); *Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 190 (recovery of $1000 statutory maximum damages not de minimis); *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128 ($10,000 in damages, as well as stipulated change in defendant's policy, not de minimis, even though plaintiff sought broader relief); *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359 (*Farrar* inapplicable to a case in which $17,500 in damages was awarded); *Hall v City of Brawley* (SD Cal 1995) 887 F Supp 1333, 1346 n5 (*Farrar* held inapplicable to cases in which plaintiff prevails under 42 USC §2000e-5(g)(2)(B)(i), despite no award of damages); *Trevino v Gates* (CD Cal 1995) 888 F Supp 1509 ($1 compensatory and $9109 stipulated punitive damages, coupled with nonmonetary successes, supported attorney fees award of $25,000), aff'd in part, vacated in part (9th Cir 1996) 99 F3d 911, 925 (fee award remanded for reconsideration because, in setting fee, trial court relied too heavily on rates city paid private attorneys). Compare these cases to *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097.

For discussion of *Farrar*'s application when no damages were sought, see *Friend v Kolodzieczak* (9th Cir 1995) 72 F3d 1386; *Sierra Club v Hamilton County Bd. of County Comm'rs* (6th Cir 2007) 504 F3d 634, 651. But see *Benton v*

*Oregon Student Assistance Comm'n* (9th Cir 2005) 421 F3d 901.

Compare the cases discussed above with *United States Football League v National Football League* (2d Cir 1989) 887 F2d 408 (affirming fee and cost award of $5.5 million under Clayton Act (15 USC §15) when plaintiffs recovered only nominal damages of $1, trebled to $3). See also *Brandau v Kansas* (10th Cir 1999) 168 F3d 1179 (nominal damages of $1, fee award of $41,598.13); *Shrader v OMC Aluminum Boat Group, Inc.* (8th Cir 1997) 128 F3d 1218 ($3000 damages, $44,137.50 fee award); *McKenzie v Cooper, Levins & Pastko, Inc.* (11th Cir 1993) 990 F2d 1183 ($8600 damages, $103,000 attorney fees awarded); *Davis v Locke* (11th Cir 1991) 936 F2d 1208 ($0 compensatory and $1750 punitive damages, $62,000 attorney fees awarded); *Cowan v Prudential Ins. Co.* (2d Cir 1991) 935 F2d 522 ($15,000 damages, $54,000 attorney fees awarded); *Northeast Women's Ctr. v McMonagle* (3d Cir 1989) 889 F2d 466 ($887 in damages tripled to $2661; $64,946 attorney fees awarded).

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## III. IMPACT OF FEE AGREEMENT WITH CLIENT

### A. Effect of Contingent Fee Agreements on Lodestar-Based Fees

### §8.29 1. Issues Raised by Contingent Fee Agreement

At least four issues arise when the successful party has a contingency fee arrangement with counsel:

(1) Whether the court should adopt the parties' fee agreement, superseding use of the lodestar approach in setting the amount of the award;

(2) Whether the amount to which the attorney would be entitled under the contingent arrangement is a cap on the amount of fees the court can award under the lodestar method;

(3) If the amount awarded under the lodestar is less than the amount to which the attorney would be entitled under the contingent arrangement, whether the client still owes counsel the contingent amount; and

(4) If the lodestar approach is used, whether the fact that the case was taken on a contingency basis may be considered in applying any multiplier.

On the first issue, both federal and California courts have generally held that the court should determine fees under the lodestar method even if the successful party has a contingent fee agreement with counsel. See §8.33. Some exceptions have been made to this rule, however. See §§8.30-8.32, 8.34.

On the second issue, both California and federal courts have held that the amount payable under the contingent fee agreement should have little or no effect on the amount of the fee award determined under the lodestar method. See §§8.35-8.37.

On the third issue, the amount awarded by the court does not necessarily change the contractual arrangement between client and attorney. If the court awards lower fees than the attorney would be entitled to under the agreement, the client may still owe the attorney the contractual fee. See discussion of *Venegas v Mitchell* (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679, in §8.37.

On the fourth issue, California allows the lodestar figure to be increased to reflect the fact that the successful party's attorney took the case on a contingency basis. In contrast, the United States Supreme Court has ruled that contingency may *not* be used as a factor to increase the lodestar figure under federal fee-shifting statutes, although it still may be considered for purposes of common fund awards and under certain statutes. See §§10.22, 10.45; *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142.

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### §8.30 2. Lodestar Method Should Be Used Even if Counsel's Representation Is on Contingent Fee Basis

California courts have looked beyond the existence of a contingent fee contract in setting fees but have differed in how much weight to give the existence of such an agreement. In *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1096, 95 CR2d 198, the court, quoting *Vella v Hudgins* (1984) 151 CA3d 515, 520, 198 CR 725, held that, in calculating fees under the lodestar method, "[a]lthough the terms of the [fee] contract may be considered, they 'do not compel any particular award.'" See *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1172, 23 CR3d 335 (following *PLCM* and *Vella*); *Hayward v Ventura Volvo* (2003) 108 CA4th 509, 133 CR2d 514 (following *PLCM*); *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731 (following *Hayward*). Compare *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 105 n6, 37 CR2d 149 (reaffirming primacy of lodestar method regardless of contingent fee agreement), *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 218 CR 839 (same), and *State v Meyer* (1985) 174 CA3d 1061, 220 CR 884 (same), with *Glendora Community Redev. Agency v Demeter* (1984) 155 CA3d 465, 202 CR 389 (great weight to contingent fee agreement). See also *People ex rel Dep't of Transp. v Yuki* (1995) 31 CA4th 1754, 37 CR2d 616 (declining to decide between *Salton Bay* and *Glendora* because trial court improperly added "surcharge" to award by calculating fee as percentage of damages *and* fee award). Compare *Yuki* with *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 65, 75 CR3d 413 (expressly approving lodestar-based fee that court cross-checked against percentage of damages *plus* fee award).

Federal law is similar. See, *e.g., Blanchard v Bergeron* (1989) 489 US 87, 103 L Ed 2d 67, 109 S Ct 939; *Gotro v R&B Realty Group* (9th Cir 1995) 69 F3d 1485 (statute providing that plaintiff recover fees "incurred" for wrongful removal permits lodestar-based fee award to plaintiff represented on contingent basis). But see *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142 (under 42 USC §406(b), which provides for attorney fee of up to 25 percent of past-due Social Security benefits recovered, court should give primary consideration to contingent fee agreement with client). See also *Gisbrecht v Barnhart* (2002) 535 US 789, 807, 152 L Ed 2d 996, 122 S Ct 1817 (explaining interrelationship between lodestar-based fee awardable to client under Equal Access to Justice Act (28 USC §2412(d)) and contingent fee payable to attorney out of award under Social Security Act).

**Additional authorities:** *Marriage of Adams* (1997) 52 CA4th 911, 60 CR2d 811 (court properly awarded sanctions for fees "incurred" in opposing motion, based on hours and rates, to attorney representing party on contingent fee basis); *Sommers v Erb* (1992) 2 CA4th 1644, 1651, 4 CR2d 52 (court approved fee award based on contingent fee contract because it closely approximated estimated lodestar figure); *All-West Design, Inc. v Boozer* (1986) 183 CA3d 1212, 1227, 228 CR 736 (court affirmed fee award based on counsel's estimate of "minimum" amount of time he spent on case because resulting fee was less than amount due under contingent fee agreement; quoted with approval in *PLCM Group, Inc. v Drexler, supra*).

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### §8.31 a. Cases Establishing Primacy of Lodestar Method

The effect of contingent fee agreements on the amount of court-awarded fees was exhaustively analyzed in *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 950, 218 CR 839. In *Salton Bay,* an inverse condemnation case, the plaintiffs claimed fees of $4,285,500, based on the contingent fee contract they had with their attorneys, which gave the attorneys 40 percent of the total damages recovered. The defendant district argued that the fee should be based on a lodestar calculation, which, it argued, would result in fees of $241,000. The trial court awarded fees based on a sliding scale percentage of the award, which resulted in fees of $2,984,000.

The court of appeal reversed that award and remanded to the trial court for redetermination based on the lodestar method. The court noted that fee awards in other inverse condemnation actions were sometimes based on a contingent fee agreement, sometimes considered the agreement a primary factor, and sometimes ignored the agreement. 172 CA3d at 952. The court also looked at other cases in which the courts departed from basing fee awards on a percentage of the recovery and instead required that the award be based on the lodestar method. 172 CA3d at 953. It then reaffirmed that the lodestar method must be used in inverse condemnation actions, concluding that the legislature requires a "reasonable attorney fee," which cannot be set solely by the plaintiff and its attorney but must be based on objective factors such as a reasonable hourly rate and the amount of time spent. The contingent nature of the fee agreement must be considered, but it is not controlling. 172 CA3d at 956. See also *Cortez v Bootsma* (1994) 27 CA4th 935, 33 CR2d 20 (discussed in §8.36); *All-West Design, Inc. v Boozer* (1986) 183 CA3d 1212, 1227, 228 CR 736; *State v Meyer* (1985) 174 CA3d 1061, 220 CR 884; *Aetna Life & Cas. Co. v City of Los Angeles* (1985) 170 CA3d 865, 881, 216 CR 831. But see *Andre v City of W. Sacramento* (2001) 92 CA4th 532, 111 CR2d 891 (because CCP §1036 limits attorney fee award in inverse condemnation action to fees "actually incurred," fee agreement sets ceiling on amount court may award).

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### §8.32 b. Awards Based on Quantum Meruit

A similar result in different circumstances was reached in *Leaf v City of San Mateo* (1984) 150 CA3d 1184, 198 CR 447, disapproved on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241. In *Leaf,* the court held that a contingent fee of one-third of the recovery would not be a fair measure of a reasonable fee for two reasons: (1) The plaintiff had presented no evidence to show that such a contingent fee was customary in the local jurisdiction, and (2) the plaintiff was an attorney who represented himself and his wife. In these circumstances, the court held that a quantum meruit recovery was the reasonable and proper standard to apply. 150 CA3d at 1189 n6.

Compare *Leaf* with *Cazares v Saenz* (1989) 208 CA3d 279, 256 CR 209. In *Cazares*, the court held that an attorney seeking quantum meruit recovery on a partially performed contingent fee contract is not limited to recovering hourly rate times hours spent, but is entitled to an amount reflecting the value of contingency factors and delay in payment. This fee may be calculated by prorating the original contract price and awarding an appropriate proportion to the partially performing attorney, even if the amount exceeds the reasonable value of services, as adjusted for contingency factors and delayed payment.

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### §8.33 c. Award Based on Contingent Fee Contract, Supported by Lodestar-Adjustment Factors

A quite different approach was taken in *Glendora Community Redev. Agency v Demeter* (1984) 155 CA3d 465, 202 CR 389. In *Glendora,* the defendant successfully forced the plaintiff to abandon eminent domain proceedings after a jury found that defendant's property had been undervalued by $2.6 million. The court awarded defendant 25 percent of that figure as his attorney fee under CCP §1268.610, the amount that defendant had agreed to pay his attorney under a contingent fee contract. The court of appeal affirmed, holding that the court could properly base its fee award on the contingent fee contract, as long as that contract was reasonable under former Cal Rules of Prof Cond DR 2-107 (now see Cal Rules of Prof Cond 4-200). The court noted, however, that it was not equating a contingent fee agreement with a reasonable fee. The court then examined the nine factors set out in former Rule 2-107, which were:

(1) The novelty and difficulty of the issues involved and the skill required to perform the legal services properly;

(2) The likelihood, if apparent to the client, that the acceptance of the case will preclude other employment by the lawyer;

(3) The amount involved and the results obtained;

(4) Any time limitations imposed by the client or by the circumstances;

(5) The nature and duration of the professional relationship with the client;

(6) The experience, reputation, and ability of the lawyer or lawyers performing the service;

(7) Whether the fee is fixed or contingent;

(8) The time and labor required; and

(9) The client's informed consent to the fee agreement.

The court concluded that each factor supported the fee award. (Current Rule 4-200 adds two more factors to the list above: the amount of the fee in proportion to the value of the services performed, and the relative sophistication of the attorney and the client.) It is noteworthy both that the plaintiff's attorneys had no time records to support their claim and that defendant's expert witness testified that, under the lodestar method, the attorney fees would be between $30,000 and $45,000 rather than the $650,000 actually awarded.

Although the analysis the court used in *Glendora* was rejected in *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 950, 218 CR 839 (see §8.31), *Glendora* was cited with approval in *People ex rel Dep't of Water Resources v Andresen* (1987) 193 CA3d 1144, 1166, 238 CR 826 (affirming $1.2 million fee award when defendant recovered $3.2 million in condemnation action). *Glendora* was also cited with approval in *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 46, 97 CR2d 797 (lodestar method required in "constructive common fund" cases). A similar analysis was used in *Sommers v Erb* (1992) 2 CA4th 1644, 4 CR2d 52 (noting that contingent fee closely approximated counsel's "estimate" of lodestar fee). See also *Horning v Shilberg* (2005) 130 CA4th 197, 209, 29 CR3d 717 (contractual fee case; prevailing defendant's attorney charged $200 per hour, plus an additional $50 per hour payable if defendant was successful; trial court awarded full amount, and appellate court affirmed). Compare *People ex rel Dep't of Transp. v Yuki* (1995) 31 CA4th 1754, 37 CR2d 616 (declining to decide between *Salton Bay* and *Glendora* because trial court improperly added "surcharge" to award by calculating fee as percentage of damages *and* fee award).

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### §8.34 d. Lodestar-Adjustment Method Is Standard in Large Damage Cases

In large damages cases, the lodestar-adjustment method remains the generally applied standard for determining fees that are paid by the defendant, although that may result in the client's not being made whole. See, *e.g., Venegas v Mitchell* (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679 (court-awarded fees under 42 USC §1988 are not limit on contingent fees to which attorney and civil rights plaintiff client may agree). See also *Hamner v Rios* (9th Cir 1985) 769 F2d 1404; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 401, 33 CR3d 644 (discussed in §8.36).

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## §8.35 B. Effect of Contingent Fee Agreements in Statutory Fee Cases

Both the California and federal courts have rejected the argument that fees for plaintiffs who have contingent fee agreements with their counsel should be set or limited by the amount due under the agreement. See §§8.36-8.37.

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### §8.36 1. California Cases

As noted above, California cases have rejected the argument that fee awards to plaintiffs represented under contingency fee arrangements should be set or limited by those arrangements. See §8.30. For example, in *Vella v Hudgins* (1984) 151 CA3d 515, 198 CR 725, lengthy litigation over a deed of trust concluded with a $50,000 fee award under CC §1717. The defendant challenged the award, arguing that plaintiff's fee was limited to her obligation to her attorney under the contingent fee contract, which the defendant argued was a considerably lesser sum. The court of appeal rejected that argument, holding that although the terms of a contingent fee contract could be considered by the trial court, along with the other factors listed in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, the contract did not set an upper limit on the plaintiff's fees.

*Vella* was expressly cited with approval on this point in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1096, 95 CR2d 198, and followed in *Camacho v Schaefer* (1987) 193 CA3d 718, 238 CR 609 ($17,500 fee award affirmed although damages totaled $15,600). See *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1172, 23 CR3d 335 (following *PLCM* and *Vella*); *Hayward v Ventura Volvo* (2003) 108 CA4th 509, 133 CR2d 514 (following *PLCM*).

However, in *Andre v City of W. Sacramento* (2001) 92 CA4th 532, 111 CR2d 891, the court reached a different result in an inverse condemnation case, focusing on the words "actually incurred" in CCP §1036 to hold that when the court awards attorney fees in such a case, the fee agreement sets a ceiling on the amount of the award. Fees may be reduced if "they are unreasonable and pose an unnecessary burden on public funds, but they cannot be increased beyond what was 'actually incurred.'" 92 CA4th at 537.

**NOTE:** The decision in *Andre* appears to be out of step with cases interpreting the term "incurred" broadly to permit an award of reasonable attorney fees at market rates, even when the prevailing party did not actually incur fees because, for example, the representation was undertaken without cost to the party. See, *e.g., Lolley v Campbell* (2002) 28 C4th 367, 121 CR2d 571 (indigent plaintiff represented by labor commissioner "incurred" attorney fees under Lab C §98.2(c)). However, the distinction may lie in the legislature's use of the term "actually incurred" in CCP §1036. See §§2.20-2.26.

In a similar vein, see also *Horning v Shilberg* (2005) 130 CA4th 197, 209, 29 CR3d 717 (contractual fee case; prevailing defendant's attorney charged $200 per hour, plus an additional $50 per hour payable if defendant was successful; trial court awarded full amount, and appellate court affirmed).

In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 401, 33 CR3d 644, the court held that it was improper for the trial court to deny a lodestar enhancement on the ground that contingent fees were available to plaintiff's counsel under their contingent fee agreement, in addition to any statutory fee, to compensate counsel for their contingent risk. The court explained that contingency and delay (not the availability of contingent fees from the client) are proper enhancement factors because attorneys may collect only the larger of the two amounts, with appropriate setoffs. *Horsford v Board of Trustees, supra*.

A local court rule placing a cap on attorney fees is void when it restricts the exercise of the court's discretion to award a "reasonable" fee under a state statute. *Cortez v Bootsma* (1994) 27 CA4th 935, 33 CR2d 20 (local rule limiting fee award to contingent fee that plaintiff agreed to pay attorney was void because it conflicted with court's discretion to award reasonable fee under Lab C §3709).

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### §8.37 2. Federal Cases

The United States Supreme Court has held that a plaintiff's contingent fee agreement with his or her attorney has little or no bearing in setting a "reasonable attorneys' fee" and does not place a cap on court-awarded fees under 42 USC §1988. *Blanchard v Bergeron* (1989) 489 US 87, 103 L Ed 2d 67, 109 S Ct 939; *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426, 438. See also *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638 (prohibiting use of contingency as factor in adjusting lodestar figure).

The court held in *Venegas v Mitchell* (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679, however, that the converse was also true: Court-awarded fees under 42 USC §1988 do not place a cap on the contingent fees to which an attorney and civil rights plaintiff client may agree. In *Venegas,* a §1983 action, the plaintiff and attorney had entered into a contingent fee agreement which provided that any fee awarded by the court would be applied dollar for dollar to offset the contingent fee. The plaintiff won at trial and was awarded damages of $2.08 million. The court awarded $75,000 as reasonable attorney fees under §1988. Counsel claimed he was due $406,000 under the contingent fee agreement, but the plaintiff argued that his attorney was limited to the amount the court awarded. The Supreme Court held that nothing in §1988 precluded the plaintiff from entering into a contingent fee agreement with his attorney that might yield a greater fee for the attorney than the court might award, nor did Congress intend that result: "[Section] 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." 495 US at 90, 109 L Ed 2d at 84.

On the relationship between contingent fee agreements and lodestar-based fees in the Social Security Act context, see *Gisbrecht v Barnhart* (2002) 535 US 789, 152 L Ed 2d 996, 122 S Ct 1817 (explaining interrelationship between lodestar-based fee awardable to client under Equal Access to Justice Act (28 USC §2412(d)) and contingent fee payable to attorney out of award under Social Security Act); *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142.

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### §8.38 C. Effect of Contingent Fee Agreement in Cases Using Percentage-of-Recovery Method

Even when fees are paid on a percentage-of-fund basis in common fund cases, the contingent fee percentage agreed to by the client is not dispositive of the percentage to be awarded. See *Paul, Johnson, Alston & Hunt v Graulty* (9th Cir 1989) 886 F2d 268, 271; *Kaplan v Industrial Indem. Co.* (1978) 79 CA3d 700, 713, 145 CR 219. Rather, the courts attempt to base the percentage on their determination of which percentage reflects the legal marketplace for comparable cases. See *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 47, 97 CR2d 797. Some cases define that percentage as the fee that would have been negotiated with a sophisticated client at the outset of the case. See *Lealao*, 82 CA4th at 48.

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# 9

# Determining the Lodestar

I. CALCULATING THE LODESTAR FIGURE
A. The Lodestar: Hours Reasonably Spent Times Reasonable Hourly Rate §9.1
B. Importance of Trial Court's Calculation of Lodestar Figure §9.2

II. HOURS REASONABLY SPENT
A. The Applicable Standard
1. Counsel Should Recover for All Hours "Reasonably Spent" §9.3
2. Standard for Determining Whether Time "Reasonably Spent" §9.4
3. Importance of "Billing Judgment" §9.5
B. Compensable Activities
1. Prelitigation Activities
a. Time Spent on Case Before Filing May Be Compensable §9.6
b. Time Spent on Prelitigation Administrative Proceedings May Be Compensable §9.7
2. Litigation Activities
a. Time Reasonably Spent on Litigation Activities Generally Is Compensable §9.8
b. Examples of Litigation Activities That May Be Compensable §9.9
c. Court Appearance Not Required for Time to Be Compensable §9.10
d. Litigation Necessitated by Third Parties May Be Compensable §9.11
e. Time Spent Opposing Intervenors May Be Compensable §9.12
3. Ancillary Proceedings
a. Time Spent on Ancillary Proceedings Closely Related to Litigation Is Compensable §9.13
b. Work Required in Ancillary Forums to Protect Decree Is Compensable §9.14
c. Time Spent on Amicus Curiae Briefs Closely Related to Litigation May Be Compensable §9.15
4. Fee-Related Services
a. Time Spent Litigating Fee Claim Is Compensable Under Fee-Shifting Statutes §9.16
b. Time Spent Litigating Fee Claim Based on Contract Is Compensable §9.17
c. Time Spent Securing or Opposing Sanctions Award May Be Compensable §9.18
d. Time Spent on Fee-Related Services Under Equitable Common Fund and Substantial Benefit Theories §9.19
e. Standards for Determining Whether Fee-Related Services Are Reasonable
(1) California Law §9.20
(2) Federal Law §9.21
f. Cost of Expert Witnesses Retained to Support Fee Claim May Be Compensable §9.22
g. Examples of Cases Awarding Substantial Fees for Fee Litigation §9.23
5. Enforcement, Monitoring, and Collection Activities
a. Work Enforcing or Monitoring Prior Decrees May Be Compensable §9.24
b. Work Defending Consent Decree Against Third Party Attack in Separate Action May Be Compensable §9.25
c. Fee Awards in Class Actions May Include Awards for Future Monitoring and Enforcement, or May Establish a Process for Claiming Future Fees §9.26
d. Time Spent Collecting or Securing Judgment May Be Compensable §9.27
6. Travel Time §9.28
7. Time Spent by Paralegals and Law Clerks
a. General Rule: Paralegal and Law Clerk Time Is Compensable §9.29
b. Attorney Performing Paralegal Work §9.30
8. Appellate Services, Including Original Writs
a. Appellate Services Generally Compensable When Reasonable Attorney Fees Provided by Statute or Contract §9.31
(1) Costs on Appeal Are Separate From Attorney Fees on Appeal §9.32
(2) Appellate Fees May Be Recoverable Regardless of Whether Trial Court Awards Fees Initially §9.33
(3) Appellate Fees May Be Recoverable Regardless of Whether Appellate Court Awards Fees §9.34
(4) Same Rules Apply to Work on Original Writ Proceedings §9.35
b. Appellate Fees Under Fee-Shifting Statutes
(1) General Rule: Appellate Services Are Compensable Under Fee-Shifting Statutes §9.36
(2) Inverse Condemnation Appellate Services §9.37

c. Appellate Fees Under Contractual Fee Clauses
(1) General Rule: Appellate Services Are Compensable Under Contracts Providing for Attorney Fees §9.38
(2) Contract Providing Fees for Arbitration §9.39
(3) Split of Authority Concerning Fees for Appealing Indemnification Award §9.40
d. Appellate Fees Under Equitable Theories
(1) General Rule: Appellate Services Are Compensable Under Equitable Theories §9.41
(2) Split of Authority Concerning *Brandt* Fees §9.42
e. Standards for Determining Entitlement to Appellate Fees
(1) General Rule: Entitlement to Appellate Fees Based on Outcome of Case as a Whole, Not Who "Won" the Appeal §9.43
(2) Fees May Be Available When Party Ultimately Prevails §9.44
f. Entitlement to Fees for Partially Successful Appeals
(1) California Courts §9.45
(2) Federal Courts §9.46
g. Standards for Determining Whether Appellate Services Are Reasonable §9.47
C. Limitations on Compensability of Time Actually Spent §9.48
1. Partial or Limited Success: Determining Whether a Reduction Is Appropriate §9.49
a. Party That Obtains Excellent Results Is Entitled to Fully Compensatory Fee §9.50
b. Time Spent on Unsuccessful or Partially Successful Claims §9.51
(1) General Rule: Time Spent on Unsuccessful *Unrelated* Claims Not Compensable; Court May Reduce Fee Accordingly §9.52
(a) Distinguishing Between Unsuccessful *Theories* and Unsuccessful *Claims*
(i) General Rule: All Time Reasonably Spent on Unsuccessful Theory Is Compensable §9.53
(ii) Distinction Between Theories and Claims Not Always Clear §9.54
(b) Distinguishing Between "Related" and "Unrelated" Claims
(i) "Unrelated" Claims Involve "Entirely Distinct and Separate Courses of Conduct"; "Related" Claims Involve Common Facts or Legal Theories §9.55
(ii) Examples §9.56
(c) Lodestar Adjustments for Partial Success ("Negative Multipliers") §9.57
(2) Exceptions to "Partial Success" Rules §9.58
(a) All Time Spent on Common Work Is Compensable §9.59
(b) Time Spent on Unsuccessful Claims That Contribute to Success of Other Claims Is Compensable §9.60
(c) Time Spent on Unsuccessful Claims That Is Impossible to Segregate, Is Inextricably Intertwined With the Successful Claim, or De Minimis May Be Compensable §9.61
(d) Time Spent on Issues Court Does Not Address May Be Compensable §9.62
(e) Time Spent on Claims That Are Ultimately Successful Is Compensable §9.63
(f) Time Spent Against Parties From Whom No Relief Obtained §9.64
2. Time Spent on Nonfee Claims Joined With Fee Claims
a. General Rule: Work on Nonfee Claims Is Not Compensable §9.65
b. Exception When Work on Both Claims Is Closely Related §9.66
c. Exception When Work Is Relevant to Both Fee and Nonfee Claims §9.67
d. Special Rule in Cartwright Act Cases §9.68
e. Exception When Work on Nonfee Claim Cannot Be Segregated From Work on Fee Claim §9.69
3. Time Spent on Public Versus Private Claims
a. Cases in Which Public Benefit Is Required for Fee Award §9.70
b. Cases in Which No Broad Public Benefit Is Required §9.71
4. Alleged Duplication of Effort by Counsel
a. General Rule: Time Spent by Multiple Attorneys Is Compensable if Reasonable §9.72
b. California §9.73
c. Federal §9.74
(1) Fee Claimants With Separate Interests §9.75
(2) Rulings on Specific Types of Alleged Duplication §9.76
(3) Burden Is on Party Challenging Hours for Duplication §9.77
5. Reductions Based on "Special Circumstances" That Would Make Fully Compensatory Award Unjust §9.78
D. Apportioning Fees Among Liable Parties
1. Fee Award May Be Apportioned Among Defendants §9.79
2. Allocation Among Defendants Need Not Be Based on Time Spent Litigating Against Particular Defendants §9.80
3. If Court Does Not Apportion Award Among Defendants §9.81
E. Documenting Reasonable Hours
1. Importance of Accurate Recordkeeping §9.82
2. Recordkeeping Requirements Under California Fee-Shifting Law

a. Detailed Time Records Not Required But Advisable §9.83
b. Level of Detail Required §9.84
c. Redaction of Privileged Information §9.85
3. Recordkeeping Requirements Under Federal Law
a. Some Federal Courts May Reduce Award if No Contemporaneous Records §9.86
b. Lack of Contemporaneous Records Not Fatal to Fee Claim §9.87
c. Level of Detail Required §9.88
d. Redaction of Privileged Information §9.89
4. Burden of Challenging Claimed Hours §9.90
5. Challenging Hours on Appeal §9.91

III. REASONABLE HOURLY RATES
A. Trial Court Must Determine Reasonable Hourly Rate for Each Attorney Claiming Fees §9.92
B. General Rule: Market Rates Set Standard §9.93
1. Rule Applies Regardless of How Attorney Claiming Fees Charges for Services §9.94
2. Rule Applies to Public Interest Lawyers
a. California §9.95
b. Federal §9.96
3. Rule Applies to Private Attorneys Charging Less Than Market Rates §9.97
4. Rule Applies to Attorneys Charging Contingent Fee §9.98
5. Rule Applies to In-House Counsel §9.99
6. Exceptions to Market Rate Rule
a. Statutes Setting Applicable Rate §9.100
b. Court Schedules Setting Hourly Rates §9.101
c. Contract Setting Applicable Rate §9.102
7. Cost-Accounting Method of Determining Rates Rejected §9.103
C. General Rule: Requested Rate Should Be Awarded if in Line with Rates of Reasonably Comparable Attorneys Performing Reasonably Comparable Services §9.104
1. Determining Reasonably Comparable Attorneys §9.105
a. Practice Area §9.106
b. Special Qualifications §9.107
c. Firm Size §9.108
2. Determining Reasonably Comparable Services
a. Rates Charged by Attorneys Handling Cases of Comparable Difficulty Generally Set Standard §9.109
b. General Rule: Rate Does Not Vary Depending on Task Performed §9.110
3. Determining Whether to Use Current or Historical Rates
a. Current Rates May Be Used to Compensate for Delay in Payment §9.111
b. Exception for Fee Awards Against the United States §9.112
c. Most California Awards Based on Current Rates §9.113
4. Determining the Geographic Market
a. General Rule: "Market" Is Community Where Services Are Rendered §9.114
b. Exception May Be Made for Counsel From Market Where Rates Are Higher Than Forum Rate §9.115
5. Avoiding Double-Counting: Same Facts May Not Be Used to Determine Both Lodestar and Multiplier
a. California §9.116
b. Federal §9.117
6. Paralegals, Law Clerks, and Other Billing Personnel
a. Paralegal, Law Clerk, and Student Time Compensable at Market Rates §9.118
b. Other Billing Personnel §9.119
D. Proof of Appropriate Rates
1. Burden of Proof Is on Party Seeking Fee Award §9.120
2. Methods of Demonstrating Market Rates §9.121
E. Challenging Claimed Rate
1. In Absence of Contradictory Evidence, Requested Rates Presumed Reasonable §9.122
2. Burden on Party Challenging Claimed Rate §9.123

IV. RECOVERING NONSTATUTORY COSTS AND OUT-OF-POCKET EXPENSES
A. California Rule
1. Expert Witness Fees Not Recoverable Under CCP §1021.5 §9.124
2. Expert Witness Fees May Be Recoverable Under Other Fee-Shifting Statutes §9.125
3. Other Nonstatutory Costs and Expenses
a. Contract Cases §9.126
b. Statutory Fee Cases §9.127
B. Federal Rule §9.128

1. Expert Witness Fees Not Recoverable Absent Express Statutory Authorization §9.129
2. Other Nonstatutory Costs and Expenses Recoverable as Attorney Fees §9.130
C. Nonstatutory Costs Recoverable Under Equitable Doctrines §9.131

V. INTEREST ON ATTORNEY FEE AWARDS
A. Interest Accrues on Fee Award §9.132
B. Date Interest Starts Accruing §9.133
C. Exception May Apply When Federal Government Is Defendant §9.134

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## I. CALCULATING THE LODESTAR FIGURE

### §9.1 A. The Lodestar: Hours Reasonably Spent Times Reasonable Hourly Rate

The lodestar-adjustment method of calculating reasonable attorney fees is the presumptively applicable methodology for determining the amount of most fee-shifting claims. On the primacy of the lodestar-adjustment method, see §§8.3-8.10.

In applying the lodestar-adjustment method, the court's first step in determining a reasonable attorney fee is to calculate the lodestar figure. *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900; *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48 n23, 141 CR 315; *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 82, 249 CR 606. The lodestar figure is obtained by multiplying the hours reasonably worked by each person entitled to compensation by a reasonable hourly rate for those services. *Serrano III*, 20 C3d at 48. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 639, 186 CR 754. The court then may adjust that lodestar figure upwards (a "multiplier") or downwards based on other factors that go into the determination of a reasonable attorney fee. On adjusting the lodestar, see chap 10.

This chapter discusses the lodestar calculation. How the court establishes the reasonable number of compensable hours spent is discussed in §§9.3-9.91. How the court decides reasonable hourly rates to apply is discussed in §§9.92-9.123. Recovery of out-of-pocket expenses of the type normally billed to fee-paying clients over and above statutory costs is discussed in §§9.124-9.131. The recovery of interest on fee awards is discussed in §9.132-9.134.

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## §9.2 B. Importance of Trial Court's Calculation of Lodestar Figure

The calculation of the lodestar figure is fundamental to the trial court's determination of the amount of fees to be awarded. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315. The lodestar figure is crucial in awarding fees because it anchors the analysis to an objective determination, which ensures that the trial judge does not award an arbitrary amount. See 20 C3d at 49 n23. See discussion in §§9.3-9.4.

Because the lodestar figure is "fundamental," the trial court's failure to calculate it is reversible error. *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900 (trial court used illogical measure to determine fees; fee award must bear reasonable relationship to lodestar figure). See also *Horsford v Board of Trustees* (2005) 132 CA4th 359, 394, 33 CR3d 644; *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269; *Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 149 CR 829.

Under federal law, there is a strong presumption that the lodestar figure is a reasonable fee. See, *e.g., Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363, 364 n8; §10.23.

Whether a statement of decision is required on the lodestar figures is discussed in §§11.65-11.68.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/ II. HOURS REASONABLY SPENT/ A. The Applicable Standard/§9.3 1. Counsel Should Recover for All Hours 'Reasonably Spent'

## II. HOURS REASONABLY SPENT

### A. The Applicable Standard

### §9.3 1. Counsel Should Recover for All Hours "Reasonably Spent"

Most courts start their determination of the lodestar figure by determining the number of hours reasonably spent by each biller. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315. In *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 639, 186 CR 754, the court held that prevailing counsel are entitled to compensation for all hours reasonably spent: "[A]bsent circumstances rendering the award unjust, fees recoverable under [CCP §1021.5] ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." See also *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143 ("Under the lodestar method, a party who qualifies for a fee should recover for all hours reasonably spent unless special circumstances would render an award unjust," citing *Serrano IV*).

Similarly, under federal law, there is a strong presumption that the lodestar, which includes all hours reasonably spent, is a reasonable fee. See, *e.g., Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363, 364 n8. See §10.23.

The following are examples of cases citing this rule with approval:

- *Ketchum v Moses* (2001) 24 C4th 1122, 1133, 104 CR2d 377;
- *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 997, 94 CR3d 802;
- *Peak-Las Positas Partners v Bollag* (2009) 172 CA4th 101, 114, 90 CR3d 775 (hours determination affirmed: "the fees are well documented and reasonable in light of the complexity of the issues, [defendant's] aggressive litigation posture, and the results obtained");
- *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 84 CR3d 754 (upholding trial court's finding that "the amount of hours claimed by Bernardi's counsel was reasonable in light of the length and difficulty of the… litigation");
- *Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 564, 77 CR3d 695 ("In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice.");
- *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731 (prevailing party must show that "fees incurred were reasonably necessary to the conduct of the litigation, and were reasonable in amount");
- *Horsford v Board of Trustees* (2005) 132 CA4th 359, 395, 33 CR3d 644 (court must "focus on providing an award of attorney fees reasonably designed to fully compensate plaintiffs' attorneys for the services provided");
- *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 839, 112 CR2d 284 ("Compensation should not be strictly limited to efforts that were demonstrably productive");
- *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1175, 74 CR2d 510 ("attorney who takes such a case can anticipate receiving full compensation for every hour spent litigating a claim against even the most polemical opponent");
- *Engel v Worthington* (1997) 60 CA4th 628, 635, 70 CR2d 526 (although plaintiff recovered only $250 in damages and claimed $80,875 in fees, court noted that he "may well be entitled to every penny of the requested fee award" and that "[t]o deny him the full amount of the requested fees would be tantamount to finding the fees were unreasonable per se, some of his efforts unwarranted, or his goal unworthy");
- *Hensley v Eckerhart* (1983) 461 US 424, 431, 76 L Ed 2d 40, 49, 103 S Ct 1933 ("The appropriate number of hours includes all time 'reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.'");
- *Winterrowd v American Gen. Annuity Ins. Co.* (9th Cir 2009) 556 F3d 815, 827;

- *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1111, 1112 ("The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client… By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.");
- *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612 (interpreting California law as requiring a "high threshold for triggering decreases due to limited success").

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### §9.4 2. Standard for Determining Whether Time "Reasonably Spent"

Generally speaking, hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." *Hensley v Eckerhart* (1983) 461 US 424, 431, 76 L Ed 2d 40, 49, 103 S Ct 1933. See also *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1111 ("The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client"); *Norman v Housing Auth.* (11th Cir 1988) 836 F2d 1292, 1306 ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done"); *Moore v Jas. H. Matthews & Co.* (9th Cir 1982) 682 F2d 830, 839 (successful attorneys entitled to be compensated for "every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest"); *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731 (prevailing party must show that "fees incurred were reasonably necessary to the conduct of the litigation, and were reasonable in amount").

Hours that would not be billed to a fee-paying client because they are unreasonably duplicative or excessive for the task performed are not reasonable. See *Hensley*, 461 US at 434 ("Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority"; citation omitted).

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### §9.5 3. Importance of "Billing Judgment"

When appropriate, counsel should exercise "billing judgment" in their fee claims, excluding excessive, redundant, or otherwise unnecessary hours. *Hensley v Eckerhart* (1983) 461 US 424, 431, 76 L Ed 2d 40, 49, 103 S Ct 1933.

Examples of cases discussing "billing judgment" include:

- *Jordan v Multnomah County* (9th Cir 1987) 815 F2d 1258, 1263 n8;
- *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345 (plaintiffs' across-the-board 5-percent reduction for "billing judgment" noted);
- *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899, 908 (noting that counsel "exercised considerable billing judgment," and finding counsel's hours justified by "quality" of papers, amount of "research they evidence," and "detailed and fact-specific work" required to prepare them);
- *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1104 (noting counsel's exercise of billing judgment);
- *Common Cause v Jones* (CD Cal 2002) 235 F Supp 2d 1076, 1079 (same).

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## B. Compensable Activities

### 1. Prelitigation Activities

### §9.6 a. Time Spent on Case Before Filing May Be Compensable

An attorney's time spent on a case before the action is filed may be compensable, including time reasonably spent interviewing the client, investigating the facts and law, and preparing the initial pleadings. See, *e.g., Webb v Board of Educ.* (1985) 471 US 234, 85 L Ed 2d 233, 105 S Ct 1923, noting that services performed before a lawsuit is formally begun are often performed "on the litigation," including drafting the initial pleadings and work associated with developing the theory of the case. See also *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1370, 69 CR3d 250; *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90 (affirming fee award for services rendered on two prior dismissed complaints when services were necessary and useful to successful action). Compare *Stokus* with *Carroll v Import Motors, Inc.* (1995) 33 CA4th 1429, 39 CR2d 791 (fees incurred in prior action were not necessary to victory in second action and therefore not compensable). See also *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1098 (parties agreed that fees during negotiation period, before complaint was filed, were recoverable).

**NOTE:** To recover fees under a "catalyst theory," the plaintiff must have made a reasonable effort to settle the matter before filing the lawsuit. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553**,** 560, 21 CR3d 331, discussed in §§2.111-2.117. When the effort is made by the party's attorney, the time spent doing so should be compensable.

**Additional authorities:** *La Mesa-Spring Valley Sch. Dist. v Otsuka* (1962) 57 C2d 309, 19 CR 479; *Case v Unified Sch. Dist. No. 233* (10th Cir 1998) 157 F3d 1243, 1251.

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### §9.7 b. Time Spent on Prelitigation Administrative Proceedings May Be Compensable

Related prelitigation administrative proceedings may also be compensable, particularly when they perform the same function as prelitigation preparation. See *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1461, 240 CR 1 (permitting attorney fees for preliminary administrative proceedings, because they were first step in the litigation and thus were "useful and of a type ordinarily necessary" to litigation). See also *Land v Anderson* (1997) 55 CA4th 69, 84, 63 CR2d 717 (noting "need for exhaustion of administrative remedies"). For further discussion of attorney fees in administrative proceedings, see chap 13.

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## 2. Litigation Activities

### §9.8 a. Time Reasonably Spent on Litigation Activities Generally Is Compensable

Subject to the exceptions noted in §§9.48-9.78 (Limitations of Compensability of Time Actually Spent) on unsuccessful claims and nonfee claims, time reasonably spent by attorneys during the course of litigation is generally compensable if it was the type and amount of work that would be billed to a fee-paying client. See *Hensley v Eckerhart* (1983) 461 US 424, 434, 76 L Ed 2d 40, 51, 103 S Ct 1933; *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1111, 1112 ("The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client… By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.").

**Additional authorities:** *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731 (prevailing party must show that "fees incurred were reasonably necessary to the conduct of the litigation, and were reasonable in amount"); *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 839, 112 CR2d 284 ("Compensation should not be strictly limited to efforts that were demonstrably productive."). See also *Peak-Las Positas Partners v Bollag* (2009) 172 CA4th 101, 114, 90 CR3d 775 (rejecting challenges that hours were excessive because case was "simple," plaintiff used two experienced attorneys to try case when one would have done, engaged in unnecessary discovery, hired expert who did not testify, and employed lawyers from different law firms); *Ballen v City of Redmond* (9th Cir 2006) 466 F3d 736, 746 (rejecting contentions that lodestar excessive because of short duration of lower court proceedings, minimal formal discovery required, fact that parties appeared jointly in court only once, and significantly fewer hours expended by losing party's attorneys); *International Rectifier Corp. v Samsung Electronics Co.* (Fed Cir 2005) 424 F3d 1235, 1240 (because no clear and concise explanation supported finding that case was "terribly over-lawyered," appellate court vacated and remanded finding).

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### §9.9 b. Examples of Litigation Activities That May Be Compensable

The following are examples of time spent that may be compensable:

- **Waiting in court for assignment to a courtroom for trial.** *Hadley v Krepel* (1985) 167 CA3d 677, 684, 214 CR 461.
- **Conducting moot court trial runs and consulting with jury experts.** *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 234, 226 CR 265; *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1286; *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407.
- **Narrowly focused political lobbying in support of the lawsuit, and time spent with the media to influence public opinion on matters directly related to the litigation or to inform class members about the lawsuit.** *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1545, modified on other grounds (9th Cir 1993) 984 F2d 345; *U.S. v City of San Diego* (SD Cal 1998) 18 F Supp 2d 1090, 1099; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1101. But see *California Common Cause v Duffy* (1987) 200 CA3d 730, 753, 246 CR 285 (affirming denial of fees for time spent "accommodating calls from the press").
- **Drafting and revising pleadings.** See generally *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 12, 54 CR3d 724; *Planned Parenthood v Attorney General* (3d Cir 2002) 297 F3d 253 (discussing variety of challenges to hours claimed). See also, *e.g., Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 561, 77 CR3d 695 (345 hours on motion to strike not unreasonable: "each fee application under [CCP §425.16(c)] must be assessed on its own merits," according to applicable legal principles and "taking into account what is reasonable under the circumstances"); *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629 (length of document no gauge of time needed to prepare it); *Stokus v Marsh* (1990) 217 CA3d 647, 266 CR 90; *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *18; *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *12; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 994; *Fleming v Kemper Nat'l Servs., Inc.* (ND Cal 2005) 373 F Supp 2d 1000, 1008; *Federation of Fly Fishers v Daley* (ND Cal 2002) 200 F Supp 2d 1181 (compensating 325 hours of work on summary judgment motion); *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 699.
- **Discovery and investigation, including depositions and review of documents.** *MBNA Am. Bank v Gorman, supra; Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 995.
- **Conferring with clients, other counsel, or both.** See, *e.g., Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 561, 77 CR3d 695; *MBNA Am. Bank v Gorman, supra; Citizens Against Rent Control v City of Berkeley, supra*. *Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 921 (at appellate stage); *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *11 (time spent serving as guardian ad litem and counsel compensable); *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095. See also *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *14 (time spent interviewing potential class members who did not qualify for class compensable).
- **Research and briefing.** See, *e.g., MBNA Am. Bank v Gorman, supra; Citizens Against Rent Control v City of Berkeley, supra; California Common Cause v Duffy, supra* (computer research); *Democratic Party of Washington v Reed, supra; Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899, 908 (affirming finding that counsel's hours were justified by the "quality" of the papers, the "research they evidence, and the detailed and fact specific work that was required to prepare them"); *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 535 (preparing amicus brief to protect clients' interests); *Ramon v County of Santa Clara* (2009) 173 CA4th 915, 93 CR3d 278 (same); *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 994. See also *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 118 CR2d 629.

- **Court appearances, as well as postappearance time.** *MBNA Am. Bank v Gorman, supra; Democratic Party of Washington v Reed, supra; Fleming v Kemper Nat'l Servs., Inc., supra*.
- **Settlement discussions and negotiations.** *Fleming v Kemper Nat'l Servs., Inc.* (ND Cal 2005) 373 F Supp 2d 1000, 1009.
- **Preparing for trial while attempting to settle.** *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 996.
- **Bringing or defending motions.** See, *e.g., Cabrales v County of Los Angeles* (9th Cir 1991) 935 F2d 1050, 1053 (plaintiff entitled to compensation for unsuccessfully defending against petition for certiorari because plaintiff ultimately successful on claim); *Winterrowd v American Gen. Annuity Ins. Co.* (9th Cir 2009) 556 F3d 815, 827 (plaintiff entitled to compensation for time spent on three unsuccessful summary judgment motions); *O'Neal v City of Seattle* (9th Cir 1995) 66 F3d 1064, 1068 (plaintiff entitled to compensation for unsuccessful class certification motion because plaintiff's claim on merits ultimately successful); *Emery v Hunt* (8th Cir 2001) 272 F3d 1042 (success assessed on case as whole, not on motion-by-motion basis); *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139; *L.H. v Schwarzenegger* (ED Cal 2009) 645 F Supp 2d 888, 897; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 994 (plaintiffs entitled to compensation for work on motions for preliminary injunction, partial summary judgment, and bifurcation). See also *Webb v Sloan* (9th Cir 2003) 330 F3d 1158.
- **Collecting a judgment, including an attorney fee award.** *Ketchum v Moses* (2001) 24 C4th 1122, 1141 n6, 104 CR2d 377; *Jaffe v Pacelli* (2008) 165 CA4th 927, 82 CR3d 423; *Globalist Internet Technols., Inc v Reda* (2008) 167 CA4th 1267, 84 CR3d 725. On compensability of time spent on fee-related services, see §§9.16-9.23. On time spent on other enforcement, monitoring, and collection activities, see §§9.24-9.27.

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### §9.10 c. Court Appearance Not Required for Time to Be Compensable

An attorney need not have appeared in court to be entitled to a fee award. *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 217 CR 125; *Winterrowd v American Gen. Annuity Ins. Co.* (9th Cir 2009) 556 F3d 815, 823. See also *Mix v Tumanjan Dev. Corp.* (2002) 102 CA4th 1318, 126 CR2d 267; *Case v Unified Sch. Dist. No. 233* (10th Cir 1998) 157 F3d 1243, 1252 (entry of appearance not required).

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### §9.11 d. Litigation Necessitated by Third Parties May Be Compensable

Fees may be awarded for work necessitated by third parties. *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 976, 259 CR 599.

**Additional authorities:** *R.P. Richards, Inc. v Chartered Constr. Corp.* (2000) 83 CA4th 146, 99 CR2d 425; *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163. See also *Behniwal v Mix* (2007) 147 CA4th 621, 641, 54 CR3d 427.

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### §9.12 e. Time Spent Opposing Intervenors May Be Compensable

Plaintiffs can recover from the defendant for time spent opposing intervenors if the defendants join with the intervenors or if the intervenor's acts are made necessary by the defendants' opposition to plaintiffs' claims. *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, 1097. See also *Richard S. v Department of Dev. Servs.* (9th Cir 2003) 317 F3d 1080, 1089. But see *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163, discussed in §9.24. On recovering fees from intervenors, see, *e.g., Costco Wholesale Corp. v Hoen* (9th Cir 2008) 538 F3d 1128. See also §2.39.

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### 3. Ancillary Proceedings

### §9.13 a. Time Spent on Ancillary Proceedings Closely Related to Litigation Is Compensable

Fees are available for ancillary proceedings that are "inextricably intertwined" with litigation. See *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 847, 216 CR 649.

In *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 778, 118 CR2d 629, the court followed *Wallace,* holding that fees are recoverable for ancillary proceedings that are "closely related and useful" to the litigation, or that "materially contributed to the litigation"; there is no requirement that the work have been "necessary."

The issue of attorney fees for work in administrative proceedings is discussed in more detail in chap 13.

**Additional authorities:** *Rosas v County of San Bernardino* (CD Cal 2003) 260 F Supp 2d 990, 992 (compensating time spent representing plaintiff in criminal proceedings); *U.S. v City of San Diego* (SD Cal 1998) 18 F Supp 2d 1090, 1100.

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### §9.14 b. Work Required in Ancillary Forums to Protect Decree Is Compensable

Work that is believed necessary to protect a judgment or decree also is compensable. See, *e.g., San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163. See also *Pennsylvania v Delaware Valley Citizens' Council for Clean Air* (1986) 478 US 546, 559, 92 L Ed 2d 439, 452, 106 S Ct 3088; *Armstrong v Davis* (9th Cir 2003) 318 F3d 965 (compensating otherwise uncompensated work performed in another case that was necessary to preserve victory); *Southern Cal. Edison Co. v PUC* (2004) 117 CA4th 1039, 12 CR3d 441 (PUC intervenor compensation statute also permits fee awards for helping to defend PUC decisions in federal court); *Jaffe v Pacelli* (2008) 165 CA4th 927, 82 CR3d 423; *Globalist Internet Technols., Inc v Reda* (2008) 167 CA4th 1267, 84 CR3d 725; *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 242, 96 CR2d 576 (test is whether administrative activities were useful and necessary and directly contributed to resolution of action); *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 971, 259 CR 599.

The issue of attorney fees for work in administrative proceedings is discussed in more detail in chap 13.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.15 c. Time Spent on Amicus Curiae Briefs Closely Related to Litigation May Be Compensable

### §9.15 c. Time Spent on Amicus Curiae Briefs Closely Related to Litigation May Be Compensable

Time spent preparing amicus briefs in cases raising issues that are important to the litigation at hand also may be compensable. See *Hasbrouck v Texaco, Inc.* (9th Cir 1989) 879 F2d 632, 638 (fees awarded for work on amicus brief in case presenting key issue to case at bar); *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 535; *Ramon v County of Santa Clara* (2009) 173 CA4th 915, 93 CR3d 278 (citing cases).

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### 4. Fee-Related Services

### §9.16 a. Time Spent Litigating Fee Claim Is Compensable Under Fee-Shifting Statutes

**California.** A prevailing party is entitled to fees for time spent preparing and litigating the fee application. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754. Distinguishing cases that hold that fees for fee-related services are not available under the "common fund" or "substantial benefit" theories (such as *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269, discussed in §9.19), the court held that a similar rationale does not apply to private attorney general-type fee-shifting statutes. *Serrano IV* (32 C3d at 635). As a matter of policy, the court held that to deny fees for fee-related services would permit the fee to "vary with the nature of the opposition," observing that a defendant "cannot litigate [a fee motion] tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." 32 C3d at 638. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553**,** 581, 21 CR3d 331 (expressly reaffirming rule of *Serrano IV*); *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377 (same); *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 1002, 94 CR3d 802; *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1371, 69 CR3d 250 (directing trial court to award all hours reasonably expended on fee motion: "Absent unusual circumstances, Hogar was entitled to recover compensation for all the hours its attorneys spent in prosecuting the attorney fees motion").

Subsequent to *Serrano IV*, the courts have held that time spent preparing the fee application is compensable whenever fees are statutorily authorized. *Estate of Trynin* (1989) 49 C3d 868, 264 CR 93 (award for time spent seeking fees appropriate as "extraordinary service" under former Prob C §910 (now see Prob C §§10810-10811)); *Guinn v Dotson* (1994) 23 CA4th 262, 28 CR2d 409 (fee award under CCP §411.35). *State v Meyer* (1985) 174 CA3d 1061, 1074, 220 CR 884 (eminent domain action).

**Federal.** The *Serrano IV* court noted that the federal courts had unanimously found that analogous federal private attorney general statutes required an award of fees for fee-related services. 32 C3d at 632. See, *e.g., Anderson v Director, Office of Workers Compensation Programs* (9th Cir 1996) 91 F3d 1322, 1325; *Cruz v Hauck* (5th Cir 1985) 762 F2d 1230; *Bernardi v Yeutter* (9th Cir 1991) 951 F2d 971, 976.

The principle that compensation for time spent preparing the fee application flows from entitlement to fees for work on the merits was reaffirmed by the United States Supreme Court in *Commissioner v Jean* (1990) 496 US 154, 110 L Ed 2d 134, 110 S Ct 2316.

**Additional authorities:** *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707 (denial of fees reversed; plaintiff entitled to fees for prior unsuccessful fee work in trial court and for appeal reversing fee denial); *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 978, 259 CR 599.

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### §9.17 b. Time Spent Litigating Fee Claim Based on Contract Is Compensable

Similarly, under CC §1717, the time spent litigating a fee claim based on a contract has been held compensable. *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 251 CR 178 (fees awardable for appeal of §1717 fee award); *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 251 CR 72 (same).

**Additional authorities:** *Haire v Stevenson* (1987) 196 CA3d 1249, 242 CR 433 (trial court directed to award fees for successful defense of §1717 fee award); *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1062, 235 CR 813.

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### §9.18 c. Time Spent Securing or Opposing Sanctions Award May Be Compensable

Compensation for time spent securing a sanctions award under CCP §128.5 was affirmed in *Brewster v Southern Pac. Transp. Co.* (1991) 235 CA3d 701, 1 CR2d 89, although the court expressly noted that it was not deciding the issue of the propriety of such awards (235 CA3d at 716 n4). Fees for bringing a discovery sanctions motion were expressly approved in *London v Dri-Honing Corp.* (2004) 117 CA4th 999, 12 CR3d 240.

Compensation for time spent securing a fee award under the common-law "bad faith" doctrine was awarded in *Brown v Sullivan* (9th Cir 1990) 916 F2d 492, 497.

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### §9.19 d. Time Spent on Fee-Related Services Under Equitable Common Fund and Substantial Benefit Theories

The courts have been more reluctant to award fees for fee-related services in cases brought under the common fund and substantial benefit doctrines.

**California.** In *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269, the court held that the prevailing party's attorneys were not entitled to "fees on fees" under the substantial benefit theory, because the fee-related services benefited the attorneys, not the plaintiffs. *Mandel*'s reasoning and holding were examined and approved in *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 626, 186 CR 754.

**Federal.** The holding in *Mandel* followed a similar interpretation of the substantial benefit theory by some federal courts. See, *e.g., In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1299 (time spent obtaining attorney fee award noncompensable in common fund case).

Other federal courts, however, have since stated that prevailing attorneys are entitled to fees for fee-related services under equitable theories because the opposing parties could otherwise dilute the value of the fee award by forcing the prevailing attorneys into performing uncompensated work. See, *e.g., Kinney v IBEW* (9th Cir 1991) 939 F2d 690, 693, and cases cited there.

Moreover, many awards in common fund cases (see chap 5) are based on a percentage of the recovery, which may implicitly compensate for fee-related services. See §5.18.

**Additional authorities:** *Pawlak v Greenawalt* (3d Cir 1983) 713 F2d 972; *Stanford Daily v Zurcher* (ND Cal 1974) 64 FRD 680, 683, aff'd (9th Cir 1977) 550 F2d 464, rev'd on other grounds (1978) 436 US 547, 56 L Ed 2d 525, 98 S Ct 1970; *Lindy Bros. Builders v American Radiator & Standard Sanitary Corp. (Lindy II)* (3d Cir 1976) 540 F2d 102, 111.

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### e. Standards for Determining Whether Fee-Related Services Are Reasonable

#### §9.20 (1) California Law

The California Supreme Court in *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754, noted that the hours claimed for fee-related services, like the hours claimed on the merits, must be reasonable, and that an excessive claim may constitute special circumstances justifying reduction or denial of the fee award. 32 C3d at 635.

Under California law, a multiplier may be applied to the lodestar figure for time spent on the fee application. In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553**,** 581, 21 CR3d 331, the California Supreme Court held that lodestar enhancements could be applied to fees for fee-related services. The court held specifically that a risk enhancement was appropriate, although it qualified that ruling by stating that the enhancement for fee work should "usually" be lower than the enhancement for merits work because the case is "generally" less risky at this stage. 34 C4th at 582.

The court also held that "results obtained" enhancement was inappropriate for the fee work, but that lodestar enhancements for fee-related services could be based on delay in payment or on any "extraordinary difficulties" caused by the opposition to the fee motion. *Graham v DaimlerChrysler Corp. supra*. On *Graham's* rulings on multipliers, see §§10.12, 10.19, 10.33, 10.37, 10.50.

In *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272, the court affirmed a fee award for fee-related work that included a 1.5 lodestar multiplier, noting that factors such as the contingent nature of any recovery and delay in payment may apply to fees for fee services as well as to work on the merits. 196 CA3d at 994. *Downey Cares* was cited in both *Graham* and *Ketchum v Moses* (2001) 24 C4th 1122, 1141 n6, 104 CR2d 377. In *Ketchum*, however, the multiplier for fee-related services was reversed because once the defendant won his motion to strike under the anti-SLAPP statute (CCP §425.16), a fee award was mandatory. The court did not appear to consider, however, the possibility that the motion to strike itself could still be reversed on appeal, meaning that the fee-motion work would not be compensated. In *Mangold v PUC* (9th Cir 1995) 67 F3d 1470, 1479, the court affirmed a 2.0 multiplier for work on the fee application, citing *Downey Cares v Downey Community Dev. Comm'n*, *supra*. See also *Kinney v IBEW* (9th Cir 1991) 939 F2d 690, 693.

As noted above, a fee request for fee-related services that "appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 635, 186 CR 754. This language was applied in *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913, which affirmed the trial court's denial of any recovery for fee litigation, based on a proper trial court finding that fee request was unreasonably inflated. See also *Hammond v Agran* (2002) 99 CA4th 115, 134, 120 CR2d 646 (noting *Serrano IV* language but rejecting argument that claimant had in fact made "outrageously unreasonable" fee request).

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### §9.21 (2) Federal Law

Under federal law, fee awards for fee-related services must be based on the lodestar method. *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982. That lodestar figure is "presumptively reasonable," but may be adjusted upward or downward "in rare cases" based on factors that are not subsumed in the lodestar determination. 523 F3d at 982, quoting *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1402.

*Camacho* states that fees for fee-related services may be adjusted for partial success under the same standards applicable to fees for work on the merits. 523 F3d at 981; see §§9.48-9.78 (Limitations on Compensability of Time Actually Spent). Compare *Bernardi v Yeutter* (9th Cir 1991) 951 F2d 971, 976 (directing trial court to compensate plaintiff's fee counsel and merits attorneys for all time spent on fee application (totaling more than $65,000), even though trial court's cuts in fee claim for pursuing merits affirmed), with *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 909 (affirming percentage reduction of fee for fee-related services based on excessiveness of claim and partial success).

If the time spent on the fee petition is excessive, the court should reduce compensation for the fee proceedings to a reasonable amount; to deny all compensation for fee-related services is an abuse of discretion. *Anderson v Director, Office of Workers Compensation Programs* (9th Cir 1996) 91 F3d 1322, 1325.

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### §9.22 f. Cost of Expert Witnesses Retained to Support Fee Claim May Be Compensable

If expert witness fees are recoverable (see §§9.124-9.125 (California law) and §9.129 (federal law)), the cost of experts retained to support the fee application may also be recoverable as part of the basic fee award. See *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1439, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345, and cases cited there.

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### §9.23 g. Examples of Cases Awarding Substantial Fees for Fee Litigation

The fees awarded for fee litigation can be substantial, as can be seen in the following examples:

**Example 1:** In *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1441 (aff'd in part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345), the court compensated plaintiffs' attorneys for almost 600 hours spent on the fee application, at full market rates plus a 100-percent enhancement. Compensation was awarded to counsel specially retained for the fee application, as well as to merits counsel for their work on the fee application. The court rejected the defendants' contention that outside counsel was unnecessary or that time spent by outside counsel to become familiar with the file was noncompensable. 748 F Supp at 1438. With the exception of the enhancement based on contingency (see §§10.41-10.46), the award was affirmed on appeal. 976 F2d at 1545.

**Example 2:** In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553**,** 582, 21 CR3d 331, a catalyst case, the trial court awarded plaintiffs fees of $762,830, at least 90 percent of which were for fees on fees. The California Supreme Court reversed and remanded, holding, among other things, that the 2.25 lodestar enhancement for fee-related services applied by the trial court was too high because it included a "results obtained" component and because it failed to consider the generally lower risk that exists at the fee motion stage. The court also held that lodestar enhancements for fee-related services could be based on delay in payment or on any "extraordinary difficulties" caused by the opposition to the fee motion. *Graham v DaimlerChrysler Corp., supra*. On *Graham's* rulings on multipliers, see §§10.12, 10.19, 10.33, 10.37, 10.50.

**Additional authorities:** *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 124 CR2d 250 ($102,201.50 in "fees for fees"); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1169, 74 CR2d 510 ($166,510.50 awarded for fees in obtaining fee award); *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1448 (court awarded $177,603 for work on fee application and upheld award to merits counsel in absence of showing that work on fee application duplicated that of fee counsel); *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *27 ($125,000 found reasonable for fee-related services); *Lucas v White* (ND Cal 1999) 63 F Supp 2d 1046, 1060 (394.74 hours compensated for single fee motion).

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### 5. Enforcement, Monitoring, and Collection Activities

### §9.24 a. Work Enforcing or Monitoring Prior Decrees May Be Compensable

Time reasonably spent enforcing or monitoring prior decrees is compensable. *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)* (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088. See also *Zambrano v Oakland Unified Sch. Dist.* (1991) 229 CA3d 802, 280 CR 454; *Daniels v McKinney* (1983) 146 CA3d 42, 193 CR 842.

In *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163, the court reaffirmed that monitoring and enforcement fees are appropriate for work that is "useful and of a type ordinarily necessary to secure the final result obtained from the litigation," "even as to matters on which [the party claiming fees] did not prevail." 284 F3d at 1166 (internal quotations omitted).

**Additional authorities:** *Jeff D. v Kempthorne* (9th Cir 2004) 365 F3d 844, 855; *Webb v Ada County* (9th Cir 2002) 285 F3d 829 (Prison Litigation Reform Act (42 USC §1997e) does not require proof of constitutional violation to obtain fees for monitoring and enforcing a consent decree); *Jenkins v Missouri* (8th Cir 1997) 127 F3d 709, 716 (thoroughly analyzing compensability of monitoring and enforcement work); *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 534; *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1451 (upholding same hourly rates for compliance and monitoring as for pre-consent-decree work); *Stewart v Gates* (9th Cir 1993) 987 F2d 1450; *Jeff D. v Andrus* (9th Cir 1989) 899 F2d 753; *Keith v Volpe* (9th Cir 1987) 833 F2d 850; *Berti v Santa Barbara Beach Prop.* (2006) 145 CA4th 70, 74, 51 CR3d 364; *Crespin v Shewry* (2004) 125 CA4th 259, 22 CR3d 696 (upholding fee award to plaintiff who successfully defended injunction against postjudgment challenges); *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 243, 96 CR2d 576 (denying fees for unsuccessful challenge to return to writ, but remanding for determination whether administrative proceedings leading up to return were compensable because they ensured compliance with court's original order).

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### §9.25 b. Work Defending Consent Decree Against Third Party Attack in Separate Action May Be Compensable

Under this standard, fees for defending a consent decree against third party attack in a separate lawsuit may also be compensable. *San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist.* (9th Cir 2002) 284 F3d 1163. Note that the court specifically distinguished between "offensive" and "defensive" enforcement actions, holding that it was irrelevant whether the third party's claims were "related" to the plaintiffs' claims. 284 F3d at 1168 n5. The trial court's fee denial was affirmed, however, because of "special circumstances"; *i.e.,* the plaintiffs' lack of success in defending against the third party attack and the fact that the defendant district would have to pay both sides' fees. 284 F3d at 1168.

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### §9.26 c. Fee Awards in Class Actions May Include Awards for Future Monitoring and Enforcement, or May Establish a Process for Claiming Future Fees

Class-action fee awards may include a fee award for future monitoring and enforcement. Compare *Hanlon v Chrysler Corp.* (9th Cir 1998) 150 F3d 1011 (fee award included compensation for future services) with *Roberts v Texaco, Inc.* (SD NY 1997) 979 F Supp 185, 199 (fund set aside from which to claim fees for future services).

In cases where monitoring and enforcement over a substantial period of time is anticipated, the parties or the court may establish a process for submitting periodic fee claims. See, *e.g., Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1449.

If the court compensates future work by enhancing the lodestar, the trial court must have a basis for estimating the future part of the award. *In re Vitamins Cases* (2003) 110 CA4th 1041, 1057, 2 CR3d 358.

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### §9.27 d. Time Spent Collecting or Securing Judgment May Be Compensable

Time spent collecting a judgment is compensable when the party is entitled to fees for the case in chief. See *Ketchum v Moses* (2001) 24 C4th 1122, 1141 n6, 104 CR2d 377, and other cases cited in §9.9; chap 15 (Collecting Fee Awards). See also *Wanland v Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 CA4th 15, 45 CR3d 633 (time spent challenging undertaking on appeal is compensable); *Downen's Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 CA4th 856, 103 CR2d 644 (plaintiffs' entitlement to fees in inverse condemnation action included fees for bringing petition for writ of mandate to collect judgment). But see But see *Imperial Bank v Pim Elec., Inc.* (1995) 33 CA4th 540, 557, 39 CR2d 432 (in contract fee case, post-judgment enforcement fees under CCP §685.040 not recoverable unless judgment includes fee award).

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### §9.28 6. Travel Time

Reasonable travel time by the attorney during the course of litigation may be compensable, at full rates if that is the practice in the community. See, *e.g., U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1422, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1543, modified on other grounds (9th Cir 1993) 984 F2d 345.

**Additional authorities:** *Henry v Webermeier* (7th Cir 1984) 738 F2d 188, 194; *Ramos v Lamm* (10th Cir 1983) 713 F2d 546, 559; *Johnson v University College* (11th Cir 1983) 706 F2d 1205; *Dowdell v City of Apopka* (11th Cir 1983) 698 F2d 1181, 1192.

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## 7. Time Spent by Paralegals and Law Clerks

### §9.29 a. General Rule: Paralegal and Law Clerk Time Is Compensable

Time spent by paralegals and law clerks is compensable at market rates separately from attorneys' services if the local practice is to bill for their services in that manner. *Richlin Sec. Serv. Co. v Chertoff* (2008) 553 US 571, 170 L Ed 2d 960, 974, 128 S Ct 2007.

In *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v Redland Ins. Co.* (9th Cir 2006) 460 F3d 1253, the court held that the key issue is whether the nonattorney services are customarily billed separately in the legal community; under that standard, even purely clerical or secretarial work can be billed, although not at paralegal rates. The court also noted that nonattorney rates must be proven in the same manner as attorney rates. 460 F3d at 1257. See §§9.120-9.121.

Some courts, however, view clerical and other support work as part of overhead encompassed in the attorneys' hourly rates, at least to the degree that this is how they are generally charged in the legal market. See, *e.g., Henry v Webermeier* (7th Cir 1984) 738 F2d 188, 192). It is not clear in those cases, however, whether evidence was presented as to whether those services are billed separately in the local market.

**Additional authorities:** *Missouri v Jenkins* (1989) 491 US 274, 105 L Ed 2d 229, 109 S Ct 2463; *Imwalle v Reliance Med. Prods., Inc.* (6th Cir 2008) 515 F3d 531, 552; *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1432, aff'd in part and reversed in part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345; *Guinn v Dotson* (1994) 23 CA4th 262, 28 CR2d 409; *Sundance v Municipal Court* (1987) 192 CA3d 268, 274, 237 CR 269 (applying rule to volunteers). See also *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 951, 218 CR 839 (secretarial and paralegal services are "necessary support services for attorneys [that] are includable within an award of attorneys fees").

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.30 b. Attorney Performing Paralegal Work

### §9.30 b. Attorney Performing Paralegal Work

Some courts have held that if an attorney performs services such as filing or translating documents that could reasonably have been performed by a paralegal, those services should be compensated at the hourly rate appropriate for paralegals, not attorneys. *Lipsett v Blanco* (1st Cir 1992) 975 F2d 934, 940.

On appropriate hourly rates if an attorney performs tasks that could have been performed by a lower-billing professional, see §9.110.

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## 8. Appellate Services, Including Original Writs

### §9.31 a. Appellate Services Generally Compensable When Reasonable Attorney Fees Provided by Statute or Contract

A statute or a contract that provides for an award of reasonable attorney fees generally authorizes the court to award fees for both trial court services and appellate court services. See, *e.g., Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 637, 186 CR 754, holding that, if fees are available for trial court services under CCP §1021.5, they are also available for appellate court services, even if the only issue on appeal is the propriety or the amount of the award. On recovery of appellate fees, see §§9.36, 9.38, 9.41.

On time spent on related amicus work, see §9.15.

**Additional authorities:** *Horsford v Board of Trustees* (2005) 132 CA4th 359, 402, 33 CR3d 644; *EWAP, Inc. v City of Ontario* (1986) 177 CA3d 1108, 223 CR 422; *Schmid v Lovette* (1984) 154 CA3d 466, 479, 201 CR 424.

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### §9.32 (1) Costs on Appeal Are Separate From Attorney Fees on Appeal

An appellate court order that each party bear its own *costs* on appeal is not an order that each party bear its own *attorney fees* on appeal. Appellate attorney fees are not a recoverable appellate cost under Cal Rules of Ct 8.278(d)(1). A claim for appellate fees is not precluded by an order awarding costs to either, or neither, party. Cal Rules of Ct 8.278(d)(2) is entirely separate from an award of fees under a contractual provision. See *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 927, 65 CR3d 242 (construing former Cal Rules of Ct 27). See §9.34.

**Additional authorities:** *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 1150, 56 CR2d 33 (decided under former Cal Rules of Ct 27). See also *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1084, 120 CR2d 273.

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### §9.33 (2) Appellate Fees May Be Recoverable Regardless of Whether Trial Court Awards Fees Initially

Fees for appellate services are available even when the trial court has denied fees (*Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 245 CR 606, overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19) or when no fee claim was made for trial services (*Committee for Sewer Referendum v Humboldt Bay Wastewater Auth.* (1978) 77 CA3d 117, 125 n7, 143 CR 463, overruled on other grounds in *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 227 n10, 226 CR 265), or when a fee claim was initially made on different grounds (see *Katz v Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 CA4th 47, 70, 11 CR3d 546). But see *Imperial Bank v Pim Elec., Inc.* (1995) 33 CA4th 540, 557, 39 CR2d 432 (lack of fee award in trial court judgment precludes fee award on appeal, notwithstanding fact that claim is based on note which contained fee clause).

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### §9.34 (3) Appellate Fees May Be Recoverable Regardless of Whether Appellate Court Awards Fees

Appellate fees are claimed by post-remand motion in the trial court. Cal Rules of Ct 3.1702. See §§12.20-12.21. They may be claimed even if the appellate decision does not expressly award fees. See, *e.g., Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 927, 65 CR3d 242; *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1080 n1, 120 CR2d 273; *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 251 CR 178. See also *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 307, 251 CR 72 (CC §1717 fees for appellate services awardable as element of "costs" on appeal, even without express direction from court of appeal).

**NOTE:** Because attorney fees are not an element of appellate costs under Cal Rules of Ct 8.278, the reasoning of *MST Farms* may be suspect, even though its result is correct. See *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 264, 55 CR2d 640 (when *MST Farms* decided, contractual attorney fees were damages that could not be taxed as costs; now, contractually authorized attorney fees are costs under CCP §1033.5 that may be requested of appellate court or of trial court on remittitur "regardless of the lack of specific instructions in the opinion or remittitur").

Also note that because the party claiming fees must meet prevailing party requirements, fees are not available for interim procedural victories until the party's status as the "prevailing party" has been established. See §§9.43-9.44, 11.18-11.19.

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### §9.35 (4) Same Rules Apply to Work on Original Writ Proceedings

The rules outlined above (in §§9.31-9.34) regarding appellate fees are generally applicable to original writ proceedings as well. Statutory fees are available for original writ proceedings in the appellate courts. See, *e.g., Saleeby v State Bar* (1985) 39 C3d 547, 573, 216 CR 367. Procedurally, however, the process for claiming them can be tricky. See §12.17.

**Additional authorities:** *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 212, 266 CR 788; *Planned Parenthood Affiliates v Swoap* (1985) 173 CA3d 1187, 1202, 219 CR 664.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/ b. Appellate Fees Under Fee-Shifting Statutes/§9.36 (1) General Rule: Appellate Services Are Compensable Under Fee-Shifting Statutes

### b. Appellate Fees Under Fee-Shifting Statutes

### §9.36 (1) General Rule: Appellate Services Are Compensable Under Fee-Shifting Statutes

Fee-shifting statutes will almost always be construed to provide fees for both trial and appellate court services. See *Morcos v Board of Retirement* (1990) 51 C3d 924, 275 CR 187, and cases cited there. Time spent obtaining or defending a fee award on appeal is also compensable. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 637, 186 CR 754. Compare *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1134, 94 CR2d 448, with *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646.

**NOTE:** Special rules apply to the award of attorney fees on appeal in marital dissolution actions. See *Marriage of MacFarlane & Lang* (1992) 8 CA4th 247, 258, 10 CR2d 157.

**Additional authorities:** *Maria P. v Riles* (1987) 43 C3d 1281, 1296, 240 CR 872; *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1399, 84 CR3d 754; *Wanland v Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 CA4th 15, 23, 45 CR3d 633; *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707 (denial of fees reversed; plaintiff entitled to fees for prior appeal on merits and for second appeal reversing fee denial); *City of Los Angeles v Animal Defense League* (2006) 135 CA4th 606, 627 n20, 37 CR3d 632 (mootness that occurred pending appeal did not deprive prevailing defendant of appellate fees under anti-SLAPP statute (CCP §425.16) and civil harassment statute (CCP §527.6)); *Wal-Mart Real Estate Bus. Trust v City Council* (2005) 132 CA4th 614, 626, 33 CR3d 817; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 402, 33 CR3d 644; *Herr v Nestle, Inc.* (2003) 109 CA4th 779, 790, 135 CR2d 477; *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc.* (1999) 69 CA4th 287, 303, 81 CR2d 456 (appellate fees available under Brown Act (Govt C §§54950-54962; see in particular §54960.5)); *Engel v Worthington* (1997) 60 CA4th 628, 70 CR2d 526; *Evans v Unkow* (1995) 38 CA4th 1490, 1499, 45 CR2d 624 (appellate fees awardable under anti-SLAPP statute, CCP §425.16); *Wilkerson v Sullivan* (2002) 99 CA4th 443, 121 CR2d 275 (applying same rule to dismissed appeal); *Fed-Mart Corp. v Pell Enters.* (1980) 111 CA3d 215, 229, 168 CR 525 (Corp C §317 includes fees for appellate as well as trial services).

See also *Jernigan v Ford Motor Co.* (1994) 24 CA4th 488, 29 CR2d 348; *Abshear v Teachers' Retirement Bd.* (1991) 231 CA3d 1629, 282 CR 833; *Elster v Friedman* (1989) 211 CA3d 1439, 260 CR 148; *Sebago, Inc. v City of Alameda* (1989) 211 CA3d 1372, 259 CR 918; *Ghory v Al-Lahham* (1989) 209 CA3d 1487, 257 CR 924; *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272; *Daniels v McKinney* (1983) 146 CA3d 42, 193 CR 842; *Board of Educ. v Commission on Prof. Competence* (1980) 102 CA3d 555, 556, 162 CR 590 (same for Ed C §44944); *T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 65, 112 CR 910; *Roberts v Brian* (1973) 30 CA3d 427, 430, 106 CR 360; *Moore v Bank of America* (SD Cal, Jan. 7, 2008, No. 03cv00520) 2008 US Dist Lexis 904.

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### §9.37 (2) Inverse Condemnation Appellate Services

Code of Civil Procedure §1036 (costs in inverse condemnation proceedings) provides attorney fees to the plaintiff in inverse condemnation actions "in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding." This statute was amended in 1995 expressly to abrogate *Holtz v San Francisco BART* (1976) 17 C3d 648, 658, 131 CR 646, which held that former CCP §1246.3 did not authorize fees for appellate services to defend the original inverse condemnation damages award. Stats 1995, ch 181, §2. However, it may well provide a broader standard for entitlement to fees on appeal than other fee-shifting statutes.

The usual rule—that fees are awardable for appellate services—applies to condemnation actions under CCP §1250.410. *San Diego Gas & Elec. Co. v Daley* (1988) 205 CA3d 1334, 1353, 253 CR 144.

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### c. Appellate Fees Under Contractual Fee Clauses

### §9.38 (1) General Rule: Appellate Services Are Compensable Under Contracts Providing for Attorney Fees

Contracts providing for attorney fees are consistently construed to include both trial court and appellate services. See, *e.g., Jones v Union Bank* (2005) 127 CA4th 542, 549, 25 CR3d 783 (upholding award of at least $329,779 for appellate fees although trial court's order failed to distinguish between trial and appellate fees).

**Additional authorities:** *Wilson v Wilson* (1960) 54 C2d 264, 5 CR 317; *Peak-Las Positas Partners v Bollag* (2009) 172 CA4th 101, 114, 90 CR3d 775; *Superior Gunite v Ralph Mitzel, Inc.* (2004) 117 CA4th 301, 317, 12 CR3d 423; *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 264, 55 CR2d 640; *Leaf v Phil Rauch, Inc.* (1975) 47 CA3d 371, 120 CR 749; *San Luis Obispo Bay Props. v PG&E* (1972) 28 CA3d 556, 573, 104 CR 733. See also *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 221, 29 CR3d 810. But see *People ex rel Dep't of Corps. v Speedee Oil Change Sys., Inc.* (2007) 147 CA4th 424, 431, 54 CR3d 225 (intervenor who successfully obtained reversal of fee award against it was not prevailing party under contract because fee clause provided fees only to party that obtained "final judgment"); *Hasler v Howard* (2005) 130 CA4th 1168, 1171, 30 CR3d 714 (when contract entitled neither party to fees, party prevailing on appeal not entitled to fees); *Snyder v Marcus & Millichap* (1996) 46 CA4th 1099, 54 CR2d 268 (party who prevailed on partial appeal, but not in overall litigation, not entitled to contractual fees). On *Hasler,* see §4.55.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.39 (2) Contract Providing Fees for Arbitration

## §9.39 (2) Contract Providing Fees for Arbitration

A contractual fee clause authorizing fees for arbitration proceedings applies to related litigation, including appellate services. *Ajida Technol., Inc. v Roos Instruments, Inc.* (2001) 87 CA4th 534, 104 CR2d 686.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.40 (3) Split of Authority Concerning Fees for Appealing Indemnification Award

### §9.40 (3) Split of Authority Concerning Fees for Appealing Indemnification Award

Authorities are split on whether a court may award fees for litigating an indemnification award on appeal. Compare *DeWitt v Western Pac. R.R.* (9th Cir 1983) 719 F2d 1448, 1453 (appellate fees awarded; California cases cited), with *Hillman v Leland E. Burns, Inc.* (1989) 209 CA3d 860, 257 CR 535 (noting split of authority and denying fees).

**NOTE:** In light of *Morcos v Board of Retirement* (1990) 51 C3d 924, 275 CR 187 (see §9.36), the former line of cases allowing fee awards appears to be more consistent with current policy and case law.

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### d. Appellate Fees Under Equitable Theories

### §9.41 (1) General Rule: Appellate Services Are Compensable Under Equitable Theories

Under equitable theories, appellate services on the merits of the case are also compensable, either as a separate award or as part of a percentage-based fee. See, *e.g., Mandel v Hodges* (1976) 54 CA3d 596, 624, 127 CR 244. Whether a separate fee could be awarded for appellate services performed after the percentage fee had been set —*i.e.*, to defend a settlement or fee award—is less clear. See *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269, and other cases discussed in §9.19.

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### §9.42 (2) Split of Authority Concerning *Brandt* Fees

There is a split of authority as to whether appellate fees are recoverable as *damages* under *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211. See §§7.1-7.2. Compare *Baron v Fire Ins. Exch.* (2007) 154 CA4th 1184, 1198, 65 CR3d 502, *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 234 CR 835 (awarding appellate fees in *Brandt*-type action), and *McGregor v Paul Revere Life Ins. Co.* (9th Cir 2004) 369 F3d 1099, with *Burnaby v Standard Fire Ins. Co.* (1995) 40 CA4th 787, 47 CR2d 326 (disapproving *Downey Savings* and reversing award of appellate fees).

**NOTE:** In the author's view, *Baron, Downey Savings,* and *McGregor* are the sounder holdings. If an insured is damaged by having to hire an attorney to recover insurance benefits denied in bad faith, the insured is also damaged by having to hire an attorney for the appeal to retain those benefits or to obtain an appellate reversal of an erroneous trial court order denying them.

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### e. Standards for Determining Entitlement to Appellate Fees

### §9.43 (1) General Rule: Entitlement to Appellate Fees Based on Outcome of Case as a Whole, Not Who "Won" the Appeal

Just as with fees for trial court services, a party is ordinarily not entitled to fees for appellate services unless the party qualifies as the prevailing party in the case as a whole. On the "prevailing party" rules, see chap 2. See, *e.g., Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 188 (affirming fee award for unsuccessful defense of damages award in U.S. Supreme Court in otherwise successful lawsuit, and cases cited therein); *People Who Care v Rockford Bd. of Educ.* (7th Cir 1996) 90 F3d 1307, 1314. But see *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 424, 69 CR3d 750.

Thus, time spent on interlocutory appeals or writs taken during the course of litigation that do not finally resolve substantive issues ordinarily cannot be claimed until a final judgment has been entered. See *Lindenstadt v Staff Builders, Inc.* (1997) 55 CA4th 882, 894 n9, 64 CR2d 484. Compare *Lindenstadt* with *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1085, 241 CR 239 (appellate fees allowed when writ of mandate resulted in vindication of important public right, even though damages claim yet to be resolved), and *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 266 CR 788 (fees allowed on petition for writ of mandate when significant benefit to general public conferred).

See also *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 428, 253 CR 426 (ordering that payment of fees not be delayed pending final outcome of action); *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 978, 259 CR 599 (appellate court vacated trial court's fee award to plaintiff and remanded for reconsideration but also directed trial court to award plaintiff fees for appeal if fee award ultimately reinstated). On the recoverability of such fees when party ultimately prevails, see §9.44.

In situations in which no substantive relief is obtained, only ordinary statutory costs, such as the cost of preparing the record (see Cal Rules of Ct 8.278(d)), may be claimed in the trial court. *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 196 CR 1 (decided under former Cal Rules of Ct 27(c)).

**Additional authorities:** *Denney v Universal City Studios, Inc.* (1992) 10 CA4th 1226, 1237 n5, 13 CR2d 170; *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 29, 272 CR 227. See also *Wanland v Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 CA4th 15, 22, 45 CR3d 633 (fees for challenging undertaking on appeal encompassed within award of appellate attorney fees); *Chhour v Community Redev. Agency* (1996) 46 CA4th 273, 286, 53 CR2d 585.

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### §9.44 (2) Fees May Be Available When Party Ultimately Prevails

A party that ultimately prevails on the merits may be entitled to fees for interim appellate services, even unsuccessful ones, if they were reasonably incurred in ultimately reaching a favorable result. *Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 188; *Jaffe v Redmond* (7th Cir 1998) 142 F3d 409, 414; *Corder v Brown* (9th Cir 1994) 25 F3d 833, 840; *Cabrales v County of Los Angeles* (9th Cir 1991) 935 F2d 1050; *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517 n15, 43 CR3d 707 (denial of fees reversed; plaintiff entitled to fees for prior appeal on merits and for second appeal reversing fee denial; trial court also directed to consider fees for opposing defendant's prior unsuccessful writ petition and stay request in court of appeal). But see *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 424, 69 CR3d 750. On entitlement to fees for partially successful appeals, see §§9.45-9.46.

**Additional authorities:** *Bjornestad v Hulse* (1991) 229 CA3d 1568, 281 CR 548; *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 30, 272 CR 227; *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 978, 259 CR 599. See also *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1085, 120 CR2d 273, discussed in §11.37.

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### f. Entitlement to Fees for Partially Successful Appeals

#### §9.45 (1) California Courts

The supreme court decisions in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, and *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754, are noteworthy, among other reasons, for allowing fees for appeals that were only partially successful.

In *Serrano III,* the plaintiffs' attorneys had both defended the fee award on appeal and cross-appealed, claiming that the trial court's fee award was too low. They prevailed on the former claim, but lost their cross-appeal. The trial court awarded fees for defending the fee award but not for the cross-appeal, and the supreme court affirmed that award. *Serrano IV* (32 C3d at 639).

**NOTE:** In inverse condemnation actions, an even broader standard may apply. Code of Civil Procedure §1036 provides that in inverse condemnation cases, the plaintiff is entitled to attorney fees "in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding."

**Additional authorities:** *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 253 CR 426; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 424, 69 CR3d 750; *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 930, 65 CR3d 242; *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 1384, 61 CR3d 114; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 165, 50 CR3d 273; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 402, 33 CR3d 644; *Armenta v Osmose, Inc.* (2005) 135 CA4th 314, 327, 37 CR3d 460; *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 74 CR2d 510; *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1; *Boquilon v Beckwith* (1996) 49 CA4th 1697, 1721, 57 CR2d 503; *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1676, 39 CR2d 189; *Shadoan v World Sav. & Loan Ass'n* (1990) 219 CA3d 97, 107, 268 CR 207 (fees awarded on appeal but trial court directed to award fees only for services rendered on claim for which fee eligibility lies, not on second claim to which no fee statute applied); *California Common Cause v Duffy* (1987) 200 CA3d 730, 246 CR 285; *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 232 CR 697; *Montgomery v Bio-Med Specialties, Inc.* (1986) 183 CA3d 1292, 228 CR 709; *Vella v Hudgins* (1984) 151 CA3d 515, 198 CR 725; *Guardians of Turlock's Integrity v Turlock City Council* (1983) 149 CA3d 584, 197 CR 303.

Compare those cases with *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 978, 259 CR 599 (appellate court vacated trial court's fee award to plaintiff and remanded for reconsideration but also directed trial court to award plaintiff fees for appeal if award ultimately reinstated), and *Bjornestad v Hulse* (1991) 229 CA3d 1568, 281 CR 548 (trial court directed to award appellate and trial court fees if plaintiff's lawsuit shown to have affected legislature's decision to amend law).

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### §9.46 (2) Federal Courts

The federal courts also have awarded fees for appellate work even if the claimant is only partly successful on appeal. See, *e.g., Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 188 (affirming fee award for unsuccessful defense of damages award in United States Supreme Court in otherwise successful lawsuit), and cases cited therein.

**Additional authorities:** *Taylor v Westly* (9th Cir 2008) 525 F3d 1288, 1290 (fees awarded for successful appeal re interim fees but not for unsuccessful challenge to dissolution of preliminary injunction); *Larez v Holcomb* (9th Cir 1994) 16 F3d 1513, 1522; *Bernardi v Yeutter* (9th Cir 1991) 951 F2d 971; *Merritt v Mackey* (9th Cir 1991) 932 F2d 1317, 1325; *Conner v City of Santa Ana* (9th Cir 1990) 897 F2d 1487, 1494; *Toussaint v McCarthy* (9th Cir 1987) 826 F2d 901; *Southeast Legal Defense Group v Adams* (9th Cir 1981) 657 F2d 1118, 1126. Compare these cases with *Trevino v Gates* (9th Cir 1996) 99 F3d 911, 925 (plaintiff who challenged fee award as inadequate entitled to fees on appeal if fee award increased as result of appellate court's reversal). See also *People Who Care v Rockford Bd. of Educ.* (7th Cir 1996) 90 F3d 1307, 1314; *Jenkins v Missouri* (8th Cir 1997) 127 F3d 709.

On the procedures for claiming fees for appellate services, see chap 12.

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### §9.47 g. Standards for Determining Whether Appellate Services Are Reasonable

Generally speaking, courts will apply the same standards to the reasonableness of time spent on appellate work as they apply to trial court work. See, *e.g., Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 563, 77 CR3d 695; *Jones v Union Bank* (2005) 127 CA4th 542, 549, 25 CR3d 783; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 234, 226 CR 265; *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1286.

Compensable time on appeal includes the time required to thoroughly and carefully present the client's position, which may include moot courts in preparation for argument. See, *e.g., Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 233, 226 CR 265; *Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 924; *Democratic Party of Washington v Reed, supra*. See also *Boller v Signal Oil & Gas. Co.* (1964) 230 CA2d 648, 41 CR 206.

On the general standard for determining whether time is reasonably spent, see §9.4.

It is important to keep in mind that in the California courts, the trial court makes those determinations. See §12.1. In the federal courts, however, the appellate court generally does so, often referring the factual determinations to the Appellate Commissioner. See, *e.g., Nadarajah v Holder, supra*; §12.27.

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## §9.48 C. Limitations on Compensability of Time Actually Spent

In some cases, the time reasonably spent on a case may not be fully compensable. This may be because the party achieved only partial or limited success (see §§9.49-9.64; 10.52-10.66), or because one (or more) of the claims brought was based on a non-fee-shifting claim or statute (see §§9.65-9.71). The court may also deny fees as unreasonable because of alleged duplication of effort by multiple counsel (see §§9.72-9.77), or because special circumstances would make a fully compensatory award unjust (see §9.78).

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## §9.49 1. Partial or Limited Success: Determining Whether a Reduction Is Appropriate

The most frequently litigated issue in determining the amount of reasonable attorney fees is the impact of the prevailing party's alleged lack of complete success on all of its contentions, claims, or requests for relief. Very few cases are wholly successful on every contention, claim, or request for relief, yet clients generally must pay full fees for such work as long as it was reasonably directed to achieving the client's goals.

If attorneys are to be encouraged to take certain types of cases by the assurance that they will be fully compensated if they win just as they would be by a fee-paying client, reductions for every unsuccessful theory, claim, or request for relief would defeat this purpose and discourage vigorous representation: "To reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the costs of enforcing' the plaintiff's rights." *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 431, 69 CR3d 1. See also, *e.g., Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1133, 94 CR2d 448 ("Litigation may involve a series of attacks on an opponent's case. The final ground of resolution may become clear only after a series of unsuccessful attacks. Compensation is ordinarily warranted even for those unsuccessful attacks, to the extent that those attacks led to a successful claim."); *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1303, 255 CR 704 ("The process of litigation is often more a matter of flail than flair; if the criteria of [CCP §1021.5] are met the prevailing flailer is entitled to an award of attorney fees").

On the other hand, some types of claims that are joined with fee-shifting claims are not compensable, either because the statute or grounds under which the claim was brought does not provide for fee-shifting, or because the claim is a fee-shifting claim but was unsuccessful. (On compensability of time spent on non-fee-shifting claims joined with fee claims, see §§9.65-9.69.) Further, sometimes a court recognizes that even if all the time directed to a fee-shifting claim was reasonably expended, a full fee award against the defendant would be unjust in the circumstances of the case.

To deal with these conflicting purposes and policies, both the California and federal courts generally have adopted a series of tests for determining whether a reduction for "partial" or "limited" success is appropriate. These are discussed in §§9.50-9.64. As can be seen in that discussion, it is not always easy to predict how the principles will be applied. Further, although both the California and federal courts use essentially the same tests, the standards they use in applying the various tests are not identical; those differences are noted.

The following sections (§§9.50-9.64) address the issue of whether hours spent on unsuccessful or non-fee-shifting claims should be included in the lodestar calculation. The more subjective adjustments to the lodestar for "partial" or "limited" success, sometimes referred to as a negative multiplier, are addressed in §§10.52-10.66.

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### §9.50 a. Party That Obtains Excellent Results Is Entitled to Fully Compensatory Fee

Under both state and federal law, a party that obtains "excellent results" is entitled to a fully compensatory fee: If "A plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674 n8, 39 CR2d 189, quoting *Hensley v Eckerhart* (1983) 461 US 424, 435, 76 L Ed 2d 40, 50, 103 S Ct 1933. See also *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 632, 186 CR 754 (adopting federal rule that "absent facts rendering the award unjust, parties who qualify for a fee should recover for all hours reasonably spent, including those on fee-related matters").

Excellent results do not necessarily require a party to win every issue or gain every bit of relief sought. See, *e.g., Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 84 CR3d 754; *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1369, 69 CR3d 250; *Sorenson v Mink* (9th Cir 2001) 239 F3d 1140, 1147 ("A plaintiff may obtain excellent results without receiving all the relief requested"); *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426, 438 ("The law does not require plaintiffs to recover 100% of what they sue for in order to be considered successful at trial. Otherwise, virtually no plaintiff would ever recover reasonable attorneys' fees."); *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *5.

This rule comports with the generally applicable standard for determining the number of compensable hours. Under California law, the successful party ordinarily is entitled to a fully compensatory fee, which may be reduced only when special circumstances would render a fully compensatory award unjust. See *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 639, 186 CR 754, and other cases discussed in §9.3. Under federal law, "[t]here is a strong presumption that the lodestar figure represents a reasonable fee. 'Only in rare instances should the lodestar figure be adjusted on the basis of other considerations.'" *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 364 (internal citations omitted).

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### §9.51 b. Time Spent on Unsuccessful or Partially Successful Claims

In many cases, fee opponents will contend that the prevailing party did not obtain "excellent results" warranting a fully compensatory fee, claiming instead that counsel should not be compensated for time spent on non-fee-shifting claims or on unsuccessful fee-shifting claims, theories, or contentions, or that the prevailing party achieved insufficient success to warrant a fully compensatory fee. See §9.50.

In those circumstances, the courts look first at whether time was spent on unsuccessful "unrelated" or non-fee-shifting claims: That time is generally *not* compensable, unless it was in common with, in aid of, or inseparable from the fee-shifting claim. (On these exceptions to the general rule of noncompensability of unrelated or non-fee-shifting claims, see §§9.58-9.64.) See, *e.g., Hensley v Eckerhart* (1983) 461 US 424, 440, 76 L Ed 2d 40, 52, 103 S Ct 1933 ("Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.").

If the unsuccessful claims are "related," however, as is often the case, the courts *may* award a fully compensatory fee despite the unsuccessful claims. It also *may* reduce the fee if, given all the circumstances of the case, a fully compensatory fee would be unjust. See generally *Hensley v Eckerhart, supra* ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount that is reasonable in relation to the results obtained."); *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750. See also, *e.g., Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 997, 242 CR 272 ("Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised"); *Dang v Cross* (9th Cir 2005) 422 F3d 800, 813 (district court's reduction for time spent on dismissed defendants and unsuccessful claims reversed because court failed to determine if claims related).

The distinction between "related" and "unrelated" claims is significant: If the claims are "related" and the party has won "substantial relief," the court has the discretion to award a fully compensatory fee, even if the results are less than excellent. See, *e.g., Downey Cares v Downey Community Dev. Comm'n, supra.* On distinguishing between related and unrelated claims, see §§9.52-9.56.

**NOTE:** When counsel has spent time on unrelated, non-fee-shifting claims or on unsuccessful, unrelated fee-shifting claims, the "favored procedure" for taking this "partial success" into account is to reduce the number of hours found reasonable when determining the lodestar. *Harman*, 158 CA4th at 417 n7, quoting *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1404. If that is not possible, partial success may be reflected by an adjustment to the lodestar; although this is a "disfavored procedure," it is permissible so long as partial success is accounted for only once. *Harman, supra,* citing *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 364 n9. On adjusting the lodestar for partial success, see chap 10.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.52 (1) General Rule: Time Spent on Unsuccessful Unrelated Claims Not Compensable; Court May Reduce Fee Accordingly

## §9.52 (1) General Rule: Time Spent on Unsuccessful *Unrelated* Claims Not Compensable; Court May Reduce Fee Accordingly

As noted above (see §9.51), time spent on unsuccessful, unrelated claims is generally uncompensable. Two issues are involved in determining whether time was spent on "unrelated" claims: (1) Was the time spent on an unrelated *claim,* or was it merely devoted to an alternative *theory* for achieving relief on the successful, fee-shifting claim—a theory that was either unsuccessful or not reached (see §§9.53-9.54); and (2) assuming the time was spent on a separate *claim*, was that claim *related* to the successful claim? (see §§9.55-9.56).

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## (a) Distinguishing Between Unsuccessful *Theories* and Unsuccessful *Claims*

### §9.53 (i) General Rule: All Time Reasonably Spent on Unsuccessful Theory Is Compensable

A successful plaintiff is entitled to compensation for all time reasonably spent on losing or unreached "theories," but a reduction may be appropriate if the plaintiff failed to succeed on some of its "claims." *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 249, 261 CR 520. Compare *Sokolow* with *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club* (2008) 42 C4th 1142, 1148, 74 CR3d 81. See also *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646. A more rigorous standard may apply to fee claims in cases involving only private, as opposed to public, interests. See *Boquilon v Beckwith* (1996) 49 CA4th 1697, 1722, 57 CR2d 503 (distinguishing cases brought under private attorney general theory, and upholding trial court finding that, in suit to vindicate plaintiffs' "personal financial interest," time spent on unsuccessful legal theory was unreasonably spent and not compensable).

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### §9.54 (ii) Distinction Between Theories and Claims Not Always Clear

The distinction between "theories" and "claims" is not always clear. As the court in *Hensley v Eckerhart* (1983) 461 US 424, 434, 76 L Ed 2d 40, 51, 103 S Ct 1933, put it:

> [A] plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories.… Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories.

See also *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 250, 261 CR 520 ("Attorneys generally must pursue all available legal avenues and theories in pursuit of their clients' objectives; it is impossible, as a practical matter, for an attorney to know in advance whether or not his or her work on a potentially meritorious legal theory will ultimately prevail.").

For cases finding that the successful party presented different *theories* rather than *claims*, see, *e.g., City of Sacramento v Drew* (1989) 207 CA3d 1287, 1303, 255 CR 704; *Sundance v Municipal Court* (1987) 192 CA3d 268, 273, 237 CR 269; *Robinson v City of Edmond* (10th Cir 1998) 160 F3d 1275, 1283 ("Litigants should be given the breathing room to raise alternative legal grounds without fear that merely raising an alternative theory will threaten the attorney's subsequent compensation"); *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 700 (upholding hours awarded, noting that "plaintiffs cannot be faulted for their thoroughness under the circumstances" in pleading six theories rather than just the one that prevailed, or in filing numerous affidavits; court noted that defendants responded in kind with extensive arguments and declarations).

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/ (b) Distinguishing Between 'Related' and 'Unrelated' Claims/§9.55 (i) 'Unrelated' Claims Involve 'Entirely Distinct and Separate Courses of Conduct'; 'Related' Claims Involve Common Facts or Legal Theories

### (b) Distinguishing Between "Related" and "Unrelated" Claims

### §9.55 (i) "Unrelated" Claims Involve "Entirely Distinct and Separate Courses of Conduct"; "Related" Claims Involve Common Facts or Legal Theories

The distinction between "related" and "unrelated" claims is generally the same under both state and federal law:

> [T]he essential inquiry is "whether the 'different claims for relief… are based on different facts and legal theories.' If so, they qualify as unrelated claims. Conversely, related claims 'will involve a common core of facts or will be based on related legal theories.'" "'Under this analysis, an unsuccessful claim will be *un*related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.'"

*Harman v City & County of San Francisco* (2007) 158 CA4th 407, 423, 69 CR3d 750 (internal citations omitted; emphasis in original) citing *Hensley v Eckerhart* (1983) 461 US 424, 431, 76 L Ed 2d 40, 49, 103 S Ct 1933. Claims are related "if either the facts *or* the legal theories are the same." *Webb v Sloan* (9th Cir 2003) 330 F3d 1158, 1169 (court's emphasis); *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1133, 94 CR2d 448 (related claims rule applies when there is "common *legal* issue" (court's emphasis)).

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### §9.56 (ii) Examples

**Cases finding that the prevailing party's claims involved common facts or a common course of conduct or related legal theories, and thus were related:** *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 423, 69 CR3d 750 (although three plaintiffs' claims challenged different discriminatory acts, all involved common course of conduct, *i.e.,* defendant's racial discrimination in airport hiring practices); *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 431, 69 CR3d 1 (all claims involved underlying age and disability discrimination issues); *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1369, 69 CR3d 250; *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1133, 94 CR2d 448; *LeVine v Weis* (2001) 90 CA4th 201, 214, 108 CR2d 562 (all causes of action arose out of same facts), disapproved on other grounds in *Wells v One2One Learning Found.* (2006) 39 C4th 1164, 1197, 48 CR3d 108; *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 423, 124 CR2d 250 (plaintiff's unsuccessful discrimination claim interrelated with successful harassment claim; both based on "common core of facts"); *Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 112 CR2d 99 (no reduction required for unsuccessful contract claims when successful contract claim arose out of same contractual relationship); *Drouin v Fleetwood Enters.* (1985) 163 CA3d 486, 493, 209 CR 623; *Imwalle v Reliance Med. Prods., Inc.* (6th Cir 2008) 515 F3d 531, 554; *Thomas v NFL Players Ass'n* (DC Cir 2001) 273 F3d 1124; *Passantino v Johnson & Johnson Consumer Prods.* (9th Cir 2000) 212 F3d 493, 518 (former employee's unsuccessful discrimination claims "inextricably intertwined" with successful retaliation claim); *Thomlison v City of Omaha* (8th Cir 1995) 63 F3d 786, 791 (error to reduce fee for partial success when plaintiff won full relief and a "strong interrelationship" existed between the successful and unsuccessful claims); *Odima v Westin Tucson Hotel* (9th Cir 1995) 53 F3d 1484, 1499 (in employment discrimination case, plaintiff's unsuccessful state tort claims were sufficiently "related" to his successful Title VII and 42 USC §1981 claims to justify full fee award; all plaintiff's claims arose "from common core of facts—his employment relationship with [defendant]," and "course of conduct" challenged in tort action was not "entirely distinct and separate" from "course of conduct" challenged in successful statutory claims); *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743. See also *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 158, 50 CR3d 273; *Thorne v El Segundo* (9th Cir 1986) 802 F2d 1131, 1142.

**Cases finding that the prevailing party's claims involved distinct courses of conduct, and thus were unrelated:** *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 903 (affirming trial court's partial success reduction because unsuccessful discrimination claims involved entirely different office in different state); *Outdoor Sys., Inc. v City of Mesa* (9th Cir 1993) 997 F2d 604, 619 (plaintiff's claims "rest on different legal theories, focus on different aspects of the sign codes, and rely on different facts for support"). See also *Chavez v City of Los Angeles* (2010) 47 C4th 970, 989, __ CR3d __.

An unsuccessful class certification motion is not a separate unrelated claim, but rather "a method of pursuing [the plaintiff's] ultimately successful claims." *O'Neal v City of Seattle* (9th Cir 1995) 66 F3d 1064, 1069.

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## §9.57 (c) Lodestar Adjustments for Partial Success ("Negative Multipliers")

Under both state and federal law, even if only one claim is successfully brought or all the claims brought are related, and even if all the time spent was reasonable (*i.e.,* exhibited sound legal judgment and would be billed to a fee-paying client), the court may adjust the lodestar downward—*i.e.,* apply a negative multiplier—if the court determines that the level of success achieved does not warrant the full lodestar. See, *e.g., Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 49, 103 S Ct 1933; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750; *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607. This discretionary second stage of the "two-stage" *Hensley* test is discussed in §§10.52-10.66.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.58 (2) Exceptions to 'Partial Success' Rules

## §9.58 (2) Exceptions to "Partial Success" Rules

Even if claims are unrelated or are not fee-shifting claims, time spent on those claims may be compensated in certain circumstances, discussed below in §§9.59-9.64.

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### §9.59 (a) All Time Spent on Common Work Is Compensable

Time spent on work that is common to both fee-shifting and non-fee-shifting claims is fully compensable, without reduction or apportionment. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1; *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1133, 94 CR2d 448 ("All expenses incurred on the common issues qualify for an award").

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## §9.60 (b) Time Spent on Unsuccessful Claims That Contribute to Success of Other Claims Is Compensable

Time spent on unsuccessful claims is compensable if it contributes to the success of other claims. See, *e.g., Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 649; *Webb v Sloan* (9th Cir 2003) 330 F3d 1158, 1169; *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145, 1148 (at least some time spent deposing individual defendant who obtained summary judgment must be compensated because he was witness in claim against remaining defendant).

The same rule applies to time spent on nonfee claims joined with fee claims. See §§9.65-9.69.

**Additional authorities:** *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 94 CR2d 448; *Cabrales v County of Los Angeles* (9th Cir 1991) 935 F2d 1050, 1052; *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 903; *Shrader v OMC Aluminum Boat Group, Inc.* (8th Cir 1997) 128 F3d 1218, 1222; *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642.

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## §9.61 (c) Time Spent on Unsuccessful Claims That Is Impossible to Segregate, Is Inextricably Intertwined With the Successful Claim, or De Minimis May Be Compensable

Another exception to the partial-success rules on unrelated claims occurs when the work on the two claims is so interrelated that it would be impossible to segregate it, or so de minimis that allocation is unnecessary. In those situations, no allocation to unrelated claims is required. See, *e.g., Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 158, 50 CR3d 273; *Liton Gen. Eng'g Contractor, Inc. v United Pac. Ins.* (1993) 16 CA4th 577, 588, 20 CR2d 200.

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### §9.62 (d) Time Spent on Issues Court Does Not Address May Be Compensable

Time spent on issues or claims that the court does not address is also compensable if it is related to the claims on which plaintiff does prevail. *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 996, 242 CR 272; *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1471, 240 CR 1; *Bauer v Sampson* (9th Cir 2001) 261 F3d 775.

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### §9.63 (e) Time Spent on Claims That Are Ultimately Successful Is Compensable

Similarly, work done at an unsuccessful stage of litigation is compensable if the litigation ultimately is successful. See, *e.g., Cabrales v County of Los Angeles* (9th Cir 1991) 935 F2d 1050, 1053 (plaintiffs entitled to compensation for time spent unsuccessfully opposing defendant's petition for certiorari because relief sought eventually obtained; "[i]f a plaintiff ultimately wins on a particular claim, she is entitled to all attorneys' fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings").

**Additional authorities:** *Uniroyal Goodrich Tire Co. v Mutual Trading Corp.* (7th Cir 1995) 63 F3d 516, 526; *O'Neal v City of Seattle* (9th Cir 1995) 66 F3d 1064, 1068 (affirming fee award compensating time spent on unsuccessful effort to certify class action because class certification motion was not a separate "claim," but "rather a method of pursuing her ultimately successful claims"); *Friend v Kolodzieczak* (9th Cir 1995) 72 F3d 1386, 1391 (following *Cabrales, supra*); *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092 (even though plaintiff did not obtain any further judicial relief after obtaining preliminary injunction, all post-preliminary injunction time was compensable because it was closely related to preliminary injunction work and the level of success justified full fee); *Emery v Hunt* (8th Cir 2001) 272 F3d 1042; *Webb v Sloan* (9th Cir 2003) 330 F3d 1158, 1169; *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 849, 216 CR 649. Compare *Cabrales* with *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 96 CR2d 576 (fees denied for unsuccessful challenge to return to writ of mandate in environmental action because challenge was essentially new action).

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### §9.64 (f) Time Spent Against Parties From Whom No Relief Obtained

If there are multiple parties to an action, the trial court has the discretion to award a full fee or reduce the fee to reflect a lack of success against particular parties. See *City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686 (affirming fully compensatory fee even though 17 of over 30 defendants dismissed); *El-Hakem v BJY, Inc.* (9th Cir 2005) 415 F3d 1068, 1075 (upholding district court's discretion not to reduce fee for unsuccessful claims against one defendant); *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145; *Corder v Gates* (9th Cir 1991) 947 F2d 374; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 422, 69 CR3d 750 (noting that plaintiff voluntarily deleted all time devoted solely to two losing plaintiffs, although trial court would have found that time related); *Friends of the Trails v Blasius* (2000) 78 CA4th 810, 837, 93 CR2d 193 (upholding appellant's joint and several liability for fees, even though no relief awarded against it); *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846.

Such reductions are discretionary. See *Corder v Gates, supra*.

The same exceptions to the general rule of noncompensability (see §9.53) applicable to work on unsuccessful claims also apply to work that was directed at parties from whom no relief is obtained. For discussion of these exceptions, see §§9.59-9.64.

**Additional authorities:** *Webb v Sloan* (9th Cir 2003) 330 F3d 1158 (citing *Corder*). Compare *Corder* with *LeVine v Weis* (2001) 90 CA4th 201, 108 CR2d 562, disapproved on other grounds in *Wells v One2One Learning Found.* (2006) 39 C4th 1164, 1197, 48 CR3d 108 (no fee reduction ordered even though some individual defendants succeeded in overturning judgment against them); *Whalen v Unit Rig, Inc.* (10th Cir 1992) 974 F2d 1248, 1254; *Murphy v Lynn* (2d Cir 1997) 118 F3d 938; *LeBlanc-Sternberg v Fletcher* (2d Cir 1998) 143 F3d 748, 761; *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642; *San Dieguito Partnership v Joint Powers Auth.* (1998) 61 CA4th 910, 920, 72 CR2d 91, disapproved on other grounds in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198.

On apportioning fees among liable parties, see §§2.42-2.43, 9.79-9.81.

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### 2. Time Spent on Nonfee Claims Joined With Fee Claims

#### §9.65 a. General Rule: Work on Nonfee Claims Is Not Compensable

When claims for which fees may be awarded (fee claims) are joined with claims for which fees are unavailable (nonfee claims), the general rule is that compensation may not be awarded for work on the nonfee claims. See, *e.g., Superior Gunite v Ralph Mitzel, Inc.* (2004) 117 CA4th 301, 12 CR3d 423; *Bell v Vista Unified Sch. Dist.* (2000) 82 CA4th 672, 686, 98 CR2d 263.

Just as with work on unsuccessful fee-shifting claims, however, there are numerous exceptions to this rule. As seen below (§§9.66-9.69), the same exceptions to the general rule of noncompensability that are applicable to work on unsuccessful claims generally (see §§9.58-9.64) also apply to work on nonfee claims.

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### §9.66 b. Exception When Work on Both Claims Is Closely Related

When the attorney's work on the nonfee claim is so closely related to work on the fee claim that apportionment is impossible, the courts have awarded fees for the entire case. See, *e.g., Cruz v Ayromloo* (2007) 155 CA4th 1270, 1277, 66 CR3d 725.

**Additional authorities:** *Behniwal v Mix* (2007) 147 CA4th 621, 641, 54 CR3d 427; *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 94 CR2d 448; *LeVine v Weis* (2001) 90 CA4th 201, 108 CR2d 562, disapproved on other grounds in *Wells v One2One Learning Found.* (2006) 39 C4th 1164, 1197, 48 CR3d 108 (following *Akins*); *San Dieguito Partnership v Joint Powers Auth.* (1998) 61 CA4th 910, 920, 72 CR2d 91, disapproved on other grounds in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198; *Liton Gen. Eng'g Contractor, Inc. v United Pac. Ins.* (1993) 16 CA4th 577, 589, 20 CR2d 200; *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272; *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (work devoted to Mobilehome Residency Law (CC §798.85) cause of action, for which fees awarded, "arose from common core of operative facts" as contract cause of action, for which fees denied; no apportionment required); *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 958, 218 CR 839; *Drouin v Fleetwood Enters.* (1985) 163 CA3d 486, 493, 209 CR 623. See also *El-Hakem v BJY, Inc.* (9th Cir 2005) 415 F3d 1068, 1075 (upholding district court's discretion not to reduce fee for unsuccessful or nonfee state law claim); *Armstrong v Davis* (9th Cir 2003) 318 F3d 965 (allocation to other statutory basis not required when work on that statute was minimal and "so overlapped as to make discrete time allocations and billing challenging"); *Steefel, Levitt & Weiss v Astor Holdings, Inc.* (ND Cal 2006) 2006 US Dist Lexis 1165; *Trustees of Cent. States v Golden Nugget, Inc.* (CD Cal 1988) 697 F Supp 1538, 1557; *Odima v Westin Tucson Hotel* (9th Cir 1995) 53 F3d 1484, 1499. See also *Traditional Cat Ass'n v Gilbreath* (9th Cir 2003) 340 F3d 829. But see *Gracie v Gracie* (9th Cir 2000) 217 F3d 1060; *Cairns v Franklin Mint Co.* (9th Cir 2002) 292 F3d 1139 (following *Gracie*).

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### §9.67 c. Exception When Work Is Relevant to Both Fee and Nonfee Claims

Fees may be awarded for all work on a particular issue that is relevant to both fee and nonfee claims and for all work on a nonfee claim that is relevant to the fee claim. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1; *Thompson Pac. Constr., Inc. v City of Sunnyvale* (2007) 155 CA4th 525, 555, 66 CR3d 175; *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1082, 25 CR3d 39 (compensating time spent on non-fee-shifting claims in first phase of trial because that work determinative of fee-shifting claims in second phase); *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 958, 218 CR 839; *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 216 CR 649 (plaintiff who successfully challenged state milk-pricing regulations also entitled to fees for defending state's attempt to enforce regulations); *Hadley v Krepel* (1985) 167 CA3d 677, 685, 214 CR 461.

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### §9.68 d. Special Rule in Cartwright Act Cases

An exception to the rule permitting a fee award for all work on a particular issue that is relevant to both fee and nonfee claims was recognized in *Carver v Chevron U.S.A., Inc*. (2004) 119 CA4th 498, 14 CR3d 467, in which the court held that the unilateral fee provision in the Cartwright Act, Bus & P C §16750(a), meant that defendants could not be compensated for any time incurred defending the plaintiffs' Cartwright Act claims, even if that time also benefited the defendant's successful defense of plaintiff's breach of contract action, for which the defendant was entitled to fees.

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### §9.69 e. Exception When Work on Nonfee Claim Cannot Be Segregated From Work on Fee Claim

If services on the fee and nonfee claims are inextricably intertwined and cannot be segregated, a reduction for work on the nonfee claim may not be required. See, *e.g., Liton Gen. Eng'g Contractor, Inc. v United Pac. Ins.* (1993) 16 CA4th 577, 588, 20 CR2d 200; *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 113 CR2d 625.

If work on the nonfee claim is unreasonable, however, a reduction may be appropriate. See *Boquilon v Beckwith* (1996) 49 CA4th 1697, 1722, 57 CR2d 503.

A different rule applies when fees are claimed as damages. See §7.3.

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### 3. Time Spent on Public Versus Private Claims

#### §9.70 a. Cases in Which Public Benefit Is Required for Fee Award

For fee awards under CCP §1021.5, in which public benefit is a criterion for a fee award, it may be appropriate to apportion fees between the time spent on a plaintiff's individual claim (*i.e.,* for monetary damages) and the time attributable to significant public issues "transcending personal interest," allowing a fee award only for time spent on the latter. See *Saleeby v State Bar* (1985) 39 C3d 547, 216 CR 367.

Such an apportionment is discretionary. See *Notrica v State Compensation Ins. Fund* (1999) 70 CA4th 911, 955, 83 CR2d 89.

**Additional authorities:** *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 17, 232 CR 697.

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### §9.71 b. Cases in Which No Broad Public Benefit Is Required

No similar apportionment would be appropriate, however, in cases brought under other fee statutes that do not require a broad public benefit. See, *e.g.,* Govt C §12965(b); Lab C §218.5; 42 USC §1988. In litigation under these statutes, the legislature has already decided that actions enforcing the underlying statutory scheme warrant a fee award regardless of the number of persons who benefit. See, *e.g., Schmid v Lovette* (1984) 154 CA3d 466, 478 n11, 201 CR 424 (number of persons benefited irrelevant to fee award under 42 USC §1988); *Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 245 CR 606, overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19.

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### 4. Alleged Duplication of Effort by Counsel

### §9.72 a. General Rule: Time Spent by Multiple Attorneys Is Compensable if Reasonable

The courts must often decide what is a reasonable fee when more than one attorney represented the successful party. Generally, fees are awardable for all services reasonably rendered, in the same manner that fees would be billed to a fee-paying client. See, *e.g., Horsford v Board of Trustees* (2005) 132 CA4th 359, 396, 33 CR3d 644. When multiple parties with separate attorneys litigate the same action, the parties' relative contributions are relevant to the determination of the amount of the fee award. *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 87, 24 CR3d 72. See §9.75. However, when multiple actions are brought, the court must weigh the success achieved in each action and not discount it due to similar success achieved in a coordinated action. *State Water Resources Control Bd. Cases* (2008) 161 CA4th 304, 318 n8, 73 CR3d 842.

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### §9.73 b. California

The use of multiple counsel is permissible when the demands of the case warrant it. In such situations, some duplication of effort among the attorneys is acceptable. See *Horsford v Board of Trustees* (2005) 132 CA4th 359, 396, 33 CR3d 644.

The lodestar may be reduced due to the inefficient use of multiple counsel. *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 112 CR2d 284. See also *In re Vitamins Cases* (2003) 110 CA4th 1041, 2 CR3d 358 (following *Thayer*); *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413. General allegations of "excessiveness" or "duplication," however, are not sufficient to demonstrate unreasonable duplication. See *Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 564, 77 CR3d 695. See also *Raining Data Corp. v Barrenechea* (2009) 175 CA4th 1363, 1375, 97 CR3d 196; *Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist.* (2003) 106 CA4th 1219, 1248, 132 CR2d 57.

On challenges to claimed hours, see §9.90.

**Additional authorities:** *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 118 CR2d 629; *California Common Cause v Duffy* (1987) 200 CA3d 730, 753, 246 CR 285; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265 (awarding fees for three attorneys who spent 10 hours a day preparing counsel for oral argument in supreme court); *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1007, 185 CR 145; *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *13 (time spent by two attorneys interviewing potential expert compensable).

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### §9.74 c. Federal

Federal cases generally recognize that a team approach is often necessary in litigation and that fees should be denied for duplication "only if the attorneys are *unreasonably* doing the *same* work." *Johnson v University College* (11th Cir 1983) 706 F2d 1205, 1208. As with the California rule (see §9.73), the burden is on the fee opponent to present specific instances of unreasonable duplication. See §§9.77, 9.90.

In the absence of specific instances of unreasonable duplication, trial courts may not use "duplication" as a reason to impose large cuts—*i.e.,* more than a 10-percent "haircut"—in the successful party's fee. *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1112. See also *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1129 (duplicative work not justification for cutting fee "unless 'the lawyer does *unnecessarily* duplicative work,'" quoting *Moreno, supra* (emphasis in original).

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## §9.75 (1) Fee Claimants With Separate Interests

When fee claimants have separate interests, the reasonableness of their claimed hours is generally assessed separately. See, *e.g., Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1288; *Association of Cal. Water Agencies v Evans* (9th Cir 2004) 386 F3d 879, 887. See also *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1421, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1544, modified on other grounds (9th Cir 1993) 984 F2d 345.

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### §9.76 (2) Rulings on Specific Types of Alleged Duplication

The appearance of more than one counsel at hearings may be appropriate, even if the other attorneys do not argue, if the appearance is not merely for training but because the other attorneys' assistance "is or may be needed by the lawyer arguing the case," or if a lawyer "may need to observe argument to judge how to proceed later." *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1286. See also *Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 924 (appellate fees include time spent conferencing, discussions among counsel, and moot court); *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1112 (time spent re-preparing for postponed trial involves necessary duplication); *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *13 (time spent by two attorneys interviewing potential expert not duplicative); *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *18; *Prison Legal News v. Schwarzenegger* (ND Cal. 2008) 561 FSupp 2d 1095.

**Additional authorities:** See also *Bouman v Block* (9th Cir 1991) 940 F2d 1211, 1236 ("Common experience indicates that lawyers often hire other lawyers to help them with specific issues in the case"); *Uniroyal Goodrich Tire Co. v Mutual Trading Corp.* (7th Cir 1995) 63 F3d 516, 525 (presence of more than one attorney at pretrial motions not unreasonable); *Berberena v Coler* (7th Cir 1985) 753 F2d 629; *Ramos v Lamm* (10th Cir 1983) 713 F2d 546, 554; *Fleming v Kemper Nat'l Servs., Inc.* (ND Cal 2005) 373 F Supp 2d 1000, 1009 (approving two attorneys at settlement and pretrial conferences); *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1421, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1544, modified on other grounds (9th Cir 1993) 984 F2d 345 (need for multiple counsel in complex litigation "is well recognized").

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### §9.77 (3) Burden Is on Party Challenging Hours for Duplication

Under federal law, the party opposing the fee application has the burden of specifying the hours it claims are duplicative. *McGrath v County of Nevada* (9th Cir 1995) 67 F3d 248, 255 (party challenging fee application "bears the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged").

The court may look to the time spent by the opposing party's attorneys to determine whether the efforts of the party claiming fees were unnecessarily duplicative. See *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1286; *McGinnis v Kentucky Fried Chicken* (9th Cir 1994) 42 F3d 1273, 1276. On discovery concerning the basis for a fee award, see §§11.54-11.57.

**Additional authorities:** *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 535; *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1449; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 992.

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### §9.78 5. Reductions Based on "Special Circumstances" That Would Make Fully Compensatory Award Unjust

Although fee awards should generally compensate counsel for all hours reasonably spent, there may be "special circumstances" that would render a fully compensatory award unjust, thus permitting the court to reduce the amount of the award or to deny it altogether. See *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 635, 186 CR 754. In *Serrano IV,* the "special circumstance" cited was a fee request for fee-related services that "appear[ed] unreasonably inflated." This exception was applied in *Chavez v City of Los Angeles* (2010) 47 C4th 970, 990, __ CR3d __. See also *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612, citing *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143; *EnPalm, LLC v Teitler Family Trust* (2008) 162 CA4th 770, 775, 75 CR3d 902 (court may reduce attorney fee award to extent that fees were unnecessarily incurred); *Hammond v Agran* (2002) 99 CA4th 115, 134, 120 CR2d 646 (noting *Serrano IV* language but rejecting argument that claimant had in fact made "outrageously unreasonable" fee request); *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913 (denying "unreasonably inflated" fee request for fee litigation). See also *Garcia v Santana* (2009) 174 CA4th 464, 480, 94 CR3d 299 (even though fee-shifting statute was two-way statute, court properly considered defendant's poor financial condition in assessing amount of fees).

Most cases apply the "special circumstance" language to the issue of entitlement to any fee award at all, rather than to the *amount* of fees. See, *e.g., Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1127 (fees may not be denied entirely on grounds of "excessiveness" unless they are submitted in bad faith or application contains excessive hours based on unrelated claims; excessive time spent on some tasks and use of "block billing" also do not support complete denial of claim). But see *Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122, 1131 (lack of prelitigation notice is not "special circumstance" that would make fee award "unjust," but it might affect amount of fee).

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## D. Apportioning Fees Among Liable Parties

### §9.79 1. Fee Award May Be Apportioned Among Defendants

A court may apportion a fee award among defendants and real parties in interest. See, *e.g., California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 212, 266 CR 788 (joint and several liability imposed on both real parties in interest).

**Additional authorities:** *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 250, 261 CR 520 (directing trial court to apportion fees between defendants based on extent of relief obtained against each); *Huntington Landmark Adult Community Ass'n v Ross* (1989) 213 CA3d 1012, 1024, 261 CR 875 (equal division); *Washburn v City of Berkeley* (1987) 195 CA3d 578, 240 CR 784; *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 240 CR 1; *Sundance v Municipal Court* (1987) 192 CA3d 268, 237 CR 269; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 756, 202 CR 423.

On apportionment among defendants, see §§2.42-2.43.

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### §9.80 2. Allocation Among Defendants Need Not Be Based on Time Spent Litigating Against Particular Defendants

The good faith settlement of fees by one defendant cannot limit the award that may be assessed against a nonsettling defendant, nor is it improper for a court to award fees against one defendant for time spent litigating against another. *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 976, 259 CR 599.

**Additional authorities:** *Corder v Gates* (9th Cir 1991) 947 F2d 374, 383 (upholding district court's refusal to allocate fees among defendants when time spent by plaintiffs against each was not "grossly unequal" nor was one defendant "dramatically less culpable"), and the cases cited in *Corder*. See also *Jones v Espy* (9th Cir 1993) 10 F3d 690; *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1672 n7, 39 CR2d 189.

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### §9.81 3. If Court Does Not Apportion Award Among Defendants

If the court does not apportion the award among the liable parties, liability is presumably joint and several. See, *e.g., California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 212, 266 CR 788 (joint and several liability imposed on both real parties in interest). But any party paying a disproportionate share may be entitled to contribution from the other parties. See *Young v Rosenthal* (1989) 212 CA3d 96, 128, 260 CR 369 (when parties subject to joint sanctions award, party paying award is entitled to prorata contribution from other party against whom sanctions awarded).

**Additional authorities:** *Computer Prepared Accounts, Inc. v Katz* (1991) 235 CA3d 428, 286 CR 556 (joint and several liability for sanctions imposed on counsel and party); *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 28 n6, 272 CR 227.

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## E. Documenting Reasonable Hours

### §9.82 1. Importance of Accurate Recordkeeping

A well-documented claim, including time records and a thorough explanation of the exigencies of litigating the case, is extremely valuable in persuading a court to compensate counsel for the hours worked on a matter. See, *e.g., Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 561, 564, 77 CR3d 695; *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 118 CR2d 629; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265. In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 396, 33 CR3d 644, the court held that the trial court had abused its discretion

> in rejecting wholesale counsels' verified time records. We think the verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous.

The court of appeal also held that "the trial court abused its discretion in failing to use counsels' time records as the starting point for its lodestar determination." 132 CA4th at 397. "The [trial] court's expressed reasons for departing from this 'ordinary' method of calculating the lodestar amount do not support a conclusion that reliance on the records would lead to an unjust result." 132 CA4th at 397.

**NOTE:** To best ensure full compensation for services rendered, counsel should keep time records throughout the course of the litigation. See the sample time log in App B. Time logs allow counsel to record the date on which work was performed, the particular task performed (*e.g.,* research on summary judgment, telephone conversation with Mr. ___ re: ___, or drafting of motion to extend time), and the number of hours spent on the particular task. Time logs should be used by attorneys, paralegals, law clerks, and anyone else whose time will be included in a fee claim.

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## 2. Recordkeeping Requirements Under California Fee-Shifting Law

### §9.83 a. Detailed Time Records Not Required But Advisable

The California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent. See, *e.g., PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1095 n4, 95 CR2d 198 (claim based on detailed reconstructed records upheld; court noted that maintaining contemporaneous records by in-house counsel would "facilitate accurate calculation of the lodestar and minimize possible inaccuracies in reconstructing time spent on a matter months or even years after the fact"); *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413. See also *Trustees of Cent. States v Golden Nugget, Inc.* (CD Cal 1988) 697 F Supp 1538, 1558 (noting more lenient California rule on time records in setting fees under CC §1717).

When time records are provided, they need not have been contemporaneously recorded but may be reconstructed from the file. See *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1096 n4, 95 CR2d 198; *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1470, 240 CR 1. See also *Horsford v Board of Trustees* (2005) 132 CA4th 359, 396, 33 CR3d 644 (trial court's determination that time records not 100 percent "reliable" inadequate basis for disregarding them).

**NOTE:** Counsel should nevertheless make every effort to keep contemporaneous time records. Claims based on post hoc reconstructions or estimates run the risks that counsel may forget to claim some tasks that have been performed or that the court may give such records less credence than it would give contemporaneous records.

**Additional authorities:** See also *Raining Data Corp. v Barrenechea* (2009) 175 CA4th 1363, 1375, 97 CR3d 196; *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1399, 84 CR3d 754; *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 225, 110 CR2d 145; *Weber v Langholz* (1995) 39 CA4th 1578, 1587, 46 CR2d 677 (upholding fee award based on counsel's declaration, even though time records and billing statements not provided); *Steiny & Co. v California Elec. Supply Co.* (2000) 79 CA4th 285, 93 CR2d 920 (same); *Mardirossian & Assocs., Inc. v Ersoff* (2007) 153 CA4th 257, 269, 62 CR3d 665 (quantum meruit case following *Steiny*); *Sommers v Erb* (1992) 2 CA4th 1644, 1651, 4 CR2d 52 (fee claim based on estimate of number of hours); *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1006, 185 CR 145 (court may award fees based on time estimates for attorneys who do not keep time records); *All-West Design, Inc. v Boozer* (1986) 183 CA3d 1212, 1227, 228 CR 736; *Martino v Denevi* (1986) 182 CA3d 553, 559, 227 CR 354; *Dudman v State* (1983) 145 CA3d 617, 193 CR 500.

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### §9.84 b. Level of Detail Required

Because time records are not required under California law (see §9.83), there is no required level of detail that counsel must achieve. See, *e.g., PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1098, 95 CR2d 198 ("We do not want 'a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It… is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief,'" quoting *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 642, 186 CR 754).

Even under federal law, the level of detail required is only that which will enable the trial court to determine whether the time spent on any particular task was reasonable. See §9.88.

In some cases, however, more precision may be very useful. See, *e.g., Christian Research Institute v Alnor* (2008) 165 CA4th 1315, 81 CR3d 866 (fees limited to time spent on anti-SLAPP motion (CCP §425.16)).

**Block billing.** Some courts have criticized "block billing" (*i.e.,* lumping all tasks performed on a day as a single entry for that day). See, *e.g., Christian Research Institute*, 165 CA4th at 1325 (noting, however, that block billing is "not objectionable per se in our view"); *Bell v Vista Unified Sch. Dist.* (2000) 82 CA4th 672, 689, 98 CR2d 263 (counsel's block billing insufficient to permit court to apportion fees to losing claims; counsel directed to define time or court would assign reasonable percentage to claims).

In the author's experience, however, block billing is commonly used and is not intended to facilitate "padding" of hours but simply reflects the interrelated nature of many tasks performed during a day. Many courts recognize that block billing is not automatically suspect or grounds for a fee reduction. See, *e.g., United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F3d 555, 565 (rejecting defendant's arguments that fees should have been reduced for insufficient description and block billing), and other cases cited in §9.88; *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 103, 37 CR2d 149 ("block billings" acceptable when court can determine that hours claimed were reasonable for tasks described).

Block billing under federal law is discussed in §9.88.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.85 c. Redaction of Privileged Information

### §9.85 c. Redaction of Privileged Information

A fee claimant is entitled to redact privileged information from the time records. See *Lafayette Morehouse, Inc. v Chronicle Publishing Co.* (1995) 39 CA4th 1379, 1382, 46 CR2d 542; *Winick Corp. v Safeco Ins. Co.* (1986) 187 CA3d 1502, 1508, 232 CR 479; *Hadley v Krepel* (1985) 167 CA3d 677, 214 CR 461.

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### 3. Recordkeeping Requirements Under Federal Law

#### §9.86 a. Some Federal Courts May Reduce Award if No Contemporaneous Records

Some federal courts have announced that fee awards may be substantially reduced for lack of careful contemporaneous time records. See *Ramos v Lamm* (10th Cir 1983) 713 F2d 546; *New York State Ass'n for Retarded Children, Inc. v Carey* (2d Cir 1983) 711 F2d 1136.

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### §9.87 b. Lack of Contemporaneous Records Not Fatal to Fee Claim

In most federal courts, however, including the Ninth Circuit, the lack of contemporaneous time records is not necessarily fatal to a claim for fees. Time records reconstructed from the file, notes, co-counsel's records, or the context of the litigation have frequently been accepted. See, *e.g., U.S. v $12,248 U.S. Currency* (9th Cir 1992) 957 F2d 1513; *Bonnette v California Health & Welfare Agency* (9th Cir 1983) 704 F2d 1465, disapproved on other grounds in *Garcia v San Antonio Metro. Transit Auth.* (1985) 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1419, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1542, modified on other grounds (9th Cir 1993) 984 F2d 345 (noting that Ninth Circuit permits "reconstructed" records and that vague entries on time records may be explained by reconstructions based on other notes and files as well as on context of entry).

**Additional authorities:** *Dennis v Warren* (5th Cir 1985) 779 F2d 245, 249 (reconstructed records accepted despite court rule requiring contemporaneous time records); *Johnson v University College* (11th Cir 1983) 706 F2d 1205, 1207, and cases cited there; *Jordan v Department of Justice* (DC Cir 1982) 691 F2d 514, 518.

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### §9.88 c. Level of Detail Required

The Supreme Court noted in *Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933, that counsel need not account for the exact services performed for every minute claimed (see 461 US at 437 n12, 76 L Ed 2d at 53 n12). "[P]laintiff's counsel… is not required to record in great detail how each minute of his time was expended." 461 US at 437 n12, 76 L Ed 2d at 53 n12. The Court did note that counsel should identify the general subject matter of expenditures (461 US at 437 n12, 76 L Ed 2d at 53 n12), and Justice Burger, in his concurring opinion, stated that (461 US at 437, 76 L Ed 2d at 53):

> [T]he party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.

When time records are deficient, courts will generally afford the fee claimant an opportunity to submit more detailed records. See, *e.g., Traditional Cat Ass'n v Gilbreath* (9th Cir 2003) 340 F3d 829 (error to deny fees altogether because fee claimant had not apportioned fees between fee-shifting and non-fee-shifting claims; court must give parties opportunity to do so, and if they cannot, must attempt to do so itself); *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1305 (remanding to district court to consider more detailed records submitted on reconsideration); *Stewart v Gates* (9th Cir 1993) 987 F2d 1450, 1452 (if time records illegible, court should reduce accordingly or require supplemental submission).

**Additional authorities:** *Webb v Board of Educ.* (1985) 471 US 234, 85 L Ed 2d 233, 105 S Ct 1923 (contemporaneously recorded time sheets are "preferred" practice); *Imwalle v Reliance Med. Prods., Inc.* (6th Cir 2008) 515 F3d 531, 552; *Lytle v Carl* (9th Cir 2004) 382 F3d 978, 989 (though "minimal," time records "establish that the time was spent on the matters for which the district court awarded attorneys' fees"); *Staton v Boeing* (9th Cir 2003) 327 F3d 938, 966 (in approving class action fee settlement based on lodestar method, court must have something more than bare estimate of hours to approve fee); *Jordan v Multnomah County* (9th Cir 1987) 815 F2d 1258, 1263 n8; *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *11; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1103 ("vague" billing entries adequate when read in context.

"Block billing" (see §9.84) is an issue under federal law as it is under California law. Compare *Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 948 (district court may reduce claim for block billing but any reduction must be tied to hours that are block billed), with *United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F3d 555, 565 (rejecting defendant's arguments that fees should have been reduced for insufficient description and block billing), *A.D. v California Highway Patrol, supra* ("block billing" summaries "sufficiently describe the tasks performed to enable… review of the fee petition") and *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, *9 (block billing "does not undermine the compensability of time reasonably expended where the billing statement meets the basic requirement of listing the hours and identifying the general subject matter of time expenditures"). See also *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1129 ("the use of block billing does not justify an across-the-board reduction or rejection of *all* hours"; emphasis in original).

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### §9.89 d. Redaction of Privileged Information

Fee records may be redacted to avoid revealing privileged information, so long as the court can judge "whether the work was an appropriate basis for fees." *Democratic Party of Washington v Reed* (9th Cir 2004) 388 F3d 1281, 1286.

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### §9.90 4. Burden of Challenging Claimed Hours

Once a documented fee claim is submitted, the opposing party must state any objections to the hours claimed. The trial court may disallow claimed hours to which the opposing party objects. *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 251, 142 CR 766. Objections not raised may be waived. See *Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541; *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1227, 217 CR 125; *Goodell v Ralph's Grocery Co.* (ED Cal 2002) 207 F Supp 2d 1124.

Specific objections to particular hours are required, and generalized objections that the hours are "excessive" or "unnecessary" may not suffice to rebut the fee claim:

> In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice. Failure to raise specific challenges in the trial court forfeits the claim on appeal.

*Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 564, 77 CR3d 695. See also *Gorman v Tassajara Dev. Corp.* (2009) 178 CA4th 44, 101, 100 CR3d 152 ("The party opposing the fee award can be expected to identify the particular charges it considers objectionable."); *Avikian v WTC Fin. Corp.* (2002) 98 CA4th 1108, 120 CR2d 243; *Wooldridge v Marlene Indus. Corp.* (6th Cir 1990) 898 F2d 1169, 1176 n14; *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407 ("hours actually expended in the litigation are not to be disallowed without a supporting rationale"); *McGrath v County of Nevada* (9th Cir 1995) 67 F3d 248, 255 (fee opponent "bears the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged"). See also §§9.20-9.21 (Standards for Determining Whether Fee-Related Services Are Reasonable).

Objections that hours are duplicative must be supported by specific evidence of duplication. See *Premier Med. Mgmt Sys.*, 163 CA4th at 562; *McGrath, supra* (party challenging fee application "bears the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged"); *Gates v Gomez* (9th Cir 1995) 60 F3d 525, 535; *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1449; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 992.

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### §9.91 5. Challenging Hours on Appeal

Challenges to claimed hours should be raised in the trial court, not for the first time on appeal. *Blum v Stenson* (1984) 465 US 886, 892 n5, 79 L Ed 2d 891, 104 S Ct 1541; *Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n* (2008) 163 CA4th 550, 564, 77 CR3d 695 ("Failure to raise specific challenges in the trial court forfeits the claim on appeal."). In *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1227, 217 CR 125, the court held that, once attorney fees are granted, some showing of error is required to attack the award on appeal. In rejecting the city's contention that plaintiff's attorneys' hours were not properly documented, the court noted that the city had failed to cross-examine the attorneys when given the opportunity to do so and had cited neither authority nor reason for rejecting their affidavits.

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## III. REASONABLE HOURLY RATES

### §9.92 A. Trial Court Must Determine Reasonable Hourly Rate for Each Attorney Claiming Fees

The lodestar determination also requires the trial court to determine the reasonable hourly rate of each attorney (or other biller) claiming fees. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553**,** 579, 21 CR3d 331 ("a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney… involved in the presentation of the case,'" quoting *Ketchum v Moses* (2001) 24 C4th 1122, 1131, 104 CR2d 377); *Tutor-Saliba Corp. v City of Hailey* (9th Cir 2006) 452 F3d 1055, 1064 (court must specify hours and rates awarded).

Some of the issues that arise in determining reasonable hourly rates include:

- What rate to apply when the attorney charges discounted or below-market rates (see §§9.94, 9.97, 9.99);
- What rate to apply when the attorneys work for nonprofit law firms or are paid by someone other than the client (see §§9.95-9.96);
- How to calculate fees if the attorneys for the successful party have a contingent fee agreement with the client (see §§8.29-8.34, 9.98);
- How are comparable market rates determined—who are comparable attorneys (see §9.105), and what are comparable services (see §9.109);
- Whether the rates should be based on the rates in effect at the time the services were provided or at the time of the fee application (see §§9.111-9.113); and
- What rate to apply when the successful attorney's office is in a forum where fees are higher than those charged by the attorneys practicing in the forum where the action is litigated (see §§9.114-9.115).

**NOTE:** The hourly rates awarded by California courts in some public interest cases have been substantial. See, *e.g., Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 997, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109 (affirming fee award of $450 per hour in sexual harassment case); *Russell v Foglio* (2008) 160 CA4th 653, 661, 73 CR3d 87 (affirming $300 hourly rate for attorney licensed just over 3 years); *L.H. v Schwarzenegger* (ED Cal 2009) 645 F Supp 2d 888 (awarding rates of up to $640 per hour); *Comite de Jornaleros de Redondo Beach v City of Redondo Beach* (CD Cal, Dec. 12, 2006, No. CV 04-9396 CBM (JTLx)) 2006 US Dist Lexis 95610 (awarding rates of up to $625 per hour). But see *In re Vitamins Cases* (2003) 110 CA4th 1041, 1057, 2 CR3d 358 (questioning $1000 per hour rate).

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## §9.93 B. General Rule: Market Rates Set Standard

The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377; *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1094, 95 CR2d 198. To determine reasonable market value, courts must determine whether the requested rates are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629.

The federal rule is similar. To establish a reasonable hourly rate, the fee applicant must show

> that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable and is referred to—for convenience—as the prevailing market rate.

*Blum v Stenson* (1984) 465 US 886, 895 n11, 79 L Ed 2d 891, 104 S Ct 1541.

**Additional authorities:** *Russell v Foglio* (2008) 160 CA4th 653, 661, 73 CR3d 87; *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 54 CR3d 724; *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 82, 249 CR 606 (affirming trial court award to Raiders' attorney at rates charged by "top law firms in the Bay Area"); *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 227 CR 804 (trial court determined fees in contract action based on "normal attorney's fees in Los Angeles County"); *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 755, 202 CR 423; *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095. See also *Utility Reform Network v PUC* (2008) 166 CA4th 522, 535, 82 CR3d 791 (applying market rate standard codified in Pub Util C §1806).

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### §9.94 1. Rule Applies Regardless of How Attorney Claiming Fees Charges for Services

The market-rate standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel. See *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1098, 95 CR2d 198; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 156, 50 CR3d 273; *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 980 (district court directed to determine "the prevailing hourly rate in the [forum community] for work that is similar to that performed in this case, by attorneys with the skill, experience and reputation comparable to that of [plaintiff's] attorneys"). See also *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1278, 66 CR3d 725 (dicta disapproving trial court's reduction of fee based on attorneys' pro bono representation).

**Fees generally not limited to those "incurred."** Contractual or statutory provisions that provide for the losing party to pay the fees "incurred" by the prevailing party do not create an exception to this rule: Attorney fees should still be calculated using the lodestar method and market rates. See, *e.g., PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198. See §3.72. The same rule applies to attorneys charging a contingent (percentage-based) fee. See §9.98; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731, and other cases cited in §§8.29-8.34.

*PLCM Group, Inc. v Drexler, supra,* disapproved *San Dieguito Partnership v Joint Powers Auth.* (1998) 61 CA4th 910, 72 CR2d 91, insofar as *San Dieguito* held that fees can be recovered only to the extent that a litigant incurs them on a fee-for-service basis. 22 C4th at 1097 n5. This holding makes very questionable the holding in *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 103, 37 CR2d 149 (because attorney fees provision of Song-Beverly Consumer Warranty Act (CC §1794) limits fees to those "reasonably incurred by the buyer," court erred in awarding plaintiff higher hourly rates than those set forth in retainer agreement). But see *Andre v City of W. Sacramento* (2001) 92 CA4th 532, 111 CR2d 891 (under statute that provides for fees "actually incurred," prevailing party limited to fees paid or obligated to be paid).

**Additional authorities:** *Rosenaur v Scherer* (2001) 88 CA4th 260, 282, 105 CR2d 674; *Shaffer v Superior Court* (1995) 33 CA4th 993, 39 CR2d 506 (cited with approval in *PLCM Group, Inc.*, 22 C4th at 1098) (amount paid to contract attorney is irrelevant in determining reasonableness of fee under Cal Rules of Prof Cond 4-200; rather, issue is whether services rendered were worth rate charged *"as measured in the market place"* (court's emphasis)); *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743; *Fleming v Kemper Nat'l Servs., Inc.* (ND Cal 2005) 373 F Supp 2d 1000, 1007.

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### 2. Rule Applies to Public Interest Lawyers

#### §9.95 a. California

Determining a reasonable market rate does not depend on the source or amount of funding for the successful attorney. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754. Rejecting arguments that the rate for salaried public interest attorneys should be set at the hourly "cost" of hiring public interest lawyers (see §9.93), the court in *Serrano IV* held that the market value of publicly funded attorneys' services should be set by comparison with the prevailing billing rates of comparable private attorneys. 32 C3d at 643. See also *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1003, 185 CR 145, discussed in §9.121; *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605 (party's entitlement to contractual fees under §1717 not affected by fact that legal services provided without charge).

A different rule may apply, however, to government attorneys, at least in cases in which the plaintiff seeks attorney fees as damages. See *State v Pacific Indem. Co.* (1998) 63 CA4th 1535, 1551, 75 CR2d 69. See §9.103.

**Additional authorities:** *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1278, 66 CR3d 725; *Marriage of Ward* (1992) 3 CA4th 618, 629 n8, 4 CR2d 365; *California Common Cause v Duffy* (1987) 200 CA3d 730, 755, 246 CR 285; *Hypolite v Carleson* (1975) 52 CA3d 566, 588, 125 CR 221.

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### §9.96 b. Federal

The United States Supreme Court in *Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541, took a similar approach to that of *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754, holding that the hourly rates requested by nonprofit legal services organizations should be awarded if they are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable and is referred to—for convenience—as the prevailing market rate." 465 US at 895 n11.

**Additional authorities:** *Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 910; *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65; *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 702; *Copeland v Marshall* (DC Cir 1980) 641 F2d 880; *Dennis v Chang* (9th Cir 1980) 611 F2d 1302; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1431, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1545, modified on other grounds (9th Cir 1993) 984 F2d 345 (public interest attorneys entitled to same rates "as corporate attorneys of equal caliber"); *Comite de Jornaleros de Redondo Beach v City of Redondo Beach* (CD Cal, Dec. 12, 2006, No. CV 04-9396 CBM (JTLx)) 2006 US Dist Lexis 95610.

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### §9.97 3. Rule Applies to Private Attorneys Charging Less Than Market Rates

Private attorneys who charge their clients at billing rates lower than the reasonable market value of their services or work pro bono are not restricted to those rates in claiming fees under CCP §1021.5 and similar statutes. See *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc*. (1999) 69 CA4th 287, 302, 81 CR2d 456; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 755, 202 CR 423; *United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F3d 555, 564. See also *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1278, 66 CR3d 725 (dicta disapproving trial court's reduction of fee based on attorneys' pro bono representation).

**Additional authorities:** *Christensen v Stevedoring Servs. of Am.* (9th Cir 2009) 557 F3d 1049, 1054; *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041, 1046; *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 980; *Carson v Billings Police Dep't* (9th Cir 2006) 470 F3d 889. See also *Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 946; *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 697; *D'Emanuele v Montgomery Ward & Co.* (9th Cir 1990) 904 F2d 1379, 1384, aff'd without opinion at 993 F2d 882; *Save Our Cumberland Mountains v Hodell* (DC Cir 1988) 857 F2d 1516; *Maldonado v Lehman* (9th Cir 1987) 811 F2d 1341; *White v City of Richmond* (9th Cir 1983) 713 F2d 458, disapproved on other grounds in *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)* (1987) 483 US 711, 717 n4, 97 L Ed 2d 585, 107 S Ct 3078; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1431, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1548, modified on other grounds (9th Cir 1993) 984 F2d 345 (plaintiffs' sole practitioner attorneys not limited to rates charged clients; instead, rates based on rates charged by "corporate attorneys of equal caliber").

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### §9.98 4. Rule Applies to Attorneys Charging Contingent Fee

The same rule—that the market-rate standard applies regardless of how the attorney claiming fees charges for services (see §§9.93-9.94)—applies to attorneys charging a contingent (percentage-based) fee. See, *e.g., Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731, and other cases cited in §§8.29-8.34; *Blanchard v Bergeron* (1989) 489 US 87, 96, 103 L Ed 2d 67, 109 S Ct 939 (same rule applies to attorneys who handle cases on contingent fee basis and therefore have no billing rate).

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.99 5. Rule Applies to In-House Counsel

### §9.99 5. Rule Applies to In-House Counsel

In *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198, the court held that the term "incurred" does not limit the amount of fees to be awarded and that in-house counsel are entitled to reasonable attorney fees based on market rates. In doing so, the court cited with approval both *Beverly Hills Prop. v Marcolino* (1990) 221 CA3d Supp 7, 270 CR 605, and *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 227 CR 804.

**NOTE:** Under federal law, in-house counsel for labor unions may receive market-rate fees if the fees are segregated in a fund controlled by attorneys and used only to support litigation for members' rights. See, *e.g., Raney v Federal Bureau of Prisons* (Fed Cir 2000) 222 F3d 927 (en banc). In light of *PLCM Group, Inc. v Drexler, supra,* however, it is doubtful that similar restrictions would apply under California law.

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### 6. Exceptions to Market Rate Rule

#### §9.100 a. Statutes Setting Applicable Rate

Some statutes set or limit the reimbursement rate for attorney fees. See, *e.g.,* Govt C §800, which provides that if a reviewing court finds that the determination of an administrative proceeding resulted from arbitrary or capricious conduct, the prevailing complainant may be awarded attorney fees at a rate of $100 per hour, up to $7500. Likewise, Rev & T C §7156(c)(1)(B)(iii) limits hourly rates in certain tax cases to $75 per hour unless special factors warrant a higher rate; this is similar to the standard used in the federal Equal Access to Justice Act (5 USC §504(b)(A); 28 USC §2412(d)(2)(A)), which provides that the prevailing party may be awarded attorney fees at a rate of no more than $125 per hour, plus a cost of living increase, unless the court determines that special factors justify a higher rate. See, *e.g., Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 911.

Other statutes provide limits on the total fee award, which may have the effect of reducing the hourly rate. See, *e.g.,* Govt C §13973(c) (fees for hearings before Victim Compensation and Government Claims Board limited to 10 percent of award) and statutes discussed in chap 3.

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### §9.101 b. Court Schedules Setting Hourly Rates

Some local courts have schedules establishing hourly rates for contract cases or default judgments. These schedules have been held not to limit hourly rates when fees are provided by statute or when the party can show that higher market rates apply. See, *e.g., Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 155, 50 CR3d 273 (when evidence in record was undisputed, trial court erred in relying on local court rate schedule for attorneys testifying as experts).

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### §9.102 c. Contract Setting Applicable Rate

Whether parties may agree to an hourly rate, by contract or settlement, that will be binding on the court is unsettled. For an example of such an agreement, see *Peak-Las Positas Partners v Bollag* (2009) 172 CA4th 101, 113 n1, 90 CR3d 775 (parties agreed that fees would be based on attorneys' customary billing rates, not independent determination of reasonableness).

**NOTE:** In the author's view, such an agreement would be permissible, as long as the rate was consistent with the applicable legal standards (*i.e.,* reasonable). See *Fairchild v Park* (2001) 90 CA4th 919, 929, 109 CR2d 442 (parties may not agree by contract to alter CC §1717 definition of "prevailing party").

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### §9.103 7. Cost-Accounting Method of Determining Rates Rejected

Cost accounting is a method of fixing rates by adding together the actual costs incurred during the case, including overhead expenses and attorneys' salaries. When a figure derived from cost accounting is used as the rate, the resulting amount is usually significantly lower than when a prevailing market rate is used. For discussions of cost accounting, see *Copeland v Marshall* (DC Cir 1980) 641 F2d 880 and *Dennis v Chang* (9th Cir 1980) 611 F2d 1302.

Both the California and federal courts have unequivocally rejected cost accounting as a method of determining reasonable hourly rates.

In California, the argument that fees awarded to publicly funded attorneys should be based on cost accounting rather than the prevailing market value of the attorneys' services was explicitly rejected in *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 643, 186 CR 754. See also *Marriage of Ward* (1992) 3 CA4th 618, 4 CR2d 365; *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1004, 185 CR 145.

The court in *Serrano IV* also held that these costs were not a relevant factor in deciding to augment or diminish the fee award. *Serrano IV* (32 C3d at 643 n40). See §10.68.

In *Shaffer v Superior Court* (1995) 33 CA4th 993, 39 CR2d 506, the court used the same reasoning and applied the same line of cases in holding that under Cal Rules of Prof Cond 4-200, the amount paid by a law firm to a contract attorney is irrelevant to the reasonableness of the fee charged by the law firm for the contract attorney's services. In *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1098, 95 CR2d 198, citing *Shaffer,* the court rejected cost accounting for in-house lawyers.

**NOTE:** One possible exception under California law involves government attorneys seeking fees as damages. See *State v Pacific Indem. Co*. (1998) 63 CA4th 1535, 1551, 75 CR2d 69.

The federal rule regarding cost accounting is the same. In *Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541, the Supreme Court also rejected the cost-accounting method unequivocally. See also *Richlin Sec. Serv. Co. v Chertoff* (2008) 553 US 571, 170 L Ed 2d 960, 974, 128 S Ct 2007, reaffirming *Missouri v Jenkins* (1989) 491 US 274, 105 L Ed 2d 229, 109 S Ct 2463 (paralegals and law clerks compensated at market rates, not cost); *Copeland v Marshall* (DC Cir 1980) 641 F2d 880, 894 (discussing rationale for rejecting cost accounting).

**Possible exception for staff of nonlaw organizations.** However, some federal courts have distinguished between attorneys for public interest law organizations and attorneys on the staff of nonlaw organizations. In *National Treasury Employees Union v Department of Treasury* (DC Cir 1981) 656 F2d 848, 850 (discussed in *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 643 n39, 186 CR 754), the court reduced a fee award to a labor union because the fees would not go to the attorneys themselves or to a public interest law firm. The court held on the one hand that awarding market rate fees to salaried union attorneys would allow the impermissible sharing of a fee with a nonattorney. On the other hand, it held that market rate fees to nonlaw organizations such as unions were permissible if "the fees are plowed back into the litigative programs that made their recovery possible in the first place." 656 F2d at 854.

Under federal law, therefore, if the prevailing party's attorneys are salaried employees of a nonlaw organization, they may need to show that the organization will use the fee award solely for other litigation in order to justify a market rate fee. See also *Raney v Federal Bureau of Prisons* (Fed Cir 2000) 222 F3d 927 (en banc) (in-house counsel for labor unions may receive market-rate fees if the fees are segregated in a fund controlled by attorneys and used only to support litigation for members' rights); *Curran v Department of Treasury* (9th Cir 1986) 805 F2d 1406; *Jordan v Department of Justice* (DC Cir 1982) 691 F2d 514, 516 n14. (Note that in *PLCM Group, Inc. v Drexler, supra,* the California Supreme Court did not address this requirement. See 22 C4th at 1106 (dissenting opinion of Chin, J.)).

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## §9.104 C. General Rule: Requested Rate Should Be Awarded if in Line with Rates of Reasonably Comparable Attorneys Performing Reasonably Comparable Services

In determining the hourly rate component of the lodestar, the issue is whether the requested rate is "in line" with the rates charged by attorneys of reasonably comparable skill, experience, and reputation for reasonably comparable services. In *Blum v Stenson* (1984) 465 US 886, 895 n11, 79 L Ed 2d 891, 900 n11, 104 S Ct 1541, the Court said that to

> inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

The California rule is similar. Requested rates are reasonable if they are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629. See also *Ketchum v Moses* (2001) 24 C4th 1122, 1136, 104 CR2d 377; *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 634, 186 CR 754.

This market rate standard is intended to be a more objective method than the method occasionally used by the courts, which employs a long list of factors, some of which go to hourly rates, some to hours spent, and some to other factors. See, *e.g., PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1096, 95 CR2d 198 (describing the standard as follows: "'The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case,'" quoting *Melnyk v Robledo* (1976) 64 CA3d 618, 623, 134 CR 602); *Ketchum v Moses, supra,* at 1139 (hourly rate used to calculate lodestar "is the product of a multiplicity of factors… [, including] the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case"; internal quotations and citation omitted); *Kerr v Screen Extras Guild, Inc.* (9th Cir 1975) 526 F2d 67, 70 (listing 12 factors).

Occasionally, courts will review these underlying factors in the process of determining market rate. See, *e.g., Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1545, modified on other grounds (9th Cir 1993) 984 F2d 345. When a lodestar enhancement or reduction is sought, however, care must be taken to avoid "double-counting" any specific factor. See §§10.5, 10.21, 10.27.

**NOTE:** In general, especially under federal law, counsel should consider requesting an hourly rate that incorporates as many of those factors as is reasonable and justifiable, rather than relying on the court to apply a multiplier. See, *e.g., Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 997, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109 (affirming award of $450 per hour in sexual harassment case). See §10.22.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.105 1. Determining Reasonably Comparable Attorneys

## §9.105 1. Determining Reasonably Comparable Attorneys

There are numerous ways to establish the market rates charged by comparably qualified and experienced attorneys performing comparable services. See §9.121.

**NOTE:** In general, California law requires less documentation of comparable rates than federal law. See *Davis v City of San Diego* (2003) 106 CA4th 893, 903, 131 CR2d 266 (affirming rate awarded even though no evidence other than counsel's own statements presented; rejecting *Blum* in favor of more lenient California standard); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 13, 54 CR3d 724 (following *Davis v City of San Diego*).

Issues that may arise in determining comparable rates are discussed in §§9.106-9.108.

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### §9.106 a. Practice Area

One issue that often arises in determining market value is which legal market the court should consider. For example, in civil rights cases, should the court look only at other civil rights lawyers' rates or should it look at a more general market? Given that the fee-shifting statutes in civil rights cases are designed to encourage lawyers to take cases in which the clients cannot afford market-rate fees, there really is no fee-paying "market" for such cases. See, *e.g., White v City of Richmond* (9th Cir 1983) 713 F2d 458, 461, disapproved on other grounds in *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)* (1987) 483 US 711, 717 n4, 97 L Ed 2d 585, 107 S Ct 3078. Further, many considerations go into setting rates charged to clients. See, *e.g., Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 641, 186 CR 754 (noting that private attorneys' billing rates often depend on the financial stakes their clients have in the outcome, as well as on the clients' financial resources).

Most courts have responded to this situation by looking to the fees charged by attorneys of reasonably comparable reputation, experience, skill, and expertise for cases requiring similar skills. See, *e.g., Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 893, 104 S Ct 1541 ("'It is intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such an antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature,'" quoting S Rep No. 94-1011, 94th Cong, 2d Sess (1976), reprinted in 1976 US Code Cong & Ad News 5908.). Thus, rates are generally not limited to those charged or awarded in cases involving the same subject matter. See, *e.g., Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 979 (consumer attorneys not limited to rates charged by or awarded to other consumer attorneys); *Christensen v Stevedoring Servs. of Am.* (9th Cir 2009) 557 F3d 1049, 1054 (same re Longshore and Harbor Workers' Compensation Act, 33 USC §928); *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041, 1046 (same). See also *Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 916; *Utility Reform Network v PUC* (2008) 166 CA4th 522, 535, 82 CR3d 791 (in determining market rates for similar services, PUC may not limit rates to those awarded PUC practitioners but must also take into account attorneys' federal trial and appellate litigation experience).

Under this standard, fees paid in wholly different markets have little or no relevance. See, *e.g., Trevino v Gates* (9th Cir 1996) 99 F3d 911, 925 (discounted fees paid by government entities not probative of plaintiffs' rates); *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, *16 n2 (insurance defense law firm rate structure inapplicable to plaintiffs' public interest attorneys), aff'd (9th Cir 2000) 225 F3d 1042.

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### §9.107 b. Special Qualifications

Counsel's special expertise, background, or skill level may justify a higher rate. See *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470. See also *Blum v Stenson* (1984) 465 US 886, 890, 79 L Ed 2d 891, 893, 104 S Ct 1541 (noting special qualifications of plaintiff's legal aid counsel); *Russell v Foglio* (2008) 160 CA4th 653, 661, 73 CR3d 87 (noting counsel's particular trial experience); *Utility Reform Network v PUC* (2008) 166 CA4th 522, 537, 82 CR3d 791 (noting attorneys' federal trial and appellate litigation experience); *A.D. v California Highway Patrol* (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *20; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1105.

Compare *Crommie* with *Common Cause v Jones* (CD Cal 2002) 235 F Supp 2d 1076, 1081 (awarding full rates to big firm litigators in public interest case because their skills equally applicable given complexity, urgency, and novelty of case).

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### §9.108 c. Firm Size

A related issue is whether rates should depend on the size or overhead of the claiming law firm. Firm "costs," however, are not relevant. See §9.95. Likewise, most courts have held that firm size is not a relevant factor. See, *e.g., U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1431 (plaintiffs' sole practitioners, small law firms, and nonprofit law firms entitled to commercial rates charged by "corporate attorneys of equal caliber"), aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1545, modified on other grounds (9th Cir 1993) 984 F2d 345 ("rates should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity"). See also *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 82, 249 CR 606 (affirming trial court award to Raiders' attorney at rates charged by "top law firms in the Bay Area"); *Bankston v Illinois* (7th Cir 1995) 60 F3d 1249, 1256, disapproved on other grounds in *Auer v Robbins* (1997) 519 US 452, 137 L Ed 2d 79, 117 S Ct 905 ("the district court may not reduce the established market rate by some factor that it believes accounts for differences between large firms and small firms. Lawyers of common expertise and experience in the same market are entitled to the same rate"); *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 993 (rejecting survey that listed firms by size, not type of work performed); Cal Rules of Prof Cond 4-200(B)(1)-(11) (factors used to determine reasonableness of attorney fees do not include size of firm or its costs).

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## 2. Determining Reasonably Comparable Services

### §9.109 a. Rates Charged by Attorneys Handling Cases of Comparable Difficulty Generally Set Standard

Generally, the courts will look to equally difficult or complex types of litigation to determine which market rates to apply. See, *e.g., Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1545, modified on other grounds (9th Cir 1993) 984 F2d 345 ("rates should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity"). *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315; *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 61, 75 CR3d 413; *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491; *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *8; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1105.

If a case involves particularly "simple" issues, some courts award a lower rate than they would for complex litigation. *Trevino v Gates* (9th Cir 1996) 99 F3d 911, 924. Other cases, however, hold that simplicity should be reflected in the hours calculation, not the rate. See *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041, 1046. When the case is simple only because the attorney has significant experience and expertise in the subject matter, *Van Skike* would seem to be the better rule. See also *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1116 (cautioning that "simplicity" may not be double-counted in both rates and hours determinations). Compare *Ketchum v Moses* (2001) 24 C4th 1122, 1139, 104 CR2d 377 (rejecting losing plaintiff's argument that multiplier may not be applied because anti-SLAPP motion "relatively simple").

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### §9.110 b. General Rule: Rate Does Not Vary Depending on Task Performed

Some courts have held that if an attorney performs services such as filing or translating documents that could reasonably have been performed by a paralegal, those services should be compensated at the hourly rate appropriate for paralegals, not attorneys. See, *e.g., Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413 (trial court awarded lower rate for some work that could have been performed by paralegals); *Lipsett v Blanco* (1st Cir 1992) 975 F2d 934, 940.

However, as noted in §9.30, most attorneys do not vary their rates by the type of work performed, and many courts recognize that there is no need to do so if the attorney only occasionally does lower-level work or if that work is accomplished far more efficiently. See, *e.g., Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1548, modified on other grounds (9th Cir 1993) 984 F2d 345 ("Private practitioners do not generally charge varying rates for the different lawyerly tasks they undertake on a given case"); *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, *17 (citing cases), aff'd (9th Cir 2000) 225 F3d 1042.

Rates must be based on the staffing pattern that the claiming attorneys actually used, not on some model (*e.g.,* a pyramidal staffing pattern) that they did not use. *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1114; *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *8; *Chabner, supra*.

The same rule generally applies to stages of the litigation. See *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1450 (plaintiffs entitled to same rates for compliance and monitoring activities as for work leading to consent decree). But see *Municipal Court v Bloodgood* (1982) 137 CA3d 29, 46, 186 CR 807 (rate for litigation counsel determined separately from that of prelitigation counsel).

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### 3. Determining Whether to Use Current or Historical Rates

#### §9.111 a. Current Rates May Be Used to Compensate for Delay in Payment

Often a considerable period passes between the time the attorney renders services and the time the fee application is made. During that period, counsel's rates will generally increase because of increased experience and inflation. In addition, the attorney will lose the time value of the funds that would have been received from a fee-paying client.

To compensate for the length of time the successful party's attorney has had to wait to receive fees (*i.e.,* for the lost use of the funds and for the effects of inflation), the court may either base the award on "historical rates," with an appropriate adjustment in the nature of prejudgment interest, or it may simply award fees at higher current rates as rough compensation for the delay. *Missouri v Jenkins* (1989) 491 US 274, 284, 105 L Ed 2d 229, 240, 109 S Ct 2463. In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331, the California Supreme Court also expressly recognized that delay in payment can be compensated by using historical rates with an enhancement or by using current rates. See also *Lanni v New Jersey* (3d Cir 2001) 259 F3d 146.

If prevailing counsel's rates have not changed over the period of the litigation, current rates will not account for losses from delay, and a further adjustment for delayed payment may still be necessary to make the fee award reflect present value. See *Islamic Ctr. v City of Starkville* (5th Cir 1989) 876 F2d 465, 473. On the other hand, if counsel's rates change following the fee application, higher rates may be awarded for later work.

When current rates are used, it is an abuse of discretion to base them on outdated rate determinations. See *Bell v Clackamas County* (9th Cir 2003) 341 F3d 858, 868 (reversing fee award because district court based rate on outdated award); *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 980 (same); *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041, 1046; *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1115 ("The district court's function is to award fees that reflect economic conditions in the district; it is not to 'hold the line' at a particular rate, or to resist a rate because it would be a 'big step.' If the lodestar leads to an hourly rate that is higher than past practice, the court must award that rate without regard to any contrary practice.").

**NOTE:** In certain circumstances, prejudgment interest is also awardable on attorney fees. See *Municipal Court v Bloodgood* (1982) 137 CA3d 29, 47, 186 CR 807 (prejudgment interest awarded under CC §3287(b)). On recovery of prejudgment interest, see §§9.132-9.134

**Additional authorities:** *Pennsylvania v Delaware Valley Citizens' Council for Clean Air* (*Delaware Valley II*) (1987) 483 US 711, 97 L Ed 2d 585, 107 S Ct 3078; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822, 50 CR3d 731; *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65, 83; *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1548, modified on other grounds (9th Cir 1993) 984 F2d 345. See also *Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 947 (delay may be factored into hourly rate); *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1051 (district court properly used current rates to calculate lodestar as cross-check on percentage-based fee). But see *D'Emanuele v Montgomery Ward & Co.* (9th Cir 1990) 904 F2d 1379, 1384, aff'd without opinion at 993 F2d 882. Compare *Burgess v Premier Corp.* (9th Cir 1984) 727 F2d 826 and *Handgards, Inc. v Ethicon, Inc.* (ND Cal 1982) 552 F Supp 820, aff'd (9th Cir 1984) 743 F2d 1282, with *Corder v Brown* (9th Cir 1994) 25 F3d 833, 838, and *Keith v Volpe* (CD Cal 1980) 501 F Supp 403, 414.

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### §9.112 b. Exception for Fee Awards Against the United States

Fee awards against the federal government are an exception to the rule allowing fees to be set at current rates. Because of the federal government's sovereign immunity, fee awards against it must be based on historical rates without adjustment for delay (in the absence of an express statement by Congress to the contrary). *Library of Congress v Shaw* (1986) 478 US 310, 92 L Ed 2d 250, 106 S Ct 2957. The inequity of this result was partially remedied by the Civil Rights Act of 1991 (Pub L 102-166, 105 Stat 1079, §114), amending 42 USC §2000e-16(d), which provides that plaintiffs in discrimination actions against federal agencies are entitled to the same compensation for delay in payment as in cases involving private defendants.

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### §9.113 c. Most California Awards Based on Current Rates

Following the federal lead, most state court fee applications are based on current rates at current experience levels. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331; *Russell v Foglio* (2008) 160 CA4th 653, 661, 73 CR3d 87. In the *Serrano* fee litigation, for instance, successive fee applications were made several years apart, and the trial court adjusted the rates claimed later to reflect increased experience and skill. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 626, 186 CR 754.

On enhancement of the lodestar to compensate for delay in payment of fees, see §§10.49-10.51.

As noted, when fee awards are based on historical rates and significant delay has occurred, some adjustment of the lodestar figure is required. See, *e.g., Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1305 (mandating prime rate adjustment when trial court used historical rates for attorneys who left firm during litigation).

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### 4. Determining the Geographic Market

### §9.114 a. General Rule: "Market" Is Community Where Services Are Rendered

The determination of "market rate" is generally based on the rates prevalent in the community where the court is located. *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 13, 54 CR3d 724; *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 979 (reversing award based on rates from non-forum jurisdictions). Note that in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1096, 95 CR2d 198, the court affirmed a fee award based on the rate prevailing in the market where counsel's office was located (San Francisco), rather than where the case was litigated (Los Angeles).

**Additional authorities:** *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65, 79 (applying rule to administrative proceedings); *Davis v Mason County* (9th Cir 1991) 927 F2d 1473, 1488; *Ramos v Lamm* (10th Cir 1983) 713 F2d 546, 555; *Donnell v U.S.* (DC Cir 1982) 682 F2d 240, 251.

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### §9.115 b. Exception May Be Made for Counsel From Market Where Rates Are Higher Than Forum Rate

Prevailing attorneys from a market in which rates are higher than the forum rate, however, may be entitled to their home market rates in certain circumstances. *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1405, and cases cited therein. See also *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 907; *Metabolife Int'l, Inc. v Wornick* (SD Cal 2002) 213 F Supp 2d 1220, 1222; *L.H. v Schwarzenegger* (ED Cal 2009) 645 F Supp 2d 888, 893. In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 399, 33 CR3d 644, the appellate court reversed a trial court's refusal to award San Francisco Bay Area rates to an attorney litigating a difficult FEHA case in Fresno, stating:

> If a potential defendant is too intimidating to the local bar or so replete with resources as to potentially overwhelm local counsel, or if the local plaintiffs' bar has not the resources to engage in complex litigation on a contingency-fee basis, the public interest in the prosecution of meritorious civil rights cases requires that the financial incentives be adjusted to attract attorneys who are sufficient to the cause. In the absence of any realistic indication plaintiffs could have found local counsel, it was an abuse of discretion to fail even to consider an hourly rate based on counsel's "home" market rate.

The *Horsford* court also said, "[W]e doubt a plaintiff needs to make anything more than 'a good faith effort to find local counsel.'" 132 CA4th at 399. But see *Nichols v City of Taft* (2007) 155 CA4th 1233, 1242, 66 CR3d 680 (plaintiff failed to show retention of local counsel "impracticable," and trial court erred by applying multiplier to account for counsel's out-of-town rates). In *Chrapliwy v Uniroyal, Inc.* (7th Cir 1982) 670 F2d 760, the court held that higher out-of-town rates would be justified if the plaintiff could demonstrate that retaining out-of-town counsel was reasonable, *e.g.,* because of the need for specialized skills. If the court finds, however, that local counsel could have provided the same skills, it may be justified in awarding only local rates. 670 F2d at 768.

**Additional authorities:** *Mathur v Board of Trustees* (7th Cir 2003) 317 F3d 738 (competence of local attorneys did not justify reduction of fees paid to out-of-town lawyers, because plaintiff had tried and failed to interest local attorneys in case); *Arbor Hill Concerned Citizens Neighborhood Ass'n v County of Albany* (2d Cir 2007) 522 F3d 182, 193.

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### 5. Avoiding Double-Counting: Same Facts May Not Be Used to Determine Both Lodestar and Multiplier

#### §9.116 a. California

The issue of "double-counting" the same factor when determining the lodestar and then the multiplier is addressed in §§10.5, 10.21, 10.27. In general, courts may not use the same factor to set the lodestar and to apply a multiplier. See, *e.g., Ketchum v Moses* (2001) 24 C4th 1122, 1139, 104 CR2d 377; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822, 50 CR3d 731; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 155, 50 CR3d 273. However, some overlap is inevitable. See, *e.g., Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377 (although skill and experience are used to establish lodestar rate, "exceptional" skill and experience, beyond what would be expected of attorney billing at lodestar rate, may be used to enhance lodestar); *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 61, 75 CR3d 413.

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### §9.117 b. Federal

Under federal law, double-counting the same factor when determining hours and rates is not appropriate. See, *e.g., Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1115; *Cunningham v County of Los Angeles* (9th Cir 1988) 879 F2d 481, 489. See also *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145, 1149.

However, because lodestar adjustments are so rarely allowed under federal fee-shifting statutes (see §10.13), most relevant factors must either be factored into the lodestar equation or not considered at all. See *Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 947. One exception is anticipated delay in payment, which *may* be factored into the rate. *Welch v Metropolitan Life Ins. Co., supra*. See §9.111. Under federal fee-shifting statutes, contingent risk may not be used to enhance the lodestar or be factored into the hourly rate. See *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1549, modified on other grounds (9th Cir 1993) 984 F2d 345.

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## 6. Paralegals, Law Clerks, and Other Billing Personnel

### §9.118 a. Paralegal, Law Clerk, and Student Time Compensable at Market Rates

Paralegal and law clerk time is compensable at prevailing market rates, even if it is volunteered. *Missouri v Jenkins* (1989) 491 US 274, 286, 105 L Ed 2d 229, 242, 109 S Ct 2463 (plaintiffs entitled to compensation for paralegals and law clerks at market rates, not cost, when that is how they are billed in local market); *Richlin Sec. Serv. Co. v Chertoff* (2008) 553 US 571, 170 L Ed 2d 960, 974, 128 S Ct 2007 (reaffirming *Missouri v Jenkins*); *Sundance v Municipal Court* (1987) 192 CA3d 268, 274, 237 CR 269 (market rates apply even when services volunteered); *Guinn v Dotson* (1994) 23 CA4th 262, 28 CR2d 409.

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### §9.119 b. Other Billing Personnel

The rule applicable to other billing personnel is less clear. In *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v Redland Ins. Co.* (9th Cir 2006) 460 F3d 1253, the court held that the key issue is whether the nonattorney services are customarily billed separately in the legal community; under that standard, even purely clerical or secretarial work can be billed, although not at paralegal rates. The court also noted that nonattorney rates must be proven in the same manner as attorney rates. 460 F3d at 1257. See also *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 951, 218 CR 839 (under CCP §1036 (inverse condemnation), secretarial services are "necessary support services for attorneys,… includable within an award of attorney fees"); *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *9; *L.H. v Schwarzenegger* (ED Cal 2009) 645 F Supp 2d 888, 896 (compensating "litigation technology personnel"). But see *Prison Legal News v Schwarzenegger* (ND Cal. 2008) 561 F Supp 2d 1095, 1101. On proving the appropriate rate, see §§9.120-9.121. Other courts, however, have ruled that clerical work is not compensable, without regard for whether it is separately billed. See *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v Redland Ins. Co.* (9th Cir 2006) 460 F3d 1253, 1257.

Whether paralegal rates are applicable when attorneys are performing tasks that a nonattorney could perform is discussed in §9.30.

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## D. Proof of Appropriate Rates

### §9.120 1. Burden of Proof Is on Party Seeking Fee Award

The burden is on the fee applicant to prove the appropriate market rate to be used in calculating the lodestar. In *Blum v Stenson* (1984) 465 US 886, 895 n11, 79 L Ed 2d 891, 900 n11, 104 S Ct 1541, the Court said that to

> inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

See, *e.g., Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 946; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1546, modified on other grounds (9th Cir 1993) 984 F2d 345; *Bouman v Block* (9th Cir 1991) 940 F2d 1211, 1235; *Maldonado v Lehman* (9th Cir 1987) 811 F2d 1341. California follows a similar, though less rigid, rule. See *Davis v City of San Diego* (2003) 106 CA4th 893, 903, 131 CR2d 266.

Similarly, if out-of-town counsel seek a higher rate than the rate prevailing in the community where the lawsuit is filed, they must justify the need for higher-priced counsel. See §§9.114-9.115.

Under federal law, if objection to the rate requested is made on grounds not reasonably anticipated by the fee claimant, opportunity must be given to present evidence going to the correct standard. See *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041, 1046.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.121 2. Methods of Demonstrating Market Rates

### §9.121 2. Methods of Demonstrating Market Rates

Among the ways to demonstrate market rates are:

- **Declarations from local attorneys** (this method is the most commonly used). See, *e.g., Nadarajah v Holder* (9th Cir 2009) 569 F3d 906, 912; *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 976; *Carson v Billings Police Dep't* (9th Cir 2006) 470 F3d 889, 891; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1431, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1547, modified on other grounds (9th Cir 1993) 984 F2d 345; *Rodriguez v U.S.* (CD Cal June 2, 2006, No. CV 99-11821 CBM (Ex)) 2006 US Dist Lexis 95839, *11, rev'd in part on other grounds (9th Cir 2008) 542 F3d 704. But see *Davis v City of San Diego* (2003) 106 CA4th 893, 903, 131 CR2d 266 (affirming rate awarded even though no evidence other than counsel's own statements presented; *Blum* rejected in favor of more lenient California standard); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 13, 54 CR3d 724 (following *Davis v City of San Diego*).
- **Expert testimony** (*i.e.,* testimony from persons with specialized knowledge of billing rates). See, *e.g., Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629; *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899, 908; *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269 (noting usefulness of expert testimony on fee matters); *Estate of Lanza* (1964) 229 CA2d 720, 40 CR 528; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1105; *National Fed'n of the Blind v Target Corp.* (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139, *8; and see discussion of declarations in §11.53 and the sample declarations in Apps E-G. The expert's testimony, however, must be based on the correct standards. See, *e.g., Rodriguez v U.S.* (CD Cal June 2, 2006, No. CV 99-11821 CBM (Ex)) 2006 US Dist Lexis 95839, *11, rev'd in part on other grounds (9th Cir 2008) 542 F3d 704.
- **Counsel's own billing rates,** which carry a presumption of reasonableness. See, *e.g., Russell v Foglio* (2008) 160 CA4th 653, 661, 73 CR3d 87; *United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F3d 555, 565; *Gusman v Unisys Corp.* (7th Cir 1993) 986 F2d 1146, 1150; *Mandel v Lackner* (1979) 92 CA3d 747, 761, 155 CR 269. See also *Utility Reform Network v PUC* (2008) 166 CA4th 522, 535, 82 CR3d 791. Compare *Gusman v Unisys Corp., supra,* with *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1548, modified on other grounds (9th Cir 1993) 984 F2d 345. But see *Lytle v Carl* (9th Cir 2004) 382 F3d 978, 989 (relying on defendant's evidence because plaintiff submitted only own rates).
- **Rates awarded to the claiming attorneys in previous actions.** See, *e.g., Camacho v Bridgeport Fin., Inc., supra; Davis v City of San Diego* (2003) 106 CA4th 893, 904, 131 CR2d 266; *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1005, 185 CR 145, in which the court rejected defendants' argument that rates awarded plaintiff's counsel in prior litigation were not relevant because they may have reflected special factors such as the difficulty of the case. But see *Bell v Clackamas County* (9th Cir 2003) 341 F3d 858, 868 (reversing fee award because district court based rate on outdated award); *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 908 (suggesting that prior awards are not sufficient without other evidence); *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041 (same).
- **Rates awarded attorneys of comparable experience in other cases in the same market.** See, *e.g., United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F3d 555, 564; *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629; *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1003, 185 CR 145. See also *Covington v District of Columbia* (DC Cir 1995) 57 F3d 1101, 1109; *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1431, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1547, modified on other grounds (9th Cir 1993) 984 F2d 345. But see *Van Skike v Director, Office of Workers' Compensation Programs* (9th Cir 2009) 557 F3d 1041 (error to consider only rates awarded in proceedings under Longshore and Harbor Workers' Compensation Act (33 USC §§901-950) and not consider evidence of market rates generally).

- **Surveys of billing rates.** Relevant surveys of billing rates may be considered as evidence of market rates. For example, in *Berberena v Coler* (7th Cir 1985) 753 F2d 629, 633, the court relied on a survey in a *National Law Journal* article to justify the rates awarded plaintiff's attorneys. The *Journal*'s 2007 version of the same survey (Dec. 10, 2007) showed California partners' rates as ranging up to $875 per hour and associates' rates up to $555 per hour. See also *Utility Reform Network v PUC* (2008) 166 CA4th 522, 535, 82 CR3d 791; *Dameron v Sinai Hosp. of Baltimore, Inc.* (D Md 1986) 644 F Supp 551, 558, in which the court referred to rates published in the 1985 Compensation and Benefits Survey Report published by the Association of Legal Administrators, Los Angeles County, Orange County, and Beverly Hills Bar Associations. Compare *Covington v District of Columbia* (DC Cir 1995) 57 F3d 1101, 1109 (upholding use of local surveys), with *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 908 (rejecting surveys that did not discuss fees in relevant markets), *Common Cause v Jones* (CD Cal 2002) 235 F Supp 2d 1076, 1079 n1 (rejecting survey based on rates charged in other legal fields), *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 993 (rejecting survey that listed firms by size, not type of work performed), and *Rodriguez v U.S.* (CD Cal June 2, 2006, No. CV 99-11821 CBM (Ex)) 2006 US Dist Lexis 95839, *11, rev'd in part on other grounds (9th Cir 2008) 542 F3d 704.
- **Opposing counsel's billing rates.** Some courts have found opposing counsel's billing rates to be a relevant factor in assessing the plaintiff's attorney's reasonable rate. See, *e.g., Chrapliwy v Uniroyal, Inc.* (7th Cir 1982) 670 F2d 760, 768 n18; *Utility Reform Network v PUC* (2008) 166 CA4th 522, 530, 82 CR3d 791. However, because government and insurance defense counsel generally charge lower rates than plaintiffs' attorneys for complex litigation, such attorneys' rates reflect a different market and, therefore, may not be probative. See *Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir 2004) 374 F3d 857, 866 (rejecting argument that fee award should be reversed because rate awarded was higher than fee-opponent's rate); *Trevino v Gates* (9th Cir 1996) 99 F3d 911, 925; *U.S. v City & County of San Francisco, supra*. See also *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319.

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## E. Challenging Claimed Rate

### §9.122 1. In Absence of Contradictory Evidence, Requested Rates Presumed Reasonable

If the opposing party does not submit evidence to contradict evidence of the moving party's rates, they are presumed reasonable. *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407; *Covington v District of Columbia* (DC Cir 1995) 57 F3d 1101, 1111; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 155, 50 CR3d 273 (when evidence in record was undisputed, trial court erred in relying on local court rate schedule for attorneys testifying as experts); *Davis v City of San Diego* (2003) 106 CA4th 893, 904, 131 CR2d 266; *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629.

**Additional authorities:** *Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir 2004) 374 F3d 857, 866.

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### §9.123 2. Burden on Party Challenging Claimed Rate

Once the party claiming fees presents evidence supporting the claimed rate, the burden shifts to the party opposing fees to present equally specific countervailing evidence. *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 980; *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407. See also *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1116 ("If opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut").

Objection must be made on relevant grounds. See, *e.g., Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 908 (noting that defendant had provided a "sound basis" for trial court's reduced rate). See also *Russell v Foglio* (2008) 160 CA4th 653, 661, 73 CR3d 87 (rejecting argument that counsel's rate should be reduced because of identity of his law school, his experience in different field, and rates charged by junior associates with less trial experience).

A request for out-of-town rates may impose a burden on the fee opponent to show that local counsel were in fact available to handle the case. See *Horsford v Board of Trustees* (2005) 132 CA4th 359, 399, 33 CR3d 644; *Nichols v City of Taft* (2007) 155 CA4th 1233, 1242, 66 CR3d 680.

On determining the geographic market, see §§9.114-9.115.

**Additional authorities:** *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1405; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1546, modified on other grounds (9th Cir 1993) 984 F2d 345; *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319, 1326; *Corder v Gates* (CD Cal 1988) 688 F Supp 1418, 1422, aff'd in part and rev'd in part (9th Cir 1991) 947 F2d 374. See also *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899, 908; *Henry v Webermeier* (7th Cir 1984) 738 F2d 188, 193.

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## IV. RECOVERING NONSTATUTORY COSTS AND OUT-OF-POCKET EXPENSES

### A. California Rule

### §9.124 1. Expert Witness Fees Not Recoverable Under CCP §1021.5

In *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1146, 74 CR3d 81, the California Supreme Court held that expert witness fees are not recoverable as attorney fees under CCP §1021.5. *Olson* closely followed the reasoning of the court's prior decision in *Davis v KGO-TV, Inc.* (1998) 17 C4th 436, 446, 71 CR2d 452, which held that expert witness fees were not recoverable as attorney fees or costs under the Fair Employment and Housing Act (FEHA) (Govt C §12965(b)). (Note that the legislature subsequently amended §12965(b) to provide for expert fees to prevailing parties in FEHA actions. Stats 1999, ch 591 §12.) *Olson* thus overruled the longstanding rule in *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1421, 1 CR2d 459, which had held that expert witness fees are recoverable as part of an attorney fees award. Plaintiffs still may recover postoffer expert witness fees, however, under CCP §998(d).

Neither *Olson* nor *Davis* expressly discusses whether other out-of-pocket expenses normally billed to fee-paying clients but not awardable as statutory costs may be recovered as attorney fees, as they are under federal attorney fees law. This issue is discussed in §9.127.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.125 2. Expert Witness Fees May Be Recoverable Under Other Fee-Shifting Statutes

### §9.125 2. Expert Witness Fees May Be Recoverable Under Other Fee-Shifting Statutes

Expert witness costs may be awarded under fee-shifting statutes with language broad enough to encompass nonstatutory costs. In *California Hous. Fin. Agency v E.R. Fairway Assocs.* (1995) 37 CA4th 1508, 1514, 44 CR2d 591, the court interpreted the phrase "notwithstanding any other provision of law" in Health & S C §51205(f) to permit the recovery of nonstatutory "costs" and attorney fees.

In an action under Govt C §91003(a), the plaintiffs were awarded photocopying and messenger expenses (which the court augmented with a 1.5 multiplier). See *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272.

When expert witness fees are provided by statute, they are not required to be claimed with the memorandum of costs but may be claimed as part of an attorney fee motion. *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 83 CR3d 306.

Expert witness fees may also be available under CCP §998. See, *e.g.*, *Thompson v Miller* (2003) 112 CA4th 327, 4 CR3d 905. But see *Miller v Union Pac. R.R. Co.* (2007) 147 CA4th 451, 457, 53 CR3d 893 (absence of expert witness fee provision in Federal Employers' Liability Act (45 USC §§51-60) precludes plaintiff from recovering expert witness fees under CCP §998). See also *Seever v Copley Press, Inc.* (2006) 141 CA4th 1550, 1561, 47 CR3d 206 (under CCP §998, courts must consider financial circumstances of party against whom expert witness fees claimed).

**Additional authorities:** *Jensen v BMW of N. Am., Inc*. (1995) 35 CA4th 112, 137, 41 CR2d 295 (interpreting "costs and expenses" language of CC §1794(d) to permit recovery of expert witness costs); *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 951, 218 CR 839 (under CCP §1036 (inverse condemnation), secretarial services are "necessary support services for attorneys [that] are includable within an award of attorneys fees"); *State v Meyer* (1985) 174 CA3d 1061, 1075, 220 CR 884 (implying that trial court could have awarded necessary appraiser fees and trial and messenger expenses); *Community Redev. Agency v Matkin* (1990) 220 CA3d 1087, 1098, 272 CR 1 (fees for appraisal relied on by owner in his testimony at trial appropriately included in award for expenses even though appraiser was not called as witness).

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### 3. Other Nonstatutory Costs and Expenses

#### §9.126 a. Contract Cases

Generally, a contractual provision entitling the prevailing party to "reasonable attorney's fees and costs" must be interpreted in light of CCP §1033.5's limited definition of costs. Most cases that have considered the matter have concluded that such a contractual attorney fees provision does not include nonrecoverable costs such as expert witness fees, and further, that such costs must be specially pleaded and proved at trial, not included in the memorandum of costs. See *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442; *Steiny & Co. v California Elec. Supply Co.* (2000) 79 CA4th 285, 93 CR2d 920; *Carwash of America-PO LLC v Windswept Ventures No. 1* (2002) 97 CA4th 540, 118 CR2d 536; *Ripley v Pappadopoulos* (1994) 23 CA4th 1616, 28 CR2d 878. One exception is *Bussey v Affleck* (1990) 225 CA3d 1162, 275 CR 646, which held that awards of statutory attorney fees should include reasonable out-of-pocket expenses that are not part of the overhead and are ordinarily billed to fee-paying clients awarded nonstatutory costs without pleading and proof.

In *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 491, 54 CR2d 888, a contract case, the court refused to limit recoverable costs to those permitted by CCP §§1032 and 1033.5. In *Arntz,* unlike *Ripley,* litigation expenses had been specifically pleaded and proved under a stipulated procedure, and the court said (47 CA4th at 492):

> While it is reasonable to interpret a general contractual cost provision by reference to an established statutory definition of costs, we do not discern any legislative intent to prevent sophisticated parties from freely choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.

Traditional statutory costs, such as filing, witness, and service fees, as well as deposition costs, must be claimed under the normal costs provisions. See, *e.g.,* CCP §§1032, 1033.5.

On the availability of statutory costs not specifically listed in CCP §1033.5(a), see *Winston Square Homeowner's Ass'n v Centex West, Inc.* (1989) 213 CA3d 282, 292, 261 CR 605 (affirming award to prevailing party of special master's fees under CCP §1033.5(c)(4)); *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1102, 46 CR2d 332.

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### §9.127 b. Statutory Fee Cases

In statutory fee-shifting cases, costs that are not recoverable under CCP §1033.5(b) are not recoverable as reasonable attorney fees, even though they would be billed to fee-paying clients. Compare *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1218, 78 CR3d 572 (expressly holding that such expenses are not recoverable), with *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1421, 1 CR2d 459 (expressly holding that they are recoverable), which was overruled as to expert witness fees in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1151, 74 CR3d 81 (see §9.124).

Costs that are discretionary under CCP §1033.5(c)(4), however, have been allowed as part of an attorney fee award. See *Amaral,* 163 CA4th at 1218 n27 (allowing transcript and translation expenses). See also *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1099, 69 CR3d 184 (computerized legal research expenses recoverable).

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## §9.128 B. Federal Rule

The federal rule on out-of-pocket expenses is broader than the California rule, though now similar as to expert witness fees.

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**Source:** Civil Litigation/California Attorney Fee Awards/9 Determining the Lodestar/§9.129 1. Expert Witness Fees Not Recoverable Absent Express Statutory Authorization

## §9.129 1. Expert Witness Fees Not Recoverable Absent Express Statutory Authorization

Expert witness fees are not recoverable under federal law as part of an attorney fee award unless the particular fee statute or legislative history so directs. *West Va. Univ. Hosp. v Casey* (1991) 499 US 83, 113 L Ed 2d 68, 111 S Ct 1138.

**NOTE:** In the Civil Rights Act of 1991, §113(a)-(b) (Pub L 102-166, 105 Stat 1071), Congress expressly made expert witness fees recoverable as an element of attorney fees in actions brought to enforce the major federal employment discrimination statutes, Title VII (42 USC §§2000e-5(k)) and 42 USC §§1981-1981a.

**Additional authorities:** *Arlington Cent. Sch. Dist. Bd. of Educ. v Murphy* (2006) 548 US 291, 165 L Ed 2d 526, 126 S Ct 2455 (expert fees not recoverable under Individuals with Disabilities Education Act (IDEA) (20 USC §1415(i)(3)(B))); *Agredano v Mutual of Omaha* (9th Cir 1996) 75 F3d 541.

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### §9.130 2. Other Nonstatutory Costs and Expenses Recoverable as Attorney Fees

Under federal law, out-of-pocket costs that are normally billed to a client may be recoverable from the losing party as attorney fees under fee-shifting statutes. See *Dang v Cross* (9th Cir 2005) 422 F3d 800, 814.

Such expenses as travel, photocopying, and long-distance telephone charges are recoverable if they are ordinarily billed to a client and are not included as overhead in the hourly rate. See *Missouri v Jenkins* (1989) 491 US 274, 105 L Ed 2d 229, 109 S Ct 2463. These nonstatutory expenses are claimed as part of the attorney fee motion. See Fed R Civ P 54(d)(2)(A).

**Additional authorities:** *Harris v Marhoefer* (9th Cir 1994) 24 F3d 16, 19; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1556, vacating portion of opinion awarding expert witness fees (9th Cir 1993) 984 F2d 345; *Davis v Mason County* (9th Cir 1991) 927 F2d 1473, 1487; *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407; *Chalmers v City of Los Angeles* (9th Cir 1986) 796 F2d 1205, 1216 n7; *Dowdell v City of Apopka* (11th Cir 1983) 698 F2d 1181, 1192; *Northcross v Board of Educ.* (6th Cir 1979) 611 F2d 624, 639. See also *Thornberry v Delta Airlines, Inc.* (9th Cir 1982) 676 F2d 1240, 1244, vacated and remanded on other grounds (1983) 461 US 952, 77 L Ed 2d 1311, 103 S Ct 2421; *Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v Redland Ins. Co.* (9th Cir 2006) 460 F3d 1253, 1258 (computerized legal research costs recoverable as "attorneys fees"); *Henry v Webermeier* (7th Cir 1984) 738 F2d 188, 192; *Ramos v Lamm* (10th Cir 1983) 713 F2d 546, 559; *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1101; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 1000 (examining various costs and expenses).

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## §9.131 C. Nonstatutory Costs Recoverable Under Equitable Doctrines

Nonstatutory costs of the type ordinarily billed to fee-paying clients are generally recoverable from the common fund (*i.e.,* from the clients). See, *e.g., Trustees v Greenough* (1882) 105 US 527, 533, 26 L Ed 1157.

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## V. INTEREST ON ATTORNEY FEE AWARDS

### §9.132 A. Interest Accrues on Fee Award

Postjudgment interest accrues on unpaid fee awards, just as it would on any money judgment. See *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, 747.

**Additional authorities:** *Environmental Protection Info. Ctr. v Pacific Lumber Co.* (ND Cal 2002) 229 F Supp 2d 993, 1007, aff'd (9th Cir 2004) 2004 US App Lexis 9099 (unpublished opinion); *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 599, 86 CR2d 575; *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 76, 227 CR 804; *Serrano v Priest* (1982) 131 CA3d 188, 192 n3, 198, 182 CR 387.

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### §9.133 B. Date Interest Starts Accruing

The beginning date for postjudgment interest accruing on unpaid fee awards is not necessarily the date that the fee award is rendered. See *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606, in which the trial court awarded the successful Raiders interest on their fee award from the date of the judgment on the merits, which was 3 years before the court's ruling on attorney fees; this award was in addition to the fee augmentation for the delay in payment that occurred before judgment on the merits. See also *Jenkins v Missouri* (8th Cir 1991) 931 F2d 1273 (interest begins to run from date of entitlement to fees, which may be considerably earlier than date fees are quantified). Compare *Jenkins* with *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, 747 (interest awarded from date stipulation to fee award filed), *Friend v Kolodzieczak* (9th Cir 1995) 72 F3d 1386, 1391 (awarding postjudgment interest from date entitlement to fee award is first "secured"), and *L.H. v Schwarzenegger* (ED Cal 2009) 645 F Supp 2d 888, 902 (interest on fee award from date stipulation on merits entered as judgment, not date signed). See also *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 702 (affirming award of interest on fee award from date of original judgment, even though award vacated on appeal for consideration of intervening case law). But see *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1106.

The time value of money should also be recognized for the period between the date the fee application is filed and the date the award is made. See, *e.g., In re Continental Ill. Sec. Litig.* (7th Cir 1992) 962 F2d 566, 571; *Finkelstein v Bergna* (ND Cal 1992) 804 F Supp 1235, 1239.

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### §9.134 C. Exception May Apply When Federal Government Is Defendant

A different rule may apply, however, if the federal government is the defendant. See *Library of Congress v Shaw* (1986) 478 US 310, 92 L Ed 2d 250, 106 S Ct 2957 (sovereign immunity bars interest on fee award against federal government); 28 USC §2412(f) (Equal Access to Justice Act) (providing for postjudgment interest if government appeals fee award). In §114(2) of the Civil Rights Act of 1991 (Pub L 102-166, 105 Stat 1079; 42 USC §2000e-16), Congress made federal defendants subject to the same adjustments for delay in payment as other parties in cases brought under employment discrimination statutes. See, *e.g., Estate of Reynolds v Martin* (9th Cir 1993) 985 F2d 470.

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# 10

# Determining Adjustments to the Lodestar

I. INCREASING OR DECREASING THE LODESTAR: APPLICATION OF A MULTIPLIER §10.1
- A. Adjusting the Lodestar: General Rules §10.2
  - 1. Factors Considered §10.3
  - 2. Scope of Trial Court's Discretion §10.4
  - 3. Factors May Not Be "Double-Counted" §10.5
  - 4. Fee Resulting From Use of Multiplier Must Be Reasonable §10.6
  - 5. Negative and Positive Multipliers Governed by the Same Standards §10.7
- B. Examples of Cases Involving Lodestar Adjustment
  - 1. Cases Affirming Lodestar Enhancement §10.8
  - 2. Cases Reversing Denials of Lodestar Enhancements §10.9
  - 3. Cases Reversing Lodestar Enhancements §10.10
  - 4. Cases Involving Negative Multipliers §10.11
- C. Enhancing the Lodestar for Fee-Related Services §10.12
- D. Enhancing the Lodestar for Appellate Services §10.13
- E. Effect of Contingency Fee Agreement on Lodestar Adjustment §10.14
- F. Courts Retain Limited Discretion to Reduce or Deny Unreasonable Fee Claim §10.15

II. CALIFORNIA AND FEDERAL LAW ON USE OF MULTIPLIERS COMPARED §10.16
- A. California Law
  - 1. Independence of California Law on Attorney Fee Awards §10.17
  - 2. Differences Between California and Federal Law on Application of Multipliers §10.18
  - 3. Differences Between California and Other States on Application of Multipliers §10.19
  - 4. No Enhancement in Favor of Government Entities Under CCP §1021.5 §10.20
  - 5. Factors May Not Be "Double-Counted" §10.21
- B. Federal Law
  - 1. Multipliers Rare Under Federal Fee-Shifting Statutes §10.22
  - 2. Strong Presumption That Lodestar Is Reasonable §10.23
  - 3. Lodestar Must Be Determined First §10.24
  - 4. Lodestar Multipliers Still Permitted in Exceptional Cases §10.25
  - 5. Examples of Lodestar Adjustments Under Federal Fee-Shifting Statutes §10.26
  - 6. Factors May Not Be "Double-Counted" §10.27
  - 7. Multipliers in Federal Common Fund Cases §10.28
  - 8. Multipliers in Federal Class Actions Involving "Coupon Settlements" §10.29
  - 9. Multipliers in Other Federal Cases in Which Client Pays the Fee §10.30

III. FACTORS JUSTIFYING INCREASE OR DECREASE OF LODESTAR
- A. Novelty and Difficulty of Questions Involved, Complexity of Case, and Skill Displayed §10.31
  - 1. "Quality of Representation" Factors Often Intertwined With Other Factors §10.32
  - 2. "Quality" Factors and Fee-Related Services §10.33
  - 3. Federal Law on "Quality" Factors §10.34
  - 4. "Quality" Factors and Reduction of Lodestar §10.35
  - 5. Examples of Cases Applying "Quality of Representation" Factors §10.36
- B. "Results Obtained" Factor §10.37
  - 1. Extent of Success Required §10.38
  - 2. "Success" Can Include Broader Effects of Litigation §10.39
  - 3. Class Actions With Monetized Recoveries §10.40
- C. Contingent Risk Factor
  - 1. Risk Multipliers Under California Law
    - a. Contingent Risk May Be Used to Adjust Lodestar §10.41
    - b. Purpose and Application of Risk Enhancement §10.42
    - c. Risk Multiplier for Appellate Services §10.43
    - d. Risk Multiplier for Fee-Related Services §10.44
  - 2. Risk Multipliers Under Federal Law
    - a. Risk Multipliers Unavailable Under Federal Fee-Shifting Statutes §10.45
    - b. Risk Multipliers Available in Federal Common Fund Cases §10.46
- D. Preclusion of Other Employment §10.47
- E. Undesirability of Case §10.48
- F. Delay in Payment §10.49
  - 1. Delay Enhancements Available Under California Law §10.50
  - 2. Delay Enhancements Available Under Federal Law §10.51
- G. Partial Success
  - 1. General Rule: Court Must Consider Degree of Success, But Has Discretion to Award Full or Reduced Fee §10.52

a. California Law Approach §10.53
b. Federal Law Approach §10.54
c. Some General Rules §10.55
2. Factors Affecting Court's Discretion to Adjust Lodestar for Partial Success
a. Difference Between Relief Sought and Relief Obtained §10.56
b. Nature of the Rights Vindicated §10.57
c. Parties' Litigation Activities §10.58
d. Parties' Settlement Positions
(1) California §10.59
(2) Federal §10.60
e. Other Results Obtained §10.61
f. Appellate Decision That Reduces Plaintiff's Relief §10.62
3. Court Can Award *No* Fee if Success Only Technical or De Minimis and Important Rights Not Vindicated §10.63
4. Quantifying the "Partial Success" Adjustment §10.64
5. Examples of Cases Applying Partial Success Rules
a. California Law §10.65
b. Federal Law §10.66
H. Public Service Element §10.67
I. Identity and Resources of Parties or Their Counsel
1. Lodestar Cannot Be Diminished Because Counsel Is Publicly or Charitably Funded §10.68
2. Effect of Fact That Fees Will Be Paid to Organizations Rather Than to Attorneys §10.69
3. Fee Awards Against Plaintiffs: Consideration of Financial Resources §10.70
4. Equal Share Among Firms §10.71
5. Effect of Fact That Award Will Be Paid by Taxpayers §10.72
J. Other Factors §10.73

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## §10.1 I. INCREASING OR DECREASING THE LODESTAR: APPLICATION OF A MULTIPLIER

Once the court has calculated the lodestar figure (see §8.2), it may consider other relevant factors that could increase (often termed "enhance" or "multiply") or decrease ("diminish" or "reduce") that figure. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331; *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377; *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900; *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315.

The court expresses these factors as a number (or as an equivalent percentage), and the lodestar is multiplied by that number. Thus, the number is referred to as the "multiplier." If, *e.g.,* the court determines that these other relevant factors justify increasing the lodestar figure by 50 percent, a multiplier of 1.5 (or 150 percent) is applied to the lodestar figure to arrive at a reasonable attorney fee. As the court explained in *Ketchum,* 24 C4th at 1132: "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services."

**Example:** Assume that plaintiff is successful in obtaining for herself, and for all other similarly situated inmates in state prison, the right to exercise outdoors. The court finds that plaintiff's attorneys, who took the case on a contingent basis, reasonably spent 1000 hours on the case and that a reasonable rate is $400 per hour. The court further finds it appropriate, because of the risk taken and excellent results obtained, to enhance the lodestar amount by a multiplier of 1.5 to arrive at a reasonable fee.

| | | |
|---|---|---|
| | 1,000 | Hours reasonably worked |
| × | $400 | Reasonable hourly rate |
| = | $400,000 | Lodestar figure |
| × | 1.5 | Multiplier |
| = | $600,000 | Total reasonable attorney fee |

This lodestar adjustment method is the standard method applied to the determination of reasonable attorney fees under California law. See §8.3. It is critical to keep in mind that the lodestar adjustment is not intended as a bonus, reward, or penalty. Rather, it is the second step in calculating a reasonable attorney fee, which recognizes that reasonable attorney fees take into account more factors than just hours and rates. Compare Cal Rules of Prof Cond 4-200(B) (defining "conscionability of a fee" charged to client in terms of 11 listed factors). See *Shaffer v Superior Court* (1995) 33 CA4th 993, 39 CR2d 506 (case law on court-awarded fees used to determine "unconscionability" under Rule 4-200).

Lodestar multipliers can have a significant impact on the fee determination. See, *e.g., Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 255, 110 CR2d 145 (noting that "[m]ultipliers can range from 2 to 4 or even higher").

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## §10.2 A. Adjusting the Lodestar: General Rules

The purpose of the lodestar-adjustment method of calculating fees is to determine a reasonable attorney fee by starting with the more objective lodestar factors (hours and rates), then adjust that figure to reflect other factors that go into the determination of reasonable attorney fees in the legal marketplace, such as contingent risk, exceptional results, and the like. See generally *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377. On the primacy of the lodestar-adjustment method of fee calculation, see chap 8.

As noted in chap 8, lodestar adjustments may be applied in a wide variety of fee-shifting contexts, including contract-based fee claims (see, *e.g., PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1097, 95 CR2d 198; *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 227 CR 804). The lodestar-adjustment method also applies to fee-shifting statutes that direct the trial court to base fees on the "time expended." See *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 347, 95 CR3d 880 (multiplier permitted even though fee-shifting statute (CC §1788.30(c)) directs that fees be "based on time necessarily expended to enforce the liability"); *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731 (same re CC §1794(d)).

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### §10.3 1. Factors Considered

There are many factors that may be used to adjust the lodestar figure: "There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 834, 112 CR2d 284. See, *e.g., PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1095, 95 CR2d 198 (after determining lodestar, figure "may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided").

The initial formulation of factors that may be considered was set out in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, in which the California Supreme Court approved the trial court's use of several factors as a basis for applying a lodestar multiplier. These factors are (20 C3d at 49):

- The novelty and difficulty of the questions involved and the skill displayed in presenting them (see §§10.31-10.36);
- The extent to which the litigation precluded other employment of the attorney (see §10.47);
- The contingent nature of the award (see §§10.41-10.46);
- The fact that the award against the state would eventually fall against the taxpayers (see §10.72);
- The public or charitable funding of the attorneys (see §10.68);
- That the money would accrue not to the individual attorneys, but to their organizations (see §10.69); and
- That the court viewed the two law firms involved as having shared equally in the success of the litigation (see §10.71).

In *Thayer v Wells Fargo Bank, supra,* the court reiterated that the factors listed in *Serrano III* are not exclusive, and also recognized that "the results obtained" and "the continuing obligations of … counsel" were appropriate factors to consider. 92 CA4th at 835. See also, *e.g., Krumme v Mercury Ins. Co.* (2004) 123 CA4th 924, 947, 20 CR3d 485; *In re Vitamins Cases* (2003) 110 CA4th 1041, 1052, 2 CR3d 358.

In *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198, the court recited several factors trial courts may consider, several of which overlap the *Serrano III* factors: "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." 22 C4th at 1096, citing *Melnyk v Robledo* (1976) 64 CA3d 618, 623, 134 CR 602. The terms of any contingent fee agreement may be considered, but "do not compel any particular award." *PLCM Group, Inc. v Drexler, supra*, quoting *Vella v Hudgins* (1984) 151 CA3d 515, 520, 198 CR 725. On the effect of a contingent fee agreement on the lodestar-adjustment method of setting fees, see §§8.29-8.34.

The court may not base a lodestar adjustment on an intent to punish the defendant for its litigation strategy.. *Ketchum v Moses* (2001) 24 C4th 1122, 1142, 104 CR2d 377. However, the "extraordinary difficulties" caused by a fee-opponent's opposition to a fee motion may warrant a lodestar enhancement for that work. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 582, 21 CR3d 331.

This chapter will discuss the principal factors the courts have utilized in applying lodestar adjustments under California law. For in-depth discussion of these factors, see §§10.31-10.73.

**NOTE:** Consideration and use of multipliers under federal fee-shifting statutes differs from that under California law. On the more restricted use of multipliers under federal fee-shifting statutes, and for a comparison with California law, see §§10.22-10.30.

**Additional authorities:** For other cases that significantly help define the parameters of the lodestar-adjustment method under California law, see, *e.g., Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 1398, 84 CR3d 754 (discussing both negative and positive multipliers); *In re Lugo* (2008) 164 CA4th 1522, 1544, 80 CR3d 521; *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1216, 78 CR3d 572; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 393, 33 CR3d 644; *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 26, 97 CR2d 797 (discussing effect of large monetary recoveries in class actions); *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 997, 242 CR 272.

See also *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 60, 75 CR3d 413; *Greene v Dillingham Constr., Inc.* (2002) 101 CA4th 418, 422, 124 CR2d 250; *Mardirossian & Assocs., Inc. v Ersoff* (2007) 153 CA4th 257, 272, 62 CR3d 665 (applying lodestar method to quantum meruit fee award); *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 254, 110 CR2d 145 (in approving class action fee, trail court rejected mediator's use of "baseball arbitration" method to determine fees, but determined same fee was reasonable under lodestar method); *Ramos v Countrywide Home Loans,*

*Inc.* (2000) 82 CA4th 615, 628, 98 CR2d 388; *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1148, 74 CR3d 81; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, at *18, aff'd (9th Cir 2000) 225 F3d 1042; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (augmenting lodestar on basis of contingent risk, exceptional results in light of defendant's "vexatious" opposition, difficulties of litigation, and "public interest value").

For cases discussing downward lodestar adjustments (negative multipliers), see, *e.g., Harman v City & County of San Francisco* (2007) 158 CA4th 407, 424, 69 CR3d 750. (discussing circumstances in which lodestar may be reduced for "limited success"); *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 843, 112 CR2d 284; *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607 (when lodestar may be reduced due to "partial success" under FEHA).

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### §10.4 2. Scope of Trial Court's Discretion

Trial courts have considerable discretion in determining whether to apply a lodestar adjustment and the size of that adjustment: "the awarding of attorney fees and the calculation of attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial court." *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 581, 21 CR3d 331. See also *Mandel v Lackner* (1979) 92 CA3d 747, 761, 155 CR 269.

The balancing of factors is expressly left to the trial court. See *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 1398, 84 CR3d 754; *In re Lugo* (2008) 164 CA4th 1522, 80 CR3d 521; *Krumme v Mercury Ins. Co.* (2004) 123 CA4th 924, 20 CR3d 485. Trial courts must, however, apply the correct legal standards and their findings must have a reasonable basis in the record. See, *e.g., Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 347, 95 CR3d 880 (trial court relied on impermissible factor); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 880, 71 CR3d 642; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 50 CR3d 731 (reversing application of multiplier); *Horsford v Board of Trustees* (2005) 132 CA4th 359, 33 CR3d 644 (reversing denial of multiplier); *Greene v Dillingham Constr., Inc.* (2002) 101 CA4th 418, 124 CR2d 250 (same). See also, *e.g., Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 1006, 149 CR 829. In some cases, the factors supporting a lodestar enhancement may be so strong that an enhancement is essentially required. See, *e.g., Horsford*, 132 CA4th at 399.

The trial court need not explain how it calculated the precise multiplier used, and the reviewing court will generally presume that the award was correct on matters as to which the record is silent. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 584, 21 CR3d 331. Nor must the trial court discuss all the factors listed in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315—only the factors relevant to the particular case. *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1228, 217 CR 125; *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 994 n10, 242 CR 272; *Mandel v Lackner* (1979) 92 CA3d 747, 761, 155 CR 269. See also §§11.64-11.71.

However, despite the general principle that statements of decision are not required for fee motions (see §11.68), the appellate courts have frequently required some explanation for the application of significant lodestar multipliers. See, *e.g., In re Vitamins Cases* (2003) 110 CA4th 1041, 1054, 2 CR3d 358 ("if the trial court on remand wishes to enhance the lodestar amount by a multiplier, it must more precisely articulate why such increment is appropriate. General reference to risk, novelty and skill on this record does not support the relatively large multiplier selected by the trial court" (quoting *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 629, 98 CR2d 388)). See also *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 880, 71 CR3d 642; *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 835, 112 CR2d 284.

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### §10.5 3. Factors May Not Be "Double-Counted"

The same factors may not be used to justify both the lodestar and a lodestar adjustment. See *Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377; *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 18, 64 CR3d 327; *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 879, 71 CR3d 642; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822, 50 CR3d 731. Some factors, however, such as skill, results, difficulty, and complexity, can justify a lodestar enhancement when they are extraordinary or are otherwise unaccounted for in the lodestar determination. Compare *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 61, 75 CR3d 413 (affirming multiplier for "quality of representation"), and *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *28 (basing lodestar determination in part on "excellent recovery" does not preclude lodestar enhancement for "exceptional results"), with *Russell v Foglio* (2008) 160 CA4th 653, 662, 73 CR3d 87 (high quality of performance and time constraints imposed by client factored into hourly rate). See also §§10.21 and 10.27.

**Additional authorities:** *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 156, 50 CR3d 273; *Robbins v Alibrandi* (2005) 127 CA4th 438, 25 CR3d 387; *In re Vitamins Cases* (2003) 110 CA4th 1041, 1053, 2 CR3d 358; *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 112 CR2d 284; *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 626, 98 CR2d 388.

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### §10.6 4. Fee Resulting From Use of Multiplier Must Be Reasonable

The goal of using the lodestar-adjustment method is to arrive at a reasonable attorney fee that considers all the factors that usually go into that determination. See, *e.g.,* Cal Rules of Prof Cond 4-200. Thus, although the trial court has the discretion to modify the lodestar figure by using a positive or negative multiplier, "the resulting fee must still bear some reasonable relationship to the lodestar figure" and to the purpose of the fee-shifting statute. *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 324, 193 CR 900. See also *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1095, 95 CR2d 198 (lodestar may be adjusted "based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided"); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 879, 71 CR3d 642; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 395, 33 CR3d 644; *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 112 CR2d 284.

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### §10.7 5. Negative and Positive Multipliers Governed by the Same Standards

Negative multipliers generally are subject to the same limitations as positive ones. They most commonly are at issue in the context of a proposed reduction for partial success. On partial success as a factor in adjusting the lodestar, see §§10.52-10.66. See also §§9.48-9.57.

In *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 324, 193 CR 900, for example, the trial court took the plaintiffs' proposed fee, including a multiplier, and reduced it by using an arbitrary formula, resulting in a negative multiplier of 185 (3000 ¸ 556,000) and a fee of $112.98. In reversing that determination, the supreme court found that the trial court had erred by (1) basing the "negative multiplier" on the plaintiffs' enhanced figure rather than on the lodestar figure; (2) improperly intertwining its assessment of the importance of the litigation with the fee amount; (3) using a factor that could only result in a negative multiplier, not a positive one; and (4) so distorting the objective lodestar figure that the abuse of discretion was "palpable." 34 C3d at 323. See also *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 161, 50 CR3d 273 (negative multiplier could not be applied to make plaintiff's fee consistent with fee recoverable under contingent fee agreement).

Note that under federal case law, the heavy presumption that the lodestar is reasonable applies to proposed lodestar *reductions* as well as increases. For discussion, see §10.23.

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## B. Examples of Cases Involving Lodestar Adjustment

### §10.8 1. Cases Affirming Lodestar Enhancement

Cases affirming lodestar enhancements under California fee-shifting law include: *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315 (action challenging constitutionality of education funding statutes; 1.43 multiplier affirmed); *Consumer Privacy Cases* (2009) 175 CA4th 545, 558, 96 CR3d 127 (consumer class action; 1.75 multiplier); *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615 (class action; 2.52 multiplier); *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 1398, 84 CR3d 754; *In re Lugo* (2008) 164 CA4th 1522, 80 CR3d 521 (state prisoners class action; 1.5 multiplier); *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1216, 78 CR3d 572 (challenge to local ordinance; 1.65 multiplier); *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 60, 75 CR3d 413 (consumer class action; 2.5 multiplier); *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 430, 69 CR3d 1 (individual employment discrimination action; 1.1 multiplier); *Krumme v Mercury Ins. Co.* (2004) 123 CA4th 924, 947, 20 CR3d 485 (unfair business practices challenge; 1.5 multiplier); *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 71 CR2d 1 (CEQA action; 1.43 multiplier); *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 142 CR 766 (land use challenge; 2.1 multiplier); *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1418, 1 CR2d 459 (consumer class action; 1.5 multiplier) disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1148, 74 CR3d 81; *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 82, 249 CR 606 (2.34 multiplier in eminent domain case); *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272 (redevelopment plan challenge; 1.5 multiplier); *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1228, 217 CR 125 (environmental action challenging land use decision; 1.5 multiplier); *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 202 CR 423 (CEQA action challenging land use decision; 1.4 multiplier); *Jutkowitz v Bourns, Inc.* (1981) 118 CA3d 102, 173 CR 248 (shareholder action; 1.5 multiplier); *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552 (challenge to insurance practices; 2.0 multiplier), aff'd (9th Cir 2000) 225 F3d 1042; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719 (employment discrimination action; 2.0 multiplier), aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470.

See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 581, 21 CR3d 331 (trial court awarded 2.25 multiplier for work on merits); *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843 (applying 2.0 multiplier in FEHA case); *Noyes v Kelly Servs.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437 (rejecting multiplier of 2 and setting multipliers of 1.4 for lead counsel and 1.2 for assistant counsel).

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### §10.9 2. Cases Reversing Denials of Lodestar Enhancements

Cases that have reversed the denial of lodestar enhancements include: *Horsford v Board of Trustees* (2005) 132 CA4th 359, 394, 33 CR3d 644; *Greene v Dillingham Constr., Inc.* (2002) 101 CA4th 418, 428, 124 CR2d 250; *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 97 CR2d 797.

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### §10.10 3. Cases Reversing Lodestar Enhancements

Several cases reverse trial court lodestar enhancements, mostly with directions to reconsider the enhancement under appropriate standards. These cases include: *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 581, 21 CR3d 331 (multiplier for fees-on-fees remanded for consideration under appropriate standards); *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 347, 95 CR3d 880; *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 882, 71 CR3d 642 (reversing 16 multiplier); *Nichols v City of Taft* (2007) 155 CA4th 1233, 1244, 66 CR3d 680; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 818, 50 CR3d 731; *Robbins v Alibrandi* (2005) 127 CA4th 438, 25 CR3d 387; *In re Vitamins Cases* (2003) 110 CA4th 1041, 2 CR3d 358; *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 622, 98 CR2d 388; *Flannery v CHP* (1998) 61 CA4th 629, 71 CR2d 632; *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 74 CR2d 510.

Note, however, that some of the reasoning in *Flannery* and *Weeks* has since been rejected. In *Ketchum v Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377, the court reaffirmed California law generally on the validity of risk multipliers. In *Greene v Dillingham Constr., Inc.* (2002) 101 CA4th 418, 124 CR2d 250, the court of appeal held that to the extent that *Flannery* and *Weeks* limited risk multipliers to cases that result in great public value or that involve complex legal or factual issues, they were no longer good law after *Ketchum,* which requires that a risk enhancement be considered in every contingent case. 101 CA4th at 428.

In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 400 n11, 33 CR3d 644, the court also disagreed with *Weeks,* holding that the primary contingency to be considered is not the risk of prevailing and yet failing to obtain a fee award, but the risk of losing in the litigation itself. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331 (risk of not prevailing on merits of case is foremost consideration in determining whether to apply risk multiplier); *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572 (rejecting "unduly narrow" view of risk multiplier: "It is not simply that counsel turned away paid work for a time in order to represent the class, but that counsel risked never receiving compensation *at all*" (emphasis in original)); *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *27 (noting *Weeks* superseded by *Ketchum*).

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### §10.11 4. Cases Involving Negative Multipliers

Cases involving negative multipliers include: *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 323, 193 CR 900 (trial court's reduction of fee was not valid negative multiplier, but "illogical measure" of results obtained); *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 84 CR3d 754 (rejecting county's argument for two-thirds reduction based on partial success); *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 431, 69 CR3d 1 (rejecting defendant's argument that lodestar should be reduced based on partial success); *In re Vitamins Cases* (2003) 110 CA4th 1041, 1054, 2 CR3d 358 (reversing and remanding 2.0 multiplier); *San Diego Police Officers Ass'n v San Diego Police Dep't* (1999) 76 CA4th 19, 24, 90 CR2d 6 (affirming negative multiplier of.20); *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 234, 226 CR 265 (rejecting city's argument that lodestar fee should be reduced because case not novel or complex).

For further discussion of negative multipliers, see the discussion of partial success as a factor justifying decrease of lodestar, §§10.52-10.66.

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### §10.12 C. Enhancing the Lodestar for Fee-Related Services

The lodestar adjustment factors may be applied not only to enhance the lodestar for work on the merits of the case, but also to enhance fees for work on the fee application. In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331, the California Supreme Court held that the lodestar for fee-related services may be enhanced on the basis of such factors as contingent risk, delay in payment, or any "extraordinary difficulties" caused by the opposition to the fee motion. 34 C4th at 583. As the court noted, a rule banning fee enhancements for fee-related services would "not appear in harmony with the principle that the awarding of attorney fees and the calculation of attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial court." 34 C4th at 581.

The court also recognized, however, that "in most cases, the enhancement for the fee litigation should be lower than the enhancement for the underlying litigation, if one is applied at all." 34 C4th at 582. This is largely because the risk of not winning the case generally would be eliminated at this point (a consideration, the court noted, that would not apply in catalyst cases (34 C4th at 583)). See also 34 C4th at 561 ("fees for fee litigation usually should be enhanced at a significantly lower rate than fees for the underlying litigation").

The court also held that an enhancement for "results obtained" would be inappropriate because the benefit of the fee litigation went only to the attorneys, and that a multiplier for "exceptional skill" would rarely be justified for fee litigation. 34 C4th at 582. For further discussion of *Graham*'s rulings on multipliers, see, *e.g.,* §§10.19, 10.33, 10.44 (on lodestar enhancements for fee-related services), 10.50 (on delay enhancement).

Other cases in which multipliers have been applied to fee-related litigation include: *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470.

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### §10.13 D. Enhancing the Lodestar for Appellate Services

Fees for appellate services should also take the lodestar enhancement factors into account. *Mandel v Lackner* (1979) 92 CA3d 747, 155 CR 269. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331 (noting that risk multiplier might vary with stage of the case).

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### §10.14 E. Effect of Contingency Fee Agreement on Lodestar Adjustment

The court need not award a multiplier simply because the terms of the prevailing party's contract with counsel calls for a fee higher than the lodestar figure. *State v Meyer* (1985) 174 CA3d 1061, 1072, 220 CR 884. See §§8.28-8.37. Conversely, the court may not deny a lodestar enhancement by considering that contingent fees might be available to plaintiff's counsel under their contingent fee agreement with the plaintiff, in addition to any statutory fee, to compensate plaintiff for contingent risk. *Horsford v Board of Trustees* (2005) 132 CA4th 359, 401, 33 CR3d 644. See §8.36. *Horsford* holds that the trial court may not deny a contingent risk lodestar enhancement by looking to the attorney's possible right to collect a contingent fee from the client, *in addition to* any statutory fee, as the compensation for risk; as the court explained, even with a contingent fee agreement, the attorney may only collect the larger of the two amounts, with appropriate setoff. *Horsford v Board of Trustees, supra*. See also *In the Matter of Yagman* (Rev Dep't 1997) 3 Cal St Bar Ct Rptr 788 (addressing ethics of attorneys recovering both a statutory fee and a contingent fee); SF County Bar Ass'n Formal Opinion No. 1999-1 (Sept. 1999) (agreement to charge both hourly rate and contingent fee is not per se unconscionable). But see *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1175, 74 CR2d 510 (reversing multiplier in part based on trial attorney's contingent fee contract with client).

Conversely, in *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 161, 50 CR3d 273, the court held that a negative multiplier could not be applied to make plaintiff's statutory fee consistent with fee recoverable under contingent fee agreement).

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### §10.15 F. Courts Retain Limited Discretion to Reduce or Deny Unreasonable Fee Claim

The California Supreme Court has held that the lodestar concept is limited by the principle that a fee award may be reduced or denied altogether when it is "unreasonably inflated." *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 635, 186 CR 754. See, *e.g., Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 674, 46 CR3d 206. See also *Chavez v City of Los Angeles* (2010) 47 C4th 970, 990 __ CR3d __; *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913.

For most fee motions, the appropriate response to an excessive fee claim is to reduce the claim to the appropriate figure. See, *e.g., Disabled in Action v Mayor of Baltimore* (4th Cir 1982) 685 F2d 881, 886 (excessive fee claim should be reduced to proper amount, not denied entirely). Accord *Anderson v Director, Office of Workers Compensation Programs* (9th Cir 1996) 91 F3d 1322, 1325 (if application for fee-related services is excessive, trial court may reduce but not deny award).

Federal law authorizes such a drastic result only in the most extreme circumstances. See the cases cited in *Serrano IV*, 32 C3d at 635 n21; *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1127 (complete denial for "excessive" fees reversed); *Jordan v Department of Justice* (DC Cir 1982) 691 F2d 514, 521 (complete denial appropriate only in "most severe of cases"). For example, in *Bernardi v Yeutter* (9th Cir 1991) 951 F2d 971, the district court cut plaintiffs' lodestar claim in half and denied them compensation for their fee-related services based on its finding that the fee claim was unreasonable and excessive. Although it affirmed the reduction of the lodestar claim, the court of appeals reversed the denial of fees for fee-related services, requiring the district court to compensate plaintiffs' attorneys for all such services. 951 F2d at 976.

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## §10.16 II. CALIFORNIA AND FEDERAL LAW ON USE OF MULTIPLIERS COMPARED

Significant differences exist between California law and federal law on the application of lodestar multipliers. It is crucial that counsel recognize these differences.

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## A. California Law

### §10.17 1. Independence of California Law on Attorney Fee Awards

California attorney fee law is independent of federal attorney fee law. Although California courts have looked to federal law when California law is silent, California's fee statutes have independent bases and applications. "Federal decisions rest in part on evidence of congressional intent [citation omitted] for which there is no California parallel. We envision an independent state rule." *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 639 n29, 186 CR 754. Federal precedent serves as a guide only when there is no California precedent on point.

**NOTE:** The standard used to determine reasonable attorney fees under some state fee-shifting statutes, such as CCP §1021.5, is based on federal decisional law that predates *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612, the decision that restricted the availability of private attorney general fees in federal court. *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1148, 74 CR3d 81. Pre-*Alyeska* federal case law uniformly permitted enhancements based on such factors as contingent risk. See *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)* (1987) 483 US 711, 735, 97 L Ed 2d 585, 604, 107 S Ct 3078 (dissenting opinion). In providing for reasonable attorney fees under §1021.5, therefore, California courts have inferred that the legislature intended that pre-*Alyeska* standards apply. See *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 934, 154 CR 503 ("Because in framing the provisions of [CCP §1021.5] the Legislature drew heavily upon the pre-*Alyeska* federal decisions, we believe that such authorities—while no longer viable in the federal realm—will often be helpful and reliable guides in interpreting the various provisions of the California statutes.").

The differences between California and federal law are most pronounced on the use of lodestar multipliers. See §10.18; federal law is discussed in detail in §§10.22-10.30.

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### §10.18 2. Differences Between California and Federal Law on Application of Multipliers

The differences between California and federal law on the application of lodestar multipliers are significant. In *Ketchum v Moses* (2001) 24 C4th 1122, 1136, 104 CR2d 377, the court reaffirmed the independence of California's attorney fee jurisprudence, noting that California courts had applied the lodestar adjustment method for more than 20 years with the acquiescence of the legislature. The court then expressly rejected the reasoning of the United States Supreme Court majority in *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638, disagreeing with its conclusions that lodestar multipliers for risk encourage nonmeritorious cases, constitute a "pooling" of successful and unsuccessful cases, and inevitably result in "unfair double counting." 24 C4th at 1137. On risk multipliers under California law, see §10.41-10.44. Note that *City of Burlington v Dague* applies only to federal fee-shifting *statutes*; multipliers continue to be applied in federal common fund cases. See §10.28.

Other differences between state and federal attorney fee law are noted in: *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 43, 141 CR 315 (upholding equitable private attorney general doctrine, despite contrary federal precedent); *Flannery v Prentice* (2001) 26 C4th 572, 579, 110 CR2d 809 (upholding attorney's, as opposed to client's, right to fee award, despite contrary federal precedent); *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 568, 21 CR3d 331, and *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 608, 21 CR3d 371 (affirming catalyst theory, despite contrary federal precedent). See also *Graham,* 34 C4th at 580 (authorizing risk multipliers for fee-related services, even though federal law precludes risk multipliers); *Davis v City of San Diego* (2003) 106 CA4th 893, 903, 131 CR2d 266 (rejecting federal requirements for documenting hourly rate); *Beaty v BET Holdings, Inc*. (9th Cir 2000) 222 F3d 607, 610 n 1 (declining defendant's request to apply federal law on reductions for partial success in FEHA case).

Other cases rejecting federal restrictions on lodestar multipliers include: *Greene v Dillingham Constr., Inc.* (2002) 101 CA4th 418, 428, 124 CR2d 250 (after *Ketchum v Moses* (2001) 24 C4th 1122, 1136, 104 CR2d 377, decisions suggesting that risk multipliers should be limited to cases that result in great public value or that involve complex legal or factual issues are no longer good law); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1173, 74 CR2d 510 (adjustment of lodestar figure "far more common under California law than under federal law"); *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606 (rejecting invitation to apply federal law restrictions on enhancements and affirming trial court's determination of reasonable fee that was 2.34 times larger than counsel's lodestar); *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 995, 242 CR 272 (specifically rejecting defendant's suggestion that California adopt U.S. Supreme Court's narrow view of multipliers, instead following precedent established for CCP §1021.5 fee awards and affirming 1.5 multiplier); *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470 (state law on multipliers applies to FEHA claim litigated in federal court).

**NOTE:** The continued validity of multipliers under California law is also demonstrated by the 1993 amendment to CCP §1021.5. Stats 1993, ch 645. In that amendment, the legislature carved out a class of cases (*i.e.,* suits by government entities against other government entities) for which multipliers are not allowed, recognizing by implication that they are available in other contexts. See *Ketchum v Moses, supra; Flannery v CHP* (1998) 61 CA4th 629, 640, 71 CR2d 632. For further discussion of this amendment, see §10.20.

On federal law on the use of lodestar multipliers, see §§10.22-10.30.

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### §10.19 3. Differences Between California and Other States on Application of Multipliers

California's law on multipliers also distinguishes California's fee-shifting statutes from other states' statutes. See *America Online, Inc. v Superior Court* (2001) 90 CA4th 1, 18 n16, 108 CR2d 699. In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331, the California Supreme Court held that lodestar enhancements could be applied to fees for fee-related services; in doing so, the court rejected the contrary views of courts in several other states. 34 C4th at 580.

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### §10.20 4. No Enhancement in Favor of Government Entities Under CCP §1021.5

Attorney fees awarded to public entities in lawsuits against other public entities under CCP §1021.5 may not be increased or decreased by a multiplier. CCP §1021.5. This provision was added in 1993 and cites the discussion of multipliers in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315. See Note in §10.18. See also S*tate v Pacific Indem. Co.* (1998) 63 CA4th 1535, 1552, 75 CR2d 69 (multiplier not available to Attorney General or private counsel hired by state in action to recover defense costs from insurance company).

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### §10.21 5. Factors May Not Be "Double-Counted"

As is the rule under federal law (see §10.27), California courts must take care to avoid double-counting—that is, using the same factor to set the lodestar and to set a multiplier for (or enhance) the lodestar. In *Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377, the court cautioned that

> a trial court should not consider these factors to the extent they are already encompassed in the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult legal question typically requires more hours, and a more skillful and experienced attorney will command a higher hourly rate.... [A] trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation.

For further discussion of California law on "double-counting," see §10.5.

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### B. Federal Law

### §10.22 1. Multipliers Rare Under Federal Fee-Shifting Statutes

Although the federal decisions reaffirm the primacy of the lodestar figure, they significantly narrow the factors a court may use as a lodestar multiplier under federal fee-shifting statutes. See *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638 (prohibiting contingency adjustments); *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)* (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088 (quality of representation multiplier improper because subsumed in reasonable hourly rate); *Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541 (exceptional result multiplier improper because subsumed in reasonable hourly rate).

Under federal law, many factors that the California courts must address after the lodestar has been calculated are presumed to be *already incorporated* into the lodestar figure. These factors include the novelty and complexity of the issues, the special skill and experience of counsel, the contingent nature of the case, and, except in rare instances, the quality of representation and the results obtained. See §10.26 (citing examples of cases involving lodestar adjustments under federal fee-shifting statutes since *City of Burlington v Dague, supra*).

Whether counsel can or should, under federal law, incorporate these factors into their hourly rates because they can no longer be recognized in a multiplier, when factors such as special expertise or exceptionally novel or complex issues are involved, is an open question. Compare *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1549 (risk may not be incorporated into hourly rate), modified on other grounds (9th Cir 1993) 984 F2d 345, with *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1114 (approving district court's consideration in determining hourly rate that "counsel was to be compensated only if the lawsuit was successful").

More frequently, at least in representative actions involving large damages, fee awards are being claimed under the common fund theory as a percentage of the fund, rather than as an award from the defendant, because multipliers based on such factors as risk, results obtained, and quality of representation *are* available under federal law in common fund cases, *i.e.,* when the fee is paid by the plaintiff class. See *Staton v Boeing* (9th Cir 2003) 327 F3d 938; *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043; *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291; *Roberts v Texaco, Inc.* (SD NY 1997) 979 F Supp 185). They also have been allowed in Social Security disability cases, where the fee is paid from the individual plaintiff's recovery. See *Allen v Shalala* (9th Cir 1995) 48 F3d 456. On multipliers in federal common fund cases, see §10.28. On multipliers in individual Social Security cases, see §10.30.

**NOTE:** The issue of whether federal fee-shifting statutes authorize trial courts to apply lodestar enhancements based solely on quality of performance and results obtained is currently before the United States Supreme Court in *Perdue v Kenny A.* (cert granted Apr. 6, 2009, No. 08-970) 173 L Ed 2d 1056, 129 S Ct 1907.

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### §10.23 2. Strong Presumption That Lodestar Is Reasonable

Under federal law, there is a "strong presumption" that the lodestar represents a reasonable fee. *Childress v Darby Lumber, Inc.* (9th Cir 2004) 357 F3d 1000, 1011; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363. Only in "rare instances" is a departure from that lodestar justified. *Morales,* 96 F3d at 364. See also *Cunningham v County of Los Angeles* (9th Cir 1988) 879 F2d 481, 488 (deviations from lodestar appropriate only in "rare" or "exceptional" circumstances).

This is in part because the United States Supreme Court has significantly restricted the application of positive enhancements or multipliers for determining fee awards under federal fee-shifting statutes. See *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638; *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)* (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088; *Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541. See also *Childress v Darby Lumber, Inc.* (9th Cir 2004) 357 F3d 1000, 1011 (citing *Dague* for proposition that "there is a strong presumption that the lodestar represents a reasonable fee and that whether a fee is fixed or contingent should have no bearing on the lodestar calculation"); *Stewart v Gates* (9th Cir 1993) 987 F2d 1450, 1453 (burden on plaintiff to show that factors such as preclusion of other employment, time limitations, and undesirability of case not reflected in lodestar); *U.S. v City of San Diego* (SD Cal 1998) 18 F Supp 2d 1090, 1103 (fee claimant failed to meet burden of showing that lodestar failed to adequately reflect counsel's performance).

The same heavy presumption that the lodestar is reasonable applies to proposed lodestar *reductions.* See *Ballen v City of Redmond* (9th Cir 2006) 466 F3d 736, 746 ("only in rare circumstances should a court adjust the lodestar figure, as this figure is the presumptively accurate measure of reasonable fees"); *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 364 (downward adjustment to lodestar permissible only in "rare" cases in which limited success not reflected in lodestar figure); *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1402 (same as *Morales v City of San Rafael, supra*). But see *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097, 1103 (authorizing reductions for "limited success," without discussing strong presumption). See §10.54.

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### §10.24 3. Lodestar Must Be Determined First

Under federal law, the preferred procedure is for courts to determine the lodestar first, then adjust it for other factors not included in the lodestar calculation. *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 364 n9; *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1104; *Corder v Gates* (9th Cir 1991) 947 F2d 374, 378. Regardless of whether the court makes specific reductions from the lodestar or applies a percentage reduction, the lodestar must be determined "*first …* before departing from it." *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982 (emphasis in original).

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### §10.25 4. Lodestar Multipliers Still Permitted in Exceptional Cases

Multipliers are not entirely prohibited under federal fee-shifting statutes.. Even after contingency adjustments were prohibited in *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638 (see §10.45), the lower federal courts have continued to consider both positive and negative adjustments to the lodestar. See, *e.g., Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 697 (even after *Dague,* multipliers appropriate when "necessary" to determine reasonable fee). See cases cited in §10.26. For example, lodestar adjustments based on delay in payment are still appropriate under federal law. See §§10.49, 10.51.

**NOTE:** Whether and to what extent this practice will continue, however, is uncertain. Both *Blum v Stenson* (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541, and *Hensley v Eckerhart* (1983) 461 US 424, 435, 76 L Ed 2d 40, 52, 103 S Ct 1933, recognized that "in some cases of exceptional success an enhanced award may be justified." However, the United States Supreme Court has before it *Perdue v Kenny A.* (cert granted Apr. 6, 2009, No. 08-970) 173 L Ed 2d 1056, 129 S Ct 1907, which presents the issue of whether federal fee-shifting statutes authorize trial courts to apply lodestar enhancements based solely on quality of performance and results obtained. That decision will further clarify the state of federal law on this issue.

Under federal law, the burden is on the party seeking an adjustment to the lodestar to show that it is either unreasonably high or unreasonably low. *Blum v Stenson, supra*.

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### §10.26 5. Examples of Lodestar Adjustments Under Federal Fee-Shifting Statutes

The following are examples of lodestar adjustments under federal fee-shifting statutes after *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638:

- *Barnes v City of Cincinnati* (6th Cir 2005) 401 F3d 729, 745 (following *Guam Soc'y* in affirming 1.75 enhancement based on novelty and difficulty of action, exceptional skill, extraordinary result, and highly controversial nature of case);
- *Wing v Asarco, Inc.* (9th Cir 1997) 114 F3d 986 (upholding 2.0 multiplier awarded under settlement agreement, based on quality of representation and exceptional results obtained, or alternatively on basis of counsel's continuing obligation to class);
- *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 697 (in abortion rights case, 2.0 multiplier affirmed based on the "extreme undesirability of the case," the unwillingness of other local attorneys to take the case, and its "rare and exceptional nature");
- *Odima v Westin Tucson Hotel* (9th Cir 1995) 53 F3d 1484 (fee award remanded for trial court to provide sufficient information to justify 50-percent enhancement for limited preparation time and skill of representation);
- *Kientzy v McDonnell Douglas Corp.* (8th Cir 1993) 990 F2d 1051, 1063 ("difficulty of establishing the merits" a basis for enhancement if not considered in determination of lodestar);
- *Shipes v Trinity Indus.* (5th Cir 1993) 987 F2d 311, 320 (reversing enhancement based on novelty and difficulty of case, skill required, special time limits imposed, and preclusion of other employment because already reflected in lodestar, but remanding for consideration of enhancement for amount involved and results obtained on proof that it was customary in area for plaintiffs to charge more than hourly rate "for an exceptional result after lengthy and protracted litigation");
- *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, aff'd sub nom *Oberfelder v Bertoli* (9th Cir 2003) 67 Fed Appx 408 (unpublished opinion) (1.5 multiplier based primarily on undesirability of case and counsel's willingness to accept court appointment to represent plaintiff);
- *Donovan v Poway Unified Sch. Dist.* (2008) 167 CA4th 567, 628, 84 CR3d 285 (affirming 1.25 lodestar enhancement under 42 USC §1988, noting especially trial court's findings that counsel's rates in "low range" of reasonable).

See also *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 69 CR3d 750 (fee award under 42 USC §1988 affirmed; court examines in-depth standards for lodestar adjustments based on partial or limited success under both federal and California law); *Gomez v Gates* (CD Cal 1992) 804 F Supp 69, 73 (although federal courts have restricted enhancement for many of the "*Johnson* factors" (see *Johnson v Georgia Highway Express* (5th Cir 1974) 488 F2d 714), they have not totally eliminated enhancement for all such factors; enhancement approved in police misconduct case due to undesirability of representing plaintiffs in such cases).

See generally Note, *City of Burlington v. Dague: When You Wish Upon A Lodestar for Reasonable Attorney Fees*, 24 Pac LJ 1567 (1993); Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 Rev Litig 301, 313 (1993).

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### §10.27 6. Factors May Not Be "Double-Counted"

Under federal law, as under California law (see §10.21), a critical consideration in adjusting the lodestar is that no relevant factor be double-counted to either enhance or reduce the award disproportionately. See *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1104; *Stewart v Gates* (9th Cir 1993) 987 F2d 1450, 1453; *Corder v Gates* (9th Cir 1991) 947 F2d 374, 378; *Cunningham v County of Los Angeles* (9th Cir 1988) 879 F2d 481.

Thus, in *Cunningham,* the court held that it was improper for the district court both to exclude from the lodestar time spent by the plaintiff on unsuccessful claims and to reduce the lodestar further for partial success. Such a reduction would amount to prohibited "double counting." See also *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145; *Earth Island Inst. v Southern Cal. Edison Co.* (SD Cal 1993) 838 F Supp 458, 466.

Similarly, the court may not reduce the hourly rate based on counsel's inexperience and inefficiency, and then reduce the hours awarded for the same reasons. *Ferland v Conrad Credit Corp., supra*. Further, percentage reductions based on the straightforward nature of the litigation may overlook the demands of such cases that would be apparent from a review of the time records. *Ferland v Conrad Credit Corp., supra*. See also *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1115 (court may not reduce rate for simplicity of specified task, then reduce overall rate for other tasks based on same factor).

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### §10.28 7. Multipliers in Federal Common Fund Cases

The federal restrictions on multipliers do not apply to common fund or substantial benefit fee awards. For example, the Ninth Circuit has held that, although *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638, bars contingency enhancements in statutory fee-shifting cases, it does *not* bar such enhancements in common fund cases, in which the members of the plaintiff class, not the losing defendant, pay the fees. *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1299 ("*Dague's* rationale for barring risk multipliers in statutory fee cases does not operate to bar risk multipliers in common fund cases"). See also *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043. On the availability of risk multipliers under federal fee-shifting statutes, see §10.45.

This rationale has been extended to cases in which the losing party has agreed to pay reasonable attorney fees in addition to relief on the merits for the plaintiff class (*i.e.*, constructive common fund cases). See, *e.g., Hanlon v Chrysler Corp.* (9th Cir 1998) 150 F3d 1011; *Johnston v Comerica Mortgage Corp.* (8th Cir 1996) 83 F3d 241; *Roberts v Texaco, Inc.* (SD NY 1997) 979 F Supp 185.

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### §10.29 8. Multipliers in Federal Class Actions Involving "Coupon Settlements"

In federal class actions that provide for the recovery of coupons by class members, the Class Action Fairness Act of 2005 (28 USC §§1711-1715) imposes even further limitations on federal court fee awards. Under 28 USC §1712(a), fee awards in so-called "coupon settlements" must be based on the value of the coupons to class members that are redeemed, as opposed to those simply made available. Moreover, while unredeemed coupons may be distributed to charitable or governmental organizations (a *cy pres* distribution), the value of those distributions may not be used to calculate fees. 28 USC §1712(e). If the value of the coupons is not used to determine the fee in a coupon settlement, the fee award "shall be based on the amount of time class counsel reasonably expended working on the action." 28 USC §1712(b)(1).

Counsel is also entitled to reasonable attorney fees for obtaining equitable relief, and nothing in §1712(b) may be read to prohibit the "application of a lodestar with a multiplier method of determining attorney's fees." 28 USC §1712(b)(2). When fees are based on the mixed value of coupons and equitable relief, the court must first determine which portion of the fee applies to each. Then the court must calculate the fee using the method described in 28 USC §1712(a) for the portion of the fee based on the coupons and the method described in 28 USC §1712(b) for the portion of the fee not based on the coupons. 28 USC §1712(c).

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### §10.30 9. Multipliers in Other Federal Cases in Which Client Pays the Fee

In cases seeking past-due Social Security disability benefits, Congress has provided that, subject to court approval for reasonableness, attorneys for successful claimants are entitled to a percentage of the past-due benefits recovered, up to 25 percent. 42 USC §406(b).

In *Gisbrecht v Barnhart* (2002) 535 US 789, 807, 152 L Ed 2d 996, 122 S Ct 1817, the Court settled a conflict among the circuits by holding that in such cases, contingent-fee arrangements remain the "primary means" by which fees are set for counsel successfully representing Social Security benefits claimants, and they are not subject to the same restrictions applicable to fee-shifting statutes, in which the fees are paid by the losing party. (Note that in such cases, fee-shifting is also possible under the Equal Access to Justice Act (EAJA) (28 USC §2412), under which fees are available at a rate of up to $125 per hour unless the court rules that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 28 USC §2412(d)(2)(A)(ii). In such cases, the fee recovered from the defendant must be credited against the percentage fee owed by the client.)

In *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142, the Ninth Circuit reversed three fee awards in which the trial courts had refused to award the percentage-based fees sought by the successful claimants' attorneys on the grounds that the awards involved unreasonable lodestar multipliers (of 256 percent, 82 percent, and 279 percent, respectively). The Ninth Circuit held that the trial courts had applied the wrong standard by using a lodestar-multiplier approach, that the lodestar method traditionally undercompensated counsel in such cases, and that there were no grounds for finding the contingent percentages sought to be unreasonable. 586 F3d at 1150. The court also sets out the factors that may be considered in awarding a fee that is less than the agreed percentage, such as poor performance or delay, but expressly notes that (1) although the lodestar may be considered, it is only an aid in determining reasonableness, and (2) an attorney's overall success rate is not the significant risk factor; rather, the court must look at the complexity and risk of the particular case. 586 F3d at 1152.

See also *Cedic Dev. Co. v Warnicke* (9th Cir 2000) 219 F3d 1115 (enhancement of $10,000 allowed in bankruptcy case when hourly rates charged by attorneys did not take into account risk of nonpayment by bankrupt client, or the results obtained, and enhancement was necessary to provide reasonable compensation).

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## III. FACTORS JUSTIFYING INCREASE OR DECREASE OF LODESTAR

### §10.31 A. Novelty and Difficulty of Questions Involved, Complexity of Case, and Skill Displayed

In *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315, the court stated that the lodestar may be adjusted based on the "novelty and difficulty of the questions involved, and the skill displayed in presenting them." These "quality of representation" factors are often taken into account to some degree in determining the lodestar; for example, an exceptionally novel or difficult case typically takes more hours than a routine case. See *Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377. Thus, the court appears to have been referring to circumstances in which, because of these factors, the attorneys might expect or command a higher fee in the legal marketplace. See, *e.g., Ketchum,* 24 C4th at 1132 ("In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services").

Accordingly, the record should support a finding that the factors were not double-counted. For example, on the issue of exceptional skill, *Ketchum* cautions that counsel's skill should generally be reflected in the hourly rate component of the lodestar, and that "a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation." 24 C4th at 1139.

The finding required by *Ketchum*, however, may be implied from the record. In *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 61, 75 CR3d 413, the court awarded a 2.5 lodestar enhancement based in part on "quality of representation." The court of appeal upheld the enhancement, holding that the trial court had, by definition, found that counsel's hourly rate did not fully take into account the quality of representation: "[A] lodestar enhancement based on 'quality of representation' by definition involves considerations not captured by counsel's hourly rates. [*Ketchum, supra* (quotation omitted)]. Nothing in *Ketchum v Moses* requires the trial court to recite an express finding that class counsel's representation 'far exceed[ed]' the level of representation that comparably skilled attorneys would have provided."

These factors are often intertwined. Winning an exceptionally novel or difficult case may require an exceptional level of skill, although they may also be considered separately. See, *e.g., Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491 (affirming 1.5 multiplier based in part on novelty and difficulty of issues and skill displayed in overcoming intransigent opposition); *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606; *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 227 CR 804; *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *29 (2.0 multiplier based in part on difficulty and exceptional skill; rejecting county's argument that case was simple, and noting that defense aggressively litigated case, rebuffed settlement efforts, and chose to "roll the dice" at trial); *Noyes v Kelly Servs., Inc.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437, at *12 (applying multiplier based on degree of novelty and difficulty, but rejecting skill and results factors); *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, at *19, aff'd (9th Cir 2000) 225 F3d 1042; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719 (multiplier based, among other things, on difficulty of litigation), aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 582, 21 CR3d 331 (multiplier appropriate when opposition to fee motion creates "extraordinary difficulties"); §10.33.

**PRACTICE TIP:** In general, the court's perception of counsel's performance will be the critical factor. Particularly in cases where the judge deciding the fee motion is not the judge who decided the case, the quality of representation factors may be established by submitting declarations from well-respected attorneys on the exceptional quality of the services performed, the novelty, difficulty, and complexity of the case, and the higher rate that the attorney's services might command in the marketplace. On declarations, see §11.53, concerning contents of comprehensive fee motion.

**Additional authorities:** *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 879, 71 CR3d 642; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 161, 50 CR3d 273; *Hammond v Agran* (2002) 99 CA4th 115, 135, 120 CR2d 646; *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 218 CR 839 (difficulty of litigation is relevant factor in setting reasonable fee award); *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 251, 142 CR 766; *Mandel v Hodges* (1976) 54 CA3d 596, 623, 127 CR 244; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470

(multiplier based, among other things, on difficulty of litigation).

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### §10.32 1. "Quality of Representation" Factors Often Intertwined With Other Factors

Multipliers based on the "quality of representation" factors are often considered together with other factors, including the results obtained and counsel's efficiency. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 582, 21 CR3d 331 (noting that "results obtained" multiplier may be appropriate "where an exceptional effort produced an exceptional benefit"). See also, *e.g., In re Lugo* (2008) 164 CA4th 1522, 1546, 80 CR3d 521 (affirming multiplier based in part on finding that "the statewide results achieved by pursuing the matter as a class action resulted from class counsel's legal skills and persistence"); *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572 ("While the hourly rates included in the lodestar here largely reflect the level of skill with which the case was litigated, they do not fully account for the high level of skill necessary to achieve the results here or the relative efficiency with which they were achieved"); *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491 (affirming 1.5 multiplier based on novelty and difficulty of issues involved, skill displayed in overcoming defendant's intransigence, excellent results obtained, importance of rights involved, and defendant's refusal to accept plaintiff's settlement offer); *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606 (2.34 multiplier justified in part by novelty and complexity of issues and results obtained). On the "results obtained" factor, see §§10.37-10.40.

Multipliers for quality of representation can also be intertwined with contingent risk. In *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1228, 217 CR 125, for example, the trial court applied a 1.5 multiplier. The court of appeal affirmed, holding that because the case was "a relatively complex matter where success was not assured and where the appellants fought the case at every turn," an increased award was not an abuse of discretion. See also *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572 ("It is not simply that counsel turned away paid work for a time in order to represent the class, but that counsel risked never receiving compensation *at all*. The claims and defenses in this case raised a significant number of complex legal issues of first impression, and class counsel took a substantial risk that it would not prevail on these issues and thus would not recover a full fee.") (Emphasis in original.)

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### §10.33 2. "Quality" Factors and Fee-Related Services

Different considerations apply to work performed on the fee motion itself. In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 582, 21 CR3d 331, the court held that although lodestar enhancements may be applied to fees for fee-related services, enhancements based on results obtained or exceptional skill would be "rarely justified." On the other hand, the trial court may take into consideration "extraordinary difficulties" created by defendant's opposition to the fee motion. *Graham v DaimlerChrysler Corp., supra*. See also Cal Rules of Prof Cond 4-200(B)(3).

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### §10.34 3. Federal Law on "Quality" Factors

Federal law also continues to recognize quality of representation enhancements, particularly in common fund cases. See, *e.g., Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1051 (fee calculated at 28 percent of recovery (equal to a 3.65 multiplier) based in part on "duration and complexity" of litigation); *Wing v Asarco, Inc.* (9th Cir 1997) 114 F3d 986 (upholding 2.0 multiplier, based in part on quality of representation and exceptional results obtained); *Odima v Westin Tucson Hotel* (9th Cir 1995) 53 F3d 1484 (trial court awarded 50-percent enhancement based on "extraordinary services rendered"; reviewing court remanded for trial court to provide additional information on inadequacy of lodestar); *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1304 (quality enhancement properly awarded to individual attorneys rather than to their firms); *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, aff'd *Oberfelder v Bertoli* (9th Cir 2003) 67 Fed Appx 408 (unpublished opinion) (1.5 multiplier based primarily on undesirability of case and counsel's willingness to accept court appointment to represent plaintiff).

**NOTE:** The issue of whether federal fee-shifting statutes authorize trial courts to apply lodestar enhancements based solely on quality of performance and results obtained is currently before the United States Supreme Court in *Perdue v Kenny A.* (cert granted Apr. 6, 2009, No. 08-970) 173 L Ed 2d 1056, 129 S Ct 1907.

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### §10.35 4. "Quality" Factors and Reduction of Lodestar

Generally, poor quality of work is reflected in the hourly rate, and lack of novelty, difficulty, or complexity are reflected in the lower number of hours that can be reasonably spent. Under federal law, the same heavy presumption that the lodestar is reasonable applies to proposed lodestar *reductions.* See *Ballen v City of Redmond* (9th Cir 2006) 466 F3d 736, 746 ("only in rare circumstances should a court adjust the lodestar figure, as this figure is the presumptively accurate measure of reasonable fees"). See also *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642 (potential lodestar reduction for factors such as partial success offset by difficulty of bringing and winning sexual harassment lawsuits and vigorous defense of case).

California law has been interpreted similarly. See, *e.g., Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 234, 226 CR 265 (rejecting city's argument that lodestar fee should be reduced because case not novel or complex).

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### §10.36 5. Examples of Cases Applying "Quality of Representation" Factors

**Cases that have applied a lodestar enhancement based on one or more of the "quality of representation" factors include:** *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315; *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572; *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 65, 75 CR3d 413; *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491; *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606; *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 251, 142 CR 766; *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, at *31, aff'd *Oberfelder v Bertoli* (9th Cir 2003) 67 Fed Appx 408, 411 (unpublished opinion); *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *25; *Noyes v Kelly Servs.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437, at *11; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, at *19, aff'd (9th Cir 2000) 225 F3d 1042; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470.

**Cases that have rejected a positive lodestar enhancement based on one or more of the "quality of representation" factors include:** *Utility Reform Network v PUC* (2008) 166 CA4th 522, 537, 82 CR3d 791; *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 834, 112 CR2d 284 (neither demands of case nor quality of work justified use of quality multiplier); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1176, 74 CR2d 510 (abuse of discretion to use quality multiplier when case not novel or complex, and skills required were not beyond those that would be expected of persons of stature and experience of plaintiff's attorneys); *Flannery v CHP* (1998) 61 CA4th 629, 638, 71 CR2d 632 (2.0 multiplier not justified by skill and experience of attorneys and nature of work performed, because these factors duplicated factors trial court expressly used when setting lodestar). See also *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 880, 71 CR3d 642 (novelty and complexity listed by trial court not supported by record); *Robbins v Alibrandi* (2005) 127 CA4th 438, 25 CR3d 387.

**Cases involving the issue of whether the "quality of representation" factors would support a lodestar *reduction* include:** *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426, 436 (reversing trial court's 50-percent reduction of lodestar); *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1112 (reversing trial court's lodestar reduction); *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145; *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *25 (rejecting defendant's argument that reduction was warranted).

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### §10.37 B. "Results Obtained" Factor

The excellence of the results obtained by the prevailing party also is a factor that may be considered in increasing the lodestar. For a discussion of "negative" multipliers based on "partial" or "limited" success, see §§10.52-10.66.

Because the purpose of lodestar enhancements is to reflect the legal marketplace, exceptional success should permit enhancement of the lodestar figure when a reasonable fee under market standards would exceed the lodestar figure. See, *e.g., Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 65, 75 CR3d 413. Excellent or exceptional results have traditionally been a factor that would justify a higher than ordinary fee (that is, a higher fee than would be reflected in the lodestar with no enhancement) in the legal marketplace. See Cal Rules of Prof Cond 4-200(B)(5) (whether fee charged client is "conscionable" includes consideration of "amount involved and … results obtained"). Accordingly, the courts have long recognized that "'[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.'" *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674 n8, 39 CR2d 189, quoting *Hensley v Eckerhart* (1983) 461 US 424, 435, 76 L Ed 2d 40, 50, 103 S Ct 1933.

The "results obtained" factor often is tied to the "quality of representation" factors. See §10.32. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331 ("results obtained" lodestar enhancement appropriate when "'an exceptional effort produced an exceptional benefit,'" quoting *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 838, 112 CR2d 284). See also *In re Lugo* (2008) 164 CA4th 1522, 1546, 80 CR3d 521; *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572. In *Graham, supra,* the court found that the trial court had erred in applying a results obtained enhancement to time spent on the fee motion (the 2.25 enhancement that the trial court applied to the fee for work on the merits was unchallenged), because although the underlying litigation had produced an "exceptional benefit for consumers," the fee-related services had not produced that result.

Federal cases also have recognized this factor. See, *e.g., Wing v Asarco, Inc.* (9th Cir 1997) 114 F3d 986 (upholding 2.0 multiplier awarded under settlement agreement, based on quality of representation and exceptional results obtained, or alternatively on basis of counsel's continuing obligation to class); *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1302. See also *Fischel v Equitable Life Assur. Soc.* (9th Cir 2002) 307 F3d 997 (1.5 enhancement in common fund case based on 100-percent success rate), remanded to increase multiplier to 2 in *Fischel v Equitable Life Assur. Soc.* (9th Cir 2004) 2004 US App Lexis 7421 (unpublished opinion); *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1048 (justifying percentage-based fee on exceptional results achieved in light of particular obstacles overcome). See also *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982 n1 (listing "the amount involved and the results obtained" as relevant lodestar adjustment factors). But see *U.S. v City of San Diego* (SD Cal 1998) 18 F Supp 2d 1090, 1103 (fee claimant failed to meet burden of showing that lodestar failed to adequately reflect counsel's performance).

**NOTE:** The issue of whether federal fee-shifting statutes authorize trial courts to apply lodestar enhancements based solely on quality of performance and results obtained is currently before the United States Supreme Court in *Perdue v Kenny A.* (cert granted Apr. 6, 2009, No. 08-970) 173 L Ed 2d 1056, 129 S Ct 1907.

**Additional authorities:** *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 879, 71 CR3d 642; *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491 (affirming 1.5 multiplier based in part on excellent results obtained and importance of rights involved); *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606 (2.34 multiplier justified in part by novelty and complexity of issues and results obtained); *Aetna Life & Cas. Co. v City of Los Angeles* (1985) 170 CA3d 865, 881, 216 CR 831; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, at *19 (success measured by deterrent effect on other insurance companies), aff'd (9th Cir 2000) 225 F3d 1042; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719 (augmenting lodestar based, among other things, on exceptional results achieved in light of defendant's "excessively vexatious and often unreasonable opposition" and difficulties inherent in preparing case), aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470.

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### §10.38 1. Extent of Success Required

Most cases seem to require that the success be "exceptional" to justify a lodestar enhancement based on the level of success achieved. See*, e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 582, 21 CR3d 331; *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 838, 112 CR2d 284. Under this standard, however, a party need not obtain every form of relief sought or win every argument to obtain an enhancement for results obtained. See, *e.g., In re Lugo* (2008) 164 CA4th 1522, 80 CR3d 521 (plaintiffs lost some relief on appeal but enhancement based largely on results obtained still affirmed); *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *28 (plaintiff's failure to succeed on all her claims does not show results "unexceptional"). Compare *Lugo* with *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 17, 64 CR3d 327 (multiplier based in part on equitable relief achieved reversed after equitable relief reversed). See also *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1176, 74 CR2d 510 (enhancement based on amounts involved and results obtained "may be appropriate when an attorney who obtained a significant result otherwise would receive but meager compensation").

Likewise, that the fee-claimant may not have succeeded entirely does not bar a lodestar enhancement based on other factors. See *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 84 CR3d 754. See also, *e.g., Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 430, 69 CR3d 1; *Krumme v Mercury Ins. Co.* (2004) 123 CA4th 924, 947, 20 CR3d 485; *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1419, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1148, 74 CR3d 81; *Sorenson v Mink* (9th Cir 2001) 239 F3d 1140, 1147 ("A plaintiff may obtain excellent results without receiving all the relief requested").

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### §10.39 2. "Success" Can Include Broader Effects of Litigation

In assessing the quality of the results achieved, courts are not limited to considering the formal relief ordered by the court or obtained through settlement: Other benefits that flow as a result of the litigation may also be considered. For example, in *Aguirre v Los Angeles Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1114, the court recognized that success may include "'other tangible results—such as sparking a change in policy or establishing a finding of fact.'" 461 F3d at 1121, quoting *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550, 555. See also *Farrar v Hobby* (1992) 506 US 103, 121, 121 L Ed 2d 494, 113 S Ct 566 (concurring opinion of O'Connor, J.); *Hensley v Eckerhart* (1983) 461 US 424, 435, 440 n15, 76 L Ed 2d 40, 103 S Ct 1933; *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1049 (noting that lawsuit had "benefitted employers and workers nationwide by clarifying the law of temporary worker classification").

California law takes a similar view. See *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1362, 100 CR2d 491; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, 726 (noting that verdict had impact on other similarly situated employees), aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, at *19 (success measured by deterrent effect on other insurance companies), aff'd (9th Cir 2000) 225 F3d 1042. See also *Santisas v Goodin* (1998) 17 C4th 599, 609, 71 CR2d 830 (success in lawsuit measured in part by attainment of nonjudicial relief).

In *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 50, 97 CR2d 797, the court held that in determining a lodestar adjustment, the trial court should consider not only the size of the recovery (discussed in §10.40), but also the need to encourage settlement, reward attorneys for maximizing their clients' recoveries, and promote the private enforcement necessary to vindicate many legal rights. See also *Edgerton, supra* (especially noting defendant's unreasonable refusal to accept reasonable settlement terms as justification for multiplier).

In *Flannery v CHP* (1998) 61 CA4th 629, 71 CR2d 632, the court held that it was improper to base a multiplier expressly on the factors set out in CCP §1021.5 because those factors are relevant only to *entitlement* to fees, not to the *amount* of those fees; the court did not rule out use of the "results obtained" factor as a multiplier factor. Rather, the "results obtained" factor cannot be presumed from a finding of entitlement to fees under §1021.5, but must be properly analyzed in terms of its effect on the determination of a reasonable attorney's fee (*i.e.,* why the results obtained warrant a fee that exceeds the lodestar). See *Edgerton, supra* (enhancement justified in part on importance of rights vindicated).

In *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 350, 95 CR3d 880, the court held that a multiplier may not be based solely on a finding that the lawsuit accomplished the legislature's objective of securing counsel to enforce important rights, which is a criterion for *entitlement* to fees under CCP §1021.5.

**Additional authorities:** *Mercer v Duke Univ.* (4th Cir 2005) 401 F3d 199, 203, 206 (affirming $380,000 fee award despite "extremely limited" relief of $1 in compensatory damages, based on importance of right and fact that decision would "serve as guidance to other schools facing similar issues"); *Sinajini v Board of Educ.* (10th Cir 2000) 233 F3d 1236; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359; *Beard v Teska* (10th Cir 1994) 31 F3d 942, 955, overruled in part on other grounds in *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 602 n3, 149 L Ed 2d 855, 863, 121 S Ct 1835.

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### §10.40 3. Class Actions With Monetized Recoveries

Another indicator of results obtained is the size of any monetary recovery. When the value of a class recovery "can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate," a trial court may adjust the basic lodestar by applying a positive or negative multiplier when "necessary to insure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 50, 97 CR2d 797. *Lealao* also directs trial courts to consider whether the size of the recovery was due to the size of the class or to the size of the individual recoveries, with the latter deserving a greater enhancement. 82 CA4th at 53. Compare *Lealao* with *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 164, 50 CR3d 273 (rejecting lodestar *reduction* and concluding that *Lealao* was inapplicable to individual case with no class recovery and limited statutory damages).

In *Consumer Privacy Cases* (2009) 175 CA4th 545, 557, 96 CR3d 127, the court reaffirmed the *Lealao* methodology, while also cautioning that such adjustments are discretionary, and that a fee award "may not be justified solely as a percentage of the recovery when that award will not come from the settlement fund." The court also reiterated that "'the ultimate goal … is the award of a "reasonable" fee to compensate counsel for their efforts, regardless of the method of calculation.'" 175 CA4th at 557, quoting *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1270, 24 CR3d 818. The court also justified the trial court's lodestar enhancement by cross-checking the fee against the percentage-based fees typically awarded in common fund cases. 175 CA4th at 557 n13.

In *Staton v Boeing* (9th Cir 2003) 327 F3d 938, 973, the court explained that even if the value of injunctive relief is too uncertain to allow the court to apply a percentage-based fee to it, its value can affect determination of the fee under the lodestar-adjustment method (*i.e.,* by increasing the multiplier), or under a percentage-based fee (*i.e.,* if quantifiable damages also are obtained) by affecting the percentage awarded.

**Additional authorities:** *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 65, 75 CR3d 413 (explaining and applying *Lealao*; upholding 2.5 multiplier, looking to percentages typically charged by contingent fee attorneys to aid in determining enhancement); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 881, 71 CR3d 642 (distinguishing *Lealao*); *In re Vitamins Cases* (2003) 110 CA4th 1041, 1060, 2 CR3d 358 (applying *Lealao*); *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 627, 98 CR2d 388 (following *Lealao*). See also *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1371, 69 CR3d 250 (affirming denial of multiplier because, among other things, lodestar approximated 50 percent of funds recovered). Compare *Lealao* with *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1169, 74 CR2d 510, in which the court held that a large punitive damages award, which the court termed a "windfall," could not justify a multiplier.

See generally Comment, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions*, 50 UCLA L Rev 879 (Feb. 2003).

On multipliers in class action involving "coupon settlements," see §10.29.

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**Source:** Civil Litigation/California Attorney Fee Awards/10 Determining Adjustments to the Lodestar/ C. Contingent Risk Factor/ 1. Risk Multipliers Under California Law/§10.41 a. Contingent Risk May Be Used to Adjust Lodestar

## C. Contingent Risk Factor

### 1. Risk Multipliers Under California Law

### §10.41 a. Contingent Risk May Be Used to Adjust Lodestar

In the legal marketplace, contingent risk is a significant factor in determining the market value of an attorney's services. See generally *Rader v Thrasher* (1962) 57 C2d 244, 253, 18 CR 736 (risk involved in contingent fee contract warrants larger fee than would otherwise be reasonable); *Cazares v Saenz* (1989) 208 CA3d 279, 287, 256 CR 209. Under California fee-shifting law, contingent risk is "[o]ne of the most common fee enhancers." *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331. See also *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1398, 84 CR3d 754; *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1216, 78 CR3d 572.

The propriety of applying risk enhancements was first recognized in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315. After the United States Supreme Court held that risk could not be considered a factor in determining reasonable attorney fees under federal fee-shifting statutes (see *City of Burlington v Dague* (1992) 505 US 557, 561, 120 L Ed 2d 449, 112 S Ct 2638; see below and §10.45), the California Supreme Court expressly reaffirmed the validity of risk multipliers under California law in *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377.

*Ketchum* thoroughly examined and explained the underlying rationale for risk enhancements:

> The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. …[¶] … "A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. […]" "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."
>
> …
>
> The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees.

24 C4th at 1132, 1138 (internal citations deleted).

The court in *Ketchum* also cautioned that risk or other enhancements are not required in every case, and that the party seeking an enhancement bears the burden of proof. 24 C4th at 1138. But see *Horsford v Board of Trustees* (2005) 132 CA4th 359, 401, 33 CR3d 644 (holding that risk enhancement "required" by particular facts of that case). The trial court should consider whether there are any factors that mitigate the risk of nonpayment, "the degree to which the relevant market compensates for contingency risk," and the other *Serrano* factors. 24 C4th at 1138. See *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 65, 75 CR3d 413 (2.5 multiplier upheld, based in part on percentage-based fees that would be recoverable under contingent fee contracts).

In rejecting federal restrictions on risk multipliers, *Ketchum* expressly disagreed with the policies cited by the majority in *City of Burlington v Dague, supra,* to justify those restrictions. *Ketchum v Moses,* 24 C4th at 1137 (rejecting arguments that risk multipliers encourage nonmeritorious cases, constitute "pooling" of successful and unsuccessful cases, and result in "unfair double-counting" (see §10.5)). For further discussion of the purpose and application of risk enhancement under California law, see §10.42.

**Additional authorities:** *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 880, 71 CR3d 642; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 819, 50 CR3d 731 (contingent risk may be considered, but not in setting both rate and multiplier); *In re Vitamins Cases* (2003) 110 CA4th 1041, 1060, 2 CR3d 358; *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 626, 98 CR2d 388; *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 42, 97 CR2d 797; *State v Meyer* (1985) 174 CA3d 1061, 220 CR 884; *Salton Bay Marina, Inc. v Imperial Irrig. Dist.* (1985) 172 CA3d 914, 218 CR 839; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 202 CR 423; *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 251, 142 CR 766; *Lanni v New Jersey* (3d Cir 2001) 259 F3d 146 (risk enhancement must be considered under New Jersey law even though plaintiffs partially

compensated by clients); *Chabner v United of Omaha Life Ins. Co.* (ND Cal Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552 at *18, aff'd (9th Cir 2000) 225 F3d 1042; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470. Gronemeier & Penny, *The Private Attorney General Fee Controversy/Economic Realities of Fee Awards Under Section 1021.5*, LA Law 53 (Sept. 1985); Note, *City of Burlington v. Dague: When You Wish Upon a Lodestar for Reasonable Attorney Fees*, 24 Pac LJ 1567, 1624 (1993).

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### §10.42 b. Purpose and Application of Risk Enhancement

To be awarded a risk enhancement, the plaintiff is not required to show that it is necessary to make up for other lost cases. *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572. The primary purpose of risk enhancements is not to make up for other lost cases but "to compensate for the *risk* of loss generally in contingency cases *as a class*." *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1419, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1148, 74 CR3d 81 (emphasis in original). See *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142.

The riskiness of winning a particular case is the crucial factor. The primary contingency to be considered is not the risk of prevailing while failing to obtain a fee award, but the risk of losing in the litigation. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331 ("The purpose of [a lodestar adjustment] is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services."); *Amaral v Cintas Corp. No. 2*, 163 CA4th at 1216; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 400 n11, 33 CR3d 644 ("litigation is fraught with uncertainty and even the most scrupulous attorney will 'win some and lose some,' as the saying goes"). As *Amaral v Cintas Corp. No. 2, supra,* explains: "It is not simply that counsel turned away paid work for a time in order to represent the class, but that counsel risked never receiving compensation *at all.* The claims and defenses in this case raised a significant number of complex legal issues of first impression, and class counsel took a substantial risk that it would not prevail on these issues and thus would not recover a full fee." 163 CA4th at 1217 (emphasis in original). See also *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843, at *26; *Noyes v Kelly Servs.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437.

Likewise, risk multipliers are not limited to cases providing great public value or involving complex legal or factual issues; they must be considered in every contingent statutory fee-shifting case. *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 428, 124 CR2d 250. Moreover, risk enhancements may not be denied on the grounds that the attorney's contingent fee agreement with his or her client will provide additional fees to compensate for risk. *Horsford v Board of Trustees*, 132 CA4th at 401.

In light of the California Supreme Court's rejection of *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638, in *Ketchum v Moses* (2001) 24 C4th 1122, 1137, 104 CR2d 377, decisions such as *Flannery v CHP* (1998) 61 CA4th 629, 642, 71 CR2d 632, and *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1173, 74 CR2d 510, which approved risk enhancements in concept but appeared to agree with the Supreme Court's policy concerns, are more restrictive in their view of risk multipliers than *Ketchum* now permits. Thus, although *Weeks* implies that the ability to recover a court-awarded fee minimizes risk, that position is expressly rejected, in light of *Ketchum*, in both *Graham v DaimlerChrysler Corp.,* 34 C4th at 583, and *Horsford v Board of Trustees,* 132 CA4th at 400 and n11: Both cases state that the risk of not being the successful party is the most substantial risk to consider. Moreover, *Graham* expressly recognizes that less difficult and risky undertakings, such as fee motions, generally justify a lower enhancement. *Graham v DaimlerChrysler Corp., supra*.

Likewise, *Robbins v Alibrandi* (2005) 127 CA4th 438, 25 CR3d 387, takes a narrow view of risk enhancements that appears irreconcilable with either *Ketchum* or *Graham*. *Robbins* suggests that if a case is "weak," *i.e.,* if there are substantial defenses or proof difficulties, a risk multiplier would be less appropriate because it would encourage counsel to take frivolous cases. See 127 CA4th at 454, 455 n4. *Ketchum* clearly recognizes, however, that the purpose of a risk multiplier is "to bring the financial incentives for attorneys enforcing important constitutional rights … into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." *Ketchum v Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377. Those incentives include a "premium" for risky cases. 24 C4th at 1138.

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**Source:** Civil Litigation/California Attorney Fee Awards/10 Determining Adjustments to the Lodestar/§10.43 c. Risk Multiplier for Appellate Services

### §10.43 c. Risk Multiplier for Appellate Services

Risk enhancements may be applied to appellate services. See *Mandel v Lackner* (1979) 92 CA3d 747, 761, 155 CR 269.

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### §10.44 d. Risk Multiplier for Fee-Related Services

Risk enhancements also may be applied to fees for fee-related services. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331. Reaffirming the principles stated in *Ketchum,* the *Graham* court held that contingent risk at the fee-motion stage could be recognized in the fee award, although "generally" at a lower rate than for work on the merits. 34 C4th at 579. "The fact that the risk of fee litigation is generally less than the risk of litigation on the merits of the suit justifies a lower attorney-fee multiplier for the former, if one is given at all." 34 C4th at 582. The court also noted that because of the additional risk faced by counsel in "catalyst" cases (see §§2.111-2.114), "some enhancement for that risk may be justified." 34 C4th at 583. For cases awarding risk enhancements for fee-related services, see *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, 725, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470.

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### 2. Risk Multipliers Under Federal Law

### §10.45 a. Risk Multipliers Unavailable Under Federal Fee-Shifting Statutes

In *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638, the United States Supreme Court rejected a long line of federal cases and prohibited lodestar enhancements based on contingent risk in cases involving fee-shifting statutes. See, *e.g., Childress v Darby Lumber, Inc.* (9th Cir 2004) 357 F3d 1000, 1011 (citing *Dague* for proposition that "there is a strong presumption that the lodestar represents a reasonable fee and that whether a fee is fixed or contingent should have no bearing on the lodestar calculation"). Contingent risk also may not be factored into the hourly rate. See *Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 947; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1549, modified on other grounds (9th Cir 1993) 984 F2d 345. But see *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1114.

The Supreme Court's ruling in *Dague* has engendered significant criticism. See Note, *City of Burlington v. Dague: When You Wish Upon a Lodestar for Reasonable Attorney Fees*, 24 Pac LJ 1567, 1624 (1993) and Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 Rev Litig 301, 313 (1993)).

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### §10.46 b. Risk Multipliers Available in Federal Common Fund Cases

In common fund cases, however, federal courts must consider risk enhancements in determining a reasonable attorney fee for the beneficiaries to pay. It is an abuse of discretion to deny a risk enhancement when the record shows (1) the attorney took the case with the expectation of a risk enhancement; (2) the lodestar rates do not reflect risk; and (3) the case was in fact risky. *Fischel v Equitable Life Assur. Soc.* (9th Cir 2002) 307 F3d 997, 1008, remanded to increase multiplier to 2 in *Fischel v Equitable Life Assur. Soc.* (9th Cir 2004) 2004 US App Lexis 7421 (unpublished opinion). Alternatively, a risk enhancement can be awarded if (1) the clients would have faced "substantial difficulties" finding counsel without an adjustment for risk, and (2) the market for this particular type of case warrants a risk enhancement. 307 F3d at 1008 n8. Whether there is risk requires consideration of both the factual and legal strength of the case, assessed as of the outset of the litigation. 307 F3d at 1009.

An instructive discussion of the propriety and nature of risk enhancements, albeit in the context of recovery under a contingent fee agreement with the client, is set out in *Crawford v Astrue* (9th Cir 2009) 586 F3d 1142, 1147. *Crawford* examines 42 USC §406(b), which authorizes, subject to court approval for reasonableness, a contingent fee of up to 25 percent to be taken from the past-due payments recovered for Social Security claimants.

**NOTE:** In discussing the effect of contingent risk, the court emphasizes that it is the risk of not prevailing, not the attorney's need to make up for other lost cases, that is the determinative factor. 586 F3d at 1152.

**Additional authorities:** *Staton v Boeing* (9th Cir 2003) 327 F3d 938, 967; *Hanlon v Chrysler Corp.* (9th Cir 1998) 150 F3d 1011; *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1301 (court may use risk multipliers to enhance lodestar amount in common fund cases); *Roberts v Texaco, Inc.* (SD NY 1997) 979 F Supp 185. See also *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1051 (justifying percentage-based fee on "substantial risk" counsel faced).

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### §10.47 D. Preclusion of Other Employment

Under both California and federal law, a multiplier may be applied to the lodestar figure to take into account the fact that the litigation precluded the attorney from accepting other employment. See *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315; *Ketchum v Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377; *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572 (noting "the burden imposed on class counsel," which included "a significant amount of billing" for "a small firm such as [theirs]"); *Horsford v Board of Trustees* (2005) 132 CA4th 359, 399, 33 CR3d 644 (recognizing that suit's effect on attorneys' law practices substantially increases risk taken); *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 626, 98 CR2d 388; *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843; Cal Rules of Prof Cond 4-200(B)(4). But see *Robbins v Alibrandi* (2005) 127 CA4th 438, 454, 25 CR3d 387 (preclusion not shown); *Noyes v Kelly Servs.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437, at *14 (same).

Generally, this factor should be applied if the preclusion is so significant that it would be reflected in the fee charged the client. For example, if a case is so all-consuming that the attorney cannot maintain his or her client base, an enhanced fee would be warranted. See *Clark v City of Los Angeles* (9th Cir 1986) 803 F2d 987, 991. See also *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982 n1 (listing "the preclusion of other employment by the attorneys due to acceptance of the case" and "time limitations imposed by the client or the circumstances" as relevant lodestar adjustment factors); *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1050 (justifying percentage-based fee on preclusion of other employment).

This factor may also apply to nonprofit law firms. See, *e.g., Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, aff'd (9th Cir 2000) 225 F3d 1042.

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### §10.48 E. Undesirability of Case

Some cases are a particular hardship to the attorney who undertakes them, either because the party or the cause is widely known and disliked in the community, or because the lawsuit itself is very unpopular in the community. An attorney who represents such a party may be making a sacrifice in two ways: First, in associating with and representing such a person or cause, the attorney may harm his or her own reputation in the community and suffer a loss of clients or potential clients. Second, the trier of fact may be biased against the party, making it more difficult to prevail.

The federal courts have sometimes enhanced the multiplier when the plaintiff's case is undesirable. In *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 697, an abortion rights case, the Ninth Circuit affirmed a 2.0 multiplier based on the "extreme undesirability of the case," the unwillingness of other local attorneys to take the case, and its "rare and exceptional nature." The court held that even after *Dague,* multipliers are appropriate when "necessary" to determine a reasonable fee. It also held that enhancement because of the unavailability of willing local counsel is "clearly necessary" if the case is "of the type that attorneys are unwilling to take for fear of ostracization and out of concern for their personal safety" because such a consideration is not ordinarily reflected in the lodestar amount. 100 F3d at 697.

The lodestar may be enhanced by a multiplier if the case is undesirable because the plaintiffs are "unattractive." *Gomez v Gates* (CD Cal 1992) 804 F Supp 69, 75. In *Gomez,* the plaintiffs were alleged felons (and their surviving family members) who claimed that the police had used excessive force in capturing them. The *Gomez* court noted that the jury would probably not be willing to compensate such plaintiffs, and it distinguished *City of Burlington v Dague* (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638, by noting that plaintiffs in undesirable cases are unlikely to prevail for reasons that have nothing to do with the merits of their claim or the quality of their attorney's performance. The court further noted that not all excessive-force cases would justify a multiplier because the plaintiffs' cases would not always be undesirable, *e.g.,* those in which the plaintiff was a suspect, but had not, in fact, committed a crime.

Multipliers have been applied when the defendant is particularly intransigent, a circumstance that can also make the case undesirable. See, *e.g., Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, 726, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470. Multipliers may not be used, however, to "punish" the opponent for its litigation strategy. *Ketchum v Moses* (2001) 24 C4th 1122, 1139, 104 CR2d 377. The distinction between these two would be in showing that in the legal marketplace, additional compensation would be expected for having to litigate in these circumstances. On "extraordinary difficulties" caused by defendant's opposition as a factor in setting the multiplier, see §10.73.

Note that the undesirability of the case may also be a factor in determining reasonable hourly rates. In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 399, 33 CR3d 644, the court of appeal held that when the prevailing party was justified in hiring out-of-town counsel (see §§9.14-9.15), a fee adjustment could be made by awarding nonlocal rates *or* applying a lodestar enhancement; one reason for hiring out-of-town counsel is the undesirability of the case. But see *Nichols v City of Taft* (2007) 155 CA4th 1233, 1243, 66 CR3d 680 (reversing multiplier based on out-of-town rates when necessity of hiring out-of-town counsel not shown).

**Additional authorities:** *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982 n1 (listing "the 'undesirability' of the case" as relevant lodestar adjustment factor); *Kinney v IBEW* (9th Cir 1991) 939 F2d 690, 695 (trial court may use undesirability of case as factor in determining multiplier); *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, at *31, aff'd *Oberfelder v Bertoli* (9th Cir 2003) 67 Fed Appx 408, 411 (unpublished opinion) (undesirability of case, which was partially confirmed by defendant's difficulty in obtaining legal representation, justified 1.5 multiplier). But see *Jordan v Multnomah County* (9th Cir 1987) 815 F2d 1258, 1264 (failure to award multiplier for unpopularity of case not reversible without evidence that plaintiffs or their attorneys were "adversely affected" by its unpopularity).

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### §10.49 F. Delay in Payment

Occasionally, years may pass between the time the services are rendered and the time the court orders payment of attorney fees. A long delay in receiving a court-awarded fee can also be the basis for enhancement of the lodestar figure.

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### §10.50 1. Delay Enhancements Available Under California Law

In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331, the California Supreme Court expressly recognized that delay in payment can be compensated by using historical rates with an enhancement or by using current rates. See, *e.g., Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377 (market level compensation "typically includes a premium for the risk of nonpayment or delay in payment of attorney fees"). In practice, such delay is often accounted for by the use of current rates. See §§9.11-9.13 on the courts' use of current or historical rates when payment of fees is delayed.

In *Graham v DaimlerChrysler Corp., supra,* the court also held that a lodestar enhancement for delay may be as applicable to fees for fee-related services as to fees for work on the merits. Citing the well-established rationale for delay multipliers, the court held that the delay enhancement, "which is tantamount to an interest rate, is by itself quite small and may be reduced or eliminated if the lodestar rate is based on the present hourly rate rather than the lesser rate applicable when the services were rendered." 34 C4th at 584, citing this book. *Graham* thus implicitly recognizes that a delay enhancement may be appropriate even when current rates are used; for example, if counsel's rates have not increased over the course of the litigation, the use of current rates would not compensate counsel for delay in payment. See, *e.g., Islamic Ctr. v City of Starkville* (5th Cir 1989) 876 F2d 465, 473.

**Additional authorities:** *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1399, 1398, 84 CR3d 754; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822, 50 CR3d 731 (delay in payment may be considered, but not in setting both rate and multiplier); *Horsford v Board of Trustees* (2005) 132 CA4th 359, 399, 33 CR3d 644; *Cazares v Saenz* (1989) 208 CA3d 279, 256 CR 209 (quantum meruit recovery must take into account risk taken by attorney and delay in payment); *City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 85, 249 CR 606; *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272; *Sternwest Corp. v Ash* (1986) 183 CA3d 74, 76, 227 CR 804; *Noyes v Kelly Servs.* (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437, at *17 (applying delay multiplier only to noncurrent rates used in lodestar calculation).

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### §10.51 2. Delay Enhancements Available Under Federal Law

Adjustments to the lodestar based on delay in payment are also appropriate under federal law. This adjustment can be made by either adjusting historic rates or using current rates:

> Clearly, compensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the statute.

*Missouri v Jenkins* (1989) 491 US 274, 283, 105 L Ed 2d 229, 240, 109 S Ct 2463. See also *Fischel v Equitable Life Assur. Soc.* (9th Cir 2002) 307 F3d 997 (in common fund cases, delay in obtaining payment must be compensated); *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1050 (noting long duration of case as factor justifying 28-percent fee); *Anderson v Director, Office of Workers Compensation Programs* (9th Cir 1996) 91 F3d 1322; *In re Continental Ill. Sec. Litig.* (7th Cir 1992) 962 F2d 566; *U.S. v City of San Diego* (SD Cal 1998) 18 F Supp 2d 1090, 1109 (award included "appropriate enhancement" for delay); *Finkelstein v Bergna* (ND Cal 1992) 804 F Supp 1235, 1239.

Under federal case law, delay must be considered separately from any enhancement for contingency. See *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)* (1987) 483 US 711, 97 L Ed 2d 585, 107 S Ct 3078; *In re Washington Pub. Power Supply Sys. Litig.* (9th Cir 1994) 19 F3d 1291, 1305. See also *Clark v City of Los Angeles* (9th Cir 1986) 803 F2d 987, 993 n6 ("factors of delay, interest and inflation may overlap very substantially"). Therefore, even though contingency enhancements are no longer allowed under federal law (see §10.45), enhancement for delay is still appropriate.

Delay occurring between the time fee eligibility is established or the fee application is filed and the time the fee award is rendered may also be compensated by awarding interest on the fee amount. See, *e.g., In re Continental Ill. Sec. Litig.* 962 F2d at 571; *Jenkins v Missouri* (8th Cir 1991) 931 F2d 1273; *Finkelstein v Bergna, supra*. The court also may compensate later work at higher rates.

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## G. Partial Success

### §10.52 1. General Rule: Court Must Consider Degree of Success, But Has Discretion to Award Full or Reduced Fee

Another lodestar-adjustment factor that is frequently raised is the fee-claimant's alleged "limited" or "partial" success. Under both California and federal law, a determination that all of the prevailing party's claims are related (see §§9.51-9.57) and that all the time was reasonably spent (*i.e.,* exhibited sound legal judgment) does not end the trial court's duty to examine the degree of success the party has achieved. See *Hensley v Eckerhart* (1983) 461 US 424, 434, 76 L Ed 2d 40, 103 S Ct 1933; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 417, 69 CR3d 750 (thoroughly analyzing both state and federal rules); *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 610 (analyzing California law). As *Hensley* states the rule (461 US at 440):

> Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Although trial courts must *consider* the degree of success obtained, they retain broad discretion to determine whether to reduce the lodestar for partial or limited success and by how much. "'California law allows the trial court to reduce … attorneys' fees award based on the results … obtained, or not to reduce the fee award, as the trial judge finds is appropriate in the exercise of … discretion.'" *Harman*, 158 CA4th at 426, quoting *Beaty v BET Holdings, Inc., supra*. See also *City of Riverside v Rivera* (1986) 477 US 561, 584, 91 L Ed 2d 466, 106 S Ct 2686 (concurring opinion of Powell, J.); *Hensley*, 461 US at 437.

A reduction is not required: "[W]hile the degree of the plaintiff's success in obtaining the objectives of the litigation is a factor that the trial court may consider in determining an award of reasonable attorney fees under a fee statute, … we determine that there is no requirement that the trial court make an award of attorney fees in an amount that is commensurate with or in proportion to the degree of success in the [California Public Records Act] litigation." *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1398, 84 CR3d 754 (internal citations deleted). See also *Aguirre v Los Angeles Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1114, 1121 (*Hensley* rule "is broad enough, in appropriate cases, to permit an award of full fees even where a party did not prevail on every contention").

To determine whether to reduce the lodestar for partial success, numerous factors may be considered. Those factors are discussed in §§10.56-10.62. Initially, however, the California and federal courts appear to differ somewhat in their overall approaches, with California law permitting lodestar reductions for limited success in fewer circumstances than federal law.

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### §10.53 a. California Law Approach

In *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 639, 186 CR 754, the California Supreme Court held that prevailing counsel are entitled to compensation for all hours reasonably spent unless "special circumstances" would render such an award "unjust." Although state appellate courts have indicated that a plaintiff's lack of total success, even on related claims, may justify a reduction of the lodestar fee (see *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 247, 261 CR 520), if substantial relief has been obtained, such reductions are discretionary: "Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 997, 242 CR 272. Compare *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1369, 69 CR3d 250, and *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 430, 69 CR3d 1, with *San Diego Police Officers Ass'n v San Diego Police Dep't* (1999) 76 CA4th 19, 24, 90 CR2d 6.

In *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143, the court upheld a $470,000 fee award, which was more than ten times the plaintiff's damages, and rejected the defendant's arguments that the trial court should have reduced the fee based on plaintiff's "overall success." Under *Vo,* a partial success adjustment to the lodestar would be warranted only when "special circumstances" would render a full lodestar award "unjust."

Following *Vo*'s interpretation of California law, the Ninth Circuit held in *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612, that consistent with the purposes of the Fair Employment and Housing Act (FEHA) fee-shifting statute (Govt C §12965), reductions for limited success are disfavored and may be applied only in the "unusual" case when "special circumstances" would render a fully compensatory fee award "unjust." *Beaty, supra,* citing *Vo*, 79 CA4th at 446. The *Beaty* court explained that this "high threshold for triggering decreases due to limited success" was consistent with the purposes of fee-shifting statutes like FEHA's, which make it easier to bring a suit to vindicate important rights regardless of the amount of damages involved. *Beaty, supra*. Subsequently, in *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 426, 69 CR3d 750, the appellate court cited and quoted *Beaty* with approval in stating the rule applicable to a federal claim under 42 USC §1988 litigated in state court.

In *Chavez v City of Los Angeles* (2010) 47 C4th 970, __ CR3d __, another FEHA case, the court held that under CCP §1033(a), a court of unlimited jurisdiction retains discretion to reduce or deny a prevailing plaintiff's fee request when the plaintiff recovers less than the maximum recoverable in a court of limited jurisdiction. 47 C4th at 986. The court noted, however, that the trial court also is required to give due consideration to the policies and objectives of the FEHA in general and its attorney fee provision in particular, and that fees need not be strictly proportional to the amount of damages. 47 C4th at 989. The court also noted that the plaintiff's successful claim did not appear to be factually intertwined with his unsuccessful claims, he recovered minimal damages in light of the size of the fee request, the claim had no impact on anyone other than the plaintiff, and that he had presented "sparse" evidence of damages. 47 C4th at 990. The court also upheld the trial court's fee denial on the grounds that the trial court could have found that special circumstances justified the fee denial because the fee claim was unreasonably inflated. 47 C4th at 990. See §§10.15, 10.63.

Partial success may also be reflected in a reduction to the lodestar multiplier that would otherwise be applied. See, *e.g., Krumme v Mercury Ins. Co.* (2004) 123 CA4th 924, 947, 20 CR3d 485; *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1418, 1 CR2d 459 (trial court accounted for partial success by reducing multiplier from 2.0 to 1.5), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1151, 74 CR3d 81.

Under federal law (discussed in §10.54), courts also have the discretion to deviate from the lodestar method entirely when the plaintiff's success is "technical" or "de minimis," and other considerations do not justify the fee. See *Farrar v Hobby* (1992) 506 US 103, 119, 121 L Ed 2d 494, 113 S Ct 566, discussed in §10.63. See also *Chavez v City of Los Angeles, supra*; *Choate v County of Orange* (2000) 86 CA4th 312, 325, 103 CR2d 339.

**Additional authorities:** *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1398, 84 CR3d 754; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 160, 50 CR3d 273; *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674, 39 CR2d 189 (awarding full compensation even though not all relief sought was obtained); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1175, 74 CR2d 510 (under FEHA, "attorney who takes such a case can anticipate receiving full compensation for every hour spent litigating a claim against even the most polemical opponent"). Examples of cases applying California's "partial success" rules are set out in §10.65.

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### §10.54 b. Federal Law Approach

Federal law, like California law, starts with the presumption that the prevailing party will be compensated for all hours reasonably expended by its attorneys. See *Hensley v Eckerhart* (1983) 461 US 424, 440, 76 L Ed 2d 40, 51, 103 S Ct 1933. When the results are excellent, a fully compensatory fee is required. 461 US at 435. (Federal law also is similar to California's regarding proportionality and the noncompensability of time spent on unrelated and/or non-fee-shifting claims; see §§8.25-8.27 (on the relationship between relief awarded and fee claim), 9.51-9.69 (on the time spent on unsuccessful or nonfee claims joined with fee claims).)

When "partial" or "limited success" is obtained, however, the next step is not as easy to apply or predict. On the one hand, there is a "strong presumption" that the lodestar fee is the reasonable fee: This means that all hours reasonably expended should be compensated and that any adjustments to the lodestar for results obtained, positive or negative, should be applied only in rare cases. See, *e.g., Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 364 n8. See also *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1402. Following this rule, numerous cases have held that when the action results in some significant relief for the plaintiff, all hours that were reasonably necessary to obtain the relief actually obtained are compensable, even if the actual relief is less than the plaintiff originally sought. *City of Riverside v Rivera* (1986) 477 US 561, 569, 91 L Ed 2d 466, 106 S Ct 2686; *Aguirre v Los Angeles Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1114, 1121; *Cunningham v County of Los Angeles* (9th Cir 1988) 879 F2d 481, 488; *Quesada v Thomason* (9th Cir 1988) 850 F2d 537, 539. As *Hensley* states, it is not "necessarily significant that a prevailing plaintiff did not receive all the relief requested," explaining that a party may be denied some forms of relief sought and still be entitled to a fully compensatory fee if the relief obtained justifies that fee. 461 US at 435 n11. See §10.56.

On the other hand, even if there is only one claim, or if all the claims are related, and the plaintiff has obtained significant relief, a further reduction may be appropriate if the relief obtained "is limited in comparison to the scope of the litigation as a whole":

> [T]he inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. … [¶] … Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

*Hensley,* 461 US at 439.

The standards for making this determination, however, though quite subjective, must be consistent with the purposes of the underlying statute:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

461 US at 436.

Courts also have the discretion to deviate from the lodestar method when the plaintiff's success is "technical" or "de minimis," and other considerations do not justify the fee. See *Farrar v Hobby* (1992) 506 US 103, 119, 121 L Ed 2d 494, 113 S Ct 566, discussed in §10.63.

**Additional authorities:** *Imwalle v Reliance Med. Prods., Inc.* (6th Cir 2008) 515 F3d 531, 554; *Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 190; *Dang v Cross* (9th Cir 2005) 422 F3d 800, 813; *Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 649 (plaintiff's "clear victory" on one cause of action renders trial court's denial of attorney fees abuse of discretion; "a reasonable fee in this case is *not* no fee at all"); *Dannenberg v Valadez* (9th Cir 2003) 338 F3d 1070, 1075 (plaintiff did not prevail on two causes of action and against four of eight defendants, and obtained only fraction of damages and injunctive relief requested; district court's conclusion that he was entitled to full fee was incorrect); *Webb v Sloan* (9th Cir 2003) 330 F3d 1158, 1169; *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, 1096; *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899, 908; *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426; *Coutin v Young & Rubicam Puerto Rico* (1st Cir 1997) 124 F3d 331, 338; *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 904; *Partington v Broyhill Furniture Indus.* (7th Cir 1993) 999 F2d 269, 273; *Lipsett v Blanco* (1st Cir 1992) 975 F2d 934, 941; *Grant v Martinez* (2nd Cir 1992) 973 F2d 96, 101; *Bernardi v Yeutter* (9th Cir 1991) 951 F2d 971 (requiring district court to compensate plaintiffs' attorneys for all

time spent on fee-related services, even though fee claim reduced by half).

See also *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642; *Emery v Hunt* (8th Cir 2001) 272 F3d 1042 (success assessed on case as whole, not on stage-by-stage or motion-by-motion basis); *Brandau v Kansas* (10th Cir 1999) 168 F3d 1179; *Zagorski v Midwest Billing Servs.* (7th Cir 1997) 128 F3d 1164; *Orchano v Advanced Recovery, Inc.* (2d Cir 1997) 107 F3d 94, vacated and remanded (2d Cir 1998) 166 F3d 1201; *Common Cause v Jones* (CD Cal 2002) 235 F Supp 2d 1076, 1080.

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### §10.55 c. Some General Rules

Although there is substantial tension and uncertainty in the rules set out above in §§10.53-10.54, there are some certainties.

- First, when the issue is raised, the trial court must *consider* the degree of success, even if it concludes that an adjustment for it is not required. *Hensley v Eckerhart* (1983) 461 US 424, 436, 76 L Ed 2d 40, 51, 103 S Ct 1933. See *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 419, 69 CR3d 750; *McGinnis v Kentucky Fried Chicken* (9th Cir 1994) 51 F3d 805.
- Second, a "mathematical approach" to determining reductions for partial success is inappropriate: "We agree with the District Court's rejection of 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon.' … Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors." *Hensley v Eckerhart,* 461 US at 435 n11. See *Harman v City & County of San Francisco, supra; Gates v Deukmejian,* 987 F2d at 1404 n13.
- Third, "success" must be measured by more than just the monetary recovery; the importance of the rights vindicated and the nonmonetary benefits the litigation has achieved for the plaintiff and the public must also be considered. See *Farrar v Hobby* (1992) 506 US 103, 121, 121 L Ed 2d 494, 113 S Ct 566 (concurring opinion of O'Connor, J.). In *Aguirre v Los Angeles Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1114, the court recognized that under Hensley, 461 US at 435, 76 L Ed 2d 40, 52, 103 S Ct 1933, success may include "'other tangible results —such as sparking a change in policy or establishing a finding of fact.'" 461 F3d at 1121, quoting *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550, 555. See also *Harman v City & County of San Francisco, supra*; *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1370, 69 CR3d 250; *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363.
- Correlatively, success cannot be measured by the fee that an attorney working under a contingent-fee arrangement would charge. *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 156, 50 CR3d 273; *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426, 438. See also *Harman*, 158 CA4th at 420. See §§8.25-8.27.
- Fourth, although reductions for partial success are permitted, the courts do not permit that factor to be counted twice—that is, first in reducing the number of hours reasonably spent as part of the lodestar, and then as an adjustment to the lodestar (*i.e.,* a negative multiplier). See, *e.g., Cunningham v County of Los Angeles* (9th Cir 1988) 879 F2d 481; *Corder v Gates* (9th Cir 1991) 947 F2d 374, 378. See §§10.5, 10.21, 10.27.
- Fifth, even when the plaintiff has achieved only partial success, a lodestar enhancement may still be applied, based on other factors. See *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1398, 84 CR3d 754, and other cases cited in §§10.37-10.38.

How a court will decide whether to make a partial success reduction in a particular case largely depends on how it evaluates these factors and others discussed below in §§10.56-10.62.

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### 2. Factors Affecting Court's Discretion to Adjust Lodestar for Partial Success

#### §10.56 a. Difference Between Relief Sought and Relief Obtained

One of the most commonly litigated grounds for reducing the lodestar is the difference between the relief that the prevailing party sought and the relief it obtained. See*, e.g., Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913; *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097; *McGinnis v Kentucky Fried Chicken* (9th Cir 1994) 51 F3d 805; *Corder v Brown* (9th Cir 1994) 25 F3d 833, 840.

Under California law, although trial courts have discretion to reduce the lodestar for that reason, a reduction is not required by the fact that the plaintiff sought greater relief than was recovered: "[W]hile the degree of the plaintiff's success in obtaining the objectives of the litigation is a factor that the trial court may consider in determining an award of reasonable attorney fees under a fee statute [citations deleted], including the CPRA [California Public Records Act] fee statute ([Govt C §6259(d)]), we determine that there is no requirement that the trial court make an award of attorney fees in an amount that is commensurate with or in proportion to the degree of success in the CPRA litigation." *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1398, 84 CR3d 754. See also *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 421, 69 CR3d 750 (applying both federal and state law, and concluding: "'we do not reflexively reduce fee awards whenever damages fail to meet a plaintiff's expectations in proportion to the damages' shortfall,'" quoting *Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 190); *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674, 39 CR2d 189; *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612.

Likewise, failure to obtain all the types of relief sought does not require a lodestar reduction. See *Hensley v Eckerhart* (1983) 461 US 424, 435 n11, 76 L Ed 2d 40, 51, 103 S Ct 1933 ("[it is not] necessarily significant that a prevailing plaintiff did not receive all the relief requested"; a party may be denied some forms of relief sought and still be entitled to a fully compensatory fee if the relief obtained justifies that fee); *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1404 ("[A] district court should not reduce the lodestar merely because the prevailing party did not receive the type of relief that it requested.… This is especially true in civil rights cases." (citations omitted)). See also *Watson v County of Riverside* (9th Cir 2002) 300 F3d 1092, 1096; *Sorenson v Mink* (9th Cir 2001) 239 F3d 1140, 1147 (because plaintiffs' "mission" of achieving institutional reform was accomplished, no reduction was required even though plaintiffs failed to achieve all relief requested: "A plaintiff may obtain excellent results without receiving all the relief requested"; quoting *Hensley, supra*); *Beaty v BET Holdings, Inc.,* 222 F3d at 613 (failure to obtain punitive damages does not require reduced fee); *Desilets v Wal-Mart Stores, Inc.* (1st Cit 1999) 171 F3d 711, 717 (same); *Davis v Mason County* (9th Cir 1991) 927 F2d 1473, 1489 (no reduction required even though plaintiffs failed to obtain injunctive relief and lost some verdicts). But see *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 17, 64 CR3d 327; *Dannenberg v Valadez* (9th Cir 2003) 338 F3d 1070, 1075.

The case law also recognizes that "the difference between the amount recovered and the damages sought is not the only consideration." *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363, quoting Justice O'Connor's concurring (and swing) opinion in *Farrar v Hobby* (1992) 506 US 103, 121, 121 L Ed 2d 494, 113 S Ct 566). See, *e.g., Estate of Enoch v Tienor* (7th Cir 2009) 570 F3d 821, 823 ("In cases which involve more than a nominal award, we have rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought or that the fee award might, in fact, be more than the plaintiff's recovery.… This court has repeatedly rejected the notion that the fees must be calculated proportionally to damages. The principle applies equally to purported disproportionality between the relief requested and that received.") (internal quotation omitted); *Murray v City of Onawa* (8th Cir 2003) 323 F3d 616, 619, 620 (plaintiff awarded lodestar-based fees even though she asked for $500,000 but received only $1, because discrepancy not an "outrageous split" and she prevailed on significant legal issue and vindicated public policy: "compelling city officials to make at least a cursory investigation into serious allegations of police abuse and misconduct are significant legal issues"); *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899; *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426, 437 (reversing 50-percent reduction based in part on failure to achieve all damages sought); *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550; *Lunday v City of Albany* (2d Cir 1994) 42 F3d 131, 135 (recovery of $35,000 out of $7,130,000 requested a "substantial success" in circumstances of difficult case); *Partington v Broyhill Furniture Indus.* (7th Cir 1993) 999 F2d 269, 273.

Nor is a reduction required by the fact that the damages awarded were small. See, *e.g., Harman,* 158 CA4th at 426; *Quaratino v Tiffany & Co.* (2d Cir 1999) 166 F3d 422; *Hyde v Small* (7th Cir 1997) 123 F3d 583; *Quesada v Thomason* (9th Cir 1988) 850 F2d 537, 541; *Thorne v El Segundo* (9th Cir 1986) 802 F2d 1131, 1142. See also *Mendez v County*

*of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1128 (fees may not be denied entirely simply because many issues lost at trial and damages small). But see *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922 (plaintiff awarded token ($500) attorney fee because lawsuit reasonably involved only $44.63).

**No "rule of "proportionality."** These rules are consistent with the well-established principle that fees may not be reduced based on the proportion of attorney fees to damages. See *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 425, 69 CR3d 750 (reaffirming rule); *Riverside v Rivera* (1986) 477 US 561, 575, 91 L Ed 2d 466, 106 S Ct 2686. Both California and federal law recognize that in cases involving private attorney general-type fee-shifting statutes, the amount of damages recovered by the plaintiff is not the sole or even primary measure of the lawsuit's success:

> "[W]e reject the notion that the value of civil rights action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."

*Blanchard v Bergeron* (1989) 489 US 87, 96, 103 L Ed 2d 67, 109 S Ct 939, quoting *Riverside v Rivera,* 477 US at 574. See also *Chavez v City of Los Angeles* (2010) 47 C4th 970, 988, ___ CR3d ___ (restating rule); *Jones v Tracy Sch. Dist.* (1980) 27 C3d 99, 110, 165 CR 100; *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642, 663; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363 (given the intrinsic value of the rights vindicated, "the difference between the amount recovered and the damages sought is not the only consideration"; quoting Justice O'Connor's concurring (and swing) opinion in *Farrar v Hobby* (1992) 506 US 103, 121, 121 L Ed 2d 494, 113 S Ct 566). On lodestar-based fee awards generally not limited by amount of damages recovered, see §§8.25-8.28.

The same principle also has been recognized in contract cases. See *Niederer v Ferreira* (1987) 189 CA3d 1485, 1507, 234 CR 779 ("Although the amount of money involved in the litigation is an important factor in determining an award of attorney fees, defendant cites no authority for the proposition it is a controlling factor," citing *Riverside v Rivera,* 477 US at 479).

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### §10.57 b. Nature of the Rights Vindicated

The importance of the rights vindicated also is a significant factor in determining whether to reduce a fee for partial success. See, *e.g., RiverWatch v County of San Diego* (2009) 175 CA4th 768, 783, 96 CR3d 362 (trial court award properly "account[ed] for the qualitative as opposed to quantitative significance of the issues included in the writ of mandate"); *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 426, 69 CR3d 750 ("a slight monetary recovery will not control assessment of the appropriate amount of attorney fees where a constitutional right is vindicated"; citing both state and federal cases); *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 424, 61 CR3d 295 (upholding trial court's refusal to reduce fee, "[e]ven if we might have ruled differently," because lawsuit enforced significant right); *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097, 1105 ("when a decision has 'served the public interest by vindicating important constitutional rights' an award of attorney's fees that is disproportionate to the actual damages may be appropriate," citing *City of Riverside v Rivera* (1986) 477 US 561, 572, 91 L Ed 2d 466, 106 S Ct 2686; *Diaz-Rivera v Rivera-Rodriguez* (1st Cir 2004) 377 F3d 119, 125 (upholding lodestar-based fee when plaintiffs recovered only $1: district court's determination that municipality violated plaintiffs' rights "represented a significant legal conclusion serving an important public purpose"); *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612 (the "high threshold for triggering decreases due to limited success reflects the values underlying the award of attorneys' fees in FEHA and other civil rights cases"); *O'Connor v Huard* (1st Cir 1997) 117 F3d 12, 17 ($1 award not de minimis because of importance of encouraging attorneys to represent victims of constitutional violations that do not result in substantial damages, importance of the finding of constitutional violation, and deterrent effect of litigation); *Murray v City of Onawa* (8th Cir 2003) 323 F3d 616, 619 (plaintiff awarded lodestar-based fees even though she asked for $500,000 but received only $1, because "compelling city officials to make at least a cursory investigation into serious allegations of police abuse and misconduct are significant legal issues"); *Muhammed v Lockhart* (8th Cir 1997) 104 F3d 1069, 1070 (success on constitutional claims justified full fee, even though only $1 awarded).

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### §10.58 c. Parties' Litigation Activities

In determining whether a fully compensatory award is appropriate, some courts look at how the case has been litigated to determine whether the time spent on the entire case, including unsuccessful related claims, has been reasonable. See, *e.g., Bernardi v County of Monterey*(2008) 167 CA4th 1379, 1397, 84 CR3d 754 (hours reasonable in light of length and difficulty of litigation); *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 447, 94 CR2d 143 (upholding fee award that was "based on the entire course of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial itself, which consisted of three weeks of testimony and other evidence," as well as pleadings and theories of recovery); *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674, 39 CR2d 189 (no reduction required because little time spent on losing claims); *City of Riverside v Rivera* (1986) 477 US 561, 579, 91 L Ed 2d 466, 106 S Ct 2686 (hours spent "reflected sound legal judgment under the circumstances"); *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899, 908; *Hamlin v Charter Township of Flint* (6th Cir 1999) 165 F3d 426, 437 (reversing 50-percent reduction based in part on "closeness" of case and time spent by judge); *Planned Parenthood v Arizona* (9th Cir 1986) 789 F2d 1348, aff'd (1987) 479 US 925, 93 L Ed 2d 346, 107 S Ct 391 (plaintiffs entitled to compensation for unsuccessful efforts when, in light of overall success, client "would not cavil at being billed" for such services).

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### d. Parties' Settlement Positions

**§10.59 (1) California**

The parties' settlement positions may also have an impact on a court's determination whether to reduce a fee for partial success.

Formal settlement offers under CCP §998 provide a designated method for obtaining the reduction of an otherwise successful plaintiff's fee, based on the plaintiff's incomplete success. On the effect of CCP §998 offers generally, see §§4.79-4.81; *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614.

Informal settlement offers are more problematic. In *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 124 CR2d 250, the First District Court of Appeal upheld the trial court's award of fees for time spent after the plaintiff rejected an informal settlement offer that was higher than the ultimate judgment. The First District held that informal settlement offers could not be used to determine whether time was reasonably spent; if the defendant wished to cut off a plaintiff's right to post-offer fees, it was required to serve a CCP §998 offer, with all the attendant procedural protections. In so holding, *Greene* disagreed with the Sixth District's decision in *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 78 CR2d 913 (plaintiff's failure to obtain damages offered in settlement must be considered by the trial court in determining reasonable attorney fees). See also *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 426, 69 CR3d 750 (affirming full fee award even though plaintiff ultimately recovered only slightly more than city offered in pretrial settlement); *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822 n25, 50 CR3d 731 (settlement discussions properly considered; Evid C §1152 inapplicable because evidence not offered to prove liability); *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 447, 94 CR2d 143 (trial court fee award based in part on "settlement negotiations").

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### §10.60 (2) Federal

The federal equivalent of CCP §998, Fed R Civ P 68, bars recovery of attorney fees incurred after a rejected Rule 68 offer if the fee-shifting statute provides fees as part of costs and the plaintiff's ultimate recovery is less than the offer. *Marek v Chesny* (1985) 473 US 1, 87 L Ed 2d 1, 105 S Ct 3012 (42 USC §1983 action).

When Rule 68 applies, some federal courts hold that informal settlement offers (*i.e.,* offers that do not comply with Rule 68) may not be considered. See, *e.g., Berkla v Corel Corp.* (9th Cir 2002) 302 F3d 909, 922; *Ortiz v Regan* (2d Cir 1992) 980 F2d 138, 141. Compare *Ortiz* with *Harman v City & County of San Francisco* (2006) 136 CA4th 1279, 1315, 39 CR3d 589 (noting that federal law is "by no means consistent on this point").

When Rule 68 does not apply—*e.g.,* in actions brought under fee-shifting statutes that award fees and costs separately—the court may consider informal settlement offers in determining what fees are reasonable. *Haworth v Nevada* (9th Cir 1995) 56 F3d 1048.

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### §10.61 e. Other Results Obtained

Evaluation of a party's success is not limited to the formal relief ordered by the court. It also may include "'other tangible results—such as sparking a change in policy or establishing a finding of fact.'" *Aguirre v Los Angeles Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1114, 1121, quoting *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550, 555. See also *Hensley v Eckerhart* (1983) 461 US 424, 440 n15, 76 L Ed 2d 40, 49, 103 S Ct 1933; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359. See also §§10.56-10.57.

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### §10.62 f. Appellate Decision That Reduces Plaintiff's Relief

An appellate decision that reduces the plaintiff's damages or other relief *may* require a reconsideration of the original fee award. See, *e.g., Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 17, 64 CR3d 327 (appellate court's reversal of all equitable relief required reversal of fee award); *Colgan v Leatherman Tool Group, Inc.* (2006) 135 CA4th 663, 703, 38 CR3d 36 (reversal of restitution remedy required modification of fee award for amount attributable to that remedy). The rejection of some arguments on appeal, however, does not *require* a reduction in the trial court's fee award when the relief awarded is affirmed. *Kunec v Brea Redev. Agency* (1997) 55 CA4th 511, 526, 64 CR2d 143 (plaintiff "need not be the prevailing party on every issue").

Even a reduction in damages or other relief does not always *require* a reduction of the fee award. See, *e.g., In re Lugo* (2008) 164 CA4th 1522, 80 CR3d 521 (plaintiff lost both merits arguments on appeal; trial court fee award, including 1.5 multiplier, affirmed); *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 1384, 61 CR3d 114 (damages reduced on appeal; fees affirmed in full); *Armenta v Osmose, Inc.* (2005) 135 CA4th 314, 327, 37 CR3d 460 (same); *Kwan v Mercedes-Benz* (1994) 23 CA4th 174, 193, 28 CR2d 371.

The converse proposition also applies: Reinstatement of some relief on appeal may require a reevaluation of any partial success reduction. See*, e.g., Guardians of Turlock's Integrity v Turlock City Council* (1983) 149 CA3d 584, 601, 197 CR 303 (fee award vacated for consideration of additional issues plaintiffs won on appeal).

**Additional authorities—Examples of cases vacating and remanding fee award after reversal of merits on appeal:** *Ventas Fin. LLC v Franchise Tax Bd.* (2008) 165 CA4th 1207, 1233, 81 CR3d 823; *O'Neal v City of Seattle* (9th Cir 1995) 66 F3d 1064, 1069; *McGinnis v Kentucky Fried Chicken* (9th Cir 1994) 51 F3d 805. See also *Poland v Chertoff* (9th Cir 2007) 494 F3d 1174, 1187 (fee award remanded after plaintiff lost appeal, but district court directed to reinstate award if plaintiff obtained similar relief on another claim).

**Additional authorities—Examples of cases not reducing fee award after reversal on appeal:** *Nigh v Koons Buick Pontiac GMC, Inc.* (4th Cir 2007) 478 F3d 183, 190; *Larez v Holcomb* (9th Cir 1994) 16 F3d 1513; *Bankston v Illinois* (7th Cir 1995) 60 F3d 1249, 1255. See also *LeVine v Weis* (2001) 90 CA4th 201, 108 CR2d 562, disapproved on other grounds in *Wells v One2One Learning Found.* (2006) 39 C4th 1164, 1197, 48 CR3d 108 (no fee reduction ordered even though some individual defendants succeeded in overturning judgment against them).

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### §10.63 3. Court Can Award *No* Fee if Success Only Technical or De Minimis and Important Rights Not Vindicated

When plaintiff's success is only "technical" or "de minimis," a reasonable fee may be no fee at all. See *Farrar v Hobby* (1992) 506 US 103, 119, 121 L Ed 2d 494, 113 S Ct 566; *Benton v Oregon Student Assistance Comm'n* (9th Cir 2005) 421 F3d 901, 905; *Chavez v City of Los Angeles* (2010) 47 C4th 970, __ CR3d __; *Choate v County of Orange* (2000) 86 CA4th 312, 325, 103 CR2d 339. See also *Harman v City & County of San Francisco* (2006) 136 CA4th 1279, 1313, 39 CR3d 589 (dicta stating federal rule).

Under this rule, the court must compare the relief sought to the relief obtained. *Farrar,* 506 US at 114. If there is a gross disparity and the relief is only "technical" or "de minimis," then the court may be justified in disregarding the lodestar method and awarding a reduced fee or no fee at all, if the conditions in Justice O'Connor's concurring (and controlling) opinion are met. *Farrar, supra*.

Under Justice O'Connor's opinion, a comparison of the relief sought to the relief obtained is not the only factor in making this determination: The court must also consider the overriding factors cited in Justice O'Connor's concurring opinion—the nature of the rights vindicated and the public purposes served (*Farrar*, 506 US at 121 (concurring opinion of O'Connor, J.)). A finding that the relief was "technical" or "de minimis" and that none of the overriding factors apply permits the trial court to deviate from the lodestar method and set a reasonable fee based solely on the result obtained.

The local federal courts have rarely found the *Farrar* exception applicable. See *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1126 (award of punitive damages alone establishes that relief not "nominal"); *Park v Anaheim Union High Sch. Dist.* (9th Cir 2006) 464 F3d 1025, 1037 (district court's discretion to deny fees to prevailing plaintiff is "narrow"; relief obtained by parents in IDEA action not technical or de minimis); *Thomas v City of Tacoma* (9th Cir 2005) 410 F3d 644, 648 (*Farrar* inapplicable when plaintiff recovered $15,000 in compensatory damages and $20,000 in punitives; "[t]he jury's award of punitive damages alone is sufficient to take it out of the nominal category"); *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128 (*Farrar* inapplicable when plaintiff obtained settlement allowing him to continue coaching on field and $10,000 damages); *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359 (*Farrar* inapplicable because $17,500 damages award not nominal, plaintiff prevailed on significant legal issues, and damage award served "a significant public policy interest" by deterring defendants from similar conduct in future); *Friend v Kolodzieczak* (9th Cir 1995) 72 F3d 1386, 1390 (*Farrar* inapplicable when plaintiff obtained "meaningful and substantial" injunctive relief).

**Additional authorities:** *Murray v City of Onawa* (8th Cir 2003) 323 F3d 616, 619, 620 (plaintiff awarded lodestar-based fees even though she asked for $500,000 but received only $1, because discrepancy not an "outrageous split" and she prevailed on significant legal issue and vindicated public policy: "compelling city officials to make at least a cursory investigation into serious allegations of police abuse and misconduct are significant legal issues"); *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550. See also *Estate of Enoch v Tienor* (7th Cir 2009) 570 F3d 821, 823 ("In cases which involve more than a nominal award, we have rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought or that the fee award might, in fact, be more than the plaintiff's recovery.… This court has repeatedly rejected the notion that the fees must be calculated proportionally to damages. The principle applies equally to purported disproportionality between the relief requested and that received." (internal quotation omitted)); *National Black Police Ass'n v District of Columbia Bd. of Elections & Ethics* (DC Cir 1999) 168 F3d 525, 529 (improper to value injunction based on First Amendment principles in solely monetary terms).

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### §10.64 4. Quantifying the "Partial Success" Adjustment

In *Hensley v Eckerhart* (1983) 461 US 424, 436, 76 L Ed 2d 40, 50, 103 S Ct 1933, the Supreme Court held that a reduction for partial success could be made by eliminating specific hours or simply reducing the fee to account for partial success. Recognizing the highly subjective nature of percentage reductions, however, the Ninth Circuit has held that fee decisions "employing percentages in cases involving large fee requests are subject to heightened scrutiny." *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1400, cited with approval on a related point in *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 417 n4, 69 CR3d 750. Compare *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 904 (affirming percentage reduction for unsuccessful, unrelated claims because plaintiff failed to provide alternative method for reducing award), with *Lipsett v Blanco* (1st Cir 1992) 975 F2d 934, 941 (if plaintiff documents fee claim and plausibly asserts impossibility of allocating time between successful and unsuccessful claims, burden is on party opposing fee claim to rebut plaintiff's assertion).

**Additional authorities:** *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145, 1151 (court must explain "precise reduction chosen"); *Moreno v City of Sacramento* (9th Cir 2008) 534 F3d 1106, 1112 (if court applies more than a 10-percent reduction—a "haircut"—its reasons for doing so must be carefully explained, and court may shift burden to defendant to provide specific reasons for reduction: "If opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut").

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### 5. Examples of Cases Applying Partial Success Rules

#### §10.65 a. California Law

Cases finding a partial success reduction not required under California law include:

- *RiverWatch v County of San Diego* (2009) 175 CA4th 768, 783, 96 CR3d 362 (defendant argued that trial court should have reduced fee because of plaintiff's lack of success on numerous issues; full fee award affirmed because trial court properly "account[s] for the qualitative as opposed to quantitative significance of the issues included in the writ of mandate");
- *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 84 CR3d 754 (in California Public Records Act (CPRA) litigation, fact that plaintiff succeeded in obtaining only one-third of record requests did not require lodestar reduction; rule requiring attorney fees to be commensurate with success in CPRA litigation could chill efforts to enforce public's right to information);
- *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 430, 69 CR3d 1 (plaintiff in FEHA action obtained excellent results even though he prevailed on only two of eight causes of action);
- *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 422, 124 CR2d 250 (plaintiff's attorneys reduced fee request to account for unsuccessful claims, and trial court properly declined to reduce it further);
- *Daniels v McKinney* (1983) 146 CA3d 42, 55, 193 CR 842 (plaintiffs obtained court order requiring that county jail inmates get minimum of 3 hours' exercise per week, but lost request for contempt order; court of appeal rejected partial success reduction, finding that plaintiffs had essentially succeeded in obtaining relief sought and fees should not be reduced simply because sheriff not held in contempt).

See also *Peak-Las Positas Partners v Bollag* (2009) 172 CA4th 101, 114, 90 CR3d 775; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 421, 69 CR3d 750 (fee award of more than $1 million affirmed, even though plaintiff recovered only $30,300, which was far less damages than sought and only slightly more than defendant offered); *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 445, 94 CR2d 143; *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1676, 39 CR2d 189; *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 242 CR 272.

**Cases upholding partial success reductions:** *Harrington v Payroll Entertainment Servs., Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922; *San Diego Police Officers Ass'n v San Diego Police Dep't* (1999) 76 CA4th 19, 24, 90 CR2d 6; *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 455, 78 CR2d 913. See also *Chavez v City of Los Angeles* (2010) 47 C4th 970, __ CR3d __.

**Case ordering partial success reduction:** *ComputerXpress, Inc. v Jackson* (2001) 93 CA4th 993, 1020, 113 CR2d 625 (defendants who brought partially successful anti-SLAPP motion entitled to fees only for work incurred on stricken causes of action).

**Cases remanding fee awards for determination of whether partial success reduction is appropriate:** *Estrada v FedEx Ground Package Sys., Inc.* (2007) 154 CA4th 1, 17, 64 CR3d 327; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 165, 50 CR3d 273; *Colgan v Leatherman Tool Group, Inc.* (2006) 135 CA4th 663, 703, 38 CR3d 36 (reversal of restitution remedy required modification of fee award for amount attributable to that remedy); *Engel v Worthington* (1997) 60 CA4th 628, 635, 70 CR2d 526; *Guardians of Turlock's Integrity v Turlock City Council* (1983) 149 CA3d 584, 601, 197 CR 303 (fee award reversed and remanded for consideration of additional issues plaintiffs won on appeal); *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607. See also *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 425, 253 CR 426.

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### §10.66 b. Federal Law

**No partial success reduction required under federal law:** *City of Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686; *Imwalle v Reliance Med. Prods., Inc.* (6th Cir 2008) 515 F3d 531, 554; *El-Hakem v BJY, Inc.* (9th Cir 2005) 415 F3d 1068, 1075 (upholding district court's discretion not to reduce fee for unsuccessful claims against one defendant or for nonfee state law claim); *Armstrong v Davis* (9th Cir 2003) 318 F3d 965, 974; *Wilcox v City of Reno* (9th Cir 1994) 42 F3d 550; *Grant v Martinez* (2nd Cir 1992) 973 F2d 96; *Lopez v San Francisco Unified Sch. Dist.* (ND Cal 2005) 385 F Supp 2d 981, 996; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 419, 69 CR3d 750 (reviewing fee award under federal law, but using state and federal law principles interchangeably; fee award of more than $1 million affirmed, even though plaintiff recovered only $30,300, which was far less damages than sought and only slightly more than defendant offered). See also §§10.52-10.55.

**Partial success reduction reversed:** *Dang v Cross* (9th Cir 2005) 422 F3d 800, 812; *DiLaura v Township of Ann Arbor* (6th Cir 2006) 471 F3d 666, 671; *Quaratino v Tiffany & Co.* (2d Cir 1999) 166 F3d 422; *Cunningham v County of Los Angeles* (9th Cir 1988) 879 F2d 481; *Quesada v Thomason* (9th Cir 1988) 850 F2d 537.

**Remand required:** *Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 49, 103 S Ct 1933; *McCown v City of Fontana* (9th Cir 2009) 565 F3d 1097; *Webb v Sloan* (9th Cir 2003) 330 F3d 1158, 1168; *Morales v City of San Rafael* (9th Cir 1996) 96 F3d 359, 363; *Thorne v El Segundo* (9th Cir 1986) 802 F2d 1131, 1142.

**Reduction ordered:** *Dannenberg v Valadez* (9th Cir 2003) 338 F3d 1070, 1075.

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### §10.67 H. Public Service Element

The "public service element … and motivation to represent consumers and enforce laws" were factors cited in *State v Meyer* (1985) 174 CA3d 1061, 1073, 220 CR 884, as criteria to be weighed in setting a reasonable fee award. In *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 97 CR2d 797, the court held that in determining lodestar adjustments, the trial court should consider the need to encourage the private enforcement necessary to vindicate many legal rights, as well as the role that representative actions play in relieving the courts of the need to separately adjudicate numerous claims.

The "importance of the suit" and the "public nature of the plaintiff's position" were factors relied on in *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 251, 142 CR 766. The "public interest value of plaintiff's individual age discrimination actions" was also used to augment the fee award under CCP §1021.5 and Govt C §12965(b) in *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, 726, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470. In *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 94 CR2d 143, the court rejected the defendants' argument that, as a matter of law, the trial court's fee award was too high because it was based in part on that court's desire to "send a message" to the defendant. In *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491, the court affirmed a 1.5 multiplier based in part on the importance of the privacy rights vindicated. In *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 839, 112 CR2d 284, the court noted the important purposes that fee-shifting statutes serve, and cautioned trial courts not to be "unduly parsimonious" in the calculation of fees.

Other cases recognizing the impact of public service on the lodestar adjustment include: *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 84 CR3d 754; *In re Lugo* (2008) 164 CA4th 1522, 1546, 80 CR3d 521; *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, aff'd (9th Cir 2000) 225 F3d 1042; *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843. See also *Hammond v Agran* (2002) 99 CA4th 115, 120 CR2d 646; *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 626, 98 CR2d 388.

**NOTE:** In *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 350, 95 CR3d 880, the court held that the trial court erred in basing a multiplier on the need to encourage enforcement of the underlying statute (CC §§1788-1788.33), which it viewed as an issue going to entitlement to fees, not the amount. Some showing of a need for private enforcement that goes beyond the ordinary, though not required by the cases listed in the text, might address the court's concern.

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## I. Identity and Resources of Parties or Their Counsel

### §10.68 1. Lodestar Cannot Be Diminished Because Counsel Is Publicly or Charitably Funded

The amount of the prevailing law firm's funding in the form of overhead or salaries is irrelevant not only to the hourly rates awardable under fee-shifting statutes but also to the decision of whether to augment or diminish the fee award. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 643 and n40, 186 CR 754. See also *Marriage of Ward* (1992) 3 CA4th 618, 629 n8, 4 CR2d 365 (same rule in family law cases); *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1004, 185 CR 145; §§9.95-9.96. In *Cruz v Ayromloo* (2007) 155 CA4th 1270, 1278, 66 CR3d 725, the court noted in dicta that it was improper to reduce an otherwise reasonable fee award because the attorneys had provided representation pro bono.

The underlying fact of public or foundation support, however, can be relevant to the *size* of the final award. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 643 n40, 186 CR 754; *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49 n24, 141 CR 315. In *Serrano III,* a 1.43 multiplier for plaintiff's publicly-funded attorneys was affirmed, but the court did not explain what impact the public funding had on its decision, if any. In *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552 at *21, aff'd (9th Cir 2000) 225 F3d 1042, the district court expressly noted that the plaintiff's nonprofit law firm had not received funding for that particular lawsuit.

No subsequent case has specifically applied this factor to increase or diminish the lodestar enhancement, though the courts have found that the fact that the fees will go to nonprofit organizations rather than private attorneys supports a lodestar enhancement. See, *e.g., In re Lugo* (2008) 164 CA4th 1522, 1546, 80 CR3d 521. See §10.69.

Unlike California's supreme court, the United States Supreme Court has held that the charitable or public funding of successful parties' attorneys should not affect the size of the award. *Blum v Stenson* (1984) 465 US 886, 901 n18, 79 L Ed 2d 891, 903 n18, 104 S Ct 1541 (court draws no distinction between profit and nonprofit law offices in deciding whether to enhance fee award).

Note that under the express terms of CCP §1021.5, public entities may recover fee awards from other public entities but those awards may not include a multiplier.

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### §10.69 2. Effect of Fact That Fees Will Be Paid to Organizations Rather Than to Attorneys

Attorneys who seek fees in public interest litigation are often staff attorneys in legal services organizations or unions and other organizations, rather than private practitioners. The question has arisen whether they should be treated differently for purposes of an award of fees because the individual attorney will not be receiving the fee award.

In *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315, the court stated that the fact that the fee award would go to the organization employing the attorney rather than to the individual attorney *was* a proper factor to consider in deciding to apply a multiplier to the lodestar figure. This has been interpreted to support lodestar enhancements to nonprofit law firms. See, *e.g., In re Lugo* (2008) 164 CA4th 1522, 1546, 80 CR3d 521 (noting that fees would go to nonprofit law firm and not individual attorneys); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 881, 71 CR3d 642 (that fees would go to individual attorneys "militate[s] against an upward adjustment of the lodestar"). See also *Chabner v United of Omaha Life Ins. Co.* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, at *21, aff'd (9th Cir 2000) 225 F3d 1042.

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### §10.70 3. Fee Awards Against Plaintiffs: Consideration of Financial Resources

When fees are awarded against the *plaintiff* in a civil rights action because the action was "frivolous, unreasonable, or without foundation," the court may consider the plaintiff's financial resources in determining the amount of the award because the award is in the nature of a sanction. *Miller v Los Angeles County Bd. of Educ.* (9th Cir 1987) 827 F2d 617, 621. On fees awarded as a sanction, see chap 6.

In *Garcia v Santana* (2009) 174 CA4th 464, 469, 94 CR3d 299, a case involving common interest developments, the defendant was entitled to fees under the mandatory, two-way provisions of CC §1354, which provides that "the prevailing party shall be awarded reasonable attorney's fees and costs." Nonetheless, the trial court considered the plaintiff's indigency and awarded no fees. The court of appeal recognized that although considerations of access to courts and not deterring individuals from asserting their rights were valid, the losing party's financial condition could not be the only consideration. 174 CA4th at 476. The lodestar method requires a determination of reasonable fees, which in turn requires consideration of all the relevant factors. 174 CA4th at 474. The appellate court also held, however, that after considering all the relevant factors, the trial court on remand might still determine that a reasonable fee is zero. 174 CA4th at 477.

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### §10.71 4. Equal Share Among Firms

The extent of the role played by each firm involved in the case is a factor that the court may consider in determining whether to adjust the lodestar. In *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, the supreme court affirmed a fee award of $400,000 to each of plaintiffs' two public interest law firms based on the trial court's finding that each law firm had an approximately "equal share" in the litigation, even though one law firm's hours and rates resulted in a lodestar figure of $320,710, while the other law firm's hours and rates resulted in a lodestar figure of $225,662.50. The trial court's finding that the two firms' input was "equal" therefore implicitly justified the trial court's decision to equalize the fee awards. See also *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 841, 112 CR2d 284 (reversing multiplier awarded to two law firms that court found had played "tag-along" role).

Note that in *In re Vitamins Cases* (2003) 110 CA4th 1041, 1055 n10, 2 CR3d 358, the court expressed concern that class counsel had stated an intent to divide fees among themselves, rather than distribute fees according to the lodestar used by the court in making the award. Other cases have held, however, that trial courts are not required to specify what share of the common fund fee award each attorney can ultimately receive. See, *e.g., Six (6) Mexican Workers v Arizona Citrus Growers* (9th Cir 1990) 904 F2d 1301, 1311.

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### §10.72 5. Effect of Fact That Award Will Be Paid by Taxpayers

That the fee award will eventually be paid by the taxpayers also is a relevant factor to consider in determining whether to adjust the lodestar. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315. The court did not explain, however, whether or how this factor affected its determination to affirm a 1.43 multiplier, payable by the taxpayers.

In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 400, 33 CR3d 644, the court held that payment of plaintiff's fees by a public entity could not, standing alone, justify the complete denial of a lodestar enhancement:

> The trial court's reliance on the public-entity status of the defendant to completely deny an enhancement multiplier in this case was an abuse of discretion.... [T]he *Serrano* court did not say and has not said that a public entity should not fully compensate plaintiffs' attorneys when litigation has been necessary to remedy intentional race discrimination by the public entity.... This factor is far less important … where the public entity intentionally engages in discrimination and chooses to defend its conduct through lengthy and complex litigation. And in neither event is a trial court permitted to use the "public entity" factor to wholly negate the enhancement of a lodestar that otherwise would be appropriate after consideration of the contingency and delay factors.

In both *In re Lugo* (2008) 164 CA4th 1522, 1546, 80 CR3d 521, and *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1395, 84 CR3d 754, the courts rejected arguments that the taxpayer factor required a reversal of the multipliers applied by the trial courts. *Lugo* does suggest, however, that the taxpayer factor would militate against a lodestar multiplier, as does *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 881, 71 CR3d 642 (that fee award would be paid by taxpayers "militate[s] against an upward adjustment of the lodestar").

The public-entity factor was also considered in *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265, in which the city argued that plaintiff's lodestar should be reduced because of the burden on the taxpayers. The court rejected this argument by finding that the plaintiffs had made convincing arguments for an upward adjustment of the lodestar fee based on all other factors and that the trial court could reasonably have found that the taxpayer burden factor was outweighed by the others. 181 CA3d at 235.

In practice, significant lodestar enhancements have been applied in numerous fee awards against governmental defendants. In addition to *Lugo* and *Bernardi, supra,* see, *e.g., Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491; *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 217 CR 125; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 202 CR 423; *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, 725, aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470; *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843.

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### §10.73 J. Other Factors

The factors listed above are not the only factors that may be considered in determining whether to adjust the lodestar: "There is no hard and fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 834, 112 CR2d 284. See also *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 880, 71 CR3d 642 (same, citing *Thayer*). Other factors considered by the courts include:

**Awards in similar cases.** See, *e.g., Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 66, 75 CR3d 413; *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982 n1; *Cairns v Franklin Mint Co.* (9th Cir 2002) 292 F3d 1139; *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043; *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642.

**The expectations of counsel and/or how the market compensates comparable cases.** Compare *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1049, with *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 50, 97 CR2d 797. See also *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 66 n11, 75 CR3d 413; *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 881, 71 CR3d 642; *Leuzinger v County of Lake* (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843. But see *Nichols v City of Taft* (2007) 155 CA4th 1233, 1244, 66 CR3d 680 (court erred in using multiplier to award non-forum rates when plaintiff failed to show that retaining local counsel was "impracticable").

**The ongoing obligations of plaintiffs' counsel.** See, *e.g., In re Vitamins Cases* (2003) 110 CA4th 1041, 1057, 2 CR3d 358 (trial court must have basis to estimate future work compensated by means of lodestar enhancement); *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 835, 112 CR2d 284. See also *Chavez v Netflix, Inc.,* 162 CA4th at 66; *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 982 n1 (listing "the nature and length of the professional relationship with the client" as relevant lodestar adjustment factors); *Hanlon v Chrysler Corp.* (9th Cir 1998) 150 F3d 1011, 1029.

**The amount the opponent has paid in legal fees.** See *Cairns v Franklin Mint Co.* (9th Cir 2002) 292 F3d 1139, 1159 (court declined to reduce defendant's lodestar in part because opponent had incurred even greater fees). See also §13.28.

**The extent to which prevailing attorney's conduct made some of litigation unnecessary.** See *EnPalm, LLC v Teitler Family Trust* (2008) 162 CA4th 770, 775, 75 CR3d 902 (upholding lodestar reduction based on finding that prevailing attorney's conduct made much of the litigation unnecessary).

**The "extraordinary difficulties" caused by the defendant's opposition to a fee motion.** Although a multiplier may not be awarded to punish the losing party for its litigation strategy (*Ketchum v Moses* (2001) 24 C4th 1122, 1139, 104 CR2d 377), the California Supreme Court also has said that "fees for fee litigation may be enhanced when a defendant's opposition to the fee motion creates extraordinary difficulties." *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 582, 21 CR3d 331.

The same factor has also been applied to work on the merits. See *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491 (affirming 1.5 multiplier based in part on skill displayed in overcoming intransigent opposition, and "in particular," on defendant's insistence on continuing litigation in face of plaintiff's offer to settle); *Crommie v PUC* (ND Cal 1994) 840 F Supp 719, 726 (noting defendant's intransigence as multiplier factor), aff'd sub nom *Mangold v PUC* (9th Cir 1995) 67 F3d 1470. A well-funded, vigorous, or hard-line defense may also be relevant to other factors such as risk, results, skill, and complexity. See, *e.g., Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1048; *Green v Administrators of Tulane Educ. Fund* (5th Cir 2002) 284 F3d 642, 663; *Edgerton, supra*. See also *EnPalm, LLC v Teitler Family Trust* (2008) 162 CA4th 770, 775, 75 CR3d 902 (applying *Graham* principle to lodestar reduction). On the undesirability of a case as a factor in adjusting the lodestar, see §10.48.

**Other factors.** In *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 51, 97 CR2d 797, the court held, inter alia, that promptness of settlement may not justify refusal to apply a multiplier. It also stated that the attorneys' willingness to forego a higher fee in order to obtain greater benefits for the class may be considered, as may the absence of any objections from class members.

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# 11

# Claiming and Opposing Trial Court Fees

I. GENERAL CONSIDERATIONS
- A. Pleading Attorney Fee Claims
  - 1. Prayer for Relief §11.1
  - 2. Pleading Grounds for Fee Claim §11.2
- B. Jurisdictional Considerations §11.3
  - 1. Statutory Fees §11.4
  - 2. Arbitration Proceedings §11.5
- C. No Entitlement to Jury Trial on Statutory or Contractual Fee Issues §11.6
- D. Engaging Outside Counsel for Fee Motion §11.7

II. SETTLING FEE CLAIMS
- A. Special Considerations §11.8
- B. Conflicts of Interest
  - 1. Parameters of Conflict of Interest Between Client and Attorney §11.9
  - 2. Court Approval of Bifurcated Settlements §11.10
  - 3. Party's Right to Waive Attorney Fees §11.11
  - 4. Handling Conflicts of Interest §11.12
    - a. Bifurcated Settlement Discussions §11.13
    - b. Retainer Agreement §11.14
    - c. Assignment of Right to Fees §11.15
    - d. Motion to Intervene §11.16
- C. Court Approval of Fee Settlements §11.17

III. INTERIM FEES
- A. Interim Fees in Federal Courts §11.18
- B. Interim Fees in California Courts §11.19

IV. JUDGMENT ON THE MERITS §11.20
- A. Fee Award When Decision Is Appealed §11.21
- B. Consider Attorney Fees When Drafting or Reviewing Judgment or Settlement on the Merits §11.22
- C. Fee Award Under Federal Fee-Shifting Statutes §11.23
- D. Timing of Fee Motion §11.24

V. THE FEE APPLICATION
- A. Fees and Costs Claimed in Separate Requests §11.25
- B. Fee Awards Generally Claimed by Noticed Motion
  - 1. Noticed Motion §11.26
  - 2. Memorandum of Costs §11.27
  - 3. Default Judgment §11.28
  - 4. Fees Based on Contract (CC §1717) §11.29
  - 5. Fees Based on Statute §11.30
  - 6. Fees Based on Other Grounds §11.31
  - 7. Exception: Fees as Damages Must Be Proved at Trial §11.32
- C. Fee Motion Procedure Similar to Other Motions §11.33
- D. Bifurcation of Entitlement and Amount Issues §11.34

VI. TIMING OF FEE MOTION IN STATE COURT
- A. Fees for Work in Trial Court
  - 1. Fees Generally Should Be Sought Even if Merits Will Be Appealed §11.35
  - 2. Contractual and Statutory Fee Motions Must Be Filed Within Time to File Appeal §11.36
    - a. In General, File Fee Motion 60 Days After Notice of Entry of Judgment §11.37
    - b. Rule Inapplicable to Postjudgment Work §11.38
  - 3. Extensions and Stipulations §11.39
  - 4. Relief From Default §11.40
  - 5. Timing of Fee Motions Not Based on Contract or Statute §11.41
  - 6. Fees and Costs Claimed as Damages Must Be Claimed at Trial §11.42

B. Fees in Trial Court After Appeal §11.43

VII. FEDERAL COURT PROCEDURES AND TIME LIMITS §11.44

VIII. CLAIMS FOR STATUTORY COSTS OTHER THAN ATTORNEY FEES §11.45

IX. THE FEE MOTION PROCEDURE
A. The Initial Motion §11.46
1. Entitlement to Fees Usually Based on Record, But Other Circumstances May Be Considered §11.47
2. Amount of Fees Claimed Should Be Carefully Documented §11.48
3. California and Federal Courts Differ on Amount of Documentation Required
a. Federal Courts §11.49
b. California Courts §11.50
4. Fee Motions in Small or Uncontested Fee Matters §11.51
5. Judge to Whom Fee Motion Should Be Presented §11.52
6. Contents of Comprehensive Fee Motion §11.53
B. Discovery §11.54
1. Limited to Relevant Factors §11.55
2. Fee Records of Opposing Counsel §11.56
3. Attorney Depositions §11.57
C. Opposition Papers
1. Preparing Opposition §11.58
2. Stating and Supporting Objections §11.59
3. Including Specific Evidence §11.60
D. Reply §11.61
E. Deadlines §11.62
F. Hearing on Fee Application §11.63

X. FEE ORDER §11.64
A. Court Should Articulate Its Findings on Elements of Fee Award §11.65
1. Federal Court Standards
a. Order Must Be Clear and Concise §11.66
b. Parameters of "Clear and Concise" §11.67
2. State Courts Allow More General Findings Than Do Federal Courts §11.68
B. Ambiguities or Omissions in Fee Order §11.69
C. Court May Award Fees Directly to Attorney §11.70
D. Order Awarding Fees Under CCP §128.7 §11.71

XI. PROCEDURE FOR CLAIMING FEES AS LITIGATION SANCTIONS
A. Fees as Sanctions Under CCP §128.7 §11.72
B. Fees as Sanctions Under CCP §128.5 §11.73

XII. CHECKLIST: MOTION PROCEDURE §11.74

XIII. FORMS AND DOCUMENTS USED IN FEE MOTIONS §11.75

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## I. GENERAL CONSIDERATIONS

### A. Pleading Attorney Fee Claims

### §11.1 1. Prayer for Relief

As a practical matter, a party with a potential fee claim should almost always include a prayer for attorney fees in the complaint or answer. Though advisable, most fee-shifting statutes do not *require* that the complaint allege statutory fees in the complaint. See *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 194, 82 CR3d 586 (CCP §1033.5); *Washburn v City of Berkeley* (1987) 195 CA3d 578, 583, 240 CR 784 (CCP §1021.5); *Committee for Sewer Referendum v Humboldt Bay Wastewater Auth.* (1978) 77 CA3d 117, 125 n7, 143 CR 463 (same), overruled on other grounds in *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 227 n10, 226 CR 265; *T.E.D. Bearing Co. v Walter E. Heller & Co.* (1974) 38 CA3d 59, 64, 112 CR 910 (CC §1717).

Failure to plead a claim for fees, however, may well prejudice a later application. See *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 77, 200 CR 322 (failure to seek fees under private attorney general doctrine at time petition for writ filed was factor favoring denial of attorney fees after settlement). In *Board of Admin. v Wilson* (1997) 57 CA4th 967, 67 CR2d 477, the court upheld the trial court's denial of 42 USC §1988 fees for redressing federal civil rights violations under 42 USC §1983 because the plaintiff had neither pled a federal claim nor tried the case on that basis. In light of the defendant's substantial "standing" defense, the court concluded that raising the §1983 claim by postjudgment motion unfairly surprised and prejudiced the defendant. 57 CA4th at 976 (distinguishing *Green v Obledo* (1984) 161 CA3d 678, 683, 207 CR 830 (court held fees could be collected under 42 USC §1988 though not sought in complaint or originally awarded under that statute)). See also *City of Hawaiian Gardens v City of Long Beach* (1998) 61 CA4th 1100, 1113, 72 CR2d 134 (following *Wilson* when §1983 claim pled but not tried, then dismissed after plaintiff prevailed on state law claim).

In contract actions, most courts have held that pleading and presenting the contract that contains the fee clause is a sufficient pleading of the fee claim. *Wong v Davidian* (1988) 206 CA3d 264, 271, 253 CR 675; *Ganey v Doran* (1987) 191 CA3d 901, 236 CR 787. See also *Huntington Landmark Adult Community Ass'n v Ross* (1989) 213 CA3d 1012, 1024, 261 CR 875; *Perry v Robertson* (1988) 201 CA3d 333, 247 CR 74 (citing first edition of this book); *Meadows v Lee* (1985) 175 CA3d 475, 221 CR 22; *American Olean Tile Co. v Schultze* (1985) 169 CA3d 359, 367, 215 CR 184.

In such actions, however, pleading a claim for contract-based fees in the complaint or the answer may significantly improve the opposing party's chances of recovering fees should it prevail. See *Manier v Anaheim Bus. Ctr. Co.* (1984) 161 CA3d 503, 507, 207 CR 508, discussed in §4.45. For that reason, when it is questionable whether a contractual fee provision applies, careful thought should be given to whether to plead a claim for fees because of its possible effect on the opposing party's ability to collect fees if it wins.

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## §11.2 2. Pleading Grounds for Fee Claim

Generally, the grounds for the fee need not be specified in the complaint. A simple prayer for "reasonable attorney fees" is sufficient, and advisable, as the grounds for recovering fees may change as the litigation progresses. See *Green v Obledo* (1984) 161 CA3d 678, 683 n3, 207 CR 830 (fees sought under two state fee-shifting statutes; fees enforced under 42 USC §1988 although not "explicitly tendered as a ground" of award). Further, a party may seek fees on grounds other than those originally stated (*Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 228, 226 CR 265), even after fees have been awarded on the original grounds (*Green v Obledo, supra*). A party may also seek fees on more than one ground. See, *e.g.*, *Galbiso v Orosi Pub. Util. Dist.* (2008) 167 CA4th 1063, 1068, 84 CR3d 788.

Some fee-shifting statutes, however, require the grounds to be spelled out. See, *e.g.,* Lab C §218.5; *Rutherford v Board of Trustees* (1974) 37 CA3d 775, 782, 112 CR 560 (elements of fee claim under Govt C §800 must be "placed before the court in some fashion").

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### §11.3 B. Jurisdictional Considerations

An attorney fee motion is "a collateral matter, ancillary to the main cause." *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 637, 186 CR 754. As such, a trial court retains jurisdiction to hear a fee motion even after appeal of the merits decision has deprived the trial court of jurisdiction to act on the merits. *Hoover Community Hotel Dev. Corp. v Thomson* (1985) 168 CA3d 485, 486, 214 CR 264. Similarly, a trial court retains jurisdiction to award fees even after the underlying judgment has become final. *Maria P. v Riles* (1987) 43 C3d 1281, 1289, 240 CR 872 (dismissal of action for failure to bring to trial does not divest court of jurisdiction to hear attorney fees motion); *Marini v Municipal Court* (1979) 99 CA3d 829, 834, 160 CR 465.

The California Supreme Court raised an additional jurisdictional consideration in *Chavez v City of Los Angeles* (2010) 47 C4th 970, __ CR3d __, which involved an individual Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) claim. *Chavez* held that, under CCP §1033(a), in an action under FEHA that was not brought as a limited civil case, the trial court has discretion to deny or reduce a fee award if the prevailing plaintiff recovers a judgment that could have been rendered in a limited civil case. 47 C4th at 976. Note, however, that the trial court must "give due consideration to the policies and objectives of the FEHA and determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives." 47 C4th at 976. It also should "consider FEHA's underlying policy of encouraging the assertion of meritorious FEHA claims, and it should evaluate the entire case in light of the information that was known, or should have been known, by the plaintiff's attorney when the action was initially filed and as it developed thereafter," and avoid "hindsight bias" in judging the decision to file in the higher court. 47 C4th at 976. It also was significant that the plaintiff had not shown any benefit to others from the lawsuit. 47 C4th at 990. Thus, the decision whether to bring an action as a limited civil case may become significant to the fee recovery and must be carefully considered.

**Additional authorities:** *Shisler v Sanfer Sports Cars, Inc.* (2008) 167 CA4th 1, 9, 83 CR3d 771 (trial court retains jurisdiction to award fees to defendant who successfully moved to quash service for lack of personal jurisdiction); *Katz v Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 CA4th 47, 70, 11 CR3d 546 (trial court has jurisdiction to consider fee application under CCP §1021.5 for first time on remand, even without specific remand from appellate court; following *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265); *Ajida Technol., Inc. v Roos Instruments, Inc.* (2001) 87 CA4th 534, 104 CR2d 686 (contract providing for fees incurred in arbitration also authorizes court to award fees for subsequent trial court and appellate proceedings). But see *Wackeen v Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502 (trial court lacked subject matter jurisdiction to award fees pursuant to settlement when party failed to follow procedures under CCP §664.6 to retain jurisdiction). See also §11.35.

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## §11.4 1. Statutory Fees

The procedures established by the legislature for seeking statutory fees (see §11.30) are not jurisdictional. See *Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 CA3d 924, 929, 272 CR 899; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226, 226 CR 265. They are, however, mandatory, such that failure to comply with them, though required, may be excused under CCP §473 (see §11.40). Compare *Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 1728, 24 CR2d 274 (motion procedure mandatory), with *Gunlock Corp. v Walk on Water, Inc.* (1993) 15 CA4th 1301, 1305, 19 CR2d 197 (filing memorandum of costs within statutory time period constitutes substantial compliance with "notice and motion" requirement). See also *Esther B. v City of Los Angeles* (2008) 158 CA4th 1093, 1099, 70 CR3d 596 (mandatory relief provision of CCP §473(b) inapplicable to attorney acting in pro per).

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## §11.5 2. Arbitration Proceedings

Attorney fees also are a remedy in arbitration proceedings. See, *e.g., Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 94 CR2d 603, and *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597 (discussed in §14.7). See also *Broughton v CIGNA Healthplans* (1999) 21 C4th 1066, 90 CR2d 334; *Delaney v Dahl* (2002) 99 CA4th 647, 121 CR2d 663 (following *Moore* and *Moshonov*). On procedures for fee claims in arbitration proceedings, see §§14.10-14.14.

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## §11.6 C. No Entitlement to Jury Trial on Statutory or Contractual Fee Issues

Attorney fee awards are equitable matters, even when sought under a fee-shifting statute. See, *e.g., Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 938, 154 CR 503. Neither party is entitled to a jury trial on the issue of attorney fees. *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 426, 152 CR 31. A different rule applies to fees sought as damages, which must be pleaded and proved as part of the case in chief. See *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211).

On attorney fees as damages, generally, see chap 7.

Federal courts have ruled that, in civil rights cases, it is improper for attorneys to comment to the jury on the prospect of a court-awarded attorney fee. *Brooks v Cook* (9th Cir 1991) 938 F2d 1048, 1051.

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### §11.7 D. Engaging Outside Counsel for Fee Motion

It is not uncommon for counsel who have handled the merits of a case to retain outside counsel to handle large or complex fee motions. See *Alberti v Klevenhagen* (5th Cir 1990) 896 F2d 927, 937, modified (5th Cir 1990) 903 F2d 352; *Bernardi v Yeutter* (9th Cir 1991) 951 F2d 971, 976; *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1438, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1544, modified on other grounds (9th Cir 1993) 984 F2d 345. There are several reasons for doing so:

- The expertise required for fee motions may make it more efficient or effective to hire an experienced fee litigator;
- Trial counsel's credibility or skill are often major issues, and an outside attorney adds objectivity to the presentation;
- Fee applications can become very time-consuming, and trial counsel's efforts might be better spent on matters more within his or her areas of expertise; and
- The cost to trial counsel can be claimed from the opponent (see §9.16-9.23).

There might also be reasons for handling fee motions "in-house" in some cases, particularly if the law firm or program seeking the fees has an attorney with sufficient expertise. Though outside counsel potentially can recover his or her fees from the opponent, there is a risk that the court will deny the motion for fees or refuse to award fully compensatory fees.

**PRACTICE TIP:** Whether a law firm uses its own attorneys to file fee motions or contracts with outside counsel, the firm should designate one of its own attorneys as primarily responsible for maximizing attorney fee recoveries. Otherwise, the firm is likely to miss deadlines or make mistakes early in the case that even the best outside counsel will be unable to remedy. The need for a "fee-responsible" person is particularly critical for nonprofit organizations, in which attorney fees may be the last thing on the minds of the attorneys litigating the merits of a case.

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## II. SETTLING FEE CLAIMS

### §11.8 A. Special Considerations

Settling a case that involves potential court-awarded fees raises several unique problems.

**Ethical and tactical questions.** First, difficult ethical and tactical questions often arise from the potential conflict of interest between the attorney and client. This topic is discussed in more detail in §§11.9-11.17.

**Local rules.** Local rules, particularly regarding class actions, may affect the approach to take in negotiating a settlement.

**PRACTICE TIP:** Once the merits of the case are resolved, counsel should almost always try to settle the fee claim before filing a fee motion. Because the cost of litigating fee issues may be substantial and because the party claiming fees is generally entitled to fees for successfully litigating the fee issues (see *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 186 CR 754), there is considerable incentive for both sides to settle. Moreover, opposing counsel may concede entitlement to fees but dispute the amount, or may be willing to concede what would be a reasonable amount if the court finds entitlement to fees. See §11.34 on bifurcation. Some local court rules even require opposing counsel to meet and confer to discuss settlement before filing a fee motion. See ND Cal Local R 54-5(a).

**Relationship between settlement and merits.** The relationship between settlement on the merits and settlement of fee issues also must be considered. Under California law, for example, a plaintiff may be the prevailing party even if the settlement contains an express disclaimer of liability (see §2.95), but such a disclaimer may affect the court's perception of the extent of success achieved for purposes of determining the amount of fees to award (see §10.61). See also §11.22.

**Fee waivers must be explicit.** Under California law, a settlement on the merits that does not resolve the issue of attorney fees is not a bar to a subsequent fee motion unless there is a clear waiver of the right to fees. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 680, 186 CR 589; *Engle v Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 169, 68 CR3d 461; *Berti v Santa Barbara Beach Prop.* (2006) 145 CA4th 70, 75, 51 CR3d 364; *Ritzenthaler v Fireside Thrift Co.* (2001) 93 CA4th 986, 991, 113 CR2d 579; *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 175, 17 CR2d 510; *Washburn v City of Berkeley* (1987) 195 CA3d 578, 583, 240 CR 784. This is true whether fees are ignored during negotiations, as in *Folsom*, or discussed but not resolved, as in *Washburn*. See also *Zambrano v Oakland Unified Sch. Dist.* (1991) 229 CA3d 802, 280 CR 454 (settlement that provided fees for specified enforcement proceedings not a waiver of fees for other enforcement proceedings). Compare those cases with *Vaillette v Fireman's Fund Ins. Co.* (1993) 18 CA4th 680, 22 CR2d 807 (distinguishing *Folsom* on facts; holding agreement silent as to fees and costs necessarily precluded further efforts to seek them).

The Ninth Circuit follows the same rule. *Erdman v Cochise County* (9th Cir 1991) 926 F2d 877, 880, citing *Muckleshoot Tribe v Puget Sound Power & Light Co.* (9th Cir 1989) 875 F2d 695. See also *Holland v Roeser* (9th Cir 1994) 37 F3d 501, 503; *Wakefield v Matthews* (9th Cir 1988) 852 F2d 482.

**Rules under CC §1717.** Different rules apply to contract cases decided under CC §1717. If a settlement results in dismissal of the action, CC §1717(b)(2) precludes the court from awarding fees to either party under the contract. That section does not, however, bar a stipulation to dismiss the case pursuant to a settlement that is conditioned on the payment of any costs or fees awarded by the court. *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 755 n6, 98 CR2d 1. But see *Wackeen v Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502 (failure to reserve jurisdiction to award fees in settlement agreement requiring dismissal of action deprives court of jurisdiction to hear fee claim).

**Settlement history.** The settlement history of the case may also be relevant to either entitlement to fees or the reasonable amount, or both. Some courts have held that confidential settlement discussions are admissible, as long as they are not used to prove liability on the merits. See *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822 n25, 50 CR3d 731; *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 452, 78 CR2d 913 (plaintiff denied

fees incurred after rejecting informal settlement offer more favorable than result achieved).

Other courts are more restrictive. For example, *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 424, 124 CR2d 250, disagreed with *Meister*, holding that informal settlement offers may not be used to limit a party's right to fees because that would undermine the purposes and protections of CCP §998. The court also noted that under Evid C §1119, written settlement offers made during mediation may not be offered in evidence. 101 CA4th at 425. See also *A.D. v California Highway Patrol* (ND Cal, Nov. 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743, *8.

**Section §998 settlement.** The relationship between attorney fees and the pretrial settlement procedures in CCP §998 must also be considered. Section 998 provides generally that, if a written settlement offer is made and the opposing party is unable to obtain a more favorable judgment, some costs and fees incurred after the offer are borne by the party refusing the offer. On §998, see §4.79 and California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

A party who accepts a CCP §998 offer can be the prevailing party, even though there is no determination of liability under the contract or fee-shifting statute. *Engle v Copenbarger & Copenbarger, LLP* (2007) 157 CA4th 165, 170, 68 CR3d 461; *On-Line Power, Inc. v Mazur* (2007) 149 CA4th 1079, 1084, 57 CR3d 698; *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276. Compare these cases with *Sea Coast Foods, Inc. v Lu-Mar Lobster & Shrimp, Inc.* (9th Cir 2001) 260 F3d 1054 (interpreting comparable federal rule, Fed R Civ P 68). A settlement under CCP §998 that is silent on attorney fees and costs does not preclude a subsequent award of fees or costs under CC §1717. See *Pazderka v Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 73 CR2d 242; *Lanyi v Goldblum* (1986) 177 CA3d 181, 223 CR 32. See also *Elite Show Servs., Inc. v Staffpro, Inc.* (2004) 119 CA4th 263, 14 CR3d 184 (§998 offer was valid even though it left fees to be determined by court and cut off fees at certain date); *Arias v Katella Townhouse Homeowners Ass'n, Inc.* (2005) 127 CA4th 847, 26 CR3d 113 (discussing effect on prevailing party determination of voluntary payments made after rejection of §998 offer).

Note that CCP §998 does not provide an independent basis for fees. Postoffer fees are recoverable only if the party would otherwise be entitled to them. See *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526; *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 1532, 78 CR3d 661; §2.80.

**Federal rules.** The federal rules are different, however. In *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, the court held, 5 to 4, that in order for the plaintiff to qualify as the prevailing party, there must be a "judicial imprimatur" on the plaintiff's action, in the form of judicial relief that materially altered the relationship between the parties. In a footnote, the Court questioned whether obtaining a "private settlement" that does not require judicial oversight would qualify the plaintiff as the prevailing party. 149 L Ed 2d at 1840 n7. In *Barrios v California Interscholastic Fed'n* (9th Cir 2002) 277 F3d 1128, however, the court chose to follow its own precedent on settlements, which permits fee awards when the prevailing party standards are otherwise met, rather than the *Buckhannon* dicta. The court also declined to apply *Buckhannon* to the plaintiff's state law claims. The United States Supreme Court denied certiorari in *Barrios*. *California Interscholastic Fed'n v Barrios* (2002) 537 US 820, 154 L Ed 2d 28, 123 S Ct 98. But see *P.N. v Seattle Sch. Dist. No. 1* (9th Cir 2007) 474 F3d 1165, 1167 (parent not prevailing party under IDEA because settlement agreement lacked judicial imprimatur). The kind of settlement that is necessary to qualify the plaintiff as a prevailing party after *Buckhannon* has been the subject of much discussion and many divergent views among the lower federal courts. Compare *American Disability Ass'n v Chmielarz* (11th Cir 2002) 289 F3d 1315 with *New York State Fed'n of Taxi Drivers, Inc. v Westchester County Taxi & Limousine Comm'n* (2d Cir 2001) 272 F3d 154, 158. See §§2.108-2.109.

In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331, and *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371, the California Supreme Court reaffirmed the catalyst theory under California fee-shifting law, rejecting the U.S. Supreme Court's contrary ruling. See §2.111. Accordingly, settlements, whether private or court-ordered, remain a valid basis for qualifying a party as the "successful" or "prevailing party." See §§2.103-2.104.

**Prelitigation demand or notice.** The advisability of and necessity for a prelitigation demand or notice to the opposing party as a precondition to recovering fees must also be kept in mind. See *Vasquez v State* (2008) 45 C4th 243, 85 CR3d 466, discussed in §2.58; *Graham v DaimlerChrysler Corp., supra*, and *Tipton-Whittingham, supra*, discussed in §§2.111-2.114; *Jankey v Poop Deck* (9th Cir 2008) 537 F3d 1122, 1131.

**Class action settlements.** Class action settlements present their own considerations. See §11.17.

**Tax issues.** Tax issues also must be considered and factored into the settlement agreement. See §1.21-1.24.

**Time limits.** Counsel should be alert to any time limits for claiming fees and costs (see §§11.36-11.41) and should secure a stipulation and order extending the time to file the fee motion if settlement discussions might not be concluded within the applicable time limits. See Cal Rules of Ct 3.1702(b). In more complex cases it may also be advisable to set a briefing or discovery schedule that will give both sides a full opportunity to present their positions.

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## B. Conflicts of Interest

### §11.9 1. Parameters of Conflict of Interest Between Client and Attorney

Settlement of both the merits of a case and the attorney fee claim at the same time creates a potential conflict of interest between attorney and client. The conflict of interest usually arises when the defendant has offered a favorable settlement on the merits in exchange for little or no attorney fees. A conflict can also arise, however, when a defendant offers a large attorney fee but a poor settlement on the merits. In both situations, the settlement package attempts to cut the defendant's costs by pitting the plaintiffs against their attorneys. In light of these considerations, the preferred practice is to reserve the fee issue until the merits are resolved, whether by litigation or settlement. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 681, 186 CR 589. At that point, the fee issues may be either settled separately or submitted to the court for determination. See *Robbins v Alibrandi* (2005) 127 CA4th 438, 444, 25 CR3d 387.

On the other hand, the court in *Folsom* also recognized the defendants' concern for knowing their total liability in advance of settlement. 32 C3d at 681. It thus adopted the view previously taken by the United States Supreme Court in *White v New Hampshire Dep't of Employment Sec.* (1982) 455 US 445, 71 L Ed 2d 325, 102 S Ct 1162:

> In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

Compare the approach taken in *Folsom* with *Anthony v Superior Court* (1976) 59 CA3d 760, 130 CR 758, in which a settlement agreement that provided for a substantial sum to be paid directly to plaintiffs' counsel was held to leave "the unfortunate impression that defendants are buying themselves out of a lawsuit by direct compensation of plaintiffs' counsel." 59 CA3d at 772. To avoid this problem, *Anthony* had approved the procedure adopted by several federal courts that *required* that attorney fees be determined by the court. The court in *Folsom* declined to impose such an absolute requirement. 32 C3d at 681.

**Additional authorities:** *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1265, 24 CR3d 818 (examining potential conflicts of interest for class counsel when named plaintiff is attorney represented by own firm and closely related firm); *Beard v Goodrich* (2003) 110 CA4th 1031, 2 CR3d 160 (attorney representing successful party in contract case that settled on appeal entitled only to contingent fee called for by retainer agreement, not higher court-awarded fee superseded by lump-sum settlement); *7-Eleven Owners for Fair Franchising v Southland Corp.* (2000) 85 CA4th 1135, 1159, 102 CR2d 777 (simultaneous negotiation of merits and fees is factor to consider in determining whether to approve class action settlement); *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554, discussed in §11.10. See also American Bar Association, Section of Litigation, Ethical Guidelines for Settlement Negotiations, May 2002.

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### §11.10 2. Court Approval of Bifurcated Settlements

Because of the inherent conflict of interest involved, "bifurcated settlements," *i.e.,* settlements that break out damages and attorney fees separately rather than providing a lump sum, require court approval. *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554. See also *Robbins v Alibrandi* (2005) 127 CA4th 438, 451, 25 CR3d 387 (fee settlement in shareholder derivative action must be approved by court).

The conflict of interest presented by the simultaneous negotiation of merits and fees, even outside the class action context, was addressed in *Ramirez, supra*. In *Ramirez*, the plaintiff brought a wrongful termination suit against her employer. Her attorney had agreed to represent her on a contingent fee basis, although their retainer agreement also provided that any court-awarded fee would go to the attorney. After summary judgment was granted to the employer, the fee agreement was renegotiated to require the plaintiff to accept any settlement offer of $150,000 or more; the agreement also provided that the attorney would agree to seek more than the $150,000. After reversal on appeal, the defendant offered the plaintiff $150,000, which her attorney accepted. The plaintiff's attorney and the defendant then negotiated a fee award of $215,000. The plaintiff objected to the attorney's claim to the $215,000, claiming that his fee should be the agreed percentage of the gross settlement.

The court of appeal concluded that the dual nature of the settlement negotiations itself created a potential conflict of interest, which may or may not have adversely affected the plaintiff's rights. The court held that because the basic fee provision gave the attorney "the discretion to negotiate either a lump-sum settlement, or a bifurcated or trifurcated settlement, one part of which would be his attorney fee, it created a potential conflict of interest." 21 CA4th at 919. The court refused, however, to disapprove the use of bifurcated settlements, holding that there might even be situations in which "a bifurcated approach should be taken even over the client's objection, at least when the client's interests in fact are being represented." 21 CA4th at 922.

Because of the potential conflict of interest, the court held that judicial approval of any bifurcated settlement was required. Analogizing the problem to that faced by class action counsel, the court in *Ramirez* adopted the approach outlined in *Mendoza v U.S.* (9th Cir 1980) 623 F2d 1338, 1352. 21 CA4th at 924. In *Mendoza*, the Ninth Circuit noted that the preferable procedure is to negotiate damages separately from attorney fees to minimize any potential conflict of interest, but that simultaneously negotiated settlements, though "strongly discouraged," would not be disapproved per se but must be examined on a case-by-case basis to decide whether the client's interests are adequately represented.

Accordingly, the *Ramirez* court directed trial courts to use the procedures used in federal class actions for individual actions in which damages and attorney fees are separately negotiated (21 CA4th at 925):

> The parties may, if they wish, negotiate a separate settlement of damages and attorney fees. That settlement, however, should be approved by an impartial tribunal charged with the duty of determining whether a fair and reasonable balancing of the interests of the plaintiff and plaintiff's attorney was reflected in the negotiations. The settlement may be reviewed by the court at a settlement conference or by the court in which the action is filed on motion of a party. As with other situations involving a conflict of interest, in the absence of any evidence to the contrary it will be presumed that the conflict prejudiced the client.

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### §11.11 3. Party's Right to Waive Attorney Fees

The related question of whether a plaintiff can agree to waive the right to attorney fees in exchange for a more beneficial settlement was addressed in *Evans v Jeff D.* (1986) 475 US 717, 89 L Ed 2d 747, 106 S Ct 1531. In *Jeff D.,* the Court held that 42 USC §1988 does not preclude a district court from approving a class action settlement in which the plaintiff waived any right to attorney fees in exchange for a more beneficial settlement on the merits. The Court held that the policies underlying §1988 do not require a per se ruling prohibiting waivers of attorney fees, at least if the offered relief on the merits equals or exceeds the probable outcome at trial. The Court did not determine whether such waivers offend legal ethics requirements under state or local law (see 475 US at 728 n15, 89 L Ed 2d at 758 n15), but it did suggest that such waivers might be impermissible in three circumstances (475 US at 740, 89 L Ed 2d at 766):

- If the plaintiffs receive no quid pro quo (*e.g.,* if the defendant demanded a waiver in a case that had no realistic defense);
- If the defendant has a policy or practice of routinely seeking fee waivers; or
- If the request for a fee waiver is "a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits."

Note, however, that the waiver in *Jeff D.* was applied only to work performed up to the time of settlement. See *Jeff D. v Kempthorne* (9th Cir 2004) 365 F3d 844, 855; *Jeff D. v Andrus* (9th Cir 1989) 899 F2d 753.

The Ninth Circuit has struggled with how far a defendant may go to require attorney fee waivers in civil rights cases. See *Mitchell v City of Los Angeles* (9th Cir 1984) 741 F2d 281 (questioning whether attorney has standing to bring independent action against defendant for 42 USC §1988 fee). But see *Bernhardt v County of Los Angeles* (9th Cir 2003) 339 F3d 920 (enjoining county from applying lump-sum settlement policy in plaintiff's case). In *Pony v County of Los Angeles* (9th Cir 2006) 433 F3d 1138, 1146, the court, distinguishing *Bernhardt,* in which plaintiff had standing to sue, held that the plaintiff could not convey her right to pursue attorney fees under 42 USC §1983 to her attorney, and thus the attorney had no right to seek fees after the plaintiff waived them as part of the settlement.

In *U.S. v Jerry M. Lewis Truck Parts & Equip.* (9th Cir 1996) 89 F3d 574, 577, the Ninth Circuit said that although only a party has the "power" to claim fees, fees must be paid directly to the attorneys who have the "right" to them. In *Citizens Legal Envt'l Action Network, Inc. v Premium Standard Farms, Inc.* (8th Cir 2005) 397 F3d 592, the court held that the plaintiff was not entitled to attorney fees for one of its former attorney's services after the attorney had settled his fee claim without the plaintiff's knowledge. The court recognized that although the party retained the right to settle fees, it had not been prejudiced by its attorney's actions because the retainer agreement provided that all fees would go to the attorney. 397 F3d at 595 n3, citing *Image Tech. Serv. v Eastman Kodak Co.* (9th Cir 1998) 136 F3d 1354, 1359. See also *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 703 (fee award proper even if some plaintiffs represented by same counsel do not have standing). On the attorney's right to an assignment of the fee claim, see §11.15.

In *Flannery v Prentice* (2001) 26 C4th 572, 578, 581, 110 CR2d 809, the court analyzed California law consistently with *U.S. v Jerry M. Lewis Truck Parts & Equip., supra,* and cited it with approval. The *Flannery* court held that when the plaintiff had not been charged fees in a civil rights case, court-awarded fees should be paid to the attorney, not to the plaintiff, even in the absence of a retainer agreement. 26 C4th at 590. The court in *Beard v Goodrich* (2003) 110 CA4th 1031, 1036, 2 CR3d 160, distinguished *Flannery*, holding that an attorney representing a successful party in a contract case that settled on appeal was entitled only to the contingent fee called for by his retainer agreement, not the court-awarded fee that was extinguished by the lump-sum settlement.

In *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 43 CR3d 707, the court of appeal held that under *Flannery,* an attorney whose client has not authorized a fee motion under CCP §1021.5 may intervene in the action and secure a fee award. In so holding, the *Lindelli* court expressly rejected the Ninth Circuit's contrary holding in *Churchill Village LLC v General Elec.* (9th Cir 2004) 361 F3d 566, 579. See 139 CA4th at 1513. On when a court may award fees directly to an attorney, see §11.70.

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## §11.12 4. Handling Conflicts of Interest

There are several methods for dealing with the conflict of interest created when the opposing party pits the attorney's right to compensation against the client's recovery.

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### §11.13 a. Bifurcated Settlement Discussions

One method to deal with such conflicts of interest (see §11.9) is to insist on bifurcated settlement discussions, negotiating the client's recovery before discussing attorney fees. In light of *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554, discussed in §11.10, it may even be possible for counsel to obtain a court order requiring such bifurcated settlements if the conflict with the client's interest cannot be alleviated in any other way. Under *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 681, 186 CR 589, it may be necessary to inform the opposing party of the amount of fees at stake, but that would not preclude bifurcated discussion. See also American Bar Association, Section of Litigation, Ethical Guidelines for Settlement Negotiations, May 2002; *Bernhardt v County of Los Angeles* (9th Cir 2002) 279 F3d 862 (permitting challenge to county's policy of requiring fee waivers as matter of practice).

In *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 51, 97 CR2d 797, the court said that in determining lodestar adjustments, the trial court should consider the fact that counsel rejected a proposed settlement that would have resulted in a larger fee for themselves in order to maximize the class's recovery.

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.14 b. Retainer Agreement

### §11.14 b. Retainer Agreement

More fundamentally, the potential conflict (see §11.9) can be minimized through a well-drafted retainer agreement. Assuming that the client cannot afford to pay fees as they are incurred, there are at least two ways to craft the retainer agreement to avoid this problem. One possibility is to charge the client a reasonable hourly rate for all services due on resolution of the action. In that way, the client and the attorney's interests are the same during settlement, and the incentive for the client to accept a low settlement is not as great. If there is a limited sum from which the client can recover damages and the attorney his or her fees, then the client and attorney will have to negotiate a fair division of that limited pot, rather than allowing the client to accept a settlement that waives the attorney's fee.

For nonprofit organizations that may not charge fees to their clients, however, such retainer agreements may not provide a solution. The organizations may, however, negotiate an assignment of the statutory fees, as discussed in §11.15.

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### §11.15 c. Assignment of Right to Fees

A second method for minimizing this potential conflict through the retainer agreement is to obtain an assignment of the right to attorney fees from the client. The state bar has approved such assignments, conditioned on compliance with Cal Rules of Prof Cond 3-300, 3-310. State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1994-136.

In *Flannery v Prentice* (2001) 26 C4th 572, 586, 110 CR2d 809, the court held that despite the contrary advice in the state bar opinion, an agreement to allow the attorney to retain any court-awarded fees does not require compliance with Cal Rules of Prof Cond 3-300. Assignment of the right to fees as a means of paying for the attorney's services also was upheld by the federal courts of appeals in *Curtis v City of Des Moines* (8th Cir 1993) 995 F2d 125 and *Zeisler v Neese* (7th Cir 1994) 24 F3d 1000, 1002. See also *U.S. v Jerry M. Lewis Truck Parts & Equip.* (9th Cir 1996) 89 F3d 574 (although only party has "power" to claim fees, fees must be paid directly to attorneys, who have "right" to them).

The Ninth Circuit has refused, however, to recognize a fee assignment under 42 USC §1983 when California law did not permit the transfer of a substantive tort claim. See *Pony v County of Los Angeles* (9th Cir 2006) 433 F3d 1138, 1146. But see *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1513, 43 CR3d 707 (rejecting federal restrictions on attorney's rights under fee-shifting statutes).

The Supreme Court also implicitly approved assignment of the right to fees in *Venegas v Mitchell* (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679. In *Venegas*, the Court stated:

> If [42 USC] §1983 plaintiffs may waive their causes of action entirely, there is little reason to believe that they may not assign part of their recovery to an attorney if they believe that the contingency arrangement will increase their likelihood of recovery. A contrary decision would place section 1983 plaintiffs in the peculiar position of being more free to negotiate with their adversaries than with their own attorneys.

495 US at 88, 109 L Ed 2d at 83.

Though the Court was speaking of the right to assign a part of the damages recovery to the attorney, there is no logical reason why the same rationale would not apply to the right to assign the statutory attorney fee award to the attorney. Such an assignment would be entirely consistent with one of the purposes of fee-shifting statutes, which is to enable persons who could not otherwise afford it to obtain representation.

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### §11.16 d. Motion to Intervene

*Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 43 CR3d 707, presents a third option to minimize the potential conflict (see §11.9): if the successful "party" declines to move for fees, the attorneys may intervene to protect their rights, at least as long as the client does not object. 139 CA4th at 1516. *Lindelli* expressly refused to decide, however, whether the attorneys could intervene to claim fees when the client objected on the ground that intervention would interfere with settlement on the merits. 139 CA4th at 1513 n10.

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.17 C. Court Approval of Fee Settlements

### §11.17 C. Court Approval of Fee Settlements

In class actions, court approval of fee settlements is required. See Cal Rules of Ct 3.769; Fed R Civ P 23(e). The trial court has the power and the duty to set fees independently of any agreement between the parties. *Garabedian v Los Angeles Cellular Tel. Co.* (2004) 118 CA4th 123, 128, 12 CR3d 737 (citing federal authorities). See also §11.8.

Court approval is also required in "common fund" fee cases, in which the fee is essentially paid by the plaintiff class. See *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 511, 89 CR3d 615; *Consumer Privacy Cases* (2009) 175 CA4th 545, 555, 96 CR3d 127; *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 9 CR3d 544; *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 110 CR2d 145; *Bank of America v Cory* (1985) 164 CA3d 66, 210 CR 351. Court supervision is necessary because the money to pay the attorneys in common fund cases comes from the funds set aside for the class members' recovery, resulting in an adversary relationship between counsel and the plaintiff class. *Staton v Boeing* (9th Cir 2003) 327 F3d 938 (discussing ethical implications of settling class action in which plaintiffs and their attorneys are eligible for both statutory and common fund fees). See also *In re Fine Paper Antitrust Litig.* (3d Cir 1984) 751 F2d 562, 582; *Zucker v Occidental Petroleum Corp.* (9th Cir 1999) 192 F3d 1323 (district court had authority and duty to pass on fairness of attorney fees settlement independently of whether defendant objected; no need for appellate court to decide whether appellee had standing); *Robbins v Alibrandi* (2005) 127 CA4th 438, 25 CR3d 387 (fee settlement in shareholder derivative action must be approved by court); §11.8.

Similarly, at least one court has held that judicial court approval is now required in individual actions in which damages and attorney fees are separately negotiated. *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554, discussed in §11.10.

**NOTE:** The procedure for obtaining approval of settlements in individual actions is not clear. *Ramirez v Sturdevant, supra,* from which the requirement stems, indicates that approval can be obtained either at the settlement conference or on motion of one of the parties. Proceedings to obtain approval of minors' or disabled persons' compromises (see Prob C §§3600-3613) or for good faith settlements (see CCP §877.6) appear to be analogous.

Under Cal Rules of Ct 3.769, when a party requests court approval of a proposed agreement to settle all or a part of a class action, the application must include any agreement the parties have reached about attorney fees or an application for approval of attorney fees. Cal Rules of Ct 3.769(b). This procedure prevents the attorneys from making secret agreements on attorney fees that are not disclosed to the class or the court during the settlement approval process. It does not prevent an attorney from demanding that negotiations on the merits and on the fees be totally separate. By permitting the parties to submit either a fee agreement or a fee application to the court along with the settlement agreement, the rule permits a settlement that determines the rights of the class even if the parties have not agreed on a fee. Leaving the issue of fees to be determined by the court minimizes the potential conflict of interest for the plaintiff's attorney. See, *e.g., Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 46, 75 CR3d 413 (trial court approved settlement and awarded attorney fees).

**NOTE:** In *Staton v Boeing* (9th Cir 2003) 327 F3d 938, the court extensively discussed the appropriate procedures and standards the court and counsel should follow in settling class actions in which the plaintiffs are eligible for statutory fee-shifting and their counsel are entitled to common fund fees. In *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 726, 9 CR3d 544, the court noted that counsel had been awarded common fund fees equal to 25 percent of the fund recovered, which fees had not been appealed, plus statutory fees under Lab C §1194 that were to be credited against the common fund fee and that were the subject of a separate, pending appeal.

In federal court, an unnamed class member who files an objection to an attorney fee request in district court has standing to appeal the award without intervening. *Powers v Eichen* (9th Cir 2000) 229 F3d 1249, 1251. Furthermore, a class member has standing to appeal a class counsel fee award even though the award is payable independent of the class settlement. *Lobatz v U.S. W. Cellular, Inc.* (9th Cir 2000) 222 F3d 1142, 1147. But see *Knisley v Network Assocs., Inc.* (9th Cir 2002) 312 F3d 1123 (class member who had not filed timely claim form and was therefore not

entitled to distribution from fund did not have standing to object to attorney fee award). An objector may be entitled to attorney fees from the common fund, but only if his or her action substantially enhanced the benefits to the class. *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1051 (upholding denial of attorney fees to objectors).

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## III. INTERIM FEES

### §11.18 A. Interim Fees in Federal Courts

Awarding interim fees (*i.e.,* a fee award made before the case is completed) is an accepted procedure in federal courts. See, *e.g., Hensley v Eckerhart* (1983) 461 US 424, 452 n9, 76 L Ed 2d 40, 63 n9, 103 S Ct 1933 (concurring opinion of Brennan, J.). An application for interim fees can be filed at any time after the moving party has obtained some of its objectives, even though other parts of the action remain to be resolved. See §15.14. There are no established time limits for interim fee motions.

Entitlement to an interim fee award depends on obtaining relief under a fee-shifting statute at an interim stage of the litigation. If such relief is obtained, the party is entitled to prompt payment of its attorney fees for having achieved that success. "The fact that the dispute between the parties may continue does not preclude a fee award." *Marks v Clarke* (9th Cir 1996) 102 F3d 1012, 1034, quoting *Animal Lovers Volunteer Ass'n v Carlucci* (9th Cir 1989) 867 F2d 1224. See, *e.g., Taylor v Westly* (9th Cir 2008) 525 F3d 1288, 1289 (interim fees required because of "magnitude" of case and risk of "starving out" plaintiffs with meritorious claims). Interim fee awards are more likely to be made when the litigation has gone on for several years and counsel has not been paid. See, *e.g., Carpenter v Stephen F. Austin State Univ.* (5th Cir 1983) 706 F2d 608.

To qualify for an interim award, however, the plaintiff must have prevailed on the *merits* at some interim stage; an interim *procedural* victory will not suffice. See *Hanrahan v Hampton* (1980) 446 US 754, 757, 64 L Ed 2d 670, 674, 100 S Ct 1987; *Marks v Clarke, supra; Rosenfeld v U.S.* (9th Cir 1988) 859 F2d 717, 720; *Mantolete v Bolger* (9th Cir 1986) 791 F2d 784. See also *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835.

Under the federal rules, the court has the power to direct immediate payment of the interim fees when "delay[ing] a fee until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel." *Bradley v School Bd.* (1974) 416 US 696, 723, 40 L Ed 2d 476, 495, 94 S Ct 2006. Interim fee awards and the orders directing their payment generally are not appealable. See, *e.g., Rosenfeld v U.S.* (9th Cir 1988) 859 F2d 717, 720 (interim fee award not final order appealable under 28 USC §1291); *Hillery v Rushen* (9th Cir 1983) 702 F2d 848 (interim fee award under 42 USC §1988 not collateral order appealable under 28 USC §1291). This raises a potential problem for the attorneys receiving the interim award if there is a chance that an appeal from the final judgment might reverse the award. Counsel must evaluate on a case-by-case basis the prospect that all or part of the interim award might be reversed, giving the fee opponent the right to be repaid.

If an appeal has been taken from a fee award but some of the fees are undisputed, the trial court may order the undisputed fees paid immediately as "interim fees." *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 703. See also §15.14.

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## §11.19 B. Interim Fees in California Courts

California courts are likely to follow the federal approach to interim fees (discussed in §11.18), as they have done on other issues. See, *e.g., Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 352 n5, 188 CR 873; *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589; §11.46.

Several reported California decisions involve interim fee awards, although none expressly discusses the issue. See, *e.g., Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 428, 253 CR 426; *Westside Community for Indep. Living, Inc. v Obledo* (1983) 33 C3d 348, 188 CR 873; *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 213, 266 CR 788 (awarding fees under CCP §1021.5 for writ compelling compliance with preliminary injunction and "ensuing interim injunctive relief proceedings"); *Sundance v Municipal Court* (1987) 192 CA3d 268, 271, 237 CR 269 (fee award not "premature" even though further litigation on merits possible); *Boehm v Superior Court* (1986) 178 CA3d 494, 503, 223 CR 716 (fees awarded after appellate writ required issuance of preliminary injunction). See also *Hightower v Superior Court* (2001) 86 CA4th 1415, 104 CR2d 209 (arbitrator also may award fees on an interim basis).

Granting interim fees is consistent with the rule that, in some circumstances, entitlement to fees may not depend on the ultimate resolution of the action. For example, in *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 228 CR 847, the plaintiff had won an appellate ruling affording him the right to refuse medical treatment. The trial court denied plaintiff's request for fees under CCP §1021.5 because the issue of his consent to treatment had not yet been resolved. The appellate court reversed, holding that plaintiff's entitlement to fees was established by its favorable ruling on the merits and did not depend on the ultimate resolution of his claim. See §§9.43-9.44. See also *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 241 CR 239 (entitlement to fees not dependent on outcome of plaintiff's damages action); *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846 (attorney fees awarded against plaintiffs from whom defendants obtained dismissal, although suit continued and defendant might have right to further fee award against other plaintiffs); *Boehm v Superior Court* (1986) 178 CA3d 494, 503, 223 CR 716 (fees awarded after reversal of order denying preliminary injunction).

Not all statutory fees may be recovered on an interim basis. In *Bell v Farmers Ins. Exch.* (2001) 87 CA4th 805, 105 CR2d 59, the court held that because Lab C §1194 conditioned attorney fees on the "recovery" of wages, it did not authorize an award of interim attorney fees based on a summary adjudication of liability.

The issue of availability of interim fees has also arisen under CC §1717. See *Pueblo Radiology Med. Group, Inc. v Gerlach* (2008) 163 CA4th 826, 829, 77 CR3d 880; *Otay River Constructors v San Diego Expressway* (2008) 158 CA4th 796, 70 CR3d 434; *Acosta v Kerrigan* (2007) 150 CA4th 1124, 58 CR3d 865. See also *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 196 CR 1; *Cole v BT&G, Inc.* (1983) 141 CA3d 995, 190 CR 690; *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 186 CR 695; §4.91.

A fee is not "interim" simply because the underlying judgment has been appealed. See *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1546, 1 CR2d 35. See also *First Sec. Bank v Paquet* (2002) 98 CA4th 468, 119 CR2d 787 (fee award not premature simply because claimant may later be assessed additional fees or costs).

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## §11.20 IV. JUDGMENT ON THE MERITS

Entitlement to court-awarded attorney fees does not depend on the form of the judgment or order terminating the action. See §2.85. Therefore, attorney fees may be awarded in a postjudgment motion even if the judgment awarded neither costs nor fees. See CC §1717(b); *Maria P. v Riles* (1987) 43 C3d 1281, 240 CR 872; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 227, 226 CR 265; *Miles Cal. Co. v Hawkins* (1959) 175 CA2d 162, 345 P2d 492.

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### §11.21 A. Fee Award When Decision Is Appealed

Though fees cannot be awarded until the prevailing party can be determined (see chap 2, §4.91), a party "prevails" if it wins at the trial court level, even if the trial court's merits decision has been appealed. Compare *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 599 n8, 86 CR2d 575, *Bankes v Lucas* (1992) 9 CA4th 365, 11 CR2d 723, *Nazemi v Tseng* (1992) 5 CA4th 1633, 7 CR2d 762, and *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1546, 1 CR2d 35, with *United Servs. Auto. Ass'n v Dalrymple* (1991) 232 CA3d 182, 283 CR 330, and *Day v Papadakis* (1991) 231 CA3d 503, 282 CR 548, disapproved on other grounds in 7 C4th at 743 n11. See also Cal Rules of Ct 3.1702. If the action on the merits is reversed, however, the fee award also may be reversed. See, *e.g., Save Our Residential Env't v City of W. Hollywood* (1992) 9 CA4th 1745, 1750, 12 CR2d 308.

Although an express reservation of jurisdiction to award fees in the judgment may be advisable to avoid misunderstandings, it is not required; trial courts have the inherent jurisdiction to award fees even after the judgment is final. *Maria P. v Riles* (1987) 43 C3d 1281, 1289, 240 CR 872; *Grant v List & Lathrop* (1992) 2 CA4th 993, 3 CR2d 654. See also *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 98 CR2d 1. This jurisdiction remains even after the merits have been appealed. Cal Rules of Ct 3.1702. See also §11.3. But see *Wackeen v Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502 (failure to reserve jurisdiction to award fees in settlement agreement requiring dismissal of action deprives court of jurisdiction to hear fee claim).

The pendency of a motion for attorney fees does not toll the time for filing a notice of appeal from the judgment on the merits. *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 CA3d 1028, 1039, 285 CR 856; *Marini v Municipal Court* (1979) 99 CA3d 829, 835, 160 CR 465 (judgments on merits and fee award orders are "separately appealable"). See §16.11. Federal law is similar. See *Budinich v Becton Dickinson & Co.* (1988) 486 US 196, 202, 100 L Ed 2d 178, 185, 108 S Ct 1717.

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### §11.22 B. Consider Attorney Fees When Drafting or Reviewing Judgment or Settlement on the Merits

The substance of the judgment or settlement may be significant to the determination of entitlement to attorney fees. See *Vacco Indus. v Van Den Berg* (1992) 5 CA4th 34, 54, 6 CR2d 602. Attorney fee considerations should always be kept in mind in drafting or reviewing the judgment on the merits. For example, if fees are sought on a statutory basis, the judgment should indicate whether the party claiming fees prevailed on its fee-shifting claim. Similarly, if fees are sought under CC §1717, the judgment should indicate whether the fee claimant prevailed in the "action on the contract." And, of course, in actions under CCP §1021.5, the nature and extent of relief achieved in the judgment, though not dispositive of entitlement to fees, may affect the court's determination of whether the elements of §1021.5 have been met. See also §11.8. Because settlement offers under CCP §998, if accepted, become judgments, the language of §998 offers also must be carefully drafted. See §§2.80, 2.89, 2.95, 2.108.

Settlements also require care in drafting. See, *e.g.*, *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1099. On whether a finding of liability is relevant, see §§2.95, 2.97, 2.103. In federal court, the language of any settlement is particularly significant. See §11.23.

If the parties have agreed on fee issues, the judgment should reflect that agreement. See *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 776, 118 CR2d 629 (party's failure to challenge inclusion of fee entitlement in judgment in trial court waived right to challenge it on appeal); *Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 CA3d 924, 272 CR 899 (if judgment erroneously fails to award fees or costs to prevailing party, party entitled to fees and costs must file timely motion for fees and memorandum of costs in order to preserve issue on appeal).

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### §11.23 C. Fee Award Under Federal Fee-Shifting Statutes

When federal fee-shifting statutes might be available, it is important to keep in mind *Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835. In *Buckhannon,* a sharply divided Court held that for the plaintiff to qualify as the prevailing party, there must be a "judicial imprimatur" on the plaintiff's action—there must be some form of judicial relief that materially alters the relationship between the parties. Although the Court held that either a judgment on the merits or a consent decree overseen by the court provides an adequate judicial imprimatur, it questioned in dictum whether a "private settlement" that results in dismissal provides sufficient judicial imprimatur to qualify. It is critical to keep in mind, therefore, the settlement language that will be necessary to qualify for fees under *Buckhannon*. See §2.104.

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## §11.24 D. Timing of Fee Motion

In preparing the judgment on the merits, counsel should also keep in mind that the timing of the entry of the judgment or of the filing of the notice of entry may also affect the timing of the fee motion. See §§11.35-11.41.

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## V. THE FEE APPLICATION

### §11.25 A. Fees and Costs Claimed in Separate Requests

Prevailing parties who intend to claim attorney fees under an applicable statute, contract, or equitable doctrine generally also will seek statutory costs under CCP §1033.5. To do this, counsel generally must file separate requests for fees and costs that will proceed on parallel, but not identical, tracks: a memorandum of costs under Cal Rules of Ct 3.1700 and a motion for fees under the applicable contract or statute, governed by Cal Rules of Ct 3.1702 and the procedures for noticed motions (see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004)). These may or may not be filed simultaneously. The memorandum of costs must be served and filed within 15 days after the date of mailing of the notice of entry of judgment or of service of written notice of entry of judgment. Cal Rules of Ct 3.1700(a). The fee motion need only be filed within the time to file a notice of appeal. Cal Rules of Ct 3.1702(b).

The form Memorandum of Costs (Summary) (Judicial Council Form MC-010) includes a space (item 9) for listing attorney fees "authorized by statute, assessed upon motion or by this memorandum." To avoid confusion, counsel should refer to any pending or anticipated fee motion in item 9. See also §11.45. For copy of Judicial Council Form MC-010, see App A.

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## B. Fee Awards Generally Claimed by Noticed Motion

### §11.26 1. Noticed Motion

The procedure to follow for claiming attorney fees generally depends on the basis on which fees are sought. The fee-shifting statutes generally envision a motion procedure. See, *e.g.,* CCP §1021.5 ("upon motion, a court may award…."); CC §1717 ("The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract [for purposes of awarding fees]"). See *Christensen v Dewor Devs.* (1983) 33 C3d 778, 191 CR 8; *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 194, 82 CR3d 586; *Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 24 CR2d 274 (motion procedure mandatory); *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 428, 152 CR 31. See also *Karton v Dougherty* (2008) 171 CA4th 133, 148, 89 CR3d 506 (reversing award for postjudgment fees for failure to notify adverse party). Compare these cases with *American Humane Ass'n v Los Angeles Times Communications* (2001) 92 CA4th 1095, 112 CR2d 488 (setting out three alternatives for claiming fees under the anti-SLAPP statute, CCP §425.16). On the other hand, fees sought as damages must be claimed at trial. See §11.32.

A judgment that includes a judicial determination of entitlement to contractual fees under CC §1717 satisfies the CCP §1033.5 noticed motion requirement. *Miller v Provost* (1994) 26 CA4th 1703, 1710, 33 CR2d 288. See also *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 776, 118 CR2d 629 (failure to object to provision in judgment that awarded fees precluded defendant from challenging on appeal plaintiff's entitlement to fees). In that situation, however, a party must move for a determination of the amount of fees within the time period prescribed by Cal Rules of Ct 3.1702. See also *Chinn v KMR Prop. Mgmt.*, 166 CA4th at 195.

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## §11.27 2. Memorandum of Costs

In limited circumstances, fees may be sought in the memorandum of costs. Some courts have fee schedules that set fees for routine matters based on the amount recovered. These schedules are mainly intended for use when the party liable for fees has defaulted. See *Cortez v Bootsma* (1994) 27 CA4th 935, 33 CR2d 20. If the prevailing party's fees are fixed by a fee schedule or other formula (*e.g.,* agreement of the parties) so that court determination is unnecessary, they must be claimed in the memorandum of costs. Cal Rules of Ct 3.1702(e). See §11.29.

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### §11.28 3. Default Judgment

A party seeking a default judgment on declarations must use the mandatory Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100), and include any request for attorney fees. Cal Rules of Ct 3.1800(a). The court may establish by local rule a schedule of attorney fees to be used in determining the reasonable amount of fees to be allowed in a default judgment. Cal Rules of Ct 3.1800(b). Note that a later claim for additional fees may require new notice to the opposing party. See *David S. Karton, A Law Corp. v Dougherty* (2009) 171 CA4th 133, 148, 89 CR3d 506.

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### §11.29 4. Fees Based on Contract (CC §1717)

In contested cases, attorney fees based on contract must be claimed by noticed motion unless the parties stipulate otherwise. CCP §1033.5(c)(5). This rule applies regardless of whether the claim is based on CC §1717 or on a contract-based claim for fees for noncontract causes of action. *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 192, 82 CR3d 586. There is no requirement that such fees be pleaded as an item of damages. *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 1797, 54 CR2d 541. But see *Carwash of America-PO LLC v Windswept Ventures No. 1* (2002) 97 CA4th 540, 118 CR2d 536 (expert witness fees claimed under contract must be pleaded and proved at trial).

When a default judgment will be entered, the fees should be claimed on entry of the default judgment. CCP §1033.5(c)(5). If neither entitlement to nor the amount of fees is contested (*i.e.,* if the fees are to be set by court formula or are otherwise not in dispute), they must be claimed in the memorandum of costs. Cal Rules of Ct 3.1702(e).

Though it was once common to apply for contractual fees simply by filing a memorandum of costs, that procedure may no longer be acceptable in contested cases. Compare *Gunlock Corp. v Walk on Water, Inc.* (1993) 15 CA4th 1301, 19 CR2d 197 (excusing claim for fees under CC §1717 made by memorandum of costs rather than noticed motion because trial court has discretion to overlook "technical noncompliance" when application within "spirit of law"), with *Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 24 CR2d 274 (expressly disagreeing with *Gunlock* in holding motion procedure mandatory for fee claims under CC §1717). See also Stats 1990, ch 804, §2 (declaring legislature's belief that motion procedure stated in former Cal Rules of Ct 870.2 (now see Cal Rules of Ct 3.1702) is fair and equitable procedure for determining fees based on contract and must be used).

The noticed motion requirement of CCP §1033.5 is not applicable to a request for attorney fees incurred in an underlying arbitration; such a request should be made to the arbitrator. *DiMarco v Chaney* (1995) 31 CA4th 1809, 1817, 37 CR2d 558 (noticed motion procedure in §1033.5 pertains only to request made in the superior court for attorney fees incurred in proceedings to correct, vacate, or confirm arbitration award).

An attorney fee motion generally follows the same rules and procedures as other motions. See §11.33.

The timing requirements for contractual fee motions are discussed in §§11.36-11.38.

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### §11.30 5. Fees Based on Statute

The procedures for seeking fees based on statute are not as restricted as the procedures for fees based on contract. Under CCP §1033.5(c)(5), attorney fees based on statute may be claimed:

- On noticed motion;
- At the time a statement of decision is rendered;
- On application supported by affidavit made concurrently with a claim for other costs; or
- On entry of a default judgment.

Some statutes specify that fees must be sought by noticed motion. See, *e.g.,* CCP §1021.5. Others simply provide for entitlement to fees, without specifying a procedure. See *American Humane Ass'n v Los Angeles Times Communications* (2001) 92 CA4th 1095, 1103, 112 CR2d 488 (listing three ways that claim for fees under anti-SLAPP statute, CCP §425.16(c), may be sought).

The usual practice is to claim statutory fees by noticed motion. See Cal Rules of Ct 3.1702. Rule 3.1702 applies whenever the court determines "entitlement to the fees, the amount of the fees, or both." Cal Rules of Ct 3.1702(a).

Under Cal Rules of Ct 3.1702(b), (d), motions for reasonable attorney fees for services "up to and including the rendition of judgment," including any interim appellate work, must be filed within the time for filing a notice of appeal, unless extended by stipulation or court order. See *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1085, 120 CR2d 273 (decided under former Cal Rules of Ct 870.2(b)(1)); §11.36. When fees are sought for services that do not culminate in a judgment, Rule 3.1702 may not be applicable. See *Crespin v Shewry* (2004) 125 CA4th 259, 265, 22 CR3d 696 (decided under former Cal Rules of Ct 870.2 (now Rule 3.1702)); *Hollaway v Edwards* (1998) 68 CA4th 94, 80 CR2d 166 (former Cal Rules of Ct 870.2 (now Rule 3.1702) inapplicable to claim for attorney fees in probate court). But see *Sanabria v Embrey* (2001) 92 CA4th 422, 427, 111 CR2d 837 (former Rule 870.2 (now Cal Rules of Ct 3.1702) time limits start when action voluntarily dismissed, even though dismissal is not appealable and not a judgment).

**PRACTICE TIP:** If the governing statute does not specify a motion procedure, it is generally preferable in contested cases to seek fees by noticed motion rather than by a memorandum of costs because the motion allows the fee claimant to control the timing of the motion process, to support the claim fully with documentation and other supporting materials, and to file the opening and closing memorandums of law. On the other hand, the only advantage of claiming fees through a memorandum of costs is that the initial application is simpler.

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### §11.31 6. Fees Based on Other Grounds

Under CCP §1033.5(c)(5), attorney fees based on "law," as distinguished from "contract" or "statute," must be claimed by noticed motion unless the parties stipulate otherwise. This provision appears to require a noticed motion, which is consistent with the general practice.

When a default judgment will be entered, the fees should be claimed on entry of that judgment. CCP §1033.5(c)(5).

On the timing of fee motions not based on contract or statute, see §11.41.

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### §11.32 7. Exception: Fees as Damages Must Be Proved at Trial

If fees are recoverable as an element of damages (see chap 7), they must be pleaded and proved in the case in chief, and they will be awarded as part of the judgment, not in a separate noticed motion or motion for costs. In *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211, the court held that, because attorney fees were recoverable as damages, "the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." The court suggested, however, that a "stipulation for a post judgment allocation and award by the trial court would normally be preferable since the determination would then be made after completion of the legal services [citation omitted], and proof that otherwise would have been presented to the jury could be simplified because of the court's expertise in evaluating legal services."

If the recovery of expert witness fees or other expenses not allowed under CCP §1033.5 is sought under a contractual provision, they must be pleaded and proved at trial as damages rather than sought as costs or fees. See *Carwash of America-PO LLC v Windswept Ventures No. 1* (2002) 97 CA4th 540, 544, 118 CR2d 536, and cases cited therein.

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### §11.33 C. Fee Motion Procedure Similar to Other Motions

A motion for attorney fees follows the general procedures for noticed motions (see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004)) and any applicable local rules. Because the underlying facts are sometimes vigorously contested in fee motions, however, such motions often become more complicated than more routine motions.

The fee motion usually involves two primary issues: (1) whether the party or attorney is entitled to court-awarded fees; and, if so, (2) the proper amount of the fee. These issues are usually submitted to the court simultaneously. Occasionally, however, counsel or the court may wish to bifurcate the entitlement and amount issues. See §11.34.

Normally, after the prevailing party files the fee motion, the fee opponent files an opposition. See §§11.58-11.60. The party claiming fees then has an opportunity to file a reply. See §11.61. CCP §1005(b). The court then hears the matter in the same manner as any other motion. See §11.63. In some fee motions, however, the fee opponent may seek discovery from the fee claimant or the claiming party may seek discovery of the opponent's fees. See §§11.54-11.57.

**PRACTICE TIP:** If counsel knows that the fee motion is likely to be vigorously contested, it is often helpful to attempt to establish briefing or discovery procedures with opposing counsel in advance. By agreeing on a schedule for the time to file the motion, for discovery (if any), for filing opposition and reply briefs, and for conduct of the hearing, counsel can avoid uncertainty and unnecessary litigation over procedural issues.

At the hearing on the fees motion, the trial court generally has the discretion to decide the matter on the pleadings or to take testimony. See §11.63. See also *Padilla v McClellan* (2001) 93 CA4th 1100, 1106, 113 CR2d 680 (describing fee motion procedure), and *Elite Show Servs., Inc. v Staffpro, Inc.* (2004) 119 CA4th 263, 14 CR3d 184 (citing *Padilla* on nature of fee hearings). In practice, however, courts seldom allow live testimony.

The procedure is closely analogous to an application for a preliminary injunction, because (1) the trial court's discretion in determining fees is similar (see §§16.23-16.24) and (2) fee orders, like preliminary injunctions, are separately appealable (see §§16.1-16.9).

On motion procedure in general, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004) and the sample motion and supporting memorandum in Apps C-D.

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.34 D. Bifurcation of Entitlement and Amount Issues

### §11.34 D. Bifurcation of Entitlement and Amount Issues

In some instances, it may be advantageous to ask the court to first determine whether it should award fees at all. Then, if the court finds entitlement to fees, it may determine the amount of fees in a subsequent proceeding. Just as bifurcation of liability and damages issues is often useful in resolving the merits of actions, there are several advantages to bifurcated attorney fee proceedings:

- If the court finds no entitlement to a fee award, the parties and the court will not have wasted time on the amount issue;
- The amount issues may have an inappropriate influence on the entitlement issue;
- Bifurcated proceedings may be more manageable; and
- If the court finds entitlement, the parties may be able to settle or streamline the proceedings on amount issues.

There also are several disadvantages:

- The two-stage procedure may significantly delay entry of a fee award;
- Entitlement and amount issues may be closely intertwined; for example, under CCP §1021.5, the results the lawsuit obtains would be highly relevant to both issues;
- Having two motions may increase significantly the resources required from the parties and the court; and
- Courts dislike spending time on attorney fee motions and may not appreciate having two hearings when one would suffice.

**PRACTICE TIP:** If either the entitlement or the amount issue is fairly simple or undisputed, bifurcation is probably unnecessary. Note also that in the absence of a stipulation or court order, difficult timing issues might arise. See *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 195, 82 CR3d 586 (upholding motion to determine entitlement, but implying in dicta that motion to determine amount also would have had to be filed within time period provided by Cal Rules of Ct 3.1702(b)(1)). The parties should weigh all features of the case in deciding which procedure to use.

If bifurcated proceedings are desirable, they can be obtained in several ways. A stipulation with opposing counsel is the easiest and best method. Because bifurcated proceedings may be in both sides' best interests, stipulations are often feasible. Bifurcated proceedings can also be obtained by court order or by filing a motion for a determination of entitlement, specifying that the amount issues will be presented if the court finds entitlement. The latter procedure, however, involves the risk that either the opposing party or the court will object. It also may raise a timeliness issue. See *Chinn v KMR Prop. Mgmt.,* 166 CA4th at 195 (implying both entitlement and amount motions may have to be filed within time limited established by Cal Rules of Ct 3.1702(b)(1)). On bifurcation generally, see California Trial Practice: Civil Procedure During Trial §§6.99-6.104 (3d ed Cal CEB 1995).

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## VI. TIMING OF FEE MOTION IN STATE COURT

### A. Fees for Work in Trial Court

### §11.35 1. Fees Generally Should Be Sought Even if Merits Will Be Appealed

The prevailing party determination does not depend on a final determination in one party's favor. For example, a party who wins at the trial level is entitled to a fee award even if the merits decision on which fee entitlement is based has been appealed. The trial court retains jurisdiction to rule on a motion for fees despite an appeal from the underlying judgment. *Gregory v State Bd. of Control* (1999) 73 CA4th 584, 599 n8, 86 CR2d 575; *Robertson v Rodriguez* (1995) 36 CA4th 347, 360, 42 CR2d 464. See §§11.3-11.5 on jurisdictional considerations. But if the merits are reversed, the fee award may also be reversed. See §§2.91-2.93. The fee decision may also be deferred, however. See Cal Rules of Ct 3.1702(b)(2).

The tactical question in cases that have been or will be appealed is whether to move for fees prior to or following appeal on the merits. As a general rule, the prevailing party should move for fees as soon as possible after the case is settled or entry of judgment. Even if the underlying decision on the merits has been appealed, there are several reasons for moving immediately rather than awaiting the outcome of the appeal:

- A party that waits until the appeal on the merits has been resolved faces the prospect of a further round of trial court proceedings and appeal over the fee award, greatly delaying receipt of the fee;
- In contrast, if the trial court's fee determination is appealed by either party, it can be heard concurrently with or shortly after the appeal on the merits, greatly reducing the wait for a final fee award;
- The trial judge who decided the case is generally the judge the prevailing party would prefer to decide the fee motion as well, and if an appeal is taken, that judge may not be available to hear the fee motion (*i.e.*, due to retirement, etc.) when the merits appeal is finally decided);
- The information necessary for the fee application is fresh and can be more easily and effectively presented;
- The trial court's knowledge of the case is fresh, which may be of great benefit to the fee claim;
- A fee award, and the promise of a further fee award for defending the appeal, might influence the opposing party to settle; and
- If a stipulation or court order deferring the motion has not been obtained, the opponent might claim unfair prejudice, surprise, or waiver when the post-appeal motion is filed.

The advantage to waiting until after the appeal on the merits, of course, is that if the decision is reversed or significantly modified, the parties will have avoided unnecessary fee litigation. They may also have a firmer basis on which to settle any fee claim.

If the decision is made to await the results of the appeal on the merits, a stipulation or court order under Cal Rules of Ct 3.1702(b)(2) or (d) should be obtained to preserve the claim for trial court fees.

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### §11.36 2. Contractual and Statutory Fee Motions Must Be Filed Within Time to File Appeal

Fee motions based on either contract or statute that claim fees for services rendered through and including the rendition of judgment must be filed within the time for filing a notice of appeal, unless the parties stipulate otherwise or the court extends time. Cal Rules of Ct 3.1702(b), (d). See *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 705, 75 CR2d 376; *Save Our Forests & Ranchlands v County of San Diego* (1996) 50 CA4th 1757, 58 CR2d 708.

California Rules of Court 3.1702(a)-(b) provides:

> (a) Application
>
> Except as otherwise provided by statute, this rule applies in civil cases to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract. Subdivisions (b) and (c) apply when the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statute or contract refers to "reasonable" fees, because it requires a determination of the prevailing party, or for other reasons.
>
> (b) Attorney's fees before trial court judgment
>
> (1) *Time for motion* A notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court—including attorney's fees on an appeal before the rendition of judgment in the trial court—shall be served and filed within the time for filing a notice of appeal under [Cal] rules [of Ct] 8.104 and 8.108.
>
> (2) *Stipulation for extension of time* The parties may, by stipulation filed before the expiration of the time allowed under subdivision (b)(1) extend the time for filing a motion for attorney fees:
>
> (A) Until 60 days after the expiration of the time for filing a notice of appeal; or
>
> (B) If a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed under [Cal Rules of Ct] 8.278(c).

But see *Gamble v Department of Water & Power* (2002) 97 CA4th 253, 118 CR2d 271 (fee motion under CCP §1038 must be filed "at the earliest practical time 'prior to the discharge of the jury or the entry of judgment,'" citing CCP §1038(c)).

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### §11.37 a. In General, File Fee Motion 60 Days After Notice of Entry of Judgment

Under Cal Rules of Ct 8.104, a party generally has 60 days after the notice of entry of judgment to file a notice of appeal. See California Civil Appellate Practice §§7.25-7.43 (3d ed Cal CEB 1996). Under Cal Rules of Ct 8.108, various circumstances may extend the time to appeal. Thus, as a general rule, contractual and statutory attorney fee motions must be filed within 60 days after service or mailing of the notice of entry of judgment, unless there has been a valid posttrial motion that extends the time to appeal. *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1176, 23 CR3d 335 (fee motion timely (although fee award was reversed on other grounds) when filed within 30 days of denial of postjudgment motions). The rule also has been applied, however, to orders that are not final, appealable judgments. See *Sanabria v Embrey* (2001) 92 CA4th 422, 111 CR2d 837 (rule applies to voluntary dismissal); *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29 (rule applies to minute order requiring disclosure of documents). A different rule applies to fee claims for postjudgment work. See §11.38.

All prejudgment fees, including appellate fees incurred before the rendition of a final judgment in the trial court, must be claimed under Cal Rules of Ct 3.1702(b)(1), which requires motions to be served and filed within the time for filing a notice of appeal, *i.e.,* 60 days from notice of entry of judgment. *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1085, 120 CR2d 273 (decided under former Cal Rules of Ct 870.2(b)(1)). Generally, it is preferable for the party to include all fees incurred through the fee motion, but if that has not been done, a second motion to claim fees incurred on the fee motion is permissible. See *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 1002, 94 CR3d 802, discussed in §11.38.

**NOTE:** Claims for appellate fees when the appellate court "simply affirms the judgment without remanding the matter for further proceedings entailing the entry of a new judgment" must be made under Cal Rules of Ct 3.1702(c)(1) and 8.278(c)(1), which require such motions to be filed within 40 days after notice of issuance of the remittitur. 98 CA4th at 1084. See §11.43.

If the fee motion is filed prematurely, it may still be timely. 98 CA4th at 1086. See also *Marriage of Freeman* (2005) 132 CA4th 1, 33 CR3d 237 (reversing fee award under Fam C §271 for failure to comply with former Cal Rules of Ct 870.2(c)(1) (now Cal Rules of Ct 3.1702(c)(1))).

**WARNING:** Some statutes do provide a shorter period for filing an appeal. See, *e.g.,* CCP §870(b) (30 days from notice of entry of judgment to file appeal in validating proceedings). In lawsuits brought under such statutes, the fee motion should be made within the prescribed statutory time period.

**Order granting summary judgment.** An order granting summary judgment, as opposed to a judgment based on a summary judgment order, is not an appealable order and does not trigger the time limit under Cal Rules of Ct 3.1702(b)(1) for filing a fee motion. *Saben, Earlix & Assocs. v Fillet* (2005) 134 CA4th 1024, 36 CR3d 610 (decided under former Cal Rules of Ct 870.2(b)(1)).

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### §11.38 b. Rule Inapplicable to Postjudgment Work

Motions seeking fees for postjudgment work in the trial court are not subject to the timing requirements of Cal Rules of Ct 3.1702, even if there have been appealable postjudgment orders. *Crespin v Shewry* (2004) 125 CA4th 259, 265, 22 CR3d 696 (decided under former Cal Rules of Ct 870.2). The timing of such motions, however, must not unfairly prejudice the fee opponent. 125 CA4th at 271 (rejecting defendant's prejudice claims despite 3-year delay in filing fee motion). Following *Crespin, Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 59 CR3d 839, held that Rule 3.1702 does not apply to prejudgment orders, such as denial of a motion to strike under CCP §425.16, even if they are appealable. Instead, a fee motion based on such an order may be brought after entry of judgment at the conclusion of the litigation. 151 CA4th at 468.

In *Doppes v Bentley Motors, Inc.* (2009) 174 CA4th 967, 1002, 94 CR3d 802, the plaintiff brought a second fee motion to claim his fees incurred since the original posttrial motion was filed. The trial court denied the motion, but the court of appeal reversed, holding that while it would have been "more desirable" for the plaintiff to claim these fees by submitting a declaration before the hearing on the first fee motion, "a second motion including other postjudgment attorney fees was permissible."

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.39 3. Extensions and Stipulations

## §11.39 3. Extensions and Stipulations

If a fee motion cannot be filed within the time to file a notice of appeal, Cal Rules of Ct 3.1702 provides several alternatives:

- The parties may stipulate to extend the time for filing the motion until 60 days after the time for filing a notice of appeal has expired. Cal Rules of Ct 3.1702(b)(2)(A).
- If a notice of appeal is filed, the parties may extend the time until the time to file a memorandum of costs on appeal (40 days after the reviewing court mails notice of issuance of the remittitur, under Cal Rules of Ct 8.278(c)). Cal Rules of Ct 3.1702(b)(2)(B). This alternative is provided for parties who choose to defer litigation of attorney fees until after an appeal on the merits has been decided.

These stipulations must be filed before the expiration of the time for filing the fee motion. Cal Rules of Ct 3.1702(b)(2). Alternatively, an extension may be sought from the trial judge, who may extend the time for filing the fee motion in the absence of a stipulation or for a longer period than the stipulation allows. Cal Rules of Ct 3.1702(d).

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### §11.40 4. Relief From Default

Interpreting former Rule 870.2 (now Rule 3.1702), the courts have held that failure to file a motion for fees within the required time may be treated as a waiver of counsel's right to seek costs and fees. See *Bankes v Lucas* (1992) 9 CA4th 365, 11 CR2d 723; *Nazemi v Tseng* (1992) 5 CA4th 1633, 7 CR2d 762. In *Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 CA3d 924, 929, 272 CR 899, the court held that former Rule 870.2 (now Rule 3.1702) procedures were mandatory but not jurisdictional. This means that relief may be obtained under CCP §473 based on a showing of mistake, inadvertence, surprise, or excusable neglect. See *Lee v Wells Fargo Bank* (2001) 88 CA4th 1187, 106 CR2d 726; *Save Our Forests & Ranchlands v County of San Diego* (1996) 50 CA4th 1757, 58 CR2d 708. See also *Esther B. v City of Los Angeles* (2008) 158 CA4th 1093, 1099, 70 CR3d 596 (mandatory relief provision of §473(b) inapplicable to pro per attorney). The 6-month time limit for bringing a §473 motion begins to run when the trial court rules that the fee motion is untimely, although a request for §473 relief may be combined with a hearing on the belated motion. 88 CA4th at 1200. See also *Russell v Trans Pac. Group* (1993) 19 CA4th 1717, 24 CR2d 274. Compare *Russell* with *Gunlock Corp. v Walk on Water, Inc.* (1993) 15 CA4th 1301, 19 CR2d 197, discussed in §11.29.

In a related area, one court has held that substantial compliance with the filing requirements of the eminent domain law, CCP §1250.410, coupled with a lack of prejudice to the opposing party, was sufficient under CCP §473 to grant relief from default and allow a motion for fees to be heard. *Poway Unified Sch. Dist. v Chow* (1995) 39 CA4th 1478, 46 CR2d 651.

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### §11.41 5. Timing of Fee Motions Not Based on Contract or Statute

Fee awards that are not based on contract or statute (*e.g.,* fees based on equitable theories) appear to be fees authorized by "law" (CCP §1033.5(a)(10)(C)), which must be claimed by noticed motion under CCP §1033.5(c)(5). The safest procedure is to file the fee motion within the period for filing contractual and statutory fee motions required by Cal Rules of Ct 3.1702 (see §§11.36-11.38), or to make other arrangements as discussed in §11.39.

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### §11.42 6. Fees and Costs Claimed as Damages Must Be Claimed at Trial

**Fees claimed as damages.** Fees claimed as damages must be pleaded and proved at trial. See *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211 ("the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise"); *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 678 n16, 186 CR 589. *Brandt* suggested, however, that a "stipulation for a postjudgment allocation and award by the trial court would normally be preferable since the determination would then be made after completion of the legal services [citation], and proof that otherwise would have been presented to the jury could be simplified because of the court's expertise in evaluating legal services." 37 C3d at 819.

See also *Vacco Indus. v Van Den Berg* (1992) 5 CA4th 34, 56, 6 CR2d 602; *United Servs. Auto. Ass'n v Dalrymple* (1991) 232 CA3d 182, 283 CR 330; *No Oil, Inc. v City of Los Angeles* (1984) 153 CA3d 998, 1005, 200 CR 768.

In certain other circumstances, attorney fees also must be pleaded and proved as an element of the main case. See, *e.g.*, Govt C §800, discussed in §§2.81, 3.90-3.93. See also *Gamble v Department of Water & Power* (2002) 97 CA4th 253, 118 CR2d 271 (fee motion under CCP §1038 must be filed "at the earliest practical time 'prior to the discharge of the jury or the entry of judgment,'" citing CCP §1038(c)).

**Expert witness fees and other expenses recoverable under contract.** If a party seeks recovery of expert witness fees or other nonstatutory expenses under a contractual provision, the party must plead and prove the fee or expenses amounts at trial as damages rather than seek them as costs or fees. See *Carwash of America-PO LLC v Windswept Ventures No. 1* (2002) 97 CA4th 540, 544, 118 CR2d 536, and cases cited therein. A different rule applies to expert fees claimed under statute. See *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 1016, 83 CR3d 306 (expert fees recoverable under FEHA, Govt C §12965(b), may be claimed with fee motion).

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### §11.43 B. Fees in Trial Court After Appeal

Two different timing rules apply to fee claims following an appeal. If a new judgment on the merits must be entered following the appeal, either because the prior judgment has been reversed or the judgment must be amended, Cal Rules of Ct 3.1702(b) applies. Under that rule, trial court fees sought for the first time after an appeal (*i.e.,* when a prior adverse decision is reversed on appeal) or sought because the initial fee order was remanded for a new determination must be claimed within 60 days after entry of a new judgment in the trial court. Any appellate fees that have been incurred before the new final judgment should be claimed along with any prejudgment trial court fees under Cal Rules of Ct 3.1702(b)(1) (requiring motions be filed within 60 days from entry of judgment). *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1085, 120 CR2d 273 (decided under former Cal Rules of Ct 870.2(b)(1)). See §§11.36-11.38.

If, however, the appeal "simply affirms the judgment without remanding the matter for further proceedings entailing the entry of a new judgment," the claim must be made under Cal Rules of Ct 3.1702(c)(1) and 8.278(c)(1), which require such motions for appellate fees to be filed within 40 days after notice of issuance of the remittitur. 98 CA4th at 1084. If the fee motion is filed prematurely, it may still be timely. 98 CA4th at 1086. See §§11.36-11.38.

The same provisions for stipulations and extensions applicable to trial court fee claims (§11.39) apply to appellate fee claims. Cal Rules of Ct 3.1702(c)(2), (d).

The trial court has jurisdiction to consider the fee application for the first time on remand, even without a specific directive from the appellate court. *Katz v Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 CA4th 47, 70, 11 CR3d 546.

**NOTE:** Following reversal of a fee order on appeal, the judge who issued the fee order may be subject to disqualification under CCP §170.6(a)(2) (permitting additional peremptory disqualification when "new trial" required following appeal). The decisions on whether an appellate order requiring a new attorney fee motion constitutes a "new trial" are divided. Compare *First Fed. Bank of Cal. v Superior Court* (2006) 143 CA4th 310, 315, 49 CR3d 296, and *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 767, 132 CR2d 400, with *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 695, 32 CR 288. See also *Paterno v Superior Court* (2004) 123 CA4th 548, 557, 20 CR3d 282 (questioning *Pfeiffer Venice*).

On claiming fees for appellate services, see chap 12.

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## §11.44 VII. FEDERAL COURT PROCEDURES AND TIME LIMITS

A detailed discussion of federal procedures and time limits is beyond the scope of this book, but generally Fed R Civ P 54(d)(2) requires the following unless otherwise provided by statute or court rule:

- A motion for attorney fees must be filed within 14 days after entry of judgment;
- The motion must state the basis for the fee award and the amount sought or a "fair estimate" of it, and disclose, if ordered by the court, any fee agreement with the client;
- The court must afford a party or class member an "opportunity for adversary submissions" on the motion;
- The court may decide entitlement to fees before deciding the amount, if any;
- The court must make findings and state conclusions on the fee motion under Fed R Civ P 52(a); and
- Courts may establish local rules to resolve fee matters "without extensive evidentiary hearings."

Under Rule 54, many federal courts have adopted local rules establishing procedures and time limits for fee motions. See, *e.g.,* ED Cal Local R 293 (establishing 28-day time limit for filing fee motions and describing showing required and criteria for award); ND Cal Local R 54-5 (establishing 14-day time limit for filing fee motions, specifying form of motion, and requiring meet and confer prior to filing); CD Cal Local R 54-12 (establishing 14-day time limit for filing fee motions). These local rules are not jurisdictional. *Harris v Marhoefer* (9th Cir 1994) 24 F3d 16, 20 n4; *VISA Int'l Serv. Ass'n v Bankcard Holders of Am.* (9th Cir 1986) 784 F2d 1472, 1476 (trial court has discretion to "forgive… noncompliance" with local rule). But see *Kyle v Campbell Soup Co.* (9th Cir 1994) 28 F3d 928. See also *Webb v Ada County* (9th Cir 1999) 195 F3d 524; *Peterson v Minidoka County Sch. Dist. No. 331* (9th Cir 1997) 118 F3d 1351, 1360 (for purposes of local rule requiring attorney fees petition within 14 days after entry of final judgment, final judgment not "entered" until postjudgment motions denied); *Smith v Village of Maywood* (7th Cir 1992) 970 F2d 397, 399 (noting "need for flexibility and good sense in interpreting time limits on attorneys' fee petitions").

Fees claimed under California law must be filed within the time limits of Fed R Civ P 54(b). *Port of Stockton v Western Bank Ctr.* (9th Cir 2004) 371 F3d 1119.

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.45 VIII. CLAIMS FOR STATUTORY COSTS OTHER THAN ATTORNEY FEES

## §11.45 VIII. CLAIMS FOR STATUTORY COSTS OTHER THAN ATTORNEY FEES

Counsel must be sure to submit a request for "pure" or "statutory" court costs (including filing, service, deposition, and witness fees) in a memorandum of costs and disbursements within the required time limits. The procedures for claiming statutory costs are set out in Cal Rules of Ct 3.1700.

Trial court costs must usually be claimed *within 15 days* after the date of mailing of the notice of entry of judgment. Cal Rules of Ct 3.1700(a)(1). See *Lee v Wells Fargo Bank* (2001) 88 CA4th 1187, 1197, 106 CR2d 726 (decided under former Cal Rules of Ct 870); *Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 CA3d 924, 927, 272 CR 899 (same).

**NOTE:** Some courts have allowed discretionary costs under CCP §1033.5(c)(4) to be claimed in conjunction with an attorney fee motion. See *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1218 n27, 78 CR3d 572 (transcript and translation expenses); *Plumbers & Steamfitters, Local 290 v Duncan* (2007) 157 CA4th 1083, 1099, 69 CR3d 184 (computerized legal research). The safer course, however, would be to claim such discretionary expenses as costs.

Expert fees that are recoverable under statute are not recoverable as "costs;" as such, they are not subject to the time limitations of Cal Rules of Ct 3.1700 but instead may be claimed with the party's fee motion. *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 1015, 83 CR3d 306.

When a contract provides for the recovery of nonstatutory costs, including expert witness fees, they must be pleaded and proved at trial. *Carwash of America-PO LLC v Windswept Ventures No. 1* (2002) 97 CA4th 540, 544, 118 CR2d 536.

Similar though not identical rules apply in federal court. Statutory costs should be claimed by the ordinary costs procedure, but nonstatutory expenses should be claimed as attorney fees. See §§9.128-9.130. Compare *Lytle v Carl* (9th Cir 2004) 382 F3d 978, 989, with *Harris v Marhoefer* (9th Cir 1994) 24 F3d 16.

On eligibility for statutory costs, see §§2.47-2.49.

On the parties' respective burdens to document or challenge costs, see *El Dorado Meat Co. v Yosemite Meat & Locker Serv., Inc.* (2007) 150 CA4th 612, 58 CR3d 590; *Benach v County of Los Angeles* (2007) 149 CA4th 836, 57 CR3d 363; *Wagner Farms, Inc. v Modesto Irrig. Dist.* (2006) 145 CA4th 765, 52 CR3d 683; *Jones v Dumrichob* (1998) 63 CA4th 1258, 74 CR2d 607.

Appellate costs must be claimed in the trial court within 40 days after the mailing of the notice of issuance of the remittitur. Cal Rules of Ct 8.278(c).

**PRACTICE TIP:** Counsel may wish to state in the memorandum of costs that attorney fees and other out-of-pocket expenses (see §§9.128-9.130) are being or will be claimed in a separate motion. This statement clarifies the procedure being followed and precludes a later claim of surprise.

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## IX. THE FEE MOTION PROCEDURE

### §11.46 A. The Initial Motion

A comprehensive, well-documented fee application often is essential to obtaining a reasonable fee award. The attorney claiming fees has the burden of producing evidence to support the fee claim. *Hensley v Eckerhart* (1983) 461 US 424, 433, 76 L Ed 2d 40, 50, 103 S Ct 1933; *Melnyk v Robledo* (1976) 64 CA3d 618, 606, 134 CR 602. See also CCP §1033.5(c)(5).

In preparing the application, it is important to keep in mind the showing required to demonstrate both entitlement to fees and the amount to be awarded. On the one hand, the courts have tried to discourage extended attorney fee proceedings, stating that a request for fees should not result in a "second major litigation." *Hensley v Eckerhart* (1983) 461 US 424, 437, 76 L Ed 2d 40, 53, 103 S Ct 1933. See also *Webb v Board of Educ.* (1985) 471 US 234, 244 n20, 85 L Ed 2d 233, 243 n20, 105 S Ct 1923 (lauding trial court for admonishing parties to "limit adversary hostilities and to avoid excessive cross-examination of fee witnesses"); *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1098, 95 CR2d 198, quoting *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 642, 186 CR 754 ("We do not want 'a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It… is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief'"); *Jones v Dumrichob* (1998) 63 CA4th 1258, 1268 n5, 74 CR2d 607 (documentation submitted to support costs bill not required to comply with Evidence Code).

On the other hand, the large amounts that may be at stake and the extensive documentation required by the courts occasionally turn fee applications into litigation that equals or exceeds in intensity the litigation on the merits.

On the contents of a comprehensive fee motion, see §11.53.

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### §11.47 1. Entitlement to Fees Usually Based on Record, But Other Circumstances May Be Considered

The determination of entitlement to fees is generally based on the record already before the court, although the court is authorized to consider additional evidence. The trial court can usually determine entitlement from the file and from its general knowledge. See *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 940, 154 CR 503 (determination of entitlement should be based on "a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case"). See also:

- *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589 ("the inquiry as to a party's success must be a pragmatic one that may range outside the merits of the underlying dispute");
- *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 8, 232 CR 697 ("Except in rare situations [determining whether the elements of CCP §1021.5 are present] does not require either [the trial or appellate] court to make factual findings based on conflicting testimony from live witnesses of varying credibility");
- *Leiserson v City of San Diego* (1988) 202 CA3d 725, 735, 249 CR 28 ("the court must critically analyze the surrounding circumstances of the litigation and pragmatically assess the gains achieved by a particular action"); and
- *Braude v Automobile Club* (1986) 178 CA3d 994, 1013, 223 CR 914 (party claiming fees under CCP §1021.5 need not show actual and concrete benefits conferred on large class of persons).

Thus, the court can, for example, presume a significant benefit to a large class of persons from an appellate decision settling the law for other persons in the same position as the plaintiff. See §§3.58-3.59.

Occasionally, however, evidence must be presented on elements of entitlement that may not be apparent. For example, in catalyst cases, the plaintiff may have to present factual evidence on other factors, such as the catalytic effect of the lawsuit, "the precise factual/legal condition" that the plaintiff sought to change, and reasonable prelitigation notice. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 576, 21 CR3d 331. In such cases, *Graham* states that "[s]ometimes this factual background will have been developed in the course of litigation," but that such background also "may generally be established during the attorney fee proceedings by declarations, or, at the discretion of the trial court, by an abbreviated evidentiary hearing." 34 C4th at 576 (citing this book). See also *Yield Dynamics, Inc. v TEA Systems Corp.* (2007) 154 CA4th 547, 579, 66 CR3d 1; *Angelheart v City of Burbank* (1991) 232 CA3d 460, 285 CR 463; *Los Angeles Police Protective League v City of Los Angeles, supra* (factual evidence occasionally required on such issues as significance of benefit and burden of private enforcement). These showings can be made by presenting (among other things) declarations, documentary evidence, and judicially noticeable matters. See *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 173 n4, 17 CR2d 510 (positions previously taken by fee opponent were proper basis for determining that significant benefit was conferred on large class of persons). See also *Padilla v McClellan* (2001) 93 CA4th 1100, 1106, 113 CR2d 680 (describing fee motion procedure).

**NOTE:** Occasionally, the court will determine entitlement as part of the judgment. If the fee-opponent objects, it must file a motion to vacate the judgment. See *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 776, 118 CR2d 629.

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### §11.48 2. Amount of Fees Claimed Should Be Carefully Documented

The amount of fees claimed should be thoroughly and carefully supported. Although the trial court has broad discretion in determining the amount of fees to be awarded (see §16.23), the claiming attorney should be prepared to present evidence on each factor relevant to computation of a fee under the lodestar method: the amount of time spent, including the general subject matter of the time expenditures (*Hensley v Eckerhart* (1983) 461 US 424, 437 n12, 76 L Ed 2d 40, 53 n12, 103 S Ct 1933); the hourly rates, including the basis for those rates (see §§9.120-9.121); and every other relevant factor (*e.g.,* contingency and preclusion of other employment) the court must assess in determining the fee (see chap 9). See, *e.g., Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 777, 118 CR2d 629; *Fair Housing of Marin v Combs* (9th Cir 2002) 285 F3d 899. See also *City of Oakland v McCullough* (1996) 46 CA4th 1, 10, 53 CR2d 531 (fee request partially denied because it was unaccompanied by any supporting declaration or documentation), and compare with *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 110 CR2d 145. In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 394, 33 CR3d 644, the court recognized that fee claims must be documented while also reiterating the requirement that attorneys must be fully compensated for their services.

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### 3. California and Federal Courts Differ on Amount of Documentation Required

#### §11.49 a. Federal Courts

The extent to which extensive documentation of the attorney fee claim is required varies from court to court and judge to judge. Federal courts have shown some extreme views. Compare the rigorous requirements stated in *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319 with the more flexible application procedures discussed in *Jordan v Department of Justice* (DC Cir 1982) 691 F2d 514, 520, *Frank Music Corp. v Metro-Goldwyn-Mayer, Inc.* (9th Cir 1989) 886 F2d 1545, 1557 (contemporaneous time records not required when request is reasonable and supported by other evidence), and *U.S. v $12,248 U.S. Currency* (9th Cir 1992) 957 F2d 1513. See also *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109, 1129 (use of "block billing" may not justify across-the-board reduction or rejection of all hours).

**Additional authorities:** *United Steelworkers v Retirement Income Plan* (9th Cir 2008) 512 F3d 555, 565 (rejecting defendant's arguments that fees should have been reduced for insufficient description and block billing); *Welch v Metropolitan Life Ins. Co.* (9th Cir 2007) 480 F3d 942, 948 (reversing 20-percent reduction for "block billing" as excessive and remanding for more limited reduction; affirming 20-percent reduction for billing in quarter-hour increments based on review of records showing that practice greatly overstated time spent); *Democratic Party of Wash. v Reed* (9th Cir 2004) 388 F3d 1281, 1286 (fee records may be redacted to avoid revealing privileged information, so long as court can judge "whether the work was an appropriate basis for fees"); *Lytle v Carl* (9th Cir 2004) 382 F3d 978, 989 (though "minimal," time records "establish that the time was spent on the matters for which the district court awarded attorneys' fees"); *Lobatz v U.S. W. Cellular, Inc.* (9th Cir 2000) 222 F3d 1142, 1149 (trial court did not err by relying on time summaries rather than on contemporaneous records); *Gates v Gomez* (9th Cir 1995) 60 F3d 525 (billing statements for client contacts that listed date of communication, person who performed it, and sometimes the issue addressed, found "more than sufficient"); *Intel Corp. v Terabyte Int'l* (9th Cir 1993) 6 F3d 614, 623 (summaries acceptable in proper circumstances, but underlying records must be made available); *Prison Legal News v Schwarzenegger* (ND Cal 2008) 561 F Supp 2d 1095, 1101 n2 (rejecting "block-billing" objection). *U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1433, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1542, modified on other grounds (9th Cir 1993) 984 F2d 345 (approving use of time records reconstructed from litigation files and other records).

But see *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895 (fee reduction affirmed based on fee application that contained "commingled and undifferentiated" estimates of time spent on one successful claim and several unsuccessful claims which were found to be unrelated). See also §§9.86-9.89.

On proper billing for fees and other expenses, see ABA Formal Opinion 93-329 (Dec. 6, 1993).

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### §11.50 b. California Courts

In general, California courts have required less documentation than federal courts and have given more discretion to the trial court. See, *e.g., Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 255, 110 CR2d 145 ("California case law permits fee awards in the absence of detailed time sheets"); *Steiny & Co. v California Elec. Supply Co.* (2000) 79 CA4th 285, 293, 93 CR2d 920 (same); *Mardirossian & Assocs., Inc. v Ersoff* (2007) 153 CA4th 257, 270, 62 CR3d 665 (quantum meruit case following *Steiny* and noting that reconstructed evidence sufficient when attorneys only estimated total hours spent, not amount for "each piece of correspondence, discovery or pleading"); *Weber v Langholz* (1995) 39 CA4th 1578, 46 CR2d 677 (attorney's declaration summarizing work performed and listing hourly rates and total fees incurred was sufficient for fee award, even though unsubstantiated by time records and billing statements). See also *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 512, 89 CR3d 615; *Bernardi v County of Monterey* (2008) 167 CA4th 1379, 1398, 84 CR3d 754; *Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413. But see *Christian Research Inst. v Alnor* (2008) 165 CA4th 1315, 1325, 81 CR3d 866.

In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 396, 33 CR3d 644, the court of appeal held that trial courts do not have unfettered discretion to disregard entirely the time records submitted by fee-claimants, stating:

> the verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous.... [T]he trial court abused its discretion in failing to use counsels' time records as the starting point for its lodestar determination. [Citation omitted] The court's expressed reasons for departing from this "ordinary" method of calculating the lodestar amount do not support a conclusion that reliance on the records would lead to an unjust result.

**Additional authorities:** *Sommers v Erb* (1992) 2 CA4th 1644, 1652, 4 CR2d 52; *Glendora Community Redev. Agency v Demeter* (1984) 155 CA3d 465, 202 CR 389; *Dudman v State* (1983) 145 CA3d 617, 619, 193 CR 500, and cases cited there. *Lafayette Morehouse, Inc. v Chronicle Publishing Co.* (1995) 39 CA4th 1379, 46 CR2d 542 (billing statements edited to delete information protected by attorney-client privilege); *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 37 CR2d 149; *All-West Design, Inc. v Boozer* (1986) 183 CA3d 1212, 228 CR 736 (no time records); *Martino v Denevi* (1986) 182 CA3d 553, 559, 227 CR 354 (contemporaneous time records need not be submitted to recover attorney fees); *Excelsior Union High Sch. v Lautrup* (1969) 269 CA2d 434, 446, 74 CR 835 (same). But see *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1810, 56 CR2d 483; *Garcia v Hyster Co.* (1994) 28 CA4th 724, 34 CR2d 283.

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### §11.51 4. Fee Motions in Small or Uncontested Fee Matters

In small or uncontested fee matters, the more extensive showing described in §11.48 may not always be required. The trial court has the discretion to set fees based on its own knowledge of what fees are reasonable and may do so even when no evidence is presented. *Hadley v Krepel* (1985) 167 CA3d 677, 686, 214 CR 461. However, in *Hadley*, the fee award was reversed based on the trial judge's "unrealistic view of what constitutes a reasonable value for legal services." 167 CA3d at 686. See also *Garcia v Hyster Co.* (1994) 28 CA4th 724, 737, 34 CR2d 283 (recognizing trial court's discretion to base fee award on its informed opinion, appellate court reversed award based solely on conclusory declarations lacking hourly fee or accounting of time spent); *Martino v Denevi* (1986) 182 CA3d 553, 559, 227 CR 354 (recognizing time records not required, appellate court reversed $40,000 fee award as lacking factual basis).

*Hadley*, *Garcia*, and *Martino* demonstrate that if the fee award is challenged, the trial court's decision is more likely to be overturned if it is unsupported by evidence. See also, *e.g., Mandel v Lackner* (1979) 92 CA3d 747, 758, 155 CR 269.

Statutory or contractual fees that may be fixed without the need for a court determination must be claimed in the memorandum of costs. Cal Rules of Ct 3.1702(e).

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### §11.52 5. Judge to Whom Fee Motion Should Be Presented

The attorney fee motion should be presented to the judge who heard the merits of the case. A critical factor in determining whether an adequate fee award will be recovered is how favorably the trial judge viewed the case and the attorney's work on it.

Obtaining an adequate fee award is more difficult. therefore, if the fee motion must be presented to a different judge or if most of the claimed activity occurred outside the courtroom (*e.g.,* in settlement negotiations). To obtain an adequate award in these situations, counsel must be especially careful to fully explain the issues, the history of the case, and the nature of the work performed. See *Long Beach City Employees Ass'n v City of Long Beach* (1981) 120 CA3d 950, 961, 172 CR 277 (when judge deciding fee motion was not judge who decided merits, fee applicants must make evidentiary showing justifying reasonable amount of fees).

**NOTE:** Following reversal of a fee order on appeal, the judge who issued the fee order may be subject to disqualification under CCP §170.6(a)(2). The decisions on this issue are divided. Compare *First Fed. Bank of Cal. v Superior Court* (2006) 143 CA4th 310, 315, 49 CR3d 296, and *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 767, 132 CR2d 400, with *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 695, 32 CR 288. See also *Paterno v Superior Court* (2004) 123 CA4th 548, 557, 20 CR3d 282 (questioning *Pfeiffer Venice*).

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.53 6. Contents of Comprehensive Fee Motion

### §11.53 6. Contents of Comprehensive Fee Motion

A comprehensive fee motion should include:

- A notice of motion stating the date, time, and place of the motion, as well as a statement of the grounds for entitlement to fees and the documents on which the fee claim is based. For an example, see App C.
- A comprehensive memorandum of law. This is the cornerstone of a successful fee motion, and it should state the relevant facts and procedural history of the case, the bases for entitlement to a fee award, and the evidence supporting the amount of fees sought, including any relevant case law and supporting evidence. For an example, see App D.
- Declarations from the attorneys claiming fees, stating their background and training, their role in the litigation, a description of their services (often with time records attached as an exhibit to the declaration), an explanation of why the hours are reasonable (*e.g.,* hours generated by the losing party's tactics), a description of any billing judgment exercised, a statement of the hourly rates and their basis, and any other facts the court needs for its determination. These other facts might include the complexities and results of the litigation, how multiple counsel divided responsibilities in litigating the action, and whether counsel took the case on a contingent basis. Any expenses claimed as part of the fee (see §§9.124-9.131) should also be documented. If the petitioning attorney has received rate determinations in other fee cases that tend to support the rate requested, these should be set forth in the declarations. If other attorneys in the firm, or comparable attorneys in the area, have received comparable rates, these too should be set forth. The retainer agreement with the client need not be disclosed; if relevant, it may be described in a declaration. See, *e.g., Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir 2004) 374 F3d 857, 866. For an example, see App E.
- In larger fee cases, declarations from other attorneys, experts, or others supporting the fee application are generally essential. See, *e.g*., *Mardirossian & Assocs., Inc. v Ersoff* (2007) 153 CA4th 257, 272, 62 CR3d 665 (quantum meruit case affirming trial court's admission of expert evidence on reasonableness of hours spent); *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 782, 118 CR2d 629; *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1085 n8, 241 CR 239; *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 101, 228 CR 847; *Martino v Denevi* (1986) 182 CA3d 553, 558, 227 CR 354; *Mandel v Lackner* (1979) 92 CA3d 747, 762, 155 CR 269. These declarations can address issues bearing on the applicant's entitlement to fees, such as the importance of the right protected or the number of persons benefited under CCP §1021.5. More often, they address the amount of fees, going to the reasonableness of the rates requested or of the number of hours spent, or both, the quality of the work, the effect of contingent representation, and any other relevant factors. See, *e.g., Lobatz v U.S. W. Cellular, Inc.* (9th Cir 2000) 222 F3d 1142, 1148 (in upholding class action fee award, court refers to expert's opinion); *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 700 n12. For an example, see App F. See also §§10.31-10.73.
- A declaration stating that the rates are reasonable should also state the evidentiary basis for that conclusion, *e.g.,* that the claimed rates are consistent with the declarant's rates or that the declarant has specific knowledge of community rates. See, *e.g., Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629; *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1546, modified on other grounds (9th Cir 1993) 984 F2d 345; *Jordan v Multnomah County* (9th Cir 1987) 815 F2d 1258, 1263 n9; *Chalmers v City of Los Angeles* (9th Cir 1986) 796 F2d 1205, 1214; *Corder v Gates* (CD Cal 1988) 688 F Supp 1418, 1422, aff'd in part and rev'd in part (9th Cir 1991) 947 F2d 374. On facts relevant to a percentage-based award, see *Vizcaino v Microsoft Corp.* (9th Cir 2002) 290 F3d 1043, 1049. For an example, see App F.

**PRACTICE TIP:** The more specific the information in the declarations, the better. For example, if the attorney with the most time on the case has 20 years of experience, declarations showing what comparable private law firms would bill for a 20-year lawyer would be ideal. By contrast, a declaration merely stating without elaboration that the declarant has reviewed the hourly rates and finds them reasonable will not be given as much weight.

- Survey data may be useful, as long as the survey is geared to the relevant market. See, *e.g., Maughan v Google Technology, Inc.* (2006) 143 CA4th 1242, 1256, 49 CR3d 861 (dissenting opinion of Vogel, J.); *Guinn v Dotson* (1994) 23 CA4th 262, 269, 28 CR2d 409. See §9.121.
- A proposed Order Awarding Reasonable Attorney Fees, including specific findings on the lodestar or touchstone figures, may be useful, although in larger fee cases, courts tend to prepare their own decisions. See §11.65.

If required elements are omitted from the initial filing, they may be filed supplementally if there is no prejudice to the opposing party. See *U.S. v Hristov* (9th Cir 2005) 396 F3d 1044, 1045. See also *Scarborough v Principi* (2004) 541 US 401, 158 L Ed 2d 674, 124 S Ct 1856.

**PRACTICE TIP:** Counsel should always consult local court rules for motion procedures. For example, ND Cal Local R 54-5(b) describes supporting materials required for fee applications in the United States District Court for the Northern District of California.

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## §11.54 B. Discovery

Limited discovery concerning the basis for a fee request is permissible. See *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 712, 32 CR 288; *State v Meyer* (1985) 174 CA3d 1061, 1075, 220 CR 884. See also *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319, 1329. Because discovery concerning the fee award would ordinarily be initiated after the discovery cutoff date (CCP §§2024.020(a)), leave of court under CCP §2024.050(a) may be required to conduct such discovery.

**PRACTICE TIP:** If a party seeks discovery, it should be timed so that responses, if helpful, can be incorporated into the opposition or reply.

A party seeking discovery should do so by a specific request (*i.e.,* notice a deposition or request documents) as soon as the fee motion is filed. See *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 711, 32 CR 288. Because fee issues are generally resolved by motion, discovery may have to be conducted on an expedited basis or, preferably, with the cooperation of opposing counsel by establishing a discovery, briefing, and hearing schedule. A party who waits until the hearing on the fee motion to seek discovery is likely to be disappointed. See *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 235, 226 CR 265 (denial of generalized request for "discovery" not an abuse of discretion).

**NOTE:** Under federal law, discovery on fee matters is rarely permitted. Manual for Complex Litigation §14.224 (4th ed Federal Judicial Center 2004). See also Fed R Civ P 54(d), Advisory Comm. Notes on 1993 Amendments (discovery useful on "rare occasion").

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### §11.55 1. Limited to Relevant Factors

Discovery must be limited to relevant factors. For example, in both *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 640, 186 CR 754, and *Margolin v Regional Planning Comm'n* (1982) 134 CA3d 999, 1003, 185 CR 145, the courts rejected defendants' attempts to discover the salaries and overhead costs of plaintiffs' public interest attorneys. See *Shaffer v Superior Court* (1995) 33 CA4th 993, 1003, 39 CR2d 506 (in determining whether law firm's fees were unconscionable, hourly rate firm paid to contract attorney was irrelevant and therefore could not be discovered). As the court said in *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 1098, 95 CR2d 198, quoting *Serrano IV,* 32 C3d at 642, "We do not want 'a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It… is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief.'"

Discovery in connection with fee motions is far more constrained that discovery on the merits. See, *e.g.*, *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.* (1st Cir 1995) 56 F3d 295, 303 (nothing "require[s] freewheeling adversarial discovery as standard equipment in fee contests"); *Abels v JBC Legal Group, Inc.* (ND Cal 2006) 233 FRD 645 (denying discovery of plaintiff's fees, including fee agreement, before determination of merits). For example, in *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 61 CR3d 295, the court held that "a presumption exists against deposing opposing counsel that can be rebutted only by meeting a high standard of extremely good cause." 152 CA4th at 424. The court noted that attorney depositions would "add to the length and expense of litigation" and that "the parties would become sidetracked by collateral disputes." 152 CA4th at 424. The court also noted that the defendant had not been deprived of critical information. 152 CA4th at 425.

*Riverside Sheriffs'* distinguished *Save Open Space Santa Monica Mountains v Superior Court* (2000) 84 CA4th 235, 250, 100 CR2d 725, in which the court permitted discovery when the party opposing a fee award had produced evidence suggesting that the litigation had been funded by outside sources and might not meet the CCP §1021.5 "burden of private enforcement" requirement. However, the court noted that only limited, incremental, in camera discovery concerning the funding of the litigation would be allowed.

On the discovery rights of objectors to class action fee awards, see *Lobatz v U.S. W. Cellular, Inc.* (9th Cir 2000) 222 F3d 1142, 1148.

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### §11.56 2. Fee Records of Opposing Counsel

Sometimes, a fee claimant may wish to discover the opponent's fee records in order to show, *e.g.,* that the number of hours claimed is reasonable. If the fee opponent is challenging the reasonableness of the number of hours spent by the fee claimant's attorneys, the number of hours spent by the fee opponent attorneys would seem relevant but not dispositive. The discoverability of such records has engendered some conflict within the federal courts. Compare *Gaines v Board of Educ.* (11th Cir 1985) 775 F2d 1565, 1571 n12 (in some circumstances opponent's fee records are discoverable), with *Johnson v University College* (11th Cir 1983) 706 F2d 1205, 1208 (district court has discretion to deny discovery of opponent's fee records).

The discoverability issue often turns on the relevance of the opposing party's records. See *Democratic Party of Wash. v Reed* (9th Cir 2004) 388 F3d 1281, 1287 (plaintiffs' hours not excessive because number of hours claimed of same "magnitude" as opponent's hours); *Cairns v Franklin Mint Co.* (9th Cir 2002) 292 F3d 1139 (declining to reduce defendant's lodestar in part because opponent had incurred even greater fees); *Robinson v City of Edmond* (10th Cir 1998) 160 F3d 1275, 1284 (opponent's hours relevant but not dispositive); *McGinnis v Kentucky Fried Chicken* (9th Cir 1994) 51 F3d 805, 809 (noting that defendant spent "considerably more money losing than its adversary spent winning"); *Chalmers v City of Los Angeles* (9th Cir 1986) 796 F2d 1205, 1214 (stating that information about defendant's fees would be helpful); *Mirabal v GMAC* (7th Cir 1978) 576 F2d 729, 731 (fees paid by opposing party to its own counsel irrelevant to determination of fees awardable to prevailing party); *Dease v City of Anaheim* (CD Cal 1993) 838 F Supp 1381, 1383 (that defendant's counsel spent less time than plaintiff's was "irrelevant"); *Real v Continental Group, Inc.* (ND Cal 1986) 116 FRD 211 (defense counsel's hours and rates relevant and not privileged, but underlying billing records not discoverable to extent they reveal nature of services provided). See also *Ballen v City of Redmond* (9th Cir 2006) 466 F3d 736, 746 (rejecting, among other things, City's contention that plaintiff's hours excessive because City's attorneys spent significantly fewer hours); *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145, 1151 (explaining reasons why plaintiff's attorney may need to expend more hours than defendant's).

California courts also have noted the utility of such comparisons (see, *e.g., Deane Gardenhome Ass'n v Denktas* (1993) 13 CA4th 1394, 1399, 16 CR2d 816 (comparing losing party's fees with prevailing party's claim for fees); *West Coast Dev. v Reed* (1992) 2 CA4th 693, 707, 3 CR2d 790) but have not ruled directly on the discoverability of an opponent's fee information.

**PRACTICE TIP:** As a practical matter, fee opponents tend to submit their own fees when they are significantly less than the claimant's and object to discovery requests when they are greater. The fee claimant's strategy is the opposite.

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### §11.57 3. Attorney Depositions

Occasionally, parties may also wish to take the depositions of the claiming attorneys or the attorneys whose declarations are submitted to support or oppose the fee motion. In *Riverside Sheriffs' Ass'n v County of Riverside* (2007) 152 CA4th 414, 424, 61 CR3d 295, however, the court held that "[a] presumption exists against deposing opposing counsel that can be rebutted only by meeting a high standard of extremely good cause." The court noted that attorney depositions would "add to the length and expense of litigation" and that "the parties would become sidetracked by collateral disputes." 152 CA4th at 424. The court also noted that the defendant had not been deprived of critical information. 152 CA4th at 425.

If the attorneys to be deposed qualify as experts, the opposing party must pay them expert witness fees when taking their depositions. See CCP §§2034.410-2034.470. On the recoverability of such expert witness fees, see §§9.124-9.129.

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### C. Opposition Papers

### §11.58 1. Preparing Opposition

Any opposition to a fee motion must be prepared with great care. A verified cost bill (and presumably a fee motion supported by declarations) is prima facie evidence that the costs, expenses, and services listed were necessarily incurred. *Hadley v Krepel* (1985) 167 CA3d 677, 682, 214 CR 461. The opponent may challenge any fees and costs that it believes are unreasonable or unjustified by presenting oral or written evidence in opposition. When fees and costs are challenged, the burden shifts to the claiming party to justify them. Conclusory and unsubstantiated objections to a fee claim, however, are inadequate to rebut the presumption that the claiming party's fees were reasonably and necessarily incurred. *Premier Med. Mgmt. Sys., Inc. v CIGA* (2008) 163 CA4th 550, 563, 77 CR3d 695; *State v Meyer* (1985) 174 CA3d 1061, 1075, 220 CR 884; *Hadley v Krepel,* 167 CA3d at 684. If the fee claim appears on its face to be unjustified or unreasonable and is properly challenged by the fee opponent, the burden shifts back to the fee claimant to establish its propriety. See *State v Meyer, supra*.

In general, the opposition should consist of a well-reasoned supporting memorandum and declarations supporting the fee opponent's position and specifically challenging any relevant untrue factual assertions made by the fee claimants.

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### §11.59 2. Stating and Supporting Objections

Objections to costs or fees that are not stated are waived. For example, in *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 118 CR2d 629, the court refused to hear a challenge to plaintiff's entitlement to fees because that argument had not been raised when the plaintiff submitted a proposed judgment which awarded fees. In *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1227, 217 CR 125, the court of appeal cited the fact that appellants did not cross-examine plaintiff's attorneys about the adequacy of their documentation of hours as a factor supporting affirmance of the award. See also *Premier Med. Mgmt. Sys., Inc. v CIGA* (2008) 163 CA4th 550, 564, 77 CR3d 695; *County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 657 n12, 52 CR3d 1 (party's failure to object in trial court on financial burden grounds forfeited right to appeal on that issue); *Jones v Union Bank* (2005) 127 CA4th 542, 550, 25 CR3d 783 (rejecting challenge to fee award because opponent failed to "attack any particular billing as unnecessary or unreasonable"); *City of Santa Paula v Narula* (2003) 114 CA4th 485, 494, 8 CR3d 75 (fee opponent filed no declarations in opposition to fees and presented no proof that there was duplication of services); *Camacho v Schaefer* (1987) 193 CA3d 718, 725, 238 CR 609 (failure to argue that fees should be apportioned between fee and nonfee claims precludes raising argument on appeal); *Del Cerro Mobile Estates v Proffer* (2001) 87 CA4th 943, 105 CR2d 5 (same); *Staples v Hoefke* (1987) 189 CA3d 1397, 1409, 235 CR 165. See also *Rosas v County of San Bernardino* (CD Cal 2003) 260 F Supp 2d 990, 996 n4 (refusing to deduct hours not objected to by defendant).

Similarly, failure to submit evidence on any specific aspect of the plaintiffs' fee claim may result in a waiver of any objection to that part of the claim. In *Blum v Stenson* (1984) 465 US 886, 892 n5, 79 L Ed 2d 891, 897 n5, 104 S Ct 1541, the Court held that the defendant had waived its right to an evidentiary hearing on the reasonableness of the hours claimed by plaintiff's attorneys by failing to submit any evidence challenging the accuracy and reasonableness of the hours charged or the facts submitted by plaintiff's counsel. See also *Premier Med. Mgmt. Sys., supra*.

Although statements of decision generally are not required for fee motions, some courts have held that if rulings on particular issues are desired, a timely request should be made. See §§11.65, 11.68.

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### §11.60 3. Including Specific Evidence

The fee opponent's opposition should include specific evidence supporting its assertions and/or controverting disputed facts asserted by the claiming attorney. See:

- *Premier Med. Mgmt. Sys., Inc. v CIGA* (2008) 163 CA4th 550, 564, 77 CR3d 695 (party challenging hours must present evidence that hours claimed not appropriate or declaration from attorney "with expertise in the procedural and substantive law");
- *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1449 (rejecting "duplication" objection because of failure to specify duplicative hours);
- *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1397 (although fee applicant bears burden of documenting appropriate hours expended, the "party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits"); and
- *National Ass'n of Concerned Veterans v Secretary of Defense* (DC Cir 1982) 675 F2d 1319, 1326.

Failure to submit evidence may limit or eliminate the court's power to make findings contrary to the fee claimant's request. See *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 407 (rates claimed must be presumed reasonable because no contrary evidence presented). Compare *King v McCord* (11th Cir 1983) 707 F2d 466 (any reduction from uncontradicted fee claim must be supported by logical, articulated factors) and *Suzuki v Yuen* (9th Cir 1982) 678 F2d 761, 764 (same), with *Hall v Board of Sch. Comm'rs* (11th Cir 1983) 707 F2d 464 (trial court abused discretion by disregarding undisputed facts concerning rate and enhancement factors). See also *Hadley v Krepel* (1985) 167 CA3d 677, 683, 214 CR 461 (court may disregard claiming attorney's affidavits and award reasonable fee based on judge's own experience, but some permissible basis must exist for court's determination).

A common response is for the party opposing the fee motion to submit the hours and/or rates its attorneys billed, if those figures are lower than the claiming party's. The courts' mixed response to such evidence is discussed in §11.56.

Expert testimony is often used. See, *e.g., City of Oakland v Oakland Raiders* (1988) 203 CA3d 78, 249 CR 606; *Excelsior Union High Sch. v Lautrup* (1969) 269 CA2d 434, 74 CR 835. But see *Common Cause v Jones* (CD Cal 2002) 235 F Supp 2d 1076, 1079 n1 (rejecting expert's survey based on rates charged in other legal fields).

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### §11.61 D. Reply

A succinct and focused reply is often invaluable in law and motion practice, and the same is true for attorney fee motions. Because the nature of the opponent's objections may not be known until the opposition is filed, the reply presents the opportunity to rebut those objections. See, *e.g., U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1420, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345 (detailed explanations of attorney time records successful in countering opponent's claims that fee records were too vague); *Dease v City of Anaheim* (CD Cal 1993) 838 F Supp 1381, 1383 (noting that every contested entry was justified in reply memorandum). For an example of a reply brief, see App H.

When fee opponents employ experts or "fee auditors" to challenge the claimant's fees, it is particularly important to challenge that testimony. See, *e.g., U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1438, aff'd in relevant part sub nom *Davis v City & County of San Francisco* (9th Cir 1992) 976 F2d 1536, 1543, modified on other grounds (9th Cir 1993) 984 F2d 345; *Common Cause v Jones* (CD Cal 2002) 235 F Supp 2d 1076, 1079 n1.

**PRACTICE TIP:** Given the importance of the reply brief, fee applicants should seek an agreement for a briefing schedule that gives sufficient time to file all briefs, but particularly the reply brief.

Discovery may also be available to the fee claimant (see §§11.54-11.57), but again, difficult timing problems may be presented, necessitating either orders shortening time or court-ordered or court-stipulated schedules.

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## §11.62 E. Deadlines

If the fee application is presented by motion:

- Moving and supporting papers must be served and filed at least 16 court days before the hearing if personally served, 18 court days if served by facsimile or overnight delivery, and at least 21 days if served by mail within California. CCP §1005(b).
- Opposition papers must be served and filed at least 9 court days before the hearing. CCP §1005(b). The opposition must be served in person, or by facsimile, overnight delivery, or "other means… reasonably calculated to ensure delivery… not later than the close of the next business day" after it is filed. CCP §1005(c). In the very limited instances in which fees are sought through a memorandum of costs (see Cal Rules of Ct 3.1702(e)), the opponent must file a motion to tax costs within 15 days. Cal Rules of Ct 3.1700(b)(1).
- After the fee opponent's response has been filed and served, the party seeking fees may file and serve a reply. CCP §1005(b). The reply must be filed at least 5 court days before the hearing, and must be personally served or served by fax, overnight delivery, or "other means… reasonably calculated to ensure delivery… not later than the close of the next business day" after it is filed. CCP §1005(b)-(c).

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### §11.63 F. Hearing on Fee Application

Hearings on attorney fee motions generally involve oral argument based on the declarations and memoranda filed in support of and in opposition to the motion. See Apps C-H. Consistent with the trial court judges' broad discretion in fee matters, these hearings seldom involve live testimony. See Cal Rules of Ct 3.1306(a), which requires advance notice to the court if live testimony is to be presented at a motion hearing; *Sablan v Department of Fin.* (9th Cir 1988) 856 F2d 1317, 1322; *Hamner v Rios* (9th Cir 1985) 769 F2d 1404, 1406; *Moore v Jas. H. Matthews & Co.* (9th Cir 1982) 682 F2d 830, 838. See also *Padilla v McClellan* (2001) 93 CA4th 1100, 1106, 113 CR2d 680 (describing fee motion procedure); *Copeland v Marshall* (DC Cir 1980) 641 F2d 880, 905. But see *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 576, 21 CR3d 331 (noting that elements of claim may be established, at trial court's discretion, at "abbreviated evidentiary hearing"); *Bruckman v Parliament Escrow Corp.* (1987) 190 CA3d 1051, 1062, 235 CR 813 (noting live testimony at fee motion hearing). In practice, many federal district court judges now dispense with oral argument on fee motions.

If written documentation of the claim is adequate, there generally will be a sufficient basis to support the trial court's exercise of its discretion in setting the fee. See, *e.g., Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1227, 217 CR 125. Compare *Kern River* with *Martino v Denevi* (1986) 182 CA3d 553, 227 CR 354 (court should require affidavit or courtroom testimony on precise nature and extent of services rendered if judge has not personally observed significant portion of those services), and *Long Beach City Employees Ass'n v City of Long Beach* (1981) 120 CA3d 950, 961, 172 CR 277 (same). See also *Staton v Boeing* (9th Cir 2003) 327 F3d 938, 966 (record that contained "only the barest estimate of hours expended" was inadequate to permit review). See §§9.82-9.91 on the importance of accurate recordkeeping.

To facilitate appellate review, the hearing should be recorded. See *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 103, 228 CR 847. See also *Maria P. v Riles* (1987) 43 C3d 1281, 1295, 240 CR 872 (challenge on appeal to fee award amount rejected because of failure to present complete record, including reporter's transcript). On appellate review of fee orders, see chap 16.

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## §11.64 X. FEE ORDER

After the court has rendered its decision, it will be formalized as an order. *Mabee v Nurseryland Garden Ctrs.* (1979) 88 CA3d 420, 152 CR 31. See also *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1077, 25 CR3d 39; *Engel v Worthington* (1997) 60 CA4th 628, 70 CR2d 526. Fee orders are judgments. *Alioto Fish Co. v Alioto* (1994) 27 CA4th 1669, 1686, 34 CR2d 244 (fee order is judgment under CCP §680.230).

The state and federal courts differ in their requirements for fee orders. These differences are discussed in §§11.65-11.68.

For sample fee orders, see Apps I-J.

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### §11.65 A. Court Should Articulate Its Findings on Elements of Fee Award

To permit appellate review, the trial court should articulate its findings on the elements of the fee award. A formal statement of decision is not required. *Maria P. v Riles* (1987) 43 C3d 1281, 1294, 240 CR 872. However, it is probably advisable to request one, using the procedures set forth in CCP §632. See *Gorman v Tassajara Dev. Corp.* (2009) 178 CA4th 44, 63, 100 CR3d 152 (assuming for sake of argument that statement of decision was required, plaintiffs' request for statement nonetheless dismissed as untimely). See also *Rosenman v Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 868, 110 CR2d 903 (court must make findings to support determination that defendant entitled to fees under "frivolous, groundless, or unreasonable" standard applicable to FEHA claims by defendants); *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1807, 1810 n23, 56 CR2d 483 (although trial court not obligated to make formal findings in absence of request, if record does not show how court calculated fees, fee award may be reversed for abuse of discretion). See §11.68.

In *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 584, 21 CR3d 331, the court stated that the trial court "was not required to explain how it calculated [the contingent risk] factor," and that the supreme court would "generally presume the attorney fee award was correct 'on matters as to which the record is silent.'" Note, however, that the court also remanded the fee award to the trial court for reassessment, among other things, of its calculation of a risk enhancement. See also *Ketchum v Moses* (2001) 24 C4th 1122, 1140, 104 CR2d 377 (trial courts not required to address every objection to fee award).

To facilitate appellate review, if the fee order awards fees, it should state the grounds on which fees are awarded or denied and state the findings on the underlying elements of the fee claim. For example, under CCP §1021.5, the order should state the court's basis for finding whether:

- The plaintiff is the successful party;
- The action has enforced an important right;
- The lawsuit has conferred a significant benefit on the general public or on a large class of persons;
- The necessity and burden of private enforcement make a fee award appropriate; and
- In the interests of justice, fees should not be paid out of the recovery.

See, *e.g.*, *Baggett v Gates* (1982) 32 C3d 128, 143, 185 CR 232.

The fee order also must be consistent with the court's findings on the merits. See *Moran v Oso Valley Greenbelt Ass'n* (2001) 92 CA4th 156, 160, 111 CR2d 636; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 246, 261 CR 520.

The determination of the amount of the fees awarded should also be explained. The lodestar figures and the reasons for augmenting or reducing the lodestar should be stated and explained. See *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 321, 193 CR 900. If the lodestar method is followed and evidence in the record supports the findings, those findings need not be detailed. *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 850, 216 CR 649. See also *Graham*, 34 C4th at 584 (trial court "not required to explain how it calculated [the contingent risk] factor"); *Rebney v Wells Fargo Bank* (1991) 232 CA3d 1344, 284 CR 113. It is not necessarily an abuse of discretion, therefore, if the order fails to mention explicitly every potentially relevant factor. See *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 998, 242 CR 272 (appellate court presumed that trial court considered all appropriate factors in choosing multiplier); *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1228, 217 CR 125 (trial court need only discuss factors it relied on to augment lodestar fee). See also §11.68.

If the fee order does not adequately address the relevant factors, various alternatives are available. See §11.69.

For sample fee orders, see Apps I-J.

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## 1. Federal Court Standards

### §11.66 a. Order Must Be Clear and Concise

Under Fed R Civ P 54(d)(2)(C), courts deciding fee motions are required to prepare findings of fact and conclusions of law under Fed R Civ P 52(a). The order need not be set forth in a separate document. Fed R Civ P 58(a)(3).

Accordingly, the federal courts require that the trial court's order be clear and concise, yet sufficiently detailed to permit appellate review. *Hensley v Eckerhart* (1983) 461 US 424, 437, 76 L Ed 2d 40, 53, 103 S Ct 1933; *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392, 1398. The court must determine the lodestar figures (hours and rates) and, in some cases, must discuss the relevant *Kerr* factors (from *Kerr v Screen Extras Guild, Inc.* (9th Cir 1975) 526 F2d 67, 70, also called the "*Johnson* factors" after *Johnson v Georgia Highway Express* (5th Cir 1974) 488 F2d 714). *Tutor-Saliba Corp. v City of Hailey* (9th Cir 2006) 452 F3d 1055, 1064 (court must specify hours and rates awarded); *D'Emanuele v Montgomery Ward & Co.* (9th Cir 1990) 904 F2d 1379, 1386, aff'd without opinion at 993 F2d 882. See also *Orchano v Advanced Recovery, Inc.* (2d Cir 1997) 107 F3d 94, vacated and remanded (2d Cir 1998) 166 F3d 1201; *Intel Corp. v Terabyte Int'l* (9th Cir 1993) 6 F3d 614, 623.

If the award differs substantially from the documented request, the district court must "explain the reasons for rejecting the proffered proof." *D'Emanuele*, 904 F2d at 1386. See also *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 979; *Sierra Club v Hamilton County Bd. of County Comm'rs* (6th Cir 2007) 504 F3d 634, 645 (fee award reversed because district court failed to specify what "duplicative and unreasonable charges" it excluded from fee award); *Webb v Ada County* (9th Cir 2002) 285 F3d 829, 839 (district court failed to adequately explain substantial lodestar reductions); *Pennsylvania Envt'l Defense Found. v Canon-McMillan Sch. Dist.* (3d Cir 1998) 152 F3d 228, 232 ("silent auction" method, under which court chooses one party's proposed findings, is impermissible; lodestar method must be followed); *McGrath v County of Nevada* (9th Cir 1995) 67 F3d 248, 253 (court's explanation of reasons must adequately support reductions ordered); *United Steelworkers v Phelps Dodge Corp.* (9th Cir 1990) 896 F2d 403, 406.

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### §11.67 b. Parameters of "Clear and Concise"

The parameters of the requirement that the district court's fee order be "concise but clear" were explored in *Gates v Deukmejian* (9th Cir 1992) 987 F2d 1392. The guidelines stated in *Gates* include:

- The district court must "give at least some indication of how it arrived at the amount of compensable hours for which fees were awarded to allow for meaningful appellate review.… [W]e do not require 'an elaborately reasoned, calculated, or worded order.… [A] brief explanation of how the court arrived at its figures will do.… [S]omething more than a bald, unsupported amount is necessary.'" 987 F2d at 1398 (quoting *Chalmers v City of Los Angeles* (9th Cir 1986) 796 F2d 1205, 1211 n3).
- The district court cannot "accept uncritically" the plaintiff's representations about the time spent on the case but must independently review the request. 987 F2d at 1399.
- If the request for fees is voluminous, the court need not make an hour-by-hour analysis, but it may make "across-the-board" percentage cuts in either the lodestar amount or the hours claimed.
- If the fees are substantial, the authority to make a percentage cut does not relieve the court of its obligation to state clearly and concisely its reasons for selecting specific percentage reductions and to independently review the applicant's fee request; the court "must do more than eyeball the request and if it seems excessive cut it down by an arbitrary percentage." 987 F2d at 1399 (quoting *Heiar v Crawford County* (7th Cir 1984) 746 F2d 1190, 1204). See*, e.g., Cairns v Franklin Mint Co.* (9th Cir 2002) 292 F3d 1139, 1158 (court substantially reduced fee request by percentage reduction in effort to reflect apportionment between recoverable and nonrecoverable claims).
- The court need not make findings on each specific objection raised by the defendant, and, as long as the court sufficiently explains the reasons for its decision, the appellate court presumes that the trial court implicitly rejected those specific objections. 987 F2d at 1400.
- Fee decisions using percentage reductions in cases involving large fee requests will be subject to "heightened scrutiny." 987 F2d at 1400. See also *Ferland v Conrad Credit Corp.* (9th Cir 2001) 244 F3d 1145, 1148 (district court did not adequately explain decision to cut hours by more than half).

*Gates* and *Ferland* were applied in *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 979, which reversed a fee award for, among other things, making a "flat award" for fee-related services instead of calculating the lodestar. The court held that although percentage reductions may be used, the court must still first calculate the lodestar before applying any percentage reduction. 523 F3d at 982.

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### §11.68 2. State Courts Allow More General Findings Than Do Federal Courts

California state courts have not required the same level of detail for fee orders as federal courts. Very general findings have been upheld in several state court actions. See, *e.g., Chavez v Netflix, Inc.* (2008) 162 CA4th 43, 64, 75 CR3d 413; *Jones v Union Bank* (2005) 127 CA4th 542, 549, 25 CR3d 783 (trial court's order failed to distinguish between trial and appellate fees); *Sommers v Erb* (1992) 2 CA4th 1644, 1652, 4 CR2d 52; *Vella v Hudgins* (1984) 151 CA3d 515, 524, 198 CR 725; *State v County of Santa Clara* (1983) 142 CA3d 608, 616, 191 CR 204. In *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 447, 94 CR2d 143, the court upheld a fee award despite very general findings, ruling that the appellant's failure to provide a complete record precluded full appellate review. See also *Wershba v Apple Computer, Inc.* (2001) 91 CA4th 224, 254, 110 CR2d 145. But see *Harman v City & County of San Francisco* (2006) 136 CA4th 1279, 1308, 39 CR3d 589 (directing trial court to explain reasoning for fee award under 42 USC §1988 according to federal standards for fees under §1988); *In re Vitamins Cases* (2003) 110 CA4th 1041, 1052, 2 CR3d 358 (same); *Northwest Energetic Servs., LLC v California Franchise Tax Bd.* (2008) 159 CA4th 841, 674, 71 CR3d 642 (given absence of explanation in trial court order, record did not adequately support lodestar enhancement); *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 629, 98 CR2d 388 (criticizing trial court's failure to fully explain lodestar enhancement); *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 835, 112 CR2d 284 (citing *Ramos*).

See also *Rosenman v Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 868, 110 CR2d 903 (court must make findings to support determination that defendant was entitled to fees under "frivolous, groundless, or unreasonable" standard applicable to FEHA claims by defendants).

The fee order also must be consistent with the court's findings on the merits. See *Moran v Oso Valley Greenbelt Ass'n* (2001) 92 CA4th 156, 160, 111 CR2d 636; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 246, 261 CR 520.

**PRACTICE TIP:** Although a statement of decision on the fee motion is apparently not required (see *Maria P. v Riles* (1987) 43 C3d 1281, 1294, 240 CR 872; *Ketchum v Moses* (2001) 24 C4th 1122, 1140, 104 CR2d 377), counsel should realistically assess the likelihood of an adverse decision requiring an appeal. If an appeal from the fee order is contemplated, the safest practice is to request a statement of decision on each relevant issue (*e.g.,* reasonable hourly rate, number of hours reasonably spent). See CCP §632. Doing so may assist the trial court in issuing a decision that will permit appellate review. It also may prevent the appellate court from presuming adverse findings on those factors. If, on the other hand, counsel concludes there is a strong likelihood of substantially prevailing in the trial court, the same case law would militate against requesting a detailed statement of decision.

**Additional authorities:** *Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 1405, 245 CR 606, overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 233, 226 CR 265; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 754, 202 CR 423; *Guardians of Turlock's Integrity v Turlock City Council* (1983) 149 CA3d 584, 601, 197 CR 303. See also CCP §634.

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### §11.69 B. Ambiguities or Omissions in Fee Order

Any ambiguities or omissions in the fee order should first be raised in the trial court. *Ketchum v Moses* (2001) 24 C4th 1122, 1140, 104 CR2d 377; *Horning v Shilberg* (2005) 130 CA4th 197, 209, 29 CR3d 717; *Rebney v Wells Fargo Bank* (1991) 232 CA3d 1344, 1349, 284 CR 113; *United Servs. Auto. Ass'n v Dalrymple* (1991) 232 CA3d 182, 185, 283 CR 330; *California Common Cause v Duffy* (1987) 200 CA3d 730, 755, 246 CR 285. See also *Dunk v Ford Motor Co.* (1996) 48 CA4th 1794, 1807, 56 CR2d 483 (absent request, trial court not obligated to make formal findings); *Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 1406, 245 CR 606, overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19 (failure to request finding on fee issues means appellate court can infer all findings necessary to support fee order).

Because a formal statement of decision is not required, however, the proper procedure for raising ambiguities or omissions in the fee order is unclear. Some alternatives that might be available include:

- Filing a motion for reconsideration under CCP §1008. See, *e.g., Johnston v Corrigan* (2005) 127 CA4th 553, 25 CR3d 657. Counsel should be aware, however, of the statutory requirements for such a motion (application must be made within 10 days after service of written notice of entry of the order and must be supported by an affidavit showing new or different facts, circumstances, or law). CCP §1008(a). See *Le Francois v Goel* (2005) 35 C4th 1094, 1108, 29 CR3d 249 (formal motions for reconsideration must follow statutory requirements, but courts have inherent power to order reconsideration sua sponte). Such motions have been successful in federal court. See, *e.g., Holland v Roeser* (9th Cir 1994) 37 F3d 501. See ND Cal Local R 7-9.
- Filing a motion for a new trial under CCP §§657-659 or for further proceedings under CCP §662. New trial motions have been used to challenge decisions made on dispositive motions. See, *e.g., Blue Mountain Dev. Co. v Carville* (1982) 132 CA3d 1005, 1014, 183 CR 594. See also *Concerned Citizens Coalition of Stockton v City of Stockton* (2005) 128 CA4th 70, 26 CR3d 735 (describing CCP §662). But see *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 695, 32 CR 288 (new trial statute not applicable to fee motions). In *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 118 CR2d 629, the court held that if the defendant wished to challenge the trial court's inclusion of a right to fees in the judgment, it should have filed a motion to vacate the judgment under CCP §663.
- Filing a motion for clarification of the fee order, including a request that the court address specific ambiguities or omissions.

On procedures for challenging ambiguities or omissions in arbitrators' awards, see, *e.g., Century City Med. Plaza v Sperling, Isaacs & Eisenberg* (2001) 86 CA4th 865, 103 CR2d 605; *Delaney v Dahl* (2002) 99 CA4th 647, 121 CR2d 663.

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### §11.70 C. Court May Award Fees Directly to Attorney

Under California law, trial courts have the equitable power to make a fee award directly to the successful party's attorney, at least when it is clear that all or part of the services for which fees are awarded were provided without charge to the client. *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 682 n26, 186 CR 589; *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 47 n21, 141 CR 315; *Knoff v City & County of San Francisco* (1969) 1 CA3d 184, 81 CR 683. Absent an agreement to the contrary, attorney fees awarded under fee-shifting statutes like California's Fair Employment and Housing Act (FEHA) (Govt C §12965) in excess of fees already paid belong to the attorneys who labored to earn them. *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809.

If the successful "party" declines to move for fees, the party's attorneys may intervene to protect their rights, at least as long as the party/client does not object. *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1516, 43 CR3d 707. See also *U.S. v Jerry M. Lewis Truck Parts & Equip.* (9th Cir 1996) 89 F3d 574; *Burnett v Ala Moana Pawn Shop* (9th Cir 1993) 3 F3d 1261, 1263; *Curtis v City of Des Moines* (8th Cir 1993) 995 F2d 125.

Ninth Circuit law is more ambivalent. See *Gilbrook v City of Westminster* (9th Cir 1999) 177 F3d 839 (in absence of written assignment, fee must be paid to party, not attorney, distinguishing *U.S. v Jerry M. Lewis Truck Parts & Equip., supra*); *Churchill Village LLC v General Elec.* (9th Cir 2004) 361 F3d 566, 579 (interpreting California law). Note that *Lindelli v Town of San Anselmo, supra,* expressly rejected the federal courts' analysis set out in *Gilbrook* and *U.S. v Jerry M. Lewis Truck Parts & Equip.,* as well as the interpretation of California law set out in *Churchill Village LLC v General Elec, supra.* 139 CA4th at 1515. In *Citizens Legal Envt'l Action Network, Inc. v Premium Standard Farms, Inc.* (8th Cir 2005) 397 F3d 592, 595 n3, the court implicitly approved payment by the defendants to one of plaintiff's former attorneys, citing *Image Tech. Serv. v Eastman Kodak Co.* (9th Cir 1998) 136 F3d 1354, 1359.

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**Source:** Civil Litigation/California Attorney Fee Awards/11 Claiming and Opposing Trial Court Fees/§11.71 D. Order Awarding Fees Under CCP §128.7

## §11.71 D. Order Awarding Fees Under CCP §128.7

The requirements of an order awarding fees under CCP §128.7 are discussed in §6.23.

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## XI. PROCEDURE FOR CLAIMING FEES AS LITIGATION SANCTIONS

### §11.72 A. Fees as Sanctions Under CCP §128.7

The procedure for obtaining sanctions under CCP §128.7(b) is discussed in §§6.25-6.28. It is important to comply with the statute's "safe harbor" provision, which requires that the party against whom sanctions are sought be given 21 days to withdraw the offending pleading. CCP §128.7(c)(1). See *Hart v Hart* (2002) 95 CA4th 410, 115 CR2d 511 (safe harbor provision required denial of motion for sanctions *filed* after dismissal because it differed from motion *served* several months previously); *Goodstone v Southwest Airlines Co.* (1998) 63 CA4th 406, 422, 73 CR2d 655.

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### §11.73 B. Fees as Sanctions Under CCP §128.5

The procedure for obtaining sanctions under CCP §128.5 is discussed in §6.39.

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## §11.74 XII. CHECKLIST: MOTION PROCEDURE

▶ To download **Word** version, right click and choose *Save Target As*

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- Prepare a Notice of Motion and Memorandum in Support of Motion for Award of Reasonable Attorney Fees
- Prepare declarations and/or affidavits of counsel
- Prepare declarations of experts and/or other relevant declarants
- Prepare any exhibits not yet on file with the court that are relevant to the motion
- If appropriate, prepare a Request for Statement of Decision
- If appropriate, prepare a proposed order
- Attach proof of service
- Serve and file moving papers

On motions and orders, including forms, see California Civil Procedure Before Trial, chaps 12-13 (4th ed Cal CEB 2004).

For sample forms and documents, see the list in §11.75 and Apps C-L.

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## §11.75 XIII. FORMS AND DOCUMENTS USED IN FEE MOTIONS

The following forms and documents are commonly used in conjunction with motions for attorney fees:

- Notice of Motion for Award of Reasonable Attorney Fees. See App C.
- Memorandum in Support of Motion for Award of Reasonable Attorney Fees. See App D.
- Declarations in Support of Motion for Award of Reasonable Attorney Fees. See §11.53, Apps E-F. (These include declarations by attorneys seeking the award, describing their legal experience and qualifications, their work done on the case, the reasonable market value of their services, and the basis of that value. Time records or summaries are usually attached as exhibits, along with explanations of how they were prepared. They also include declarations from attorney/experts stating their experience and qualifications and their opinions on such issues as the quality of the work, reasonable market rates for the claiming attorneys' services, the basis for that assessment, and the effect of factors like contingent representation.)
- Declarations from other experts or witnesses on such issues as causative effect or the significance of the case.
- Memorandum Supporting Opposition to Motion for Attorney Fees and Declarations.
- Stipulation and Order re Costs and Attorney Fees. See App K.
- Reply and Supplemental Declarations in Support of Motion for Award of Reasonable Attorney Fees. See Apps G-H.

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# 12

# Obtaining Fees for Appellate Services

I. DETERMINATION OF FEES FOR APPELLATE SERVICES
- A. Entitlement to and Amount of Fees for Work on Appeal Generally Determined in Trial Court §12.1
- B. Trial Court May Award Appellate Fees on Remand Even if Remittitur Is Silent on Fees
  - 1. Entitlement Based on Statute §12.2
  - 2. Entitlement Based on Contract §12.3
  - 3. Trial Court May Award Fees Regardless of How Appellate Court Allocates Costs §12.4
- C. Situations in Which Appellate Court Determines Fee Issue Itself §12.5
  - 1. Original Writ Proceedings §12.6
  - 2. Appeals §12.7
  - 3. When Fees Based on Effect and Importance of Appellate Decision §12.8
  - 4. Sanctions for Frivolous Appeal §12.9

II. PROCEDURE FOR OBTAINING FEE AWARD FOR WORK ON APPEAL
- A. Requesting Appellate Court to Set Fee
  - 1. Statement in Brief §12.10
  - 2. Fee Motion in Appellate Court §12.11
  - 3. Effect of Appellate Court Ruling on Trial Court §12.12
  - 4. Requesting Appellate Court to Set Amount of Fee Award §12.13
  - 5. Requesting Sanctions for a Frivolous Appeal §12.14
- B. Claiming Fees for Appellate Services in Trial Court
  - 1. Appellate Fees May Be Claimed in Trial Court Regardless of Request to Appellate Court for Fees or Actual Award by Appellate Court
    - a. Fee Award Based on Statute §12.15
    - b. Fee Award Based on Contract §12.16
    - c. Fees for Writ Proceedings §12.17
    - d. Effect of Prior Appellate Court Determination §12.18
    - e. Fees for Federal Appeals §12.19
  - 2. Procedure and Timing of Application for Appellate Fees in Trial Court
    - a. Claiming Appellate Fees When Judgment Is Affirmed §12.20
    - b. Claiming Appellate Fees When There Will Be a New Final Judgment §12.21
    - c. Stipulations and Extensions §12.22
    - d. Possible Disqualification of Judge Who Issued Initial Fee Order §12.23
    - e. Statutory Appellate Costs §12.24
    - f. When Appeal Is Abandoned §12.25
  - 3. Appellate Review of Trial Court Orders §12.26
- C. Federal Appeals §12.27

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## I. DETERMINATION OF FEES FOR APPELLATE SERVICES

### §12.1 A. Entitlement to and Amount of Fees for Work on Appeal Generally Determined in Trial Court

Virtually all fee-shifting statutes, contractual fee provisions, and equitable doctrines authorize prevailing parties to recover reasonable attorney fees for appellate as well as trial court services. See §§9.31-9.47.

As a procedural matter, the general rule is that both entitlement to and the amount of fees for appellate services are first determined in the trial court. See, *e.g., Citizens Ass'n for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 176, 217 CR 893 (quoting *Woodland Hills Residents Ass'n v City Council (Woodland Hills II)* (1979) 23 C3d 917, 940, 154 CR 503):

> Determining whether [CCP §]1021.5 is applicable, and if so, the amount of attorneys' fees that are reasonable, is generally left to the sound discretion of the trial court.... "[R]eviewing courts are *not* 'in a position to decide the question [of propriety of attorney fees] in the first instance,'" the trial court is best suited for this task.

See also *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315; *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 927, 65 CR3d 242; *Rider v County of San Diego* (1992) 11 CA4th 1410, 1423, 14 CR2d 885.

In *Hammond v Agran* (2002) 99 CA4th 115, 132, 120 CR2d 646, the court criticized the defendant for fully briefing his entitlement to fees under CCP §1021.5 before he had won the case on appeal; the court held that a simple request for a remand if he did win the case would have been sufficient.

Whether to remand the issue of appellate fees, however, is a matter within the appellate court's discretion. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426 (noting that, although remand may be "normal or customary" or even the "better practice," appellate court has discretion to decide entitlement to fees in first instance). See, *e.g., Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707.

On cases in which the appellate court decided both entitlement to fees and the amount of fees awarded, see §§12.5-12.9.

**Additional authorities:** *Jones v Union Bank* (2005) 127 CA4th 542, 25 CR3d 783; *Katz v Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 CA4th 47, 11 CR3d 546; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 335, 130 CR2d 512; *Stanislaus Audubon Soc'y v County of Stanislaus* (1995) 33 CA4th 144, 39 CR2d 54 (case remanded with order to conduct a hearing limited to appellant's request for fees under CCP §1021.5); *Bjornestad v Hulse* (1991) 229 CA3d 1568, 1598, 281 CR 548.

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## B. Trial Court May Award Appellate Fees on Remand Even if Remittitur Is Silent on Fees

### §12.2 1. Entitlement Based on Statute

When entitlement to fees is based on a *statute,* appellate fees may be claimed in the trial court even if the appellate decision is silent as to costs or fees. See *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 461, 59 CR3d 839; *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 251 CR 72 (trial court retains jurisdiction to award statutory fees, including fees under CC §1717); *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226 CR 265.

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## §12.3 2. Entitlement Based on Contract

When entitlement to fees is based on a contract, a party may also claim appellate fees in the trial court even if the appellate opinion is silent as to fees. *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 55 CR2d 640. In *Harbour Landing,* the court noted that in 1990 the legislature specifically included contractual attorney fees as costs under CCP §1033.5, so that they are no longer special damages to be awarded only on pleading and proof. Thus, a party may request contractual attorney fees *either* from the appellate court while the appeal is pending *or* from the trial court on issuance of the remittitur, regardless of the lack of specific instructions in the opinion or the remittitur. 48 CA4th at 264. See also *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 927, 65 CR3d 242. Earlier decisions, *e.g., American City Bank v Zetlen* (1969) 272 CA2d 65, 69, 76 CR 898, are no longer authoritative on this point.

See also §§12.15-12.19.

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### §12.4 3. Trial Court May Award Fees Regardless of How Appellate Court Allocates Costs

Unless an appellate decision expressly awards or denies fees, any decision on allocation of appellate *costs* is irrelevant to a later motion for fees in the trial court. "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." Cal Rules of Ct 8.278(d)(2). See *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 925, 65 CR3d 242 (thoroughly examining rule); *Mustachio v Great W. Bank* (1996) 48 CA4th 1145, 56 CR2d 33 (order that parties bear own costs on appeal is not order that they bear own attorney fees); *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 251 CR 178 (trial court retains jurisdiction to award statutory fees as costs on appeal, even after appellate court summarily denies prevailing party's request to modify appellate decision to award costs and fees); *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1081, 1082 n5, 241 CR 239 (summary denial of "costs" in writ proceeding is no bar to later application for attorney fees for same proceeding); *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 962, 196 CR 1 (award of costs for securing reversal of summary judgment did not entitle appellant to fees, which could only be awarded for prevailing on entire action).

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**Source:** Civil Litigation/California Attorney Fee Awards/12 Obtaining Fees for Appellate Services/§12.5 C. Situations in Which Appellate Court Determines Fee Issue Itself

## §12.5 C. Situations in Which Appellate Court Determines Fee Issue Itself

Although the appellate courts generally remand determinations of attorney fees for appellate services to the trial court, the appellate courts occasionally determine these issues themselves.

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## §12.6 1. Original Writ Proceedings

Because determination of the amount of attorney fees usually requires fact-finding, appellate courts are reluctant to make this determination unless the task is unavoidable. This situation is most likely to arise in original writ proceedings. In such cases, the appellate courts readily rule on entitlement, and have employed different procedural devices for dealing with amount issues. See *Saleeby v State Bar* (1985) 39 C3d 547, 574, 216 CR 367 (awarding fees while reserving jurisdiction to determine amount (without specifying how that determination would be made)); *Cruz v Superior Court* (2004) 120 CA4th 175, 191, 14 CR3d 917 (reserving jurisdiction to determine amount, but only after giving parties 20 days to negotiate); *Planned Parenthood Affiliates v Swoap* (1985) 173 CA3d 1187, 1202, 219 CR 664 (same procedure as *Cruz;* parties given 30 days to agree).

The appellate court may also appoint a master or a referee to determine fee issues. *Mack v Younger* (1980) 27 C3d 687, 689, 165 CR 876 (referee appointed to determine fee application, after which parties settled).

If there is a lower court action that is closely related to the original writ proceeding, the amount issue may be remanded to that court. See *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569 (amount issues remanded to court of appeal where writ originally filed).

**Additional authorities:** *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 29 CR3d 810 (contractual fees awarded for defeating original writ that challenged postjudgment discovery order); *California Trout, Inc. v Superior Court* (1990) 218 CA3d 187, 212, 266 CR 788; *Committee to Defend Reprod. Rights v Rank* (1984) 151 CA3d 83, 88, 198 CR 630; *Committee to Defend Reprod. Rights v Cory* (1982) 132 CA3d 852, 859, 183 CR 475. See also *Cumero v Public Employment Relations Bd.* (1989) 49 C3d 575, 606, 262 CR 46 (remanding entitlement and amount issues to court of appeal where writ originally filed); *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517 n15, 43 CR3d 707 (directing trial court to consider compensating counsel for earlier unsuccessful writ petition and request for stay).

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### §12.7 2. Appeals

Even as to regular appeals, appellate courts occasionally determine entitlement to fees for appellate services while directing the trial court to determine the appropriate amount of those fees. See, *e.g., Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 265, 55 CR2d 640 (entitlement to fees and costs determined by appellate court); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 13, 54 CR3d 724.

**Additional authorities:** *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 428, 69 CR3d 750; *Eicher v Advanced Bus. Integrators, Inc.* (2007) 151 CA4th 1363, 1385, 61 CR3d 114 (appellate fees awarded even though damages reduced on appeal); *Horsford v Board of Trustees* (2005) 132 CA4th 359, 402, 33 CR3d 644 (ordering trial court to award appellate fees, but limiting award to fees for successful defense of defendant's merits appeal and plaintiff's appeal of inadequate fee award); *Planning & Conserv. League v Department of Water Resources* (2000) 83 CA4th 892, 926, 100 CR2d 173; *Evans v Unkow* (1995) 38 CA4th 1490, 45 CR2d 624; *Poway Unified Sch. Dist. v Chow* (1995) 39 CA4th 1478, 1485, 46 CR2d 651; *Ludwig v Superior Court* (1995) 37 CA4th 8, 43 CR2d 350; *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 43, 36 CR2d 456 (reversing trial court's merits decision and determining plaintiff's entitlement to fees for entire case); *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 176, 17 CR2d 510; *Deane Gardenhome Ass'n v Denktas* (1993) 13 CA4th 1394, 1399, 16 CR2d 816; *Sierra Club v California Coastal Comm'n* (1993) 12 CA4th 602, 620, 15 CR2d 779; *Whitfield v Board of Supervisors* (1991) 227 CA3d 451, 461, 277 CR 815. See also *Bjornestad v Hulse* (1991) 229 CA3d 1568, 1599, 281 CR 548 (directing trial court to award appellate fees if lawsuit found to be catalyst for legislative change); *Beeman v Burling* (1990) 216 CA3d 1586, 1607, 265 CR 719 (determining entitlement to appellate fees under CC §1717, based on postargument motion). But see *Chantiles v Lake Forest II Master Homeowners Ass'n* (1995) 37 CA4th 914, 45 CR2d 1 (appellate court found no entitlement to fees, despite trial court's specific reservation to determine fees and costs); *People v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 211 CR 501 (also determining no entitlement to fees).

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### §12.8 3. When Fees Based on Effect and Importance of Appellate Decision

Appellate courts are more likely to decide entitlement to fees when that entitlement to fees is based on the effect and importance of the appellate decision. *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 8, 232 CR 697 ("the appellate court indeed appears to be in a *better* position [than the trial court] to determine whether its opinion vindicated an 'important right' which 'affects the public interest' and yielded a 'significant benefit'"). See also *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 43, 36 CR2d 456 (reversing trial court's merits decision and determining plaintiff's entitlement to fees for entire case); *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426; *People ex rel Seal Beach Police Officers Ass'n v City of Seal Beach* (1984) 36 C3d 591, 602, 205 CR 794. Compare *Los Angeles Police Protective League* with *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1083 n7, 241 CR 239 (disagreeing that appellate court in "better position" but agreeing that appellate court "in at least as good a position" as trial court to determine importance and benefit of appellate opinion).

**Additional authorities:** *County of San Diego v Lamb* (1998) 63 CA4th 845, 73 CR2d 912; *Christensen v Superior Court* (1987) 193 CA3d 139, 145, 239 CR 143; *Environmental Protection Info. Ctr. v Johnson* (1985) 170 CA3d 604, 216 CR 502; *Wilkerson v City of Placentia* (1981) 118 CA3d 435, 445, 173 CR 294. See also *Neecke v City of Mill Valley* (1995) 39 CA4th 946, 46 CR2d 266 (remanded to trial court to determine entitlement to fee award, and amount if entitled, in light of significant change in decision on appeal); *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 167, 188 CR 104.

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## §12.9 4. Sanctions for Frivolous Appeal

When fees are awarded as sanctions for a frivolous appeal (see §§6.60-6.73), the appellate court generally sets the amount. See, *e.g., Young v Rosenthal* (1989) 212 CA3d 96, 134, 260 CR 369 ($118,909 awarded for defending frivolous appeals), and the cases cited in §§6.60-6.73. The procedures for requesting sanctions on the ground that the appeal is frivolous or taken solely for purposes of delay, or for an unreasonable infraction of the appellate rules, are set out in Cal Rules of Ct 8.276. See §§6.73, 12.14.

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## II. PROCEDURE FOR OBTAINING FEE AWARD FOR WORK ON APPEAL

### A. Requesting Appellate Court to Set Fee

#### §12.10 1. Statement in Brief

A party is not required to claim appellate fees in the appellate briefs. See *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 226, 226 CR 265. See also, *e.g., Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 262, 264, 55 CR2d 640 (reversing trial court's denial of contractual attorney fees for prior appeal, even though no claim made in appellate briefs and right to fees not mentioned in opinion, because contractual attorney fees for services on appeal may be requested of either appellate court while appeal is pending or of trial court on issuance of remittitur).

**NOTE:** When a party files an appeal in an action in which the party may be entitled to a fee award, one common practice is to include a short statement in the appellate brief requesting an award of attorney fees on appeal. If the court of appeal rules in the claiming party's favor on the merits of the appeal, it may be inclined to rule favorably on the fee request. On the other hand, without thorough briefing on entitlement to fees, there is a risk that the court of appeal will summarily deny fees without careful consideration.

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## §12.11 2. Fee Motion in Appellate Court

A party prevailing on appeal may also move for fees in the appellate court after the court has rendered its decision, but such motions are disfavored except when the appellant has dismissed the appeal. See *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 166, 188 CR 104. To rule on a fee motion, the appellate court must either retain jurisdiction for that purpose or reinstate its jurisdiction by recalling the remittitur. *Pacific Legal Found. v California Coastal Comm'n, supra*. Thus, a motion for fees in the appellate court should be made long enough before the court loses jurisdiction (the appellate court generally loses jurisdiction 30 days after the opinion is filed; see California Civil Appellate Practice §20.17 (3d ed Cal CEB 1996)) to allow the appellate court to either rule on the motion or retain jurisdiction.

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### §12.12 3. Effect of Appellate Court Ruling on Trial Court

If the appellate court does expressly rule on a party's entitlement to appellate fees, the trial court must follow it. See, *e.g.*, *Benson v Greitzer* (1990) 220 CA3d 11, 14, 269 CR 201 (court of appeal's denial of motion for fees under standard of *Marriage of Flaherty* (1982) 31 C3d 637, 641, 183 CR 508, and "principles of law of the case" precluded defendant from seeking fees under 42 USC §1988 because standards substantially identical); *Mandel v Lackner* (1979) 92 CA3d 747, 763, 155 CR 269 (expressly denying fees on appeal). If, as often happens, the remittitur is silent on entitlement to attorney fees, the trial court has discretion to decide that issue. See §§12.2-12.9.

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### §12.13 4. Requesting Appellate Court to Set Amount of Fee Award

It is less common for a party to request that the appellate court set the amount of any fee award. If such a request is made, the usual procedure is to ask the appellate court to determine entitlement to fees but to remand the amount issues to the trial court. See, *e.g., Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517, 43 CR3d 707. This procedure is generally preferred because of the factual nature of the amount issues. Appellate courts also occasionally show a tendency to set low fees. See, *e.g., Stephens v Coldwell Banker Commercial Group, Inc.* (1988) 199 CA3d 1394, 1406, 245 CR 606, overruled on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19 ($5000 awarded); *Roberts v Brian* (1973) 30 CA3d 427, 431, 106 CR 360 ($1000 awarded). But see *Young v Rosenthal* (1989) 212 CA3d 96, 134, 260 CR 369 ($118,909 awarded for defending frivolous appeal).

In some circumstances, counsel may prefer that the appellate court set the fee in the first instance (*i.e.,* if counsel anticipates that the trial court will not be favorably inclined toward the request for appellate fees). Appellate courts are reluctant to do so, however, unless the claim is uncomplicated or the appellate court is convinced that it can avert further appeals by determining the amount itself.

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### §12.14 5. Requesting Sanctions for a Frivolous Appeal

An attorney who is serious about seeking fees as a sanction for a frivolous appeal must serve and file a motion under Cal Rules of Ct 8.54 no later than 10 days after the appellant's reply brief is due. Cal Rules of Ct 8.276(b)(1). If a motion for sanctions accompanies a motion to dismiss the appeal, and the appellate court denies the motion to dismiss, the party may make a new motion for sanctions within 10 days after appellant's reply brief is due. See Cal Rules of Ct 8.276(b)(2). To prevent unnecessary litigation of sanctions issues, Rule 8.276(c) states that the "court must give notice in writing if it is considering imposing sanctions." If the court is considering sanctions, it will normally combine oral argument on the issue of sanctions with argument on the merits of the appeal. Cal Rules of Ct 8.276(e).

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## B. Claiming Fees for Appellate Services in Trial Court

### 1. Appellate Fees May Be Claimed in Trial Court Regardless of Request to Appellate Court for Fees or Actual Award by Appellate Court

#### §12.15 a. Fee Award Based on Statute

When a fee award is based on a statute, fees for appellate services may first be claimed in the trial court, regardless of whether they were requested in the appellate court or whether the appellate court specifically awarded fees in its remittitur. *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 461, 59 CR3d 839 (fee award under CCP §425.16(c)); *MST Farms v C.G. 1464* (1988) 204 CA3d 304, 251 CR 72 (trial court had jurisdiction to award appellate fees even though appellate court ignored request made in appellate brief); *M.C. & D. Capital Corp. v Gilmaker* (1988) 204 CA3d 671, 251 CR 178 (trial court had jurisdiction to award appellate fees despite court of appeal's denial, without comment, of party's postdecision motion to include fee award in remittitur); *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 227, 226 CR 265 (CCP §1021.5 fee award); *People v Mitchell Bros. Santa Ana Theater* (1985) 165 CA3d 378, 211 CR 501; *Roberts v Brian* (1973) 30 CA3d 427, 106 CR 360.

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### §12.16 b. Fee Award Based on Contract

The same rule applicable to a fee award based on statute (see §12.15) applies to a fee award based on a *contract* for fees. *Harbour Landing-Dolfann, Ltd. v Anderson* (1996) 48 CA4th 260, 264, 55 CR2d 640 (party may request contractual attorney fees either from appellate court while appeal is pending, or from trial court on remand, regardless of lack of specific instructions in opinion or remittitur).

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### §12.17 c. Fees for Writ Proceedings

The same rule applicable to a fee award based on statute (see §12.15) applies to fees for interlocutory writs. *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1517 n15, 43 CR3d 707 (directing trial court to consider compensating counsel for earlier unsuccessful writ petition and request for stay); *580 Folsom Assoc. v Prometheus Dev. Co.* (1990) 223 CA3d 1, 272 CR 227 (fees for writ proceedings expressly denied because respondent not yet prevailing party, but request could be renewed once prevailing party ascertained); *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1081, 1082 n5, 241 CR 239 (fees for services performed on writ of mandate to appellate court not precluded by failure to raise issue in writ proceeding or by denial of costs in writ proceeding).

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### §12.18 d. Effect of Prior Appellate Court Determination

In some circumstances, the trial court may retain jurisdiction to award appellate fees even if the appellate court has denied fees sought on another ground. In *Benson v Greitzer* (1990) 220 CA3d 11, 269 CR 201, the court held that, even though the appellate court had denied a request for appellate fees as sanctions, the trial court had jurisdiction to entertain the defendant's motion for appellate fees under 42 USC §1988 following remittitur. Note, however, that the court then found that the fee claim was barred by law of the case principles because the federal claim involved the same standard as the sanctions request. 220 CA3d at 14.

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### §12.19 e. Fees for Federal Appeals

As discussed in §12.27, appellate fees for work in the Ninth Circuit generally must be claimed in the Ninth Circuit or they are waived. If the appeal is an interim one, however, so that there is no prevailing party in the case as a whole, the appellate fees may be claimed following judgment in the district court. See, *e.g.*, *Twentieth Century Fox Film Corp. v Entertainment Distribs.* (9th Cir 2005) 429 F3d 869, 884, discussed in §12.27.

**PRACTICE TIP:** Each district in California has different procedures for making such fee claims, and counsel should check the relevant local rules before drafting or filing a fee claim.

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## 2. Procedure and Timing of Application for Appellate Fees in Trial Court

### §12.20 a. Claiming Appellate Fees When Judgment Is Affirmed

There are two applicable procedures for claiming appellate fees in the trial court. If the appeal essentially concludes the matter, *i.e.,* there will not be a new judgment entered following the remittitur, Cal Rules of Ct 3.1702(c)(1) applies. Under that rule, a notice of motion to claim attorney fees on appeal under either statute or contract must be served and filed within the time for serving and filing a memorandum of costs on appeal under Cal Rules of Ct 8.278(c)(1). Under Cal Rules of Ct 8.278(c)(1), a memorandum of costs on appeal must be filed within 40 days after notice of issuance of the remittitur. Because claims for appellate court fees must be made by motion, the same procedures applicable to motions for trial court fees appear to apply. See chap 11.

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### §12.21 b. Claiming Appellate Fees When There Will Be a New Final Judgment

If, following the remittitur, there will be further proceedings leading to a new judgment, Cal Rules of Ct 3.1702(b)(2) applies. Under that rule, appellate fees are claimed as part of a motion for prejudgment fees, which must be served and filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104 and 8.108. That time limit is generally 60 days, but may be shorter or longer in some circumstances. See §11.37. The same rule would apply when, for example, the appeal does not resolve who is the prevailing party on the litigation as a whole.

The difference between these two rules was clarified in *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 1083, 120 CR2d 273. *Yuba Cypress* held that when appellate fees are incurred before a final judgment, such fees must be claimed under former Cal Rules of Ct 870.2(b)(1) (now Cal Rules of Ct 3.1702(b)(1)), which requires motions to be filed within 60 days from entry of judgment, rather than under former Cal Rules of Ct 870.2(c)(1) (now Cal Rules of Ct 3.1702(c)(1)), which requires motions for appellate fees to be filed within 40 days after a remittitur is issued. A fees motion may still be timely if it is filed prematurely. 98 CA4th at 1086. Former Rule 870.2(c)(1) (now Cal Rules of Ct 3.1702(c)(1)) generally applies when the appellate court "simply affirms the judgment without remanding the matter for further proceedings entailing the entry of a new judgment." 98 CA4th at 1085. See also *Carpenter v Jack in the Box Corp.* (2007) 151 CA4th 454, 462, 59 CR3d 839; *Marriage of Freeman* (2005) 132 CA4th 1, 33 CR3d 237 (reversing fee award under Fam C §271 for failure to comply with former Cal Rules of Ct 870.2(c)(1) (now Cal Rules of Ct 3.1702(c)(1))).

**PRACTICE TIP:** The safest course for a fee claimant when seeking appellate fees would be to obtain a stipulation specifying the time periods and the briefing schedules.

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### §12.22 c. Stipulations and Extensions

Under both of the procedures outlined above (see §§12.20-12.21), the parties may stipulate to extend the time to file the fees motion for up to 60 days. Cal Rules of Ct 3.1702(b)(2)(A), (c)(2). The trial court may also extend the time for good cause. Cal Rules of Ct 3.1702(d).

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### §12.23 d. Possible Disqualification of Judge Who Issued Initial Fee Order

Note that following a reversal of a fee award on appeal, the judge who issued the original fee order may be subject to disqualification under CCP §170.6(a)(2), even if the only matter left to be decided is attorney fees. The decisions on this issue are divided. Compare *First Fed. Bank of Cal. v Superior Court* (2006) 143 CA4th 310, 315, 49 CR3d 296, and *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 767, 132 CR2d 400, with *Oak Grove Sch. Dist. v City Title Ins. Co.* (1963) 217 CA2d 678, 695, 32 CR 288. See also *Paterno v Superior Court* (2004) 123 CA4th 548, 557, 20 CR3d 282 (questioning *Pfeiffer Venice*).

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### §12.24 e. Statutory Appellate Costs

The "prevailing party" on appeal under Cal Rules of Ct 8.278(a) is entitled to appellate costs as defined in Cal Rules of Ct 8.278(d)(1). These statutory appellate "costs" must be claimed within the 40-day period of Cal Rules of Ct 8.278(c)(1). The verification and taxing procedures applicable to memorandums of costs filed for trial court costs apply as well to memorandums for appellate costs. Cal Rules of Ct 8.278(c)(1)-(2).

**PRACTICE TIP:** To avoid any waiver issue, if a party is not going to seek appellate fees at the time it files the memorandum of costs on appeal, the party may wish to state in the memorandum of costs that it will seek fees later.

The standards for determining the "prevailing party" on appeal are different than the standards for determining the prevailing party in the litigation as a whole. See, *e.g.*, *Butler-Rupp v Lourdeaux* (2007) 154 CA4th 918, 65 CR3d 242. Given that attorney fees are awardable only to the latter, in some situations, one party can recover appellate "costs" as defined in Cal Rules of Ct 8.278(d)(1), while the opposing party can recover attorney fees, including fees for the same appeal, because it has prevailed in the litigation as a whole.

An order taxing appellate costs is not separately appealable if it is entered before a new postappeal judgment. *Barnes v Litton Sys.* (1994) 28 CA4th 681, 33 CR2d 562.

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### §12.25 f. When Appeal Is Abandoned

The time limits described above may not apply when a party abandons an appeal before the record is filed and the opposing party is entitled to costs as the prevailing party. *Wilson v Harley Davidson Motor Co.* (1977) 67 CA3d 678, 136 CR 793. In *Wilson,* the court held that the memorandum of costs should be submitted within a "reasonable" amount of time after the clerk provides notification of abandonment (decided under former Cal Rules of Ct 20 (now see Cal Rules of Ct 8.244)), since there is no filing of the remittitur to begin the running of the former Rule 27(d) (now see Cal Rules of Ct 8.278(c)) period.

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## §12.26 3. Appellate Review of Trial Court Orders

When appellate fees are decided first in the trial court, they may be reviewed in the appellate court. See, *e.g.*, *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 424, 69 CR3d 750. See chap 16 (Appellate Review of Fee Orders).

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## §12.27 C. Federal Appeals

The procedure for obtaining appellate fees for work in the Ninth Circuit is significantly different from California state court procedures for obtaining appellate fees. Appellate fees *must* be claimed initially in the Ninth Circuit under 9th Cir R 39-1.6, which sets out both the timing and content requirements for such a motion; failure to do so may result in a waiver of those fees. See *Cummings v Connell* (9th Cir 2005) 402 F3d 936, 947. Under 9th Cir R 39-1.8, a party may request a transfer of the fee issues to the district court. Given that the decision to transfer the fee issues is discretionary (402 F3d at 948), it may be wise to combine the transfer request with at least a skeletal motion. See *Cummings v Connell*, *supra*. See also *Hobson v Orthodontic Ctrs. of Am.* (ED Cal, June 19, 2007, No. CIV. S-02-0886 WBS PAN) 2007 US Dist Lexis 44710. The Ninth Circuit may also refer determination of the fee to its Appellate Commissioner. 9th Cir R 39-1.9. See *Seattle Sch. Dist. No. 1 v B.S.* (9th Cir 1996) 82 F3d 1493, 1502.

Of course, the Ninth Circuit rules cannot be construed to require a party to apply for fees when to do so would be frivolous. In *Twentieth Century Fox Film Corp. v Entertainment Distribs.* (9th Cir 2005) 429 F3d 869, 884, the plaintiff won its copyright claim on summary judgment, but the Ninth Circuit found there were triable issues of fact and remanded. The plaintiff, no longer a prevailing party at that point, did not seek appellate fees. Later, after winning at trial, the plaintiff claimed its appellate fees along with its trial court fees. The defendant argued that the trial court lacked jurisdiction to award appellate fees because plaintiff did not seek these fees initially on appeal. The trial court rejected that argument because the plaintiff was not yet the prevailing party when the first appeal was decided, and the Ninth Circuit upheld the award despite the absence of a prior fee application with the appellate court.

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# 13

# Attorney Fees Awarded for Administrative Proceedings

I. ATTORNEY FEES MAY BE AWARDED FOR WORK PERFORMED IN ADMINISTRATIVE PROCEEDINGS §13.1

II. FEE AWARDS FOR ADMINISTRATIVE PROCEEDINGS RESOLVED WITHOUT JUDICIAL ACTION
- A. Statutory Bases for Fee Awards in Administrative Proceedings That Are Not Intertwined With Litigation
  - 1. California Law §13.2
  - 2. Federal Law §13.3
- B. Equitable Bases for Fee Awards in Administrative Proceedings That Are Not Intertwined With Litigation §13.4
- C. Fee Awards in Particular Administrative Settings
  - 1. Proceedings Before Public Utilities Commission §13.5
  - 2. Proceedings Before Insurance Commissioner §13.6
  - 3. Proceedings Before Fair Employment and Housing Commission §13.7
  - 4. Proceedings Before Commission on Professional Competence §13.8
  - 5. Licensee Disciplinary Proceedings §13.9
  - 6. Proceedings Under the Individuals With Disabilities Education Act
    - a. When Attorney Fees Are Recoverable Under the IDEA §13.10
    - b. Procedure to Recover IDEA Fees §13.11
    - c. Determining the Amount of Fees Recoverable Under the IDEA
      - (1) No Fees for Attorney-Parent §13.12
      - (2) No Expert-Consultant Fees §13.13
  - 7. Proceedings Under Local Ordinances Authorizing Fee Awards §13.14
  - 8. Federal Administrative Proceedings §13.15

III. FEE AWARDS FOR WORK PERFORMED IN ADMINISTRATIVE PROCEEDINGS IN CONJUNCTION WITH JUDICIAL ACTION
- A. Fee Awards for Administrative Proceedings Before Litigation
  - 1. California Courts §13.16
  - 2. Federal Courts
    - a. Standard When Administrative Proceedings Are a Prerequisite to Court Action §13.17
    - b. Standard When Administrative Proceedings Are Optional §13.18
- B. Fee Awards for Administrative Proceedings That Are Intertwined With Litigation
  - 1. California Courts §13.19
  - 2. Federal Courts §13.20

IV. WHO MAY RECOVER ADMINISTRATIVE FEES §13.21

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## §13.1 I. ATTORNEY FEES MAY BE AWARDED FOR WORK PERFORMED IN ADMINISTRATIVE PROCEEDINGS

Statutes and equitable doctrines that provide for awards of attorney fees are not necessarily restricted to attorney fees incurred in judicial actions. Fees may sometimes be awarded for work performed in administrative proceedings that resolve the controversy without the need for any litigation (other than, in some cases, a judicial action to recover attorney fees). See §§13.2-13.3. In other circumstances, attorney fees may be recovered for work done in administrative proceedings that precede litigation or that occur after the litigation has been filed. See §§13.16-13.20.

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## II. FEE AWARDS FOR ADMINISTRATIVE PROCEEDINGS RESOLVED WITHOUT JUDICIAL ACTION

### A. Statutory Bases for Fee Awards in Administrative Proceedings That Are Not Intertwined With Litigation

#### §13.2 1. California Law

Courts must assess the availability of fees for work in administrative proceedings that resolve the dispute without litigation on a case-by-case basis. For example, California's omnibus private attorney general statute, CCP §1021.5, does not authorize fees for administrative proceedings. In *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 910, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728, the supreme court held that CCP §1021.5's authorization for "a court" to award attorney fees in "any action" applies only to *judicial* actions. Thus, the Public Utilities Commission (PUC) was not authorized to award fees under §1021.5 for work performed at the administrative level. 25 C3d at 910. See also *Hospital Sys. v Office of Statewide Health Planning & Dev.* (1994) 25 CA4th 1686, 1695, 30 CR2d 922 (§1021.5 does not authorize independent court action to recover fees for administrative proceeding). Note, however, that fees may sometimes be awarded under §1021.5 for administrative proceedings that precede litigation (see §13.16) or that are intertwined with litigation (see §13.19).

On the other hand, the court in *Consumers Lobby* did hold that administrative agencies could use the equitable attorney fee doctrines (see chap 5) in appropriate circumstances. *Consumers Lobby Against Monopolies,* 25 C3d at 908. See §13.4. Other fee-shifting statutes might authorize administrative agencies to award attorney fees. These statutory bases are discussed in §§13.5-13.15.

See also *Sam Andrews' Sons v ALRB* (1988) 47 C3d 157, 253 CR 30 (Agricultural Labor Relations Act (Lab C §§1140-1140.4) does not authorize ALRB to award attorney fees).

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### §13.3 2. Federal Law

Federal law requires specific statutory authorization for fee awards in administrative proceedings. Compare *New York Gaslight Club, Inc. v Carey* (1980) 447 US 54, 64 L Ed 2d 723, 100 S Ct 2024 (fees available for racial discrimination claim proceedings that successfully terminated at state administrative level under Title VII, 42 USC §2000e-5(k)), with *North Carolina Dep't of Transp. v Crest Street Community Council, Inc.* (1986) 479 US 6, 93 L Ed 2d 188, 107 S Ct 336 (fees not available under 42 USC §1988 in independent action brought to obtain fees for proceedings terminated successfully at administrative level). But see *ECOS, Inc. v Brinegar* (MD NC 1987) 671 F Supp 381. See also *Moreno v City & County of San Francisco* (ND Cal 1983) 567 F Supp 458, in which court awarded fees under the rationale of *New York Gaslight Club, Inc. v Carey, supra,* for the successful prosecution of an employment discrimination complaint before the San Francisco Civil Service Commission. See §13.15.

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## §13.4 B. Equitable Bases for Fee Awards in Administrative Proceedings That Are Not Intertwined With Litigation

Attorney fees may be awarded under equitable theories for work performed in quasi-judicial administrative proceedings. In *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728, the court held that administrative agencies conducting quasi-judicial proceedings have the equitable power to award fees under the common fund doctrine, one of California's equitable fee doctrines. Administrative agencies also may, on proper facts, award fees under the equitable private attorney general doctrine. See *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1462 n12, 240 CR 1.

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## C. Fee Awards in Particular Administrative Settings

### §13.5 1. Proceedings Before Public Utilities Commission

The Public Utilities Commission (PUC) has specific authority to award attorney fees in administrative proceedings relating to utility rates. See Pub Util C §§1801-1812. See generally *Southern Cal. Edison Co. v PUC* (2004) 117 CA4th 1039, 12 CR3d 441 (statute also permits fee awards for helping to defend PUC decisions in federal court); *Southern Cal. Gas Co. v PUC* (1985) 38 C3d 64, 66, 211 CR 99. The PUC now also has comprehensive regulations governing fee awards. 20 Cal Code Regs §§17.1-17.4. See also *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 908, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728. The PUC also has authority to award fees for related litigation that flows from administrative proceedings. See *The Utility Reform Network v PUC* (2008) 166 CA4th 522, 532, 82 CR3d 791 (denying fees because intervenors' work did not constitute substantial contribution to proceedings under Pub Util C §§1801.3, 1802(i)).

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## §13.6 2. Proceedings Before Insurance Commissioner

The Insurance Commissioner is authorized to award attorney fees in administrative proceedings relating to insurance rates. Ins C §1861.10(b). See *Economic Empowerment Found. v Quackenbush* (1997) 57 CA4th 677, 67 CR2d 323 (interpreting Ins C §1861.10). The Department of Insurance has promulgated comprehensive regulations governing fee awards. 10 Cal Code Regs §§2662.1-2662.8.

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## §13.7 3. Proceedings Before Fair Employment and Housing Commission

The Fair Employment and Housing Commission may award attorney fees under Govt C §12965(b) to successful complainants in proceedings before the commission when the private attorney's work does not duplicate work performed by the Department of Fair Employment and Housing (DFEH). See *Louis Cairo* (1984) FEHC Dec No. 84-04, FEHC Precedential Decisions CEB 3 (Cal CEB 1984-1985); *American Airlines* (1983) FEHC Dec No. 83-15, FEHC Precedential Decisions CEB 15 (Cal CEB 1982-1983). Section 12965(b) also provides for the award of expert witness fees.

Successful complainants may also recover fees in a subsequent judicial action. See *New York Gaslight Club, Inc. v Carey* (1980) 447 US 54, 64 L Ed 2d 723, 100 S Ct 2024. See also *Moreno v City & County of San Francisco* (ND Cal 1983) 567 F Supp 458 (fees awarded under Title VII in independent judicial action to recover fees for optional proceedings before county commission that provided full relief).

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## §13.8 4. Proceedings Before Commission on Professional Competence

Permanent school employees who prevail in proceedings before the Commission on Professional Competence or on review of those proceedings are entitled to reasonable attorney fees under Ed C §44944(e). See *Fontana Unified Sch. Dist. v Burman* (1988) 45 C3d 208, 224, 246 CR 733. *Fontana* also holds that fee awards under Ed C §44944 are not subject to the standards or limits set out in Govt C §800 (see §3.90). 45 C3d at 225.

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## §13.9 5. Licensee Disciplinary Proceedings

Under various sections of the Business and Professions Code, state licensing agencies may recover attorney fees from licensees who lose disciplinary proceedings brought by those agencies. Business and Professions Code §125.3 is the general cost recovery provision for agencies under the jurisdiction of the Department of Consumer Affairs, which includes most professional and vocational licensing boards. *Zuckerman v State Bd. of Chiropractic Exam'rs* (2002) 29 C4th 32, 38, 124 CR2d 701. Section 125.3 provides that recoverable costs include "charges imposed by the attorney general." This term authorizes awards of attorney fees to the State under Bus & P C §125.3. *Angelier v State Bd. of Pharmacy* (1997) 58 CA4th 592, 68 CR2d 213.

Some agencies have separate statutory authority to recover their costs, including costs of investigation and prosecution. For those agencies, the specific statute governs instead of the general provision. Bus & P C §125.3(j). See, *e.g.:*

- Bus & P C §2497.5 (podiatrists);
- Bus & P C §2661.5(a) (physical therapists);
- Bus & P C §§3753.5, 3753.7 (respiratory therapists);
- Bus & P C §4959(a) (acupuncturists);
- Bus & P C §5107(a) (accountants); and
- Bus & P C §7403(f) (barbers and cosmetologists).

See Professional Licensing: Disciplinary Practice in California §§7.47-7.56 (Cal CEB 2008).

Cost recovery is not reciprocal. If an agency's cost recovery statute does not provide for a prevailing licensee to recover costs, then a licensee is not entitled to recover costs under the cost recovery statute. *Zuckerman*, 29 C4th 32 at 47.

Other statutory provisions may permit a prevailing licensee to recover attorney fees under certain circumstances. See, *e.g.*, Govt C §800(a) (limited amount of fees awarded in court action to review agency decision when agency action was "arbitrary or capricious"), discussed in §3.92. On recovery methods available to prevailing licensees, see California Administrative Hearing Practice §4.5 (2d ed Cal CEB 1997).

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### 6. Proceedings Under the Individuals With Disabilities Education Act

### §13.10 a. When Attorney Fees Are Recoverable Under the IDEA

Fees for administrative representation under the Individuals with Disabilities Education Act (IDEA) (20 USC §1415; formerly called the Education for All Handicapped Children Act) are awardable regardless of whether relief is obtained at the administrative or at the judicial level. 20 USC §1415(i)(3)(B)(i). See *A.R. v New York City Dep't of Educ.* (2d Cir 2005) 407 F3d 65; *McSomebodies v San Mateo Unified Sch. Dist.* (9th Cir 1989) 897 F2d 975; *McSomebodies v Burlingame Elementary Sch. Dist.* (9th Cir 1989) 886 F2d 1558. Compare *Barlow-Gresham Union High Sch. Dist. v Mitchell* (9th Cir 1991) 940 F2d 1280, 1284 (parents entitled to fees for case that settles before due process hearing), with *Kletzelman v Capistrano Unified Sch. Dist.* (9th Cir 1995) 91 F3d 68, 70 (parents who obtained relief at individualized education program (I.E.P.) meeting not entitled to attorney fees). Parents can recover attorney fees incurred in enforcing the IDEA through state complaint resolution procedures. *Lucht v Molalla River Sch. Dist.* (9th Cir 2000) 225 F3d 1023.

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### §13.11 b. Procedure to Recover IDEA Fees

Under the IDEA, if the school district or state agency will not stipulate to the fees incurred in an administrative proceeding, a judicial action to recover those fees may be brought in either state or federal court under 20 USC §1415(i)(2). The IDEA also contains various restrictions and limitations on fee awards that are not commonly found in other fee-shifting statutes, including its own timing rules. See, *e.g.,* 20 USC §1415(i)(3)(C)-(D), (F).

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### c. Determining the Amount of Fees Recoverable Under the IDEA

#### §13.12 (1) No Fees for Attorney-Parent

A student who prevails under the IDEA is not entitled to fees for his attorney-parent. *Ford v Long Beach Unified Sch. Dist.* (9th Cir 2006) 461 F3d 1087. In *Van Duyn v Baker Sch. Dist. 5J* (9th Cir 2007) 481 F3d 770, the court reaffirmed the ruling in *Ford*, but also held that the student could recover for the fees of counsel other than his mother.

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### §13.13 (2) No Expert-Consultant Fees

Expert-consultant fees are not recoverable under the IDEA. *Arlington Cent. Sch. Dist. Bd. of Educ. v Murphy* (2006) 548 US 291, 165 L Ed 2d 526, 126 S Ct 2455.

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## §13.14 7. Proceedings Under Local Ordinances Authorizing Fee Awards

Local ordinances also may authorize administrative agencies to award reasonable attorney fees. See *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 378, 261 CR 318.

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## §13.15 8. Federal Administrative Proceedings

Fees may be awarded for work performed in administrative proceedings in which the federal government is a party under the Equal Access to Justice Act (5 USC §504(a); 28 USC §2412(d)).

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## III. FEE AWARDS FOR WORK PERFORMED IN ADMINISTRATIVE PROCEEDINGS IN CONJUNCTION WITH JUDICIAL ACTION

### A. Fee Awards for Administrative Proceedings Before Litigation

### §13.16 1. California Courts

Work performed in administrative proceedings that precede the filing of litigation in California courts is generally compensable if it is intertwined with the ensuing litigation and if it is useful and of the type ordinarily necessary to the court action. *Best v California Apprenticeship Council* (1987) 193 CA3d 1448, 1462, 240 CR 1. In *Best,* the plaintiff had challenged his discharge from an apprenticeship program on the ground that the discharge violated his right to freedom of religion. After he succeeded in the appellate court, the trial court granted his application for fees under CCP §1021.5 for work in court but denied him fees for work in the prior administrative proceeding. The court of appeal reversed, holding that fees may be awarded under both 42 USC §1988 and CCP §1021.5 when administrative proceedings are intertwined with judicial proceedings and the work in the administrative forum is useful and of the type ordinarily necessary to the court action. But see *Beach Colony II, Ltd. v California Coastal Comm'n* (1985) 166 CA3d 106, 212 CR 485, stating in dicta that fees cannot be awarded for quasi-legislative, as opposed to quasi-judicial, administrative proceedings that precede litigation. See also *Sampson v Parking Serv. 2000 Com., Inc.* (2004) 117 CA4th 212, 11 CR3d 595 (denying fees for optional administrative proceedings before Labor Commissioner, distinguishing *Best*).

Fees under Welf & I C §10962 for preliminary administrative work in welfare and MediCal hearings appear to have been awarded and affirmed in *Land v Anderson* (1997) 55 CA4th 69, 84, 63 CR2d 717 (hours reasonable in light of "need for exhaustion of administrative remedies"). On fees under §10962, see §3.84.

Fees for preliminary administrative work are also available in successful litigation under the Individuals with Disabilities Education Act, 20 USC §1415(e)(4)(B). See §§9.24-9.25.

Fee awards that include compensation for time spent in state regulatory proceedings are specifically authorized by CCP §1028.5(b), cited in *Beach Colony II, Ltd. v California Coastal Comm'n* (1985) 166 CA3d 106, 116, 212 CR 485.

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## 2. Federal Courts

### §13.17 a. Standard When Administrative Proceedings Are a Prerequisite to Court Action

Federal courts have wrestled with the issue of whether fees are available for work performed in administrative proceedings that precede litigation. When administrative proceedings are a prerequisite to court action, fees incurred in those proceedings are recoverable in the subsequent litigation. For example, in *New York Gaslight Club, Inc. v Carey* (1980) 447 US 54, 71, 64 L Ed 2d 723, 738, 100 S Ct 2024, the Court held that, under Title VII, 42 USC §2000e-5(k), fees could be recovered in a subsequent federal court action for required administrative proceedings at the state level. See also *Native Village of Quinagak v U.S.* (9th Cir 2002) 307 F3d 1075 (plaintiffs entitled to fees for time spent exhausting required administrative remedies, even though fee-shifting statute provided fees for "action" and did not use term "proceedings").

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### §13.18 b. Standard When Administrative Proceedings Are Optional

When administrative proceedings are optional, the standard is murkier. In *Webb v Board of Educ.* (1985) 471 US 234, 85 L Ed 2d 233, 105 S Ct 1923, a schoolteacher claimed that he was fired for racially discriminatory reasons. He unsuccessfully sought relief through local administrative proceedings and then filed suit in federal court under 42 USC §1983. He eventually obtained a favorable settlement and sought an award of attorney fees under 42 USC §1988. The trial court awarded him attorney fees for the time incurred in the judicial proceedings, but it disallowed the time spent by his attorney in the administrative proceedings. The Supreme Court affirmed.

First, the Court rejected the plaintiff's argument that he was entitled to fees for the administrative proceedings because they were brought to enforce 42 USC §1983. The Court held that, although the administrative hearings could be characterized as "proceedings," they were not brought to enforce §1983. The Court distinguished *Carey* on the basis that *Carey* involved administrative proceedings that were a prerequisite to filing a lawsuit in federal court. In contrast, under §1983, the plaintiff in *Webb* could have gone directly to court and bypassed the administrative proceedings. Therefore, the Court held that the administrative proceedings did "not have the same integral function under §1983 that state administrative proceedings have under Title VII." *Webb v Board of Educ.* (1985) 471 US 234, 241, 85 L Ed 2d 233, 241, 105 S Ct 1923.

Second, the plaintiff contended that he should receive his administrative fees because those services were "reasonably expended" in preparation for the §1983 litigation. The Court rejected this argument on the facts before it, finding that the plaintiff had failed to identify distinct aspects of the work done for the administrative proceedings that were both useful and of the type ordinarily necessary to advance litigation. The Court implied, however, that if the application had cited particular work in the administrative proceedings that substituted for litigation preparation, those hours would have been compensable as part of the normal process of developing a case. 471 US at 243, 85 L Ed 2d at 242. This concept was expanded in Justice Brennan's concurring opinion, which noted that work in administrative proceedings should also be compensable when the administrative proceedings are incorporated by the court as an integral part of the lawsuit (*i.e.,* when the trial court abstains, forcing the parties to seek an administrative ruling, or when administrative proceedings are part of the remedy in the case). 471 US at 249, 85 L Ed 2d at 246.

**Additional authorities:** Compare *Sullivan v Hudson* (1989) 490 US 877, 104 L Ed 2d 941, 109 S Ct 2248, with *Shalala v Schaefer* (1993) 509 US 292, 125 L Ed 2d 239, 113 S Ct 2625; *Flores v Shalala* (9th Cir 1995) 49 F3d 562.

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## B. Fee Awards for Administrative Proceedings That Are Intertwined With Litigation

### §13.19 1. California Courts

Fees may also be available for administrative work incurred after the filing of a judicial action in California courts. In *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 847, 216 CR 649, for example, litigation between the state Department of Food and Agriculture and a consumers' cooperative involving the legality of regulations setting minimum retail milk prices resulted in a settlement agreement. The cooperative agreed to dismiss its cross-complaint if the department held hearings—a necessary prerequisite to suspending the pricing regulations—and if it suspended the regulations. The cooperative took part in the subsequent hearings, and the department rescinded the regulations. The trial court awarded fees under CCP §1021.5 for both the judicial action and the administrative proceeding.

In upholding the award, the court of appeal noted that, unlike 42 USC §1988, CCP §1021.5 does not authorize fee awards for "proceedings," but only for "actions." However, the court found that the administrative hearings were inextricably intertwined with the legal action. It was implicit in the settlement that the cooperative would participate in the hearings and that this participation was useful and necessary to resolve the action. Compare *Wallace* with *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 971, 259 CR 599 (fees denied for administrative work that was not sufficiently related to litigation), and *Ciani v San Diego Trust & Sav. Bank* (1994) 25 CA4th 563, 575, 30 CR2d 581 (court denied fees incurred in postlitigation administrative proceedings). Note that in *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 780, 118 CR2d 629, although dealing with ancillary federal litigation and not administrative proceedings, the court followed the rules stated in *Wallace* and distinguished *Kizer* and *Ciani*, holding that fees are recoverable for ancillary federal litigation that is "closely related and useful" to the litigation, or that "materially contributed to the litigation"; there is no requirement that the work was "necessary."

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### §13.20 2. Federal Courts

Federal courts apply a rule similar to the California rule discussed in §13.19. In *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)* (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088, the plaintiffs entered into a consent decree with the state Department of Transportation over the state's vehicle emission and inspection program. The plaintiffs then spent considerable time commenting on regulations promulgated by the state under the decree and appearing at hearings held by the federal Environmental Protection Agency concerning the state's program. The Court affirmed an award of fees for this work, holding that the fact that these activities were not traditional judicial litigation did not preclude a fee award. The Court held that the award was appropriate because participation in the administrative proceedings was crucial to protecting the plaintiffs' rights under the consent decree.

Several other federal cases have permitted fee awards for administrative proceedings that were integrally related to successful court actions. In *Chrapliwy v Uniroyal, Inc.* (7th Cir 1982) 670 F2d 760, for example, the plaintiffs successfully resolved their employment discrimination complaint largely because of their successful administrative efforts to have the defendant barred from entering into federal contracts. The court found that the plaintiffs were entitled to fees for both the administrative proceedings and the judicial proceedings because the former contributed to the outcome of the Title VII litigation. See also *U.S. v City of San Diego* (SD Cal 1998) 18 F Supp 2d 1090, 1100.

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## §13.21 IV. WHO MAY RECOVER ADMINISTRATIVE FEES

In some circumstances, a nonattorney may be entitled to recover "attorney fees" for work done in administrative proceedings. In *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 910, 160 CR 124, disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728, the supreme court held that a nonattorney advocate could recover "attorney fees" under the common fund doctrine for his work performed in a quasi-judicial reparations proceeding.

In *Longval v WCAB* (1996) 51 CA4th 792, 803, 59 CR2d 463, however, the court noted that the law had changed and that, under the new law, only attorneys licensed in California could obtain fees for representing workers' compensation applicants before the Workers' Compensation Appeals Board. See also §§13.12-13.13. On the rights of self-represented parties generally, see §§2.22.

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# 14

# Procedures for Claiming and Opposing Fees for Work in Arbitration

I. AVAILABILITY OF FEE AWARDS IN ARBITRATION
- A. Fees Generally Available in Arbitration as in Litigation §14.1
- B. Terms of Arbitration Agreement Control §14.2
- C. Availability of Specific Types of Fees
  - 1. Statutory Fees §14.3
  - 2. Contract-Based Fees §14.4
  - 3. Fees Based on Equitable Doctrines §14.5
  - 4. Fees as Sanctions §14.6
- D. Standards for Determining Fee Awards in Arbitration Proceedings
  - 1. Standards in Arbitration Generally the Same as in Judicial Proceedings §14.7
  - 2. Arbitrators Have Far Greater Discretion to Decide Fee Issues §14.8
  - 3. Code of Civil Procedure §998 Applies to Arbitrations §14.9

II. PROCEDURE FOR OBTAINING FEE AWARDS IN ARBITRATIONS
- A. Fee Claims Ordinarily Decided by Arbitrator
  - 1. General Rule §14.11
  - 2. Exceptions §14.12
- B. Applicable Procedures §14.13
- C. Arbitrator's Fee Award §14.14

III. JUDICIAL REVIEW OF ARBITRATOR FEE AWARDS
- A. Proceedings to Vacate Arbitrator's Award
  - 1. Vacating Award §14.15
  - 2. Grounds for Vacating Award §14.16
  - 3. Correcting Award §14.17
- B. Proceedings to Confirm Arbitrator's Award §14.18

IV. OBTAINING FEES FOR PRE-ARBITRATION PROCEEDINGS
- A. Work Performed in Preparation for Arbitration §14.18
- B. Compensability of Time Spent on Motions to Compel Arbitration §14.19
  - 1. Cases Awarding Fees §14.20
  - 2. Cases Denying Fees §14.21
  - 3. Actions to Compel Arbitration Under Collective Bargaining Agreements §14.22

V. OBTAINING FEES FOR POST-ARBITRATION PROCEEDINGS §14.23

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# I. AVAILABILITY OF FEE AWARDS IN ARBITRATION

## §14.1 A. Fees Generally Available in Arbitration as in Litigation

Generally speaking, parties that are entitled to fee awards from their opponents in litigation are entitled to fees on the same basis in arbitration. See *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597 (arbitrator has power to determine contractual fees); *Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 90 CR2d 334 (arbitrator has power to award statutory fees). See also §§4.57-4.58, 11.2.

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## §14.2 B. Terms of Arbitration Agreement Control

The terms of the referral to arbitration are controlling. If the terms of the agreement to arbitrate provide that the arbitrator will decide a substantive claim that provides for attorney fees as a remedy, then the arbitrator is empowered to award fees under the applicable law. See, *e.g., Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 90 CR2d 334.

Likewise, if the arbitrator is directed to decide all matters at issue in the trial court, this includes requests for attorney fees contained in the parties' pleadings. *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597. In *Moshonov,* for example, the parties' stipulation to arbitrate provided that the arbitration would be governed by the arbitration provisions in the California Rules of Court; those provisions expressly authorize the arbitrator to determine "costs if appropriate" (Cal Rules of Court 3.825(a) (formerly Cal Rules of Ct 1615(a)), which *Moshonov* holds include attorney fees authorized by contract. See also Cal Rules of Ct 3.824(a)(8) (arbitrator has power to award "costs, not to exceed the statutory costs of the suit").

**NOTE:** Code of Civil Procedure §1284.3 is an exception to the general rule that the arbitration agreement controls whether the arbitrator is empowered to decide fee issues; it provides that arbitrators may not conduct "consumer arbitrations" that require the consumer to pay the opposing party's fees if the consumer does not prevail.

The agreement to arbitrate does not have to specify that attorney fees are subject to arbitration. In *Corona v Amherst Partners* (2003) 107 CA4th 701, 705, 132 CR2d 250, the court held that a general agreement for the parties to settle "disputes" by arbitration includes an agreement to arbitrate attorney fee issues. If the arbitrator's award does not include attorney fees, however, the court is without power to award them. 107 CA4th at 706.

If the agreement on which the arbitration is based does not provide for an award of attorney fees, the arbitrator is without jurisdiction to award fees. *Thompson v Jespersen* (1990) 222 CA3d 964, 272 CR 132.

**NOTE:** The American Arbitration Association's "Construction Industry Arbitration Rules and Mediation Procedures" provide that arbitrators may award attorney fees when both parties request them, regardless of any contractual or statutory basis for the fee claim. See *Taylor v Van-Catlin Constr.* (2005) 130 CA4th 1061, 1064, 30 CR3d 690. On use of estoppel in the context of claiming attorney fees under a contractual fee clause, see §§4.55-4.56.

The parties may also limit entitlement to fees to selected proceedings. See, *e.g., Kalai v Gray* (2003) 109 CA4th 768, 777 135 CR2d 449 (fees recoverable only by prevailing party in arbitration).

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## C. Availability of Specific Types of Fees

### §14.3 1. Statutory Fees

In *Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 1086, 90 CR2d 334, the court held that when a claim under a consumer protection statute is submitted to arbitration, the arbitrator has the power to award fees provided by the statute. As the court recognized, "the availability of fees to prevailing plaintiffs is integral to making the [statute] an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute." *Broughton v Cigna Healthplans, supra.* The court also held that the right to statutory fees is not negated by CCP §1284.2, which has been read to provide that parties to arbitration pay their own attorney fees; rather, §1284.2 is a "default provision" that does not override the statutory attorney fees remedy. *Broughton v Cigna Healthplans, supra.* See also, *e.g., Taylor v Van-Catlin Constr.* (2005) 130 CA4th 1061, 30 CR3d 690 (upholding arbitrator fee award based on CC §3260).

In at least one instance, the legislature itself determined that the prevailing plaintiffs' fees should be decided through arbitration. See Rev & T C §6909(b), construed in *Jordan v DMV* (2002) 100 CA4th 431, 123 CR2d 122.

**NOTE:** Some statutes authorize fees only in court actions. See *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 910, 160 CR 124 (CCP §1021.5 inapplicable to administrative proceedings unrelated to litigation). Whether such a restriction would bar a fee award for an arbitration conducted independently of litigation has not been decided.

On eligibility and entitlement under fee-shifting statutes, see chap 2. On specific fee shifting statutes, see chap 3.

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## §14.4 2. Contract-Based Fees

When a contract containing an arbitration clause also contains an attorney fee clause providing for an award to the prevailing party, the arbitrator may make the award of fees to the prevailing party. *Pierotti v Torian* (2000) 81 CA4th 17, 23, 96 CR2d 553; *Kelley v Bredelis* (1996) 45 CA4th 1819, 1832, 53 CR2d 536; *Tate v Saratoga Sav. & Loan Ass'n* (1989) 216 CA3d 843, 856, 265 CR 440; *Taranow v Brokstein* (1982) 135 CA3d 662, 185 CR 532. In such cases, just as in litigation, the terms of the contract may impose restrictions on, or even expand, the parties' right to recover fees. See, *e.g., Kalai v Gray* (2003) 109 CA4th 768, 135 CR2d 449 (fees recoverable only by prevailing party in arbitration).

On contract-based fee awards, see chap 4.

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### §14.5 3. Fees Based on Equitable Doctrines

Fee awards based on equitable principles also should be available through arbitration. For example, in *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 908, 160 CR 124, the court held that administrative agencies performing an adjudicatory function could award fees under the common fund doctrine. There is no reason arbitrators should not have the same power.

Arbitrators may also apply the "equitable apportionment" doctrine, a subset of the common fund doctrine codified in Lab C §3856. See *Quinn v State* (1975) 15 C3d 162, 169, 124 CR 1; *Phelps v Stostad* (1997) 16 C4th 23, 65 CR2d 360.

On fee awards based on equitable doctrines, see chap 5.

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## §14.6 4. Fees as Sanctions

**Code of Civil Procedure §§128.5 and 128.7.** Arbitrators may award attorney fees as sanctions under CCP §§128.5 and 128.7. Section 128.5(a), which applies to cases filed before January 1, 1995, expressly provides that it applies to judicial arbitration proceedings under CCP §§1141.10-1141.31. In *Thompson v Jespersen* (1990) 222 CA3d 964, 968, 272 CR 132, the court expressed doubt that §128.5 applies to contractual arbitration proceedings. In *David v Abergel* (1996) 46 CA4th 1281, 54 CR2d 443, however, the court held that an arbitrator can award sanctions under CCP §128.5 when the parties' agreement empowers the arbitrator to award "any remedy or relief" available under California law.

Whether CCP §128.7, which applies to actions filed on or after January 1, 1995, also applies to arbitrations has not been decided. Section 128.7 does not contain the same express language applying it to judicial arbitrations that §128.5 did. On the other hand, the reasoning expressed in *David v Abergel, supra,* would seem equally applicable to §128.7.

**Code of Civil Procedure §575.2.** Attorney fees are also available as sanctions under CCP §575.2 for violation of local rules. In *Rietveld v Rosebud Storage Partners* (2004) 121 CA4th 250, 16 CR3d 791, the court upheld sanctions for failure to meaningfully participate in judicial arbitration, citing a local rule that allowed attorney fees to be imposed for such a failure and §575.2 (sanctions for failure to comply with local rules).

On fee awards as sanctions, see chap 6.

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## D. Standards for Determining Fee Awards in Arbitration Proceedings

### §14.7 1. Standards in Arbitration Generally the Same as in Judicial Proceedings

Fee awards in arbitration proceedings are subject to the same standards for determining reasonable attorney fees as court awards. Because of the broad powers arbitrators have to decide matters, however, judicial review is far more limited. See, *e.g., Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597; *Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 94 CR2d 603. For example, in *Moshonov*, the arbitrator denied fees to the prevailing defendant, finding that the dispute did not fall within the terms of the contractual fee clause. The supreme court held that this determination was not reviewable and did not exceed the arbitrator's powers. In so holding, the court, without concluding whether it was correctly decided, distinguished *DiMarco v Chaney* (1995) 31 CA4th 1809, 37 CR2d 558.

In *DiMarco,* the appellate court held that an arbitrator's refusal to award fees to a prevailing party under a contract that specified that the prevailing party "shall" be awarded fees was improper because it conflicted with the express and mandatory terms of the contract. See also *Kahn v Chetcuti* (2002) 101 CA4th 61, 65, 123 CR2d 606 (distinguishing *DiMarco;* arbitrator had authority to determine whether prevailing party's act of filing complaint before mediation barred attorney fee award, and determination unreviewable); *Creative Plastering, Inc. v Hedley Builders, Inc.* (1993) 19 CA4th 1662, 1665, 24 CR2d 216 (affirming arbitrator's unreviewable discretion to determine prevailing party).

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### §14.8 2. Arbitrators Have Far Greater Discretion to Decide Fee Issues

In reality, arbitrators often base their fee awards on their own perceptions of equity. As discussed in §14.7, those decisions are largely unreviewable. See, *e.g., Kahn v Chetcuti* (2002) 101 CA4th 61, 65, 123 CR2d 606 (arbitrator has broad power to base fee decision on broad principles of justice and equity that trial court could not); *Creative Plastering, Inc. v Hedley Builders, Inc.* (1993) 19 CA4th 1662, 1665, 24 CR2d 216.

Moreover, unlike trial courts, arbitrators can decide a fee motion on any legal or factual basis, even if not argued by the parties. *Moshonov v Walsh* (2000) 22 C4th 771, 777, 94 CR2d 597 (citing Cal Rules of Ct 3.824(a)(7) (formerly Cal Rules of Ct 1614(a)(7))).

On standards of review applicable to arbitrator awards see §§14.15-14.18.

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### §14.9 3. Code of Civil Procedure §998 Applies to Arbitrations

Arbitrators also may enforce CCP §998, which provides that "costs," including attorney fees when otherwise authorized, may be shifted when an offer has been made in writing at least 10 days before the beginning of trial or arbitration and been refused, and the offeree fails to obtain a more favorable judgment or award at trial. See generally *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 1112, 86 CR2d 614; *Pilimai v Farmers Ins. Exch. Co.* (2006) 39 C4th 133, 45 CR3d 760 (insurance company in uninsured motorist arbitration is liable for costs under CCP §998 even when total exceeds insured's policy limits).

The interplay between §998 and parties' rights to pre- and postoffer attorney fees under CC §1717 is discussed in depth in §§4.79-4.81. Briefly stated, the supreme court in *Scott Co. v Blount, Inc., supra,* concluded that a plaintiff, which was the prevailing party under CC §1717 but had not exceeded the defendant's CCP §998 offer, was entitled to its *preoffer* attorney fees and costs, but that the defendant was entitled to its *postoffer* fees. See also, *e.g., Biren v Equality Emergency Med. Group, Inc.* (2002) 102 CA4th 125, 125 CR2d 325 (following *Scott*).

A party who accepts a CCP §998 offer can be the prevailing party for purposes of CC §1717, even though there is no determination of liability under the contract. *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276. Likewise, a party who accepts a §998 offer that fails to address fees and costs may claim fees under CC §1717. *Chinn v KMR Prop. Mgmt.* (2008) 166 CA4th 175, 184, 82 CR3d 586 (CCP §998 offer that is silent on attorney fees "cannot reasonably be interpreted to exclude recovery of fees and costs by the prevailing party"); *Ritzenthaler v Fireside Thrift Co.* (2001) 93 CA4th 986, 990, 113 CR2d 579. See also *Elite Show Servs., Inc. v Staffpro, Inc.* (2004) 119 CA4th 263, 14 CR3d 184 (CCP §998 offer valid even though it left fees to be determined by court and cut off fees at certain date).

In determining whether a plaintiff is the prevailing party for §998 purposes, the court must include costs and reasonable attorney fees the plaintiff incurred before the CCP §998 offer was made. *Adam v DeCharon* (1995) 31 CA4th 708, 37 CR2d 195.

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## II. PROCEDURE FOR OBTAINING FEE AWARDS IN ARBITRATIONS

### A. Fee Claims Ordinarily Decided by Arbitrator

### §14.10 1. General Rule

As a general rule, if a party to an arbitration seeks reasonable attorney fees under a contractual or statutory provision, or an equitable doctrine, the arbitrator decides the attorney fee issue. See, *e.g., Corona v Amherst Partners* (2003) 107 CA4th 701, 132 CR2d 250 (if attorney fees are within scope of issues that agreement has made subject to arbitration, only arbitrator has power to award them). See also *DiMarco v Chaney* (1995) 31 CA4th 1809, 1817, 37 CR2d 558 (noticed motion requirement of CCP §1033.5 (items allowable as costs) inapplicable to arbitrator fee awards).

The arbitrator also may determine fees even though the contract that compels arbitration also provides that the "court" will determine attorney fees. *Harris v Sandro* (2002) 96 CA4th 1310, 1314, 117 CR2d 910 (contract that both compels arbitration and requires "court" to determine amount of fee award must contemplate that arbitrator will make fee award).

For comparison of private contractual arbitration and judicial arbitration, see A Litigator's Guide to Effective Use of ADR in California, chaps 9, 11 (Cal CEB 2005).

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## §14.11 2. Exceptions

If the agreement on which the arbitration is based does not provide for an award of attorney fees, the arbitrator is without jurisdiction to award fees. *Thompson v Jespersen* (1990) 222 CA3d 964, 967, 272 CR 132 (if parties' contract is silent on issue of attorney fees for arbitration, arbitrator is without authority to consider issue).

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### §14.12 B. Applicable Procedures

Fee awards in arbitration are generally decided after the arbitrator has determined the merits of the action. See, *e.g., Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 1086, 90 CR2d 334 (when statutory claims that include fees are submitted to arbitration, arbitrator has power to award them). As with the merits of the case, arbitrators determining fee awards have a great deal of discretion to decide what procedures to follow and how formal the proceedings will be. See *DiMarco v Chaney* (1995) 31 CA4th 1809, 1817, 37 CR2d 558 (noticed motion requirement of CCP §1033.5 pertains only to fee requests made in the superior court, not to requests for fees incurred in underlying arbitration).

Generally, trial courts decide attorney fee motions on the papers and oral argument, without live testimony. See chap 11. Most arbitrators follow a similar procedure, although in very large fee claims, if the parties' positions are far apart, arbitrators may be more inclined to hear testimony from the attorneys or from expert witnesses.

Parties seeking to engage in discovery on the fee issues face a double hurdle: Arbitration rules are generally less conducive to formal discovery (see A Litigator's Guide to Effective Use of ADR in California §9.69 (Cal CEB 2005)), and discovery on fee motions is generally discouraged (see §§11.54-11.55). Nonetheless, the more informal nature of arbitration may allow the parties to work out exchanges of information more readily than they can in trial courts.

An arbitrator may also award interim fees. See *Hightower v Superior Court* (2001) 86 CA4th 1415, 104 CR2d 209.

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### §14.13 C. Arbitrator's Fee Award

In keeping with the generally less formal nature of arbitration awards, fee awards by arbitrators can be even more perfunctory than court awards. No findings or conclusions are required. CCP §1283.4; Cal Rules of Ct 3.825(a)(2) (arbitrator not required to make findings of fact or conclusions of law). Findings of fact are not required nor is the arbitrator required to disclose the rationale or reasons for the award. See *Cothron v Interinsurance Exch. of the Auto. Club* (1980) 103 CA3d 853, 860, 163 CR 240. Fee awards by arbitrators also are subject to far more deferential review than trial court awards. See, *e.g., Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597. On judicial review of arbitration awards, see §§14.15-14.17.

The arbitrator may amend an award to include costs and attorney fees when they were inadvertently omitted from the original award. *Century City Med. Plaza v Sperling, Isaacs & Eisenberg* (2001) 86 CA4th 865, 868, 103 CR2d 605.

Arbitrators may *correct* their award within 30 days after service of the award, and a party may request correction within 10 days of service of the award. CCP §1284. An arbitrator may *amend or supplement* an award at any time prior to judicial confirmation of the award. State Bar Office of Mandatory Fee Arbitration, Arbitration Advisory 03-02, The Amendment or Supplementation of Arbitration Awards, March 27, 2003.

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## III. JUDICIAL REVIEW OF ARBITRATOR FEE AWARDS

### A. Proceedings to Vacate Arbitrator's Award

### §14.14 1. Vacating Award

A party seeking to vacate an arbitrator's fee award under CCP §1286.2 faces an even more daunting task than a party seeking appellate review of a trial court fee award (see §16.17). Review of attorney fee awards rendered by arbitrators is far more limited than review of fee awards rendered by trial courts.

If the agreement authorizes the arbitrator to award fees, that award is subject to no greater review than awards on the merits, meaning that review is limited to the statutory grounds for vacating (CCP §1286.2) or correcting (CCP §1286.6) an award. See *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597 (arbitrator's determination that successful claims were not encompassed within fee clause is unreviewable); *Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 94 CR2d 603 (arbitrators' award denying contractual fees upheld on ground that arbitrators had not determined prevailing party; court reserved question of whether arbitrators' refusal to award fees to prevailing party when underlying contract requires such an award is judicially reviewable). See also *Delaney v Dahl* (2002) 99 CA4th 647, 121 CR2d 663 (following *Moore* and *Moshonov*); *Pierotti v Torian* (2000) 81 CA4th 17, 26, 96 CR2d 553 (who is "prevailing party" is mixed question of law and fact, and court of appeal has no power to second-guess arbitrator's decision on issue).

Compare *DiMarco v Chaney* (1995) 31 CA4th 1809, 37 CR2d 558 (arbitrator's refusal to award fees to prevailing party under contract that specified that prevailing party "shall" be awarded fees was improper because it conflicted with contract's express, mandatory terms), with *Creative Plastering, Inc. v Hedley Builders, Inc.* (1993) 19 CA4th 1662, 24 CR2d 216 (affirming arbitrator's unreviewable discretion to determine prevailing party).

Arbitration awards are *not* reviewable for errors of law or fact, and this same limited review applies to arbitrators' determinations of attorney fee claims. See, *e.g., Moore v First Bank of San Luis Obispo*, 22 C4th at 788 ("Even if legally erroneous,… an arbitral decision as to who, if anyone, prevailed in the contractual dispute would not ordinarily be reviewable under [CCP §1286.2]"). See also *Taylor v Van-Catlin Constr.* (2005) 130 CA4th 1061, 1068, 30 CR3d 690 (even if based on incorrect interpretation of law, arbitrator's decision to award attorney fees to contractor under CC §3260 not judicially reviewable).

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### §14.15 2. Grounds for Vacating Award

The court must vacate an arbitration award if it determines any of the following:

- The award was procured by fraud, corruption, or other undue means (CCP §1286.2(a)(1); *Pacific Crown Distribs. v Brotherhood of Teamsters & Auto. Truck Drivers* (1986) 183 CA3d 1138, 228 CR 645 (fraud));
- There was corruption in any of the arbitrators (CCP §1286.2(a)(2); see, *e.g., Gebers v State Farm Gen. Ins. Co.* (1995) 38 CA4th 1648, 45 CR2d 725 (interested appraiser appointed by party));
- The rights of the party were substantially prejudiced by a neutral arbitrator's misconduct (CCP §1286.2(a)(3));
- The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted (CCP §1286.2(a)(4); see *O'Flaherty v Belgum* (2004) 115 CA4th 1044, 9 CR3d 286);
- The party's rights were substantially prejudiced by the arbitrator's refusal to postpone the hearing on sufficient cause being shown therefor, or by the arbitrator's refusal to hear evidence material to the controversy, or by other conduct of the arbitrator that is contrary to the provisions of CCP §§1280-1294.2 (CCP §1286.2(a)(5)); or
- An arbitrator making the award either (1) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware (see *Advantage Med. Servs., LLC v Hoffman* (2008) 160 CA4th 806, 817, 72 CR3d 935), or (2) was subject to disqualification on grounds specified in CCP §1281.91 but failed on receipt of timely demand to disqualify himself or herself as required by that provision (CCP §1286.2(a)(6)) (subdivision not applicable to proceedings conducted under a collective bargaining agreement); *Guseinov v Burns* (2006) 145 CA4th 944, 958, 51 CR3d 903 (arbitrator's service as uncompensated mediator in single prior matter in which plaintiff's counsel represented party did not constitute "professional relationship" between arbitrator and plaintiff's counsel requiring disclosure).

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### §14.16 3. Correcting Award

When faced with an award that violates California law in part, the trial court will attempt to correct the award before resorting to vacating it in its entirety. In *Jones v Humanscale Corp.* (2005) 130 CA4th 401, 411, 29 CR3d 881, the arbitrator directed that the parties each pay one-half of the arbitration fees. The trial court vacated the award. The court of appeal found that although this portion of the award violated California law (because the case involved an employee wage claim and needed to comply with the minimum requirements stated in *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99 CR2d 745), the trial court erred by vacating the entire award without first exercising its authority to correct it.

On the procedures governing petitions to vacate or correct an arbitrator's award, see A Litigator's Guide to Effective Use of ADR in California §9.83 (Cal CEB 2005).

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### §14.17 B. Proceedings to Confirm Arbitrator's Award

Conversely, if a petition or response seeks to *confirm* a properly served and filed arbitrator's fee award or denial, the trial court must confirm it unless it corrects or vacates the award or dismisses the proceedings. CCP §1286. See *Weinberg v Safeco Ins. Co.* (2004) 114 CA4th 1075, 1083, 8 CR3d 224; *Ajida Technol., Inc. v Roos Instruments, Inc.* (2001) 87 CA4th 534, 542, 104 CR2d 686. See also *Landis v Pinkertons, Inc.* (2004) 122 CA4th 985, 18 CR3d 890 (trial court properly confirmed award despite petitioners' failure to comply with statutory procedure).

If confirmed, an award is entered as a judgment and has the same force and effect as a judgment in a civil action of the same jurisdictional classification and may be enforced like any other such judgment. CCP §1287.4.

On the procedures governing petitions to confirm, correct, or vacate an arbitrator's award, see A Litigator's Guide to Effective Use of ADR in California §9.83 (Cal CEB 2005).

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## IV. OBTAINING FEES FOR PRE-ARBITRATION PROCEEDINGS

### §14.18 A. Work Performed in Preparation for Arbitration

As a general rule, attorney fees may be recovered for prelitigation activities that are reasonably undertaken in preparation for litigation. See §§9.6-9.7. The same rule should apply to pre-arbitration work that was reasonably undertaken to prepare for an arbitration.

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**Source:** Civil Litigation/California Attorney Fee Awards/14 Procedures for Claiming and Opposing Fees for Work in Arbitration/§14.19 B. Compensability of Time Spent on Motions to Compel Arbitration

## §14.19 B. Compensability of Time Spent on Motions to Compel Arbitration

The courts have struggled with the issue of whether a party that successfully moves to compel arbitration or successfully resists such a motion is entitled to reasonable attorney fees for that work, regardless of the outcome of the arbitration or litigation.

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### §14.20 1. Cases Awarding Fees

In *Acosta v Kerrigan* (2007) 150 CA4th 1124, 1131, 58 CR3d 865, the court held that the party who filed a successful petition to compel arbitration as required by the contract was entitled to fees under CC §1717 as to the proceedings on the petition to compel, regardless of the arbitration's outcome, and that this fee motion should be decided by the trial court, not the arbitrator. See *Otay River Constructors v San Diego Expressway* (2008) 158 CA4th 796, 799, 70 CR3d 434 (party that succeeds in obtaining order denying petition to compel arbitration is "prevailing party" under CC §1717 even though merits of underlying contractual dispute not yet resolved); *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 11, 54 CR3d 724 (defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause was invalid entitled to fees under contractual fee clause and CCP §1021.5, regardless of ultimate outcome of dispute between parties). See also *Turner v Schultz* (2009) 175 CA4th 974, 980, 96 CA3d 659 (following reasoning of *Acosta* and *Otay River Contractors* and determining that trial court properly awarded attorney fees to party who successfully fought action to stay arbitration, even though it was not yet known which party would prevail in arbitration).

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### §14.21 2. Cases Denying Fees

In contrast to the cases discussed in §14.21, the court in *Lachkar v Lachkar* (1986) 182 CA3d 641, 649, 227 CR 501 (following *Bank of Idaho v Pine Ave. Assoc.* (1982) 137 CA3d 5, 186 CR 695, discussed in §4.94), held that merely obtaining an order compelling arbitration does not qualify a party as the prevailing party under CC §1717, because there has been no determination of the parties' substantive rights. See also *Green v Mount Diablo Hosp. Dist.* (1989) 207 CA3d 63, 76, 254 CR 689.

In *Kalai v Gray* (2003) 109 CA4th 768, 777, 135 CR2d 449, the court held that a defendant who successfully enforced an arbitration clause was not entitled to fees for that litigation because the contractual fee-shifting clause provided for fees to "the prevailing party to [the] Arbitration," and the arbitration had not yet occurred. If the party won the arbitration, however, it could then recover for the time spent compelling arbitration because those fees fell within the contractual clause for fees incurred "in connection with the Arbitration proceedings."

See also *California Teachers Ass'n v Governing Bd.* (1984) 161 CA3d 393, 207 CR 659, in which fees were awarded to the party that had been compelled to arbitrate because it effectively received a favorable judgment on the merits in the arbitration proceedings.

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## §14.22 3. Actions to Compel Arbitration Under Collective Bargaining Agreements

Labor Code §1128 provides that fees may be awarded in actions to compel arbitration under a collective bargaining agreement. Note, however, that federal labor law has been held to preempt the fee provision in Lab C §1128. *Warehouse, Processing, Distrib. Workers Union, Local 26 v Hugo Neu Proler Co*. (1998) 65 CA4th 732, 739, 76 CR2d 814.

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## §14.23 V. OBTAINING FEES FOR POST-ARBITRATION PROCEEDINGS

When attorney fees are recoverable under a statute or contract for arbitration, they also are recoverable for the proceedings to confirm the arbitration award and for any appeal from those proceedings. *Ajida Technol., Inc. v Roos Instruments, Inc.* (2001) 87 CA4th 534, 552, 104 CR2d 686 (contract providing for fees incurred in arbitration also authorizes fees for subsequent trial court and appellate proceedings); *Stermer v Modiano Constr. Co.* (1975) 44 CA3d 264, 118 CR 309; *San Luis Obispo Bay Props. v PG&E* (1972) 28 CA3d 556, 104 CR 733; *Lafarge Conseils et Etudes S.A. v Kaiser Cement & Gypsum Corp.* (9th Cir 1986) 791 F2d 1334, 340.

A fee award in the arbitration is not a prerequisite to a fee award for postjudgment work. Even if the arbitrator has denied fees to the prevailing party at the arbitration level, the superior court is not bound by this denial of fees in post-arbitration proceedings and may award post-arbitration fees to the prevailing party. *Carole Ring & Assocs. v Nicastro* (2001) 87 CA4th 253, 260, 104 CR2d 519 (citing CCP §§1293.2 and 1717). See also *MBNA Am. Bank v Gorman* (2006) 147 CA4th Supp 1, 11, 54 CR3d 724 (defendant who defeated bank's petition to confirm arbitration award on grounds that arbitration clause was invalid entitled to fees under contractual fee clause and CCP §1021.5, regardless of ultimate outcome of dispute between parties); *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 39 CR3d 550 (plaintiff who failed to obtain damages in arbitration of tort claims entitled to recover fees under CCP §1021.5 for post-arbitration work on equitable relief claim); *Marcus & Millichap Real Estate Inv. Brokerage Co. v Woodman Inv. Group* (2005) 129 CA4th 508, 514, 28 CR3d 584 (affirming award of contractual fees as costs under CCP §1293.2 in action that vacated arbitration award).

A petition to confirm an arbitration award is not an "action" within the meaning of CC §3176, which provides for reasonable attorney fees in any "action" on a bonded stop notice. *Villinger/Nicholls Dev. Co. v Meleyco* (1995) 31 CA4th 321, 326, 37 CR2d 36.

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# 15

# Collecting Fee Awards

I. FEE AWARDS COLLECTIBLE AS MONEY JUDGMENTS §15.1

II. COLLECTING FROM PRIVATE DEFENDANTS §15.2

III. COLLECTING FROM GOVERNMENT DEFENDANTS §15.3
- A. Collecting From State of California §15.4
  - 1. Former Budget Act Restrictions §15.5
  - 2. No Current Restrictions §15.6
- B. Collecting From Local Public Entities §15.7
- C. Collecting Federal Court Fee Awards §15.8

IV. ADDING PARTIES FOR COLLECTION §15.9

V. RECOVERY OF FEE AWARD PENDING APPEAL
- A. California Courts §15.10
  - 1. Posting an Undertaking §15.11
  - 2. Amount of Undertaking §15.12
- B. Federal Courts §15.13
- C. Undisputed Sums May Be Recovered Pending Appeal §15.14

VI. FEES MAY BE RECOVERED FOR COLLECTION EFFORTS §15.15

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## §15.1 I. FEE AWARDS COLLECTIBLE AS MONEY JUDGMENTS

An order awarding attorney fees is enforceable as a money judgment in the same manner as any other money judgment. *Stockton Theatres, Inc. v Palermo* (1961) 55 C2d 439, 443, 11 CR 580. See also *Alioto Fish Co. v Alioto* (1994) 27 CA4th 1669, 1686, 34 CR2d 244 (order awarding fees is "judgment," citing CCP §680.230); Cal Rules of Ct 8.278(c)(3) (award of costs enforceable as money judgment). Recipients of fee awards can resort to all the remedies generally used by creditors. CCP §§680.010-724.260. For example, in *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 1573, 272 CR 535, the court ruled that an attorney fee award is recoverable from a lis pendens bond posted by the plaintiff.

As with any money judgment, winning a substantial attorney fee award may be only half the battle. How difficult collection of the award will be may depend on whether the party who must pay the fees is a private party (see §15.2), the State of California (see §§15.4-15.6), or a local government entity (see §15.7). See McDermott & Rothschild, *The Private Attorney General Rule and Public Interest Litigation in California*, 66 Cal L Rev 138, 169 (1978). (Collection of fee awards against the federal government or its agencies is beyond the scope of this book.) Likewise, the issue of whether a fee award is automatically stayed on appeal recurs frequently and may have significant consequences for the outcome of the litigation (see §15.10). Finally, the fact that attorney fees may be recovered for the time spent collecting a prior fee award must also be taken into account (see §15.15). This chapter addresses these issues.

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## §15.2 II. COLLECTING FROM PRIVATE DEFENDANTS

Attorney fee awards are collectible from private defendants in the same manner as any other money judgment. See *Stockton Theatres, Inc. v Palermo* (1961) 55 C2d 439, 443, 11 CR 580, and other cases cited in §15.1. On creditors' remedies, see Debt Collection Practice in California (2d ed Cal CEB 1999); Enforcing Civil Money Judgments (Cal CEB Action Guide November 2008).

On the relationship between a judgment for fees to one party and a monetary judgment for the opposing party, see CC §1717(c); *Behniwal v Mix* (2007) 147 CA4th 621, 624, 54 CR3d 427 (attorney fee award to plaintiffs could not be set off against amounts owed under judgment for specific performance).

In *Java Oil Ltd. v Sullivan* (2008) 168 CA4th 1178, 1189, 86 CR3d 177, the court held that a foreign judgment for attorney fees was enforceable in California under the former Uniform Foreign Money-Judgments Recognition Act (UFMJRA) (former CCP §§1713-1724), rejecting arguments that the amounts awarded were "penalties."

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## §15.3 III. COLLECTING FROM GOVERNMENT DEFENDANTS

The traditional methods for enforcing judgments generally (see CCP §§695.010-709.030) do not apply to state court money judgments (including judgments or orders for attorney fees) obtained against the state of California or a county or municipal defendant. CCP §695.050.

The statutes governing payment of claims differ, depending on whether the paying entity is the state or a local entity, as described in §§15.4-15.7. In general, money judgments against state and local government entities may be enforced only as stated in Govt C §965.5(b) (state) and Govt C §970.1(b) (local).

Once a judgment has been entered against a government entity, it is enforceable for 10 years from the date the judgment becomes final (or, if payable in installments, from the date the last installment becomes due). Govt C §965.5(a) (state); Govt C §970.1(a) (local).

If the government entity refuses to pay a money judgment against it, the judgment creditor's recourse is to seek a writ of mandate to compel the government entity (or an officer or employee of that entity) to pay it. Govt C §965.7 (state); Govt C §970.2 (local). On writs of mandate, see California Civil Writ Practice (4th ed Cal CEB 2008).

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## §15.4 A. Collecting From State of California

The procedure for obtaining payment of judgments against the State of California is governed by Govt C §§965-965.9. For most judgments, the State Controller must draw a warrant to pay any final judgment against the state once the Director of Finance certifies that a sufficient appropriation exists for the payment of that judgment. Govt C §965.2(a). If money has been appropriated to pay the money judgment, but the state fails to do so voluntarily, Govt C §965.7 allows the judgment creditor to seek a writ of mandate to force payment. However, Govt C §965.7(b) states that nothing in §965.7 affects the legislature's discretion to make or not make an appropriation from which a judgment can be paid. See also CCP §1028, discussed in §15.5.

**NOTE:** In practice, the government has paid many fee awards by including them in the semiannual supplemental appropriations bills ("claims bills") that the legislature enacts to pay judgments. See §15.6. In the author's experience, state agencies often prefer this practice and incorporate it into the settlement of fee claims against the state.

In the past, the legislature has tried to limit the number or size of the fee awards that the state would pay, particularly awards under the private attorney general theory, CCP §1021.5. In *Mandel v Myers* (1981) 29 C3d 531, 174 CR 841, the supreme court held that, although courts lack the power to require the legislature to appropriate funds, they can order payment from already appropriated funds. 29 C3d at 539. The court also held that disapproval of awards on a case-by-case basis violated the separation of powers doctrine. Concluding that the defendant state agency's appropriation for "general operating expenses" had been and could be used to pay fee awards, the court held that the state could not choose which award it would pay from that appropriation. 29 C3d at 545.

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## §15.5 1. Former Budget Act Restrictions

In response to *Mandel v Myers* (1981) 29 C3d 531, 174 CR 841 (discussed in §15.4), the legislature adopted specific appropriations for fee awards under CCP §1021.5 and the equitable substantial benefit and private attorney general doctrines, and set maximum hourly rates for awards from those appropriations. However, the rate restrictions were placed in the annual budget acts rather than in §1021.5 or any other statute. The budget acts also specified that no other appropriations could be used to pay such fees.

In 1992, the Budget Act restrictions were invalidated in *California Labor Fed'n v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 7 CR2d 399. In that case, the state refused to pay any fee that provided hourly rates in excess of the Budget Act limits. The court of appeal held that, although the legislature had the power to impose hourly rate restrictions, it could not do so in the Budget Act because of the single-subject rule (Cal Const art IV, §9, limiting legislation to coverage of only a single subject). The court ordered that the fees be paid from the appropriation for §1021.5 fee awards without regard to the invalid restrictions.

The court also noted that the Budget Act restrictions might impermissibly amend other statutes bearing on the collection of fee awards, such as CCP §1028. 5 CA4th at 996 n11. Section 1028 provides that:

> Notwithstanding any other provisions of law, when the State is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the appropriation for the support of the agency on whose behalf the State appeared.

Because attorney fees authorized by law, contract, or statute are considered elements of the costs of suit (see CCP §1033.5(a)(10)) "for some purposes," the court noted that payment of fee awards against the state out of the agency's general support budget may be legislatively mandated. 5 CA4th at 996 n11.

Finally, the court rejected the state's challenges to the court of appeal's jurisdiction to enforce the award, finding that it had virtually complete power both to award the fees and to enforce the award. 5 CA4th at 989 n1.

The restrictions apply only to the collection of fee awards, not to entitlement to, or the amount of, the fees awarded. *Committee to Defend Reprod. Rights v Cory* (1982) 132 CA3d 852, 859, 183 CR 475. Accordingly, trial courts could not anticipate collection problems in the fee orders themselves. See *Wallace v Consumers Coop. of Berkeley, Inc.* (1985) 170 CA3d 836, 851, 216 CR 649. See also *Planned Parenthood Affiliates v Swoap* (1985) 173 CA3d 1187, 1202 n12, 219 CR 664.

Other cases ruled that under the supremacy clause of the United States Constitution (US Const art VI, cl 2), the Budget Act limitations could not apply to fee awards under federal law (*e.g.,* 42 USC §1988). In *Green v Obledo* (1984) 161 CA3d 678, 207 CR 830, for example, the court held that a court can order the State Controller to pay a fee awarded under federal law out of the general operating budget of the state agency defendant. The court also held that the Budget Act restrictions do not apply to fees *awardable* under federal law, even if they were originally awarded under state law. 161 CA3d at 685. *Green* was followed in *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 960, 217 CR 621. See also discussion of *Filipino Accountants' Ass'n v State Bd. of Accountancy* (1984) 155 CA3d 1023, 1029, 204 CR 913, in §2.14.

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### §15.6 2. No Current Restrictions

After the decision in *California Labor Fed'n v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 7 CR2d 399 (discussed in §15.5), the legislature adopted a provision which has been a part of the budget since 1993 (see Budget Act of 1993, Stats 1993, ch 55, §5.25), under which fees awarded under CCP §1021.5, Welf & I C §10962, or the private attorney general or substantial benefit doctrines are payable out of the appropriations that support the operations of the defendant agency. See Stats 2008, ch 268, §5.25. The act does not state limits on hourly rates, nor does it appropriate any specific amount. Section 5.25 does, however, specify that fee awards may not be paid unless they are in "full and final satisfaction of the claim, settlement, compromise, or judgment for attorney's fees incurred in connection with a single action." Stats 2008, ch 268, §5.25(c). This restriction appears to be of questionable applicability or validity under *California Labor Fed'n* in cases in which fees might be awarded in stages (*e.g.,* when interim fees are awarded or when fees for postjudgment monitoring and enforcement are awarded after a prior award).

As noted in §15.4, however, many of the more substantial fee awards against the state or state agencies are paid through the semiannual supplemental appropriations process (known as the "claims bill"). See, *e.g.,* Govt C §965(b); Stats 2008, ch 59. In the author's experience, state agencies often prefer this practice and incorporate it into the settlement of fee claims against the state.

In sum, a party attempting to collect a fee award from the state should request that the defendant pay the award out of its general operating appropriation, or through the supplemental appropriations process. If the state declines to do so, the remedies in Govt C §§965.7-965.8 should be adequate to require the state to make payment. *Mandel v Myers* (1981) 29 C3d 531, 174 CR 841.

Different rules may apply to fee awards based on federal law or to the collection of fee awards against the state in federal court. See §§15.5, 15.8.

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**Source:** Civil Litigation/California Attorney Fee Awards/15 Collecting Fee Awards/§15.7 B. Collecting From Local Public Entities

## §15.7 B. Collecting From Local Public Entities

Judgments for attorney fees against local public entities are governed by Govt C §§970-971.2. See also CCP §1029. Local government entities are obligated to pay judgments (with interest) out of any unappropriated, unrestricted funds, or out of funds appropriated for the current fiscal year for the purpose of paying judgments. Govt C §970.4. Every local taxing entity is obligated to include sufficient funds in its budget provisions to pay all judgments. Govt C §970.8(a). If a local entity does not pay a judgment within the fiscal year, the local entity must pay the judgment the next year, as soon as funds are available. Govt C §970.5. These requirements may be enforced by writ of mandate. Govt C §970.2. Local entities have the option, however, of requesting the court that enters the judgment to order it paid in installments of up to ten equal annual payments if the entity has adopted a resolution stating that it would otherwise bear an unreasonable hardship and if the court finds after hearing that an unreasonable hardship would occur. Govt C §970.6.

Federal court fee awards against local public entities are collectible regardless of state law restrictions. See §15.8.

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## §15.8 C. Collecting Federal Court Fee Awards

While federal court fee awards generally are collectible under the law of the state in which the court sits, in *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, the Ninth Circuit held that under the supremacy clause of the United States Constitution (US Const art VI, cl 2), California's Budget Act restrictions could not bar the enforcement of federal court attorney fee awards made under 42 USC §1988. Under *Spain,* federal court fee awards are enforceable by writ of execution under Fed R Civ P 69 (execution) or 70 (equitable order).

Other federal cases have also made it clear that state restrictions on the payment of judgments may not bar collection of judgments or awards based on federal law. See *Gary W. v Louisiana* (5th Cir 1980) 622 F2d 804 (despite Louisiana's constitutional prohibition of collection of judgment against state absent legislative appropriation, importance of implementing congressional policy dictated that plaintiffs entitled to collect fee award under Fed R Civ P 69(a) and 70); *Gates v Collier* (5th Cir 1980) 616 F2d 1268 (rehearing granted on other grounds (5th Cir 1981) 636 F2d 942)—federal court has power to require state treasurer to pay award); *La Raza Unida v Volpe* (ND Cal 1982) 545 F Supp 36.

Local government entities have also been found subject to the federal courts' same plenary power to enforce their own fee awards. See *Dotson v Chester* (4th Cir 1991) 937 F2d 920; *Bowman v City of New Orleans* (5th Cir 1990) 914 F2d 711 (affirming (ED La 1989) 747 F Supp 344); *Argento v Village of Melrose Park* (7th Cir 1988) 838 F2d 1483.

As a practical matter, under these cases, if the state or local government entity refuses to pay a federal court fee award, the award may be collected by writ of execution against the defendant's property (*e.g.,* bank accounts).

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## §15.9 IV. ADDING PARTIES FOR COLLECTION

It is permissible to add a party to the action for purposes of facilitating collection of a fee award. Under federal law, the Supreme Court has approved joinder of the state as a defendant solely as to the fee award when the named individual defendant was acting in his or her official capacity (*i.e.,* the state was the real defendant). *Hutto v Finney* (1978) 437 US 678, 699, 57 L Ed 2d 522, 540, 98 S Ct 2565 (fee awards in civil rights suit against prison officials in their official capacity may be obtained from the state itself); *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, 743 (adding State Controller as party, citing *Hutto*). See also *Brandon v Holt* (1985) 469 US 464, 471, 83 L Ed 2d 878, 885, 105 S Ct 873; *Odum v Clark* (11th Cir 1984) 748 F2d 1538. Compare these cases with *Kentucky v Graham* (1985) 473 US 159, 87 L Ed 2d 114, 105 S Ct 3099, which held that the state could not be added as a party in order to collect a fee award when it had been previously dismissed and was not liable for any award, because the defendant had been sued in his individual, not his official, capacity.

Under state law, it appears that either the California Department of Finance or the State Controller could be joined to compel performance of its duties to pay a valid fee award. See Govt C §§965.7-965.8.

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## V. RECOVERY OF FEE AWARD PENDING APPEAL

### §15.10 A. California Courts

Whether a party may collect a fee award immediately despite a pending appeal of the award remains an open question, despite the legislature's attempt to clarify the issue.

Under CCP §917.1(a), an undertaking is mandatory to stay enforcement pending appeal in three circumstances:

- If attorney fees and costs are awarded in conjunction with a money judgment;
- If "costs" are awarded solely under CCP §998 (pretrial settlement offers); or
- If "costs" are awarded solely under CCP §1141.21 (when trial de novo after judicial arbitration does not yield a more favorable result).

On staying enforcement during appeal and posting an undertaking, see California Civil Appellate Practice (3d ed Cal CEB 1996), chap 6.

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## §15.11 1. Posting an Undertaking

An undertaking is not mandatory to stay enforcement if the judgment is "solely for costs" under CCP §§1021-1038. CCP §917.1(d).

If an undertaking is not mandatory to stay enforcement (*e.g.,* when the judgment is "solely for costs" awarded under CCP §§1021-1038), the trial court has the discretion to require one in certain circumstances. If (1) appellant was found to possess respondent's money or other property, (2) the judgment or order appealed from requires appellant to act for respondent's benefit, or (3) the judgment is solely for costs, then perfecting an appeal does not stay enforcement if the court requires an undertaking and one is not given. CCP §917.9(a). The undertaking amount is left to the trial court to determine, but it must be sufficient to cover damages caused by the stay. CCP §917.9(b).

The effect of CCP §§917.1 and 917.9, therefore, is to shift the burden of seeking a stay, depending on whether the undertaking is mandatory or discretionary. If it is mandatory, the party to whom fees were awarded may take steps to collect the judgment unless the appellant posts an adequate undertaking. If an undertaking is discretionary, the party to whom fees were awarded must move the trial court to require an undertaking as a condition of continuing the stay.

In *Ziello v Superior Court* (1999) 75 CA4th 651, 89 CR2d 398, the court of appeal held that a judgment debtor who pays and does not appeal a judgment for damages, but who does appeal the postjudgment award of costs and attorney fees, is not required to file an appeal bond to stay execution on the unpaid amount. No undertaking is required under CCP §917.1(d) when the appeal is solely from an award of fees and costs. In contrast, in *Dowling v Zimmerman* (2001) 85 CA4th 1400, 1431, 103 CR2d 174, the court extensively analyzed CCP §917(d)(1), and concluded that an award of attorney fees and costs under the anti-SLAPP statute, CCP §425.16, must be bonded on appeal.

**NOTE:** In the author's view, *Dowling* is the better reasoned decision because of the large amounts that may be at stake when fee awards are appealed and because attorney fees have often been treated differently than "routine" or statutory costs.

On posting an undertaking, see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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### §15.12 2. Amount of Undertaking

The amount of the undertaking is generally set forth in CCP §§917.1(b) and 917.9(b). The amount required to stay enforcement of a judgment consisting of expert witness costs under CCP §998 and routine costs under CCP §1032 is based only on the amount of CCP §998 costs because enforcement of the routine costs is automatically stayed. CCP §917.1(a)(2), (d); *Gallardo v Speciality Restaurants Corp.* (2000) 84 CA4th 463, 100 CR2d 884. See also *Selma Auto Mall II v Superior Court* (1996) 44 CA4th 1672, 52 CR2d 599 (trial court may not require appellant to guarantee payment of attorney fees owed by nonappealing codefendant as condition for stay of enforcement pending appeal of writ of possession).

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## §15.13 B. Federal Courts

On the enforcement of fee awards in federal court, see *Lightfoot v Walker* (7th Cir 1986) 797 F2d 505 (enforcement of federal statutory fee award not automatically stayed pending appeal); *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, 746 (state may not enact barriers to collection of federal fee awards).

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## §15.14 C. Undisputed Sums May Be Recovered Pending Appeal

Under federal law, any undisputed fees may be ordered paid immediately as "interim fees," regardless of a pending appeal over the disputed portion of the fee award. See *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 703. See also §11.18.

There is no reason California law should be interpreted any differently. See §11.19.

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## §15.15 VI. FEES MAY BE RECOVERED FOR COLLECTION EFFORTS

Time spent collecting contractual attorney fee awards is compensable. Under CCP §685.040, attorney fees incurred in enforcing a judgment are includable as compensable costs if the underlying fee award was based on a contract (see, *e.g., Chelios v Kaye* (1990) 219 CA3d 75, 268 CR 38) or a fee-shifting statute (see, *e.g.*, *Ketchum v Moses* (2001) 24 C4th 1122, 1141 n6, 104 CR2d 377; *Wilkerson v Sullivan* (2002) 99 CA4th 443, 121 CR2d 275). Code of Civil Procedure §685.040 provides that attorney fees are not recoverable as part of the costs of collecting a judgment unless such fees are "otherwise provided by law" or the underlying judgment included a contract-based fee award. *Ketchum* held that a statutory fee-shifting provision in the underlying action means that collection fees are "otherwise provided by law." 24 C4th at 1141 n6. This is consistent with the principle that an award of reasonable attorney fees must include time spent securing the fee award because otherwise the defendant could effectively dilute the award. See, *e.g., Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 632, 186 CR 754; *Estate of Trynin* (1989) 49 C3d 868, 879, 264 CR 93.

In contract cases, the underlying judgment must include a contract-based fee award; simply having the right to have claimed such fees is not enough. See *Imperial Bank v Pim Elec., Inc.* (1995) 33 CA4th 540, 558, 39 CR2d 432.

Collection fees are not limited solely to trial court collection activities. In *Downen's Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 CA4th 856, 103 CR2d 644, the court held that the plaintiffs' entitlement to fees in an inverse condemnation action included fees for bringing a petition for writ of mandate to collect the judgment. See also *Imperial Bank,* 33 CA4th at 557 (noting, in dicta, that appellate fees recoverable under CCP §685.040).

In *Globalist Internet Technologies, Inc. v Reda* (2008) 167 CA4th 1267, 1276, 84 CR3d 725, the court held that, under CCP §685.040, plaintiff was entitled to recover the fees incurred in defending a separate action filed by the defendant/judgment debtor because, if that action had been successful, it would have reduced the judgment collectible by the plaintiff.

Actions taken in bankruptcy court to collect a judgment also may be recovered under CCP §685.040. See *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 885, 88 CR3d 250; *Jaffe v Pacelli* (2008) 165 CA4th 927, 929, 82 CR3d 423.

The procedure for claiming such fees is stated in CCP §685.080. A noticed motion filed no more than 2 years after the costs were incurred is required (CCP §685.080(a)), supported by a declaration stating, among other things, that the costs were "reasonable and necessary" (CCP §685.080(b)).

Under federal attorney fee statutes, time spent collecting a fee award is compensable. See *Spain v Mountanos* (9th Cir 1982) 690 F2d 742, 747.

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# 16

# Appellate Review of Fee Orders

I. APPEAL OF FEE AWARD
- A. Orders to Pay Attorney Fees Separately Appealable
  - 1. Postjudgment Fee Orders §16.1
  - 2. Prejudgment Fee Orders §16.2
  - 3. Interim Fee Awards in Statutory Fee-Shifting Cases §16.3
  - 4. Sanctions Orders §16.4
  - 5. Sanctions Order Against Attorney Who Has Substituted Out of Case §16.5
  - 6. Judgments or Orders That Award Fees But Do Not Quantify the Amount §16.6
  - 7. Judgments That Award Costs of Suit §16.7
  - 8. Appeal of Entitlement Issue Only §16.8
  - 9. Appeals That Challenge Fee Award Only on Grounds That Merits Judgment Should Be Reversed §16.9
- B. Order Denying Attorney Fees Also Appealable §16.10
- C. Fee Motion Does Not Toll Time to Appeal Merits Judgment §16.11
- D. Attorney Standing to Appeal Fee Order §16.12
- E. Timing of Fee Appeal §16.13
- F. Form of Fee Appeal §16.14
- G. Collection of Fees Pending Appeal §16.15
- H. Federal Court Order to Pay Fees §16.16

II. STANDARD OF REVIEW ON APPEAL
- A. Appeal of Ruling on Entitlement to Fee Award
  - 1. Entitlement to Fees Generally Reviewed for Abuse of Discretion §16.17
    - a. Reviewing Contract Fee Awards §16.18
    - b. Reviewing Arbitration Fee Awards §16.19
    - c. Other Specific Proceedings §16.20
  - 2. Entitlement Based on Published Opinion §16.21
  - 3. Entitlement Based on Multiple Grounds §16.22
- B. Appeal of Amount of Fee Award
  - 1. Determinations of Amount of Fees Given Particularly Deferential Review §16.23
  - 2. Amount Determinations May Be Reversed for Abuse of Discretion §16.24
  - 3. Fee Award Challenged as Excessive §16.25
    - a. Fee Award Found Not Excessive §16.26
    - b. Fee Award Found Excessive §16.27
    - c. Mixed Results §16.28
  - 4. Fee Award Challenged as Inadequate §16.29
    - a. Adequacy Challenge Upheld §16.30
    - b. Adequacy Challenge Rejected §16.31

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## I. APPEAL OF FEE AWARD

### A. Orders to Pay Attorney Fees Separately Appealable

### §16.1 1. Postjudgment Fee Orders

Postjudgment fee orders are appealable as postjudgment orders under CCP §904.1(b). See generally *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 651, 25 CR2d 109 (explaining criteria for appealability of postjudgment orders and why orders granting and denying fees meet those criteria). See also, *e.g.*, *Kray Cabling Co. v County of Contra Costa* (1995) 39 CA4th 1588, 1594, 46 CR2d 674 (order awarding fees rendered after judgment entered and notice of appeal filed was appealable as order after judgment; challenge to fee award lost because party failed to appeal from order awarding fees); *Alioto Fish Co. v Alioto* (1994) 27 CA4th 1669, 1686, 34 CR2d 244; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 223, 226 CR 265.

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## §16.2 2. Prejudgment Fee Orders

When a court orders payment of fees before judgment, the order is appealable as a final collateral order. *Young v Rosenthal* (1989) 212 CA3d 96, 103 n2, 260 CR 369 (sanctions award immediately appealable); *Lachkar v Lachkar* (1986) 182 CA3d 641, 645 n1, 227 CR 501 (fees awarded as part of order compelling arbitration).

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### §16.3 3. Interim Fee Awards in Statutory Fee-Shifting Cases

The appealability of interim fee awards—statutory fees awarded while the lawsuit is still pending (see §§11.18-11.19)—is uncertain. Compare *Nimmagadda v Krishnamurthy* (1992) 3 CA4th 1505, 5 CR2d 351 (trial court stayed attorney fee award, dependent on entry of final judgment and election of contract cause of action; fee award held not appealable until satisfaction of those contingencies), with *Bell v Farmers Ins. Exch.* (2001) 87 CA4th 805, 834, 105 CR2d 59 (reversing interim award). Federal law is also mixed. Compare *Rosenfeld v U.S.* (9th Cir 1988) 859 F2d 717, 720 (prejudgment interim fee order *not* immediately appealable), with *Taylor v Westly* (9th Cir 2008) 525 F3d 1288 (order denying interim fees appealable). See §16.16.

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### §16.4 4. Sanctions Orders

A party can appeal a sanctions order or an interlocutory judgment immediately, while the case is still being litigated, only if sanctions exceed $5000. CCP §904.1(a)(11)-(12). An attorney or party whose sanctions order is $5000 or less can appeal on entry of final judgment in the main action or petition for a writ. CCP §904.1(b). Multiple sanctions orders may not be aggregated to meet the threshold for appealability. *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 44, 24 CR2d 337.

An interlocutory judgment or order for *discovery* sanctions exceeding $5000 also can be immediately appealed. See *Rail-Transport Employees Ass'n v Union Pac. Motor Freight* (1996) 46 CA4th 469, 54 CR2d 713.

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### §16.5 5. Sanctions Order Against Attorney Who Has Substituted Out of Case

An order for sanctions in whole or in part against an attorney *who has substituted out of the case* is immediately appealable, regardless of the amount of the sanction, because the attorney is no longer involved in the underlying action. See *Barton v Ahmanson Devs.* (1993) 17 CA4th 1358, 1361, 22 CR2d 56.

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### §16.6 6. Judgments or Orders That Award Fees But Do Not Quantify the Amount

Trial courts occasionally will enter a judgment that decides entitlement to fees but leaves to later determination the *amount* of those fees. Some courts have held that an appeal from such a judgment is sufficient to challenge both entitlement and amount. *R.P. Richards, Inc. v Chartered Constr. Corp.* (2000) 83 CA4th 146, 158, 99 CR2d 425; *Grant v List & Lathrop* (1992) 2 CA4th 993, 998, 3 CR2d 654; *Community Cause v Boatwright* (1987) 195 CA3d 562, 574, 240 CR 794. See also *California Recreation Indus. v Kierstead* (1988) 199 CA3d 203, 244 CR 632. Whether a subsequent fees or costs order can be reviewed on an appeal from the judgment may depend on whether the fees and costs referred to in the judgment were mandatory or discretionary. See *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 764, 114 CR2d 558 (attempting to reconcile *Grant* with *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329; appeal from judgment did not preclude the need to separately appeal from discretionary award of expert witness fees).

Other cases have found that the subsequent order must be appealed. See, *e.g.*, *Soldate v Fidelity Nat'l Fin.* (1998) 62 CA4th 1069, 1073, 72 CR2d 404 (plaintiff who appealed judgment on merits waived right to appeal subsequent order quantifying fee award by failing to file separate notice of appeal); *Colony Hill v Ghamaty* (2006) 142 CA4th 1408, 1414, 48 CR3d 798 (same); *Kennedy v Applause, Inc.* (9th Cir 1996) 90 F3d 1477 (notice of appeal filed before court quantified fee award was premature and ineffective).

Generally speaking, when several judgments occurring close in time are separately appealable, each appealable judgment and order must be expressly specified in the notice of appeal in order to be reviewable on appeal. Thus, an appellate court will lack jurisdiction to review an attorney fee award made in the amended judgment if appeal is taken only from the original judgment and no appeal is taken from the subsequent order or amended judgment. *DeZerega v Meggs* (2000) 83 CA4th 28, 43, 99 CR2d 366.

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## §16.7 7. Judgments That Award Costs of Suit

If an original judgment includes "costs of suit" but does not award attorney fees, then an amended judgment that includes attorney fees is separately appealable. *DeZerega v Meggs* (2000) 83 CA4th 28, 43, 99 CR2d 366.

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## §16.8 8. Appeal of Entitlement Issue Only

Parties may stipulate to the reasonable value of attorney services rendered and still reserve the right to appeal the fee claimant's entitlement to the award. *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 958, 217 CR 621.

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## §16.9 9. Appeals That Challenge Fee Award Only on Grounds That Merits Judgment Should Be Reversed

Occasionally, a party will appeal the merits of a case in which fees are awarded, and will challenge the fee awarded solely on the grounds that it should be vacated if the merits are reversed. The question arises whether the party must separately appeal the fee award.

Under federal law, a separate appeal may not be required. See *California Med. Ass'n v Shalala* (9th Cir 2000) 207 F3d 575 (party that objects to merits judgment but has no objection to fee award itself need not appeal fee award and may seek relief from award under Fed R Civ P 60(b)(5) once merits judgment is reversed; party must file separate appeal from fee award only when it challenges some aspect of award itself).

The safer course is to file a separate notice of appeal from the fee award, then make clear to the appellate court that the challenge to the fee award is based solely on the challenge to the merits.

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## §16.10 B. Order Denying Attorney Fees Also Appealable

A postjudgment order denying fees is also a separately appealable order. *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 651, 25 CR2d 109. Similarly, any other order denying fees may be appealed as a final collateral order. *Henneberque v City of Culver City* (1985) 172 CA3d 837, 841, 218 CR 704.

In *Day v Collingwood* (2006) 144 CA4th 1116, 1123, 50 CR3d 903, the court held that the trial court's *post*judgment order denying a sanctions motion *was* appealable under CCP §904.1(a)(2) in part because the motion is a collateral proceeding that is not directly based on the merits of the underlying proceeding. A *pre*judgment order denying sanctions, however, is not appealable; review from the final judgment is deemed an adequate remedy. See *Wells Prop. v Popkin* (1992) 9 CA4th 1053, 1055, 11 CR2d 845.

An order denying fees is appealable even if the underlying order on which it is based is not appealable. *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 1388, 107 CR2d 29.

**PRACTICE TIP:** When in doubt, a party should appeal from any order requiring the party to pay a specified fee amount. There may be instances when such an appeal is unnecessary or premature, but the penalty for filing an unnecessary or premature appeal is merely dismissal of that appeal, preserving the right to appeal the later order. The penalty for failing to notice an appeal from an appealable order is the forfeiture of the right to challenge any aspect of that order.

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### §16.11 C. Fee Motion Does Not Toll Time to Appeal Merits Judgment

The pendency of a fee motion or claim for costs does not toll the time for filing a notice of appeal from an otherwise final judgment; the underlying judgment cannot be challenged by appealing the subsequent fee order. See *Torres v City of San Diego* (2007) 154 CA4th 214, 222, 64 CR3d 495; *UAP-Columbus JV 326132 v Nesbitt* (1991) 234 CA3d 1028, 285 CR 856; *Marini v Municipal Court* (1979) 99 CA3d 829, 835, 160 CR 465. See also *Budinich v Becton Dickinson & Co.* (1988) 486 US 196, 100 L Ed 2d 178, 108 S Ct 1717 (time limit for appealing judgment on merits not tolled by pending fee motion). Thus, counsel should be sure to file a timely notice of appeal on the merits regardless of whether a fee motion or a claim for costs is or may be made.

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### §16.12 D. Attorney Standing to Appeal Fee Order

When the award is or may be paid directly to the plaintiff's attorney (see §2.32), that attorney may have standing to pursue an appeal of the fee order, even if the client does not choose to do so. In *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 43 CR3d 707, the plaintiffs' law firm represented plaintiffs on appeal based on the expectation of receiving a statutory fee award under CCP §1021.5 if they won. 139 CA4th at 1504. After winning the appeal, the plaintiffs chose not to file a fee motion, prompting their law firm to move to intervene in order to present its fee motion. The trial court denied the motion for lack of standing. 139 CA4th at 1504. The court of appeal reversed, holding that the intervention requirements had been met and that the purposes of the fee-shifting statutes, as set out in *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809, supported the law firm's right to request fees on its own motion. 139 CA4th at 1502. See also *Marriage of Gumabao* (1984) 150 CA3d 572, 574 n2, 198 CR 90; *Ellis v Roshei Corp.* (1983) 143 CA3d 642, 645 n3, 192 CR 57 (attorney against whom sanctions awarded has standing to appeal order).

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## §16.13 E. Timing of Fee Appeal

The time for noticing an appeal from a fee order is the same as the time for noticing an appeal from any other judgment, which is usually 60 days. See, *e.g.*, *Melbostad v Fisher* (2008) 165 CA4th 987, 993, 81 CR3d 354 (postjudgment attorney fee award in anti-SLAPP case); *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 1079, 25 CR3d 39. See also *Engel v Worthington* (1997) 60 CA4th 628, 70 CR2d 526; *California Recreation Indus. v Kierstead* (1988) 199 CA3d 203, 244 CR 632. On the timing of appeals generally, see California Civil Appellate Practice, chap 7 (3d ed Cal CEB 1996).

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## §16.14 F. Form of Fee Appeal

The general rule is that any order appealed from must be expressly specified in the notice of appeal in order to be reviewable on appeal. Thus, an appellate court will lack jurisdiction to review an attorney fee award made in an amended judgment if appeal is taken only from the original judgment and no appeal is taken from the subsequent order or amended judgment. *DeZerega v Meggs* (2000) 83 CA4th 28, 43, 99 CR2d 366. On requirements for a notice of appeal, see California Civil Appellate Practice, chap 7 (3d ed Cal CEB 1996).

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## §16.15 G. Collection of Fees Pending Appeal

On the rights and procedures governing the collection of attorney fee awards pending an appeal of the merits judgment and/or fee award, see chap 15.

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### §16.16 H. Federal Court Order to Pay Fees

The federal rules regarding the appealability of fee orders are similar to the California rules, *i.e.,* fee orders are collateral matters that are separately appealable. See, *e.g., Intel Corp. v Terabyte Int'l* (9th Cir 1993) 6 F3d 614, 617 (attorney fee issue is collateral to merits; it does not become final and appealable until amount of fee award is determined). Compare *Gates v Rowland* (9th Cir 1994) 39 F3d 1439, 1450 (postjudgment order awarding monitoring fees appealable), with *Rosenfeld v U.S.* (9th Cir 1988) 859 F2d 717, 720 (prejudgment interim fee order *not* immediately appealable). See also *California Med. Ass'n v Shalala* (9th Cir 2000) 207 F3d 575 (party that objects to merits judgment but has no objection to fee award itself need not appeal fee award and may seek relief from award under Fed R Civ P 60(b)(5) once merits judgment is reversed; party must file separate appeal from fee award only when it challenges some aspect of award itself).

Full discussion of these federal rules is beyond the scope of this treatise.

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**Source:** Civil Litigation/California Attorney Fee Awards/16 Appellate Review of Fee Orders/ II. STANDARD OF REVIEW ON APPEAL/ A. Appeal of Ruling on Entitlement to Fee Award/§16.17 1. Entitlement to Fees Generally Reviewed for Abuse of Discretion

## II. STANDARD OF REVIEW ON APPEAL

### A. Appeal of Ruling on Entitlement to Fee Award

#### §16.17 1. Entitlement to Fees Generally Reviewed for Abuse of Discretion

A trial court decision on entitlement to attorney fees under CCP §1021.5 is reviewed under the abuse of discretion standard. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 578, 21 CR3d 331. The appellant must show that the resulting injury is sufficiently grave to amount to a manifest miscarriage of justice. *Maria P. v Riles* (1987) 43 C3d 1281, 1291, 240 CR 872. See *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 158, 67 CR3d 228 (summarizing standard); *City of Santa Monica v Stewart* (2005) 126 CA4th 43, 82, 24 CR3d 72 (summarizing standard). See also *Planned Parenthood, Inc. v Aakhus* (1993) 14 CA4th 162, 170, 17 CR2d 510 ("whether a plaintiff has proved each of the three prerequisites for [a §1021.5] award of trial fees is a question best decided by the trial court"). Under this standard, the fee decision must not be made capriciously, and reversal is appropriate if there was no reasonable basis for the decision (*Baggett v Gates* (1982) 32 C3d 128, 143, 185 CR 232) or if it is based on an erroneous legal standard (*Braude v Automobile Club* (1986) 178 CA3d 994, 1014, 223 CR 914).

*Connerly v State Personnel Bd.* (2006) 37 C4th 1169, 39 CR3d 788, set out a refinement of this standard. The court held that the issue of whether the criteria for an award of attorney fees and costs have been satisfied "may be a mixed question of law and fact and, if factual questions predominate, may warrant a deferential standard of review." If the underlying facts are largely undisputed, however, and the issue calls for statutory construction, that is a question of law that the court will review de novo. 37 C4th at 1175.

Determining whether the trial court applied proper legal standards involves a de novo review. See *City of Sacramento v Drew* (1989) 207 CA3d 1287, 1297, 255 CR 704 (scope of trial court's discretion to deny fees under CCP §1021.5 limited to substantive criteria in that statute; abuse of discretion occurs when trial court uses improper standards, regardless of whether such standards are otherwise "reasonable"); *Lyons v Chinese Hosp. Ass'n* (2006) 136 CA4th 1331, 1344, 39 CR3d 550 (following *Drew*); *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 149, 50 CR3d 273 (determining legal standards for prevailing party determination is matter of statutory construction reviewed de novo).

To determine whether the trial court applied the proper standards, the reviewing court will pay particular attention to the trial court's stated reasons for its decision. *Crawford v Board of Educ.* (1988) 200 CA3d 1397, 1406, 246 CR 806; *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1081, 241 CR 239; *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 97, 103, 228 CR 847. See, *e.g., Contractors Labor Pool, Inc. v Westway Contractors, Inc.* (1997) 53 CA4th 152, 168, 61 CR2d 715.

The normal rules of appellate review favoring the judgment apply to fee awards. *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 578, 581, 21 CR3d 331 (court noted that it would "generally presume the fee award was correct on matters as to which the record is silent"). See California Civil Appellate Practice §17.11 (3d ed Cal CEB 1996).

A fee award may be reversed if the findings and rulings in the fee order are not consistent with the court's findings on the merits. See *Moran v Oso Valley Greenbelt Ass'n* (2001) 92 CA4th 156, 160, 111 CR2d 636; *Sokolow v County of San Mateo* (1989) 213 CA3d 231, 246, 261 CR 520.

Appellate courts will afford far more deference to the trial court's determination of factual issues. See *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 581, 21 CR3d 331 (reaffirming "the principle that the awarding of attorney fees and the calculation of attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial court"). Some courts phrase the standard as determining whether there is any reasonable basis in the record for the trial court's factual determination. See, *e.g., Baggett v Gates* (1982) 32 C3d 128, 143, 185 CR 232. Others phrase it in terms of the substantial evidence rule. See, *e.g., Godinez v Schwarzenegger* (2005) 132 CA4th 73, 91, 33 CR3d 270 (factual finding of "causation" in "catalyst" case reviewed under substantial evidence standard). Under either standard, the normal rules of appellate review of factual issues make such appeals very difficult. See, *e.g.*, *Bowman v*

*City of Berkeley* (2005) 131 CA4th 173, 182, 31 CR3d 447 (trial court's acceptance of plaintiff's testimony that intent of lawsuit was to redress procedural rights and stop housing project must be afforded same deference as other credibility determinations); California Civil Appellate Practice, chap 5 (3d ed Cal CEB 1996).

The party challenging the award has the burden of producing an adequate record and, if it fails to do so, its challenge to the trial court's exercise of discretion may be resolved against it. *Maria P. v Riles* (1987) 43 C3d 1281, 1295, 240 CR 872 (award affirmed when defendant failed to produce transcript or settled statement); *Rancho Santa Fe Ass'n v Dolan-King* (2004) 115 CA4th 28, 46, 8 CR3d 614; *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 447, 94 CR2d 143 (attorney fee award affirmed; defendant could not show that trial court abused discretion in awarding plaintiff attorney fees without adequate record of what occurred at trial). See also *Erickson v R.E.M. Concepts, Inc.* (2005) 126 CA4th 1073, 25 CR3d 39; *Manson v Reed* (1986) 186 CA3d 1493, 1505, 231 CR 446.

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**Source:** Civil Litigation/California Attorney Fee Awards/16 Appellate Review of Fee Orders/§16.18 a. Reviewing Contract Fee Awards

### §16.18 a. Reviewing Contract Fee Awards

For examples of cases discussing the standard of review applicable to determinations of entitlement to contractual fees, see *Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 112 CR2d 99; *Exxess Electronixx v Heger Realty Corp.* (1998) 64 CA4th 698, 705, 75 CR2d 376.

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## §16.19 b. Reviewing Arbitration Fee Awards

For examples of cases discussing the standard of review applicable to determinations of entitlement to attorney fees in arbitration proceedings, see *Moore v First Bank of San Luis Obispo* (2000) 22 C4th 782, 94 CR2d 603, and *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597.

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### §16.20 c. Other Specific Proceedings

Fee awards under the Public Utilities Commission's intervenor fee statutes (Pub Util C §§1801-1812) are subject to the standards for appellate review set out in Pub Util C §1757. *Utility Reform Network v PUC* (2008) 166 CA4th 522, 533, 82 CR3d 791. See also *Southern Cal. Edison Co. v PUC* (2004) 117 CA4th 1039, 1044, 12 CR3d 441.

Code of Civil Procedure §1021.6 provides that a court may award attorney fees to the party prevailing on a claim for implied indemnity under certain circumstances. See *Fidelity Mortgage Trustee Serv. v Ridgegate E. Homeowners Ass'n* (1994) 27 CA4th 503, 32 CR2d 521. An indemnitee's entitlement to fees under §1021.6 is a question of law, reviewable de novo. *Uniroyal Chem. Co. v American Vanguard Corp.* (1988) 203 CA3d 285, 291, 249 CR 787. See, *e.g., Fidelity Mortgage Trustee Serv. v Ridgegate E. Homeowners Ass'n, supra*.

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### §16.21 2. Entitlement Based on Published Opinion

When entitlement to fees is based on the impact of a published appellate opinion, the appellate court may give less deference to the trial court's determinations of entitlement to fees. See *Wilkerson v City of Placentia* (1981) 118 CA3d 435, 445, 173 CR 294, cited with approval in *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 427, 253 CR 426; *Bouvia v County of Los Angeles* (1987) 195 CA3d 1075, 1083 n7, 241 CR 239; *Los Angeles Police Protective League v City of Los Angeles* (1986) 188 CA3d 1, 7, 232 CR 697. In *Lindelli v Town of San Anselmo* (2006) 139 CA4th 1499, 1516, 43 CR3d 707, the court held that because plaintiffs' entitlement to fees was based on the impact of its prior published opinion, it would decide their entitlement to fees in the first instance rather than remanding. See also *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1415, 1 CR2d 459 (applying same rule to determination of estimated value of lawsuit when appellate court considered merits and attorney fee issues simultaneously), disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81.

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### §16.22 3. Entitlement Based on Multiple Grounds

When entitlement to a fee award could have been based on more than one ground, the court's order awarding fees can be treated as if it had been made on all available grounds that would support the award. See *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1132, 94 CR2d 448 (appellate court may determine basis for entitlement regardless of trial court's ruling); *Green v Obledo* (1984) 161 CA3d 678, 207 CR 830, discussed in §2.16.

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## B. Appeal of Amount of Fee Award

### §16.23 1. Determinations of Amount of Fees Given Particularly Deferential Review

The amount of fees awarded by the trial court is subject to a very deferential standard of review. As the California Supreme Court said in *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315:

> The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."

See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 581, 21 CR3d 331 (reaffirming "the principle that the awarding of attorney fees and the calculation of attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial court"); *In re Lugo* (2008) 164 CA4th 1522, 1544, 80 CR3d 521 ("The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination"), citing *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1134, 94 CR2d 448.

Federal law is similarly deferential. See, *e.g., Webb v Board of Educ.* (1985) 471 US 234, 244, 85 L Ed 2d 233, 243, 105 S Ct 1923. But see *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973, 978.

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### §16.24 2. Amount Determinations May Be Reversed for Abuse of Discretion

Despite the intensely factual nature of many of the issues involved in determining reasonable attorney fees, the trial court's discretion is not unlimited. The rules applicable to the review of entitlement determinations (see §§16.17-16.22) are generally also applicable to review of amount determinations: the amount determination can be reversed if the court applied the wrong legal standards or had no reasonable basis for its findings. See, *e.g., Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 584, 21 CR3d 331; *Ketchum v Moses* (2001) 24 C4th 1122, 104 CR2d 377; *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 193 CR 900; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 394, 33 CR3d 644*; Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 97 CR2d 797; *Contractors Labor Pool, Inc. v Westway Contractors, Inc.* (1997) 53 CA4th 152, 168, 61 CR2d 715.

**PRACTICE TIP:** In deciding whether to appeal a fee determination, counsel should keep in mind that the appellate courts generally will afford greater deference to a trial court's determination of the amount of the fee award than to its determination of entitlement to a fee award.

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### §16.25 3. Fee Award Challenged as Excessive

Given the deferential standard of review applied to trial court determinations of reasonable attorney fees (see §16.23), it is quite difficult to overturn a fee award on the ground that the fees are excessive. See *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315; *Jones v Union Bank* (2005) 127 CA4th 542, 550, 25 CR3d 783 (rejecting appellate court's "experience as an appellate court" as basis for reversing trial court's award of appellate fees); *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 997, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109 (affirming fee award of $450 per hour, noting that although rate was "at the 'high end' it was not 'off the scale'").

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### §16.26 a. Fee Award Found Not Excessive

Cases that have rejected challenges to a fee award as excessive include *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1217, 78 CR3d 572; *Russell v Foglio* (2008) 160 CA4th 653, 662, 73 CR3d 87; *Mardirossian & Assocs., Inc. v Ersoff* (2007) 153 CA4th 257, 273, 62 CR3d 665 (trial court's determination of reasonable hours reviewed under substantial evidence standard); *Foundation for Taxpayer & Consumer Rights v Garamendi* (2005) 132 CA4th 1375, 1394, 34 CR3d 368 (fee award affirmed; although award was "generous," trial court did not exceed discretion); *Children's Hosp. & Med. Ctr. v Bontá* (2002) 97 CA4th 740, 783, 118 CR2d 629 (award affirmed; "[t]he length of a document is no gauge of the time needed to prepare it. The pithy pleadings that are most effective usually require more time to prepare than the endlessly discursive and digressive documents judges often receive"); *Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 404, 112 CR2d 99; *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1363, 100 CR2d 491; *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 94 CR2d 448; *Vo v Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143; *Land v Anderson* (1997) 55 CA4th 69, 84, 63 CR2d 717; *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1418, 1 CR2d 459, disapproved on other grounds in *Olson v Automobile Club of S. Cal.* (2008) 42 C4th 1142, 1153 n6, 74 CR3d 81; *Niederer v Ferreira* (1987) 189 CA3d 1485, 1507, 234 CR 779; *Citizens Against Rent Control v City of Berkeley* (1986) 181 CA3d 213, 233, 226 CR 265; *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 870, 223 CR 846; *Excelsior Union High Sch. v Lautrup* (1969) 269 CA2d 434, 448, 74 CR 835.

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### §16.27 b. Fee Award Found Excessive

Cases that have reversed a fee award as excessive include *In re Vitamins Cases* (2003) 110 CA4th 1041, 1053, 2 CR3d 358 (reversed and remanded for trial court to provide "more complete explanation" for award); *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 839, 112 CR2d 284 ("*unquestioning* award of generous fees may encourage duplicative and superfluous litigation and other conduct deserving no such favor. This case simply does not present the level of risk or any other circumstances that would warrant enhancement of the basic lodestar."); *Ramos v Countrywide Home Loans, Inc.* (2000) 82 CA4th 615, 98 CR2d 388 (remanded; trial court failed to make precise findings as to why it selected relatively large multiplier).

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### §16.28 c. Mixed Results

Cases with mixed results include *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 584, 21 CR3d 331; *Ketchum v Moses* (2001) 24 C4th 1122, 1132, 1140, 104 CR2d 377; *Harman v City & County of San Francisco* (2007) 158 CA4th 407, 428, 69 CR3d 750; *Robertson v Fleetwood Travel Trailers* (2006) 144 CA4th 785, 822, 50 CR3d 731.

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### §16.29 4. Fee Award Challenged as Inadequate

Challenging a fee award as inadequate also is difficult but not impossible. In *Horsford v Board of Trustees* (2005) 132 CA4th 359, 33 CR3d 644, the court reiterated that determinations of the amount of fees must be based on the correct legal standards and have a reasonable basis in the record. Moreover, the amount of the award must be consistent with the purpose of the statute that authorized the award. Thus, "'[i]n its discretion'… is not the equivalent of 'if it wants to' or 'if it feels like it.' Instead, in the context of the grant of discretion in [Govt C §12965(b)], it means something akin to the italicized portion of the following: 'the court, [*in a manner that, in the judgment of the court, will best effectuate the purposes of FEHA*], may award to the prevailing party reasonable attorney's fees and costs.'" 132 CA4th at 394.

In a similar vein, *Hadley v Krepel* (1985) 167 CA3d 677, 682, 214 CR 461, held that an inadequate fee award can be reversed if the trial court "exceeded the bounds of reason or contravened the uncontradicted evidence." Although the trial court has its own expertise and its award would normally be reversed only if the amount was "so large (or so small) as to 'shock the conscience' and suggest that passion and prejudice influenced the determination," the fee award must still bear a rational relationship to the fees actually incurred and cannot be based on an "unrealistic view" of what constitutes a reasonable value for legal services; "an award of attorney's fees and costs must be measured by the economics of the times." 167 CA3d at 686. *Press v Lucky Stores, Inc.* (1983) 34 C3d 311, 324, 193 CR 900, applied a similar rule.

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### §16.30 a. Adequacy Challenge Upheld

Cases that have reversed a fee award as inadequate include *Utility Reform Network v PUC* (2008) 166 CA4th 522, 538, 82 CR3d 791; *Hogar Dulce Hogar v Community Dev. Comm'n* (2007) 157 CA4th 1358, 1361, 69 CR3d 250; *Graciano v Robinson Ford Sales, Inc.* (2006) 144 CA4th 140, 154, 50 CR3d 273; *Horsford v Board of Trustees* (2005) 132 CA4th 359, 33 CR3d 644; *Lealao v Beneficial Cal., Inc.* (2000) 82 CA4th 19, 97 CR2d 797; *Contractors Labor Pool, Inc. v Westway Contractors, Inc.* (1997) 53 CA4th 152, 168, 61 CR2d 715; *Hadley v Krepel* (1985) 167 CA3d 677, 682, 214 CR 461.

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### §16.31 b. Adequacy Challenge Rejected

Cases that have rejected a challenge that the award was inadequate include *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 49, 141 CR 315; *EnPalm, LLC v Teitler* (2008) 162 CA4th 770, 774, 75 CR3d 902 (appellate court affirmed award challenged as inadequate; trial court's reduction of lodestar based on party's litigation conduct that "made much of the litigation unnecessary" was proper); *Montgomery v Bio-Med Specialties, Inc.* (1986) 183 CA3d 1292, 228 CR 709 (trial court could award fees lower than lodestar amount in contract case).

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# Appendixes

**NOTE:** Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel should not rely on the currency of the authorities cited in sample forms, but are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).


| | |
|---|---|
| **A** | Judicial Council Form MC-010: Memorandum of Costs (Summary) |
| **B** | Charts: Attorney Time Record |
| **C** | Sample Form: Notice of Motion for Award of Reasonable Attorney Fees and Costs |
| **D** | Sample Form: Memorandum in Support of Petitioner's Motion for Award of Reasonable Attorney Fees |
| **E** | Sample Form: Declaration in Support of Motion for Award of Reasonable Attorney Fees |
| **F** | Sample Form: Declaration in Support of Plaintiff's Motion for Award of Reasonable Attorney Fees |
| **G** | Sample Form: Supplemental Declaration in Support of Motion for Award of Reasonable Attorney Fees |
| **H** | Sample Form: Reply Memorandum in Support of Petitioner's Motion for Award of Reasonable Attorney Fees |
| **I** | Sample Form: Order Awarding Attorney Fees |
| **J** | Sample Form: Order Granting in Part Plaintiffs' Motion for Attorney Fees and Expenses |
| **K** | Sample Form: Stipulation for Award of Attorney Fees; [Proposed] Order Awarding Attorney Fees |
| **L** | Sample Form: Statement of Decision |


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# Appendix A

## Judicial Council Form MC-010: Memorandum of Costs (Summary)

MC-010

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| INSERT NAME OF COURT, JUDICIAL DISTRICT, AND BRANCH COURT, IF ANY: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **MEMORANDUM OF COSTS (SUMMARY)** | CASE NUMBER: |

**The following costs are requested:** **TOTALS**

| | | |
|---|---|---|
| 1. Filing and motion fees | 1. $ | |
| 2. Jury fees | 2. $ | |
| 3. Jury food and lodging | 3. $ | |
| 4. Deposition costs | 4. $ | |
| 5. Service of process | 5. $ | |
| 6. Attachment expenses | 6. $ | |
| 7. Surety bond premiums | 7. $ | |
| 8. Witness fees | 8. $ | |
| 9. Court-ordered transcripts | 9. $ | |
| 10. Attorney fees *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)* | 10. $ | |
| 11. Models, blowups, and photocopies of exhibits | 11. $ | |
| 12. Court reporter fees as established by statute | 12. $ | |
| 13. Other | 13. $ | |
| **TOTAL COSTS** | **$** | |

I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

(Proof of service on reverse)



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

**PROOF OF ☐ MAILING ☐ PERSONAL DELIVERY**

1. At the time of mailing or personal delivery, I was at least 18 years of age and **not a party** to this legal action.
2. My residence or business address is *(specify)*:

3. I mailed or personally delivered a copy of the *Memorandum of Costs (Summary)* as follows *(complete either a or b)*:
   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
      (1) I enclosed a copy in an envelope AND
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed as follows:
         (a) Name of person served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state)*:
   b. ☐ **Personal delivery.** I personally delivered a copy as follows:
      (1) Name of person served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)



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**Source:** Civil Litigation/California Attorney Fee Awards/Appendix B Charts: Attorney Time Record

# Appendix B

# Charts: Attorney Time Record

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

ATTORNEY TIME RECORD FOR INDIVIDUAL CLIENT

Matter _____ File No. _____ Page No. __

| TIME CONVERSION | Date | Service performed | ATTORNEY | TIME | |
|---|---|---|---|---|---|
| | | | | Hours | Tenths |
| 6 Minutes = 0.1 Hour<br>12 Minutes = 0.2 Hour<br>15 Minutes = 0.25 Hour<br>18 Minutes = 0.3 Hour<br>24 Minutes = 0.4 Hour<br>30 Minutes = 0.5 Hour<br>36 Minutes = 0.6 Hour<br>42 Minutes = 0.7 Hour<br>45 Minutes = 0.75 Hour<br>48 Minutes = 0.8 Hour<br>54 Minutes = 0.9 Hour | | | | | |
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| | | | | | |
| SERVICE CODES<br>C conference<br>CH court hearing<br>D dictation | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| DP deposition<br>LF letter from<br>LT letter to<br>LR legal research<br>NC nonchargeable time<br>P preparation<br>TC telephone call<br>R review<br>RV revision<br>SA sums advanced for | | | | | |
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# Appendix C

# Sample Form: Notice of Motion for Award of Reasonable Attorney Fees and Costs

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

**BARRY BLUE, SBN 0000**
**Law Office of Barry Blue**
**1234 West Street**
**Anywhere, CA 90000**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**JOHN BLACK, SBN 1111**
**Law Offices of John Black**
**5678 A Street**
**Anywhere, CA xxxxx**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**Attorneys for Petitioner**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF WWW**

| | |
|---|---|
| **XXX, a Nonprofit Corporation, Petitioner,** | **Case No.: BS 123456 (Consolidated with BS 078910)** |
| **vs** | **PETITIONER'S NOTICE OF MOTION AND MOTION FOR AWARD OF REASONABLE ATTORNEY FEES AND COSTS** |
| **CITY OF YYY, a Municipal Corporation, and DOES I through X, Respondents.** | **Date: September 11, 2009 Time: 9:00 a.m. Dept.: 3 Judge: ABC** |
| **ZZZ, Real Parties in Interest.** | |

**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE that on September 12, 2009, at 9:00 a.m., or as soon thereafter as the matter can be heard, in Courtroom 3 of the WWW County Superior Court, GHI Courthouse, located at 4567 GHI Boulevard, GHI, California, petitioner will move the Court for an award of reasonable attorney fees and costs under Code of Civil Procedure §1021.5.**

**This motion will be based upon this Notice of Motion, the supporting declarations and Memorandum filed herewith, the papers and records on file herein, and on such further briefing and oral and documentary evidence as may be presented at or before the hearing of this motion.**

**Dated: July ___, 2009** **Respectfully submitted,**
**Barry Blue**

**LAW OFFICE OF BARRY BLUE**

**LAW OFFICES OF JOHN BLACK**

_____

**By: John Black**

*Comment:* Attorney-drafted papers filed in court must comply with the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in papers and supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. See Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix D

# Sample Form: Memorandum in Support of Petitioner's Motion for Award of Reasonable Attorney Fees

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

**BARRY BLUE, SBN 0000**
**Law Office of Barry Blue**
**1234 West Street**
**Anywhere, CA xxxxx**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**JOHN BLACK, SBN 1111**
**Law Offices of John Black**
**5678 A Street**
**Berkeley, CA xxxxx**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**Attorneys for Petitioner**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF WWW**

| | |
|---|---|
| **XXX, a Nonprofit Corporation, Petitioner** | **CASE NO.: 123456** |
| | **(Consolidated with 078910)** |
| | **Assigned to the Honorable** |
| **vs** | **ABC-Dept. 3, GHI Courthouse** |
| **CITY OF YYY, a Municipal Corporation, and DOES I through X, Respondents** | **MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR AWARD OF REASONABLE ATTORNEY FEES** |
| ***ZZZ*** | |
| **Real Parties in Interest.** | **Date: September 11, 2009** |
| | **Time: 9:00 a.m.** |
| | **Dept.: 3** |

[*Insert required Table of Contents and Table of Authorities here. See Comment following sample form.*]

**I. INTRODUCTION AND SUMMARY**

**By this motion, Petitioner XXX requests an award of reasonable attorney fees from Respondents City of YYY ("the City") and Real Parties in Interest ZZZ ("ZZZ" or "Real Parties"), pursuant to Code of Civil Procedure §1021.5, California's private attorney general statute.**

**Section 1021.5 "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embedded in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 933, 154 CR 503. One of its primary purposes is to facilitate important**

**environmental lawsuits by private citizens. 23 C3d at 936.**

**This litigation has challenged the City's approval of Phase 2 of the controversial DDD Development Project ("the Project"), the largest development project ever proposed in the history of the City. Petitioner's counsel have litigated it for over three (3) years at every level of the California judicial system, from this Court, through the court of appeal, to the California Supreme Court, and back.**

**Now, following their successful appeal (*City of EEE v City of YYY*, No. 078910, Slip Opinion filed September 13, 2008 (unpublished) (attached as Exhibit A to Petitioners' Joint Notice of Motion and Motion for Entry of Proposed Judgment and Proposed Writ of Mandate, filed April 2, 2009)), XXX and its co-petitioners in the coordinated action (No. 078910) have succeeded in obtaining a Judgment and Writ of Mandate requiring the City to vacate all its prior approvals and permits for the Project, and to comply with the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21187). Indeed, the court of appeal even took the remarkable step of immediately enjoining further implementation of the Project.**

**In halting the Project, petitioner has ensured that City officials know exactly what the environmental ramifications of the Project are *before* they decide whether to approve and implement it. In doing so, petitioner has ensured enforcement of California's critical environmental, planning, and zoning laws, benefiting the entire community, and have helped to protect and preserve California's wetlands.**

**Petitioner's attorneys are now entitled to be fully compensated for their efforts under CCP §1021.5, as are the co-petitioners' attorneys in the companion action. Contemporaneous but coordinated fee motions have been filed in both cases, to be heard together in this Court.**

**In this memorandum, XXX will first recount the litigation's procedural history and then briefly address petitioner's undeniable entitlement to a fee award. XXX then will show that the amount of fees requested is eminently reasonable: this case was efficiently and effectively litigated in the face of a well-funded, all-out defense, to a very successful result. Petitioner's attorneys are entitled to be fully compensated for that accomplishment.**

## II. STATEMENT OF FACTS AND PROCEEDINGS

**To give context to petitioner's fee claim, XXX presents the following brief summary of the facts and proceedings, taken from the courts' files and the declarations filed with this motion.**

**THE PROJECT. The Project is not only the largest development project ever proposed in the history of the City of YYY, it also has been one of the most contentious. The Project site is located on land that was once part of the greater GGG Wetlands Ecosystem, the last remaining undeveloped wetlands area in the City. Declaration of Bernard Black ("Black Decl.") ¶2. Since the 1980s, when it was first proposed as a mammoth development of over 1000 acres of land, the Project has faced vigorous public scrutiny and has been the subject of countless public hearings, numerous lawsuits, and constant media attention, resulting in a substantial scaling back of the Project from its original vision and a large reduction of the amount of acreage that can be developed. Black Decl. ¶2.**

**The portion of the Project that is the subject of this action is Phase 2 of development of "Area D," a 461-acre parcel located adjacent to the HHH Bluffs between the state-owned GGG Wetlands (an ecological reserve) on the west and the 405 Freeway on the east. During the development's first phase, ZZZ developed 3246 dwelling units and over 3 million square feet of office and retail space. Black Decl. ¶2. The intense development of the first phase left ZZZ with only a little over 100,000 square feet of office space development rights available for Phase 2 of the Project, and nothing else. Slip Opinion ("Sl. Op.") at 4. Regardless, ZZZ's proposal for developing Phase 2 asked the City to approve a massive increase in entitlements, adding another 2600 dwelling units, 175,000 square feet of office space, and 150,000 square feet of retail space. Sl. Op. at 5. The increased density of this proposal came with substantially increased impacts to the environment. Black Decl. ¶2.**

**THE ENVIRONMENTAL IMPACT REPORT. After ZZZ applied to the City for approval of the Phase 2 Project, the City circulated the Draft EIR for public review on August 21, 2003. As the court of appeal ultimately noted, the EIR was inadequate and misleading with respect to a number of crucial issues. Sl. Op. at 112. For example, it concealed even the fact that ZZZ asked the City to approve a massive *increase* in development entitlements and substantial rezoning. Indeed, the EIR portrayed the Project as a *decrease* in entitlements, with only minor**

**zoning boundary changes. Sl. Op. at 18-28.**

**XXX is a nonprofit environmental advocacy organization formed in 1993 by members of the community who were concerned about the Project's impacts on the environment and on quality of life. Black Decl. ¶1. XXX submitted comments at every step of the review process, pointing out this and other defects in the analysis of alternatives, mitigation measures, and other portions of the EIR, but its comments were dismissed on each occasion.**

**The Final EIR was released in April 2004. On September 22, the City Council certified the EIR and adopted a Statement of Overriding Considerations to approve the Project despite unmitigated significant environmental impacts. Black Decl. ¶4. The Council also approved a development agreement, general and specific plan amendments, and other discretionary approvals for the Project. Black Decl. ¶4.**

**XXX'S PETITION FOR WRIT OF MANDATE. In November 2004, two Petitions for Writ of Mandate were filed challenging the Project by two different coalitions of organizations and individuals. XXX's petition challenging defects in the EIR and related approvals of the Phase 2 Project was filed on November 8. Black Decl. ¶5.**

**XXX'S ATTORNEYS. After being assigned and reassigned to a number of departments, the matter was set for a 5-day trial before Judge DEF on August 1, 2006. Just prior to trial, XXX's initial counsel fell seriously ill, and was unable to complete pretrial briefing or assist in the conduct of the trial. Declaration of Barry Blue in Support of Motion for Award of Reasonable Attorney Fees ("Blue Decl.") ¶4. On July 13, 2005, XXX retained Mr. Blue; this was approximately two and a half weeks before trial. Mr. Blue had substantial experience successfully litigating environmental law cases on behalf of public interest organizations and was familiar with the controversy surrounding the Project. Blue Decl. ¶4. Although XXX could not afford to pay him for his services, Mr. Blue agreed to take the case because of the difficulty XXX faced finding counsel on such short notice and because of the case's public importance. Blue Decl. ¶4. To assist him in preparing for trial, Mr. Blue also engaged the services of Greta Green, a 19-year environmental attorney with prior experience litigating the Project. Blue Decl. ¶5; Declaration of Greta Green in Support of Motion for Reasonable Attorney Fees ("Green Decl.") ¶2.**

**BRIEFING ON THE MERITS, PREPARATION FOR TRIAL. To prepare for trial and complete the remaining pretrial briefing in such a short time, Mr. Blue spent nearly every waking hour of every day familiarizing himself with the nearly 40,000-page administrative record, the two petitions, all the briefings, and researching the relevant case law, statutes, and regulations. Blue Decl. ¶5.**

**TRIAL AND POSTTRIAL BRIEFING. Trial began on August 1, 2006, and lasted five (5) days. It required substantial research, preparation, coordination with co-counsel, and client debriefing each evening. Blue Decl. ¶5. Every issue petitioners raised was heavily litigated. Blue Decl. ¶5-8. On the last day of trial, Judge DEF set a posttrial briefing schedule, which required a thorough review of the record and arguments at trial, preparation of a closing brief, and a reply to the opposition's briefs. Blue Decl. ¶5-8. The majority of Mr. Blue's time during the month of August was devoted to this trial and to the posttrial briefing. Blue Decl. ¶5-8.**

**THE INITIAL TRIAL COURT DECISION. On November 29, 2006, Judge DEF issued a lengthy tentative ruling denying the Writ of Mandate. Blue Decl. ¶7. Petitioner drafted objections to the ruling, to which respondents replied, and hearings were held on December 8, 2006, and January 10, 2007. Blue Decl. ¶7. Although Judge DEF ultimately entered a judgment denying the writ, he remarked at the conclusion of the proceedings on the high quality of legal representation provided by all sides throughout the trial and its related briefing, and noted that the petitions raised legitimate questions about the Project that were suitable for appellate review. Blue Decl. ¶7 and Exh. A.**

**PETITIONER'S APPEAL AND ITS HEAVY BRIEFING DEMANDS. In March 2007, XXX appealed the trial court's decision. Blue Decl. ¶9. A substantial amount of time over a period of several months was spent coordinating with co-counsel regarding arguments and strategies, and preparing a comprehensive 30-page opening brief. Blue Decl. ¶9. After respondents' briefs were received in November, a 20-page Reply Brief and Request for Judicial Notice were filed in December. Blue Decl. ¶9. (For the Court's convenience, copies of petitioner's appellate briefings have been filed as a Compendium of Appellate Briefs Prepared for XXX ("Compendium").)**

**ADDITIONAL LETTER BRIEFS ALSO WERE REQUIRED. On March 20, 2008, the court of appeal notified the parties that it was particularly interested in the issues of land use impacts, wastewater impacts, and archaeological impacts, and requested letter briefs and reply briefs from the parties on those issues. Blue**

**Decl. ¶9. Since the issues regarding land use were originally raised in XXX's briefs, Mr. Blue responded to those issues with a lengthy letter brief, as well as a Reply to Respondents' brief. Blue Decl. ¶9.**

**APPELLATE ARGUMENT AND POST-ARGUMENT BRIEFING. Argument was heard on April 17, 2008, before Division AAA of the BBB Appellate District. Blue Decl. ¶9. Mr. Blue argued on behalf of XXX, while Alice Adams and John Jones argued for the petitioners in the consolidated case. The parties were granted substantial additional time to argue the issues identified in the court's tentative ruling, which was in petitioners' favor on the issues of land use, archaeology, and wastewater impacts. The court also permitted post-argument briefing to address issues raised at argument. Blue Decl. ¶9.**

**MEDIATION. Following the argument, the parties attempted to negotiate a settlement, engaging in a day-long mediation and a number of subsequent follow-up meetings. Though ultimately unsuccessful, the negotiations required substantial time to prepare for due to the number of parties involved and the complexities of reaching consensus on issues related to such a large development. Blue Decl. ¶10.**

**THE APPELLATE DECISION IN PETITIONERS' FAVOR. On September 13, 2008, the court of appeal reversed the trial court's decision and ordered it to enter a Writ of Mandate directing the City to decertify the EIR and vacate all Project approvals. Sl. Op. at 111-114. The court also issued an immediate injunction prohibiting all construction activity at the site until the City demonstrated compliance with CEQA. Sl. Op. at 111-113. The court specifically agreed with XXX that the EIR was "materially misleading" regarding its discussion of land use impacts and that misinformation regarding the true impacts of the development appeared throughout the EIR and in the respondents' responses to comments. Sl. Op. at 18-28. It concluded that "the misleading analysis of land use impacts, failure to discuss preservation in place of historical archaeological resources, and failure to properly analyze wastewater impacts rendered *the EIR as a whole deficient as an informational document*, and that these matters collectively are not severable from the Project as a whole." Sl. Op. at 112. (Emphasis added.)**

**ZZZ'S PETITION TO THE CALIFORNIA SUPREME COURT. On October 25, 2008, ZZZ filed a petition for review with the supreme court, challenging the appellate court's authority to enter judgment against respondents. That petition necessitated a 20-page Answer and Statement of Additional Issues for Review. ZZZ's petition was denied on December 12, 2008. Blue Decl. ¶11.**

**REMAND TO THE TRIAL COURT. On remand, petitioners exercised their option to request assignment to a new judge on remand, which was strenuously opposed. Judge DEF set a briefing schedule on the request, heard oral argument, and ultimately upheld the challenge. The case was then transferred to this Court. Blue Decl. ¶12.**

**THE JUDGMENT AND WRIT. The parties then submitted competing proposed judgments and writs of mandate. The form of the final judgment was hotly contested, with briefing and argument to the Court, at which point supplemental briefing was invited on a number of issues. Blue Decl. ¶12.**

**The final Judgment and Writ of Mandate were entered by this Court on May 27, 2009. The judgment forbids respondents from taking any action that "would prejudice the City's consideration or implementation of mitigation measures or alternatives that could result in an adverse change in the physical environment," and the writ compels the City to vacate the project approvals, decertify the EIR, and prepare a revised EIR that complies with CEQA. *See* Judgment, filed May 23, 2009. This was precisely the relief that petitioner had sought.**

**THE RESULTS ACHIEVED FOR THE PUBLIC. Counsel's work here has achieved a great deal. It has accomplished XXX's goals of halting the Project and requiring a full and honest disclosure of the Project's size and environmental impacts. Black Decl. ¶2. It also significantly benefits the public: If the public had known that ZZZ was actually seeking a major *increase* in development entitlements rather than a decrease, and that the Project's impacts on the wastewater treatment system and on Native American heritage had not been adequately investigated or mitigated, they would have had the chance to reject the Project or demand changes. The public will now have that chance. Black Decl. ¶3.**

**The extensive media attention generated by this lawsuit also shows that the public has more than a theoretical interest in being provided adequate information about the Project. Numerous news articles have appeared throughout the State, and the story has frequently been covered on local television and radio. *See* Blue Decl. ¶15 and Exh. C.**

**III. PETITIONER IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY FEES UNDER CODE OF CIVIL**

**PROCEDURE §1021.5**

**Under §1021.5, petitioner is entitled to an award of reasonable attorney fees if four criteria are met: (1) it is the "successful party"; (2) its lawsuit has enforced an important right affecting the public interest; (3) a significant benefit has been conferred on the general public or a large class of persons; and (4) the necessity and financial burden of private enforcement are such as to make an award of fees appropriate. These criteria are easily met here.**

**Petitioner's "successful party" status is beyond dispute. In obtaining a Judgment and Writ of Mandate vacating all the prior approvals and permits and requiring compliance with CEQA, XXX and its co-petitioners have achieved relief from the benchmark conditions challenged by the lawsuit, making them the successful party. See, *e.g.*, *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685, 186 CR 589; *Bowman v City of Berkeley* (2005) 131 CA4th 173, 177, 31 CR3d 447.**

**Likewise, lawsuits that mandate compliance with environmental laws like CEQA indisputably meet §1021.5's "important right" criterion. See, *e.g., Woodland Hills*, 23 C3d at 936 (purpose of §1021.5, inter alia, is to encourage "environmental protection" litigation); *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 392, 253 CR 426; *San Bernardino Valley Audubon Soc'y v County of San Bernardino* (1984) 155 CA3d 738, 754, 202 CR 423. In the instant case, this lawsuit served to vindicate the important policies underlying CEQA on a realistic and practical level by ensuring that the environmental impacts of the Project were fully evaluated *before* it was approved and/or implemented. In doing so, the State's vitally important environmental laws have been enforced, and public discourse over this highly controversial Project has been facilitated. Black Decl. ¶7; Blue Decl. ¶¶4, 11-12. The important right criterion is easily satisfied.**

**That significant benefits to the public flow from CEQA enforcement has been reaffirmed by the courts time and again. *See, e.g., Laurel Heights,* 47 C3d at 392; *Bowman,* 131 CA4th at 176; *Schwartz v City of Rosemead* (1984) 155 CA3d 547, 557, 202 CR 400; *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 250, 142 CR 766 (action compelling County's compliance with general plan statute conferred "substantial benefits… on the residents of the county"). Here, petitioner's action has ensured that the entire public and their elected representatives know all the environmental ramifications of Phase 2 *before* they decide whether to approve it, and if so, in what form. Petitioner's action has thus preserved the integrity of the governmental functions that are at the heart of California's environmental, planning, and zoning laws. See *Coalition for L.A. County Planning,* 76 CA3d at 248; *Vineyard Area Citizens for Responsible Growth, Inc. v Rancho Cordova* (2007) 40 C4th 412, 449, 53 CR3d 821; *Laurel Heights,* 47 C3d at 391.**

**Finally, the "necessity and burden of private enforcement" make a fee award entirely "appropriate." "Necessity" is apparent because the agency responsible for enforcing the law is the transgressor. See *Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors* (2000) 79 CA4th 505, 512, 94 CR2d 205. The "burden of private enforcement" requirement is met because XXX and its members have no direct personal interests at stake in this case; they brought it solely to protect the environment and to enforce California's important land use laws. 79 CA4th at 516; Black Decl. ¶1.**

**IV. PETITIONER'S REQUESTED ATTORNEY FEES ARE REASONABLE**

**A. Section 1021.5 Requires a Fully Compensatory Fee**

**The fundamental objective of private attorney general fee statutes is "to encourage suits effectuating a strong public policy by awarding *substantial* attorneys' fees… to those who successfully bring such suits." *Woodland Hills*, 23 C3d at 933 (emphasis added); *San Bernardino Valley Audubon Soc'y,* 155 CA3d at 755 (fee award must be large enough "to entice competent counsel to undertake difficult public interest cases"). That purpose is met by ensuring attorneys who vindicate important statutory rights that they will receive fully compensatory fee awards when their lawsuits are successful. *Serrano v Unruh (Serrano IV)* (1982) 32 C3d 621, 632, 186 CR 754.**

**B. Petitioner's Fee Request Is Based on the Lodestar/Multiplier Method**

**The amount of any fee award under §1021.5 must be determined by the "lodestar/multiplier" method. *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315. Under this method, the base or "lodestar" is determined by multiplying the number of hours reasonably expended by the reasonable hourly rate for these services. 20 C3d at 48. The lodestar also includes compensation for time spent obtaining fees: "Absent special**

**circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee." *Ketchum v Moses* (2001) 24 C4th 1122, 1133, 104 CR2d 377 (emphasis in original).**

**After the lodestar figure is determined, the Court must consider other factors that go into the determination of a reasonable attorney's fee, such as contingent risk: "[T]he unadorned lodestar reflects the general local hourly rate for a *fee-bearing case;* it does *not* include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider." *Ketchum,* 24 C4th at 1138. The goal is to arrive at a reasonable attorney fee that compensates public interest attorneys by the same marketplace standards that apply to other litigation of comparable difficulty and importance. *Serrano IV*, 32 C3d at 643.**

**C. A Summary of Petitioner's Fee Request**

**Petitioner's fee claim is fully documented by detailed, contemporaneous time records showing how each hour of work was spent. Blue Decl. ¶¶3-14 and Exh. B; Green Decl. ¶¶2, 4 and Exh. A; Black Decl. ¶7 and Exh. B. It also is documented by careful descriptions of counsel's qualifications (Blue Decl. ¶¶ 3-4; Green Decl. ¶3; Black Decl. ¶¶2-5 and Exh. A), as well as irrefutable evidence of local market rates for comparable work (Redd Decl. ¶¶18-26; Black Decl. ¶10). Counsel also have documented their work on the fee motion to date, to be supplemented for further fees incurred on this motion. Blue Decl. ¶13; Black Decl. ¶7 and Exh. B.**

**Applicable non-lodestar factors like contingent risk and how the local legal marketplace compensates for them also are carefully documented. See Redd Decl. ¶¶20-22; Black Decl. ¶¶13-14).**

**Petitioner's lodestar is summarized in the following chart:**

| | **Trial: 7/13/2005-1/10/2006** | | **Appeal: 1/10/2006-12/18/2007** | | **Post Appeal: 12/18/2007-Present** | | **Fee Motion** | |
|---|---|---|---|---|---|---|---|---|
| | Hours | Lodestar | Hours | Lodestar | Hours | Lodestar | Hours | Lodestar |
| Greta Green | 11.2 | $5,544.00 | 17.15 | $8,489.25 | 0 | $0 | 1.5 | $742.50 |
| Barry Blue | 325.85 | $128,710.75 | 456.4 | $180,278.00 | 66.8 | $26,386.00 | 13.15 | $5,194.25 |
| John Black | | | | | | | 20.85 | $11,467.50 |
| Total | 337.05 | $134,254.75 | 473.55 | $188,767.25 | 66.8 | $26,386.00 | 35.50 | $17,404.25 |

**To achieve a fee that truly reflects market value, petitioners also request that a 2.0 lodestar enhancement be applied to the merits portion of their lodestar, to account, inter alia, for the great risk petitioner's counsel took in taking on this hotly contested matter, at the last minute, on a wholly contingent basis. (No lodestar enhancement is sought for counsel's fee-related work.)**

**D. Counsel's Hours Are Reasonable**

**Under California law, petitioner's counsel are entitled to be compensated for "*all* the hours *reasonably spent*." *Ketchum*, 24 C4th at 1133 (emphasis in original). Where, as here, petitioner's counsel have obtained "excellent results," they are entitled to a fully compensatory fee: " 'Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.' " *Fem. Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674, 39 CR2d 189 (internal citation omitted).**

**Under this standard, compensation is appropriate for "every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v Jas. H. Matthews & Co.* (9th Cir 1982) 682 F2d 830, 839. "The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in**

**which it might theoretically have been done." *Norman v Housing Auth.* (11th Cir 1988) 836 F2d 1292, 1306.**

**Once petitioners document their claim with credible time records, the burden shifts to the City to show that specific time is unreasonable. *Hadley v Krepel* (1985) 167 CA3d 677, 682, 214 CR 461. Here, however, there are numerous reasons why every hour claimed by petitioner is compensable:**

**1. Petitioner's claim is fully documented by detailed time records. Blue Decl. ¶3-14 and Exh. B; Green Decl. ¶¶2, 4 and Exh. A; Black Decl. ¶7 and Exh. B. These time records are "the starting point for [the trial court's] lodestar determination." *Horsford* v *Board of Trustees* (2005) 132 CA4th 359, 397, 33 CR3d 644. "[T]he verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous." 132 CA4th at 396. See also *Perkins v Mobile Housing Bd.* (11th Cir 1988) 847 F2d 735, 738 (counsel's "sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case"). Counsel also have exercised substantial "billing judgment," excluding any time that might be considered excessive, redundant, or otherwise unnecessary. Blue Decl. ¶3; Green Decl. ¶4.**

**2. The City and ZZZ have been aggressively represented by some of YYY's major law firms, including Gray & Brown and Jones, Smith. Blue Decl. ¶¶6, 9. While they had every right to do so, they now must bear the resulting fees: "[A party] cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *Copeland v Marshall* (DC Cir 1980) 641 F2d 880, 904 (*en banc*), quoted in *Serrano IV*, 32 C3d at 633.**

**3. All of petitioner's requested hours were reasonably spent. Mr. Blue's declaration provides a detailed, step-by-step summary of the various tasks that required counsel's time. Blue Decl. ¶¶3-14. With assistance from Ms. Green, Mr. Blue had to review, analyze, and become closely familiar with the briefing, petitions, relevant case law, and statutory authorities, as well as the relevant portions of the nearly 40,000-page administrative record, all in a matter of three (3) weeks. They also had to finalize pretrial briefing and conduct a 5-day trial on the merits; prepare substantial posttrial briefing, review the decision, and prepare objections thereto; prepare substantial appellate briefing, including opening and reply briefs; assist with the Writ of Supersedeas; prepare lengthy letter briefs requested by the court; prepare for and conduct oral argument; try to negotiate a settlement, including a mediation; respond to Respondent's Petition for Review; and complete briefing on the CCP §170.6 challenges and competing motions for entry of judgment. In the end, the number of hours spent compares very favorably to those found reasonable in many other cases, some of which were decidedly less complex or far-reaching. See Black Decl. ¶¶18-19 (listing numerous appellate awards).**

**4. This case also was efficiently litigated. Mr. Blue handled the majority of the work entirely by himself, with some excellent assistance from Ms. Green, and in close cooperation and coordination with the co-petitioners' attorneys. Blue Decl. ¶¶3-14.**

**5. Petitioner's success here was virtually complete. While some theories or contentions may have been rejected or never reached, under California law, when, as here, excellent or substantial results are achieved and the petitioner's claims are "related"—*i.e.,* they challenge the same course of conduct—no reduction for losing "theories" or "claims" is appropriate. See *Downey Cares v Downey Community Dev. Comm'n* (1983) 196 CA3d 983, 997, 242 CR 272 ("Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised"). See also, *e.g., Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 431, 69 CR3d 1.**

**Here, Petitioner's legal claims all were directed at the same conduct and sought the same relief, *i.e.,* a Writ of Mandate commanding the City to set aside its approval of the Project and enjoin further development until the City complies with CEQA. Black Decl. ¶¶ 5, 7. That relief was obtained, and XXX's attorneys are entitled to be fully compensated for their work. As the court said in *Sundance v Municipal Court* (1987) 192 CA3d 268, 273, 237 CR 269:**

> **It must be remembered that an award of attorney fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right. To reduce the attorney fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the costs of enforcing that public right.**

**E. Counsel's Hourly Rates Are Reasonable**

Petitioner's attorneys have requested hourly rates that are squarely in line with the rates charged by private attorneys of comparable skill, reputation, and experience for similarly complex litigation. *Children's Hosp. & Med. Ctr. v Bonta* (2002) 97 CA4th 740, 783, 118 CR2d 629 (affirming rates "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work"). Barry Blue ($395 per hour) and Greta Green ($495 per hour) are in their tenth and 20th years of legal practice, respectively, with extensive experience and expertise in environmental law. Blue Decl. ¶2; Green Decl. ¶3. Their hourly rates for such complex, high stakes, and high-visibility litigation are very modest by YYY legal marketplace standards. Redd Decl. ¶¶18-26; Black Decl. ¶10. For example, Morrison & Foerster charges $560 per hour for ninth-year attorneys and $650 for 14th year attorneys. Black Decl. ¶10. In 2007, Mr. Redd's firm billed $525 per hour for a 16th year attorney. Redd Decl. ¶24. Counsel's rates also are consistent with numerous recent fee awards. See Redd Decl. ¶¶25-26; Black Decl. ¶10(a). See also *Russell v Foglio* (2008) 160 CA4th 653, 73 CR3d 87 (affirming $300 rate for third-year attorney). The rate charged by Mr. Black also is reasonable. Black Decl. ¶¶ 2-10 and Exh. A; Redd Decl. ¶¶18-26. He is the author of [a leading treatise on attorney fees] and a leading litigator of attorney fee issues. Black Decl. ¶¶ 2-10 and Exh. A; Redd Decl. ¶¶18-26. Numerous courts have found his rates reasonable, including a recent award from the YYY County Superior Court. Black Decl. ¶6 and Exh. C.

F. Petitioner's Requested Lodestar Enhancement Is Reasonable

Petitioner's lodestar represents the fee that would have been paid by a fee-paying client, win or lose, and without consideration for such factors as contingent risk: "[T]he unadorned lodestar reflects the general local hourly rate for a *fee-bearing case;* it does *not* include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider." *Ketchum*, 24 C4th at 1138 (emphasis in original). To determine a fee that truly reflects the legal marketplace, factors in addition to hours and rates, especially contingent risk, must be considered. See *Horsford,* 132 CA4th at 399.

In the instant case, those factors fully support a 100-percent enhancement of petitioner's lodestar (a 2.0 multiplier). Similar factors have justified lodestar enhancements in numerous environmental cases. See, *e.g., Coalition for L.A. County Planning*, 76 CA3d at 251 (affirming 2.1 multiplier in land use action, based, inter alia, on contingent risk and importance of case); *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 1229, 217 CR 125 (affirming 1.5 multiplier because case was "a relatively complex matter where success was not assured and where the appellants fought the case at every turn"); *Downey Cares,* 196 CA4th at 994 (1.5 multiplier for land use case). See also Black Decl. ¶15 (listing other cases). The same factors are present here.

1. The Great Risk Counsel Took Warrants a Significant Lodestar Enhancement

In the legal marketplace, an attorney who takes a significant risk—whose compensation is wholly dependent upon achieving success for his client—demands and gets a higher fee than an attorney who is paid a market rate without contingency. *Ketchum*, 24 C4th at 1132. A risk enhancement is not a bonus or a windfall, it is "*earned compensation;* unlike a windfall, it is *neither unexpected nor fortuitous*. Rather, it is intended to approximate market-level compensation for such services, which typically includes a *premium* for the risk of nonpayment or delay in payment of attorney fees." 24 C4th at 1138 (emphasis added).

If counsel are not compensated for their risk, they do not receive the fair market value for their work and will be reluctant to accept future cases:

> A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases. *Ketchum,* 24 C4th at 1132 (citation omitted).

Risk enhancements, therefore, are essential to CCP §1021.5's purpose of enticing competent counsel to take important cases:

> The purpose of a fee enhancement, or so-called multiplier, for contingent risk is to bring the financial incentives for attorneys enforcing important… [rights] into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis. 24 C4th at 1132.

Correlatively, risk enhancements also serve to hold large, politically powerful institutions like the City of YYY and ZZZ accountable. *Horsford,* 132 CA4th at 400.

Risk enhancements are especially necessary in hard-fought cases like this one, where a favorable outcome

**is uncertain. See *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1218, 78 CR3d 572 ("Cintas takes an unduly narrow view of the concept of 'contingent risk.' It is not simply that counsel turned away paid work for a time in order to represent the class, but that counsel risked never receiving compensation *at all.* The claims and defenses in this case raised a significant number of complex legal issues of first impression, and class counsel took a substantial risk that it would not prevail on these issues and thus would not recover a full fee").**

**In this case, counsel's ability to recover *any* compensation for *any* of their 892.05 hours of work was entirely contingent on winning the case and obtaining a fee award. Blue Decl. ¶¶4, 14; Green Decl. ¶4. Many significant obstacles had to be overcome: their opponents' far greater resources; the deferential abuse of discretion standard and presumption of regularity that applies to the City's actions; the extensive administrative record that had to be marshaled and then presented to this Court; the several areas of law that had to be analyzed and presented; the inevitable risk of having to convince a court of appeal to reverse a trial court's lengthy decision; and the need to defeat their opponents' petition for review. This was a very risky case. Blue Decl. ¶¶14-15; Redd Decl. ¶¶17, 28.**

**Law firms simply do not commit that much uncompensated time to a case without the expectation of a fee award that will compensate them for such a significant risk. Redd Decl. ¶28; Black Decl. ¶¶13-14. That expectation prevailed here as well. Blue Decl. ¶14.**

**2. The Exceptional Novelty, Difficulty, and Complexity of the Action Warrant a Lodestar Enhancement**

**A lodestar enhancement also is appropriate based on the novelty, difficulty, and complexity of the action, and the skill displayed in presenting it. *See Kern River,* 170 CA3d at 1229; *Amaral,* 163 CA4th at 1218. Here, many of the issues presented were highly technical, complex, and difficult, requiring particular skill and expertise beyond the level that might be expected from counsel billing at the rates requested by petitioner's counsel. Blue Decl. ¶2; Green Decl. ¶4; Redd Decl. ¶¶17-28. In a very short period of time and under the pressure of a looming trial on the writ, petitioner's attorneys had to review a massive (40,000-page) administrative record, prepare pretrial briefing, and conduct a 5-day trial. Blue Decl. ¶4-8. Their willingness to do so also warrants a significant lodestar enhancement. See Cal Rules of Prof Cond 4-200(B)(6) (noting relevance of "time limitations imposed by the client or the circumstances"); *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, *30, aff'd (9th Cir, June 4, 2003, Nos. 01-17302, No. 02-15423) 2003 US App Lexis 11371. This factor also warrants a lodestar enhancement.**

**3. The Preclusion of Other Employment Warrants Enhancement**

**The demands of this litigation also prevented Mr. Blue from taking on several new cases. Blue Decl. ¶14. This factor also warrants enhancement. See *Serrano III,* 20 C3d at 49; *Amaral*, 163 CA4th at 1218 (noting heavy burden case had placed on counsel's small firm).**

**4. The Importance of the Case to Petitioners and the Public**

**The importance of the case to petitioners and the public also warrants enhancement. *Coalition for L.A. County Planning,* 76 CA3d at 251 ("importance of the suit" supports 2.1 multiplier); *Amaral,* 163 CA4th at 1218. The DDD Project involves the largest single development ever proposed for the City of YYY, with great potential impact on the City's last remaining wetlands. The importance is apparent, as the extensive media coverage illustrates. Blue Decl. ¶15 and Exh. C**

**V. CONCLUSION**

**For the foregoing reasons, Petitioners respectfully request that this Court award them their reasonable attorney fees and expenses in the amount requested ($732,688.75), plus attorney fees incurred subsequently on this motion.**

**Date: July ___, 2009**

**By:_____**
**John Black**
**Attorney for Petitioner XXX**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the

paper must be numbered consecutively (Cal Rules of Ct 201(d)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 201(g)). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 313(f). As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix E

# Sample Form: Declaration in Support of Motion for Award of Reasonable Attorney Fees

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**JOHN BLACK, SBN 1111**
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**Anywhere, CA xxxxx**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**Attorneys for Petitioner**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF WWW**

| | |
|---|---|
| **XXX, a Nonprofit Corporation, Petitioner,** | **CASE NO.: 123456 (Consolidated with 078910)** |
| **vs** | **Assigned to the Honorable ABC-Dept. 3, GHI Courthouse** |
| **CITY OF YYY, a Municipal Corporation, and DOES I through X, Respondents.** | **DECLARATION OF BARRY BLUE IN SUPPORT OF MOTION FOR AWARD OF REASONABLE ATTORNEY FEES** |
| **ZZZ Real Parties in Interest** | |

**I make this declaration from personal knowledge, except where stated as based upon information and belief. If called, I could and would testify competently as follows:**

**I am an attorney licensed to practice in California and counsel of record for the petitioner, XXX.**

**I graduated with highest honors from University School of Law in San Francisco in 2000, and have been a member of the California State Bar for nine (9) years. I was an editor of the University Law Review and earned specialization certificates in environmental and public interest law. I worked as a student attorney for the University School of Law Environmental Law and Justice Clinic, where I represented non-profit organizations before the Public Utilities Commission and in environmental actions filed in both federal and state courts. I also worked as a law clerk for Safe California, where I assisted in drafting model hazard abatement legislation. Since joining the bar, I have worked as a sole practitioner, and have served as either lead counsel or co-counsel in a variety of civil litigation matters including civil rights and trademark litigation, but the principal**

**focus of my practice has been environmental litigation involving the Clean Water Act (CWA) (33 USC §§1251-1387), the Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k), the Safe Drinking Water and Toxic Enforcement Act (Health & S C §§25249.5-25249.13), and the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177). I have appeared and argued cases in both federal and state courts throughout California as well as the California Court of Appeal. In May 2003, I was awarded the University School of Law "Award for Outstanding Achievement as an Alumnus." Reported cases in which I have assisted as counsel include: _ _[*insert published cases here*]_ _. My billing rate is currently $395 per hour, which I believe to be equivalent to or lower than the rates charged by other attorneys of comparable experience for similar work.**

**The following paragraphs describe the time spent by both myself and my colleague, Greta Green, on litigating this case from July of 2005 up to the filing of this motion. Both Ms. Green and I record time expended by rounding down to the nearest tenth of an hour or quarter of an hour. The records have been reviewed by both Ms. Green and myself, and time spent that was duplicative or inefficient has been either eliminated or appropriately reduced. A copy of my time records for work performed is attached as Exhibit B. A brief description of that work follows.**

**Pretrial, Trial, and Posttrial: July 13, 2006-January 23, 2007**

**I was originally contacted by Bernard Black of XXX on July 13, 2006, about representing his organization and a number of other organizations in this matter. Mr. Black informed me that XXX's attorney of record in the matter, Mr. Thomas Tan, had fallen ill and would not be able to appear at the trial scheduled for the matter from August 1 to August 5 or complete any remaining pre-trial briefing or motion work, and that XXX was seeking an attorney who would be able to provide representation on an emergency basis in the matter. Given the public importance of the case, and the fact that several years of effort spent by these organizations opposing the Project would be for naught if the case was abandoned so close to trial, I agreed to represent XXX on a contingent fee basis, as they were only able to advance $1000 to cover my out-of-pocket costs in the case.**

**Being unfamiliar with the record in the matter and the issues raised in the original petition and through the public comment process, I arranged with Mr. Black to obtain copies of the case files and access the administrative record for the case. Since the record in the matter spanned over 140 volumes and nearly 40,000 pages, researching the factual and legal basis underlying the claims presented in the action in order to finalize the briefing and prepare for trial required an enormous commitment of time and resources, requiring, as a practical matter, nearly every waking moment through much of July and August 2006. I also engaged the services of Greta Green, whose experience is described in the Declaration of Greta Green in Support of Motion for Award of Reasonable Attorney Fees accompanying this motion, to assist in preparing for the trial, as she had substantial previous experience litigating the Phase 1 portion of the Project.**

**Trial in the matter occurred in the week of August 1, 2006. Trial lasted 5 days. All of the issues presented by petitioner were heavily challenged by respondents, who were represented at trial by Gray & Brown. On the last day of trial, Judge DEF asked for supplemental briefing to address a number of issues raised during trial. Throughout trial and the posttrial period, I worked closely with counsel for the petitioner in the related case to prepare for trial, draft briefs and motions, and strategize.**

**On November 29, 2006, Judge DEF issued a lengthy tentative decision denying the petitions. Objections to the decision were filed, and two hearings were conducted on the judgment on December 8, 2006, and January 10, 2007. At the December 8, 2006 hearing, Judge DEF remarked on the high quality of the legal services provided by counsel on all sides, and also remarked that the issues presented were valid questions of public importance that were suitable for appeal. A transcript of the hearing is attached as Exhibit A.**

**The total amount of time spent by myself and Ms. Green on the trial phase of this case, which lasted from July 13, 2006, to January 23, 2007, was 337.05 hours, for a total lodestar of $134,254.75. The work performed during this time can be described generally as follows: review of pretrial briefing from all parties, the petitions, and the extensive record in the case; completion of remaining pretrial briefing; preparation for and attendance at the 5-day trial on the merits; extensive posttrial briefing regarding issues raised at trial; numerous conferences with both clients and co-counsel regarding trial preparation, strategy, and briefing; coordination with counsel for the other petitioner regarding brief writing, argument, and strategy, review of the tentative decision and preparations of objections thereto, and attendance at both pre- and post-trial case management conferences and related hearings on the statement of decision.**

**Appeal: January 24, 2007-December 18, 2008**

**Following the entry of a final Judgment denying the Petition for a Writ of Mandamus, I consulted with XXX about filing an appeal, and agreed to continue to represent the organization throughout the appellate process on a contingent fee basis. A Notice of Appeal was filed in March 2007. Substantial time was expended by both myself and Ms. Green in preparing and reviewing the record on appeal, the various stipulations regarding consolidation of cases and other matters, preparing the opening briefs, reviewing respondents' opposition papers, and preparing a reply to the same. I also reviewed and assisted in the preparation of briefing by co-petitioners, and preparation and review of various appellate motions, objections to evidence, and notices of new authority. Prior to the scheduled oral argument in the matter, the court of appeal requested substantial letter briefs from all parties on a number of issues, and a significant amount of time was spent drafting those briefs, reviewing respondents' and co-petitioners' briefing, and drafting responses. A large amount of time was then devoted to preparing for the oral argument, which was heard on April 17, 2008 (and at which the parties were granted substantial additional time to argue in response to the court's tentative ruling), and on the supplemental briefing that was requested by the court of appeal in response to issues raised at oral argument; this again involved reviewing respondents' briefing, preparing a response, reviewing the reply from respondents, and preparing objections to the reply. At the appeal, respondents were represented by two major YYY law firms, Gray & Brown and Jones, Smith.**

**After oral argument was heard, the parties attempted to reach a settlement of the matter. A number of discussions and meetings between co-counsel and counsel for respondents took place, substantial time was spent meeting with all of the petitioning organizations to form a consensus regarding settlement, and the parties engaged in a day-long mediation. Ultimately, the mediation and settlement discussions were unsuccessful in reaching a resolution.**

**In September 2008, the court of appeal issued an opinion reversing the trial Court's ruling and directing the entry of a judgment that granted all of the relief requested by petitioners in their original petitions—an order directing respondents to decertify the EIR and rescind all project-related approvals, and an order of an immediate stay on all construction activity at the site. Respondents sought review of the decision in the supreme court, necessitating review of the petition and preparation of an answer. Respondent's petition was denied on December 12, 2008, and a remittitur issued on December 18. The total amount of time expended by myself and my colleague Greta Green on the above-described tasks during the course of the appeal was 473.55 hours, for a total lodestar of $188,767.25.**

**Post Appeal: December 19-Present**

**Following the issuance of the remittitur, a case management conference was scheduled in the trial court. Petitioners elected to file affidavits of prejudice pursuant to CCP §170.6, which were opposed by respondents, resulting in a round of briefing on the matter and an oral argument. On February 7, 2009, Judge DEF ruled in favor of petitioners on the §170.6 affidavits, resulting in the transfer of the matter to this Court. Respondents then sought to transfer the case to another department through a notice of related case; that motion was denied. Additionally, competing Motions for Entry of Judgment and Writ of Mandamus were filed by both respondents and petitioners, which resulted in a hearing on May 5, 2009, at which additional supplemental briefing was permitted. On July 14, the City of YYY filed a Return to the Writ of Mandamus, which required researching the adequacy of the return's compliance with the writ and the preparation of objections. The total amount of time spent by myself and Ms. Green on the above-described briefing and related tasks was 66.8 hours, for a total lodestar of $26,386.**

**In addition to the above, Ms. Green and I have spent time assisting in the preparation of this motion. Since every issue of substance in this matter has been heavily litigated by respondents, and given the complicated nature of the litigation, the substantial amount at issue, and the significant amount of time involved in adequately preparing the motion, I believed it was necessary to retain counsel experienced in attorney fee awards to prepare this motion. For those reasons, I retained John Black, a recognized and respected expert in California attorney fee awards, to prepare and argue this motion. Ms. Green and I have spent 14.65 hours consulting with co-counsel regarding this motion, reviewing correspondence with opposing counsel regarding the meet-and-confer process, reviewing the briefing and other documents filed in this case, preparing and reviewing declarations, and otherwise assisting Mr. Black in the preparation of this motion, for a total lodestar of $5,936.75.**

**The total amount of time expended on this case through all stages to date exceeds 892.05 hours and**

**$355,344.75 in fees. My client has only been able to advance $4000 for costs of litigation. To date, the costs of travel, transcripts, filing fees, photocopying, faxing, mailing, and messenger services far exceeds that amount. Due to the demands of the case, I had to decline to accept both paid and contingent representation in a number of other matters in order to devote the time and resources needed to adequately represent XXX in this case. Additionally, as a sole practitioner, it is a major financial risk to accept complex contingent fee cases such as this, where the time demands are great but payment for that time is both uncertain and long deferred.**

**This litigation is a matter of substantial public interest, and has generated numerous news articles throughout the State, as well as extensive coverage on local television and radio stations, regarding the suit since the Petitions were first filed. Attached as Exhibit C is an index of some of those articles, with some of the most recent articles attached.**

**DATED: July ___, 2009** **By: _____**
**BARRY BLUE**
**Attorney for Petitioner XXX**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 201(d)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 201(g)). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 313(f). As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix F

# Sample Form: Declaration in Support of Plaintiffs' Motion for Award of Reasonable Attorney Fees

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**Attorneys for Plaintiffs**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF BBBBB**

| | | |
|---|---|---|
| **Alison Apple, et al.,** | **)** | **No. _ _ _ _ _ _** |
| **Plaintiffs,** | **)** | |
| | **)** | **declaration of SUSAN SMITH** |
| **vs** | **)** | **in support of plaintiffs' motion** |
| | **)** | **for award of reasonable** |
| **Saul Strawberry, individually,** | **)** | **attorney fees** |
| **and** | **)** | |
| **Doing business as Coconut,** | **)** | **Reservation No. YYYYY** |
| **Inc., a California corporation,** | **)** | **Date: July 28, 20XX** |
| **and DOES 1 through 200,** | **)** | **Time: 3:00 p.m.** |
| **inclusive,** | **)** | **Dept.: AA, Honorable Julia** |
| **Defendant(s).** | **)** | **Jones** |
| **_____)** | | |

**I, Susan Smith, declare:**

**I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify as to those facts.**

**1. I am currently a partner in the law firm of Chan, Sanchez and Smith, LLP (CSS) located in Anywhere, California. I am an attorney admitted to the practice of law before the Courts of the State of California, the United States District Courts for the Northern, Central and Eastern Districts of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.**

**2. I graduated from the School of Law at the University of California, Anywhere, in 19XX and was admitted to the State Bar of California that year. I have been with CSS since 19XX and a partner in the firm since 19XX. While at CSS, I have been involved in litigating, negotiating, and supervising attorneys in litigating _ _[***insert practice area, experience, honors and awards***]_ _.**

**3. I have written and lectured on _ _[***insert relevant topics***]_ _ litigation subjects, including attorney fees. I am also a member of the Board of Directors of _ _[***insert relevant affiliations and experience***]_ _. A true and correct copy of my resume, which further details my relevant legal experience, is attached hereto as Exhibit A.**

**4. CSS is a 15-attorney firm located in Anywhere, California. Our practice focuses on**

[*List practice areas and other relevant information about firm here*]

**Among the significant cases our firm has litigated are:**

[*List relevant examples of litigation here*]

**5. As a result of my background in trial and _ _[*insert particular practice areas*]_ _, and my work on attorneys' fee matters for my own and other law firms, I am familiar with the prevailing market rates for skilled and competent attorneys in the Anywhere Area legal community, both private and public interest, for trial court and _ _[*insert particular practice areas*]_ _ litigation of important issues. I consider _ _[*insert particular practice areas*]_ _ litigation like *Apple* to be important and demanding work, and am familiar with the great skill required to successfully litigate and try such cases.**

**6. The bulk of my practice is contingent, and many of my firm's cases have been large and substantial in settlement or verdict, as demonstrated in paragraph 4, above. In contingent risk cases, my firm and other firms doing this type of work frequently advance tens or hundreds of thousands of dollars in costs and defer all payment of our fees for several years, with no guarantee that any of the fees we incurred or costs we advanced would ever be recovered.**

**7. Attached hereto as Exhibit B is a true and correct copy of my firm's 20XX rate schedule. These rates are wholly consistent with the rates charged by comparable attorneys in the Anywhere Area and numerous other locales within California for comparable work. In fact, they are lower than the rates charged at many Anywhere Area firms. My firm's billing practices are similarly comparable to those of other attorneys in the Anywhere Area and elsewhere in California.**

**8. My firm's billing rates are charged to and paid by fee-paying clients of our firm and by defendants through court awards and settlements, and are paid by the hour on a regular billing basis. They are also the rates we claim in our fee applications in all of our fee-shifting cases.**

**9. I am aware of the nature of this case and have reviewed the hourly rates being charged by all of Plaintiffs' attorneys and their respective experience levels. In my opinion, these rates are quite reasonable and within the market range for comparably qualified and experienced attorneys handling comparable litigation in the Anywhere Area.**

[*Describe claiming attorneys' particular experience or skill*]

**10. Attorney A and Attorney B's rates are particularly justified given their extensive trial experience; _ _[*describe specific factors that support rate in this case*]_ _. The experience and ability to competently and efficiently _ _[*describe work*]_ _ to a highly successful result is highly-valued in the legal marketplace. I also am personally familiar with John Black, one of Plaintiffs' attorneys. He is a highly respected attorney in complex civil litigation and is an acknowledged expert in _ _[*list expertise*]_ _.**

**11. During my years specializing in litigation, I have come to appreciate the close relationship between the award of reasonable attorney fees to successful public interest attorneys and the enforcement of _ _[*specify type*]_ _ laws. Many public interest cases, where statutory fees are available to the prevailing party, take several years or more before judgment. During that period, little or no money comes in and the case drains cash and attorney time from the law firm in a substantial and ongoing manner. These facts of economic life explain the small number of attorneys willing to take on this type of highly risky litigation. Without the award of attorney fees in cases in which public interest lawyers achieve success, persons like the Plaintiff here who seek to enforce important _ _[*specify type*]_ _ laws would face substantial difficulty in obtaining counsel.**

**12. It is my understanding that counsel's representation of the Plaintiffs in this case was entirely contingent on winning their action and collecting an award of statutory attorney fees. Given that fact, in the legal marketplace, our firm and others would expect that a substantial enhancement would be applied to our lodestar to make the fee comparable to the fees recovered in other contingent litigation. Without a lodestar enhancement for risk, counsel would receive only the fee that would have been paid by a fee-paying client, win or lose; such a fee would simply be considered inadequate by most attorneys in the legal marketplace. As a general rule, our firm looks to recover at least twice our market billing rate in order to justify the risk of taking on a contingent fee case.**

[*Address other enhancement factors if applicable. For example, defendants' extreme intransigence, exceptionally*

*complex facts or law, difficult issues of proof, etc., that would justify larger fee award.*]

**13. By obtaining complete success and enforcing the rights of people similarly situated to plaintiffs to recover their damages in accordance with California law, Plaintiffs and their attorneys have performed a great public service. Without such a successful action, Defendants' past, present, and future customers would be deprived of valuable protections afforded by the law. This action will also benefit other people similarly situated to plaintiffs by**

[*Describe benefits*]

**In my opinion, the award of reasonable attorney fees and costs should recognize the important and broader consequences of Plaintiffs' attorneys' work, just as the private legal marketplace would recognize it.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Executed this _____ day of June 20XX in Anywhere, California.**

**_____**
**SUSAN SMITH**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix G

# Sample Form: Supplemental Declaration in Support of Motion for Award of Reasonable Attorney Fees

▶ To download **Word** version, right click and choose *Save Target As*

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**WALTER WHITE, #000000**
**1234 First Street**
**Anywhere, CA 90000**
**Telephone: (000) 000-0000**
**Fax: (000) 123-4567**
**E-mail: wwhite@ceb.com**
**Attorney for Plaintiffs**

**SUPERIOR COURT OF CALIFORNIA**
**COUNTY OF SONOMA**

| | | |
|---|---|---|
| **XXX,** | ) | **No. 00000** |
| **Plaintiff(s)** | ) | |
| | ) | **SUPPLEMENTAL** |
| **vs** | ) | **DECLARATION OF WALTER** |
| | ) | **WHITE, ESQ. IN SUPPORT OF** |
| **ACME,** | ) | **XXX'S MOTION FOR AWARD** |
| **Defendant(s)** | ) | **OF REASONABLE** |
| | ) | **ATTORNEY FEES** |
| | ) | |
| | ) | **Hearing: August 20, 2009,** |
| | ) | **Time: 9:00 a.m.** |
| | ) | **Dept: 1** |
| | ) | **Judge: ABC** |
| _____ | ) | **Date action filed: May 3, 2007** |

**I, WALTER WHITE, declare and state:**

**I am an attorney duly licensed to practice in the State of California, and I have been counsel of record representing plaintiffs in this case since its inception.**

**The decision of the California Supreme Court in this case invalidated the confession of judgment procedure used by local governments to collect welfare-related debts and used in certain commercial contexts. The statutory scheme was found violative of the due process rights of debtors.**

**The declaration of SARA SMITH, attached to this declaration as Exhibit A and incorporated by reference, demonstrates that confession of judgment procedures have been used recently and extensively by Santa Clara County against welfare debtors.**

**The declaration of LAURA LONG, attached to this declaration as Exhibit B and incorporated by reference, demonstrates that confession of judgment procedures have been used recently by Riverside County.**

**The foregoing demonstrates that very large numbers of judgment debtors all over California have received and will receive the benefit of improved due process safeguards when creditors propose to use confessions of judgment. Such benefits derive entirely from the decision of the California Supreme Court in this case.**

**I declare under penalty of perjury that the foregoing is true and correct, and was executed on July 25, 2009, at Santa Rosa, California.**

__[*Signature*]__
**Walter White**
**Attorney for Plaintiff**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix H

# Sample Form: Reply Memorandum in Support of Petitioner's Motion for Award of Reasonable Attorney Fees

▶ To download **Word** version, right click and choose *Save Target As*

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**BARRY BLUE, SBN 0000**
**Law Office of Barry Blue**
**1234 West Street**
**Anywhere, CA xxxxx**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**JOHN BLACK, SBN 1111**
**Law Offices of John Black**
**5678 A Street**
**Anywhere, CA xxxxx**
**Tel: (xxx) xxx-xxxx**
**Fax: (xxx) xxx-xxxx**

**Attorneys for Petitioner**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF WWW**

| | |
|---|---|
| **XXX, a Nonprofit Corporation, Petitioner,** | **CASE NO.: 123456** |
| | **(Consolidated with 078910)** |
| **vs** | ***Assigned to the Honorable*** |
| | ***ABC, Dept. 3, GGG*** |
| **CITY OF YYY, a Municipal Corporation, and** | ***Courthouse*** |
| **DOES I through X, Respondents,** | **REPLY MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR AWARD OF REASONABLE ATTORNEY FEES** |
| **ZZZ Real Parties in Interest.** | |

**Date: October 2, 2009**
**Time: 9:00 a.m.**
**Dept.: 3**

[*Insert required Table of Contents and Table of Authorities here. See Comment following sample form.*]

## I. SUMMARY OF REPLY

**In their Joint Opposition, Respondent City of YYY and Real Parties in Interest ZZZ ("Respondents") do not challenge XXX's entitlement to an award of reasonable attorney fees, nor do they question counsel's hourly rates; only the number of hours and lodestar enhancement are challenged. In this Reply, coordinated with co-petitioners in Case No. 078910, petitioner will show that respondents' objections are unsupported either by correct interpretations of the law or credible evidence: indeed, they are largely based on "tables" that border on the fraudulent. Petitioner's fees, including the fees incurred for this Reply, are reasonable and should be awarded in full.**

**II. PETITIONER'S HOURS ARE REASONABLE**

**A. Respondents Present No Credible Evidence to Support Their Proposed Deductions**

**Petitioner's moving papers presented this Court with competent, thorough evidence supporting their fee request, including sworn declarations regarding the work counsel performed, detailed billing records, and expert testimony attesting to the reasonableness of the amounts claimed. This showing shifted the burden to respondents to present evidence that specific hours are unreasonable. *Hadley v Krepel* (1985) 167 CA3d 677, 682, 214 CR 461. Respondents' Opposition, which relies almost entirely on the "calculations" of ZZZ's attorney, wholly fails to meet that burden.**

**Fundamentally, Respondents' Opposition lacks any credibility whatsoever because *their calculations of hours spent on various tasks are too utterly unreliable to be of probative value*. Respondents' Exhibits 1-10 of the Appendix in Support of Combined Opposition to Fees consists of a series of "tables" that purportedly "segregate" the various billing entries submitted by petitioners into ten categories of tasks for the purpose of characterizing the time as either "excessive" or "unlawful." White Decl. ¶¶4-14. Respondents then ask this Court to deduct either all or a large portion of each amount in the aggregate from petitioners' fees.**

**The voluminous errors and grossly unsound methodology employed in these "tables" is manifested in many ways. Most fundamentally, it does *not* "segregate" counsel's billing entries into separate categories. Rather, it puts *hundreds* of billing entries into multiple categories, so that they *are deducted two, three, and even four times.* Declaration of Martin Maroon (accompanying Reply in coordinated case 078910) ("Maroon Reply Decl.") ¶11, Exh. A, Blue Reply Decl. ¶¶3, 7, 10, 12-13, 15. The categories themselves also are grossly inflated with numerous entries that, on their face, have nothing to do with the challenged activity (*e.g.,* deducting 11.9 hours of trial time as a "meeting"). Blue Reply Decl. ¶¶3, 14.**

**Most inexplicably, respondents use "reverse block billing"—they combine all of a biller's separate entries for a given day into one single entry—then deduct the *entire entry* if any one item falls into a challenged category. For instance, respondents turn a.1 hour settlement discussion into a 4.5 settlement matter by including 4.4 hours of brief drafting time. Blue Reply Decl. ¶¶3, 11. Through this tactic alone, respondents were able to nearly *triple* the amount of time attributed to Mr. Blue in a number of categories. Blue Reply Decl. ¶¶8, 14. The same is true for co-petitioners' counsel. See Maroon Decl. ¶112.**

**Nor is petitioners' arithmetic "incorrect"; the error is in *respondents'* "tables," which omit six of Mr. Blue's entries. Blue Reply Decl. ¶17.**

**It is axiomatic that evidence regarding the calculation of monetary awards must be reliable and credible. *See U.S. v City & County of San Francisco* (ND Cal 1990) 748 F Supp 1416, 1422, aff'd in relevant part sub nom *Davis v City & County* of San Francisco (9th Cir 1992) 976 F2d 1544, modified on other grounds (9th Cir 1993) 984 F2d 345 ("In generating computer summaries,... the City forced attorney activities into narrow, at times unsuitable categories. Therefore, the conclusions which the City reached based on the faulty data are themselves faulty (once again illustrating the computer adage: garbage in, garbage out)"). The exhibits relied on by respondents are so hopelessly flawed that they are of no probative value whatsoever here.**

**Given the undeniable unreliability of his "data," the opinions of ZZZ's attorney about the reasonableness or compensability of petitioners' hours (Crimson Decl. ¶¶10-17) lack any foundation. Moreover, Mr. Crimson offers no other basis for his opinions: He does not say he has reviewed the billing practices of his firm or any others in this or similar matters, nor does he compare the fees requested to fees awarded for similar matters, nor does he reveal how many hours respondents' attorneys spent. In fact, he provides no basis whatsoever for his "opinions"; they are simply not probative on the issue of the reasonableness of an attorney fee award. *Dina v People ex rel Dep't of Transp.* (2007) 151 CA4th 1029, 1049, 142 CR 766 (when conclusory opinion fails to connect "the factual predicates to the ultimate conclusion, that opinion has no evidentiary value").**

**B. Counsel's Post-Appeal Time Is Compensable**

**Respondents argue that time spent after submission of the matter to the court of appeal is not compensable time, concocting the novel theory that fees are only awardable up to the point at which "victory" is obtained, and not beyond. Opp. at 10-11. The law is well established, however, that a successful party under CCP §1021.5 is entitled to be compensated for *all* time reasonably incurred in enforcing that right, including post "victory" or even post-judgment matters such as monitoring and enforcing a judgment. See, *e.g., Daniels v***

*McKinney* (1983) 146 CA3d 42, 193 CR 842; *Chabner v United of Omaha* (ND Cal, Oct. 12, 1999, No. C-95-0447 MHP) 1999 US Dist Lexis 16552, *14, aff'd (9th Cir 2000) 225 F3d 1042 (compensating 268 hours to finalize language of judgment and close out case).

Respondents' novel theory for challenging this time relies on patent misinterpretations of two cases. Respondents cite *Thayer v Wells Fargo Bank* (2001) 92 CA4th 819, 839, 112 CR2d 284, for the proposition that "there should be no recovery for 'the continuing obligations of Plaintiff's counsel' after judgment." Opp. at 10. *Thayer* says nothing of the sort. On the contrary, *Thayer* expressly holds that 20 such "continuing obligations," when they are ascertainable, *are* compensable. *Thayer*, 92 CA4th at 835. Likewise, *National Parks & Conserv. Ass'n v County of Riverside* (2000) 81 CA4th 234, 234, 96 CR2d 576, explicitly recognizes that time spent on post-judgment work that, inter alia, "helps ensure compliance with the prior court order" *is* compensable under CCP §1021.5. 81 CA4th at 241. Neither case even remotely suggests that "post-victory" fees are not compensable.

C. Counsel's Hours Are Not "Excessive"

In *National Parks,* the plaintiff had successfully challenged an EIR before the trial court, obtained a judgment, and had been awarded fees for that success. 81 CA4th at 239. At issue was a second motion to recover fees for an unsuccessful challenge to the return to the writ, which the trial court treated as an entirely separate action. 81 CA4th at 239.

Respondents contend that counsel for XXX spent excessive time on various tasks. Opp. at 12. As we now show, however, the time actually spent by XXX's attorneys on these tasks is demonstrably reasonable and should be compensated in full.

1. Time spent in "Meetings," "Settlement," and opposing Respondent's challenge to CCP §170.6 affidavit. Respondents do not challenge time spent on any of these subjects as not compensable; they simply complain that the time spent on these issues was "excessive." Opp. at 11-13. However, when one deducts the irrelevant and duplicative entries from the time they attribute to counsel for XXX, Respondents have only actually identified under 15 hours of meetings, 20 hours of time on settlement (half of which was spent at the mediation itself), and another 20 hours of time necessitated by Respondents' own opposition to XXX's §170.6 motion. Blue Reply Decl. ¶¶9-16. These small amounts of time for such complex litigation are hardly "excessive" by any standard.

2. Time spent preparing fee motion. Petitioner's fee-related services are fully compensable. See *Hogar v Community Development Comm'n* (2007) 157 CA4th 1358, 1371, 69 CR3d 250 (directing trial court to compensate *all* fee-related work). Although respondents complain about the time spent on this motion, they ignore how much is at stake here: any compensation for XXX's counsel for 877 hours of work—a market value of nearly $350,000—depends on winning this motion. It is little wonder then that petitioner's counsel have committed over 67 hours to it (including these reply papers), especially in light of respondents' suggestion that Mr. Blue be paid for less than 20 percent of his time. Respondents' suggestion that fees for this motion be limited arbitrarily to $40,000, for all petitioners, a figure plucked out of thin air, is unsupported by any evidence or case law. In fact, for contested fee motions like this one with so much at stake, far larger fees have been found reasonable by numerous courts. See Reply Memorandum in coordinated case No. 078910 at p. 9; Black Reply Decl. ¶3 (listing numerous other cases).

D. A Reduction for "Losing Issues" Is Neither Required Nor Appropriate

Petitioners won this lawsuit—even respondents cannot dispute that the denial of a writ was reversed in a 114-page opinion, an injunction was ordered by the court of appeal, and on remand, a writ issued commanding respondents to vacate all approvals for the Project and prepare a new EIR. Nonetheless, respondents argue that whatever hours this Court determines are reasonable should be reduced by 76 percent to reflect losing "issues" and "theories," citing *Hensley v Eckerhart* (1983) 461 US 424, 436, 76 L Ed 2d 40, 103 S Ct 1933, and *Feminist Women's Health Ctr. v Blythe* (1995) 32 CA4th 1641, 1674 n8, 39 CR2d 189. Respondents' argument is a gross distortion of the applicable law, on several levels.

First, *Hensley* expressly *rejects* the type of "mathematical" comparison of winning and losing issues that respondents urge: "We agree with the District Court's rejection of a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors." 461 US at 435 n11 (internal citation omitted). So do

**the California courts. See *Harman v City* & *County of San Francisco* (2007) 158 CA4th 407, 421, 69 CR3d 750.**

**Second, neither state nor federal law requires a fee-claimant to win every issue, theory, or claim in order to be compensated for all their reasonable hours: "[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley*, 461 US at 435. Indeed, "a plaintiff may obtain excellent results without receiving all the relief requested." *Sorenson v Mink* (9th Cir 2001) 239 F3d 1140, 1147.**

**Rather, parties who recover "substantial relief" may be compensated for *all* their hours: "Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 997, 242 CR 272. For example, in *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 69 CR3d 1, the plaintiff lost six of eight causes of action. Nonetheless, the trial court found all of plaintiff's hours reasonable, and the court of appeal affirmed, noting that all of plaintiff's causes involved disability and age discrimination and were based on the same set of facts. 157 CA4th at 430.**

**Third, only time spent exclusively on distinct, unrelated claims must be deducted: "Attorneys' fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." *Drouin v Fleetwood Enters.* (1985) 163 CA3d 486, 493, 209 CR 623. Unrelated claims involve a distinctly different course of conduct and/or unrelated facts and legal theories. See, *e.g., Acree v General Motors Acceptance Corp.* (2001) 92 CA4th 385, 112 CR2d 99 (no reduction required for unsuccessful contract claims when successful contract claim arose out of same contractual relationship).**

**Fourth, all *common* time is compensable, without apportionment. *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 129, 158 CR 1. So is all time spent on losing claims that contributes to the successful claim or that is impossible to segregate. *Akins v Enterprise Rent-A-Car Co.* (2000) 79 CA4th 1127, 1133, 94 CR2d 448. Thus, for example, all time spent on the common portions of a brief is compensable because it would have had to be spent on the winning claims.**

**Fifth, in order to encourage attorneys to take meritorious public interest cases, reductions for obtaining less relief than was sought are permitted only in "the unusual circumstance" where "special circumstances" would make a fully compensatory fee "unjust." See *Beaty v BET Holdings, Inc.* (9th Cir 2000) 222 F3d 607, 612.**

**Under these correct standards, a fully compensatory fee is reasonable and appropriate here:**

- **Petitioners succeeded in obtaining their primary objective: reversal of the trial court's initial judgment, and a writ commanding the City to vacate its approvals of the Project and to prepare a new EIR. These are "excellent results" or "substantial relief' by any standard. Compare *Wysinger,* 157 CA4th at 431. Petitioners did not present separate "claims." They presented separate "issues" and ''theories'' for their one CEQA claim. Indeed, even respondents repeatedly refer to these losing issues as "theories," not "claims." See Opp. at 5.**
- **All of petitioners' arguments were "related." All involved the same course of conduct—the City's approval of the Project. All involved "related facts and legal theories"—the same EIR and CEQA principles. See, *e.g., Harman,* 158 CA4th at 423 (all of plaintiff's claims "related" because they involved same course of discriminatory practices.); *Acree v General Motors, supra*.**
- **The vast majority of time was spent on common and winning issues. The major issue here was land use, and that issue consumed the great majority of Mr. Blue's time. Blue Reply Decl. ¶¶18-20. In contrast, the amount of time exclusively spent on the losing issues was minimal for Mr. Blue, it was approximately 110 of the 862 expended on the entire case. Id.**
- **Looking at petitioners' level of success, respondents have presented no "unusual circumstances" here that would make a fully compensatory fee "unjust." The mere fact that petitioners did not achieve every bit of relief they sought does not require a less than fully compensable fee. As the court of appeal recognized in *Sundance v Municipal Court* (1987) 192 CA3d 268, 273, 237 CR 269: "It must be remembered that an award of attorneys' fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right. To reduce the attorneys' fees of a successful party because he did**

not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right."

## III. PETITIONER'S LODESTAR ENHANCEMENT COMPORTS WITH MARKETPLACE STANDARDS

Petitioners' lodestar figure is the fee that would have been paid by a fee-paying client, win or lose, without consideration for such non-lodestar factors as contingent risk: "[T]he unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider." *Ketchum v Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377. As petitioners' moving papers showed, a 2.0 lodestar enhancement is appropriate to arrive at a reasonable attorney fee here, especially given the great financial risk taken by petitioners' attorneys, as well as the public interests their lawsuit has served. See Redd Decl. ¶¶27-28; Black Decl. ¶15. Anything less does not serve the fee-shifting statute's purpose: "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *Ketchum,* 24 C4th at 1132. Respondents' Opposition provides no reason to deny a lodestar enhancement, as we now show.

### A. Lodestar Enhancements Are Frequently Applied in Environmental Actions

Initially, respondents imply that lodestar enhancements are rarely applied in environmental actions, but this is incorrect. In fact, as petitioner's moving papers showed *(*see Pets. Mem. at 13; Black Decl. ¶15), lodestar enhancements frequently have been awarded in environmental and land use cases, many of which involved far less risk and far lesser stakes than this case. For example, in *Kern River Pub. Access Comm. v City of Bakersfield* (1985) 170 CA3d 1205, 217 CR 125, a 1.5 multiplier was applied in a Subdivision Map Act case to secure river access through a proposed 11-acre development, based on the court of appeal's recognition that "[t]his is a relatively complex matter where success was not assured and where the appellants fought the case at every turn." 170 CA3d at 1228.

In response, respondents assert that only two reported CEQA cases, *San Bernardino Valley Audubon Soc'y* (1984) 155 CA3d 738, 755, 202 CR 423, and *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 71 CR2d 1, awarded multipliers, and that they involved orders requiring new EIR's and "modest sums." Opp. at 14. That argument too is wrong on several levels.

First, no case holds that different rules apply to determining reasonable attorney fees in CEQA cases. Respondents cite *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 67 CR3d 228, but *Mejia* did not involve a contingent fee, nor did it even address the fee amounts.

Second, many land use and environmental cases *do* apply multipliers, especially when the successful attorneys' compensation is contingent on success. See, *e.g., Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 142 CR 766 (2.1 multiplier in challenge to L.A. County's 10 general plan amendments); *Downey Cares,* 196 CA3d at 994 (1.5 multiplier in challenge to redevelopment plan affecting 116 acres).

Third, the relief in this case was every bit as great as the relief in *San Bernardino* or *Galante Vineyards.* The only reasons those cases involved more "modest sums" were: a) the proposed projects had far less impact (*San Bernardino* involved a 14-acre cemetery project; *Galante* involved a sparsely populated area); b) neither case involved a hotly contested appeal; and c) fees have increased dramatically since those cases. In every way—contingent risk, novelty and difficulty, preclusion of employment, and importance to the community—this case warrants at least as high a multiplier as the examples cited above. Respondents present no evidence to the contrary—instead they rely again on misstatements of law and mischaracterizations of the facts. A reasonable attorney fee here requires a lodestar enhancement.

### B. The Great Risk Taken by Petitioner's Attorneys Warrants a Significant Enhancement

Mr. Blue took an incredible risk in litigating this case. If XXX had not won a significant victory, more than *860 hours* of his work would have gone uncompensated. In the legal marketplace, this type of risk commands a significantly higher fee than the lodestar represents. See Redd Decl. ¶¶27-28; Black Decl. ¶¶14-15.

In response, even respondents cannot deny that an attorney who takes such a risk expects and deserves a higher fee than an attorney paid a market-rate fee, win or lose. Instead, respondents contend that contingent

**risk is only a "slight consideration" in determining a reasonable attorney fee. Opp. at 15. That unsupported assertion is manifestly wrong.**

**Contingent risk is *the most important* enhancement factor. In fact, the California Supreme Court has expressly recognized that contingent risk is one of the "most common" fee enhancers: "One of the most common fee enhancers, and one used by the trial court in the present case, is for contingency risk." *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331. Indeed, the court's two most recent decisions on lodestar multipliers both focus extensively on the contingent risk factor above all others. See *Graham,* 34 C4th at 579; *Ketchum,* 24 C4th at 1132 ("The adjustment to the lodestar figure, *e.g.,* to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees").**

**Likewise, in *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 78 CR3d 572, the trial court applied a 1.65 lodestar enhancement in a case challenging the defendant's failure to comply with a local wage ordinance, based primarily on contingent risk: *'"Most important* to the Court's determination on the question of a multiplier, however, are the contingent risks inherent in this litigation, wherein a number of issues of first impression were presented and were largely resolved in plaintiffs' favor.'" *Amaral*, 163 CA4th at 1217 (emphasis added). The court of appeal affirmed, holding that "[t]he claims and defenses in this case raised a significant number of complex legal issues of first impression, and class counsel took a substantial risk that it would not prevail on these issues and thus would not recover a full fee." 163 CA4th at 1217. Contingent risk also was a prominent factor in many of the fee awards cited above, including *Coalition for L.A. County Planning,* 77 CA3d at 251, and *Downey Cares,* 196 CA3d at 998, as well as numerous trial court decisions. Black Decl. ¶15.**

**Respondents' only "authority" for their position is *State v Meyer* (1985) 174 CA3d 1061, 220 CR 884, but again they seriously misstate its holding. *Meyer* does not hold that contingent risk enhancements are "irrelevant or but one factor to consider," as respondents allege (Opp. at 15). That language refers to the landowners' *contingent fee agreement,* under which they were required to pay their attorneys a percentage of the recovery. *Meyer*, 174 CA3d at 1073. The court of appeal ruled, however, that the lodestar-multiplier method of determining fees must be used, not the percentage set out in the fee agreement, and that numerous factors must be considered, including *"the contingent nature of the fee award."* *Meyer,* 174 CA3d at 1074 (emphasis added).**

**C. Other Factors Also Support a Lodestar Enhancement**

**A 2.0 lodestar enhancement could be justified here on the basis of contingent risk alone. Redd Decl. ¶¶14-15; Black Decl. ¶14. However, other factors also support the requested enhancement.**

**Respondents' only response to petitioners' "novelty, difficulty, and complexity" argument, for example, is that Mr. Blue's willingness to enter the case a month before trial may not be considered. Opp. at 13. The courts have recognized, however, that willingness like Mr. Blue's to take on an important case under such difficult circumstances is a factor that may be compensated through a lodestar enhancement. See *Oberfelder v City of Petaluma* (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, *3014, aff'd sub nom *Oberfelder v Bertoli* (9th Cir, June 4, 2003, Nos. 01-17302, 02-15423) 2003 US App Lexis 11371 (1.5 multiplier based in part on law firm's willingness to accept representation in particularly difficult case).**

**Likewise, rather than dispute that this litigation precluded Mr. Blue from taking on other potentially lucrative cases, respondents argue that it could not have done so for *all* the attorneys claiming fees. Opp. at 15. This has nothing to do with *Mr. Blue's* fee, however.**

**Lastly, respondents have no response whatsoever to petitioner's request for an enhancement based on the importance of this lawsuit to petitioners and the public. Indeed, the importance of a case involving the largest single development ever proposed for the City of YYY and the City's last remaining wetlands cannot be disputed. The courts continue to apply lodestar enhancements based on this factor. See *Amaral,* 163 CA4th at 1217. A similar result is appropriate here.**

**IV. CONCLUSION**

**For the foregoing reasons, petitioners respectfully request an award of reasonable attorney fees and**

**expenses in the amount of $732,688.75, including the reasonable attorney fees incurred subsequently on this motion. See Blue Reply Decl. ¶21-23; Black Reply Decl. ¶2 and Exh. A.**

**Date: September 22, 2009** **By: _____**
**John Black**
**Attorney for Petitioner**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix I

# Sample Form: Order Awarding Attorney Fees

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**COUNTY OF WWW**

| | | |
|---|---|---|
| **XXX,** | ) | **No. 12345** |
| **Plaintiff(s),** | ) | |
| | ) | **Judge: Hon. ABC** |
| **vs** | ) | |
| | ) | |
| **YYY,** | ) | **ORDER AWARDING** |
| **Defendant(s).** | ) | **ATTORNEY FEES** |
| _____ | ) | |

**Defendant/interested parties YYY ("defendants") have moved for an award of attorney fees, payable to their counsel, against plaintiff XXX and interested party ZZZ. The motion was heard on September 11, 2009, in Department 3, the Honorable ABC presiding. Warren Waters, Public Interest Firm, appeared for defendants. John Doe appeared for YYY. John Roe appeared for ZZZ.**

**The Court having carefully reviewed the record in the case, the court of appeal opinion, and the written arguments and declarations submitted by all sides, and having considered the oral argument presented, orders as follows:·**

**Defendants' Motion Against XXX**

**Entitlement to Fees**

**Defendants are entitled to an award of attorney fees under Code of Civil Procedure Section §1021.5. The Court finds that there were important rights involved in this matter and the litigation conferred significant benefits.**

**Reasonable Lodestar Amount**

**The Court has evaluated the claim using the lodestar methodology, which is based on the reasonable number of hours spent by each attorney and paralegal on the case times the reasonable hourly rate for that person. The lodestar claimed by defendants is summarized on Exhibit 1 and 2 to this Order. The Court finds that the lodestar, which includes a voluntary 5-percent billing judgment, is reasonable.**

**Reasonable Hourly Rates**

**The hourly rates claimed, as summarized in Exhibit 1, are reasonable.**

**Reasonable Number of Hours**

**The number of hours claimed is reasonable.**

**Multiplier**

**The Court grants defendants' request to modify the lodestar with a 2.0 multiplier for work on the merits of the case. The Court, however, denies defendants' request to modify the lodestar with a 1.5 multiplier for work on the attorney fees motion.**

**Defendants' Motion Against ZZZ**

**The Court denies defendants' fee motion insofar as it seeks fees payable by ZZZ. ZZZ's interest in this litigation is insufficient to make it an opposing party liable to pay fees under Code of Civil Procedure §1021.5.**

**Disposition**

**Defendants' motion for attorney fees against XXX is granted in substantial part. XXX is ordered to pay fees in the lodestar amount of $957,670 for work on the merits augmented by a 2.0 multiplier, for a total of $1,915,340, and $63,000 for services rendered on the fee issue, for a grand total of $1,978,340. Payment shall be made to the Public Interest Firm, which shall be responsible for distributing to each co-counsel its appropriate share.**

**Defendants' motion for an award of attorney fees against ZZZ is denied.**

**Date: _____, 2009 By: _____**
**Judge of the Superior Court**

**APPROVED AS TO FORM:**

**_____**
**Attorneys for Plaintiff**

**PUBLIC INTEREST FIRM**

**By: _____**
**Warren Waters**
**Attorney for Defendants/Appellants YYY**

**WHITE & BLACK, PC**

**By: _____**
**John Roe**
**Attorneys for Defendant ZZZ**

**EXHIBIT 1**

**ATTORNEY FEES LODESTAR: XXX v YYY MERITS LITIGATION (THROUGH 3/19/09 JUDGMENT)**

| Attorney/Firm | Grad. Year | Hours | Hourly Rate | Total |
|---|---|---|---|---|
| *Public Interest Firm* | | | | |
| Attorney 1 | 1992 | 894.75 | $400 | $357,900 |
| Attorney 2 | 1992 | 905.1 | $400 | $362,040 |
| Warren Waters | 1975 | 124.0 | $450 | $55,800 |
| | 1995 | 45.1 | $375 | $16,912.50 |
| *Center Total* | | | | $792,652.50 |
| | | | | |
| *ABC Law Project* | | | | |
| Attorney 3 | 1991 | 431.7 | $405 | $174,838.50 |
| Attorney 4 | 1980 | 66.5 | $440 | $29,260 |

| | | | | |
|---|---|---|---|---|
| ***ABC Total*** | | | | **$204,098.50** |
| | | | | |
| **XYZ Law Corporation** | | | | |
| **Attorney 5** | **1994** | **27.45** | **$395** | **$10,842.75** |
| **Attorney 6** | **paralegal** | **4.8** | **$100** | **$480.00** |
| ***XYZ Total*** | | | | **$11,322.75** |
| | | | | |
| **Grand Total** | | | | **$1,008,073.75** |
| **Grand Total with 5% Billing Judgment Reduction** | | | | **$957,670** |

**EXHIBIT 2**

**ATTORNEY FEES LODESTAR: XXX v YYY LITIGATION ON FEE ISSUE (THROUGH HEARING)**

| Attorney/Firm | Grad. Year | Hours | Hourly Rate | Total |
|---|---|---|---|---|
| **Public Interest Firm** | | | | |
| **Warren Waters** | **1975** | **140** | **$450** | **$63,000** |

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix J

# Sample Form: Order Granting in Part Plaintiffs' Motion for Attorney Fees and Expenses

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF WWW**

| | | |
|---|---|---|
| **XXX, on behalf of themselves and All Others Similarly Situated,** | ) | **No. HG03.103046** |
| **Plaintiff(s)** | ) | **ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR ATTORNEY FEES AND EXPENSES** |
| **vs** | ) | |
| **YYY, and DOES 1-25,** | ) | |
| **Defendant(s)** | ) | |

**Plaintiffs' Motion for Attorney Fees and Expenses came on regularly for hearing on July 6, 2009, in Department 3 of this Court, before the Honorable ABC, assigned to this matter for all purposes. Plaintiffs appeared by Beatrice Blue and Charles Cerise, and Defendants appeared by Grant Green. Intervenor did not appear.**

**Based on the pleadings submitted in support of and in opposition to the motion, the evidence admitted, and the arguments of counsel, the Court grants the motion, in part, for the reasons that follow.**

**LODESTAR**

**In determining an attorney fee award, the trial court must first determine the fee to which attorneys of like skill in the area would typically be entitled. See *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 48, 141 CR 315; *Ketchum v Moses* (2001) 24 C4th 1122, 1133, 104 CR2d 377. Here, although the Court has reviewed the detailed billing records submitted by plaintiffs, YYY expressly does not contest the reasonableness of plaintiffs' hours or hourly rate. Hence, the lodestar figure is undisputed. (See, *e.g.,* YYY's Opposition at 5:12, 5:18-19). Based on the Court's review of plaintiffs' evidence in support of the fee application, and the lack of opposition thereto, as well as the Court's own knowledge of the quality of counsel's work and the nature of this litigation to date, the Court determines that the lodestar amount is $727,000.**

**MULTIPLIER**

**Once the lodestar amount is determined, the Court may consider a variety of factors specific to the case, in deciding whether, and by how much, it will adjust the lodestar figure to reach a fair market value for the services rendered. *Serrano III,* 20 C3d at 49; *Ketchum,* 24 C4th at 1134. These factors include: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; and (2) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award. *Serrano III,* 20 C3d at 49; *Ketchum*, 24 C4th at 1138.**

**In considering the exceptional skill factor, a court should only award a multiplier when "the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation." *Ketchum,* 24 C4th at 1139.**

**In analyzing the contingent risk factor, a court examines the lodestar with an eye toward bringing the financial incentives for attorneys enforcing important rights into line with incentives that they have to undertake claims for which they are paid on a fee-for-services basis. *Ketchum,* 24 C4th at 1132. As the supreme court stated in *Ketchum,* "the unadorned lodestar reflects the general local hourly rate for a *fee-bearing case* [*i.e, a non-contingent matter, where a payment is certain regardless of outcome*]; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may**

**consider" in adjusting the lodestar. 24 C4th at 1138 (emphasis in original).**

**Finally, a fee enhancement must not be imposed for the purpose of punishing the losing party. 24 C4th at 1138.**

**The Court has conducted a thorough assessment of its prior orders in this matter and is familiar with the multiple, complex, and often novel legal issues presented thus far in this litigation. The Court has also reviewed plaintiffs' billing records and the declarations of Beatrice Blue, Charles Cerise, Patrick Pink, and Thomas Tan submitted in support of plaintiffs' motion.**

**The Court notes that YYY did not offer counter-declarations on the issues of the novelty of the issues presented, the contingency risks, or the skill with which plaintiffs litigated the case. While YYY objects to these declarations and moves to strike them, the Court finds those objections to be without merit and DENIES that motion. Although the Court finds that the Declaration of Martin Maroon is largely unnecessary, given the Court's familiarity with the case and its review of prior orders in connection with this fee application, YYY's objections to the declaration are without merit and its motion to strike with respect to this declaration is also DENIED. YYY's request that the Court take judicial notice of other cities' living wage ordinances is also DENIED, as the information is not relevant to the fee determination before the Court. Further, YYY's objections to the Supplemental Declaration of Martin Maroon are likewise OVERRULED and the motion to strike the declaration is DENIED.**

**The instant case presented a number of important issues of constitutional interpretation, as well as interpretation of the Private Attorneys General Act of 2004 (Lab C §§2698-2699.5), and the Hayward Living Wage Ordinance itself. These issues, as well as difficult and novel questions of retroactive application and evidentiary burden, were skillfully presented by plaintiffs' counsel. Based on the novelty and difficulty of the issues involved, the importance of this case in enforcing the rights to payment of an established living wage, and the high degree of skill displayed by plaintiffs' counsel—both in establishing a right to summary adjudication of the class claims and in defeating YYY's constitutional, statutory interpretation, contract, and evidentiary burden arguments—the Court finds that a multiplier is appropriate. While the hourly rates included in the lodestar here largely reflect the level of skill with which the case was litigated, they do not fully account for the high level of skill necessary to achieve the results here or the relative efficiency with which they were achieved. Most important to the Court's determination on the question of a multiplier, however, are the contingent risks inherent in this litigation, wherein a number of issues of first impression were presented and were largely resolved in plaintiffs' favor.**

**Therefore, based on the Court's review of the entirety of the case, the billing records, and the declarations submitted in support of the motion, as well as the authorities cited and discussed in the parties' briefs, the Court determines that a multiplier of 1.65 is appropriate, bringing the attorney fees for the merits to a total of $1,199,550.00.**

**FEES ON FEES**

**The Court must next determine the amount of the reasonable attorney fees for the time spent on the attorney fee motion, or the "fees on fees." "Fees recoverable… ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." *Serrano v Unruh* (1982) 32 C3d 621, 639, 186 CR 754.**

**In this case, plaintiffs made a settlement demand for attorney fees, as the Court directed that they do before filing this motion. YYY apparently never responded to that demand, nor did it indicate that it would not contest the lodestar prior to the filing of plaintiffs' motion. The amount of the "fees on fees" sought here is $60,611.00.**

**Plaintiffs do not appear to seek, nor does the Court find, that these fees should be enhanced by a multiplier. Once the motion for summary judgment was granted, fees became mandatory and the contingency risk factor dropped away. *Ketchum,* 24 C4th at 1141. The Court appreciates that YYY bears some responsibility for the amount of fees on fees incurred, given that it failed to respond to plaintiffs' demand and failed to indicate that it would not contest the lodestar amount.**

**The Court finds that the $60,611.00 in fees submitted by plaintiffs, not disputed as to their reasonableness, are the appropriate measure of attorney fees on the fee motion itself.**

**EXPERT FEES/COSTS**

**Plaintiffs seek an award of litigation expenses in the amount of $65,641.28. These expenses are over and above those that plaintiffs seek in their bill of costs, and are not costs otherwise available under CCP §1033.5, including $40,749.47 in expert witness fees.**

**Plaintiffs rely on *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1 CR2d 459, for the proposition that such costs are recoverable by a party that has established its entitlement to attorney fees, if the costs are of the type that would normally be billed to a paying client. The *Beasley* case is contrary to the weight of authority on the subject, including the recent case of *Olson v Automobile Club of S. Cal.* (2006) 139 CA4th 552, 44 CR3d 1, as well as the supreme court's decision in *Davis v KGO-T.V., Inc.* (1998) 17 C4th 436, 442, 71 CR2d 452.**

**Recovery of costs is strictly limited by statute. *Murillo v Fleetwood Enters., Inc.* (1998) 17 C4th 985, 989, 73 CR2d 682; *Davis,* 17 C4th at 439. Section 1033.5 of the Code of Civil Procedure limits the types of costs recoverable by a prevailing party. Section 1033.5(b) specifically states that fees of experts not ordered by the court, and certain other categories of expenses sought, are not allowable as costs except when expressly authorized by law. Though the supreme court in *Davis* did not overrule *Beasley,* the court's reasoning in *Davis* completely undercuts the notion that a prevailing plaintiff may recoup costs not permitted by §1033.5 in the absence of express statutory authority allowing such cost-shifting. Plaintiffs offer no statutory basis for recovery of their expert costs or other non-statutory costs. The Court therefore denies these expenses.**

**In any event, the Court would not be inclined to award a number of the non-statutory costs sought here (*e.g.,* charges for online research, facsimile, and copying costs) based on the evidence submitted by plaintiffs, as these costs appear more reasonably to be subsumed within overhead costs.**

**At oral argument, counsel for plaintiffs made the point that certain expenses sought herein are neither expressly permitted nor expressly prohibited by CCP §1033.5, and that the Court has discretion to award such expenses as costs if it finds them to be reasonable. CCP §1033.5(c)(4). Of these categories of expenses sought by plaintiffs, the Court awards $25.00 in transcript expenses and $473.00 for translation expenses, for a total of $498.00.**

**CONCLUSION**

**Plaintiffs' motion for attorney fees is GRANTED IN PART. Plaintiffs are awarded $1,199,550.00 in attorney fees on the merits and $60,611.00 on the fee motion, for a total attorney fee award of $1,260,161.00, plus $498.00 in additional expenses. The total award, not including statutory costs, is thus $1,260,659. Except as so specified, plaintiffs' request for expenses beyond those in their uncontested Memorandum of Costs is otherwise DENIED.**

**IT IS SO ORDERED.**

**DATED: July 7, 2009**

**_____**
**Judge of the Superior Court**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, *e.g.,* the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix K

# Sample Form: Stipulation for Award of Attorney Fees; [Proposed] Order Awarding Attorney Fees

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**Warren Waters #xxxxx**
**CENTER ON LAW AND POVERTY, INC.**
**xxxx West Street**
**Los Angeles, CA 90020**
**Telephone: (xxx)xxx-xxxx**
**Fax: (xxx)xxx-xxxx**
**E-mail: waters@western.com**
**Attorneys for Petitioner**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**COUNTY OF SAN DIEGO**

| | | |
|---|---|---|
| **XXX, YYY,** | ) | **No. 56789** |
| **Plaintiff(s)** | ) | |
| | ) | **STIPULATION FOR AWARD** |
| **vs** | ) | **OF ATTORNEY FEES;** |
| | ) | **[PROPOSED] ORDER** |
| **ZZZ, UUU, TTT,** | ) | **AWARDING ATTORNEY FEES** |
| **Defendant(s)** | ) | |
| _____ | ) | |

**IT IS HEREBY STIPULATED between the parties, through their respective counsel, that the remaining issue in this case, plaintiffs' entitlement to attorney fees, may be resolved as follows:**

**1. The Department of Social Services agrees to pay attorney fees and costs to plaintiffs' counsel Public Interest Firm and County Legal Services, Inc. under Welfare and Institutions Code Section 10962.**

**2. The parties agree that the Department of Social Services shall pay fees in the total amount of $30,968.25 plus interest at the legal rate running from the date the Order Awarding Attorney Fees is signed through the date of payment, payable to plaintiffs' counsel.**

**3. The fee award shall be paid to the Public Interest Firm, which shall be responsible for distribution to co-counsel of its appropriate share.**

**Date: _ _ _ _ _ _** **By: __**[*Signature*]**__**
**Warren Waters**
**Public Interest Firm**
**Attorneys for Plaintiffs**

**Date: _ _ _ _ _ _** **Office of the Attorney General**
**By: __**[*Signature*]**__**
**Attorney for Defendant**

**ORDER AWARDING ATTORNEY FEES**

**Pursuant to the stipulation by the parties, IT IS ORDERED that the Department of Social Services pay the**

**sum of $30,968.25 plus postjudgment interest in attorney fees to the Public Interest Firm.**

**Date:** _ _ _ _ _ _

**Judge of the Superior Court**

*Comment:* Attorney-drafted papers filed in court must conform to the California Rules of Court, e.g., the lines of the paper must be numbered consecutively (Cal Rules of Ct 2.108(1)), and a footer showing the paper's title must appear on every page below the page number (Cal Rules of Ct 2.110). Authorities in supporting memorandums should be in the style set out in the California Style Manual or the Uniform System of Citation. Cal Rules of Ct 1.200. As always, counsel are advised to update all authorities before citing them in any court document. For general information on preparing court papers, see California Civil Procedure Before Trial, chaps 1, 11 (4th ed Cal CEB 2004).

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# Appendix L

# Sample Form: Statement of Decision

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**EXHIBIT A**

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**IN AND FOR THE COUNTY OF XXXXX**

| | | |
|---|---|---|
| **AAA, BBB, CCC et al.,** | ) | **No. xxxxxx Dept. 0 XX** |
| | ) | |
| **Petitioners** | ) | **STATEMENT OF DECISION** |
| | ) | |
| **vs** | ) | |
| | ) | |
| **STATE BOARD OF ACCOUNTANCY and the Individual Members thereof,** | ) | |
| | ) | |
| **Respondents.** | ) | |
| _____ | ) | |

**In June of 1978, petitioners instituted this action, claiming violation of the right to equal protection of the law by the action of the respondent in denying waiver of the CPA examination to petitioners.**

**On December 18, 1980, this Court entered a Judgment pursuant to stipulation, ordering that a peremptory writ of mandate issue commanding the respondents to reevaluate the application received during the period of 1957 through November 30, 1977, from applicants who were duly licensed as CPAs in the Philippines (or individuals who could provide satisfactory evidence that they were discouraged from applying due to the Board's perceived policy relating to the CPA certificate from the Philippines). As to the two named classes, it was commanded that the respondent issue certificates as certified public accountants in the State of California to members of the classes who met each and every one of ten criteria articulated in the Judgment pursuant to stipulation. The Judgment was entered without prejudice to the petitioners regarding their seeking a judicial determination of a claim for costs and attorney fees, and without prejudice to respondents to oppose said claims. In March 1982, at the request of both parties, the judgment pursuant to stipulation was modified by making certain major changes in some of the criteria for licensure.**

**After considering the brief filed and the arguments and evidence presented at several hearings on the issue of attorney fees, this Court hereby makes the following written statement of decision:**

**California Code of Civil Procedure §1021.5 and 42 United States Code §1988 provide authority for an award of attorney fees to petitioners.**

**This action has resulted in the enforcement of important rights affecting the public interest. These rights include the rights of Filipino CPAs to equal protection of the law under the United States and California Constitutions, the right of such individuals to practice their profession, the right of such individuals to be free from arbitrary and capricious treatment by the Board of Accountancy, and the right of minority communities and the public generally to be served by a wide range of professionals without regard to national origin.**

**The litigation has conferred significant pecuniary and nonpecuniary benefits on large classes of persons and on the general public. The beneficiaries include approximately 500 California residents who were licensed as CPAs in the Philippines and were given an opportunity to practice accountancy equal to that of foreign CPAs of other races and nationalities. As a result of the judgment in this action, minority communities and the**

public generally will benefit from increased diversification in the accounting profession and the corporate and business world.

The financial burden of this litigation placed on petitioners was far in excess of their personal stake in the case. Neither petitioner organizations nor the individual petitioners have the resources to finance the lengthy and protracted proceedings involved in prosecuting this case.

The Court awards attorney fees to the petitioners, after finding, based on the records submitted by the petitioner, the specialized training and experience of the attorneys, the complexity of the litigation, the extensive span of this litigation, the prior administrative proceedings, and the reasonable amount and value of the time spent, as follows:

| ATTORNEYS | TIME | HOURLY RATE | FEE |
|---|---|---|---|
| Attorney A | 821.0 | $155.00 | $127,255.00 |
| Attorney B | 10.5 | 105.00 | 1,102.50 |
| Attorney C | 292.0 | 50.00 | 14,600.00 |
| Attorney D | 68.0 | 50.00 | 3,400.00 |
| LAW STUDENTS | | | |
| Student E | 247.0 | 20.00 | 4,940.00 |
| Student F | 276.0 | 20.00 | 5,520.00 |
| Student G | | | 3,000.00 |
| Lodestar Total | | | $159,817.50 |
| Multiplier | | | 1.75 |
| TOTAL WITH MULTIPLIER | | | $314,531.62 |
| ATTORNEYS | | | |
| Attorney H | 85.20 | 155.00 | $13,206.00 |
| Attorney I | 144.30 | 150.00 | 21,645.00 |
| TOTAL WITH MULTIPLIER | | | $314,531.62 |

This Court has determined the time properly spent on this case and has multiplied that amount by reasonable hourly compensation for each person, thus resulting in a base rate or lodestar amount. The Court has then multiplied that base-rate amount by the multiplier 1.75 to reach the total amount of the award.

Based on the evidence presented to the Court, the Court finds that the number of hours indicated for each person set forth above represents time actually spent in good faith on matters reasonably necessary to petitioners' case in this litigation.

Based on the evidence presented to the Court, the hourly rates used in determining the lodestar amount, as set forth above, are reasonable hourly rates for each individual as indicated.

Based on the evidence presented, the appropriate multiplier to be used in determining the award in this case is 1.75. This multiplier is based on consideration of the following factors:

1. The complexity of the issues of the case;

2. The specialized training and experience of the attorneys;

3. Even though a stipulated judgment was eventually entered, a trial was held in this matter and the Court had issued a tentative decision in petitioners' favor;

4. Even though there is a stipulated judgment in this case, the matter had been vigorously defended prior to

**such stipulated judgment and subsequently as to certain issues;**

**5. The contingency nature of being paid;**

**6. The long length of time it has taken for this litigation and related administrative hearings.**

**Based on the evidence, the Court finds that it was necessary for Public Service Firm to associate Law Offices of Attorneys H and I, attorneys, on the issue of attorney fees.**

**Based on the petitioners' memorandum of costs filed, petitioners are awarded costs of $3,259.27.**

**In accordance with the above, the Court finds that Public Service Firm is awarded the sum of $292,886.62 as and for attorney fees and the further sum of $3,259.27 as and for costs, and Attorneys H and I are awarded the sum of $21,645.00 as attorney fees.**

**Date: _ _ _ _ _ _** **_____**
**Judge of the Superior Court**

*Comment:* Although hourly rates are now generally higher than those stated above, this Statement of Decision remains a good example.

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# Table of Statutes, Regulations, and Rules

## CALIFORNIA

### Constitution

**Art IV, §9:** §15.5

### Statutes

**BUSINESS AND PROFESSIONS CODE**
**125.3:** §13.9
**125.3(j):** §13.9
**2497.5:** §13.9
**2661.5(a):** §13.9
**3753.5:** §13.9
**3753.7:** §13.9
**4959(a):** §13.9
**5107(a):** §13.9
**7403(f):** §13.9
**16750(a):** §§3.123, 9.68
**17200:** §§3.19, 3.46, 3.48, 3.80, 4.99
**17200-17210:** §4.51
**17500:** §3.46

**CIVIL CODE**
**45:** §6.5
**46:** §6.5
**47:** §2.63
**51:** §3.83
**51.6:** §3.83
**51.7:** §§3.80, 3.83
**51.9:** §3.83
**52:** §§2.75, 2.77
**52(a):** §§1.12, 2.77, 2.95, 3.33, 3.83
**52(b)(3):** §§2.78, 3.83
**52.1:** §§2.78, 3.80, 3.83
**52.1(h):** §3.83
**54:** §3.83
**54-55.3:** §3.83
**54.1:** §3.83
**54.3(a):** §§2.75, 2.77
**55:** §§2.10, 2.71, 2.75, 2.78, 2.95, 3.83
**171:** §4.29
**789.3(d):** §3.100
**798-799.10:** §2.102
**798-799.11:** §3.100
**798.85:** §§2.75, 2.83, 2.107, 3.100, 4.85, 9.66
**1354:** §§2.110, 3.103, 4.22, 10.70
**1354(c):** §§2.75, 3.103
**1354(f):** §3.103
**1642:** §4.33
**1671(d):** §3.46
**1695.7:** §3.104
**1717:** §§1.4, 2.6, 2.10, 2.20, 2.23, 2.25, 2.55, 2.77, 2.79, 2.85, 2.90, 2.92-2.93, 2.95, 2.103, 3.93, 3.103, 4.2-4.4, 4.8-4.22, 4.24-4.25, 4.27-4.32, 4.34-4.35, 4.37, 4.40, 4.42-4.46, 4.49-4.53, 4.56, 4.58-4.60, 4.64-4.70, 4.72-4.73, 4.75, 4.77-4.78, 4.80-4.85, 4.88-4.95, 4.101, 5.4, 8.5, 8.24, 8.26, 8.36, 9.17, 9.34, 9.83, 9.102, 11.1, 11.8, 11.19, 11.22, 11.26, 11.29, 12.2, 12.7, 14.9, 14.21-14.22
**1717 (former):** §§4.50, 4.52
**1717(a):** §§4.2, 4.13-4.14, 4.16-4.17, 4.19, 4.22, 4.28, 4.32, 4.38, 4.47, 4.49, 4.51, 4.59, 4.66, 4.78, 4.88

**1717(a):** §2.79
**1717(b):** §§2.79, 4.2, 11.20
**1717(b)(1):** §§4.49, 4.66, 4.69-4.71, 4.77, 4.88
**1717(b)(2):** §§2.78-2.80, 4.11, 4.18-4.19, 4.22, 4.30, 4.51, 4.66, 4.78, 4.80, 4.83, 4.85-4.87, 11.8
**1717(c):** §§4.23, 4.69, 15.2
**1780(d):** §§2.9, 2.76, 2.78, 3.104
**1780(e):** §§2.9, 2.76, 2.78
**1785.31(d):** §§2.76, 2.78, 3.104
**1785.31(d)-(e):** §2.76
**1785.31(e):** §§2.76, 3.104
**1785.31(f):** §3.104
**1788-1788.33:** §§3.104, 10.67
**1788.30:** §10.2
**1788.30(c):** §8.4
**1794:** §§3.104, 9.94
**1794(d):** §§2.78, 8.4, 9.125, 10.2
**1798-1798.78:** §§3.88, 8.6
**1798.48(b):** §3.88
**1801-1812.20:** §4.78
**1811.1:** §§3.104, 4.78
**1942.4:** §2.75
**1942.4(b):** §3.100
**1942.4(b)(2):** §3.100
**1942.5:** §3.100
**1942.5(g):** §3.100
**2772-2784.5:** §4.57
**2778:** §7.15
**2981-2984.6:** §4.78
**2983.4:** §§2.78, 2.110, 3.104, 4.78, 4.85
**2985.7:** §3.104
**2988.9:** §2.75
**2995:** §2.77
**3068(d):** §2.75
**3176:** §§2.107, 14.24
**3260:** §§2.18, 2.75, 14.3, 14.15
**3260(g):** §3.126
**3260.1:** §3.126
**3287(b):** §9.111
**3318:** §2.77
**3344:** §§2.110, 3.122
**3344(a):** §§2.75, 3.122
**3426-3426.11:** §3.124
**3426.4:** §§3.124, 6.6
**3496:** §§3.103, 8.6
**54960(a):** §2.95

**CODE OF CIVIL PROCEDURE**

**3:** §2.6
**5.25:** §15.6
**128.5:** §§1.10, 3.17, 3.115, 4.85, 6.1-6.2, 6.8, 6.17, 6.22-6.23, 6.29, 6.31-6.36, 6.39, 6.41, 6.43, 6.45-6.46, 6.48-6.49, 6.66, 6.68, 9.18, 11.73, 14.6
**128.5(a):** §§6.29, 6.35, 14.6
**128.5(b)(1):** §6.8
**128.5(c):** §§6.23, 6.34, 6.39
**128.5(d)(1):** §6.29
**128.7:** §§1.10, 2.20, 2.41, 4.85, 6.1-6.2, 6.8-6.17, 6.19, 6.21, 6.23-6.29, 6.41, 6.49-6.50, 6.68, 11.71, 14.6
**128.7(a):** §6.11
**128.7(a)-(b):** §6.9
**128.7(b):** §§6.9, 6.15, 6.20, 6.47, 11.72
**128.7(b)(1):** §6.16
**128.7(b)(1)-(4):** §§6.9, 6.15
**128.7(b)(2):** §§6.17, 6.20, 6.47
**128.7(b)(3):** §6.18
**128.7(b)(4):** §6.18
**128.7(c):** §§6.15, 6.20, 6.24

**128.7(c)(1):** §§6.10, 6.13-6.14, 6.20, 6.24, 6.26, 11.72
**128.7(c)(2):** §6.28
**128.7(d):** §§6.9, 6.24
**128.7(d)(1):** §§6.20, 6.47
**128.7(d)(2):** §6.28
**128.7(e):** §6.23
**128.7(f):** §6.50
**128.7(g):** §6.12
**128.7(h):** §6.19
**170.1:** §6.42
**170.6:** App E, App H
**170.6:** App D
**170.6(a)(2):** §§11.43, 11.52, 12.23
**177.5:** §6.2
**386.6:** §3.128
**388:** §3.62
**389.6 (former):** §3.62
**391-391.7:** §6.7
**391(c):** §6.7
**405.38:** §§2.110, 3.103
**411.35:** §9.16
**425.16:** §§2.6, 2.20, 2.23, 2.26, 2.75-2.76, 2.91, 2.99, 2.110, 3.4, 3.19, 3.37, 3.110-3.113, 3.116-3.118, 4.85, 6.8, 6.29-6.30, 6.32, 8.4, 9.20, 9.36, 9.84, 11.26, 11.38, 15.11
**425.16(c):** §§2.24, 3.110-3.112, 3.114-3.115, 3.119-3.120, 6.29, 6.32, 6.39, 6.60, 9.9, 11.30, 12.15
**425.16(c)(1):** §§2.76, 6.8, 6.29
**425.16(c)(2):** §2.76
**425.16(e)(4):** §3.111
**425.16(f):** §3.110
**425.16):** §3.114
**425.17:** §§3.37, 3.111
**425.18:** §3.111
**425.18(c):** §3.111
**437c(j):** §6.66
**473:** §§11.4, 11.40
**473(b):** §§11.4, 11.40
**527.6:** §§2.50, 2.55, 3.109, 9.36
**527.6(h) (former):** §2.47
**527.6(i):** §§2.74, 3.109
**527.6):** §2.85
**575.2:** §§6.56, 14.6
**583 (former):** §3.6
**632:** §§11.65, 11.68
**634:** §11.68
**657-659:** §11.69
**662:** §11.69
**663:** §11.69
**664.6:** §11.3
**680.010-724.260:** §15.1
**680.230:** §§11.64, 15.1
**685.040:** §§4.62-4.63, 9.27, 15.15
**685.070(a)(6):** §4.62
**685.080:** §15.15
**685.080(a):** §15.15
**685.080(b):** §15.15
**695.010-709.030:** §15.3
**695.050:** §15.3
**870(b):** §11.37
**877.6:** §§2.47, 11.17
**904.1(a)(2):** §§3.120, 16.10
**904.1(a)(11)-(12):** §16.4
**904.1(b):** §§16.1, 16.4
**907:** §§1.10, 6.60, 6.67-6.69
**916-917.1:** §3.120
**917(d)(1):** §15.11
**917.1:** §15.11

**917.1(a):** §15.10
**917.1(a)(1):** §3.120
**917.1(a)(2):** §15.12
**917.1(b):** §15.12
**917.1(d):** §§15.11-15.12
**917.9:** §15.11
**917.9(a):** §15.11
**917.9(b):** §§15.11-15.12
**998:** §§2.2, 2.6, 2.18, 2.35, 2.47, 2.49, 2.70, 2.78, 2.80, 2.89, 2.95, 2.103, 2.108, 3.82, 3.97-3.98, 3.103-3.104, 4.66, 4.69, 4.77-4.81, 4.83, 9.125, 10.59-10.60, 11.8, 11.22, 14.9, 15.10, 15.12
**998(b):** §4.81
**998(c):** §4.79
**998(c)(1):** §4.79
**998(d):** §§4.79, 9.124
**998(e):** §4.79
**1005(b):** §§11.33, 11.62
**1005(b)-(c):** §11.62
**1005(c):** §11.62
**1008:** §11.69
**1008(a):** §11.69
**1010:** §6.26
**1021:** §§1.2, 2.92, 3.1, 3.100, 3.105, 4.1, 4.25, 4.53, 5.1, 5.5, 6.44, 7.1, 7.3, 7.9, 7.28, 7.31, App D
**1021-1038:** §15.11
**1021.4:** §3.108
**1021.5:** §§1.1, 1.5, 1.12, 2.2-2.3, 2.6, 2.9-2.10, 2.13-2.14, 2.16, 2.19-2.20, 2.22-2.24, 2.26, 2.28, 2.32, 2.35, 2.37, 2.39-2.40, 2.44, 2.51, 2.54-2.55, 2.58-2.60, 2.63, 2.72, 2.85-2.86, 2.90, 2.93, 2.99, 2.101, 2.108, 2.112, 3.1-3.3, 3.5-3.34, 3.36-3.40, 3.42-3.43, 3.45-3.52, 3.55, 3.57, 3.59-3.61, 3.63, 3.65-3.67, 3.69, 3.71-3.77, 3.79-3.81, 3.84, 3.87, 3.90, 3.95, 3.100, 3.104, 3.111, 4.94, 5.2, 5.9, 5.19, 5.21-5.23, 5.44, 5.46-5.47, 5.53, 5.57-5.59, 9.31, 9.49, 9.70, 9.97, 9.124, 10.17-10.18, 10.20, 10.39, 10.67-10.68, 11.1, 11.3, 11.11, 11.19, 11.22, 11.26, 11.30, 11.34, 11.47, 11.53, 11.55, 11.65, 12.1, 12.15, 13.2, 13.16, 13.19, 14.3, 14.21, 14.24, 15.4-15.6, 16.12, 16.17, Apps C-D, Apps H-I, App L
**1021.5(c):** §3.79
**1021.6:** §§7.23, 16.20
**1021.7:** §§1.12, 3.107, 6.5
**1021.8:** §3.17
**1021.9:** §3.103
**1024:** §6.59
**1025:** §4.78
**1028:** §§15.4-15.5
**1028.5:** §§3.90, 3.94
**1028.5(a):** §2.82
**1028.5(b):** §§2.82, 3.94, 13.16
**1028.5(g):** §3.90
**1029:** §15.7
**1032:** §§2.47, 2.78, 2.84, 3.104, 4.68, 4.70, 4.72, 4.77, 4.88, 4.90, 9.126, 15.12
**1032(a)(4):** §2.47
**1032(c) (former):** §4.88
**1033(a):** §§2.99, 3.81, 4.82, 8.26, 10.53, 11.3
**1033.5:** §§4.70, 4.90, 9.34, 9.126, 11.1, 11.25-11.26, 11.29, 11.32, 12.3, 14.11, 14.13, App J
**1033.5(a):** §9.126
**1033.5(a)(10):** §§2.47, 2.80, 4.68, 15.5
**1033.5(a)(10)(C):** §11.41
**1033.5(b):** §9.127, App J
**1033.5(c)(4):** §§9.126-9.127, 11.45, App J
**1033.5(c)(5):** §§8.23, 11.29-11.31, 11.41, 11.46
**1036:** §§3.102, 8.6, 8.31, 8.36, 9.37, 9.45, 9.119, 9.125
**1038:** §§6.4-6.5, 6.38, 6.66, 11.36, 11.42
**1038(a):** §6.4
**1038(b):** §6.4
**1038(c):** §§11.36, 11.42
**1085:** §§3.84, 3.91
**1094.5:** §§2.47, 3.84, 3.91
**1095:** §2.47
**1141.10-1141.31:** §14.6
**1141.21:** §§2.78, 15.10
**1141.21(a)(ii):** §5.27

**1174.2:** §3.100
**1209:** §6.2
**1218:** §6.2
**1218(a):** §§5.2-5.3, 6.57
**1235.140:** §3.101
**1246.3:** §9.37
**1250.410:** §§3.101, 9.37, 11.40
**1268.610:** §§3.101, 8.33
**1280-1294.2:** §14.16
**1281.91:** §14.16
**1283.4:** §14.14
**1284:** §14.14
**1284.2:** §14.3
**1284.3:** §14.2
**1286:** §14.18
**1286.2:** §14.15
**1286.2(a)(1):** §14.16
**1286.2(a)(2):** §14.16
**1286.2(a)(3):** §14.16
**1286.2(a)(4):** §14.16
**1286.2(a)(5):** §14.16
**1286.2(a)(6):** §14.16
**1286.6:** §14.15
**1287.4:** §14.18
**1293.2:** §14.24
**1354:** §§2.103, 2.110
**1713-1724 (former):** §15.2
**1717:** §§4.69, 4.76, 14.24
**1985.8(l):** §6.53
**2023.010:** §6.51
**2023.010-2023.040:** §§1.10, 6.51-6.52
**2023.030:** §§6.51, 6.54
**2023.030(a):** §6.52
**2023.040:** §6.54
**2024.020(a):** §11.54
**2024.050(a):** §11.54
**2025.410(d):** §6.52
**2030.290(c):** §6.52
**2030.300(d):** §6.52
**2030.310(d):** §6.52
**2031.060(i):** §6.53
**2031.300(d):** §6.53
**2031.310(j):** §6.53
**2031.320(d):** §6.53
**2033.420:** §6.52
**2034.410-2034.470:** §11.57
**54960.5:** §9.36

**CORPORATIONS CODE**
**317:** §§8.6, 9.36
**800:** §4.8
**6334:** §3.46
**8337:** §§2.51, 2.83, 3.121
**13406(b):** §§1.17, 2.34

**EDUCATION CODE**
**44944:** §§3.99, 9.36, 13.8
**44944(e):** §§3.90, 3.99, 13.8
**44955:** §3.99

**ELECTIONS CODE**
**9241:** §3.46
**13307:** §3.19

**EVIDENCE CODE**

**1119:** §11.8
**1152:** §10.59

**FAMILY CODE**
**271:** §§11.37, 12.21

**GOVERNMENT CODE**
**800:** §§2.81, 3.90-3.92, 8.22, 9.100, 11.2, 11.42, 13.8
**800(a):** §§2.4, 3.90-3.93, 13.9
**900-935.7:** §2.3
**945.6(a)(1):** §6.46
**965-965.9:** §15.4
**965(b):** §15.6
**965.2(a):** §15.4
**965.5(a):** §15.3
**965.5(b):** §15.3
**965.7:** §§15.3-15.4
**965.7-965.8:** §§15.6, 15.9
**965.7(b):** §15.4
**970-971.2:** §15.7
**970.1(a):** §15.3
**970.1(b):** §15.3
**970.2:** §§15.3, 15.7
**970.4:** §15.7
**970.5:** §15.7
**970.6:** §15.7
**970.8(a):** §15.7
**3300-3313:** §§3.46, 3.58, 3.75
**3309.5(e):** §§2.9, 3.11
**3500-3511:** §3.46
**6250-6276.48:** §§3.87, 8.6
**6259:** §§2.95, 2.99
**6259(d):** §3.87
**6529:** §3.87
**6529(d):** §3.87
**11370-11529:** §3.46
**12560:** §3.127
**12900-12996:** §§2.2, 2.111
**12900-12996):** §3.81
**12965:** §§2.32, 2.70, 3.80, 8.4, 10.53, 11.70, 16.29
**12965(b):** §§1.12, 2.2, 2.10, 2.26, 2.44, 2.49, 2.51, 2.70, 2.78, 2.95, 2.101, 2.111, 3.33, 3.65, 3.80-3.81, 8.26, 9.71, 9.124, 10.67, 11.42, 13.7
**13950-13966:** §§3.46, 3.58, 3.75
**13950-13969.5:** §§3.46, 3.58, 3.75
**13957.7(g):** §8.22
**13973(c):** §9.100
**25845:** §3.103
**25845(d):** §3.103
**29530-29536:** §3.46
**38773.5:** §3.105
**38773.5(b):** §3.103
**54950-54962:** §9.36
**54950-54963:** §§2.53, 3.86, 8.6
**54960.5:** §§2.51, 2.59, 2.77, 8.6
**81000-81016:** §6.46
**81000-91014:** §§3.85, 8.6
**91003:** §§2.51, 3.85
**91003(a):** §§2.55, 2.70, 9.125
**91012:** §§2.51, 2.55, 2.70, 3.85

**HEALTH AND SAFETY CODE**
**17980.7:** §2.26
**17980.7(c)(11):** §3.103
**17980.7(d)(1):** §§2.77, 3.103
**51205:** §2.6

**51205(f):** §9.125

**INSURANCE CODE**
**1861.10:** §13.6
**1861.10(b):** §13.6

**LABOR CODE**
**98.2:** §§2.26, 3.96-3.97
**98.2(b):** §2.77
**98.2(c):** §§2.83, 2.86, 3.96, 8.36
**98.4:** §3.96
**218.5:** §§2.2, 2.4, 2.78, 3.97, 9.71, 11.2
**226(e):** §§2.77, 3.97
**1021.5:** §3.94
**1128:** §§3.98, 14.23
**1140-1140.4:** §§6.44, 13.2
**1194:** §§2.78, 2.90, 3.96-3.97, 5.19, 8.8, 8.12, 11.17, 11.19
**1194(a):** §§2.77, 3.97
**1197:** §3.46
**1197.5:** §§2.51, 3.97
**1720-1861:** §3.46
**2699:** §3.97
**2699(g):** §§2.77, 3.97
**2802:** §3.46
**3351(e):** §3.46
**3709:** §§8.23, 8.36
**3856:** §§2.78, 5.27-5.28, 14.5
**3856(c):** §5.29
**3860(e):** §5.28
**4607:** §§2.2, 2.83, 3.97

**PENAL CODE**
**2717.8:** §3.46

**PROBATE CODE**
**910 (former):** §9.16
**3600-3613:** §11.17
**10810-10811:** §9.16

**PUBLIC CONTRACT CODE**
**7107:** §§2.75, 8.26
**7107(f):** §3.125

**PUBLIC RESOURCES CODE**
**30001-30900:** §3.46

**PUBLIC UTILITIES CODE**
**1757:** §16.20
**1801-1812:** §§3.89, 13.5, 16.20
**1801.3:** §13.5
**1802(i)):** §13.5
**1806:** §9.93

**REVENUE AND TAXATION CODE**
**6909(b):** §14.3
**7080-7099.1:** §3.95
**7156:** §3.95
**7156(c)(1)(B)(iii):** §9.100
**7156(c)(2)(A):** §3.95
**17942 (former):** §3.95
**19717:** §§3.11, 3.95

**WELFARE AND INSTITUTIONS CODE**
**730.6:** §3.108
**10962:** §§2.16, 2.23, 2.28, 3.47, 3.84, 13.16, 15.6, App K

**11000:** §3.84
**11350:** §3.46
**15600-15675:** §§2.83, 3.106
**15657:** §§2.6, 3.4, 3.106

**ACTS BY POPULAR NAME**
**Administrative Procedure Act:** §3.46
**Agricultural Labor Relations Act:** §§6.44, 13.2
**Automobile Sales Finance Act:** §§2.78, 3.104, 4.78
**Brown Act:** §§2.51, 2.53, 2.59, 2.77, 3.86, 8.6, 9.36
**Budget Act of 1982:** §§2.14, 2.16, 15.5, 15.8
**Budget Act of 1993:** §15.6
**California Disabled Persons Act (CDPA):** §3.83
**California Environmental Quality Act (CEQA):** §§2.101, 3.46, 3.54, 3.62, 3.68, 3.76, 10.8, App D-E, App H
**California Public Records Act (CPRA):** §§2.76, 8.6, 10.52, 10.56, 10.65
**Cartwright Act:** §§3.123, 9.68
**Civil Discovery Act:** §6.53
**Coastal Act:** §3.46
**Consumer Credit Reporting Agencies Act:** §§2.76, 2.78, 3.104
**Consumers Legal Remedies Act:** §§2.76, 2.78, 3.104
**Davis-Stirling Act:** §2.75
**Disabled Persons Act:** §§2.75, 2.78
**Elder Abuse and Dependent Adult Civil Protection Act (EADACPA):** §3.106
**Electronic Discovery Act (EDA):** §6.53
**Equal Pay Act of 1963 (EPA):** §3.97
**Fair Employment and Housing Act (FEHA):** §§1.12, 2.2, 2.10, 2.26, 2.49, 2.68, 2.78, 2.80, 2.101, 2.111, 3.65, 3.80-3.83, 8.4, 8.6, 8.26, 9.115, 9.124, 10.3, 10.8, 10.18, 10.53, 10.57, 10.65, 11.3, 11.42, 11.68, 11.70
**False Claims Act (FCA):** §§2.41, 2.71
**Government Claims Act:** §6.4
**Hayward Living Wage Ordinance:** §3.97
**Home Equity Sales Contract Act:** §3.104
**Information Practices Act of 1977:** §§3.88, 8.6
**Legal Remedies Act:** §2.9
**Meyers-Milias-Brown Act:** §3.46
**Mobilehome Residency Law (MRL):** §§2.75, 2.83, 2.102, 2.107, 3.100, 4.85, 9.66
**Political Reform Act:** §§2.51, 3.85, 6.46, 8.6
**Public Records Act:** §§2.95, 2.99, 3.87
**Public Safety Officers Procedural Bill of Rights Act:** §§2.9, 3.11, 3.46, 3.58, 3.75
**Ralph Civil Rights Act:** §2.77
**Rees-Levering Motor Vehicle Sales and Finance Act:** §§2.78, 3.104, 4.78
**Retail Installment Sales Act:** §3.104
**Robbins-Rosenthal Fair Debt Collection Practices Act:** §8.4
**Rosenthal Fair Debt Collection Practices Act:** §3.104
**Song-Beverly Consumer Warranty Act:** §§2.78, 3.104, 8.4, 9.94
**Taxpayers' Bill of Rights Act:** §3.95
**Tom Bane Civil Rights Act:** §2.77
**Transportation Development Act:** §3.46
**Uniform Trade Secrets Act (UTSA):** §3.124
**Unruh Civil Rights Act:** §§1.12, 2.10, 3.11, 3.33, 3.83, 4.78
**Vehicle Leasing Act:** §§2.75, 3.104
**Williamson Act:** §3.46

**SESSION LAWS**
**Stats 2009, ch 5:** §6.53
**Stats 2008, ch 268, §5.25:** §15.6
**Stats 2008, ch 268, §5.25(c):** §15.6
**Stats 2008, ch 59:** §15.6
**Stats 2005, ch 535, §3:** §6.8
**Stats 2003, ch 93, Digest AB 223:** §3.96
**Stats 2003, ch 93, §2:** §§2.83, 2.86, 3.96
**Stats 2003, ch 159, §4:** §3.17
**Stats 2000, ch 876, §4:** §2.78
**Stats 2000, ch 876, §§4, 11:** §3.97
**Stats 1999, ch 591 §12:** §9.124
**Stats 1995, ch 181, §2:** §9.37

**Stats 1993, ch 55, §5.25:** §15.6
**Stats 1993, ch 645:** §§3.17, 10.18
**Stats 1990, ch 804, §2:** §11.29
**Stats 1983, ch 1073:** §4.16
**Stats 1982, ch 326:** §2.16

## Regulations and Rules

**CALIFORNIA CODE OF REGULATIONS**
**Title 10**
**2662.1-2662.8:** §13.6
**Title 20**
**17.1-17.4:** §13.5

**CALIFORNIA RULES OF COURT**
**1.200:** App C, Apps F-K
**2.30(b):** §6.2
**2.108(1):** App C, Apps F-K
**2.110:** App C, Apps F-K
**2.551(h):** §3.30
**2.551(h)(2):** §3.18
**3.769:** §11.17
**3.769(b):** §11.17
**3.824(a)(7):** §14.8
**3.824(a)(8):** §14.2
**3.825(a):** §14.2
**3.825(a)(2):** §14.14
**3.1306(a):** §11.63
**3.1700:** §§11.25, 11.45
**3.1700(a):** §11.25
**3.1700(a)(1):** §11.45
**3.1700(b)(1):** §11.62
**3.1702:** §§9.34, 11.21, 11.25-11.26, 11.29-11.30, 11.38-11.39, 11.41
**3.1702(a):** §11.30
**3.1702(a)-(b):** §11.36
**3.1702(b):** §§11.8, 11.25, 11.30, 11.36, 11.43
**3.1702(b)(1):** §§2.91, 11.34, 11.37, 11.43, 12.21
**3.1702(b)(2):** §§11.35, 11.39, 12.21
**3.1702(b)(2)(A):** §§11.39, 12.22
**3.1702(b)(2)(B):** §11.39
**3.1702(c):** §2.48
**3.1702(c)(1):** §§11.37, 11.43, 12.20-12.21
**3.1702(c)(2):** §§11.43, 12.22
**3.1702(d):** §§11.30, 11.35-11.36, 11.39, 11.43, 12.22
**3.1702(e):** §§11.27, 11.29, 11.51, 11.62
**3.1800(a):** §11.28
**3.1800(b):** §11.28
**8.54:** §12.14
**8.104:** §§11.36-11.37, 12.21
**8.108:** §§11.36-11.37, 12.21
**8.204:** §6.72
**8.204(a)(1)(C):** §6.72
**8.204(a)(2)(C):** §6.72
**8.244:** §12.25
**8.272:** §6.66
**8.276:** §§6.66, 12.9
**8.276(a):** §§1.10, 6.60
**8.276(b):** §6.73
**8.276(b)(1):** §12.14
**8.276(b)(2):** §12.14
**8.276(c):** §12.14
**8.276(e):** §12.14
**8.278:** §§2.48, 9.34
**8.278(a):** §§2.48, 12.24
**8.278(c):** §§11.36, 11.39, 11.45, 12.25

**8.278(c)(1):** §§11.37, 11.43, 12.20, 12.24
**8.278(c)(1)-(2):** §12.24
**8.278(c)(3):** §15.1
**8.278(d):** §9.43
**8.278(d)(1):** §§9.32, 12.24
**8.278(d)(2):** §§2.48, 9.32
**8.1100-8.1125:** §3.42
**13 (former):** §6.72
**14(a)(1)(B)-(C) (former):** §6.72
**14(a)(2)(C):** §6.72
**15(a) (former):** §6.72
**20 (former):** §12.25
**26 (former):** §6.66
**26(a) (former):** §6.60
**27 (former):** §9.32
**27(c) (former):** §9.43
**27(d) (former):** §12.25
**201(d):** Apps D-E
**201(g):** Apps D-E
**227(b) (former):** §6.2
**313(f):** Apps D-E
**870 (former):** §11.45
**870.2 (former):** §§11.29-11.30, 11.38
**870.2(b)(1) (former):** §§11.30, 11.37, 11.43, 12.21
**870.2(c)(1) (former):** §§11.37, 12.21
**1614(a)(7) (former):** §14.8
**1615(a) (former):** §14.2

**CALIFORNIA RULES OF PROFESSIONAL CONDUCT**
**2-107 (former):** §8.33
**2-200:** §1.19
**2-200(A)(1):** §1.19
**3-300:** §§1.19, 11.15
**3-310:** §§1.20, 11.15
**4-200:** §§1.8, 1.17-1.18, 8.33, 9.94, 9.103, 10.1, 10.6
**4-200(B):** §10.1
**4-200(B)(1)-(11):** §9.108
**4-200(B)(3):** §10.33
**4-200(B)(4):** §10.47
**4-200(B)(5):** §10.37
**4-200(B)(6):** App D
**DR 2-107 (former):** §8.33

**STATE BAR STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT, FORMAL OPINION**
**1994-136:** §11.15

**LOCAL COURT RULES**

**HAYWARD MUNICIPAL CODE**
**2.14.010-2.14.080:** §3.97

**OAKLAND MUNICIPAL CODE**
**8.22.300-8.22.390:** §3.100

**LOCAL ORDINANCES**

**SAN FRANCISCO RENT STABILIZATION AND ARBITRATION ORDINANCES**
**37.9(f):** §3.100

**Miscellaneous**

**SAN FRANCISCO COUNTY BAR ASSOCIATION FORMAL OPINION**
**1999-1 (Sept. 1999):** §10.14

**STATE BAR STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT FORMAL OPINION**

**1994-136:** §11.15

## UNITED STATES

### Constitution

**Art VI, cl 2:** §§15.5, 15.8
**Amend I:** §§2.63, 3.52, 3.54, 10.63

### Statutes

**UNITED STATES CODE**
**Title 5**
**504:** §2.115
**504(a):** §§2.82, 3.94, 13.15
**504(b)(A):** §9.100
**Title 12**
**2601-2617:** §§2.71, 2.73
**Title 15**
**15:** §8.28
**26:** §2.39
**1640(a)(3):** §4.8
**1681n-1681o:** §§2.78, 3.104
**1692k(a)(3):** §3.104
**Title 16**
**1531-1544:** §2.71
**Title 18**
**1961-1968:** §4.98
**Title 20**
**1415:** §13.10
**1415(e)(4)(B):** §§2.77, 13.16
**1415(i)(2):** §13.11
**1415(i)(3)(B):** §§2.21, 9.129
**1415(i)(3)(B)(i):** §13.10
**1415(i)(3)(C)-(D):** §13.11
**1415(i)(3)(F):** §§2.65, 13.11
**1681-1688:** §3.129
**Title 28**
**1291:** §11.18
**1447(c):** §2.50
**1711-1715:** §§8.20, 10.29
**1712(a):** §§8.20, 10.29
**1712(b):** §10.29
**1712(b)(1):** §§8.20, 10.29
**1712(b)(2):** §10.29
**1712(c):** §10.29
**1712(e):** §10.29
**2412:** §2.115
**2412(d):** §§2.82, 3.94, 8.30, 8.37, 13.15
**2412(d)(2)(A):** §9.100
**2412(d)(2)(A)(ii):** §10.30
**2412(f):** §2.115
**Title 29**
**141-187:** §2.16
**185(a):** §4.24
**216(b):** §1.23
**Title 31**
**3730(d)(4):** §2.41
**Title 33**
**901-950:** §9.121
**928:** §9.106
**Title 42**
**301-1397mm:** §3.47
**406:** §§8.30, 10.46
**406(b):** §§8.22, 10.30
**1973l(e):** §2.12

**1981:** §§3.129, 9.56
**1981-1981a:** §9.129
**1982:** §3.129
**1983:** §§2.4, 2.12-2.15, 2.21, 2.60, 2.71, 2.98, 3.129, 8.25, 8.37, 10.60, 11.1, 11.11, 11.15, 13.18
**1985:** §3.129
**1986:** §3.129
**1988:** §§2.13-2.16, 2.21, 2.23, 2.33, 2.52, 2.54-2.55, 2.60, 2.68, 2.71, 2.100, 2.115, 3.8, 3.43, 3.84, 3.129, 7.33, 8.25, 8.27, 8.34, 8.37, 9.71, 10.26, 10.53, 11.1-11.2, 11.11, 11.18, 11.68, 12.18, 13.3, 13.16, 13.18-13.19, 15.5, 15.8, App L
**1997e:** §9.24
**1997e(d)(3):** §2.7
**2000d-1-2000d-4-(4):** §3.129
**2000e-5(g)(2)(B)(i):** §8.28
**2000e-5(k):** §§9.129, 13.3, 13.17
**2000e-16:** §9.134
**2000e-16(d):** §9.112
**2996e(b)(1)(B):** §2.34
**12101-12213:** §§2.3, 2.112, 3.83
**12188(a)(1):** §§2.3, 2.112
**12205:** §§2.10, 2.75, 2.78, 3.83
**Title 45**
**51-60:** §§3.97, 9.125

**INTERNAL REVENUE CODE**
**62(e)(1)-(16):** §1.22
**62(e)(17):** §1.22
**62(e)(18):** §1.22
**67(a):** §1.22
**68(a):** §1.22
**104(a)(2):** §1.21

**ACTS BY POPULAR NAME**
**American Jobs Creation Act of 2004 (Jobs Act):** §§1.22, 1.24
**Americans with Disabilities Act of 1990 (ADA):** §§2.3, 2.10, 2.75, 2.78, 2.112, 3.83
**Civil Rights Act:** §§2.7, 3.8, App P
**Civil Rights Act of 1991:** §§2.7, 9.112
**§113(a)-(b):** §9.129
**§114(2):** §9.134
**Civil Rights Attorney's Fees Awards Act of 1976:** §§3.8, 3.43
**Class Action Fairness Act of 2005:** §§8.20, 10.29
**Clayton Act:** §8.28
**Clean Air Act:** §2.117
**Clean Water Act:** §2.71
**Education for All Handicapped Children Act (former):** §13.10
**Endangered Species Act (ESA):** §§2.71, 2.117
**Equal Access to Justice Act:** §§2.5, 2.82, 2.115, 3.94, 8.30, 8.37, 9.100, 9.134, 13.15
**Fair Credit Reporting Act:** §§2.78, 3.104
**Fair Debt Collection Practices Act:** §3.104
**Fair Labor Standards Act of 1938 (FLSA):** §1.23
**Federal Employers' Liability Act (FELA):** §§3.97, 9.125
**Individuals with Disabilities Education Act (IDEA):** §§2.21, 2.65, 2.77, 2.100, 2.104, 2.109, 9.129, 10.63, 13.10-13.11, 13.13, 13.16
**Jobs Act:** §§1.22, 1.24
**Labor Management Relations Act of 1947 (LMRA):** §§2.16, 4.24
**Longshore and Harbor Workers' Compensation Act:** §§9.106, 9.121
**Prison Litigation Reform Act of 1995:** §§2.7, 9.24
**Racketeer Influenced and Corrupt Organizations Act (RICO):** §4.98
**Real Estate Settlement Procedures Act (RESPA):** §§2.71, 2.73
**Resource Conservation and Recovery Act:** §2.71
**Social Security Act:** §§3.47, 8.30, 8.37
**Title VI:** §3.129
**Title VII:** §§9.56, 9.129, 13.3
**Title IX:** §§3.129, 8.28
**Truth in Lending Act:** §4.8
**Voting Rights Act of 1965:** §2.12
**Worker Adjustment and Retraining Notification Act (WARN):** §2.71

**SESSION LAWS**
**Pub L 109-135, §412(q), 119 Stat 2577:** §1.22
**Pub L 108-357, §703, 118 Stat 1418:** §§1.22, 1.24
**Pub L 102-166, 105 Stat 1079:** §9.134
**Pub L 102-166, 105 Stat 1079, §114:** §9.112
**Pub L 102-166, 105 Stat 1071:** §9.129

**Court Rules**

**FEDERAL CIRCUIT COURT OF APPEALS RULES**

**Ninth Circuit**
**39-1.6:** §12.27
**39-1.8:** §12.27
**39-1.9:** §12.27

**FEDERAL DISTRICT COURT RULES**

**Central District of California Local Rules**
**54-12:** §11.44

**Eastern District of California Local Rules**
**293:** §11.44

**Northern District of California Local Rules**
**7-9:** §11.69
**54-5:** §11.44
**54-5(a):** §11.8
**54-5(b):** §11.53

**FEDERAL RULES OF CIVIL PROCEDURE**
**1993 amendments:** §§6.24, 11.54
**11:** §§6.10, 6.16-6.17, 6.24
**11(c):** §6.24
**23(e):** §§2.104, 11.17
**37(d):** §6.55
**37(g):** §6.55
**52(a):** §11.44
**54:** §11.44
**54(b):** §11.44
**54(d):** §11.54
**54(d)(2):** §11.44
**54(d)(2)(A):** §9.130
**60(b)(5):** §§16.9, 16.16
**68:** §§2.104, 10.60, 11.8
**69:** §15.8
**69(a):** §15.8
**70:** §15.8

**Miscellaneous**

**ABA MODEL RULES OF PROFESSIONAL CONDUCT**
**1.5:** §§1.8, 1.17-1.18

**ABA FORMAL OPINION**
**93-329 (Dec. 6, 1993):** §11.49

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# Table of Cases

$12,248 U.S. Currency, U.S. v (9th Cir 1992) 957 F2d 1513: §§9.87, 11.49
3250 Wilshire Blvd. Bldg. v W.R. Grace & Co. (9th Cir 1993) 990 F2d 487: §§4.26, 4.51
580 Folsom Assoc. v Prometheus Dev. Co. (1990) 223 CA3d 1, 272 CR 227: §§2.42, 4.91, 8.21, 9.43-9.44, 9.81, 12.17
7-Eleven Owners for Fair Franchising v Southland Corp. (2000) 85 CA4th 1135, 102 CR2d 777: §11.9

**A**

A.D. v California Highway Patrol (ND Cal, Nov 10, 2009, No. C 07-5483 SI) 2009 US Dist Lexis 110743: §§9.9, 9.50, 9.56, 9.76, 9.88, 9.94, 9.107, 11.8
A.I. Credit Corp. v Aguilar & Sebastinelli (2003) 113 CA4th 1072, 6 CR3d 813: §1.20
A.R. v New York City Dep't of Educ. (2d Cir 2005) 407 F3d 65: §§2.100, 2.104, 2.116, 9.96, 9.111, 9.114, 13.10
ABF Capital Corp. v Berglass (2005) 130 CA4th 825, 30 CR3d 588: §4.64
ABF Capital Corp. v Grove Props. Co. (2005) 126 CA4th 204, 23 CR3d 803: §4.64
AFL-CIO v Employment Dev. Dep't (1979) 88 CA3d 811, 152 CR 193: §§3.47, 3.68, 3.71
ARA Living Ctrs.-Pac., Inc. v Superior Court (1993) 18 CA4th 1556, 23 CR2d 224: §2.6
AT&T Corp. Secs. Litig., In re (3d Cir 2006) 455 F3d 160: §8.17
Abandonato v Coldren (1995) 41 CA4th 264, 48 CR2d 429: §§2.20, 6.21-6.22, 6.49
Abbett Elec. Corp. v California Fed. Sav. & Loan Ass'n (1991) 230 CA3d 355, 281 CR 362: §4.45
Abdallah v United Sav. Bank (1996) 43 CA4th 1101, 51 CR2d 286: §§4.46, 4.98
Abels v JBC Legal Group, Inc. (ND Cal 2006) 233 FRD 645: §11.55
Abouab v City & County of San Francisco (2006) 141 CA4th 643, 46 CR3d 206: §§2.44, 2.67-2.68, 2.108, 2.112-2.113, 5.5, 5.7, 5.17, 5.22, 5.33, 5.44, 10.15
Abshear v Teachers' Retirement Bd. (1991) 231 CA3d 1629, 282 CR 833: §§3.92, 9.36
Abu-Sahyun v Palo Alto Unified Sch. Dist. (9th Cir 1988) 843 F2d 1250: §2.7
Ackerley Communications, Inc. v City of Salem (9th Cir 1985) 752 F2d 1394: §§2.13, 2.52-2.53, 2.60
Ackerman v Western Elec. Co. (9th Cir 1988) 860 F2d 1514: §1.12
Acosta v Kerrigan (2007) 150 CA4th 1124, 58 CR3d 865: §§2.93, 4.94, 11.19, 14.21
Acree v General Motors Acceptance Corp. (2001) 92 CA4th 385, 112 CR2d 99: §§4.69, 4.71, 4.75, 4.77, 9.56, 16.18, 16.26, App H
Activision Secs. Litig., In re (ND Cal 1989) 723 F Supp 1373: §8.17
Adam v DeCharon (1995) 31 CA4th 708, 37 CR2d 195: §§4.29, 4.65, 4.79, 14.9
Adams, Marriage of (1997) 52 CA4th 911, 60 CR2d 811: §§6.22, 8.30
Adler v Los Angeles Unified Sch. Dist. (1979) 98 CA3d 280, 159 CR 528: §3.92
Adler v Vaicius (1993) 21 CA4th 1770, 27 CR2d 32: §§2.47, 2.107, 3.109
Adoption of Joshua S., In re (2008) 42 C4th 945, 70 CR3d 372: §§2.35, 2.55, 2.72, 3.6, 3.19, 3.25, 3.28, 3.42, 3.45-3.46, 3.52, 3.59, 3.66-3.68, 3.76
Advantage Med. Servs., LLC v Hoffman (2008) 160 CA4th 806, 72 CR3d 935: §14.16
Aetna Life & Cas. Co. v City of Los Angeles (1985) 170 CA3d 865, 216 CR 831: §§8.6, 8.31, 10.37
Agnew v State Bd. of Equalization (2005) 134 CA4th 899, 36 CR3d 464: §§2.47, 3.95
Agredano v Mutual of Omaha (9th Cir 1996) 75 F3d 541: §9.129
Aguilar v Johnson (1988) 202 CA3d 241, 247 CR 909: §§3.46, 3.58
Aguirre v Los Angeles Unified Sch. Dist. (9th Cir 2006) 461 F3d 1114: §§10.39, 10.52, 10.54-10.55, 10.61
Aho v Clark (9th Cir 1979) 608 F2d 365: §2.68
Ajaxo Inc. v E*Trade Group, Inc. (2005) 135 CA4th 21, 37 CR3d 221: §§2.99, 4.69
Ajida Technol., Inc. v Roos Instruments, Inc. (2001) 87 CA4th 534, 104 CR2d 686: §§4.63, 9.39, 11.3, 14.18, 14.24
Akins v Enterprise Rent-A-Car Co. (2000) 79 CA4th 1127, 94 CR2d 448: §§3.104, 9.36, 9.49, 9.55-9.56, 9.59-9.60, 9.66, 16.22-16.23, 16.26, App H
Alberti v Klevenhagen (5th Cir 1990) 896 F2d 927, modified (5th Cir 1990) 903 F2d 352: §11.7
Alcott v M.E.V. Corp. (1987) 193 CA3d 797, 238 CR 520: §2.77
Alhambra Redev. Agency v Transamerica Fin. Servs. (1989) 212 CA3d 1370, 261 CR 248: §4.45
Alioto Fish Co. v Alioto (1994) 27 CA4th 1669, 34 CR2d 244: §§11.64, 15.1, 16.1
All-West Design, Inc. v Boozer (1986) 183 CA3d 1212, 228 CR 736: §§4.78, 8.30-8.31, 9.83, 11.50
Allen v Shalala (9th Cir 1995) 48 F3d 456: §10.22
Allstate Ins. Co. v Loo (1996) 46 CA4th 1794, 54 CR2d 541: §§4.26, 4.40, 11.29
Alyeska Pipeline Serv. Co. v Wilderness Soc'y (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612: §§1.2, 1.12, 3.2, 3.8, 5.1, 5.3, 5.56, 10.17
Amador Valley Secondary Educators Ass'n v Newlin (1979) 88 CA3d 254, 151 CR 724: §3.92
Amaral v Cintas Corp. No. 2 (2008) 163 CA4th 1157, 78 CR3d 572: §§2.9, 3.97, 3.105, 9.127, 10.3, 10.8, 10.10, 10.32, 10.36-10.37, 10.41-10.42, 10.47, 11.45, 16.26, App D, App H

America Online, Inc. v Superior Court (2001) 90 CA4th 1, 108 CR2d 699: §§3.104, 10.19
American Airlines (1983) FEHC Dec No. 83-15, FEHC Precedential Decisions CEB 15 (Cal CEB 1982-1983): §13.7
American Booksellers Ass'n, Inc. v Virginia (4th Cir 1986) 792 F2d 1261: §2.62
American City Bank v Zetlen (1969) 272 CA2d 65, 76 CR 898: §12.3
American Disability Ass'n v Chmielarz (11th Cir 2002) 289 F3d 1315: §§2.104, 2.109, 11.8
American Humane Ass'n v Los Angeles Times Communications (2001) 92 CA4th 1095, 112 CR2d 488: §§3.110, 11.26, 11.30
American Olean Tile Co. v Schultze (1985) 169 CA3d 359, 215 CR 184: §11.1
Ames Dep't Stores, Inc. Debenture Litig., In re (SD NY 1993) 835 F Supp 147: §8.17
Anderson v Director, Office of Workers Compensation Programs (9th Cir 1996) 91 F3d 1322: §§9.16, 9.21, 10.15, 10.51
Andre v City of W. Sacramento (2001) 92 CA4th 532, 111 CR2d 891: §§3.102, 8.6, 8.31, 8.36, 9.94
Andrus v Estrada (1995) 39 CA4th 1030, 46 CR2d 300: §§6.34, 6.43
Angelheart v City of Burbank (1991) 232 CA3d 460, 285 CR 463: §§3.56, 11.47
Angelier v State Bd. of Pharmacy (1997) 58 CA4th 592, 68 CR2d 213: §13.9
Animal Lovers Volunteer Ass'n v Carlucci (9th Cir 1989) 867 F2d 1224: §§2.90, 2.93, 11.18
Anthony v City of Los Angeles (2008) 166 CA4th 1011, 83 CR3d 306: §§3.81, 9.125, 11.42, 11.45
Anthony v Superior Court (1976) 59 CA3d 760, 130 CR 758: §11.9
Aozora Bank, Ltd. v 1333 North California Blvd. (2004) 119 CA4th 1291, 15 CR3d 340: §4.52
Apple Computer, Inc. v Superior Court (2005) 126 CA4th 1253, 24 CR3d 818: §§1.20, 2.20, 8.7, 8.12-8.13, 10.40, 11.9
Apte v Regents of Univ. of Cal. (1988) 198 CA3d 1084, 244 CR 312: §3.92
Arbor Hill Concerned Citizens Neighborhood Ass'n v County of Albany (2d Cir 2007) 522 F3d 182: §9.115
Argaman v Ratan (1999) 73 CA4th 1173, 86 CR2d 917: §6.21
Argento v Village of Melrose Park (7th Cir 1988) 838 F2d 1483: §15.8
Arias v Katella Townhouse Homeowners Ass'n, Inc. (2005) 127 CA4th 847, 26 CR3d 113: §§2.103, 3.103, 4.73, 4.77, 11.8
Arietta v Mahon (1982) 31 C3d 381, 182 CR 770: §3.100
Arlington Cent. Sch. Dist. Bd. of Educ. v Murphy (2006) 548 US 291, 165 L Ed 2d 526, 126 S Ct 2455: §§9.129, 13.13
Armendariz v Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 99 CR2d 745: §14.17
Armenta v Osmose, Inc. (2005) 135 CA4th 314, 37 CR3d 460: §§2.92, 3.97, 9.45, 10.62
Armitage v Decker (1990) 218 CA3d 887, 267 CR 399: §6.72
Armstrong v Davis (9th Cir 2003) 318 F3d 965: §§9.14, 9.66, 10.66
Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co. (1996) 47 CA4th 464, 54 CR2d 888: §§4.14, 4.23, 4.75, 9.126
Artesia Med. Dev. Co. v Regency Assoc. (1989) 214 CA3d 957, 266 CR 657: §§4.43, 4.52
Association of Cal. Water Agencies v Evans (9th Cir 2004) 386 F3d 879: §§2.117, 9.75
Atchison, T. & S.F. Ry. v Stockton Port Dist. (1983) 140 CA3d 111, 189 CR 208: §6.46
Atherton v Board of Supervisors (1986) 176 CA3d 433, 222 CR 56: §2.22
Austin v Board of Retirement (1989) 209 CA3d 1528, 258 CR 106: §3.76
Avikian v WTC Fin. Corp. (2002) 98 CA4th 1108, 120 CR2d 243: §§5.53, 9.90

**B**

Bach v County of Butte (1989) 215 CA3d 294, 263 CR 565: §§6.60, 6.70
Bach v McNelis (1989) 207 CA3d 852, 255 CR 232: §§6.46, 6.65-6.66
Baggett v Gates (1982) 32 C3d 128, 185 CR 232: §§3.46, 3.58, 3.68, 3.75, 11.65, 16.17
Bak v MCL Financial Group, Inc. (2009) 170 CA4th 1118, 88 CR3d 800: §6.73
Baker v Mid-Century Ins. Co. (1993) 20 CA4th 921, 25 CR2d 34: §3.108
Baker v Pratt (1986) 176 CA3d 370, 222 CR 253: §§5.35, 5.53
Balch Enters. v New Haven Unified Sch. Dist. (1990) 219 CA3d 783, 268 CR 543: §§3.43-3.44
Baldwin Builders v Coast Plastering Corp. (2005) 125 CA4th 1339, 24 CR3d 9: §4.58
Balistreri v Nevada Livestock Prod. Credit Ass'n (1989) 214 CA3d 635, 262 CR 862: §4.37
Ballen v City of Redmond (9th Cir 2006) 466 F3d 736: §§9.8, 10.23, 10.35, 11.56
Bank of America v Cory (1985) 164 CA3d 66, 210 CR 351: §§2.114, 3.10, 3.73, 5.10, 5.13, 5.22-5.23, 11.17
Bank of America v Henkin (1986) 185 CA3d 919, 230 CR 113: §6.72
Bank of Cal. v Varakin (1990) 216 CA3d 1630, 265 CR 666: §§6.60, 6.70-6.71
Bank of Idaho v Pine Ave. Assoc. (1982) 137 CA3d 5, 186 CR 695: §§4.91, 4.94-4.95, 11.19, 14.22
Bankes v Lucas (1992) 9 CA4th 365, 11 CR2d 723: §§2.91, 11.21, 11.40
Banks v Dominican College (1995) 35 CA4th 1545, 42 CR2d 110: §6.60
Banks v Hathaway, Perrett, Webster, Powers & Chrisman (2002) 97 CA4th 949, 118 CR2d 803: §6.27
Banks v Manos (1991) 232 CA3d 123, 283 CR 318: §8.21
Banks, Commissioner v (2005) 543 US 426, 160 L Ed 2d 859, 125 S Ct 826: §1.23
Bankston v Illinois (7th Cir 1995) 60 F3d 1249, disapproved on other grounds in Auer v Robbins (1997) 519 US 452, 137 L Ed 2d 79, 117 S Ct 905: §§9.108, 10.62
Barlow-Gresham Union High Sch. Dist. v Mitchell (9th Cir 1991) 940 F2d 1280: §13.10
Barnes v City of Cincinnati (6th Cir 2005) 401 F3d 729: §10.26
Barnes v Litton Sys. (1994) 28 CA4th 681, 33 CR2d 562: §12.24
Baron v Fire Ins. Exch. (2007) 154 CA4th 1184, 65 CR3d 502: §§7.16, 9.42
Barrientos v 1801-1825 Morton LLC (9th Cir 2009) 583 F3d 1197: §§2.10, 2.34, 4.7
Barrios v California Interscholastic Fed'n (9th Cir 2002) 277 F3d 1128: §§1.12, 2.3, 2.10, 2.95, 2.104, 2.109, 8.28, 10.63, 11.8

Bartling v Glendale Adventist Med. Ctr. (1986) 184 CA3d 97, 228 CR 847: §§2.51, 2.86, 2.90, 2.93, 3.25, 3.30, 3.51, 11.19, 11.53, 11.63, 16.17
Barton v Ahmanson Devs. (1993) 17 CA4th 1358, 22 CR2d 56: §16.5
Bauer v Sampson (9th Cir 2001) 261 F3d 775: §§2.55, 2.60, 9.62
Bauguess v Paine (1978) 22 C3d 626, 150 CR 461: §§1.10, 5.1-5.2, 6.2
Baum, Estate of (1989) 209 CA3d 744, 257 CR 566: §8.23
Baxter v Salutary Spotsclubs, Inc. (2004) 122 CA4th 941, 19 CR3d 317: §3.52
Beach Colony II, Ltd. v California Coastal Comm'n (1985) 166 CA3d 106, 212 CR 485: §§3.46, 3.76, 13.16
Beard v Goodrich (2003) 110 CA4th 1031, 2 CR3d 160: §§4.61, 11.9, 11.11
Beard v Teska (10th Cir 1994) 31 F3d 942, overruled in part on other grounds in Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835: §10.39
Beasley v Wells Fargo Bank (1991) 235 CA3d 1407, 1 CR2d 459, disapproved on other grounds in Olson v Automobile Club of S. Cal. (2008) 42 C4th 1142, 74 CR3d 81: §§3.4, 3.10, 3.38-3.40, 3.46, 3.66-3.68, 3.70, 3.73, 3.79, 5.23, 9.53, 9.124, 9.127, 10.3, 10.8, 10.17, 10.38, 10.42, 10.53, 16.21, 16.26, App J
Beaty v BET Holdings, Inc. (9th Cir 2000) 222 F3d 607: §§1.12, 2.10-2.11, 2.13, 3.81, 8.26, 8.28, 9.3, 9.57, 9.78, 10.3, 10.18, 10.52-10.53, 10.56-10.57, 10.65, App H
Beeman v Burling (1990) 216 CA3d 1586, 265 CR 719: §§4.17, 4.51, 12.7
Behniwal v Mix (2007) 147 CA4th 621, 54 CR3d 427: §§9.11, 9.66, 15.2
Bell v Clackamas County (9th Cir 2003) 341 F3d 858: §§9.111, 9.121
Bell v Farmers Ins. Exch. (2004) 115 CA4th 715, 9 CR3d 544: §§3.97, 5.18-5.19, 5.48, 8.8, 8.12, 11.17
Bell v Farmers Ins. Exch. (2001) 87 CA4th 805, 105 CR2d 59: §§2.90, 3.97, 11.19, 16.3
Bell v School Bd. (4th Cir 1963) 321 F2d 494: §5.3
Bell v Vista Unified Sch. Dist. (2000) 82 CA4th 672, 98 CR2d 263: §§3.86, 9.65, 9.84
Belth v Garamendi (1991) 232 CA3d 896, 283 CR 829: §§2.44, 2.76, 2.86, 2.95, 2.108, 2.114, 3.87
Benach v County of Los Angeles (2007) 149 CA4th 836, 57 CR3d 363: §11.45
Beneficial Standard Prop., Inc. v Scharps (1977) 67 CA3d 227, 136 CR 549: §4.18
Bennett v Yoshina (9th Cir 2001) 259 F3d 1097: §2.115
Benny, In re (9th Cir 1996) 81 F3d 91: §2.29
Benson v Greitzer (1990) 220 CA3d 11, 269 CR 201: §§2.70, 12.12, 12.18
Benton v Oregon Student Assistance Comm'n (9th Cir 2005) 421 F3d 901: §§8.28, 10.63
Berberena v Coler (7th Cir 1985) 753 F2d 629: §§9.76, 9.121
Berge v International Harvester Co. (1983) 142 CA3d 152, 190 CR 815: §§4.37, 4.46
Bergman v Rifkind & Sterling, Inc. (1991) 227 CA3d 1380, 278 CR 583: §§6.34, 6.39
Berkla v Corel Corp. (9th Cir 2002) 302 F3d 909: §§2.73, 4.68, 10.60
Bernardi v County of Monterey (2008) 167 CA4th 1379, 84 CR3d 754: §§3.87, 8.6, 9.3, 9.36, 9.50, 9.83, 10.3-10.4, 10.8, 10.11, 10.38, 10.41, 10.50, 10.52-10.53, 10.55-10.56, 10.58, 10.65, 10.67, 10.72, 11.50
Bernardi v Yeutter (9th Cir 1991) 951 F2d 971: §§9.16, 9.21, 9.46, 10.15, 10.54, 11.7
Bernardo v Planned Parenthood Fed'n (2004) 115 CA4th 322, 9 CR3d 197: §§1.7, 3.4, 3.111-3.112
Bernhardt v County of Los Angeles (9th Cir 2003) 339 F3d 920: §11.11
Bernhardt v County of Los Angeles (9th Cir 2002) 279 F3d 862: §11.13
Berti v Santa Barbara Beach Prop. (2006) 145 CA4th 70, 51 CR3d 364: §§9.24, 11.8
Best v California Apprenticeship Council (1987) 193 CA3d 1448, 240 CR 1: §§2.14-2.15, 2.42, 2.55, 3.4, 3.9, 3.34-3.35, 3.54, 3.62, 5.9, 5.57, 5.59, 9.7, 9.62, 9.79, 9.83, 13.4, 13.16
Beverly Hills Prop. v Marcolino (1990) 221 CA3d Supp 7, 270 CR 605: §§2.23, 3.93, 4.19, 4.59, 4.61, 9.95, 9.99
Bhullar v Tayyab (1996) 46 CA4th 582, 54 CR2d 17: §2.78
Bihun v AT&T Info. Sys. (1993) 13 CA4th 976, 16 CR2d 787, disapproved on other grounds in Lakin v Watkins Assoc. Indus. (1993) 6 C4th 644, 25 CR2d 109: §§3.81, 9.92, 9.104, 16.25
Birbrower, Montalbano, Condon & Frank v Superior Court (1998) 17 C4th 119, 70 CR2d 304: §1.17
Biren v Equality Emergency Med. Group, Inc. (2002) 102 CA4th 125, 125 CR2d 325: §§4.77, 4.80, 4.88, 14.9
Bjornestad v Hulse (1991) 229 CA3d 1568, 281 CR 548: §§2.114, 9.44-9.45, 12.1, 12.7
Blanchard v Bergeron (1989) 489 US 87, 103 L Ed 2d 67, 109 S Ct 939: §§8.25, 8.30, 8.37, 9.98, 10.56
Blickman Turkus, LP v MF Downtown Sunnyvale, LLC (2008) 162 CA4th 858, 76 CR3d 325: §§4.47, 4.56
Blue Mountain Dev. Co. v Carville (1982) 132 CA3d 1005, 183 CR 594: §11.69
Blum v Stenson (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541: §§2.23, 9.90-9.91, 9.93, 9.96, 9.103-9.104, 9.106-9.107, 9.120, 10.22-10.23, 10.25, 10.68, 11.59
Board of Admin. v Wilson (1997) 57 CA4th 967, 67 CR2d 477: §§2.4, 2.15, 11.1
Board of Educ. v Commission on Prof. Competence (1980) 102 CA3d 555, 162 CR 590: §§3.90, 3.99, 9.36
Board of Educ., U.S. v (2d Cir 1979) 605 F2d 573: §2.28
Boccato v City of Hermosa Beach (1984) 158 CA3d 804, 204 CR 727: §§2.99, 2.114
Bockrath v Aldrich Chem. Co. (1999) 21 C4th 71, 86 CR2d 846: §6.17
Boehm v Superior Court (1986) 178 CA3d 494, 223 CR 716: §§2.90, 11.19
Boeing Co. v Van Gemert (1980) 444 US 472, 62 L Ed 2d 676, 100 S Ct 745: §§5.15-5.16
Boller v Signal Oil & Gas. Co. (1964) 230 CA2d 648, 41 CR 206: §9.47
Bond v Pulsar Video Prods. (1996) 50 CA4th 918, 57 CR2d 917: §§2.70, 3.82
Bonnes v Long (4th Cir 1979) 599 F2d 1316: §§2.95, 2.97

Bonnette v California Health & Welfare Agency (9th Cir 1983) 704 F2d 1465, disapproved on other grounds in Garcia v San Antonio Metro. Transit Auth. (1985) 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005: §9.87
Boquilon v Beckwith (1996) 49 CA4th 1697, 57 CR2d 503: §§3.104, 9.45, 9.53, 9.69
Borunda v Richmond (9th Cir 1988) 885 F2d 1384: §2.52
Bouman v Block (9th Cir 1991) 940 F2d 1211: §§1.12, 2.10, 2.13, 2.16, 3.80, 9.76, 9.120
Bouvia v County of Los Angeles (1987) 195 CA3d 1075, 241 CR 239: §§2.90, 3.41-3.42, 3.55, 8.26, 9.43, 11.19, 11.53, 12.4, 12.8, 12.17, 16.17, 16.21
Bovard v American Horse Enters., Inc. (1988) 201 CA3d 832, 247 CR 340: §§4.36, 6.61
Bowman v City of Berkeley (2005) 131 CA4th 173, 31 CR3d 447: §§2.47, 2.93, 2.99, 2.101, 3.4, 3.13, 3.30, 3.37, 3.44, 3.46, 3.52-3.53, 3.58, 3.66, 16.17, App D
Bowman v City of New Orleans (5th Cir 1990) 914 F2d 711 (affirming (ED La 1989) 747 F Supp 344): §15.8
Boyd v Oscar Fisher Co. (1989) 210 CA3d 368, 258 CR 473: §§4.9, 4.34, 4.50
Bradbury v Superior Court (1996) 49 CA4th 1108, 57 CR2d 207: §3.110
Bradley v Perrodin (2003) 106 CA4th 1153, 131 CR2d 402: §3.66
Bradley v School Bd. (1974) 416 US 696, 40 L Ed 2d 476, 94 S Ct 2006: §§2.7, 11.18
Bramalea Cal. Inc. v Reliable Interiors, Inc. (2004) 119 CA4th 468, 14 CR3d 302: §§4.58-4.59
Brandau v Kansas (10th Cir 1999) 168 F3d 1179: §§8.28, 10.54
Brandon v Holt (1985) 469 US 464, 83 L Ed 2d 878, 105 S Ct 873: §§2.41, 15.9
Brandt v Superior Court (1985) 37 C3d 813, 210 CR 211: §§7.1, 7.3-7.4, 7.9-7.11, 7.14-7.17, 7.26, 7.28, 7.34, 9.42, 11.6, 11.32, 11.42
Braude v Automobile Club (1986) 178 CA3d 994, 223 CR 914: §§3.10, 3.25, 3.52, 5.32-5.33, 5.37-5.38, 5.44, 5.46-5.47, 5.53, 11.47, 16.17
Brawley v J.C. Interiors, Inc. (2008) 161 CA4th 1126, 74 CR3d 832: §§2.75, 2.110, 3.126
Brennan v Board of Supervisors (1984) 153 CA3d 193, 200 CR 192: §3.105
Brewster v Southern Pac. Transp. Co. (1991) 235 CA3d 701, 1 CR2d 89: §§6.37-6.39, 9.18
Briggs v Eden Council for Hope & Opportunity (1999) 19 C4th 1106, 81 CR2d 471: §3.111
Brittalia Ventures v Stuke Nursery Co. (2007) 153 CA4th 17, 62 CR3d 467: §4.34
Brooks v Cook (9th Cir 1991) 938 F2d 1048: §§2.71, 7.33, 11.6
Broughton v CIGNA Healthplans (1999) 21 C4th 1066, 90 CR2d 334: §§1.15, 2.18, 3.104, 11.5
Broughton v Cigna Healthplans (1999) 21 C4th 1066, 90 CR2d 334: §§14.1-14.3, 14.13
Brown v Lucky Stores (9th Cir 2001) 246 F3d 1182: §§2.49, 2.71
Brown v Pitchess (1975) 13 C3d 518, 119 CR 204: §2.12
Brown v Sullivan (9th Cir 1990) 916 F2d 492: §9.18
Brown v West Covina Toyota (1994) 26 CA4th 555, 32 CR2d 85: §§2.78, 3.104
Brown, People ex rel v Tehama County Bd. of Supervisors (2007) 149 CA4th 422, 56 CR3d 558: §§2.26, 3.17, 3.61, 3.78
Bruckman v Parliament Escrow Corp. (1987) 190 CA3d 1051, 235 CR 813: §§4.51, 4.73, 4.82, 4.99, 7.9, 9.17, 11.63
Bruno v Bell (1979) 91 CA3d 776, 154 CR 435: §3.45
Brusso v Running Springs Country Club, Inc. (1991) 228 CA3d 92, 278 CR 758: §§2.77, 4.8, 4.34, 4.46
Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health & Human Resources (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835: §§2.87, 2.95, 2.97, 2.104, 2.109, 2.111, 2.115-2.117, 11.8, 11.18, 11.23
Budinich v Becton Dickinson & Co. (1988) 486 US 196, 100 L Ed 2d 178, 108 S Ct 1717: §§11.21, 16.11
Building Maintenance Serv. Co. v AIL Sys., Inc. (1997) 55 CA4th 1014, 64 CR2d 353: §§4.58, 4.68, 7.30
Burgess v Premier Corp. (9th Cir 1984) 727 F2d 826: §9.111
Burkle v Burkle (2006) 144 CA4th 387, 50 CR3d 436: §6.17
Burnaby v Standard Fire Ins. Co. (1995) 40 CA4th 787, 47 CR2d 326: §§7.1, 9.42
Burnett v Ala Moana Pawn Shop (9th Cir 1993) 3 F3d 1261: §11.70
Business Guides v Chromatic Comm. Enters. (1991) 498 US 533, 112 L Ed 2d 1140, 111 S Ct 922: §6.17
Bussey v Affleck (1990) 225 CA3d 1162, 275 CR 646: §9.126
Butler-Rupp v Lourdeaux (2007) 154 CA4th 918, 65 CR3d 242: §§2.48, 2.85, 2.88, 4.91, 9.32, 9.34, 9.45, 12.1, 12.3-12.4, 12.24

**C**

CNA Cas. v Seaboard Sur. Co. (1986) 176 CA3d 598, 222 CR 276: §7.10
CRST Van Expedited, Inc. v Werner Enters., Inc. (9th Cir 2007) 479 F3d 1099: §§2.10, 3.124
Cabrales v County of Los Angeles (9th Cir 1991) 935 F2d 1050: §§2.48, 2.88, 9.9, 9.44, 9.60, 9.63
Cairns v Franklin Mint Co. (9th Cir 2002) 292 F3d 1139: §§9.66, 10.73, 11.56, 11.67
Cal Pak Delivery, Inc. v United Parcel Serv. (1997) 52 CA4th 1, 60 CR2d 207: §1.20
Calhoun v Vallejo City Unified Sch. Dist. (1993) 20 CA4th 39, 24 CR2d 337: §16.4
California Common Cause v Duffy (1987) 200 CA3d 730, 246 CR 285: §§2.85, 2.99, 2.114, 3.58, 3.75, 9.9, 9.45, 9.73, 9.95, 11.69
California Fair Plan Ass'n v Politi (1990) 220 CA3d 1612, 270 CR 243: §7.10
California Hous. Fin. Agency v E.R. Fairway Assocs. (1995) 37 CA4th 1508, 44 CR2d 591: §§2.6, 9.125
California Interscholastic Fed'n v Barrios (2002) 537 US 820, 154 L Ed 2d 28, 123 S Ct 98: §§2.109, 11.8
California Labor Fed'n v Occupational Safety & Health Standards Bd. (1992) 5 CA4th 985, 7 CR2d 399: §§15.5-15.6
California Licensed Foresters Ass'n v State Bd. of Forestry (1994) 30 CA4th 562, 35 CR2d 396: §§3.68, 3.70-3.71, 3.76
California Med. Ass'n v Shalala (9th Cir 2000) 207 F3d 575: §§16.9, 16.16
California Recreation Indus. v Kierstead (1988) 199 CA3d 203, 244 CR 632: §§16.6, 16.13

California Teachers Ass'n v Cory (1984) 155 CA3d 494, 202 CR 611: §3.91
California Teachers Ass'n v Governing Bd. (1984) 161 CA3d 393, 207 CR 659: §§4.94, 14.22
California Trout, Inc. v Superior Court (1990) 218 CA3d 187, 266 CR 788: §§2.42, 2.90, 2.93, 9.35, 9.43, 9.79, 9.81, 11.19, 12.6
California War Veterans for Justice v Hayden (1986) 176 CA3d 982, 222 CR 512: §§6.41, 6.72
California Wholesale Material Supply, Inc. v Norm Wilson & Sons, Inc. (2002) 96 CA4th 598, 117 CR2d 390: §§4.34, 4.46
Californians for Responsible Toxics Mgmt. v Kizer (1989) 211 CA3d 961, 259 CR 599: §§2.42, 2.88, 2.114, 3.36, 9.11, 9.14, 9.16, 9.43-9.45, 9.80, 13.19
Caloca v County of San Diego (2002) 102 CA4th 433, 126 CR2d 3: §3.76
Camacho v Bridgeport Fin., Inc. (9th Cir 2008) 523 F3d 973: §§3.104, 8.10, 9.21, 9.94, 9.97, 9.106, 9.111, 9.114, 9.121, 9.123, 10.24, 10.37, 10.47-10.48, 10.73, 11.66-11.67, 16.23
Camacho v Schaefer (1987) 193 CA3d 718, 238 CR 609: §§3.100, 8.26, 8.36, 11.59
Camp v Swoap (1979) 94 CA3d 733, 156 CR 600: §3.47
Campbell v Residential Rent Stabilization & Arbitration Bd. (1983) 142 CA3d 123, 190 CR 829: §3.92
Canal Ins. Co. v Tackett (2004) 117 CA4th 239, 11 CR3d 626: §3.128
Cann v Carpenters' Pension Trust Fund (9th Cir 1993) 989 F2d 313: §1.2
Cano v Glover (2006) 143 CA4th 326, 48 CR3d 871: §4.35
Carbonell v INS (9th Cir 2005) 429 F3d 894: §2.104
Card v Community Redev. Agency (1976) 61 CA3d 570, 131 CR 153: §§3.90, 5.34, 5.36, 5.41-5.43, 5.52
Cardenas v Mission Indus. (1991) 226 CA3d 952, 277 CR 247: §3.96
Care Constr., Inc. v Century Convalescent Ctrs., Inc. (1976) 54 CA3d 701, 126 CR 761: §4.37
Carole Ring & Assocs. v Nicastro (2001) 87 CA4th 253, 104 CR2d 519: §14.24
Carpenter v Jack in the Box Corp. (2007) 151 CA4th 454, 59 CR3d 839: §§3.119, 6.30, 6.39, 6.60, 12.2, 12.15, 12.21
Carpenter v Stephen F. Austin State Univ. (5th Cir 1983) 706 F2d 608: §§2.90, 11.18
Carpenters Health & Welfare Trust Fund v Acme Indus., Inc. (1990) 224 CA3d 187, 273 CR 519: §4.24
Carr Bus. Enters., Inc. v City of Chowchilla (2008) 166 CA4th 14, 82 CR3d 128: §4.58
Carroll v Hanover Ins. Co. (1968) 266 CA2d 47, 71 CR 868: §§7.15, 7.26
Carroll v Import Motors, Inc. (1995) 33 CA4th 1429, 39 CR2d 791: §9.6
Carroll v State (1990) 217 CA3d 134, 265 CR 753: §§6.4-6.5
Carson v Billings Police Dep't (9th Cir 2006) 470 F3d 889: §§9.97, 9.121
Carver v Chevron U.S.A., Inc. (2004) 119 CA4th 498, 14 CR3d 467: §§3.123, 9.68
Carver v Chevron U.S.A., Inc. (2002) 97 CA4th 132, 118 CR2d 569: §§2.77-2.78, 3.123, 4.22, 4.84, 4.99
Carwash of America-PO LLC v Windswept Ventures No. 1 (2002) 97 CA4th 540, 118 CR2d 536: §§7.2, 9.126, 11.29, 11.32, 11.42, 11.45
Case v Unified Sch. Dist. No. 233 (10th Cir 1998) 157 F3d 1243: §§9.6, 9.10
Casella v SouthWest Dealer Servs., Inc. (2007) 157 CA4th 1127, 69 CR3d 445: §4.26
Cassim v Allstate Ins. Co. (2004) 33 C4th 780, 16 CR3d 374: §7.15
Castro v Superior Court (2004) 116 CA4th 1010, 10 CR3d 865: §§2.110, 3.103
Cato v Parham (ED Ark 1968) 293 F Supp 1375: §5.3
Cazares v Saenz (1989) 208 CA3d 279, 256 CR 209: §§8.32, 10.41, 10.50
Cedic Dev. Co. v Warnicke (9th Cir 2000) 219 F3d 1115: §10.30
Center for Biological Diversity v Marina Point Dev. Co. (9th Cir 2009) 560 F3d 903: §2.98
Center for Biological Diversity v Norton (10th Cir 2001) 262 F3d 1077: §2.117
Century City Med. Plaza v Sperling, Isaacs & Eisenberg (2001) 86 CA4th 865, 103 CR2d 605: §§11.69, 14.14
Chabner v United of Omaha (ND Cal 1999) 1999 US Dist Lexis 16552, aff'd (9th Cir 2000) 225 F3d 1042: §§2.10, 3.11, 3.33, 9.106, 9.110, 10.3, 10.8, 10.31, 10.36, 10.39, 10.41, 10.47, 10.67-10.69, App H
Chabner v United of Omaha Life Ins. Co. (9th Cir 2000) 225 F3d 1042: §1.12
Chacon v Litke (Jan. 19, 2010, A122026) 2010 Cal App Lexis 159: §8.4
Chalmers v City of Los Angeles (9th Cir 1986) 796 F2d 1205: §§9.130, 11.53, 11.56, 11.67
Chambers v Kay (2002) 29 C4th 142, 126 CR2d 536: §1.19
Chantiles v Lake Forest II Master Homeowners Ass'n (1995) 37 CA4th 914, 45 CR2d 1: §§2.83, 3.121, 12.7
Charles v Daley (7th Cir 1988) 846 F2d 1057: §2.39
Chase Manhattan Mortgage Corp. v Lessel (1997) 55 CA4th 10, 64 CR2d 113: §4.84
Chavez v City of Los Angeles (2010) 47 C4th 970, __ CR3d __: §§2.67-2.68, 2.99, 3.81, 8.26, 8.28, 9.56, 9.78, 10.15, 10.53, 10.56, 10.63, 10.65, 11.3
Chavez v Netflix, Inc. (2008) 162 CA4th 43, 75 CR3d 413: §§2.30, 8.9, 8.12, 8.14, 8.30, 9.73, 9.83, 9.109-9.110, 9.116, 10.3, 10.5, 10.8, 10.31, 10.36-10.37, 10.40-10.41, 10.73, 11.17, 11.50, 11.68
Chelios v Kaye (1990) 219 CA3d 75, 268 CR 38: §§4.62, 15.15
Chhour v Community Redev. Agency (1996) 46 CA4th 273, 53 CR2d 585: §9.43
Childers v Edwards (1996) 48 CA4th 1544, 56 CR2d 328: §§2.47, 4.77
Children's Hosp. & Med. Ctr. v Bonta (2002) 97 CA4th 740, 118 CR2d 629: §§3.36, 9.9, 9.13, 9.73, 9.82, 9.93, 9.104, 9.121-9.122, 11.22, 11.26, 11.47-11.48, 11.53, 11.59, 11.69, 13.19, 16.26, App D
Childress v Darby Lumber, Inc. (9th Cir 2004) 357 F3d 1000: §§2.71, 8.27, 10.23, 10.45
Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp. (2008) 170 CA4th 868, 88 CR3d 250: §§4.62-4.63, 15.15
Chinn v KMR Prop. Mgmt. (2008) 166 CA4th 175, 82 CR3d 586: §§2.47, 4.81, 11.1, 11.26, 11.29, 11.34, 14.9
Choate v County of Orange (2000) 86 CA4th 312, 103 CR2d 339: §§2.71, 2.100, 3.129, 8.28, 10.53, 10.63

Choi v Orange County Great Park Corp. (2009) 175 CA4th 524, 96 CR3d 90: §§2.58, 2.66, 3.40, 3.45-3.46, 3.52-3.54, 3.57, 3.59, 3.65, 3.79
Choudhry v Free (1976) 17 C3d 660, 131 CR 654: §§2.12, 2.38
Chrapliwy v Uniroyal, Inc. (7th Cir 1982) 670 F2d 760: §§9.115, 9.121, 13.20
Christensen v Dewor Devs. (1983) 33 C3d 778, 191 CR 8: §11.26
Christensen v Stevedoring Servs. of Am. (9th Cir 2009) 557 F3d 1049: §§9.97, 9.106
Christensen v Superior Court (1987) 193 CA3d 139, 239 CR 143: §§3.75, 12.8
Christian Research Inst. v Alnor (2008) 165 CA4th 1315, 81 CR3d 866: §§3.117, 9.84, 11.50
Christiansburg Garment Co. v EEOC (1978) 434 US 412, 54 L Ed 2d 648, 98 S Ct 694: §§2.69-2.71
Christina A. v Bloomberg (8th Cir 2003) 315 F3d 990: §2.104
Christward Ministry v County of San Diego (1993) 13 CA4th 31, 16 CR2d 435: §§3.53, 3.69
Church of Scientology v Wollersheim (1996) 42 CA4th 628, 49 CR2d 620, disapproved on other grounds in Equilon Enters. v Consumer Cause, Inc. (2002) 29 C4th 53, 124 CR 507: §3.116
Churchill Village LLC v General Elec. (9th Cir 2004) 361 F3d 566: §§2.32, 11.11, 11.70
Ciani v San Diego Trust & Sav. Bank (1994) 25 CA4th 563, 30 CR2d 581: §§3.36, 3.63, 5.35, 5.37-5.38, 5.41, 5.46, 13.19
Circle Star Ctr. Assocs., LP v Liberate Technols. (2007) 147 CA4th 1203, 55 CR3d 232: §4.63
Cisneros v U.D. Registry, Inc. (1995) 39 CA4th 548, 46 CR2d 233: §§2.78, 3.104
Citizens Against Rent Control v City of Berkeley (1986) 181 CA3d 213, 226 CR 265: §§2.4, 2.55, 2.63, 3.45, 3.52, 3.68, 3.71, 3.75, 9.9, 9.47, 9.73, 9.82, 10.11, 10.35, 10.72, 11.2-11.4, 11.20, 11.54, 11.68, 12.2, 12.10, 12.15, 16.1, 16.26
Citizens Ass'n for Sensible Dev. v County of Inyo (1985) 172 CA3d 151, 217 CR 893: §12.1
Citizens Legal Envt'l Action Network, Inc. v Premium Standard Farms, Inc. (8th Cir 2005) 397 F3d 592: §§11.11, 11.70
Citizens for Better Forestry v U.S. Dep't of Agric. (9th Cir 2009) 567 F3d 1128: §§2.87, 2.100, 2.116
City & County of Los Angeles v Superior Court (1999) 21 C4th 292, 87 CR2d 441: §§2.12, 3.129
City & County of San Francisco v Ballard (2006) 136 CA4th 381, 39 CR3d 1: §§2.77, 3.103
City & County of San Francisco v Jen (2005) 135 CA4th 305, 37 CR3d 454: §§2.26, 3.103
City & County of San Francisco v Sweet (1995) 12 C4th 105, 48 CR2d 42: §5.30
City & County of San Francisco v Union Pac. R.R. Co. (1996) 50 CA4th 987, 58 CR2d 1: §§4.37, 4.51
City & County of San Francisco, U.S. v (ND Cal 1990) 748 F Supp 1416, aff'd in relevant part sub nom Davis v City & County of San Francisco (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345: §§9.5, 9.22-9.23, 9.28-9.29, 9.75-9.76, 9.87, 9.96-9.97, 9.108, 9.121, 11.7, 11.49, 11.61, App H
City of Burlington v Dague (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638: §§8.37, 10.18, 10.22-10.23, 10.25-10.26, 10.28, 10.41-10.42, 10.45, 10.48
City of Carmel-by-the-Sea v Board of Supervisors (1986) 183 CA3d 229, 227 CR 899: §§3.9, 3.17, 5.57, 5.59
City of Carmel-by-the-Sea v U.S. Dep't of Transp. (9th Cir 1997) 123 F3d 1142: §§2.10, 3.33, 3.46
City of Detroit v Grinnell Corp. (2d Cir 1974) 495 F2d 448: §8.3
City of Fresno v Press Communications, Inc. (1994) 31 CA4th 32, 36 CR2d 456: §§3.19, 3.45, 3.54, 3.61, 3.75, 12.7-12.8
City of Hawaiian Gardens v City of Long Beach (1998) 61 CA4th 1100, 72 CR2d 134: §§2.14-2.15, 3.17, 3.78, 11.1
City of Los Angeles v 2000 Jeep Cherokee (2008) 159 CA4th 1272, 72 CR3d 252: §§3.40, 3.45, 3.55, 3.57-3.58, 3.75
City of Los Angeles v Animal Defense League (2006) 135 CA4th 606, 37 CR3d 632: §§3.113, 9.36
City of Monte Sereno v Padgett (2007) 149 CA4th 1530, 58 CR3d 218: §§2.6, 3.103, 3.105
City of Oakland v McCullough (1996) 46 CA4th 1, 53 CR2d 531: §§3.103, 11.48
City of Oakland v Oakland Raiders (1988) 203 CA3d 78, 249 CR 606: §§3.101, 8.6, 9.1, 9.93, 9.108, 9.133, 10.8, 10.18, 10.31-10.32, 10.36-10.37, 10.50, 11.60
City of Riverside v Rivera (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686: §§1.23, 8.25-8.27, 9.64, 10.52, 10.54, 10.57-10.58, 10.66
City of Sacramento v Drew (1989) 207 CA3d 1287, 255 CR 704: §§2.51, 2.64, 2.86, 3.4, 3.19, 3.21, 3.53, 3.65, 3.68, 3.75, 9.49, 9.54, 16.17
City of San Diego, U.S. v (SD Cal 1998) 18 F Supp 2d 1090: §§9.9, 9.13, 10.23, 10.37, 10.51, 13.20
City of Santa Monica v Stewart (2005) 126 CA4th 43, 24 CR3d 72: §§2.28, 3.4, 3.18, 3.64, 3.69, 3.120, 9.72, 16.17
City of Santa Paula v Narula (2003) 114 CA4th 485, 8 CR3d 75: §§2.98, 3.105, 11.59
Civil Serv. Ass'n v San Francisco Redev. Agency (1985) 166 CA3d 1222, 213 CR 1: §§3.90, 3.92
Civitello v 1st Credit of Am., LLC (ND Cal, May 21, 2007, No. C 05-04944 WHA) 2007 US Dist Lexis 46620: §8.27
Clark v City of Los Angeles (9th Cir 1986) 803 F2d 987: §§10.47, 10.51
Clark v Millsap (1926) 197 C 765, 242 P 918: §1.20
Clark v Optical Coating Laboratory, Inc. (2008) 165 CA4th 150, 80 CR3d 812: §§5.2, 6.2, 6.4, 6.16
Club Members for an Honest Election v Sierra Club (2008) 45 C4th 309, 86 CR3d 288: §§3.37, 3.111
Coalition for Economic Survival v Deukmejian (1985) 171 CA3d 954, 217 CR 621: §§2.13, 2.101, 2.108, 3.9, 5.57, 15.5, 16.8
Coalition for Los Angeles County Planning v Board of Supervisors (1977) 76 CA3d 241, 142 CR 766: App H
Coalition for Los Angeles County Planning v Board of Supervisors (1977) 76 CA3d 241, 142 CR 766: §§2.93, 5.34, 9.90, 10.8, 10.31, 10.36, 10.41, 10.67, App D, App H
Coalition for Los Angeles County Planning in the Public Interest v Board. of Supervisors (1977) 76 CA3d 241, 142 CR 766: §3.53
Coast Bank v Holmes (1971) 19 CA3d 581, 97 CR 30: §4.11
Coastal Transfer Co. v Toyota Motor Sales (9th Cir 1987) 833 F2d 208: §6.16
Cole v BT&G, Inc. (1983) 141 CA3d 995, 190 CR 690: §§4.95, 11.19
Coleman v Gulf Ins. Group (1986) 41 C3d 782, 226 CR 90: §6.67

Colgan v Leatherman Tool Group, Inc. (2006) 135 CA4th 663, 38 CR3d 36: §§3.46, 3.53, 10.62, 10.65
Collins v Department of Transp. (2003) 114 CA4th 859, 8 CR3d 132: §6.58
Colony Hill v Ghamaty (2006) 142 CA4th 1408, 48 CR3d 798: §16.6
Coltrain v Shewalter (1998) 66 CA4th 94, 77 CR2d 600: §§3.113, 4.85
Comite de Jornaleros de Redondo Beach v City of Redondo Beach (CD Cal, Dec. 12, 2006, No. CV 04-9396 CBM (JTLx)) 2006 US Dist Lexis 95610: §§9.92, 9.96
Commissioner v Banks (2005) 543 US 426, 160 L Ed 2d 859, 125 S Ct 826: §1.23
Commissioner v Jean (1990) 496 US 154, 110 L Ed 2d 134, 110 S Ct 2316: §§2.88, 9.16
Commissioner v Schleier (1995) 515 US 323, 132 L Ed 2d 294, 115 S Ct 2159: §1.21
Committee for Sewer Referendum v Humboldt Bay Wastewater Auth. (1978) 77 CA3d 117, 143 CR 463, overruled on other grounds in Citizens Against Rent Control v City of Berkeley (1986) 181 CA3d 213, 226 CR 265: §§2.4, 9.33, 11.1
Committee to Defend Reprod. Rights v A Free Pregnancy Ctr. (1991) 229 CA3d 633, 280 CR 329: §§3.62-3.63
Committee to Defend Reprod. Rights v Cory (1982) 132 CA3d 852, 183 CR 475: §§12.6, 15.5
Committee to Defend Reprod. Rights v Rank (1984) 151 CA3d 83, 198 CR 630: §12.6
Common Cause v Jones (CD Cal 2002) 235 F Supp 2d 1076: §§9.5, 9.107, 9.121, 10.54, 11.60-11.61
Common Cause v Stirling (1981) 119 CA3d 658, 174 CR 200: §§2.51, 2.83, 3.86
Community Cause v Boatwright (1987) 195 CA3d 562, 240 CR 794: §16.6
Community Redev. Agency v Matkin (1990) 220 CA3d 1087, 272 CR 1: §9.125
Compton Community College Fed'n of Teachers v Compton Community College Dist. (1985) 165 CA3d 82, 211 CR 231: §3.53
Computer Prepared Accounts, Inc. v Katz (1991) 235 CA3d 428, 286 CR 556: §§2.42, 6.62, 6.66, 6.68, 9.81
ComputerXpress, Inc. v Jackson (2001) 93 CA4th 993, 113 CR2d 625: §§2.76, 2.99, 3.118, 9.69, 10.65
Concerned Citizens Coalition of Stockton v City of Stockton (2005) 128 CA4th 70, 26 CR3d 735: §11.69
Concerned Citizens of La Habra v City of La Habra (2005) 131 CA4th 329, 31 CR3d 599: §§3.54, 3.56
Conner v City of Santa Ana (9th Cir 1990) 897 F2d 1487: §9.46
Connerly v State Personnel Bd. (2006) 37 C4th 1169, 39 CR3d 788: §§2.35, 2.37-2.40, 3.20, 3.23, 3.26-3.27, 16.17
Conservatorship of Whitley (2007) 155 CA4th 1447, 66 CR3d 808, review granted Supreme Court Case No. (review granted Oct. 22, 2009, S175855; superseded opinion at 2009 Cal App Unpub Lexis 5983): §3.69
Consumer Cause, Inc. v Mrs. Gooch's Natural Food Mkts., Inc. (2005) 127 CA4th 387, 25 CR3d 514: §§3.21, 3.30, 3.44, 5.12, 5.46
Consumer Privacy Cases (2009) 175 CA4th 545, 96 CR3d 127: §§8.7-8.9, 8.12-8.14, 10.8, 10.40, 11.17
Consumers Lobby Against Monopolies v PUC (1979) 25 C3d 891, 160 CR 124, disapproved on other grounds in Kowis v Howard (1992) 3 C4th 888, 12 CR2d 728: §§2.19-2.20, 2.22, 3.5, 3.22, 3.29, 3.34, 5.8-5.9, 5.13, 5.22, 5.59, 13.2, 13.4-13.5, 13.21, 14.3, 14.5
Consumers Union, Inc. v Alta-Dena Certified Dairy (1992) 4 CA4th 963, 6 CR2d 193: §3.46
Continental Heller Corp. v Amtech Mechanical Servs., Inc. (1997) 53 CA4th 500, 61 CR2d 668: §§4.58, 7.23, 7.30
Continental Ill. Sec. Litig., In re (7th Cir 1992) 962 F2d 566: §§9.133, 10.51
Contractors Labor Pool, Inc. v Westway Contractors, Inc. (1997) 53 CA4th 152, 61 CR2d 715: §§8.23, 16.17, 16.24, 16.30
Cooper, People ex rel v Mitchell Bros. Santa Ana Theater (1985) 165 CA3d 378, 211 CR 501: §5.59
Copeland v Marshall (DC Cir 1980) 641 F2d 880: §§9.96, 9.103, 11.63, App D
Corbett v Hayward Dodge, Inc. (2004) 119 CA4th 915, 14 CR3d 741: §§2.76, 3.104
Corder v Brown (9th Cir 1994) 25 F3d 833: §§9.44, 9.111, 10.56
Corder v Gates (9th Cir 1991) 947 F2d 374: §§2.43, 8.27, 9.64, 9.80, 10.24, 10.27, 10.55
Corder v Gates (CD Cal 1988) 688 F Supp 1418, aff'd in part and rev'd in part (9th Cir 1991) 947 F2d 374: §§9.123, 11.53
Corona v Amherst Partners (2003) 107 CA4th 701, 132 CR2d 250: §§14.2, 14.11
Corona v Lundigan (1984) 158 CA3d 764, 204 CR 846: §6.72
Cortez v Bootsma (1994) 27 CA4th 935, 33 CR2d 20: §§8.6, 8.23, 8.31, 8.36, 11.27
Costco Wholesale Corp. v Hoen (9th Cir 2008) 538 F3d 1128: §§2.39, 9.12
Cothron v Interinsurance Exch. of the Auto. Club (1980) 103 CA3d 853, 163 CR 240: §14.14
County of Alameda v Lackner (1978) 79 CA3d 274, 144 CR 840: §3.84
County of Butte v Bach (1985) 172 CA3d 848, 218 CR 613, reaff'd 215 CA3d at 308: §§2.16, 2.71
County of Colusa v California Wildlife Conserv. Bd. (2006) 145 CA4th 637, 52 CR3d 1: §§2.26, 2.85-2.86, 2.95, 2.98, 2.103, 2.105, 2.108, 2.114, 3.13, 3.17, 3.24, 3.46, 3.56, 3.65, 3.67, 3.78, 11.59
County of Humboldt v Swoap (1975) 51 CA3d 442, 124 CR 510: §§2.23, 2.28, 3.84
County of Inyo v City of Los Angeles (1978) 78 CA3d 82, 144 CR 71: §3.66
County of Los Angeles v Superior Court (1999) 21 C4th 292, 87 CR2d 441: §§8.25, 8.27
County of Orange v Carl D. (1999) 76 CA4th 429, 90 CR2d 440: §3.46
County of Riverside v City of Murrieta (1998) 65 CA4th 616, 76 CR2d 606: §§5.36, 5.41-5.42
County of Sacramento v Sandison (2009) 174 CA4th 646, 95 CR3d 30: §3.103
County of San Diego v California Special Educ. Hearing Office (9th Cir 1996) 93 F3d 1458: §2.77
County of San Diego v Lamb (1998) 63 CA4th 845, 73 CR2d 912: §§3.19, 3.42, 3.46, 3.58, 3.75, 12.8
County of San Joaquin v Stockton Swim Club (1974) 42 CA3d 968, 117 CR 300: §4.57
County of San Luis Obispo v Abalone Alliance (1986) 178 CA3d 848, 223 CR 846: §§2.72, 3.19, 3.41, 3.55-3.56, 3.61, 3.75, 9.64, 11.19, 16.26
County of Santa Barbara v David R. (1988) 200 CA3d 98, 245 CR 836: §2.77
County of Santa Clara, State v (1983) 142 CA3d 608, 191 CR 204: §11.68
Coutin v Young & Rubicam Puerto Rico (1st Cir 1997) 124 F3d 331: §10.54

Covenant Care, Inc. v Superior Court (2004) 32 C4th 771, 11 CR3d 222: §3.106
Covenant Mut. Ins. Co. v Young (1986) 179 CA3d 318, 225 CR 861: §§2.77, 4.22
Covington v District of Columbia (DC Cir 1995) 57 F3d 1101: §§9.121-9.122
Cowan v Prudential Ins. Co. (2d Cir 1991) 935 F2d 522: §8.28
Craft v County of San Bernardino (CD Cal 2008) 624 F Supp 2d 1113: §§5.18, 8.17, 8.19
Crampton v Takegoshi (1993) 17 CA4th 308, 21 CR2d 284: §5.27
Crawford v Astrue (9th Cir 2009) 586 F3d 1142: §§8.10, 8.29-8.30, 8.37, 10.30, 10.42, 10.46
Crawford v Board of Educ. (1988) 200 CA3d 1397, 246 CR 806: §§2.28, 3.18, 16.17
Creative Plastering, Inc. v Hedley Builders, Inc. (1993) 19 CA4th 1662, 24 CR2d 216: §§14.7-14.8, 14.15
Crespin v Shewry (2004) 125 CA4th 259, 22 CR3d 696: §§9.24, 11.30, 11.38
Crespin, Carpenter v Jack in the Box Corp. (2007) 151 CA4th 454, 59 CR3d 839: §11.38
Crib Retaining Walls, Inc. v NBS/Lowry, Inc. (1996) 47 CA4th 886, 54 CR2d 850: §2.47
Crommie v PUC (ND Cal 1994) 840 F Supp 719, aff'd sub nom Mangold v PUC (9th Cir 1995) 67 F3d 1470: §§1.12, 2.13, 2.16, 3.33, 3.56, 3.59, 3.81, 8.6, 8.26, 9.107, 10.3, 10.8, 10.12, 10.18, 10.31, 10.36-10.37, 10.39, 10.41, 10.44, 10.48, 10.67, 10.72-10.73
Cruz v Ayromloo (2007) 155 CA4th 1270, 66 CR3d 725: §§4.26, 4.98-4.99, 8.6, 8.23, 9.66, 9.94-9.95, 9.97, 10.68
Cruz v Ayromloo (2007) 155 CA4th 1270, 75 CR3d 413: §8.26
Cruz v Hauck (5th Cir 1985) 762 F2d 1230: §9.16
Cruz v Superior Court (2004) 120 CA4th 175, 14 CR3d 917: §§3.24, 3.46, 12.6
Cumero v Public Employment Relations Bd. (1989) 49 C3d 575, 262 CR 46: §12.6
Cummings v Benco Bldg. Servs. (1992) 11 CA4th 1383, 15 CR2d 53: §§2.49, 2.70, 3.82
Cummings v Connell (9th Cir 2005) 402 F3d 936: §12.27
Cunningham v County of Los Angeles (9th Cir 1988) 879 F2d 481: §§9.117, 10.23, 10.27, 10.54-10.55, 10.66
Curran v Department of Treasury (9th Cir 1986) 805 F2d 1406: §9.103
Curry v Moody (1995) 40 CA4th 1547, 48 CR2d 627: §4.45
Curtis v City of Des Moines (8th Cir 1993) 995 F2d 125: §§11.15, 11.70
Curtis v County of Los Angeles (1985) 172 CA3d 1243, 218 CR 772: §6.4
CytoDyn of N.M., Inc. v Amerimmune Pharm., Inc. (2008) 160 CA4th 288, 72 CR3d 600: §§3.124, 6.6

**D**

D.C. v Harvard-Westlake Sch. (2009) 176 CA4th 836, 98 CR3d 300: §§2.77-2.78
Dameron v Sinai Hosp. of Baltimore, Inc. (D Md 1986) 644 F Supp 551: §9.121
Dameshghi v Texaco Ref. & Mktg. (1992) 3 CA4th 1262, 6 CR2d 515, disapproved on other grounds in Trope v Katz (1995) 11 C4th 274, 45 CR2d 241: §2.91
Damian v Tamondong (1998) 65 CA4th 1115, 77 CR2d 262: §§2.110, 3.104, 4.85
D'Amico v Board of Med. Examiners (1974) 11 C3d 1, 112 CR 786: §§5.1-5.2
Dang v Cross (9th Cir 2005) 422 F3d 800: §§9.51, 9.130, 10.54, 10.66
Daniels v McKinney (1983) 146 CA3d 42, 193 CR 842: §§2.85, 3.45, 3.61, 3.72, 9.24, 9.36, 10.65, App H
Dannenberg v Valadez (9th Cir 2003) 338 F3d 1070: §§10.54, 10.56, 10.66
David v Abergel (1996) 46 CA4th 1281, 54 CR2d 443: §§6.45, 14.6
David S. Karton, A Law Corp. v Dougherty (2009) 171 CA4th 133, 89 CR3d 506: §11.28
Davis v Air Technical Indus. (1978) 22 C3d 1, 148 CR 419: §7.23
Davis v City & County of San Francisco (9th Cir 1992) 976 F2d 1536, modified on other grounds (9th Cir 1993) 984 F2d 345: §§9.9, 9.104, 9.109-9.111, 9.117, 9.120-9.121, 9.123, 9.130, 10.22, 10.45, 11.49, 11.53
Davis v City of San Diego (2003) 106 CA4th 893, 131 CR2d 266: §§8.4, 9.105, 9.120-9.122, 10.18
Davis v KGO-TV, Inc. (1998) 17 C4th 436, 71 CR2d 452: §9.124, App J
Davis v Locke (11th Cir 1991) 936 F2d 1208: §8.28
Davis v Mason County (9th Cir 1991) 927 F2d 1473: §§9.114, 9.130, 10.56
Dawson v Westerly Investigations, Inc. (1988) 204 CA3d Supp 20, 251 CR 633: §§2.77, 3.96
Day v Alta Bates Med. Ctr. (2002) 98 CA4th 243, 119 CR2d 606: §5.30
Day v Collingwood (2006) 144 CA4th 1116, 50 CR3d 903: §§6.19, 6.27, 16.10
Day v Papadakis (1991) 231 CA3d 503, 282 CR 548, disapproved on other grounds in Morehart v County of Santa Barbara (1994) 7 C4th 725, 29 CR2d 804: §§4.95, 11.21
De Anza Santa Cruz Mobile Estates Homeowners Assoc. v De Anza Santa Cruz Mobile Estates (2001) 94 CA4th 890, 114 CR2d 708: §§2.92, 3.100
DeWitt v Western Pac. R.R. (9th Cir 1983) 719 F2d 1448: §9.40
DeZerega v Meggs (2000) 83 CA4th 28, 99 CR2d 366: §§16.6-16.7, 16.14
Deane Gardenhome Ass'n v Denktas (1993) 13 CA4th 1394, 16 CR2d 816: §§4.69, 11.56, 12.7
Dease v City of Anaheim (CD Cal 1993) 838 F Supp 1381: §§11.56, 11.61
Decker v U. D. Registry, Inc. (2003) 105 CA4th 1382, 129 CR2d 892: §§3.110, 3.115, 6.8, 6.29-6.30, 6.34
Del Cerro Mobile Estates v Proffer (2001) 87 CA4th 943, 105 CR2d 5: §§2.75, 2.83, 2.107, 3.100, 4.85, 9.66, 11.59
Delaney v Baker (1999) 20 C4th 23, 82 CR2d 610: §3.106
Delaney v Dahl (2002) 99 CA4th 647, 121 CR2d 663: §§11.5, 11.69, 14.15
Delaney v Superior Fast Freight (1993) 14 CA4th 590, 18 CR2d 33: §3.82
Dell Merk, Inc. v Franzia (2005) 132 CA4th 443, 33 CR3d 694: §4.43

D'Emanuele v Montgomery Ward & Co. (9th Cir 1990) 904 F2d 1379, aff'd without opinion at 993 F2d 882: §§9.97, 9.111, 11.66
Democratic Party of Washington v Reed (9th Cir 2004) 388 F3d 1281: §§2.4, 2.39, 2.52, 2.60, 9.9, 9.47, 9.75-9.77, 9.89, 11.49, 11.56
Denney v Universal City Studios, Inc. (1992) 10 CA4th 1226, 13 CR2d 170: §9.43
Dennis v Chang (9th Cir 1980) 611 F2d 1302: §§2.23, 9.96, 9.103
Dennis v Warren (5th Cir 1985) 779 F2d 245: §9.87
Denver D. Darling v Controlled Env't Constr. Inc. (2001) 89 CA4th 1221, 108 CR2d 213: §3.126
Dep't of Corps., People ex rel v Speedee Oil Change Sys., Inc. (2007) 147 CA4th 424, 54 CR3d 225: §§4.20, 4.76, 9.38
Dep't of Transp., People ex rel v Outdoor Media Group (1993) 13 CA4th 1067, 17 CR2d 19: §6.65
Dep't of Transp., People ex rel v Yuki (1995) 31 CA4th 1754, 37 CR2d 616: §§3.101, 8.6, 8.30, 8.33
Dep't of Water Resources, People ex rel v Andresen (1987) 193 CA3d 1144, 238 CR 826: §8.33
Department of Forestry & Fire Protection v LeBrock (2002) 96 CA4th 1137, 117 CR2d 790: §1.2
Desilets v Wal-Mart Stores, Inc. (1st Cit 1999) 171 F3d 711: §10.56
Di Grazia, Estate of (1993) 13 CA4th 681, 16 CR2d 621, disapproved on other grounds in Curle v Superior Court (2001) 24 C4th 1057, 103 CR2d 751: §6.42
DiLaura v Township of Ann Arbor (6th Cir 2006) 471 F3d 666: §§2.100, 10.66
DiMarco v Chaney (1995) 31 CA4th 1809, 37 CR2d 558: §§4.21, 4.69, 4.93, 11.29, 14.7, 14.11, 14.13, 14.15
Diamond v Charles (1989) 492 US 905, 106 L Ed 2d 564, 109 S Ct 3214: §2.39
Diaz-Rivera v Rivera-Rodriguez (1st Cir 2004) 377 F3d 119: §10.57
Dina v People ex rel Dept. of Transp. (2007) 151 CA4th 1029, 142 CR 766: App H
Disability Law Ctr., Inc. v Anchorage Sch. Dist. (9th Cir 2009) 581 F3d 936: §§1.12, 2.10
Disabled in Action v Mayor of Baltimore (4th Cir 1982) 685 F2d 881: §§2.67, 10.15
Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855: §6.54
Doe v Luster (2006) 145 CA4th 139, 51 CR3d 403: §§6.8, 6.29, 6.32, 6.39
Dolan v Buena Eng'rs (1994) 24 CA4th 1500, 29 CR2d 903: §6.31
Dominguez v American Suzuki (2008) 160 CA4th 53, 72 CR3d 354: §3.104
Donald v Cafe Royale, Inc. (1990) 218 CA3d 168, 266 CR 804: §§2.47, 2.75, 2.110
Donnell v U.S. (DC Cir 1982) 682 F2d 240: §§2.28, 9.114
Donovan v Poway Unified Sch. Dist. (2008) 167 CA4th 567, 84 CR3d 285: §§3.129, 10.26
Doppes v Bentley Motors, Inc. (2009) 174 CA4th 967, 94 CR3d 802: §§3.104, 9.3, 9.16, 11.37-11.38
Doran v North State Grocery, Inc. (2006) 137 CA4th 484, 39 CR3d 922: §§2.77, 2.95, 2.103
Dorman v DWLC Corp. (1995) 35 CA4th 1808, 42 CR2d 459: §4.82
Dormio, In re (1981) 127 CA3d 788, 179 CR 669: §2.22
Dotson v Chester (4th Cir 1991) 937 F2d 920: §15.8
Dowdell v City of Apopka (11th Cir 1983) 698 F2d 1181: §§9.28, 9.130
Dowling v Zimmerman (2001) 85 CA4th 1400, 103 CR2d 174: §§2.20, 3.112, 3.120, 15.11
Downen's Inc. v City of Hawaiian Gardens Redev. Agency (2001) 86 CA4th 856, 103 CR2d 644: §§3.102, 9.27, 15.15
Downey Cares v Downey Community Dev. Comm'n (1987) 196 CA3d 983, 242 CR 272: §§3.19, 3.85, 8.6, 9.20, 9.36, 9.51, 9.62, 9.66, 9.125, 10.3-10.4, 10.8, 10.12, 10.18, 10.44, 10.50, 10.53, 10.65, 11.65, App D, App H
Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co. (1987) 189 CA3d 1072, 234 CR 835: §§7.16, 9.42
Draper v Aceto (2001) 26 C4th 1086, 113 CR2d 61: §5.28
Drouin v Fleetwood Enters. (1985) 163 CA3d 486, 209 CR 623: §§8.26, 9.56, 9.66, App H
Drummond, Estate of (2007) 149 CA4th 46, 56 CR3d 691: §§4.88, 4.95
Drybread v Chipain Chiropractic Corp. (2007) 151 CA4th 1063, 60 CR3d 580: §§4.30, 4.51, 4.84
Dudman v State (1983) 145 CA3d 617, 193 CR 500: §§9.83, 11.50
Dunk v Ford Motor Co. (1996) 48 CA4th 1794, 56 CR2d 483: §§5.20, 8.7, 8.12-8.14, 11.50, 11.65, 11.69
Dwyer v Crocker Nat'l Bank (1987) 194 CA3d 1418, 240 CR 297: §§6.39, 6.66, 8.21

**E**

ECOS, Inc. v Brinegar (MD NC 1987) 671 F Supp 381: §13.3
EWAP, Inc. v City of Ontario (1986) 177 CA3d 1108, 223 CR 422: §§2.55, 9.31
Earley v Superior Court (2000) 79 CA4th 1420, 95 CR2d 57: §§2.35, 2.42, 2.78, 3.97
Earth Island Inst. v Southern Cal. Edison Co. (SD Cal 1993) 838 F Supp 458: §10.27
Eby v Chaskin (1996) 47 CA4th 1045, 55 CR2d 517: §§6.34, 6.39
Ecco-Phoenix Elec. Corp. v Howard J. White, Inc. (1969) 1 C3d 266, 81 CR 849: §4.21
Economic Empowerment Found. v Quackenbush (1997) 57 CA4th 677, 67 CR2d 323: §13.6
Edgerton v State Personnel Bd. (2000) 83 CA4th 1350, 100 CR2d 491: §§3.45, 3.56-3.57, 3.59, 3.68, 3.75, 9.109, 10.31-10.32, 10.36-10.37, 10.39, 10.48, 10.67, 10.72-10.73, 16.26
Eichenbaum v Alon (2003) 106 CA4th 967, 131 CR2d 296: §§6.13-6.14, 6.26
Eicher v Advanced Bus. Integrators, Inc. (2007) 151 CA4th 1363, 61 CR3d 114: §§2.92, 3.96-3.97, 9.45, 10.62, 12.7
El Dorado Irrig. Dist. v Traylor Bros. (ED Cal, Feb. 12, 2007, No. CIV. S-03-949) 2007 US Dist Lexis 14440: §4.34
El Dorado Meat Co. v Yosemite Meat & Locker Serv., Inc. (2007) 150 CA4th 612, 58 CR3d 590: §11.45
El-Hakem v BJY, Inc. (9th Cir 2005) 415 F3d 1068: §§9.64, 9.66, 10.66
Elite Show Servs., Inc. v Staffpro, Inc. (2004) 119 CA4th 263, 14 CR3d 184: §§4.81, 11.8, 11.33, 14.9
Ellis v Roshei Corp. (1983) 143 CA3d 642, 192 CR 57: §§6.33, 16.12

Elms v Builders Disbursements, Inc. (1991) 232 CA3d 671, 283 CR 515: §4.87
Elster v Friedman (1989) 211 CA3d 1439, 260 CR 148: §§2.85, 3.109, 9.36
Elwood v Drescher (9th Cir 2006) 456 F3d 943: §2.21
Emery v Hunt (8th Cir 2001) 272 F3d 1042: §§2.88, 2.102, 9.9, 9.63, 10.54
Employers Mut. Liab. Ins. Co. v Tutor-Saliba Corp. (1998) 17 C4th 632, 71 CR2d 851: §4.40
EnPalm, LLC v Teitler Family Trust (2008) 162 CA4th 770, 75 CR3d 902: §§9.78, 10.73, 16.31
Engel v Worthington (1997) 60 CA4th 628, 70 CR2d 526: §§2.77, 3.83, 8.26, 9.3, 9.36, 10.65, 11.64, 16.13
Engle v Copenbarger & Copenbarger, LLP (2007) 157 CA4th 165, 68 CR3d 461: §§2.95, 2.103, 11.8
Enoch, Estate of v Tienor (7th Cir 2009) 570 F3d 821: §§8.28, 10.56, 10.63
Entertainment Research v Genesis Creative Group (9th Cir 1997) 122 F3d 1211: §2.73
Environmental Defense Fund v Reilly (DC Cir 1993) 1 F3d 1254: §2.93
Environmental Protection Info. Ctr. v Johnson (1985) 170 CA3d 604, 216 CR 502: §12.8
Environmental Protection Info. Ctr. v Pacific Lumber Co. (ND Cal 2002) 229 F Supp 2d 993, aff'd (9th Cir 2004) 2004 US App Lexis 9099 (unpublished opinion): §§2.106, 2.116, 9.132
Equilon Enters. v Consumer Cause, Inc. (2002) 29 C4th 53, 124 CR2d 507: §§1.7, 3.4, 3.111
Erdman v Cochise County (9th Cir 1991) 926 F2d 877: §11.8
Erickson v R.E.M. Concepts, Inc. (2005) 126 CA4th 1073, 25 CR3d 39: §§4.46, 4.55, 4.58, 4.100, 9.67, 11.64, 16.13, 16.17
Essex Ins. Co. v Five Star Dye House, Inc. (2006) 38 C4th 1252, 45 CR3d 362: §7.17
Estate of _____ (*see* name of decedent)
Esther B. v City of Los Angeles (2008) 158 CA4th 1093, 70 CR3d 596: §§11.4, 11.40
Estrada v FedEx Ground Package Sys., Inc. (2007) 154 CA4th 1, 64 CR3d 327: §§3.46, 3.58, 3.69, 3.75, 5.23, 10.5, 10.38, 10.56, 10.62, 10.65
Evans v CenterStone Dev. Co. (2005) 134 CA4th 151, 35 CR3d 745: §§6.64, 6.68, 6.72
Evans v Jeff D. (1986) 475 US 717, 89 L Ed 2d 747, 106 S Ct 1531: §11.11
Evans v Unemployment Ins. Appeals Bd. (1985) 39 C3d 398, 216 CR 782: §3.92
Evans v Unkow (1995) 38 CA4th 1490, 45 CR2d 624: §§3.111, 9.36, 12.7
Exarhos v Exarhos (2008) 159 CA4th 898, 72 CR3d 409: §4.46
Excelsior Union High Sch. v Lautrup (1969) 269 CA2d 434, 74 CR 835: §§11.50, 11.60, 16.26
Exxess Electronixx v Heger Realty Corp. (1998) 64 CA4th 698, 75 CR2d 376: §§4.26, 4.50-4.51, 4.70, 4.86, 11.36, 16.18

**F**

FDIC v Dintino (2008) 167 CA4th 333, 84 CR3d 38: §§4.69, 4.76
Fair Housing of Marin v Combs (9th Cir 2002) 285 F3d 899: §§8.27, 9.5, 9.9, 9.121, 9.123, 10.54, 10.56, 10.58, 11.48
Fairchild v Park (2001) 90 CA4th 919, 109 CR2d 442: §§4.51, 4.59, 9.102, 9.126
Families Unafraid to Uphold Rural El Dorado County v Board of Supervisors (2000) 79 CA4th 505, 94 CR2d 205: §§2.20, 3.31, 3.37, 3.42, 3.46, 3.69, 3.72, 3.74, App D
Family Planning Specialists Med. Group, Inc. v Powers (1995) 39 CA4th 1561, 46 CR2d 667: §§3.19, 3.45, 3.52, 3.54, 3.59, 3.111
Fantasy, Inc. v Fogerty (9th Cir 1996) 94 F3d 553: §2.73
Farmers Ins. Exch. v Law Offices of Conrado Joe Sayas, Jr. (9th Cir 2001) 250 F3d 1234: §§2.10, 2.20, 4.59
Farrar v Hobby (1992) 506 US 103, 121 L Ed 2d 494, 113 S Ct 566: §§2.68, 2.75, 2.87, 2.100, 8.26, 8.28, 10.39, 10.53-10.56, 10.63
Fed-Mart Corp. v Pell Enters. (1980) 111 CA3d 215, 168 CR 525: §§8.6, 9.36
Federation of Fly Fishers v Daley (ND Cal 2002) 200 F Supp 2d 1181: §9.9
Feminist Women's Health Ctr. v Blythe (1995) 32 CA4th 1641, 39 CR2d 189: §§2.63, 9.45, 9.50, 9.80, 10.37, 10.53, 10.56, 10.58, 10.65, App D, App H
Ferland v Conrad Credit Corp. (9th Cir 2001) 244 F3d 1145: §§9.60, 9.64, 9.117, 10.27, 10.36, 10.64, 11.56, 11.67
Fidelity Mortgage Trustee Serv. v Ridgegate E. Homeowners Ass'n (1994) 27 CA4th 503, 32 CR2d 521: §§7.23, 16.20
Filipino Accountants' Ass'n v State Bd. of Accountancy (1984) 155 CA3d 1023, 204 CR 913: §§1.12, 2.14, 2.16, 2.95, 2.102-2.103, 3.43, 15.5
Finalco, Inc. v Roosevelt (1991) 235 CA3d 1301, 3 CR2d 865: §4.100
Fine Paper Antitrust Litig., In re (3d Cir 1984) 751 F2d 562: §11.17
Fineberg v Niekerk (1985) 175 CA3d 935, 221 CR 106: §4.92
Finkelstein v Bergna (ND Cal 1992) 804 F Supp 1235: §§9.133, 10.51
Finnie v Town of Tiburon (1988) 199 CA3d 1, 244 CR 581: §§6.31, 6.66, 6.70, 8.21
First Fed. Bank of Cal. v Superior Court (2006) 143 CA4th 310, 49 CR3d 296: §§11.43, 11.52, 12.23
First Nationwide Bank v Mountain Cascade, Inc. (2000) 77 CA4th 871, 92 CR2d 145: §4.14
First Sec. Bank v Paquet (2002) 98 CA4th 468, 119 CR2d 787: §§2.91, 4.43, 4.95, 11.19
Fischel v Equitable Life Assur. Soc. (9th Cir 2004) 2004 US App Lexis 7421 (unpublished opinion): §§8.19, 10.37, 10.46
Fischel v Equitable Life Assur. Soc. (9th Cir 2002) 307 F3d 997: §§2.98, 8.19, 10.37, 10.46, 10.51
Fish v Guevara (1993) 12 CA4th 142, 15 CR2d 329: §16.6
Flaherty, Marriage of (1982) 31 C3d 637, 183 CR 508: §§6.60, 6.63-6.64, 12.12
Flannery v CHP (1998) 61 CA4th 629, 71 CR2d 632: §§2.99, 3.56, 3.59, 3.76, 3.80, 10.10, 10.18, 10.36, 10.39, 10.42
Flannery v Prentice (2001) 26 C4th 572, 110 CR2d 809: §§1.7, 1.12, 1.17, 1.19-1.20, 1.25, 2.32, 2.34, 3.80-3.81, 4.61, 8.4, 8.6, 10.18, 11.11, 11.15,11.70, 16.12
Fleming v Kemper Nat'l Servs., Inc. (ND Cal 2005) 373 F Supp 2d 1000: §§9.9, 9.76, 9.94

Fletcher v A.J. Indus. (1968) 266 CA2d 313, 72 CR 146: §§5.4, 5.6, 5.36-5.37, 5.38, 5.43, 5.52
Fletcher v Davis (2004) 33 C4th 61, 14 CR3d 58: §1.19
Flores v Shalala (9th Cir 1995) 49 F3d 562: §§2.93, 13.18
Florida v Dunne (9th Cir 1990) 915 F2d 542: §§8.16, 8.19
Flynn v Page (1990) 218 CA3d 342, 266 CR 830: §§4.43, 4.84
Fogelson v Municipal Court (1981) 120 CA3d 858, 175 CR 64: §3.32
Fogerty v Fantasy, Inc. (1994) 510 US 517, 127 L Ed 2d 455, 114 S Ct 1023: §§2.50, 2.73
Folsom v Butte County Ass'n of Gov'ts (1982) 32 C3d 668, 186 CR 589: §§2.23, 2.32, 2.45, 2.84-2.86, 2.88, 2.95, 2.103, 2.108, 2.111, 3.4, 3.13, 3.15, 3.43, 3.46, 3.53, 3.72, 7.3, 11.8-11.9, 11.13, 11.19, 11.42, 11.47, 11.70, App D
Fontana Unified Sch. Dist. v Burman (1988) 45 C3d 208, 246 CR 733: §§3.90, 3.99, 13.8
Foothill Props. v Lyon/Copley Corona Assoc. (1996) 46 CA4th 1542, 54 CR2d 488: §§2.85, 4.69, 4.76
Ford v Long Beach Unified Sch. Dist. (9th Cir 2006) 461 F3d 1087: §§2.21, 13.12
Ford Motor Credit Co. v Hunsberger (2008) 163 CA4th 1526, 78 CR3d 661: §§2.78, 2.80, 4.80, 4.83, 11.8
Forrest v Trustees of Cal. State Univ. & Colleges (1984) 160 CA3d 357, 206 CR 595: §§3.91, 3.93
Foundation for Taxpayer & Consumer Rights v Garamendi (2005) 132 CA4th 1375, 34 CR3d 368: §§3.111, 3.115, 6.30, 6.32, 16.26
Frank Annino & Sons Constr. v McArthur Restaurants, Inc. (1989) 215 CA3d 353, 263 CR 592: §§6.36, 6.48, 6.66
Frank Music Corp. v Metro-Goldwyn-Mayer, Inc. (9th Cir 1989) 886 F2d 1545: §11.49
Freeman, Marriage of (2005) 132 CA4th 1, 33 CR3d 237: §§11.37, 12.21
Frei v Davey (2004) 124 CA4th 1506, 22 CR3d 429: §§4.20, 4.54
Friend v Kolodzieczak (9th Cir 1995) 72 F3d 1386: §§8.28, 9.63, 9.133, 10.63
Friends of "B" St. v City of Hayward (1980) 106 CA3d 988, 165 CR 514: §§3.67, 5.37, 5.46, 5.48, 5.50, 5.52
Friends of the Trails v Blasius (2000) 78 CA4th 810, 93 CR2d 193: §§2.37, 2.42, 2.85-2.86, 3.48, 3.57, 9.64
Frye v Tenderloin Hous. Clinic, Inc. (2006) 38 C4th 23, 40 CR3d 221: §§1.17, 2.23, 2.34
Fuhrman v California Satellite Sys. (1986) 179 CA3d 408, 225 CR 140, disapproved on other grounds in Silberg v Anderson (1990) 50 C3d 205, 266 CR 638: §§7.10, 7.28

**G**

Gaines v Board of Educ. (11th Cir 1985) 775 F2d 1565: §11.56
Galan v Wolfriver Holding Corp. (2000) 80 CA4th 1124, 96 CR2d 112: §§2.75, 3.100
Galante Vineyards v Monterey Peninsula Water Mgmt. Dist. (1997) 60 CA4th 1109, 71 CR2d 1: §§3.31, 3.46, 3.68, 3.74, 8.4, 10.8, App H
Galbiso v Orosi Pub. Util. Dist. (2008) 167 CA4th 1063, 84 CR3d 788: §§2.77, 2.95, 2.98, 3.86-3.87, 11.2
Galen v County of Los Angeles (9th Cir 2007) 477 F3d 652: §2.71
Gallardo v Speciality Restaurants Corp. (2000) 84 CA4th 463, 100 CR2d 884: §15.12
Gamble v Department of Water & Power (2002) 97 CA4th 253, 118 CR2d 271: §§11.36, 11.42
Ganey v Doran (1987) 191 CA3d 901, 236 CR 787: §§4.34, 8.26, 11.1
Gapusan v Jay (1998) 66 CA4th 734, 78 CR2d 250: §§5.27, 5.29
Garabedian v Los Angeles Cellular Tel. Co. (2004) 118 CA4th 123, 12 CR3d 737: §11.17
Garcia v Hyster Co. (1994) 28 CA4th 724, 34 CR2d 283: §§11.50-11.51
Garcia v Santana (2009) 174 CA4th 464, 94 CR3d 299: §§2.62, 2.75, 3.103, 9.78, 10.70
Garfield Bank v Folb (1994) 25 CA4th 1804, 31 CR2d 239: §4.59
Garg v State Bd. of Equalization (1997) 53 CA4th 199, 61 CR2d 376: §3.95
Gary W. v Louisiana (5th Cir 1980) 622 F2d 804: §15.8
Gates v Collier (5th Cir 1980) 616 F2d 1268, rehearing granted on other grounds (5th Cir 1981) 636 F2d 942: §15.8
Gates v Deukmejian (9th Cir 1992) 987 F2d 1392: §§9.21, 9.51, 9.111, 9.115, 9.123, 10.23-10.24, 10.27, 10.54, 10.56, 10.64, 11.60, 11.66-11.67
Gates v Gomez (9th Cir 1995) 60 F3d 525: §§2.29, 3.20, 9.9, 9.15, 9.24, 9.77, 9.90, 11.49
Gates v Rowland (9th Cir 1994) 39 F3d 1439: §§9.23-9.24, 9.26, 9.77, 9.90, 9.110, 11.60, 16.16
Gebers v State Farm Gen. Ins. Co. (1995) 38 CA4th 1648, 45 CR2d 725: §14.16
Geffen v Moss (1975) 53 CA3d 215, 125 CR 687: §4.36
Gemini Aluminum Corp. v California Custom Shapes, Inc. (2002) 95 CA4th 1249, 116 CR2d 358: §§3.124, 6.6
Gerling Global Reinsurance Corp. v Garamendi (9th Cir 2005) 400 F3d 803, amended (9th Cir 2005) 410 F3d 531, cert denied (2005) 546 US 978, 163 L Ed 2d 462, 126 S Ct 563: §2.102
Ghory v Al-Lahham (1989) 209 CA3d 1487, 257 CR 924: §§3.96, 9.36
Gil v Mansano (2004) 121 CA4th 739, 17 CR3d 420: §§4.25-4.26, 4.50
Gilbert v Master Washer & Stamping Co. (2001) 87 CA4th 212, 104 CR2d 461: §§2.20, 4.59
Gilbert v National Enquirer, Inc. (1997) 55 CA4th 1273, 64 CR2d 659: §§2.47, 2.75, 2.110, 3.122
Gilbrook v City of Westminster (9th Cir 1999) 177 F3d 839: §§2.33, 11.70
Giles v Horn (2002) 100 CA4th 206, 123 CR2d 735: §§2.108, 3.46
Gilliland v Medical Bd. of Cal. (2001) 89 CA4th 208, 106 CR2d 863: §3.92
Gisbrecht v Barnhart (2002) 535 US 789, 152 L Ed 2d 996, 122 S Ct 1817: §§8.30, 8.37, 10.30
Glendale City Employees' Ass'n, Inc. v City of Glendale (1975) 15 C3d 328, 124 CR 513: §5.13
Glendora Community Redev. Agency v Demeter (1984) 155 CA3d 465, 202 CR 389: §§8.6, 8.15, 8.30, 8.33, 11.50
Globalist Internet Technols., Inc v Reda (2008) 167 CA4th 1267, 84 CR3d 725: §§4.63, 9.9, 9.14, 15.15

Glynn v Marquette (1984) 152 CA3d 277, 199 CR 306: §4.47
Godinez v Schwarzenegger (2005) 132 CA4th 73, 33 CR3d 270: §§2.96, 2.103, 2.114, 16.17
Golden W. Baseball Co. v Talley (1991) 232 CA3d 1294, 284 CR 53: §7.27
Gomez v Gates (CD Cal 1992) 804 F Supp 69: §§10.26, 10.48
Gomon v TRW, Inc. (1994) 28 CA4th 1161, 34 CR2d 256: §§2.78, 3.104
Gonzales v ABC Happy Realty, Inc. (1997) 52 CA4th 391, 60 CR2d 566: §§6.4, 6.38, 6.66
Goodell v Ralph's Grocery Co. (ED Cal 2002) 207 F Supp 2d 1124: §§2.75, 3.83, 9.90
Goodman v Lozano (2010) 47 C4th 1327, __CR3d__, disapproving Wakefield v Bohlin (2006) 145 CA4th 963, 52 CR3d 400: §2.47
Goodstone v Southwest Airlines Co. (1998) 63 CA4th 406, 73 CR2d 655: §§6.10, 6.26, 11.72
Gorman v Tassajara Dev. Corp. (2009) 178 CA4th 44, 100 CR3d 152: §§2.20, 9.90, 11.65
Gotro v R&B Realty Group (9th Cir 1995) 69 F3d 1485: §8.30
Gouskos v Aptos Village Garage, Inc. (2001) 94 CA4th 754, 114 CR2d 558: §§2.75, 3.104, 16.6
Graciano v Robinson Ford Sales, Inc. (2006) 144 CA4th 140, 50 CR3d 273: §§2.45, 2.59, 2.75-2.76, 2.84-2.86, 2.99, 2.108, 3.104, 8.4, 8.23, 8.26, 9.45, 9.56, 9.61, 9.94, 9.101, 9.116, 9.122, 10.5, 10.7, 10.14, 10.31, 10.40, 10.53, 10.55, 10.65, 16.17, 16.30
Gracie v Gracie (9th Cir 2000) 217 F3d 1060: §9.66
Graham v DaimlerChrysler Corp. (2004) 34 C4th 553, 21 CR3d 331: §§1.12, 2.3, 2.11, 2.13, 2.44-2.46, 2.84-2.86, 2.96, 2.103, 2.111-2.113, 3.3-3.4, 3.8, 3.13, 3.25, 3.43, 3.58, 3.65, 5.7, 8.4, 9.6, 9.16, 9.20, 9.23, 9.92, 9.111, 9.113, 10.1, 10.3-10.4, 10.8, 10.10, 10.12-10.13, 10.18-10.19, 10.31-10.33, 10.37-10.38, 10.41-10.42, 10.44, 10.50, 10.73, 11.8, 11.47, 11.63, 11.65, 16.17, 16.23-16.24, 16.28, App H
Grano v Barry (DC Cir 1986) 783 F2d 1104: §2.98
Grant v Hartman Ranch Co. (1961) 193 CA2d 497, 14 CR 531: §2.28
Grant v List & Lathrop (1992) 2 CA4th 993, 3 CR2d 654: §§11.21, 16.6
Grant v Martinez (2nd Cir 1992) 973 F2d 96: §§10.54, 10.66
Gray v Don Miller & Assocs. (1984) 35 C3d 498, 198 CR 551: §§7.1, 7.3, 7.6-7.7, 7.9, 7.11, 7.27, 7.31
Green v Administrators of Tulane Educ. Fund (5th Cir 2002) 284 F3d 642: §§9.60, 9.64, 10.35, 10.54, 10.56, 10.73
Green v Mount Diablo Hosp. Dist. (1989) 207 CA3d 63, 254 CR 689: §§4.94, 14.22
Green v Obledo (1984) 161 CA3d 678, 207 CR 830: §§2.4, 2.9, 2.13, 2.15-2.16, 3.11, 3.84, 4.8, 11.1-11.2, 15.5, 16.22
Greene v Dillingham Constr., Inc. (2002) 101 CA4th 418, 124 CR2d 250: §§3.81, 9.23, 9.56, 10.3-10.4, 10.9-10.10, 10.18, 10.42, 10.59, 10.65, 11.8
Gregory v State Bd. of Control (1999) 73 CA4th 584, 86 CR2d 575: §§3.46, 3.58, 3.75, 9.132, 11.21, 11.35
Gribaldo, Jacobs, Jones & Assoc. v Agrippina Versicherunges A.G. (1970) 3 C3d 434, 91 CR 6: §7.23
Grimsley v Board of Supervisors (1985) 169 CA3d 960, 213 CR 108: §§2.58, 2.112, 2.114, 3.44
Guam Soc'y of Obstetricians & Gynecologists v Ada (9th Cir 1996) 100 F3d 691: §§9.9, 9.54, 9.96-9.97, 9.133, 10.25-10.26, 10.48, 11.11, 11.18, 11.53, 15.14
Guardians of Turlock's Integrity v Turlock City Council (1983) 149 CA3d 584, 197 CR 303: §§9.45, 10.62, 10.65, 11.68
Guillemin v Stein (2002) 104 CA4th 156, 128 CR2d 65: §§6.10, 6.17
Guimond v Trans Union Credit Info. Co. (9th Cir 1995) 45 F3d 1329: §§2.78, 3.104
Guinn v Dotson (1994) 23 CA4th 262, 28 CR2d 409: §§9.16, 9.29, 9.118, 11.53
Gumabao, Marriage of (1984) 150 CA3d 572, 198 CR 90: §16.12
Gunlock Corp. v Walk on Water, Inc. (1993) 15 CA4th 1301, 19 CR2d 197: §§11.4, 11.29, 11.40
Gunn v Employment Dev. Dep't (1979) 94 CA3d 658, 156 CR 584: §§3.49, 3.67, 3.71, 3.90, 3.92
Gunther v Lin (2006) 144 CA4th 223, 50 CR3d 317: §2.77
Guseinov v Burns (2006) 145 CA4th 944, 51 CR3d 903: §14.16
Gusman v Unisys Corp. (7th Cir 1993) 986 F2d 1146: §9.121

**H**

Hacienda La Puente Unified Sch. Dist. v Honig (9th Cir 1992) 976 F2d 487: §2.3
Hadley v Krepel (1985) 167 CA3d 677, 214 CR 461: §§4.18, 9.9, 9.67, 9.85, 11.51, 11.58, 11.60, 16.29-16.30, App D, App H
Hadley v Krepel, 167 CA3d at 684: §11.58
Hagans v Levine (1974) 415 US 528, 39 L Ed 2d 577, 94 S Ct 1372: §3.43
Haire v Stevenson (1987) 196 CA3d 1249, 242 CR 433: §§4.77, 9.17
Halaco Eng'g Co. v South Cent. Coast Regional Comm'n (1986) 42 C3d 52, 227 CR 667: §3.92
Hall v Board of Sch. Comm'rs (11th Cir 1983) 707 F2d 464: §11.60
Hall v City of Brawley (SD Cal 1995) 887 F Supp 1333: §8.28
Hall v Cole (1973) 412 US 1, 36 L Ed 2d 702, 93 S Ct 1943: §5.36
Hambrose Reserve, Ltd. v Faitz (1992) 9 CA4th 129, 11 CR2d 638, disapproved on other grounds in Trope v Katz (1995) 11 C4th 274, 45 CR2d 241: §4.62
Hamlin v Charter Township of Flint (6th Cir 1999) 165 F3d 426: §§8.37, 9.50, 10.36, 10.54-10.56, 10.58
Hammond v Agran (2002) 99 CA4th 115, 120 CR2d 646: §§2.60, 2.67, 3.19, 3.31, 3.46, 3.58, 3.66, 3.69, 3.74, 9.20, 9.36, 9.45, 9.53, 9.70, 9.78, 10.31, 10.41, 10.47, 10.67, 12.1
Hamner v Rios (9th Cir 1985) 769 F2d 1404: §§8.34, 11.63
Handgards, Inc. v Ethicon, Inc. (ND Cal 1982) 552 F Supp 820, aff'd (9th Cir 1984) 743 F2d 1282: §9.111
Haneline Pac. Prop., LLC v May (2008) 167 CA4th 311, 83 CR3d 919: §§3.110, 3.115
Hangarter v Paul Revere Life Ins. Co. (ND Cal 2002) 236 F Supp 2d 1069, aff'd in part and rev'd in part on other grounds in Hangarter v Provident Life & Acc. Ins. Co. (9th Cir 2004) 373 F3d 998: §7.10

Hanlon v Chrysler Corp. (9th Cir 1998) 150 F3d 1011: §§8.19, 9.26, 10.28, 10.46, 10.73
Hanrahan v Hampton (1980) 446 US 754, 64 L Ed 2d 670, 100 S Ct 1987: §§2.90, 11.18
Harbor v Deukmejian (1987) 43 C3d 1078, 240 CR 569: §§2.37, 2.86, 2.99-2.100, 3.45, 3.52, 12.6
Harbor View Hills Community Ass'n v Torley (1992) 5 CA4th 343, 7 CR2d 96: §2.6
Harbour Landing-Dolfann, Ltd. v Anderson (1996) 48 CA4th 260, 55 CR2d 640: §§4.51, 9.34, 9.38, 12.3, 12.7, 12.10, 12.16
Harman v City & County of San Francisco (2007) 158 CA4th 407, 69 CR3d 750: §§2.12-2.13, 2.16, 3.129, 8.25-8.27, 9.43-9.45, 9.51, 9.55-9.57, 9.64, 10.3, 10.26, 10.52-10.53, 10.55-10.57, 10.59, 10.64-10.66, 12.7, 12.26, 16.28, App H
Harman v City & County of San Francisco (2006) 136 CA4th 1279, 39 CR3d 589: §§1.12, 10.56, 10.60, 10.63, 11.68
Harrington v Payroll Entertainment Servs., Inc. (2008) 160 CA4th 589, 72 CR3d 922: §§2.75, 2.77, 2.99, 3.97, 8.26, 8.28, 10.56, 10.65
Harris v Marhoefer (9th Cir 1994) 24 F3d 16: §§9.130, 11.44-11.45
Harris v Northwestern Nat'l Ins. Co. (1992) 6 CA4th 1061, 8 CR2d 234: §4.48
Harris v Sandro (2002) 96 CA4th 1310, 117 CR2d 910: §§6.68, 14.11
Hart v Avetoom (2002) 95 CA4th 410, 115 CR2d 511: §§6.14, 6.24, 6.26
Hart v Hart (2002) 95 CA4th 410, 115 CR2d 511: §11.72
Hartford Acc. & Indem. Co. v Indus. Acc. Co. (1932) 216 C 40, 13 P2d 699: §4.48
Harvard Inv. Co. v Gap Stores, Inc. (1984) 156 CA3d 704, 202 CR 891: §§4.74, 4.79
Hasbrouck v Texaco, Inc. (9th Cir 1989) 879 F2d 632: §§2.29, 3.20, 8.27, 9.15
Hasler v Howard (2005) 130 CA4th 1168, 30 CR3d 714: §§4.55, 4.83, 9.38
Hasler v Howard (2004) 120 CA4th 1023, 16 CR3d 217: §§4.26, 4.55, 4.83
Haworth v Nevada (9th Cir 1995) 56 F3d 1048: §10.60
Hayward v Ventura Volvo (2003) 108 CA4th 509, 133 CR2d 514: §§3.104, 8.26, 8.30, 8.36
Head, In re (1986) 42 C3d 223, 228 CR 184: §§2.85, 3.4, 3.6, 3.29, 3.32
Heather Farms Homeowners Ass'n v Robinson (1994) 21 CA4th 1568, 26 CR2d 758: §§2.79, 2.103, 2.110, 4.22
Heckert v MacDonald (1989) 208 CA3d 832, 256 CR 369: §7.7
Heiar v Crawford County (7th Cir 1984) 746 F2d 1190: §11.67
Hendrix v Naphtal (9th Cir 1992) 971 F2d 398: §6.17
Henneberque v City of Culver City (1985) 172 CA3d 837, 218 CR 704: §§3.46, 3.58, 3.75, 16.10
Henry v Amrol, Inc. (1990) 222 CA3d Supp 1, 272 CR 134: §3.96
Henry v Gill Indus. (9th Cir 1993) 983 F2d 943: §6.55
Henry v Webermeier (7th Cir 1984) 738 F2d 188: §§9.28-9.29, 9.123, 9.130
Hensley v Eckerhart (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933: §§2.45, 2.52, 2.84, 2.86-2.87, 2.100, 8.25, 9.3-9.5, 9.8, 9.50-9.51, 9.54-9.55, 9.57, 9.88, 10.25, 10.37, 10.39, 10.52, 10.54-10.56, 10.61, 10.64, 10.66, 11.18, 11.46, 11.48, 11.66, App H
Heppler v J.M. Peters Co. (1999) 73 CA4th 1265, 87 CR2d 497: §4.46
Heritage Eng'g Constr. v City of Industry (1998) 65 CA4th 1435, 77 CR2d 459: §2.6
Herr v Nestle, Inc. (2003) 109 CA4th 779, 135 CR2d 477: §§3.46, 3.80, 9.36
Herrgott v U.S. Dist. Court (9th Cir 2002) 306 F3d 726: §8.17
Herrington v County of Sonoma (9th Cir 1989) 883 F2d 739: §2.13
Heston v City of Salinas (ND Cal, Jan. 30, 2009, No. C 05-03658 JW) 2009 US Dist Lexis 10096: §§3.48, 3.56-3.58, 3.67, 3.70, 3.75
Hewitt v Helms (1987) 482 US 755, 96 L Ed 2d 654, 107 S Ct 2672: §2.100
Hewlett v Squaw Valley Ski Corp. (1997) 54 CA4th 499, 63 CR2d 118: §§3.46, 3.63-3.64
Hightower v Superior Court (2001) 86 CA4th 1415, 104 CR2d 209: §§2.90, 4.94, 11.19, 14.13
Hillery v Rushen (9th Cir 1983) 702 F2d 848: §11.18
Hillman v Leland E. Burns, Inc. (1989) 209 CA3d 860, 257 CR 535: §§4.57-4.58, 7.23, 9.40
Hilltop Inv. Assoc. v Leon (1994) 28 CA4th 462, 33 CR2d 552: §4.88
Historical Research v Cabral (9th Cir 1996) 80 F3d 377: §2.73
Hobson v Orthodontic Ctrs. of Am. (ED Cal, June 19, 2007, No. CIV. S-02-0886 WBS PAN) 2007 US Dist Lexis 44710: §12.27
Hogar Dulce Hogar v Community Dev. Comm'n (2007) 157 CA4th 1358, 69 CR3d 250: §§2.88, 2.111, 2.114, 3.13, 9.6, 9.16, 9.50, 9.56, 10.40, 10.53, 10.55, 16.30, App H
Holland v Roeser (9th Cir 1994) 37 F3d 501: §§11.8, 11.69
Hollaway v Edwards (1998) 68 CA4th 94, 80 CR2d 166: §11.30
Holtz v San Francisco BART (1976) 17 C3d 648, 131 CR 646: §9.37
Hon v Marshall (1997) 53 CA4th 470, 62 CR2d 11: §§2.70, 2.101, 3.80
Honey Baked Hams, Inc. v Dickens (1995) 37 CA4th 421, 43 CR2d 595: §4.18
Hoover Community Hotel Dev. Corp. v Thomson (1985) 168 CA3d 485, 214 CR 264: §§2.5, 11.3
Horning v Shilberg (2005) 130 CA4th 197, 29 CR3d 717: §§8.33, 8.36, 11.69
Horsford v Board of Trustees (2005) 132 CA4th 359, 33 CR3d 644: §§3.81, 8.4, 8.6, 8.34, 8.36, 9.2-9.3, 9.31, 9.36, 9.45, 9.72-9.73, 9.82-9.83, 9.115, 9.123, 10.3-10.4, 10.6, 10.9-10.10, 10.14, 10.41-10.42, 10.47-10.48, 10.50, 10.72, 11.48, 11.50, 12.7, 16.24, 16.29-16.30, App D
Hospital Sys. v Office of Statewide Health Planning & Dev. (1994) 25 CA4th 1686, 30 CR2d 922: §§3.34, 13.2
Hristov, U.S. v (9th Cir 2005) 396 F3d 1044: §11.53
Hsu v Abbara (1995) 9 C4th 863, 39 CR2d 824: §§2.85, 4.11, 4.21, 4.35, 4.55, 4.69, 4.71-4.73, 4.83, 4.88, 7.34
Hubbard v SoBreck LLC (9th Cir 2009): §§2.10, 2.71, 2.75, 2.78, 3.83

Huber v Shedoudy (1919) 180 C 311, 181 P 63: §§7.3, 7.18-7.19
Hudson v Moore Bus. Forms, Inc. (9th Cir 1987) 836 F2d 1156: §6.16
Hughes v Rowe (1980) 449 US 5, 66 L Ed 2d 163, 101 S Ct 173: §2.71
Hull v Rossi (1993) 13 CA4th 1763, 17 CR2d 457: §§2.64, 2.99, 3.19, 3.25, 3.40, 3.46, 3.56, 3.65, 3.75
Hunt v Fahnestock (1990) 220 CA3d 628, 269 CR 614: §§2.47, 4.75
Huntington Landmark Adult Community Ass'n v Ross (1989) 213 CA3d 1012, 261 CR 875: §§2.42, 4.34, 9.79, 11.1
Huskinson & Brown v Wolf (2004) 32 C4th 453, 9 CR3d 693: §1.19
Hutto v Finney (1978) 437 US 678, 57 L Ed 2d 522, 98 S Ct 2565: §§2.36, 2.41, 15.9
Hutton v Hafif (2007) 150 CA4th 527, 59 CR3d 109: §3.111
Hyde v Small (7th Cir 1997) 123 F3d 583: §10.56
Hydratec, Inc. v Sun Valley 260 Orchard & Vineyard Co. (1990) 223 CA3d 924, 272 CR 899: §§11.4, 11.22, 11.40, 11.45
Hypolite v Carleson (1975) 52 CA3d 566, 125 CR 221: §§3.84, 9.95

**I**

Image Tech. Serv. v Eastman Kodak Co. (9th Cir 1998) 136 F3d 1354: §§1.20, 2.68, 11.11, 11.70
Imperial Bank v Pim Elec., Inc. (1995) 33 CA4th 540, 39 CR2d 432: §§4.5, 4.62, 9.27, 9.33, 15.15
Imran Q., In re (2008) 158 CA4th 1316, 71 CR3d 121: §3.108
Imwalle v Reliance Med. Prods., Inc. (6th Cir 2008) 515 F3d 531: §§9.29, 9.56, 9.88, 10.54, 10.66
Independent Fed'n of Flight Attendants v Zipes (1989) 491 US 754, 105 L Ed 2d 639, 109 S Ct 2732: §2.39
In re _____ (*see* name of party)
Insurance Co. of N. Am. v Moore (9th Cir 1986) 783 F2d 1326: §§2.6, 3.108, 7.9
Intel Corp. v Terabyte Int'l (9th Cir 1993) 6 F3d 614: §§11.49, 11.66, 16.16
International Billing Servs., Inc. v Emigh (2000) 84 CA4th 1175, 101 CR2d 532: §§2.24, 4.55-4.56, 4.59
International Indus., Inc. v Olen (1978) 21 C3d 218, 145 CR 691: §§4.10-4.11, 4.21, 4.83
International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc. (1999) 69 CA4th 287, 81 CR2d 456: §§2.53, 2.59, 3.86, 8.6, 9.36, 9.97
International Rectifier Corp. v Samsung Electronics Co. (Fed Cir 2005) 424 F3d 1235: §§2.28, 4.43, 9.8
Islamic Ctr. v City of Starkville (5th Cir 1989) 876 F2d 465: §§9.111, 10.50

**J**

Jackson v Homeowners Ass'n (2001) 93 CA4th 773, 113 CR2d 363: §§4.77, 4.83, 4.86
Jacobson v Delta Airlines, Inc. (9th Cir 1984) 742 F2d 1202: §7.33
Jacobson v Simmons Real Estate (1994) 23 CA4th 1285, 28 CR2d 699: §2.22
Jaffe v Pacelli (2008) 165 CA4th 927, 82 CR3d 423: §§9.9, 9.14, 15.15
Jaffe v Redmond (7th Cir 1998) 142 F3d 409: §9.44
Jalali v Root (2003) 109 CA4th 624, 135 CR2d 168: §1.24
Jankey v Poop Deck (9th Cir 2008) 537 F3d 1122: §§2.3, 2.58, 2.65, 9.78, 11.8
Java Oil Ltd. v Sullivan (2008) 168 CA4th 1178, 86 CR3d 177: §15.2
Jean, Commissioner v (1990) 496 US 154, 110 L Ed 2d 134, 110 S Ct 2316: §§2.88, 9.16
Jeff D. v Andrus (9th Cir 1989) 899 F2d 753: §§9.24, 11.11
Jeff D. v Kempthorne (9th Cir 2004) 365 F3d 844: §§9.24, 11.11
Jenkins v Missouri (8th Cir 1997) 127 F3d 709: §§9.24, 9.46
Jenkins v Missouri (8th Cir 1991) 931 F2d 1273: §§9.133, 10.51
Jensen v BMW of N. Am., Inc. (1995) 35 CA4th 112, 41 CR2d 295: §9.125
Jernigan v Ford Motor Co. (1994) 24 CA4th 488, 29 CR2d 348: §9.36
Jerry M. Lewis Truck Parts & Equip., U.S. v (9th Cir 1996) 89 F3d 574: §§11.11, 11.15, 11.70
Jobe v City of Orange (2001) 88 CA4th 412, 105 CR2d 782: §3.76
John K., In re (1985) 170 CA3d 783, 216 CR 557: §§3.90, 3.92
Johnson v Georgia Highway Express (5th Cir 1974) 488 F2d 714: §§10.26, 11.66
Johnson v Lewis (2004) 120 CA4th 443, 15 CR3d 507: §6.64
Johnson v Tago, Inc. (1986) 188 CA3d 507, 233 CR 503: §§5.5, 5.53
Johnson v University College (11th Cir 1983) 706 F2d 1205: §§9.28, 9.74, 9.87, 11.56
Johnston v Comerica Mortgage Corp. (8th Cir 1996) 83 F3d 241: §10.28
Johnston v Corrigan (2005) 127 CA4th 553, 25 CR3d 657: §11.69
Jones v Drain (1983) 149 CA3d 484, 196 CR 827: §§4.45-4.46, 4.51
Jones v Dumrichob (1998) 63 CA4th 1258, 74 CR2d 607: §§11.45-11.46
Jones v Espy (9th Cir 1993) 10 F3d 690: §9.80
Jones v Humanscale Corp. (2005) 130 CA4th 401, 29 CR3d 881: §14.17
Jones v Tracy Sch. Dist. (1980) 27 C3d 99, 165 CR 100: §§1.23, 2.51, 3.97, 8.26, 10.56
Jones v Union Bank (2005) 127 CA4th 542, 25 CR3d 783: §§4.26, 4.55, 4.72, 9.38, 9.47, 11.59, 11.68, 12.1, 16.25
Jordan v DMV (2002) 100 CA4th 431, 123 CR2d 122: §§5.7, 5.13-5.14, 5.21, 14.3
Jordan v Department of Justice (DC Cir 1982) 691 F2d 514: §§9.87, 9.103, 10.15, 11.49
Jordan v Multnomah County (9th Cir 1987) 815 F2d 1258: §§9.5, 9.88, 10.48, 11.53
Jordan v U.S. Dep't of Justice (DC Cir 1982) 691 F2d 514: §2.67
Jue v Patton (1995) 33 CA4th 456, 39 CR2d 364: §4.84

Jutkowitz v Bourns, Inc. (1981) 118 CA3d 102, 173 CR 248: §§5.22, 5.42, 5.49, 8.3, 8.9, 10.8

**K**

Kachlon v Markowitz (2008) 168 CA4th 316, 85 CR3d 532: §4.51
Kahn v Chetcuti (2002) 101 CA4th 61, 123 CR2d 606: §§14.7-14.8
Kalai v Gray (2003) 109 CA4th 768, 135 CR2d 449: §§4.20, 4.54, 14.2, 14.4, 14.22
Kangarlou v Progressive Title Co. (2005) 128 CA4th 1174, 27 CR3d 754: §4.51
Kaplan v Industrial Indem. Co. (1978) 79 CA3d 700, 145 CR 219: §§5.29, 8.38
Karam v City of Burbank (9th Cir 2003) 352 F3d 1188: §2.71
Karton v Dougherty (2008) 171 CA4th 133, 89 CR3d 506: §11.26
Katz v Los Gatos-Saratoga Joint Union High Sch. Dist. (2004) 117 CA4th 47, 11 CR3d 546: §§9.33, 11.3, 11.43, 12.1
Kay v Ehrler (1991) 499 US 432, 113 L Ed 2d 486, 111 S Ct 1435: §2.21
Kearney v Foley & Lardner (SD Cal, Mar. 18, 2008, No. 05-CV-2112) 2008 US Dist Lexis 21115: §§3.110, 3.117
Keith v Volpe (9th Cir 1987) 833 F2d 850: §9.24
Keith v Volpe (CD Cal 1986) 644 F Supp 1317, aff'd (9th Cir 1988) 858 F2d 467: §§1.12, 2.10, 3.33
Keith v Volpe (CD Cal 1980) 501 F Supp 403: §9.111
Kelley v Bredelis (1996) 45 CA4th 1819, 53 CR2d 536: §§4.26, 14.4
Kennedy v Applause, Inc. (9th Cir 1996) 90 F3d 1477: §16.6
Kentucky v Graham (1985) 473 US 159, 87 L Ed 2d 114, 105 S Ct 3099: §§2.36-2.37, 15.9
Kern River Pub. Access Comm. v City of Bakersfield (1985) 170 CA3d 1205, 217 CR 125: §§2.58, 3.4, 3.45, 8.4, 9.10, 9.90-9.91, 10.4, 10.8, 10.32, 10.72, 11.59, 11.63, 11.65, App D, App H
Kerr v Screen Extras Guild, Inc. (9th Cir 1975) 526 F2d 67: §§9.104, 11.66
Ketchum v Moses (2001) 24 C4th 1122, 104 CR2d 377: §§1.12, 1.18, 2.11, 2.13, 2.75, 3.112, 3.116, 8.2, 8.4, 9.3, 9.9, 9.16, 9.20, 9.27, 9.92-9.93, 9.104, 9.109, 9.116, 10.1-10.3, 10.5, 10.10, 10.18, 10.21, 10.31, 10.41-10.42, 10.47-10.48, 10.50, 10.73, 11.65, 11.68-11.69, 15.15, 16.24, 16.28, App D, App H, App J
Ketchum v Moses (2001) 24 C4th 1122, 104 CR2d 377: §3.110
Kientzy v McDonnell Douglas Corp. (8th Cir 1993) 990 F2d 1051: §10.26
Kievlan v Dahlberg Elecs. (1978) 78 CA3d 951, 144 CR 585: §2.6
Kilgour v City of Pasadena (9th Cir 1995) 53 F3d 1007, disapproved on other grounds in Buckhannon Bd. & Care Home, Inc. v West Va. Dep't of Health Resources (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835: §§2.97, 2.103, 2.114
Kim v Euromotors West/The Auto Gallery (2007) 149 CA4th 170, 56 CR3d 780: §§2.79, 2.103, 2.108, 3.104, 4.22
Kim v Kang (9th Cir 1998) 154 F3d 996: §4.26
Kim v Walker (1989) 208 CA3d 375, 256 CR 223: §6.64
Kindt v Otis Elevator Co. (1995) 32 CA4th 452, 38 CR2d 121: §5.29
King v McCord (11th Cir 1983) 707 F2d 466: §11.60
Kinney v IBEW (9th Cir 1991) 939 F2d 690: §§5.51, 9.19-9.20, 10.48
Kistler v Redwoods Community College Dist. (1993) 15 CA4th 1326, 19 CR2d 417: §3.91
Kletzelman v Capistrano Unified Sch. Dist. (9th Cir 1995) 91 F3d 68: §13.10
Knisley v Network Assocs., Inc. (9th Cir 2002) 312 F3d 1123: §11.17
Knoff v City & County of San Francisco (1969) 1 CA3d 184, 81 CR 683: §§5.36, 5.41, 5.43, 5.48-5.49, 5.52, 11.70
Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr. (1998) 19 C4th 851, 80 CR2d 803: §6.4
Komarova v National Credit Acceptance, Inc. (2009) 175 CA4th 324, 95 CR3d 880: §§3.104, 8.4, 10.2, 10.4, 10.10, 10.39, 10.67
Korech v Hornwood (1997) 58 CA4th 1412, 68 CR2d 637: §§4.37, 4.43, 4.77, 4.82, 4.99, 8.23
Kowis v Howard (1992) 3 C4th 888, 12 CR2d 728: §2.19
Kray Cabling Co. v County of Contra Costa (1995) 39 CA4th 1588, 46 CR2d 674: §16.1
Kreutzer v County of San Diego (1984) 153 CA3d 62, 200 CR 322: §§2.15, 2.68, 2.103, 11.1
Kroff v Larson (1985) 167 CA3d 857, 213 CR 526: §4.95
Krug v Maschmeier (2009) 172 CA4th 796, 91 CR3d 452: §§2.50, 2.55, 2.74
Krumme v Mercury Ins. Co. (2004) 123 CA4th 924, 20 CR3d 485: §§3.46, 10.3-10.4, 10.8, 10.38, 10.53
Kunec v Brea Redev. Agency (1997) 55 CA4th 511, 64 CR2d 143: §§2.92, 3.85, 10.62
Kwan v Mercedes-Benz (1994) 23 CA4th 174, 28 CR2d 371: §§2.92, 3.104, 10.62
Kyle v Campbell Soup Co. (9th Cir 1994) 28 F3d 928: §11.44
Kyle v Carmon (1999) 71 CA4th 901, 84 CR2d 303: §§3.113, 4.85
Kytasty v Godwin (1980) 102 CA3d 762, 162 CR 556: §4.88

**L**

L.H. v Schwarzenegger (ED Cal: §§9.9, 9.92, 9.115, 9.119, 9.133
La Mesa-Spring Valley Sch. Dist. v Otsuka (1962) 57 C2d 309, 19 CR 479: §9.6
La Raza Unida v Volpe (ND Cal 1972) 57 FRD 94, aff'd (9th Cir 1973) 488 F2d 559: §3.39
La Raza Unida v Volpe (ND Cal 1982) 545 F Supp 36: §15.8
LaChapelle v Toyota Motor Credit (2002) 102 CA4th 977, 126 CR2d 32: §§2.75, 3.104
Laborde v Aronson (2001) 92 CA4th 459, 112 CR2d 119: §§2.20, 6.21, 6.49
Labotest, Inc. v Bonta (9th Cir 2002) 297 F3d 892: §2.104
Lachkar v Lachkar (1986) 182 CA3d 641, 227 CR 501: §§4.94, 14.22, 16.2
Lafarge Conseils et Etudes S.A. v Kaiser Cement & Gypsum Corp. (9th Cir 1986) 791 F2d 1334: §14.24

Lafayette Morehouse, Inc. v Chronicle Publishing Co. (1995) 39 CA4th 1379, 46 CR2d 542: §§3.111, 3.117, 9.85, 11.50
Lakin v Watkins Assoc. Indus. (1993) 6 C4th 644, 25 CR2d 109: §§16.1, 16.10
Land v Anderson (1997) 55 CA4th 69, 63 CR2d 717: §§3.47, 3.84, 9.7, 13.16, 16.26
Landgraf v USI Film Prods. (1994) 511 US 244, 128 L Ed 2d 229, 114 S Ct 1483: §2.7
Landis v Pinkertons, Inc. (2004) 122 CA4th 985, 18 CR3d 890: §14.18
Lane v Residential Funding Corp. (9th Cir 2003) 323 F3d 739: §§2.71, 2.73
Lanni v New Jersey (3d Cir 2001) 259 F3d 146: §§9.111, 10.41
Lanyi v Goldblum (1986) 177 CA3d 181, 223 CR 32: §11.8
Lanza, Estate of (1964) 229 CA2d 720, 40 CR 528: §9.121
Larez v Holcomb (9th Cir 1994) 16 F3d 1513: §§9.46, 10.62
Las Palmas Assoc. v Las Palmas Ctr. Assoc. (1991) 235 CA3d 1220, 1 CR2d 301: §4.98
Laurel Heights Improvement Ass'n v Regents of Univ. of Cal. (1988) 47 C3d 376, 253 CR 426: §§2.90, 2.93, 3.42, 3.46, 3.53, 3.91, 9.43, 9.45, 10.65, 11.19, 12.1, 12.8, 16.21, App D
Lawrence Tractor Co. v Carlisle Ins. Co. (1988) 202 CA3d 949, 249 CR 150: §4.48
Le Blanc v Swoap (1976) 16 C3d 741, 129 CR 304: §3.84
Le Francois v Goel (2005) 35 C4th 1094, 29 CR3d 249: §11.69
LeBlanc-Sternberg v Fletcher (2d Cir 1998) 143 F3d 748: §9.64
LeVine v Weis (2001) 90 CA4th 201, 108 CR2d 562, disapproved on other grounds in Wells v One2One Learning Found. (2006) 39 C4th 1164, 48 CR3d 108: §§2.92, 3.127, 9.56, 9.64, 9.66, 10.62
Leach v Home Sav. & Loan Ass'n (1986) 185 CA3d 1295, 230 CR 553: §§4.45-4.46
Leaf v Phil Rauch, Inc. (1975) 47 CA3d 371, 120 CR 749: §§3.104, 9.38
Leaf v City of San Mateo (1984) 150 CA3d 1184, 198 CR 447, disapproved on other grounds in Trope v Katz (1995) 11 C4th 274, 45 CR2d 241: §8.32
Lealao v Beneficial Cal., Inc. (2000) 82 CA4th 19, 97 CR2d 797: §§1.12, 1.18, 5.6, 5.25, 8.9, 8.13-8.14, 8.33, 8.38, 10.3, 10.9, 10.39-10.41, 10.67, 10.73, 11.13, 16.24, 16.30
Leamon v Krajkiewcz (2003) 107 CA4th 424, 132 CR2d 362: §§4.20, 4.54
Lee v Wells Fargo Bank (2001) 88 CA4th 1187, 106 CR2d 726: §§11.40, 11.45
Leiserson v City of San Diego (1988) 202 CA3d 725, 249 CR 28: §§2.85-2.86, 11.47
Lerner v Ward (1993) 13 CA4th 155, 16 CR2d 486: §§4.3, 4.26, 4.51, 4.65
Leslie's Pool Mart, Inc. v Department of Food & Agric. (1990) 223 CA3d 1524, 273 CR 373: §3.91
Lesser v Huntington Harbor Corp. (1985) 173 CA3d 922, 219 CR 562: §6.39
Leuzinger v County of Lake (ND Cal, March 27, 2009, No. C 06-00398 SBA) 2009 US Dist Lexis 29843: §§3.81, 10.5, 10.8, 10.10, 10.31, 10.36, 10.38, 10.42, 10.47, 10.67, 10.72-10.73
Levine v Pollack (1995) 37 CA4th 129, 43 CR2d 491: §6.59
Levy v Blum (2001) 92 CA4th 625, 112 CR2d 144: §§6.8, 6.15
Lewin v Board of Trustees (1976) 62 CA3d 977, 133 CR 385: §§2.47, 2.108
Lewis v Alpha Beta Co. (1983) 141 CA3d 29, 189 CR 840: §§4.43, 4.77
Lewis v Anderson (9th Cir 1982) 692 F2d 1267: §§5.7, 5.37-5.38
Lezama v Justice Court (1987) 190 CA3d 15, 235 CR 238: §3.24
Li v Majestic Indus. Hills LLC (2009) 177 CA4th 585, 95 CR3d 334: §§6.26-6.27
Library of Congress v Shaw (1986) 478 US 310, 92 L Ed 2d 250, 106 S Ct 2957: §§9.112, 9.134
Lightfoot v Walker (7th Cir 1986) 797 F2d 505: §15.13
Ligon v State Personnel Bd. (1981) 123 CA3d 583, 176 CR 717: §3.46
Lindelli v Town of San Anselmo (2006) 139 CA4th 1499, 43 CR3d 707: §§2.32, 2.48, 3.42, 3.45-3.46, 3.53, 3.74-3.75, 9.16, 9.36, 9.44, 11.11, 11.15-11.16, 11.70, 12.1, 12.6, 12.13, 12.17, 16.12, 16.21
Lindenstadt v Staff Builders, Inc. (1997) 55 CA4th 882, 64 CR2d 484: §9.43
Lindy Bros. Builders v American Radiator & Standard Sanitary Corp. (Lindy II) (3d Cir 1976) 540 F2d 102: §§5.51, 9.19
Linsley v Twentieth Century Fox Film Corp. (1999) 75 CA4th 762, 89 CR2d 429: §2.70
Lipsett v Blanco (1st Cir 1992) 975 F2d 934: §§9.30, 9.110, 10.54, 10.64
Liton Gen. Eng'g Contractor, Inc. v United Pac. Ins. (1993) 16 CA4th 577, 20 CR2d 200: §§9.61, 9.66, 9.69
Liu v Moore (1999) 69 CA4th 745, 81 CR2d 807: §3.113
Llamas v Diaz (1990) 218 CA3d 1043, 267 CR 427: §6.31
Lobatz v U.S. W. Cellular, Inc. (9th Cir 2000) 222 F3d 1142: §§11.17, 11.49, 11.53, 11.55
Loduca v Polyzos (2007) 153 CA4th 334, 62 CR3d 780: §4.43
Loggerhead Turtle v County Council (11th Cir 2002) 307 F3d 1318: §2.117
Lolley v Campbell (2002) 28 C4th 367, 121 CR2d 571: §§2.26, 3.96, 4.59, 8.36
London v Dri-Honing Corp. (2004) 117 CA4th 999, 12 CR3d 240: §§6.54, 9.18
Long Beach City Employees Ass'n v City of Long Beach (1981) 120 CA3d 950, 172 CR 277: §§11.52, 11.63
Longval v WCAB (1996) 51 CA4th 792, 59 CR2d 463: §§2.22, 13.21
Lopez v San Francisco Unified Sch. Dist. (ND Cal 2005) 385 F Supp 2d 981: §§9.9, 9.77, 9.90, 9.108, 9.121, 9.130, 10.66
Los Angeles Police Protective League v City of Los Angeles (1986) 188 CA3d 1, 232 CR 697: §§2.86, 3.4, 3.31, 3.38, 3.40, 3.42, 3.49, 3.56-3.57, 3.65-3.67, 3.73-3.74, 9.45, 9.70, 11.47, 12.8, 16.21
Los Angeles Police Protective League v City of Los Angeles (1985) 166 CA3d 55, 212 CR 251: §3.91
Los Angeles Times v Alameda Corridor Transp. Auth. (2001) 88 CA4th 1381, 107 CR2d 29: §§2.76, 2.99, 3.87, 11.37, 16.10
Los Angeles Times Communications, LLC v Los Angeles County Bd. of Supervisors (2003) 112 CA4th 1313, 5 CR3d 776: §§2.51,

2.53, 2.55, 2.60, 3.86
Loube v Loube (1998) 64 CA4th 421, 74 CR2d 906: §4.26
Louis Cairo (1984) FEHC Dec No. 84-04, FEHC Precedential Decisions CEB 3 (Cal CEB 1984-1985): §13.7
Lovett v Carrasco (1998) 63 CA4th 48, 73 CR2d 496: §5.30
Lubner v City of Los Angeles (1996) 45 CA4th 525, 53 CR2d 24: §§7.8, 7.32
Lucas v White (ND Cal 1999) 63 F Supp 2d 1046: §9.23
Lucchesi v City of San Jose (1980) 104 CA3d 323, 163 CR 700: §§3.43, 3.51, 3.67
Lucht v Molalla River Sch. Dist. (9th Cir 2000) 225 F3d 1023: §13.10
Luck v Southern Pac. Transp. Co. (1990) 218 CA3d 1, 267 CR 618: §3.76
Ludwig v Superior Court (1995) 37 CA4th 8, 43 CR2d 350: §§3.111, 12.7
Lugo, In re (2008) 164 CA4th 1522, 80 CR3d 521: §§2.92, 10.3-10.4, 10.8, 10.32, 10.37-10.38, 10.62, 10.67-10.69, 10.72, 16.23
Luke v Baldwin-United Corp. (1985) 167 CA3d 664, 213 CR 654: §6.33
Lunday v City of Albany (2d Cir 1994) 42 F3d 131: §10.56
Luque v Herrera (2000) 81 CA4th 558, 96 CR2d 853: §5.29
Lussier v Dollar Tree Stores, Inc. (9th Cir 2008) 518 F3d 1062: §2.50
Lyons v Chinese Hosp. Ass'n (2006) 136 CA4th 1331, 39 CR3d 550: §§2.45, 2.56, 2.85-2.86, 2.99, 2.103, 2.111, 3.7, 3.25, 3.38, 3.63, 3.66-3.67, 3.72, 3.74, 3.79, 14.24, 16.17
Lytle v Carl (9th Cir 2004) 382 F3d 978: §§8.27, 9.88, 9.121, 11.45, 11.49

**M**

M. Perez Co. v Base Camp Condominiums Ass'n No. One (2003) 111 CA4th 456, 3 CR3d 563: §4.55
M.C. & D. Capital Corp. v Gilmaker (1988) 204 CA3d 671, 251 CR 178: §§8.23, 9.17, 9.34, 12.4, 12.15
MBNA Am. Bank v Gorman (2006) 147 CA4th Supp 1, 54 CR3d 724: §§2.93, 3.11, 3.19, 3.45, 3.54, 3.57-3.58, 3.75, 4.37, 4.94, 9.9, 9.93, 9.105, 9.114, 9.121, 12.7, 14.21, 14.24
MST Farms v C.G. 1464 (1988) 204 CA3d 304, 251 CR 72: §§9.17, 9.34, 12.2, 12.15
Mabee v Nurseryland Garden Ctrs. (1979) 88 CA3d 420, 152 CR 31: §§7.3, 7.18-7.19, 11.6, 11.26, 11.64
MacFarlane & Lang, Marriage of (1992) 8 CA4th 247, 10 CR2d 157: §9.36
Macias v Hartwell (1997) 55 CA4th 669, 64 CR2d 222: §§2.24, 3.111
Mack v Younger (1980) 27 C3d 687, 165 CR 876: §12.6
Mackinder v OSCA Dev. Co. (1984) 151 CA3d 728, 198 CR 864: §4.34
Maine v Thiboutot (1980) 448 US 1, 65 L Ed 2d 555, 100 S Ct 2502: §2.12
Major v Silna (2005) 134 CA4th 1485, 36 CR3d 875: §3.111
Maldonado v Lehman (9th Cir 1987) 811 F2d 1341: §§9.97, 9.120
Maloney v City of Marietta (11th Cir 1987) 822 F2d 1023: §2.53
Malovec v Hamrell (1999) 70 CA4th 434, 82 CR2d 712: §§6.26, 6.28
Mandel v Hodges (1976) 54 CA3d 596, 127 CR 244: §§5.36, 5.43, 5.52, 9.41, 10.31
Mandel v Lackner (1979) 92 CA3d 747, 155 CR 269: §§8.8, 9.2, 9.16, 9.19, 9.41, 9.121, 10.4, 10.13, 10.43, 11.51, 11.53, 12.12
Mandel v Myers (1981) 29 C3d 531, 174 CR 841: §§15.4-15.6
Mangano v Verity, Inc. (2008) 167 CA4th 944, 84 CR3d 526: §§2.70, 2.78, 2.80, 11.8
Mangold v PUC (9th Cir 1995) 67 F3d 1470: §§1.12, 2.10, 8.10, 9.20
Manier v Anaheim Bus. Ctr. Co. (1984) 161 CA3d 503, 207 CR 508: §§4.37, 4.45, 4.51, 11.1
Mann v Quality Old Time Serv., Inc. (2006) 139 CA4th 328, 42 CR3d 607: §§2.48, 2.75, 3.118
Mann v Superior Court (1942) 53 CA2d 272, 127 P2d 970: §2.28
Manning v Sifford (1980) 111 CA3d 7, 168 CR 387: §7.1
Manson v Reed (1986) 186 CA3d 1493, 231 CR 446: §16.17
Mantolete v Bolger (9th Cir 1986) 791 F2d 784: §§2.90, 11.18
Maple Props. v Harris (1984) 158 CA3d 997, 205 CR 532: §§6.64-6.65, 6.71-6.72, 8.21
Mapstead v Anchundo (1998) 63 CA4th 246, 73 CR2d 602: §§2.92, 2.114
Marbled Murrelet v Babbitt (9th Cir 1999) 182 F3d 1091: §2.71
Marcus & Millichap Real Estate Inv. Brokerage Co. v Woodman Inv. Group (2005) 129 CA4th 508, 28 CR3d 584: §14.24
Mardirossian & Assocs., Inc. v Ersoff (2007) 153 CA4th 257, 62 CR3d 665: §§1.20, 9.83, 10.3, 11.50, 11.53, 16.26
Marek v Chesny (1985) 473 US 1, 87 L Ed 2d 1, 105 S Ct 3012: §10.60
Margolin v Regional Planning Comm'n (1982) 134 CA3d 999, 185 CR 145: §§9.73, 9.83, 9.95, 9.103, 9.121, 10.68, 11.55
Maria P. v Riles (1987) 43 C3d 1281, 240 CR 872: §§2.5, 2.46-2.47, 2.85, 2.99, 2.105, 2.108, 3.4, 3.6, 3.13, 3.47, 3.53, 8.4, 9.36, 11.3, 11.20-11.21, 11.63, 11.65, 11.68, 16.17
Marin Hosp. Dist. v Department of Health (1979) 92 CA3d 442, 154 CR 838: §3.92
Marina Glencoe v Neue Sentimental Film AG (2008) 168 CA4th 874, 85 CR3d 800: §4.83
Marine Forests Soc'y v California Coastal Comm'n (2008) 160 CA4th 867, 74 CR3d 32: §§2.45, 2.86, 2.99, 2.111
Marini v Municipal Court (1979) 99 CA3d 829, 160 CR 465: §§3.32, 3.67, 11.3, 11.21, 16.11
Marks v Clarke (9th Cir 1996) 102 F3d 1012: §§2.90, 2.93, 11.18
Marlow v Orange County Human Servs. Agency (1980) 110 CA3d 290, 167 CR 776: §3.92
Marriage of _____ (*see* name of parties)
Marron v Superior Court (2003) 108 CA4th 1049, 134 CR2d 358: §§1.7, 3.4, 3.106
Martin v California Dep't of Veterans Affairs (9th Cir 2009) 560 F3d 1042: §2.49
Martin v Franklin Capital Corp. (2005) 546 US 132, 163 L Ed 2d 547, 126 S Ct 704: §2.50

Martin v Hadix (1999) 527 US 343, 144 L Ed 2d 347, 119 S Ct 1998: §2.7
Martin v Heckler (11th Cir 1985) 773 F2d 1145: §2.61
Martin v Szeto (2004) 32 C4th 445, 9 CR3d 687: §§3.107, 6.5
Martin, 32 C4th at 451 n7: §6.5
Martino v Denevi (1986) 182 CA3d 553, 227 CR 354: §§9.83, 11.50-11.51, 11.53, 11.63
Martorana v Marlin & Saltzman (2009) 175 CA4th 685, 96 CR3d 172: §6.26
Mason, Marriage of (1996) 46 CA4th 1025, 54 CR2d 263: §6.69
Masson v New Yorker Magazine, Inc. (9th Cir 1989) 895 F2d 1535, rev'd on other grounds (1991) 501 US 496, 115 L Ed 2d 447, 111 S Ct 2419: §§1.12, 2.10
Mathur v Board of Trustees (7th Cir 2003) 317 F3d 738: §9.115
Maughan v Google Tech., Inc. (2006) 143 CA4th 1242, 49 CR3d 861: §§3.117, 11.53
McConnell v Merrill Lynch, Pierce, Fenner & Smith, Inc. (1985) 176 CA3d 480, 222 CR 228: §§6.60, 6.64, 6.69
McCown v City of Fontana (9th Cir 2009) 565 F3d 1097: §§8.27-8.28, 10.23, 10.55-10.57, 10.66
McDonald v Doe (5th Cir 1984) 748 F2d 1055: §2.102
McFadden v Villa (2001) 93 CA4th 235, 113 CR2d 80: §§2.14, 2.102
McFarland v City of Sausalito (1990) 218 CA3d 909, 267 CR 412: §§6.35, 6.66
McGinnis v Kentucky Fried Chicken (9th Cir 1994) 51 F3d 805: §§10.55-10.56, 10.62, 11.56
McGinnis v Kentucky Fried Chicken (9th Cir 1994) 42 F3d 1273: §9.77
McGrath v County of Nevada (9th Cir 1995) 67 F3d 248: §§9.77, 9.90, 11.66
McGregor v Paul Revere Life Ins. Co. (9th Cir 2004) 369 F3d 1099: §§7.1, 7.16, 9.42
McHugh v Santa Monica Rent Control Bd. (1989) 49 C3d 348, 261 CR 318: §§3.105, 13.14
McKenzie v Cooper, Levins & Pastko, Inc. (11th Cir 1993) 990 F2d 1183: §8.28
McLarand, Vasquez & Partners, Inc. v Downey Sav. & Loan Ass'n (1991) 231 CA3d 1450, 282 CR 828: §4.88
McMahon v Lopez (1988) 199 CA3d 829, 245 CR 172: §§2.14, 2.55, 2.98
McSomebodies v Burlingame Elementary Sch. Dist. (9th Cir 1989) 886 F2d 1558: §13.10
McSomebodies v San Mateo Unified Sch. Dist. (9th Cir 1989) 897 F2d 975: §13.10
Meadows v Lee (1985) 175 CA3d 475, 221 CR 22: §§4.18, 4.43, 11.1
Mechanical Wholesale Corp. v Fuji Bank, Ltd. (1996) 42 CA4th 1647, 50 CR2d 466: §2.107
Meister v Regents of Univ. of Cal. (1998) 67 CA4th 437, 78 CR2d 913: §§2.67-2.68, 3.88, 8.6, 9.20, 9.78, 10.15, 10.56, 10.59, 10.65, 11.8
Mejia v City of Los Angeles (2007) 156 CA4th 151, 67 CR3d 228: §§2.38, 2.42, 2.55, 2.63, 3.46, 3.57, 3.75, 16.17, App H
Melamed v City of Long Beach (1993) 15 CA4th 70, 18 CR2d 729: §4.91
Melbostad v Fisher (2008) 165 CA4th 987, 81 CR3d 354: §§3.120, 16.13
Melendres v City of Los Angeles (1975) 45 CA3d 267, 119 CR 713: §§5.10, 8.12
Melnyk v Robledo (1976) 64 CA3d 618, 134 CR 602: §§9.104, 10.3, 11.46
Mendez v County of San Bernardino (9th Cir 2008) 540 F3d 1109: §§2.52-2.53, 2.56, 2.60, 2.67, 8.28, 9.74, 9.78, 9.88, 10.15, 10.56, 10.63, 11.49
Mendoza v U.S. (9th Cir 1980) 623 F2d 1338: §11.10
Mercer v Duke Univ. (4th Cir 2005) 401 F3d 199: §§2.100, 8.27-8.28, 10.39
Merritt v Mackey (9th Cir 1991) 932 F2d 1317: §9.46
Metabolife Int'l, Inc. v Wornick (SD Cal 2002) 213 F Supp 2d 1220: §§3.117, 9.115
Meyer, State v (1985) 174 CA3d 1061, 220 CR 884: §§8.30-8.31, 9.16, 9.125, 10.14, 10.41, 10.67, 11.54, 11.58, App H
Michell v Olick (1996) 49 CA4th 1194, 57 CR2d 227: §§4.68, 4.77
Midpeninsula Citizens for Fair Hous. v Westwood Investors (1990) 221 CA3d 1377, 271 CR 99: §2.108
Midstate Theaters, Inc. v Board of Supervisors (1975) 46 CA3d 204, 119 CR 894: §3.92
Miles Cal. Co. v Hawkins (1959) 175 CA2d 162, 345 P2d 492: §11.20
Miller v American Greetings Corp. (2008) 161 CA4th 1055, 74 CR3d 776: §6.52
Miller v California Comm'n on Status of Women (1985) 176 CA3d 454, 222 CR 225: §3.44
Miller v Givens (1994) 30 CA4th 18, 37 CR2d 1: §2.6
Miller v Los Angeles County Bd. of Educ. (9th Cir 1987) 827 F2d 617: §10.70
Miller v Provost (1994) 26 CA4th 1703, 33 CR2d 288: §11.26
Miller v Union Pac. R.R. Co. (2007) 147 CA4th 451, 53 CR3d 893: §§3.97-3.98, 9.125
Miller-Wohl Co. v Commissioner of Labor & Indus. (9th Cir 1982) 694 F2d 203: §2.29
Milman v Shukhat (1994) 22 CA4th 538, 27 CR2d 526: §§4.16, 4.37, 4.51, 4.77
Mir v Charter Suburban Hosp. (1994) 27 CA4th 1471, 33 CR2d 243: §2.6
Mirabal v GMAC (7th Cir 1978) 576 F2d 729: §11.56
Missouri v Jenkins (1989) 491 US 274, 105 L Ed 2d 229, 109 S Ct 2463: §§9.29, 9.103, 9.111, 9.118, 9.130, 10.51
Mitchell v City of Los Angeles (9th Cir 1984) 741 F2d 281: §11.11
Mitchell v Exhibition Foods, Inc. (1986) 184 CA3d 1033, 229 CR 535: §4.5
Mitchell v Office of Los Angeles County Superintendent (9th Cir 1986) 805 F2d 844: §2.69
Mitchell Bros. Santa Ana Theater, People v (1985) 165 CA3d 378, 211 CR 501: §§2.6, 3.17, 8.6, 12.7, 12.15
Mix v Tumanjan Dev. Corp. (2002) 102 CA4th 1318, 126 CR2d 267: §§4.60, 9.10
Moallem v Coldwell Banker Commercial Group, Inc. (1994) 25 CA4th 1827, 31 CR2d 253: §§4.15, 4.22, 4.26-4.28, 4.65
Molski v Arciero Wine Group (2008) 164 CA4th 786, 79 CR3d 574: §§2.75, 3.83
Montgomery v Bio-Med Specialties, Inc. (1986) 183 CA3d 1292, 228 CR 709: §§2.28, 4.43, 9.45, 16.31

Moore v Bank of America (SD Cal, Jan. 7, 2008, No. 03cv00520) 2008 US Dist Lexis 904: §9.36
Moore v First Bank of San Luis Obispo (2000) 22 C4th 782, 94 CR2d 603: §§4.73, 4.93, 11.5, 14.7, 14.15, 16.19
Moore v Jas. H. Matthews & Co. (9th Cir 1982) 682 F2d 830: §§9.4, 11.63, App D
Moore v Local 569, Int'l Bd. of Elec. Workers (9th Cir 1995) 53 F3d 1054: §4.24
Moore v Shaw (2004) 116 CA4th 182, 10 CR3d 154: §§6.29-6.30
Morales v City of San Rafael (9th Cir 1996) 96 F3d 359: §§2.100, 8.27-8.28, 9.2-9.3, 9.50-9.51, 10.23-10.24, 10.39, 10.54-10.56, 10.61, 10.63, 10.66
Moran v Endres (2006) 135 CA4th 952, 37 CR3d 786: §§2.75, 3.118
Moran v Oso Valley Greenbelt Ass'n (2004) 117 CA4th 1029, 12 CR3d 435: §§2.23, 4.59
Moran v Oso Valley Greenbelt Ass'n (2001) 92 CA4th 156, 111 CR2d 636: §§2.51, 2.83, 3.121, 11.65, 11.68, 16.17
Morcos v Board of Retirement (1990) 51 C3d 924, 275 CR 187: §§9.36, 9.40
Moreno v City & County of San Francisco (ND Cal 1983) 567 F Supp 458: §§13.3, 13.7
Moreno v City of Sacramento (9th Cir 2008) 534 F3d 1106: §§9.3-9.4, 9.8, 9.74, 9.76, 9.109-9.111, 9.117, 9.123, 10.22, 10.27, 10.36, 10.45, 10.64
Morgan v Reasor Corp. (1968) 69 C2d 881, 73 CR 398: §3.104
Morin v Rosenthal (2004) 122 CA4th 673, 19 CR3d 149: §6.34
Morrow v Los Angeles Unified Sch. Dist. (2007) 149 CA4th 1424, 57 CR3d 885: §§2.75, 3.118
Moshonov v Walsh (2000) 22 C4th 771, 94 CR2d 597: §§1.15, 2.18, 4.93, 11.5, 14.1-14.2, 14.7-14.8, 14.14-14.15, 16.19
Motorola Communication & Electronics, Inc. v State (1997) 55 CA4th 1340, 64 CR2d 477: §3.87
Mouchette v Board of Educ. (1990) 217 CA3d 303, 266 CR 1, disapproved on other grounds in Caldwell v Montoya (1995) 10 C4th 972, 42 CR2d 842: §7.9
Mounger v Gates (1987) 193 CA3d 1248, 239 CR 18: §§3.46, 3.58, 3.67
Muckleshoot Tribe v Puget Sound Power & Light Co. (9th Cir 1989) 875 F2d 695: §11.8
Muhammed v Lockhart (8th Cir 1997) 104 F3d 1069: §10.57
Municipal Court v Bloodgood (1982) 137 CA3d 29, 186 CR 807: §§9.110-9.111
Munson v Del Taco, Inc. (2009) 46 C4th 661, 94 CR3d 685: §2.77
Murillo v Fleetwood Enters., Inc. (1998) 17 C4th 985, 73 CR2d 682: §§2.9, 2.78, 3.104, App J
Murphy v Lynn (2d Cir 1997) 118 F3d 938: §9.64
Murray v City of Onawa (8th Cir 2003) 323 F3d 616: §§10.56-10.57, 10.63
Murray's Iron Works, Inc. v Boyce (2008) 158 CA4th 1279, 71 CR3d 317: §3.126
Musaelian v Adams (2009) 45 C4th 512, 87 CR3d 475: §§2.20, 6.21-6.22, 6.49
Music Acceptance Corp. v Lofing (1995) 32 CA4th 610, 39 CR2d 159: §3.104
Mustachio v Great W. Bank (1996) 48 CA4th 1145, 56 CR2d 33: §§2.92, 4.51, 4.74, 4.77, 9.32, 12.4
Myers Bldg. Indus., Ltd. v Interface Technology, Inc. (1993) 13 CA4th 949, 17 CR2d 242: §4.57

**N**

Nadarajah v Holder (9th Cir 2009) 569 F3d 906: §§9.9, 9.47, 9.76, 9.96, 9.100, 9.106, 9.121
Nadeau v Helgemoe (1st Cir 1978) 581 F2d 275: §§2.95, 2.97
Nasser v Superior Court (1984) 156 CA3d 52, 202 CR 552: §4.88
National Ass'n of Concerned Veterans v Secretary of Defense (DC Cir 1982) 675 F2d 1319: §§9.121, 9.123, 11.49, 11.54, 11.60
National Black Police Ass'n v District of Columbia Bd. of Elections & Ethics (DC Cir 1999) 168 F3d 525: §10.63
National Fed'n of the Blind v Target Corp. (ND Cal, Aug. 3, 2009, No. C 06-01802 MHP) 2009 US Dist Lexis 67139: §§9.9, 9.23, 9.73, 9.76, 9.93, 9.109-9.110, 9.119, 9.121
National Parks & Conserv. Ass'n v County of Riverside (2000) 81 CA4th 234, 96 CR2d 576: §§2.88, 2.92-2.93, 9.14, 9.24, 9.63, App H
National Treasury Employees Union v Department of Treasury (DC Cir 1981) 656 F2d 848: §9.103
National Wildlife Fed'n v F.E.R.C. (9th Cir 1989) 870 F2d 542: §2.93
Native Village of Quinagak v U.S. (9th Cir 2002) 307 F3d 1075: §13.17
Nazemi v Tseng (1992) 5 CA4th 1633, 7 CR2d 762: §§2.91, 4.99, 11.21, 11.40
Neecke v City of Mill Valley (1995) 39 CA4th 946, 46 CR2d 266: §§2.92, 12.8
Neptune Soc'y Corp. v Longanecker (1987) 194 CA3d 1233, 240 CR 117: §4.34
Nestande v Watson (2003) 111 CA4th 232, 4 CR3d 18: §§2.39, 3.23
New Albertsons, Inc. v Superior Court (2008) 168 CA4th 1403, 86 CR3d 457: §6.2
New York Gaslight Club, Inc. v Carey (1980) 447 US 54, 64 L Ed 2d 723, 100 S Ct 2024: §§13.3, 13.7, 13.17
New York State Ass'n for Retarded Children, Inc. v Carey (2d Cir 1983) 711 F2d 1136: §9.86
New York State Fed'n of Taxi Drivers, Inc. v Westchester County Taxi & Limousine Comm'n (2d Cir 2001) 272 F3d 154: §§2.104, 11.8
Newman v Piggie Park Enters. (1968) 390 US 400, 19 L Ed 2d 1263, 88 S Ct 964: §2.52
Newsham, U.S. ex rel v Lockheed Missiles & Space Co. (9th Cir 1999) 171 F3d 1208: §3.110
Nichols v City of Taft (2007) 155 CA4th 1233, 66 CR3d 680: §§3.81, 9.115, 9.123, 10.10, 10.48, 10.73
Niederer v Ferreira (1987) 189 CA3d 1485, 234 CR 779: §§4.34, 4.43, 8.26, 16.26
Nigh v Koons Buick Pontiac GMC, Inc. (4th Cir 2007) 478 F3d 183: §§8.27-8.28, 9.43-9.44, 9.46, 10.54, 10.56, 10.62
Nightingale v Hyundai Motor Am. (1994) 31 CA4th 99, 37 CR2d 149: §§3.104, 8.26, 8.30, 9.84, 9.94, 11.50
Nimmagadda v Krishnamurthy (1992) 3 CA4th 1505, 5 CR2d 351: §16.3
No Oil, Inc. v City of Los Angeles (1984) 153 CA3d 998, 200 CR 768: §11.42

Norman v Housing Auth. (11th Cir 1988) 836 F2d 1292: §9.4, App D
North Carolina Dep't of Transp. v Crest Street Community Council, Inc. (1986) 479 US 6, 93 L Ed 2d 188, 107 S Ct 336: §13.3
Northbrook Excess & Surplus Ins. Co. v Coastal Rescue Sys. Corp. (1986) 182 CA3d 763, 227 CR 639: §7.10
Northcross v Board of Educ. (6th Cir 1979) 611 F2d 624: §9.130
Northeast Women's Ctr. v McMonagle (3d Cir 1989) 889 F2d 466: §8.28
Northern Cal. Carpenters Reg'l Council v Warmington Hercules Assoc. (2004) 124 CA4th 296, 20 CR3d 918: §§3.37, 3.111
Northern Cal. Dist. Council of Laborers v Robles Concrete Co. (1983) 149 CA3d 289, 196 CR 776: §2.16
Northington v Davis (1979) 23 C3d 955, 154 CR 524: §§5.7, 5.40-5.41, 5.43, 5.46, 5.48, 5.50, 5.52
Northwest Energetic Servs., LLC v California Franchise Tax Bd. (2008) 159 CA4th 841, 71 CR3d 642: §§2.9, 3.10-3.11, 3.51, 3.56-3.58, 3.45, 3.95, 5.21, 5.23, 8.2, 8.9, 8.13, 10.4-10.6, 10.10, 10.31, 10.36-10.37, 10.40-10.41, 10.69, 10.72-10.73, 11.68
Notrica v FDIC (9th Cir 1993) 2 F3d 961: §§4.24, 4.40, 4.43
Notrica v State Compensation Ins. Fund (1999) 70 CA4th 911, 83 CR2d 89: §§3.31, 3.46, 3.48, 3.57, 3.67, 3.75, 3.79, 9.70
Noyes v Kelly Servs. (ED Cal, Aug. 1, 2008, No. 2:02-cv-2685-GEB-CMK) 2008 US Dist Lexis 73437: §§3.80, 10.8, 10.31, 10.36, 10.42, 10.47, 10.50

**O**

Oak Grove Sch. Dist. v City Title Ins. Co. (1963) 217 CA2d 678, 32 CR 288: §§11.43, 11.52, 11.54, 11.69, 12.23
Oberfelder v City of Petaluma (ND Cal, Jan. 29, 2002, No. C-98-1470 MHP) 2002 US Dist Lexis 8635, aff'd sub nom Oberfelder v Bertoli (9th Cir, June 4, 2003, Nos. 01-17302, 02-15423) 2003 US App Lexis 11371: §§9.88, 10.26, 10.34, 10.36, 10.48, App D, App H
O'Connor v Huard (1st Cir 1997) 117 F3d 12: §10.57
Odima v Westin Tucson Hotel (9th Cir 1995) 53 F3d 1484: §§9.56, 9.66, 10.26, 10.34
Odum v Clark (11th Cir 1984) 748 F2d 1538: §15.9
O'Flaherty v Belgum (2004) 115 CA4th 1044, 9 CR3d 286: §14.16
Ollis v HearthStone Homes, Inc. (8th Cir 2007) 495 F3d 570: §8.28
Olmstead v Arthur J. Gallagher & Co. (2004) 32 C4th 804, 11 CR3d 298: §§6.8, 6.29
Olney v Municipal Court (1982) 133 CA3d 455, 184 CR 78: §3.32
Olsen v Harbison (2005) 134 CA4th 278, 35 CR3d 909: §§3.110, 3.119, 6.39, 6.70
Olson v Automobile Club of S. Cal. (2008) 42 C4th 1142, 74 CR3d 81: §§3.8, 3.66, 9.124, 9.127
Olson v Automobile Club of S. Cal. (2006) 139 CA4th 552, 44 CR3d 1: App J
Olson v Hickman (1972) 25 CA3d 920, 102 CR 248: §3.91
On v Cow Hollow Prop. (1990) 222 CA3d 1568, 272 CR 535: §§4.37, 4.43, 4.45, 4.99, 6.35, 15.1
On-Line Power, Inc. v Mazur (2007) 149 CA4th 1079, 57 CR3d 698: §§2.108, 3.97, 11.8
O'Neal v City of Seattle (9th Cir 1995) 66 F3d 1064: §§9.9, 9.56, 9.63, 10.62
Oracle Secs. Litig., In re (ND Cal 1990) 132 FRD 538: §8.17
Orchano v Advanced Recovery, Inc. (2d Cir 1997) 107 F3d 94, vacated and remanded (2d Cir 1998) 166 F3d 1201: §§10.54, 11.66
Ortiz v Regan (2d Cir 1992) 980 F2d 138: §10.60
Otay River Constructors v San Diego Expressway (2008) 158 CA4th 796, 70 CR3d 434: §§4.94, 11.19, 14.21
Otto v Los Angeles Unified Sch. Dist. (2003) 106 CA4th 328, 130 CR2d 512: §§2.24, 3.46, 3.55, 3.58, 3.72, 3.75, 12.1
Outdoor Sys., Inc. v City of Mesa (9th Cir 1993) 997 F2d 604: §9.56

**P**

P.N. v Seattle Sch. Dist. No. 1 (9th Cir 2007) 474 F3d 1165: §§2.104, 2.109, 11.8
PLCM Group, Inc. v Drexler (2000) 22 C4th 1084, 95 CR2d 198: §§2.25, 4.10, 4.59, 4.61, 8.2, 8.5, 8.30, 8.36, 9.83-9.84, 9.93-9.94, 9.99, 9.103-9.104, 9.114, 10.2-10.3, 10.6, 11.46, 11.55
Pacific Crown Distribs. v Brotherhood of Teamsters & Auto. Truck Drivers (1986) 183 CA3d 1138, 228 CR 645: §14.16
Pacific Custom Pools, Inc. v Turner Constr. Co. (2000) 79 CA4th 1254, 94 CR2d 756: §§4.11, 4.17
Pacific Enter. Sec. Litig., In re (9th Cir 1995) 47 F3d 373: §§8.17-8.18
Pacific Indem. Co., State v (1998) 63 CA4th 1535, 75 CR2d 69: §§7.22, 9.95, 9.103, 10.20
Pacific Legal Found. v California Coastal Comm'n (1982) 33 C3d 158, 188 CR 104: §§3.45, 3.54, 3.59, 12.8, 12.11
Pacific Mut. Life Ins. Co. v State Bd. of Equalization (1996) 41 CA4th 1153, 49 CR2d 99: §3.76
Pacific Preferred Props., Inc. v Moss (1999) 71 CA4th 1456, 84 CR2d 500: §§4.41, 4.43
Padilla v McClellan (2001) 93 CA4th 1100, 113 CR2d 680: §§11.33, 11.47, 11.63
Palmer v Agee (1978) 87 CA3d 377, 150 CR 841: §3.100
Palmer v Shawback (1993) 17 CA4th 296, 21 CR2d 575: §§4.8, 4.25-4.26, 4.51
Palmer v Ted Stevens Honda, Inc. (1987) 193 CA3d 530, 238 CR 363: §7.11
Papadakis v Zelis (1992) 8 CA4th 1146, 11 CR2d 411: §6.69
Parent V.S. v Los Gatos-Saratoga Joint Union High Sch. Dist. (9th Cir 2007) 484 F3d 1230: §2.100
Park v Anaheim Union High Sch. Dist. (9th Cir 2006) 464 F3d 1025: §§2.100, 10.63
Parrot v Mooring Townhomes Ass'n, Inc. (2003) 112 CA4th 873, 6 CR3d 116: §§2.110, 3.103
Partington v Broyhill Furniture Indus. (7th Cir 1993) 999 F2d 269: §§10.54, 10.56
Passanisi v Merit-McBride Realtors, Inc. (1987) 190 CA3d 1496, 236 CR 59: §4.43
Passantino v Johnson & Johnson Consumer Prods. (9th Cir 2000) 212 F3d 493: §9.56
Paterno v Superior Court (2004) 123 CA4th 548, 20 CR3d 282: §§11.43, 11.52, 12.23

Paul v Schoellkopf (2005) 128 CA4th 147, 26 CR3d 766: §4.34
Paul, Johnson, Alston & Hunt v Graulty (9th Cir 1989) 886 F2d 268: §§5.15-5.16, 8.17, 8.38
Pawlak v Greenawalt (3d Cir 1983) 713 F2d 972: §§5.51, 9.19
Pazderka v Caballeros Dimas Alang, Inc. (1998) 62 CA4th 658, 73 CR2d 242: §11.8
Peak-Las Positas Partners v Bollag (2009) 172 CA4th 101, 90 CR3d 775: §§8.26, 9.3, 9.8, 9.38, 9.102, 10.65
Peloza v Capistrano Unified Sch. Dist. (9th Cir 1994) 37 F3d 517: §2.69
Pennsylvania v Delaware Valley Citizens' Council for Clean Air (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088: §9.14
Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley I) (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088: §§3.36, 9.24, 10.22-10.23, 13.20
Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II) (1987) 483 US 711, 97 L Ed 2d 585, 107 S Ct 3078: §§9.111, 10.17, 10.51
Pennsylvania Envt'l Defense Found. v Canon-McMillan Sch. Dist. (3d Cir 1998) 152 F3d 228: §11.66
People ex rel _____ (*see* name of relator)
People v Superior Court (_____) (*see* name of real party in interest)
People Who Care v Rockford Bd. of Educ. (7th Cir 1996) 90 F3d 1307: §§9.43, 9.46
Perdue v Kenny A. (cert granted Apr. 6, 2009, No. 08-970) 173 L Ed 2d 1056, 129 S Ct 1907: §§10.22, 10.25, 10.34, 10.37
Peretz v Legal Aid Found. of Los Angeles (2004) 122 CA4th Supp 1, 18 CR3d 863: §§2.34, 4.24
Perez v County of Santa Clara (2003) 111 CA4th 671, 3 CR3d 867: §§2.49, 3.82
Perez-Arellano v Smith (9th Cir 2002) 279 F3d 791: §2.115
Perkins v Mobile Housing Bd. (11th Cir 1988) 847 F2d 735: App D
Perlin v Fountain View Mgmt, Inc. (2008) 163 CA4th 657, 77 CR3d 743: §§2.83, 3.106
Perry v O'Donnell (9th Cir 1985) 759 F2d 702: §5.3
Perry v Robertson (1988) 201 CA3d 333, 247 CR 74: §§4.51-4.52, 11.1
Persson v Smart Inventions, Inc. (2005) 125 CA4th 1141, 23 CR3d 335: §§8.5, 8.30, 8.36, 11.37
Peterson v John Crane, Inc. (2007) 154 CA4th 498, 65 CR3d 185: §2.49
Pfeiffer Venice Props. v Bernard (2002) 101 CA4th 211, 123 CR2d 647: §3.113
Pfeiffer Venice Props. v Superior Court (2003) 107 CA4th 761, 132 CR2d 400: §§11.43, 11.52, 12.23
Pfingston v Ronan Engineering Co. (9th Cir 2002) 284 F3d 999: §§2.41, 2.71
Phelan v Superior Court (1950) 35 C2d 363, 217 P2d 951: §2.112
Phelps v Stostad (1997) 16 C4th 23, 65 CR2d 360: §§2.78, 5.27, 14.5
Phipps v Saddleback Valley Unified Sch. Dist. (1988) 204 CA3d 1110, 251 CR 720: §§2.58, 3.68
Pierotti v Torian (2000) 81 CA4th 17, 96 CR2d 553: §§6.70, 6.72, 14.4, 14.15
Pilcher v Wheeler (1992) 2 CA4th 352, 3 CR2d 533: §4.34
Pilimai v Farmers Ins. Exch. Co. (2006) 39 C4th 133, 45 CR3d 760: §§2.18, 14.9
Pines v Tomson (1984) 160 CA3d 370, 206 CR 866: §3.83
Pirkig v Dennis (1989) 215 CA3d 1560, 264 CR 494: §§4.72, 4.77
Planned Parenthood v Arizona (9th Cir 1986) 789 F2d 1348, aff'd (1987) 479 US 925, 93 L Ed 2d 346, 107 S Ct 391: §10.58
Planned Parenthood v Attorney General (3d Cir 2002) 297 F3d 253: §9.9
Planned Parenthood v City of Santa Maria (1993) 16 CA4th 685, 20 CR2d 391: §§3.59, 3.76
Planned Parenthood Affiliates v Swoap (1985) 173 CA3d 1187, 219 CR 664: §§9.35, 12.6, 15.5
Planned Parenthood, Inc. v Aakhus (1993) 14 CA4th 162, 17 CR2d 510: §§2.85, 2.95, 3.25, 3.40, 3.45, 3.57, 3.69, 11.8, 11.47, 12.7, 16.17
Planned Protective Servs. v Gorton (1988) 200 CA3d 1, 245 CR 790: §§3.107, 6.5
Planning & Conserv. League v Department of Water Resources (2000) 83 CA4th 892, 100 CR2d 173: §12.7
Plemon v Nelson (1983) 148 CA3d 720, 196 CR 190: §§4.47, 4.52
Plumbers & Steamfitters, Local 290 v Duncan (2007) 157 CA4th 1083, 69 CR3d 184: §§2.35, 2.38, 2.57, 3.37, 3.46, 3.54, 3.56-3.57, 3.68, 3.75, 3.111, 9.127, 11.45
Plumbing, Heating & Piping Employers Council v Quillin (1976) 64 CA3d 215, 134 CR 332: §3.90
Poland v Chertoff (9th Cir 2007) 494 F3d 1174: §10.62
Pollock v University of S. Cal. (2003) 112 CA4th 1416, 6 CR3d 122: §6.69
Pony v County of Los Angeles (9th Cir 2006) 433 F3d 1138: §§11.11, 11.15
Poole, In re (9th Cir 2000) 222 F3d 618: §1.17
Port of Stockton v Western Bank Ctr. (9th Cir 2004) 371 F3d 1119: §11.44
Porter v U.S. Agency for Int'l Dev. (D DC 2003) 293 F Supp 2d 152: §1.23
Poway Unified Sch. Dist. v Chow (1995) 39 CA4th 1478, 46 CR2d 651: §§11.40, 12.7
Powers v Eichen (9th Cir 2000) 229 F3d 1249: §11.17
Premier Med. Mgmt. Sys. v California Ins. Guar. Ass'n (2008) 163 CA4th 550, 77 CR3d 695: §§3.110, 3.117, 9.3, 9.9, 9.47, 9.73, 9.82, 9.90-9.91, 11.58-11.60
Prentice v North Am. Title Guar. Corp. (1963) 59 C2d 618, 30 CR 821: §§7.1, 7.3-7.5, 7.13-7.14
Presley of S. Cal. v Whelan (1983) 146 CA3d 959, 196 CR 1: §§2.90, 4.91, 9.43, 11.19, 12.4
Press v Lucky Stores, Inc. (1983) 34 C3d 311, 193 CR 900: §§3.25, 3.38, 3.41, 3.45, 3.54-3.57, 3.66, 3.68-3.69, 8.2-8.4, 9.1-9.2, 10.1, 10.6-10.7, 10.11, 11.65, 16.24, 16.29
Prison Legal News v Schwarzenegger (ND Cal 2008) 561 F Supp 2d 1095: §§9.5-9.6, 9.9, 9.76, 9.88, 9.93, 9.107, 9.109, 9.119, 9.121, 9.130, 9.133, 11.22, 11.49
Profit Concepts Mgmt., Inc. v Griffith (2008) 162 CA4th 950, 76 CR3d 396: §§4.77, 4.95

Protect Our Water v County of Merced (2005) 130 CA4th 488, 30 CR3d 202: §§2.86, 2.99, 2.101, 3.30, 3.42, 3.46, 3.56
Public Employees' Retirement Sys. v Winston (1989) 209 CA3d 205, 258 CR 612: §§2.47, 4.72
Pueblo Radiology Med. Group, Inc. v Gerlach (2008) 163 CA4th 826, 77 CR3d 880: §§4.43, 4.95, 11.19
Punsly v Ho (2003) 105 CA4th 102, 129 CR2d 89: §§2.55, 3.7, 3.25, 3.30, 3.42, 3.46, 3.65, 3.72
Pyne v Meese (1985) 172 CA3d 392, 218 CR 87: §§2.16, 2.71, 6.46

**Q**

Quaratino v Tiffany & Co. (2d Cir 1999) 166 F3d 422: §§8.27, 10.56, 10.66
Quesada v Thomason (9th Cir 1988) 850 F2d 537: §§8.27, 10.54, 10.56, 10.66
Quinlan, Marriage of (1989) 209 CA3d 1417, 257 CR 850: §6.39
Quinn v State (1975) 15 C3d 162, 124 CR 1: §§5.1, 5.10, 5.26-5.28, 5.30, 14.5

**R**

R.P. Richards, Inc. v Chartered Constr. Corp. (2000) 83 CA4th 146, 99 CR2d 425: §§9.11, 16.6
Rader v Thrasher (1962) 57 C2d 244, 18 CR 736: §10.41
Rail-Transport Employees Ass'n v Union Pac. Motor Freight (1996) 46 CA4th 469, 54 CR2d 713: §16.4
Rainier Nat'l Bank v Bodily (1991) 232 CA3d 83, 282 CR 926: §§4.45, 4.62
Raining Data Corp. v Barrenechea (2009) 175 CA4th 1363, 97 CR3d 196: §§3.110, 9.73, 9.83
Ramirez v Sturdevant (1994) 21 CA4th 904, 26 CR2d 554: §§8.26, 11.9-11.10, 11.13, 11.17
Ramon v County of Santa Clara (2009) 173 CA4th 915, 93 CR3d 278: §§2.29, 3.20, 3.27, 9.9, 9.15
Ramona Unified Sch. Dist. v Tsiknas (2005) 135 CA4th 510, 37 CR3d 381: §§2.20, 3.112
Ramos v Countrywide Home Loans, Inc. (2000) 82 CA4th 615, 98 CR2d 388: §§8.4, 10.3-10.5, 10.10, 10.40-10.41, 10.47, 10.67, 11.68, 16.27
Ramos v Lamm (10th Cir 1983) 713 F2d 546: §§9.28, 9.76, 9.86, 9.114, 9.130
Rancho Santa Fe Ass'n v Dolan-King (2004) 115 CA4th 28, 8 CR3d 614: §16.17
Raney v Federal Bureau of Prisons (Fed Cir 2000) 222 F3d 927: §§9.99, 9.103
Razore v Tulalip Tribes (9th Cir 1995) 66 F3d 236: §2.71
Real v Continental Group, Inc. (ND Cal 1986) 116 FRD 211: §11.56
Real Prop. Servs. Corp. v City of Pasadena (1994) 25 CA4th 375, 30 CR2d 536: §§4.45-4.46
Rebney v Wells Fargo Bank (1991) 232 CA3d 1344, 284 CR 113: §§8.4, 11.65, 11.69
Reeves v City of Burbank (1979) 94 CA3d 770, 156 CR 667: §3.90
Rental Hous. Ass'n v City of Oakland (2009) 171 CA4th 741, 90 CR3d 181: §§3.100, 3.105
Resolution Trust Corp. v Midwest Fed. Sav. Bank (9th Cir 1993) 36 F3d 785: §4.77
Restaino v Bah (In re Bah) (BAP 9th Cir 2005) 321 BR 41: §3.110
Reveles v Toyota by the Bay (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in Snukal v Flightways Mfg., Inc. (2000) 23 C4th 754, 98 CR2d 1: §§2.47, 2.95, 2.98, 3.104, 4.86, 8.26, 9.45, 11.8, 11.21
Reynolds, Estate of v Martin (9th Cir 1993) 985 F2d 470: §9.134
Reynolds Metals Co. v Alperson (1979) 25 C3d 124, 158 CR 1: §§4.2, 4.10, 4.42-4.43, 4.45-4.46, 4.98-4.99, 9.59, 9.67, App H
Rhodes v Stewart (1988) 488 US 1, 102 L Ed 2d 1, 109 S Ct 202: §2.100
Rhyne v Municipal Court (1980) 113 CA3d 807, 170 CR 312: §3.24
Rich v City of Benicia (1979) 98 CA3d 428, 159 CR 473: §§3.8, 3.10, 3.46, 3.67, 5.47, 5.53
Rich v Schwab (1998) 63 CA4th 803, 75 CR2d 170: §3.100
Richard S. v Department of Dev. Servs. (9th Cir 2003) 317 F3d 1080: §§2.100, 2.104, 2.106, 2.109, 2.116, 9.12
Richardson v Board of Supervisors (1988) 203 CA3d 486, 250 CR 1: §§3.91, 3.93
Richlin Sec. Serv. Co. v Chertoff (2008) 553 US 571, 170 L Ed 2d 960, 128 S Ct 2007: §§9.29, 9.103, 9.118
Rider v County of San Diego (1992) 11 CA4th 1410, 14 CR2d 885: §§5.10, 5.22, 5.53, 12.1
Rietveld v Rosebud Storage Partners (2004) 121 CA4th 250, 16 CR3d 791: §§6.56, 14.6
Ripley v Pappadopoulos (1994) 23 CA4th 1616, 28 CR2d 878: §9.126
Rite Aid Corp. Secs. Litig., In re (3d Cir 2005) 396 F3d 294: §§8.17, 8.19
Ritzenthaler v Fireside Thrift Co. (2001) 93 CA4th 986, 113 CR2d 579: §§2.103, 4.81, 11.8, 14.9
RiverWatch v County of San Diego (2009) 175 CA4th 768, 96 CR3d 362: §§3.46, 3.51-3.55, 3.57, 3.69, 10.57, 10.65
Riverside v Rivera (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686: §10.56
Riverside Sheriffs' Ass'n v County of Riverside (2007) 152 CA4th 414, 61 CR3d 295: §§2.9, 3.11, 3.41, 3.46, 3.55, 3.58, 3.75, 10.57, 11.55, 11.57
Roa v Lodi Med. Group (1985) 37 C3d 920, 211 CR 77: §2.70
Robbins v Alibrandi (2005) 127 CA4th 438, 25 CR3d 387: §§5.42-5.43, 8.8, 10.5, 10.10, 10.36, 10.42, 10.47, 11.9-11.10, 11.17
Roberts v Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 CA3d 104, 128 CR 901: §7.20
Roberts v Brian (1973) 30 CA3d 427, 106 CR 360: §§3.84, 9.36, 12.13, 12.15
Roberts v Texaco, Inc. (SD NY 1997) 979 F Supp 185: §§8.19, 9.26, 10.22, 10.28, 10.46
Robertson v Fleetwood Travel Trailers (2006) 144 CA4th 785, 50 CR3d 731: §§3.104, 8.2, 8.4, 8.26, 8.30, 9.3-9.4, 9.8, 9.94, 9.98, 9.111, 9.116, 10.2, 10.4-10.5, 10.10, 10.41, 10.50, 10.59, 11.8, 16.28
Robertson v Rodriguez (1995) 36 CA4th 347, 42 CR2d 464: §§2.6, 3.111, 11.35
Robinson v City of Edmond (10th Cir 1998) 160 F3d 1275: §§9.54, 11.56
Roden v AmerisourceBergen Corp. (2005) 130 CA4th 211, 29 CR3d 810: §§4.63, 9.38, 12.6
Rodriguez v U.S. (CD Cal June 2, 2006, No. CV 99-11821 CBM (Ex)) 2006 US Dist Lexis 95839, rev'd in part on other grounds (9th

Cir 2008) 542 F3d 704: §9.121
Roger Hedgecock for Mayor Comm., People v (1986) 183 CA3d 810, 228 CR 424: §§2.44, 2.70, 3.85
Rogers v Superior Court (1993) 19 CA4th 469, 23 CR2d 412: §3.87
Rosas v County of San Bernardino (CD Cal 2003) 260 F Supp 2d 990: §§9.13, 11.59
Rosen v Robert P. Warmington Co. (1988) 201 CA3d 939, 247 CR 635: §4.84
Rosenaur v Scherer (2001) 88 CA4th 260, 105 CR2d 674: §§2.23, 3.112, 3.120, 9.94
Rosenfeld v U.S. (9th Cir 1988) 859 F2d 717: §§2.90, 11.18, 16.3, 16.16
Rosenman v Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro (2001) 91 CA4th 859, 110 CR2d 903: §§2.70, 3.82, 11.65, 11.68
Roybal v Governing Bd. of the Salinas City Elementary Sch. Dist. (2008) 159 CA4th 1143, 72 CR3d 146: §§3.46, 3.59, 3.76, 3.99
Royster Constr. Co. v Urban W. Communities (1995) 40 CA4th 1158, 47 CR2d 684: §4.99
Ruffin v Great Dane Trailers (11th Cir 1992) 969 F2d 989: §2.100
Russell v Foglio (2008) 160 CA4th 653, 73 CR3d 87: §§3.111, 9.92-9.93, 9.107, 9.113, 9.121, 9.123, 10.5, 16.26
Russell v Thermalito Union Sch. Dist. (1981) 115 CA3d 880, 176 CR 1: §3.99
Russell v Trans Pac. Group (1993) 19 CA4th 1717, 24 CR2d 274: §§11.4, 11.26, 11.29, 11.40
Rutherford v Board of Trustees (1974) 37 CA3d 775, 112 CR 560: §11.2
Ryan v California Interscholastic Fed'n (2001) 94 CA4th 1033, 114 CR2d 787: §§3.52, 3.76
Ryder v Peterson (1996) 51 CA4th 1056, 59 CR2d 562: §4.84

**S**

S.B. Beach Props. v Berti (2006) 39 C4th 374, 46 CR3d 380: §3.114
SC Manufactured Homes, Inc. v Canyon View Estates, Inc. (2007) 148 CA4th 663, 56 CR3d 79: §§2.102, 3.100
Saben, Earlix & Assocs. v Fillet (2005) 134 CA4th 1024, 36 CR3d 610: §11.37
Sablan v Department of Fin. (9th Cir 1988) 856 F2d 1317: §11.63
Sagaser v McCarthy (1986) 176 CA3d 288, 221 CR 746: §§2.108, 2.114
Salaway v Ocean Towers Hous. Corp. (2004) 121 CA4th 664, 17 CR3d 427: §3.103
Salazar v Upland Police Dep't (2004) 116 CA4th 934, 11 CR3d 22: §§3.107, 6.5
Saleeby v State Bar (1985) 39 C3d 547, 216 CR 367: §§3.31, 3.46, 3.53, 3.74, 9.35, 9.70, 12.6
Salton Bay Marina, Inc. v Imperial Irrig. Dist. (1985) 172 CA3d 914, 218 CR 839: §§3.102, 8.6, 8.30-8.31, 8.33, 9.29, 9.66-9.67, 9.119, 9.125, 10.31, 10.41
Sam Andrews' Sons v ALRB (1988) 47 C3d 157, 253 CR 30: §§6.44, 13.2
Sampson v Parking Serv. 2000 Com., Inc. (2004) 117 CA4th 212, 11 CR3d 595: §§3.96-3.97, 13.16
San Bernardino Community Hosp. v Office of Statewide Health Planning & Dev. (1986) 187 CA3d 457, 231 CR 673: §6.62
San Bernardino Valley Audubon Soc'y v County of San Bernardino (1984) 155 CA3d 738, 202 CR 423: §§2.38, 2.42, 2.55, 3.4, 3.16, 3.25, 3.46, 9.79, 9.93, 9.97, 10.8, 10.41, 10.72, 11.68, App D, App H
San Diego Gas & Elec. Co. v Daley (1988) 205 CA3d 1334, 253 CR 144: §9.37
San Diego Police Officers Ass'n v San Diego Police Dep't (1999) 76 CA4th 19, 90 CR2d 6: §§10.11, 10.53, 10.65
San Dieguito Partnership v Joint Powers Auth. (1998) 61 CA4th 910, 72 CR2d 91, disapproved on other grounds in PLCM Group, Inc. v Drexler (2000) 22 C4th 1084, 95 CR2d 198: §§4.61, 9.64, 9.66, 9.94
San Francisco Culinary Bartenders & Serv. Employees Welfare Fund v Lucin (9th Cir 1996) 76 F3d 295: §2.10
San Francisco N.A.A.C.P. v San Francisco Unified Sch. Dist. (9th Cir 2002) 284 F3d 1163: §§2.39, 2.56, 2.68, 9.11-9.12, 9.14, 9.24-9.25
San Gabriel Tribune v Superior Court (1983) 143 CA3d 762, 192 CR 415: §3.87
San Luis Obispo Bay Props. v PG&E (1972) 28 CA3d 556, 104 CR 733: §§9.38, 14.24
Sanabria v Embrey (2001) 92 CA4th 422, 111 CR2d 837: §§11.30, 11.37
Sanders v City of Los Angeles (1970) 3 C3d 252, 90 CR 169: §§5.10, 5.20, 8.12, 8.19
Santa Clara Sav. & Loan Ass'n v Pereira (1985) 164 CA3d 1089, 211 CR 54: §§4.46-4.47
Santisas v Goodin (1998) 17 C4th 599, 71 CR2d 830: §§2.47, 2.85-2.86, 2.103, 2.110-2.111, 4.2-4.3, 4.10-4.11, 4.13, 4.18-4.19, 4.25-4.26, 4.30, 4.35, 4.50, 4.65-4.66, 4.68, 4.70, 4.83-4.85, 4.89-4.90, 4.101, 10.39
Santos v DMV (1992) 5 CA4th 537, 7 CR2d 10: §3.92
Satrap v PG&E (1996) 42 CA4th 72, 49 CR2d 348: §§3.67, 3.69
Saucedo v Mercury Sav. & Loan Ass'n (1980) 111 CA3d 309, 168 CR 552: §4.43
Savaglio v Wal-Mart Stores, Inc. (2007) 149 CA4th 588, 57 CR3d 215: §§2.28, 3.18, 3.30
Save El Toro Ass'n v Days (1979) 98 CA3d 544, 159 CR 577: §§5.32-5.33, 5.39-5.40, 5.47, 5.53
Save Open Space Santa Monica Mountains v Superior Court (2000) 84 CA4th 235, 100 CR2d 725: §§3.77, 11.55
Save Our Cumberland Mountains v Hodell (DC Cir 1988) 857 F2d 1516: §9.97
Save Our Forests & Ranchlands v County of San Diego (1996) 50 CA4th 1757, 58 CR2d 708: §§11.36, 11.40
Save Our Residential Env't v City of W. Hollywood (1992) 9 CA4th 1745, 12 CR2d 308: §§2.92, 11.21
Save Oxnard Shores v California Coastal Comm'n (1986) 179 CA3d 140, 224 CR 425: §3.76
Say & Say v Castellano (1994) 22 CA4th 88, 27 CR2d 270 ($25,000): §6.69
Scarborough v Principi (2004) 541 US 401, 158 L Ed 2d 674, 124 S Ct 1856: §11.53
Schleier, Commissioner v (1995) 515 US 323, 132 L Ed 2d 294, 115 S Ct 2159: §1.21
Schmid v Lovette (1984) 154 CA3d 466, 201 CR 424: §§2.13, 2.54-2.55, 2.61-2.62, 3.7, 3.41, 3.45, 3.54-3.55, 3.71-3.72, 3.75, 9.31, 9.71
Schmier v Supreme Court (2002) 96 CA4th 873, 117 CR2d 497: §§2.85-2.86, 3.44, 3.52

Schneider v Friedman, Collard, Poswall & Virga (1991) 232 CA3d 1276, 283 CR 882: §§7.9, 7.29
Schoolcraft v Ross (1978) 81 CA3d 75, 146 CR 57: §4.52
Schroeder v Irvine City Council (2002) 97 CA4th 174, 118 CR2d 330: §§2.26, 2.76, 3.110, 3.112
Schwartz v City of Rosemead (1984) 155 CA3d 547, 202 CR 400: §§3.46, 3.62, 3.76, App D
Schwarz v Secretary of Health & Human Servs. (9th Cir 1995) 73 F3d 895: §§9.21, 9.56, 9.60, 9.115, 9.121, 9.123, 10.54, 10.64, 11.49
Sciarrotta v Teaford Custom Remodeling, Inc. (1980) 110 CA3d 444, 167 CR 889: §4.16
Science Applications Int'l Corp. v Superior Court (1995) 39 CA4th 1095, 46 CR2d 332: §9.126
Scott Co. v Blount, Inc. (1999) 20 C4th 1103, 86 CR2d 614: §§2.80, 2.89, 4.77, 4.80, 10.59, 14.9
Scripps Mem. Hosp. v California Employment Comm'n (1944) 24 C2d 669, 151 P2d 109: §6.10
Scurlock v City of Lynn Haven (11th Cir 1988) 858 F2d 1521: §2.97
Sea Coast Foods, Inc. v Lu-Mar Lobster & Shrimp, Inc. (9th Cir 2001) 260 F3d 1054: §11.8
Seal Beach Police Officers Ass'n, People ex rel v City of Seal Beach (1984) 36 C3d 591, 205 CR 794: §§3.46, 3.53, 3.75, 12.8
Sears v Baccaglio (1998) 60 CA4th 1136, 70 CR2d 769: §§2.47, 2.85, 4.16, 4.18, 4.68, 4.71-4.72, 4.77
Seattle Sch. Dist. No. 1 v B.S. (9th Cir 1996) 82 F3d 1493: §12.27
Seattle Sch. Dist. No. 1 v Washington (9th Cir 1980) 633 F2d 1338: §2.28
Sebago, Inc. v City of Alameda (1989) 211 CA3d 1372, 259 CR 918: §9.36
See Niederer v Ferreira (1987) 189 CA3d 1485, 234 CR 779: §10.56
Seever v Copley Press, Inc. (2006) 141 CA4th 1550, 47 CR3d 206: §§2.49, 3.82, 9.125
Seghesio v County of Napa (1982) 135 CA3d 371, 185 CR 224: §3.92
Select Milk Producers, Inc. v Johanns (DC Cir 2005) 400 F3d 939: §2.106
Selma Auto Mall II v Superior Court (1996) 44 CA4th 1672, 52 CR2d 599: §§2.37, 4.47, 15.12
Serrano v Priest (1976) 18 C3d 728, 135 CR 345: §3.54
Serrano v Priest (1982) 131 CA3d 188, 182 CR 387: §9.132
Serrano v Priest (Serrano III) (1977) 20 C3d 25, 141 CR 315: §§2.23, 2.51, 3.2-3.5, 3.12, 3.15-3.16, 3.45, 3.50, 5.1, 5.4, 5.10, 5.12, 5.14, 5.21, 5.24, 5.34, 5.37, 5.42, 5.46-5.47, 5.53-5.55, 8.2-8.3, 8.6, 8.36, 9.1-9.3, 9.45, 9.109, 10.1, 10.3-10.4, 10.8, 10.18, 10.20, 10.31, 10.36, 10.41, 10.47, 10.68-10.69, 10.71-10.72, 11.70, 12.1, 16.23, 16.25, 16.31, App D, App J
Serrano v Unruh (Serrano IV) (1982) 32 C3d 621, 186 CR 754: §§1.12, 2.12, 2.51, 2.67, 3.2, 3.4, 3.7-3.8, 3.30, 4.5, 5.51, 8.4, 8.26, 9.1, 9.3, 9.16, 9.19-9.20, 9.31, 9.36, 9.45, 9.50, 9.78, 9.84, 9.95-9.96, 9.103-9.104, 9.106, 9.113, 10.15, 10.17, 10.53, 10.68, 11.3, 11.8, 11.46, 11.55, 15.15, App J
Sessions Payroll Mgmt., Inc. v Noble Constr. Co. (2000) 84 CA4th 671, 101 CR2d 127: §§4.43, 4.47, 4.56
Sethy v Alameda County Water Dist. (9th Cir 1979) 602 F2d 894: §2.7
Shadoan v World Sav. & Loan Ass'n (1990) 219 CA3d 97, 268 CR 207: §§4.51, 4.98-4.99, 9.45
Shaffer v Superior Court (1995) 33 CA4th 993, 39 CR2d 506: §§9.94, 9.103, 10.1, 11.55
Shalala v Schaefer (1993) 509 US 292, 125 L Ed 2d 239, 113 S Ct 2625: §§2.93, 13.18
Shapiro v Paradise Valley Unified Sch. Dist. (9th Cir 2004) 374 F3d 857: §§1.17, 9.121-9.122, 11.53
Share v Casiano Bel-Air Homeowners Ass'n (1989) 215 CA3d 515, 263 CR 753: §§4.62, 4.86, 4.96
Shaw v City of Sacramento (9th Cir 2001) 250 F3d 1289: §3.80
Sheller v Superior Court (2008) 158 CA4th 1697, 71 CR3d 207: §§1.10, 5.2, 6.2
Shelton v Rancho Mortgage & Inv. Corp. (2002) 94 CA4th 1337, 115 CR2d 82: §6.31
Sherwood Partners, Inc. v EOP-Marina Bus. Ctr., LLC (2007) 153 CA4th 977, 62 CR3d 896: §§4.47, 4.56
Shipes v Trinity Indus. (5th Cir 1993) 987 F2d 311: §10.26
Shisler v Sanfer Sports Cars, Inc. (2008) 167 CA4th 1, 83 CR3d 771: §§2.5, 2.9, 2.76, 2.78, 3.104, 11.3
Shrader v OMC Aluminum Boat Group, Inc. (8th Cir 1997) 128 F3d 1218: §§8.28, 9.60
Sierra Club v California Coastal Comm'n (1993) 12 CA4th 602, 15 CR2d 779: §12.7
Sierra Club v Contra Costa County (1992) 10 CA4th 1212, 13 CR2d 182: §3.46
Sierra Club v EPA (DC Cir 2003) 322 F3d 718: §2.117
Sierra Club v Hamilton County Bd. of County Comm'rs (6th Cir 2007) 504 F3d 634: §§2.28, 2.117, 8.28, 11.66
Silberman v Swoap (1975) 50 CA3d 568, 123 CR 456: §3.84
Silver v Boatwright Home Inspection, Inc. (2002) 97 CA4th 443, 118 CR2d 475: §§4.30, 4.68, 4.70, 4.84, 4.90
Silver Creek, LLC v BlackRock Realty Advisors, Inc. (2009) 173 CA4th 1533, 93 CR3d 864: §2.55
Simpson v Unemployment Ins. Compensation Appeals Bd. (1986) 187 CA3d 342, 231 CR 690: §§3.49, 3.58
Sinajini v Board of Educ. (10th Cir 2000) 233 F3d 1236: §10.39
Sindell v Gibson, Dunn & Crutcher (1997) 54 CA4th 1457, 63 CR2d 594: §§7.6, 7.20
Singh v Lipworth (2005) 132 CA4th 40, 33 CR3d 178: §6.7
Sinyard v Commissioner (9th Cir 2001) 268 F3d 756: §1.23
Sipple v Foundation for Nat'l Progress (1999) 71 CA4th 226, 83 CR2d 677: §3.111
Six (6) Mexican Workers v Arizona Citrus Growers (9th Cir 1990) 904 F2d 1301: §10.71
Skaff v Meridien N. Am. Beverly Hills, LLC (9th Cir 2007) 506 F3d 832: §§1.12, 2.3, 2.97-2.98, 2.103-2.104, 2.112
Slayton v Pomona Unified Sch. Dist. (1984) 161 CA3d 538, 207 CR 705: §§2.98, 3.45, 3.57, 3.68
Slottow v American Cas. Co. (9th Cir 1993) 10 F3d 1355: §7.14
Slurry Seal v Laborers Int'l Union (9th Cir 2001) 241 F3d 1142: §4.24
Smith v Krueger (1983) 150 CA3d 752, 198 CR 174: §§4.37, 4.43, 4.69
Smith v Rae-Venter Law Group (2002) 29 C4th 345, 127 CR2d 516: §§2.86, 3.96
Smith v Village of Maywood (7th Cir 1992) 970 F2d 397: §11.44

Smith v Workers' Comp. Appeals Bd. (2009) 46 C4th 272, 92 CR3d 894: §§2.2, 2.83, 3.97
Smyth v Rivero (4th Cir 2002) 282 F3d 268: §2.104
Snyder v Marcus & Millichap (1996) 46 CA4th 1099, 54 CR2d 268: §§2.48, 2.92, 4.74, 4.77, 9.38
Sokolow v County of San Mateo (1989) 213 CA3d 231, 261 CR 520: §§2.42, 2.45, 2.47, 2.52, 2.55, 2.86, 2.99, 3.4, 3.25, 3.44-3.45, 3.54, 3.56, 3.75, 9.53-9.54, 9.79, 10.53, 11.65, 11.68, 16.17
Soldate v Fidelity Nat'l Fin. (1998) 62 CA4th 1069, 72 CR2d 404: §16.6
Sole v Wyner (2007) 551 US 74, 167 L Ed 2d 1069, 127 S Ct 2188: §§2.102, 2.106, 2.116
Sommers v Erb (1992) 2 CA4th 1644, 4 CR2d 52: §§3.108, 8.4, 8.30, 8.33, 9.83, 11.50, 11.68
Sooy v Peter (1990) 220 CA3d 1305, 270 CR 151: §§7.1, 7.4
Sorenson v Mink (9th Cir 2001) 239 F3d 1140: §§9.50, 10.38, 10.56, App H
Soukup v Law Offices of Herbert Hafif (2006) 39 C4th 260, 46 CR3d 638: §3.111
South Bay Transp. Co. v Gordon Sand Co. (1988) 206 CA3d 650, 253 CR 753: §§4.34, 4.37
Southeast Legal Defense Group v Adams (9th Cir 1981) 657 F2d 1118: §9.46
Southern Cal. Edison Co. v PUC (2004) 117 CA4th 1039, 12 CR3d 441: §§3.89, 9.14, 13.5, 16.20
Southern Cal. Gas Co. v PUC (1985) 38 C3d 64, 211 CR 99: §13.5
Southwest Ctr. for Biological Diversity v Carroll (CD Cal 2001) 182 F Supp 2d 944: §2.117
Spain v Mountanos (9th Cir 1982) 690 F2d 742: §§2.13, 9.132-9.133, 15.8-15.9, 15.13, 15.15
Sprague v Ticonic Nat'l Bank (1939) 307 US 161, 83 L Ed 1184, 59 S Ct 777: §§5.1, 5.10
Stamps v Superior Court (2006) 136 CA4th 1441, 39 CR3d 706: §§3.80, 3.83
Stanford Daily v Zurcher (ND Cal 1974) 64 FRD 680, aff'd (9th Cir 1977) 550 F2d 464, rev'd on other grounds (1978) 436 US 547, 56 L Ed 2d 525, 98 S Ct 1970: §9.19
Stanislaus Audubon Soc'y v County of Stanislaus (1995) 33 CA4th 144, 39 CR2d 54: §12.1
Staples v Hoefke (1987) 189 CA3d 1397, 235 CR 165: §§4.59, 6.34, 11.59
Star Pac. Invs., Inc. v Oro Hills Ranch, Inc. (1981) 121 CA3d 447, 176 CR 546: §§4.37, 4.50, 4.52
Starrh & Starrh Cotton Growers v Aera Energy LLC (2007) 153 CA4th 583, 63 CR3d 165: §3.103
State Water Resources Control Bd. Cases (2008) 161 CA4th 304, 73 CR3d 842: §§2.64, 2.86, 2.114, 3.13, 3.17-3.18, 3.55, 3.63-3.64, 9.72
Staton v Boeing (9th Cir 2003) 327 F3d 938: §§5.19, 5.48, 8.19, 9.88, 10.22, 10.40, 10.46, 11.17, 11.63
Stauffer, Estate of (1959) 53 C2d 124, 346 P2d 748: §5.10
Steefel, Levitt & Weiss v Astor Holdings, Inc. (ND Cal 2006) 2006 US Dist Lexis 1165: §9.66
Steinberg v Allstate Ins. Co. (1990) 226 CA3d 216, 277 CR 32: §5.26
Steiny & Co. v California Elec. Supply Co. (2000) 79 CA4th 285, 93 CR2d 920: §§9.83, 9.126, 11.50
Stephens v Coldwell Banker Commercial Group, Inc. (1988) 199 CA3d 1394, 245 CR 606, overruled on other grounds in White v Ultramar, Inc. (1999) 21 C4th 563, 88 CR2d 19: §§2.51, 2.70, 3.81, 9.33, 9.71, 11.68-11.69, 12.13
Stermer v Modiano Constr. Co. (1975) 44 CA3d 264, 118 CR 309: §14.24
Sternwest Corp. v Ash (1986) 183 CA3d 74, 227 CR 804: §§8.5, 9.93, 9.99, 9.132, 10.2, 10.31, 10.50
Stevens v Geduldig (1986) 42 C3d 24, 227 CR 405: §2.114
Stewart v Gates (9th Cir 1993) 987 F2d 1450: §§9.24, 9.88, 10.23, 10.27
Stirling v ALRB (1987) 189 CA3d 1305, 235 CR 56: §§2.81, 3.91
Stivers v Pierce (9th Cir 1995) 71 F3d 732: §2.97
Stockton Theatres, Inc. v Palermo (1961) 55 C2d 439, 11 CR 580: §§15.1-15.2
Stokus v Marsh (1990) 217 CA3d 647, 266 CR 90: §§8.26, 9.6, 9.9
Stop Youth Addiction, Inc. v Lucky Stores, Inc. (1998) 17 C4th 553, 71 CR2d 731: §3.46
Stout v Turney (1978) 22 C3d 718, 150 CR 637: §4.52
Sullivan v Calistoga Joint Unified Sch. Dist. (1991) 228 CA3d 1313, 279 CR 529: §3.91
Sullivan v Hudson (1989) 490 US 877, 104 L Ed 2d 941, 109 S Ct 2248: §13.18
Summers v City of Cathedral City (1990) 225 CA3d 1047, 275 CR 594: §§6.46, 6.64, 6.68, 6.72, 8.21
Summers v Newman (1999) 20 C4th 1021, 86 CR2d 303: §5.28
Sundance v Municipal Court (1987) 192 CA3d 268, 237 CR 269: §§2.23, 2.42, 2.90, 9.29, 9.54, 9.79, 9.118, 11.19, App D, App H
Super 7 Motel Assoc. v Wang (1993) 16 CA4th 541, 20 CR2d 193: §§4.26, 4.28, 4.43, 4.51
Superior Gunite v Ralph Mitzel, Inc. (2004) 117 CA4th 301, 12 CR3d 423: §§4.43, 9.38, 9.65
Suter v City of Lafayette (1997) 57 CA4th 1109, 67 CR2d 420: §§2.114, 3.57
Sutter Health Uninsured Pricing Cases (2009) 171 CA4th 495, 89 CR3d 615: §§5.18, 8.7, 8.13-8.15, 10.8, 11.17, 11.50
Sutter Health Uninsured Pricing Cases (2009) 171 CA4th 495, 89 CR3d 615, the court: §8.9
Suzuki v Yuen (9th Cir 1982) 678 F2d 761: §11.60
Sweat v Hollister (1995) 37 CA4th 603, 43 CR2d 399, disapproved on other grounds in Sanstisas v Goodin (1998) 17 C4th 599, 71 CR2d 830: §§4.28, 4.51, 4.83

**T**

T.E.D. Bearing Co. v Walter E. Heller & Co. (1974) 38 CA3d 59, 112 CR 910: §§2.4, 4.10, 9.36, 11.1
Taheri Law Group v Evans (2008) 160 CA4th 482, 72 CR3d 847: §§2.20, 3.112
Taranow v Brokstein (1982) 135 CA3d 662, 185 CR 532: §14.4
Tate v Saratoga Sav. & Loan Ass'n (1989) 216 CA3d 843, 265 CR 440: §§4.6, 4.91, 14.4
Taylor v Van-Catlin Constr. (2005) 130 CA4th 1061, 30 CR3d 690: §§2.18, 3.126, 14.2-14.3, 14.15
Taylor v Westly (9th Cir 2008) 525 F3d 1288: §§2.90, 9.46, 11.18, 16.3

Tenderloin Hous. Clinic, Inc. v Sparks (1992) 8 CA4th 299, 10 CR2d 371: §§6.30, 6.35, 6.37, 6.66
Terminal Plaza Corp. v City & County of San Francisco (1986) 177 CA3d 892, 223 CR 379: §3.76
Texas Commerce Bank v Garamendi (1994) 28 CA4th 1234, 34 CR2d 155: §§4.40, 4.46, 4.51
Texas State Teachers Ass'n v Garland Indep. Sch. Dist. (1989) 489 US 782, 103 L Ed 2d 866, 109 S Ct 1486: §§2.45, 2.100
Thayer v Wells Fargo Bank (2001) 92 CA4th 819, 112 CR2d 284: §§3.4, 8.2, 9.3, 9.8, 9.73, 10.3-10.6, 10.36-10.38, 10.67, 10.71, 10.73, 11.68, 16.27, App H
The Ocean Conservancy, Inc. v National Marine Fisheries Serv. (9th Cir 2004) 382 F3d 1159 (: §2.71
The Utility Reform Network v PUC (2008) 166 CA4th 522, 82 CR3d 791: §13.5
Third Eye Blind, Inc. v Near North Entertainment Ins. Servs., LLC (2005) 127 CA4th 1311, 26 CR3d 452: §§7.5, 7.13
Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig., In re (1st Cir 1995) 56 F3d 295: §11.55
Thirteen Comm. v Weinreb (1985) 168 CA3d 528, 214 CR 297: §§2.44, 2.51, 2.55, 3.85
Thomas v City of Tacoma (9th Cir 2005) 410 F3d 644: §§2.52, 2.60, 2.71, 2.100, 9.60, 10.54, 10.63
Thomas v Fry's Electronics, Inc. (9th Cir 2005) 400 F3d 1206: §3.110
Thomas v NFL Players Ass'n (DC Cir 2001) 273 F3d 1124: §§8.27, 9.56
Thomlison v City of Omaha (8th Cir 1995) 63 F3d 786: §9.56
Thompson v Jespersen (1990) 222 CA3d 964, 272 CR 132: §§6.45, 14.2, 14.6, 14.12
Thompson v Miller (2003) 112 CA4th 327, 4 CR3d 905: §§4.26, 9.125
Thompson Pac. Constr., Inc. v City of Sunnyvale (2007) 155 CA4th 525, 66 CR3d 175: §§2.75, 3.125, 8.26, 9.67
Thornberry v Delta Airlines, Inc. (9th Cir 1982) 676 F2d 1240, vacated and remanded on other grounds (1983) 461 US 952, 77 L Ed 2d 1311, 103 S Ct 2421: §9.130
Thorne v El Segundo (9th Cir 1986) 802 F2d 1131: §§8.27, 9.56, 10.56, 10.66
Tipton-Whittingham v City of Los Angeles (2004) 34 C4th 604, 21 CR3d 371: §§1.12, 2.3, 2.10-2.11, 2.13, 2.44, 2.85-2.86, 2.96, 2.111, 3.13, 3.65, 3.80-3.81, 10.18, 11.8
Topanga & Victory Partners v Toghia (2002) 103 CA4th 775, 127 CR2d 104: §4.28
Topanga & Victory Partners LLP v Toghia (2002) 103 CA4th 775, 127 CR2d 104: §§4.15, 4.56, 4.83
Torres v City of San Diego (2007) 154 CA4th 214, 64 CR3d 495: §§2.98, 3.105, 4.58, 16.11
Torrey Pines Bank v Hoffman (1991) 231 CA3d 308, 282 CR 354: §§4.33-4.34, 4.37, 4.86
Torrisi v Tucson Elec. Power Co. (9th Cir 1993) 8 F3d 1370: §§8.17-8.18
Toussaint v McCarthy (9th Cir 1987) 826 F2d 901: §9.46
Traditional Cat Ass'n v Gilbreath (9th Cir 2003) 340 F3d 829: §§9.66, 9.88
Trans-Action Commercial Investors, Ltd. v Firmaterr, Inc. (1997) 60 CA4th 352, 70 CR2d 449: §§1.10, 6.2, 6.8, 6.24, 6.57
Travelers Cas. & Sur. Co. v PG&E (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199: §§2.10, 4.63
Trevino v Gates (9th Cir 1996) 99 F3d 911: §§9.46, 9.106, 9.109, 9.121
Trevino v Gates (CD Cal 1995) 888 F Supp 1509, aff'd in part, vacated in part (9th Cir 1996) 99 F3d 911: §8.28
Triad Data Servs. v Jackson (1984) 153 CA3d Supp 1, 200 CR 418: §3.96
Tripp v Swoap (1976) 17 C3d 671, 131 CR 789, overruled on other grounds in Frink v Prod (1982) 31 C3d 166, 181 CR 893: §3.84
Trope v Katz (1995) 11 C4th 274, 45 CR2d 241: §§2.20, 2.22, 4.11, 4.60-4.61, 5.4
Truesdell v Philadelphia Hous. Auth. (3d Cir 2002) 290 F3d 159: §2.104
Trustees v Greenough (1882) 105 US 527, 26 L Ed 1157: §9.131
Trustees of Cent. States v Golden Nugget, Inc. (CD Cal 1988) 697 F Supp 1538: §§4.88, 4.99, 9.66, 9.83
Trustees of the Constr. Indus. & Laborers Health & Welfare Trust v Redland Ins. Co. (9th Cir 2006) 460 F3d 1253: §§9.29, 9.119, 9.130
Trynin, Estate of (1989) 49 C3d 868, 264 CR 93: §§9.16, 15.15
Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist. (2003) 106 CA4th 1219, 132 CR2d 57: §§3.117, 9.73
Turner v District of Columbia Bd. of Elections & Ethics (DC Cir 2004) 354 F3d 890: §§2.43, 2.55, 2.57
Turner v Schultz (2009) 175 CA4th 974, 96 CA3d 659: §§4.94, 14.21
Tutor-Saliba Corp. v City of Hailey (9th Cir 2006) 452 F3d 1055: §§2.71, 9.92, 11.66
Twentieth Century Fox Film Corp. v Entertainment Distribs. (9th Cir 2005) 429 F3d 869: §§12.19, 12.27
Twentieth Century-Fox Film Corp. v Harbor Ins. Co. (1978) 85 CA3d 105, 149 CR 313: §7.26
Tyler v Corner Constr. Corp. (8th Cir 1999) 167 F3d 1202: §2.103

**U**

U.S. ex rel Newsham v Lockheed Missiles & Space Co. (9th Cir 1999) 171 F3d 1208: §3.110
U.S. ex rel Virani v Jerry M. Lewis Truck Parts & Equip. Inc. (9th Cir 1996) 89 F3d 574: §§1.20, 2.33-2.34
U.S. for Use & Benefit of Reed v Callahan (9th Cir 1989) 884 F2d 1180: §4.9
U.S. v _____ (*see* name of defendant)
UAP-Columbus JV 326132 v Nesbitt (1991) 234 CA3d 1028, 285 CR 856: §§11.21, 16.11
UMET Trust v Santa Monica Med. Inv. Co. (1983) 140 CA3d 864, 189 CR 922: §7.8
Uniroyal Chem. Co. v American Vanguard Corp. (1988) 203 CA3d 285, 249 CR 787: §16.20
Uniroyal Goodrich Tire Co. v Mutual Trading Corp. (7th Cir 1995) 63 F3d 516: §§9.63, 9.76
United Servs. Auto. Ass'n v Dalrymple (1991) 232 CA3d 182, 283 CR 330: §§7.10, 11.21, 11.42, 11.69
United States Football League v National Football League (2d Cir 1989) 887 F2d 408: §8.28
United Steelworkers v Phelps Dodge Corp. (9th Cir 1990) 896 F2d 403: §§9.9, 9.29, 9.90, 9.121-9.123, 9.130, 11.60, 11.66
United Steelworkers v Retirement Income Plan (9th Cir 2008) 512 F3d 555: §§9.84, 9.88, 9.97, 9.121, 11.49
Urbaniak v Newton (1993) 19 CA4th 1837, 24 CR2d 333: §2.37

Utility Automation 2000, Inc. v Choctawhatchee Elec. Coop., Inc. (11th Cir 2002) 298 F3d 1238: §2.104
Utility Reform Network v PUC (2008) 166 CA4th 522, 82 CR3d 791: §§3.89, 9.93, 9.106-9.107, 9.121, 10.36, 16.20, 16.30

**V**

VISA Int'l Serv. Ass'n v Bankcard Holders of Am. (9th Cir 1986) 784 F2d 1472: §11.44
Vacco Indus. v Van Den Berg (1992) 5 CA4th 34, 6 CR2d 602: §§6.6, 7.5, 7.34, 8.26, 11.22, 11.42
Vaillette v Fireman's Fund Ins. Co. (1993) 18 CA4th 680, 22 CR2d 807: §§3.108, 11.8
Van Duyn v Baker Sch. Dist. 5J (9th Cir 2007) 481 F3d 770: §§2.21, 13.12
Van Skike v Director, Office of Workers' Compensation Programs (9th Cir 2009) 557 F3d 1041: §§9.97, 9.106, 9.109, 9.111, 9.120-9.121
Van de Kamp v Bank of America (1988) 204 CA3d 819, 251 CR 530: §2.42
Vasquez v State (2008) 45 C4th 243, 85 CR3d 466: §§2.2-2.3, 2.58, 2.95-2.96, 2.103, 2.105, 2.112, 2.114, 3.4-3.6, 3.46, 3.65, 5.4, 11.8
Vella v Hudgins (1984) 151 CA3d 515, 198 CR 725: §§8.30, 8.36, 9.45, 10.3, 11.68
Venegas v Mitchell (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679: §§8.29, 8.34, 8.37, 11.15
Ventas Fin. LLC v Franchise Tax Bd. (2008) 165 CA4th 1207, 81 CR3d 823: §10.62
Vigil v Leavitt (9th Cir 2004) 381 F3d 826: §2.93
Villa De Las Palmas Homeowners Ass'n v Terifaj (2004) 33 C4th 73, 14 CR3d 67: §§2.88, 3.103
Villanueva v City of Colton (2008) 160 CA4th 1188, 73 CR3d 343: §§2.70, 3.82
Villinger/Nicholls Dev. Co. v Meleyco (1995) 31 CA4th 321, 37 CR2d 36: §14.24
Vincent v Hughes Air W., Inc. (9th Cir 1977) 557 F2d 759: §5.24
Vineyard Area Citizens For Responsible Growth, Inc. v Rancho Cordova (2007) 40 C4th 412, 53 CR3d 821: App D
Virani, U.S. ex rel v Jerry M. Lewis Truck Parts & Equip. Inc. (9th Cir 1996) 89 F3d 574: §§1.20, 2.33-2.34
Vitamins Cases, In re (2003) 110 CA4th 1041, 2 CR3d 358: §§8.9, 8.13, 9.26, 9.73, 9.92, 10.3-10.5, 10.10-10.11, 10.40-10.41, 10.71, 10.73, 11.68, 16.27
Vizcaino v Microsoft Corp. (9th Cir 2002) 290 F3d 1043: §§2.30, 8.17-8.19, 9.111, 10.22, 10.28, 10.34, 10.37, 10.39, 10.46-10.47, 10.51, 10.73, 11.17, 11.53
Vo v Las Virgenes Mun. Water Dist. (2000) 79 CA4th 440, 94 CR2d 143: §§3.81, 8.4, 8.26, 9.3, 9.78, 10.53, 10.58-10.59, 10.65, 10.67, 11.68, 16.17, 16.26

**W**

Wackeen v Malis (2002) 97 CA4th 429, 118 CR2d 502: §§11.3, 11.8, 11.21
Wagner Farms, Inc. v Modesto Irrig. Dist. (2006) 145 CA4th 765, 52 CR3d 683: §11.45
Wakefield v Matthews (9th Cir 1988) 852 F2d 482: §11.8
Wal-Mart Real Estate Bus. Trust v City Council (2005) 132 CA4th 614, 33 CR3d 817: §§2.35, 2.42, 2.57, 2.72, 2.85, 2.101, 3.19, 3.45, 3.63, 9.36
Walker v Countrywide Home Loans, Inc. (2002) 98 CA4th 1158, 121 CR2d 79: §§3.19, 4.51
Wallace v Consumers Coop. of Berkeley, Inc. (1985) 170 CA3d 836, 216 CR 649: §§2.95, 2.98-2.99, 2.103, 2.108, 2.114, 3.19, 3.28, 3.36, 9.13, 9.63, 9.67, 11.65, 13.19, 15.5
Wallace v Mulholland (7th Cir 1992) 957 F2d 333: §8.27
Wallis v Farmers Group, Inc. (1990) 220 CA3d 718, 269 CR 299, disapproved in part on other grounds in Dore v Arnold Worldwide, Inc. (2006) 39 C4th 384, 46 CR3d 668: §§3.76, 7.9
Walsh v New W. Fed. Sav. & Loan Ass'n (1991) 234 CA3d 1539, 1 CR2d 35: §§2.91, 4.37, 4.50, 4.91, 11.19, 11.21
Walters v Marler (1978) 83 CA3d 1, 147 CR 655: §7.31
Wang v Division of Labor Standards Enforcement (1990) 219 CA3d 1152, 268 CR 669: §§3.67, 3.94
Wanland v Law Offices of Mastagni, Holstedt & Chiurazzi (2006) 141 CA4th 15, 45 CR3d 633: §§9.27, 9.36, 9.43
Ward, Marriage of (1992) 3 CA4th 618, 4 CR2d 365: §§2.23, 3.93, 9.95, 9.103, 10.68
Warehouse, Processing, Distribution Workers Union, Local 26 v Hugo Neu Proler Co. (1998) 65 CA4th 732, 76 CR2d 814: §§3.97-3.98, 14.23
Washburn v City of Berkeley (1987) 195 CA3d 578, 240 CR 784: §§2.4, 2.42, 2.63, 3.25-3.26, 3.58, 9.79, 11.1, 11.8
Washington v Baenziger (ND Cal 1987) 673 F Supp 1478: §§4.52, 7.5
Washington Pub. Power Supply Sys. Litig., In re (9th Cir 1994) 19 F3d 1291: §§8.16-8.18, 9.19, 9.88, 9.113, 10.22, 10.28, 10.34, 10.37, 10.46, 10.51
Watson v County of Riverside (9th Cir 2002) 300 F3d 1092: §§2.88, 2.93, 2.106, 2.116, 9.12, 9.63, 10.54, 10.56
Watson v Department of Transp. (1998) 68 CA4th 885, 80 CR2d 594: §§7.5, 7.8, 7.23
Webb v Ada County (9th Cir 2002) 285 F3d 829: §§9.24, 11.66
Webb v Board of Educ. (1985) 471 US 234, 85 L Ed 2d 233, 105 S Ct 1923: §§9.6, 9.88, 11.46, 13.18, 16.23
Webb v Sloan (9th Cir 2003) 330 F3d 1158: §§2.100, 9.9, 9.55, 9.60, 9.63-9.64, 10.54, 10.66
Webb v Ada County (9th Cir 1999) 195 F3d 524; Peterson v Minidoka County Sch. Dist. No. 331 (9th Cir 1997) 118 F3d 1351: §11.44
Weber v Langholz (1995) 39 CA4th 1578, 46 CR2d 677: §§4.8, 9.83, 11.50
Weeks v Baker & McKenzie (1998) 63 CA4th 1128, 74 CR2d 510: §§3.56, 3.59, 3.76, 3.80, 8.26, 9.3, 9.23, 9.45, 10.10, 10.14, 10.18, 10.36, 10.38, 10.40, 10.42, 10.53
Weinberg v Safeco Ins. Co. (2004) 114 CA4th 1075, 8 CR3d 224: §14.18
Weisman v Bower (1987) 193 CA3d 1231, 238 CR 756: §6.31

Welch v Metropolitan Life Ins. Co. (9th Cir 2007) 480 F3d 942: §§9.88, 9.97, 9.111, 9.117, 9.120, 10.45, 11.49
Wells Fargo Bank v Zinnel (2004) 125 CA4th 393, 22 CR3d 750: §3.128
Wells Prop. v Popkin (1992) 9 CA4th 1053, 11 CR2d 845: §16.10
Werschkull v United Cal. Bank (1978) 85 CA3d 981, 149 CR 829: §§9.2, 10.4
Wershba v Apple Computer, Inc. (2001) 91 CA4th 224, 110 CR2d 145: §§8.8, 8.13, 9.83, 10.1, 10.3, 11.17, 11.48, 11.50, 11.68
West Coast Dev. v Reed (1992) 2 CA4th 693, 3 CR2d 790: §§4.85, 6.30-6.31, 6.34, 6.36, 11.56
West Va. Univ. Hosp. v Casey (1991) 499 US 83, 113 L Ed 2d 68, 111 S Ct 1138: §9.129
Westphal v Wal-Mart Stores, Inc. (1998) 68 CA4th 1071, 81 CR2d 46: §§6.64, 6.70
Westside Community for Indep. Living, Inc. v Obledo (1983) 33 C3d 348, 188 CR 873: §§2.85, 2.90, 2.93, 2.114, 3.43, 11.19
Whalen v Unit Rig, Inc. (10th Cir 1992) 974 F2d 1248: §9.64
White v Beal (ED Pa 1978) 447 F Supp 788: §3.43
White v Lieberman (2002) 103 CA4th 210, 126 CR2d 608: §§3.111, 3.113
White v New Hampshire Dep't of Employment Sec. (1982) 455 US 445, 71 L Ed 2d 325, 102 S Ct 1162: §11.9
White v Ultramar, Inc. (1999) 21 C4th 563, 88 CR2d 19: §2.51
White v Western Title Ins. Co. (1985) 40 C3d 870, 221 CR 509: §7.9
White v City of Richmond (9th Cir 1983) 713 F2d 458, disapproved on other grounds in Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II) (1987) 483 US 711, 97 L Ed 2d 585, 107 S Ct 3078: §§9.97, 9.106
Whitfield v Board of Supervisors (1991) 227 CA3d 451, 277 CR 815: §12.7
Whitley, Conservatorship of (2007) 155 CA4th 1447, 66 CR3d 808: §3.69
Whitley, Conservatorship of (2009), review granted Oct. 22, 2009, S175855, superseded opinion at 2009 Cal App Unpub Lexis 5983): §3.69
Wilcox v City of Reno (9th Cir 1994) 42 F3d 550: §§8.27, 10.39, 10.55-10.56, 10.61, 10.63, 10.66
Wilder v Bernstein (2d Cir 1992) 965 F2d 1196: §2.28
Wilhite v Callihan (1982) 135 CA3d 295, 185 CR 215: §4.43
Wilkerson v City of Placentia (1981) 118 CA3d 435, 173 CR 294: §§12.8, 16.21
Wilkerson v Sullivan (2002) 99 CA4th 443, 121 CR2d 275: §§2.91, 3.113, 9.36, 15.15
Williams v Alioto (9th Cir 1980) 625 F2d 845: §2.106
Williams v Horvath (1976) 16 C3d 834, 129 CR 453: §§2.3, 2.12
Williams v MGM-Pathe Communications Co. (9th Cir 1997) 129 F3d 1026: §8.18
Williams v San Francisco Bd. of Permit Appeals (1999) 74 CA4th 961, 88 CR2d 565: §3.69
Wilson v Harley Davidson Motor Co. (1977) 67 CA3d 678, 136 CR 793: §12.25
Wilson v Wilson (1960) 54 C2d 264, 5 CR 317: §§4.5, 9.38
Wilson's Heating & Air Conditioning v Wells Fargo Bank (1988) 202 CA3d 1326, 249 CR 553: §4.45
Wilson, McCall & Daoro v American Qualified Plans, Inc. (1999) 70 CA4th 1030, 83 CR2d 192: §7.23
Wing v Asarco, Inc. (9th Cir 1997) 114 F3d 986: §§10.26, 10.34, 10.37
Winick Corp. v County Sanitation Dist. No. 2 (1986) 185 CA3d 1170, 230 CR 289: §§6.38, 6.46, 6.66
Winick Corp. v Safeco Ins. Co. (1986) 187 CA3d 1502, 232 CR 479: §§2.107, 9.85
Wininger v SI Mgmt. L.P. (9th Cir 2002) 301 F3d 1115: §§2.30, 2.117, 5.8, 5.13, 8.19
Winslow v Harold G. Ferguson Corp. (1944) 25 C2d 274, 153 P2d 714: §5.10
Winston Square Homeowner's Ass'n v Centex West, Inc. (1989) 213 CA3d 282, 261 CR 605: §9.126
Winterrowd v American Gen. Annuity Ins. Co. (9th Cir 2009) 556 F3d 815: §§1.17, 2.27, 2.34, 9.3, 9.9-9.10
Winters v Security Pac. Nat'l Bank (1975) 49 CA3d 510, 122 CR 619: §3.104
Wong v Davidian (1988) 206 CA3d 264, 253 CR 675: §§4.51, 6.33, 11.1
Wong v Thrifty Corp. (2002) 97 CA4th 261, 118 CR2d 276: §§2.95, 2.103, 4.19-4.20, 4.69-4.70, 4.77, 4.81, 11.8, 14.9
Wood v Jamison (2008) 167 CA4th 156, 83 CR3d 877: §3.106
Wood v McGovern (1985) 167 CA3d 772, 213 CR 498: §3.108
Wood v Santa Monica Escrow Co. (2007) 151 CA4th 1186, 60 CR3d 597: §§2.77-2.78, 3.106, 4.22
Woodland Hills Homeowners Org. v Los Angeles Community College Dist. (1990) 218 CA3d 79, 266 CR 767: §3.19
Woodland Hills Residents Ass'n v City Council (Woodland Hills II) (1979) 23 C3d 917, 154 CR 503: §§1.12, 2.6, 2.46, 2.101, 3.4-3.5, 3.8, 3.39-3.40, 3.43, 3.46, 3.48, 3.50-3.51, 3.54, 3.61, 3.66, 3.69, 3.71, 3.74, 5.32-5.33, 5.38-5.40, 5.42, 5.44-5.47, 5.53, 5.55, 5.58, 11.6, 11.47, 12.1, App D
Wooldridge v Marlene Indus. Corp. (6th Cir 1990) 898 F2d 1169: §9.90
Wysinger v Automobile Club of S. Cal. (2007) 157 CA4th 413, 69 CR3d 1: §§3.81, 9.49, 9.56, 10.8, 10.11, 10.38, 10.53, 10.65, App D, App H

**X**

Xebec Dev. Partners, Ltd. v National Union Fire Ins. Co. (1993) 12 CA4th 501, 15 CR2d 726: §7.17
Xuereb v Marcus & Millichap, Inc. (1992) 3 CA4th 1338, 5 CR2d 154: §§4.3, 4.25, 4.51, 4.53, 4.65

**Y**

Yagman, In the Matter of (Rev Dep't 1997) 3 Cal St Bar Ct Rptr 788: §10.14
Yield Dynamics, Inc. v TEA Sys. Corp. (2007) 154 CA4th 547, 66 CR3d 1: §3.124
Yield Dynamics, Inc. v TEA Systems Corp. (2007) 154 CA4th 547, 66 CR3d 1: §11.47
Young v Exxon Mobil Corp. (2008) 168 CA4th 1467, 86 CR3d 507: §§2.70, 3.82
Young v Rosenthal (1989) 212 CA3d 96, 260 CR 369: §§2.42, 6.60, 9.81, 12.9, 12.13, 16.2

Yu v Signet Bank/Virginia (2002) 103 CA4th 298, 126 CR2d 516: §3.111
Yuba Cypress Hous. Partners, Ltd. v Area Developers (2002) 98 CA4th 1077, 120 CR2d 273: §§2.48, 4.37, 9.32, 9.34, 9.44, 11.30, 11.37, 11.43, 12.21

**Z**

Z.A. v San Bruno Park Sch. Dist. (9th Cir 1999) 165 F3d 1273: §1.17
Zagorski v Midwest Billing Servs. (7th Cir 1997) 128 F3d 1164: §10.54
Zaldivar v City of Los Angeles (9th Cir 1986) 780 F2d 823, disapproved on other grounds in Cooter & Gell v Hartmarx Corp. (1990) 496 US 384, 110 L Ed 2d 359, 110 S Ct 1005: §6.17
Zambrano v INS (9th Cir 2002) 282 F3d 1145: §§2.5, 2.98
Zambrano v Oakland Unified Sch. Dist. (1991) 229 CA3d 802, 280 CR 454: §§9.24, 11.8
Ziello v Superior Court (1999) 75 CA4th 651, 89 CR2d 398: §15.11
Zimmerman v Drexel Burnham Lambert, Inc. (1988) 205 CA3d 153, 252 CR 115: §6.60
Zucker v Occidental Petroleum Corp. (9th Cir 1999) 192 F3d 1323: §11.17
Zuckerman v State Bd. of Chiropractic Exam'rs (2002) 29 C4th 32, 124 CR2d 701: §13.9
Zuehlsdorf v Simi Valley Unified Sch. Dist. (2007) 148 CA4th 249, 55 CR3d 467: §§2.105, 2.108, 3.92
Zurich Ins. Co. v Killer Music, Inc. (9th Cir 1993) 998 F2d 674: §§7.10, 7.15

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# Table of References

A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005): §§14.10, 14.12, 14.16-14.17
American Bar Association, Litigation Section, Ethical Guidelines for Settlement Negotiations, May 2002: §11.13
California Administrative Hearing Practice (2d ed Cal CEB 1997): §13.9
California Attorney's Guide to Damages (2d ed Cal CEB 2004): §§1.22-1.23
California Civil Appellate Practice (3d ed Cal CEB 1996): §§11.37, 12.11, 15.10-15.11, 16.13-16.14, 16.17
California Civil Discovery Practice (4th ed Cal CEB 2006): §§6.52, 6.54
California Civil Procedure Before Trial (4th ed Cal CEB 2004): §2.89, 11.8, 11.25, 11.33, 11.74, Apps C-K
California Civil Writ Practice (4th ed Cal CEB 2008): §15.3
California Conservatorship Practice (Cal CEB 2005): §1.1
California Estate Planning (Cal CEB 2002): §1.1
California Guardianship Practice (Cal CEB Annual): §1.1
California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995): §11.34
Condemnation Practice in California (3d ed Cal CEB 2005): §§3.101-3.102
Conte, Alba. Attorney Fee Awards. Colorado Springs, Colo., Shepard's/McGraw-Hill, 2d ed 1993: §§1.1, 2.12, 3.129
Debt Collection Practice in California (2d ed Cal CEB 1999): §15.2
Derfner, Mary F. & Arthur D. Wolf. Court Awarded Attorney Fees. New York, Matthew Bender, 1983: §§1.1, 2.12, 3.129
Fee Agreement Forms Manual (2d ed Cal CEB 2007): §§1.1, 1.25
Manual for Complex Litigation (4th ed Federal Judicial Center 2004): §11.54
Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual): §1.1
Professional Licensing: Disciplinary Practice in California (Cal CEB 2008): §13.9
Schwartz, Martin A. & John E. Kirklin. Section 1983 Litigation: Claims, Defenses, and Fees. New York, Aspen Publishers, 4th ed 2003: §§1.1, 2.12, 3.129
Witkin, Bernard E. California Procedure. 10 vols. San Francisco, Bancroft-Whitney, 5th ed 2008: §§7.3, 7.21, 7.24, 7.29

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# Table of Forms

Memorandum of costs (Judicial Council form MC-010), App A
Motion for fees
- Declaration in support of motion for award of reasonable attorney fees, App E
- Declaration in support of plaintiff's motion for award of reasonable attorney fees, App F
- Memorandum in support of petitioner's motion for award of reasonable attorney fees, App D
- Notice of motion for award of reasonable attorney fees and costs, App C
- Reply memorandum in support of petitioner's motion for award of reasonable attorney fees, App H
- Supplemental declaration in support of motion for reasonable attorney fees, App G

Order awarding fees
- Order granting in part plaintiff's motion for attorney fees and expenses, App J
- Sample form of order awarding attorney fees and costs, App I
- Stipulation for award of attorney fees, proposed order awarding fees, App K

Statement of decision, App L
Taxation of fee award, sample clause relating to, 1.25

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# Index

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

*References are to chapter section numbers*

*The symbol "" after a section number indicates that a form appears in the section.*

**Abatement**
Drug house abatement action, prevailing party's recovery of costs and fees, 3.103
Nuisance abatement action, prevailing defendant's recovery of fees in, 3.103

**Abuse of Discretion.** See **Discretion of Court**

**Administrative Agencies and Proceedings**
Generally, 13.1
Before filing litigation, fee awards for administrative proceedings
California courts, compensability for work performed in administrative proceedings before filing action in, 13.16
Federal courts, standard if administrative proceedings optional, 13.18
Federal courts, standard if administrative proceedings prerequisite to court action, 13.17
Common fund doctrine. See **Common Fund Doctrine**
Equity, award of fees under. See **Equity, Award of Fees Based on**
Fee-shifting statutes, applicability in administrative proceedings, 1.14, 2.19
Judicial action, administrative proceedings in conjunction with
Before filing litigation (see Before filing litigation, fee awards for administrative proceedings, above)
California courts, fee award for administrative work incurred after filing action in, 13.19
Federal courts, fee award for administrative work incurred after filing action in, 13.20
Judicial action, fee awards for administrative proceedings resolved without
Commission on Professional Competence, prevailing school employees' right to receive fees in proceedings before, 13.8
Equitable bases for fee awards in administrative proceedings not involving litigation, 13.4
Fair Employment and Housing Commission's authority to award fees for private attorney's work, restrictions on, 13.7
Federal administrative proceedings, 13.15
IDEA. See **Individuals with Disabilities Education Act (IDEA)**
Insurance Commissioner's authority to award fees in proceedings about insurance rates, 13.6
Licensee disciplinary proceedings, state licensing agencies recovering fees from licensees in, 13.9
Local ordinances authorizing fee awards, proceedings under, 13.14
Public Utilities Commission's authority to award fees in administrative proceedings about utility rates, 13.5
Statutory basis (see Statutory basis for fee awards in administrative proceedings resolved without litigation, below)
Judicial review of administrative proceeding. See **Fee-Shifting Statutes**
Persons eligible to recover fees for work performed in administrative proceedings, 13.21
Prelitigation administrative proceedings, compensation for time spent on, 9.7
Prevailing parties
CCP §1028.5, fee award to prevailing parties against state regulatory agencies, 2.82
Commission on Professional Competence, prevailing school employees' right to receive fees in proceedings before, 13.8
Private attorney general statute, fee awards under. See **Private Attorney General Doctrine**
PUC. See **Public Utilities Commission (PUC)**
Quasi-administrative proceedings
Common fund doctrine, administrative agency awarding fees to nonattorney for quasi-judicial administrative proceedings, 5.8
Equitable theories, fee work performed in quasi-administrative proceedings, 13.4
Sanctions in administrative proceedings, limited availability of, 6.44
Statutory basis for fee awards in administrative proceedings resolved without litigation
California law, 13.2
Federal law requiring specific statutory authorization for fee awards in administrative proceedings, 13.3

**Affidavits and Declarations**
Application for statutory fees, affidavit in support of, 11.30

Bad faith affidavits in summary judgment motions, exclusion of fees as sanctions for, 6.58
Market rates, declarations from local attorneys as proof of, 9.121
Motion for fees, declaration in support of. See **Motions for Fees**
Reconsideration of fee award, affidavit supporting motion for, 11.69

**Agents and Agency**
Administrative agencies. See **Administrative Agencies and Proceedings**
Damages, no recovery of fees based on agent's misrepresentations, 7.27
Regulatory agencies (state), prevailing party's recovery of fees in actions against, 3.94

**Agricultural Lands**
Trespass action, prevailing party's right to fees, 3.103

**Alcohol and Drugs**
Drug house abatement action, prevailing party's recovery of costs and fees, 3.103

**Alternative Minimum Tax (AMT)**
American Jobs Creation Act of 2004, effect of AMT on taxpayer's deduction of fees and costs under, 1.22

**Ambiguities**
Order awarding fees, effect of ambiguities in, 11.69

**Amendments and Modifications**
Appeal of amended judgment including fee award, 16.7
Arbitration award, amendment to include fees and costs, 14.14

**American Rule**
Generally, 1.2
Exceptions to rule
Contractual fees. See **Contracts**
Damages, fees awarded under tort of another doctrine as. See **Tort of Another Doctrine**
Equitable exceptions. See **Equity, Award of Fees Based on**
Fee-shifting statutes. See **Federal Fee-Shifting Statutes; Fee-Shifting Statutes**
Prevailing parties. See **Prevailing Parties**
Private attorney general doctrine. See **Private Attorney General Doctrine**

**Americans with Disabilities Act (ADA)**
Damages and fees, recovery of, 3.83
Defendants, ADA providing for discretionary fee awards to, 2.71
Federal preemption under ADA
Defendants, ADA preempting fees awards to under state statutes to, 2.71
Dual-standard prevailing party provisions of ADA, preemption of two-sided provision in California's Disabled Persons Act, 2.78

**Amicus Curiae**
Compensability of time spent drafting amicus brief, 9.9, 9.15
Eligibility of amicus curiae to recover fee award, restrictions on, 2.29
Lodestar method of calculating fees for preparation of amicus brief, 9.9, 9.15
Private attorney general statute
Opposing party's liability for costs of opposing amicus curiae brief, 3.27
Preparation of amicus curiae brief, amicus curiae's recovery of fees for, 3.20
Public policy prohibiting fee award against, 2.40
Real parties in interest serving as amici, prohibition against assessing for fees, 2.38

**Ancillary Proceedings, Hourly Fees for.** See **Lodestar Method of Calculating Fees**

**Answers**
Prayer for fees in, 11.1

**Antitrust Statute.** See **Cartwright Act**

**Appeals**
Abuse of discretion
Amount of fee, trial court's abuse of discretion as grounds for reversing, 16.24
Entitlement to fees, reviewing trial court's determination under abuse of discretion standard, 16.17-16.20

Administrative proceedings, limits on fee awards in judicial review of, 3.90
Amended judgment including fee award, appeal of, 16.7
Amount of fee award
Abuse of discretion by trial court, reversal amount determination based on, 16.24
Deferential standard of review for amount of fees awarded by trial court, 16.23
Entitlement to and amount of fees, trial court's determination of, 12.1
Excessive fees as grounds for reversal, 16.25-16.28
Failure of judgment to specify amount of fees, effect of, 16.6
Frivolous appeal. See **Frivolous Actions**
Inadequacy of fee award, challenge based on, 16.29-16.31
Remanding case to trial court to determine amount of fee award, 12.13
Stipulation by parties on amount of fee, reserving right to appeal issue of entitlement to fees, 16.8
Appellate court's determination of fees. See **Appellate Fees**
Arbitrator's award, judicial review of. See **Arbitration**
*Brandt* fees
Damages, recovery of appellate fees as, 9.42
Insurer's appeal, *Brandt* fees including fees incurred in defending against, 7.16
Burden on party challenging fee award to produce adequate record, 16.17
Collecting fee award pending appeal. See **Collection of Fee Awards**
Costs
Allocation of costs by appellate court, trial court awarding fees regardless of, 12.4
Appellate attorney fees not recoverable appellate costs, 9.32
Memorandum of costs (see Memorandum of costs, below)
Sanctions for frivolous appeal, inclusion of costs to court system in, 6.72
Time limit for claiming appellate costs, 11.45
Denial of fee award, appeal of order for, 16.10
Disqualification of judge issuing fee order after reversal of fee order on appeal, 11.52
Entitlement to fee award, standard of review on appeal of
Abuse of discretion standard, trial court ruling on entitlement reviewed under, 16.17-16.20
Arbitration fee awards, 16.19
Contract fee awards, 16.18
De novo review, 16.17, 16.20
Miscellaneous proceedings, 16.20
Multiple grounds, entitlement to fee award based on, 16.22
Published appellate opinion, entitlement to fees based on, 16.21
Federal rules regarding appealability of fee orders, 16.16
Findings by trial court on elements of fee award facilitating appellate review, 11.65
Frivolous appeal, sanctions for. See **Frivolous Actions**
Interim fee awards in statutory fee-shifting cases, appeal of, 16.3
Merits, judgment on
Challenging fee award if judgment on merits reversed on appeal, 16.9
Determining prevailing party for purposes of awarding fees, effect of appealing judgment on, 11.21, 11.35
Interim appellate services, prevailing party on merits entitled to recover fees for, 9.44
Reversal on merits, effect on prevailing party's right to fees, 2.92
Separate appeals for judgment on merits and fee awards, 11.21
Tolling time to file notice of appeal from judgment on merits, filing fee motion not resulting in, 11.21, 16.11
Notice
Abandonment of appeal, time limit for submitting memorandum of costs after receiving notification of, 12.25
Specifying order appealed from in notice of appeal, 16.14
Time for noticing appeal from fee order, 16.13
Tolling time to file notice of appeal from judgment on merits, filing fee motion not resulting in, 11.21, 16.11
Pending appeal, effect on determination of prevailing party
Generally, 2.91
Action reversed on merits, effect of, 2.92
Subsequent developments at trial level, effect of, 2.93
Postjudgment fee orders, appeal of
Generally, 16.1
Denial of fees, appealing order for, 16.10
Prejudgment fee orders, appeal of, 16.2
Prevailing party
Effect of appeal of judgment in determining prevailing party for purposes of awarding fees, 11.21, 11.35
Entitlement to appellate fees. See **Appellate Fees**
Merits, judgment on (see Merits, judgment on, above)
Pending appeal (see Pending appeal, effect on determination of prevailing party, above)
Private attorney general doctrine. See **Private Attorney General Doctrine**

Reasonable number of hours spent on case, requirement for challenging fees based on, 9.91
Reconsideration of original fee award based on appellate decision reducing plaintiff's damages or other relief, 10.62
Sanctions
Attorney substituting out of case, immediate appeal of sanctions order against, 16.5
Denial of sanctions, appeal of, 16.10
Frivolous appeals. See **Frivolous Actions**
Immediate appeal of sanction order over $5000, 16.4
Standard of review on appeal
Amount of fee award (see Amount of fee award, above)
Entitlement to fee award (see Entitlement to fee award, standard of review on appeal of, above)
Frivolous appeals. See **Frivolous Actions**
Standing
Class member's standing to appeal fee award without intervening, 11.17
Common fund fee award, defendant's lack of standing to appeal, 5.20, 8.12
Order awarding fee, attorney's standing to appeal, 16.12
Time
Appellate costs, time limit for claiming, 11.45
Application for appellate fees. See **Appellate Fees**
Notice (see Notice, above)
Tolling time to appeal merits judgment, fee motion not resulting in, 11.21, 16.11
Writs. See **Writs**

**Appellate Fees**
Anti-SLAPP motion, prevailing defendant's entitlement to appellate fees for successful appeal from denial of, 3.120
Appellate court determining entitlement to fees for appellate services, 12.7
Appellate court's determination of fees
Generally, 12.5
Effect and importance of appellate decision, fees based on, 12.8
Entitlement to fees for appellate services, appellate court determining, 12.7
Frivolous appeal, appellate court setting amount of fees awarded as sanctions for, 12.9
Original writ proceedings, 12.6
Application for appellate fees in trial court, procedure and timing of
Abandonment of appeal, time limit for submitting memorandum of costs after receiving notification of, 12.25
Disqualification of judge issuing initial fee order after reversal of fee award on appeal, 12.23
Judgment affirmed, claiming appellate fees if, 12.20
New final judgment, claiming appellate fees in event of, 12.21
Prejudgment fees, time limit for filing motion for, 12.21
Statutory appellate costs, prevailing party's entitlement to, 12.24
Stipulation for extending time to file fees motion, 12.22
Trial court order for fees, appellate review of, 12.26
Claiming fees for appellate services in trial court
Application for appellate fees in trial court (see Application for appellate fees in trial court, procedure and timing of, above)
Contract, fee award based on (see Contractual clauses, appellate fees under, below)
Federal appeals, fees for, 12.19
Interlocutory writ proceedings, fees for, 12.17
Prior appellate court determination, effect of, 12.18
Statute, fee award based on, 12.15
Contractual clauses, appellate fees under
Generally, 4.5, 9.38, 12.3, 12.16
Arbitration, contract providing fees for, 9.39
Indemnification award, split of authority concerning fees for appealing, 9.40
Costs, appellate attorney fees not recoverable as, 9.32
Damages, recovery of appellate fees as, 9.42
Determination of fees for appellate services
Appellate court's determination of fees (see Appellate court's determination of fees, above)
Entitlement to and amount of fees, trial court's determination of, 12.1
Lodestar method of calculating fees (see Lodestar method of calculating fees for appellate services, below)
Remand (see Remand, below)
Entitlement to appellate fees, standards for determining
Generally, 9.43
Distinction between prevailing party for purposes of appellate fees versus appellate costs, 2.48
Fee-shifting statutes, contracts, and equitable doctrines authorizing fees for appellate work, 1.13
Interim appellate services, prevailing party on merits entitled to recover fees for, 9.44
Partially successful appeals (see Partially successful appeals, entitlement to fees for, below)
Equitable theories, appellate fees under

Generally, 9.41
*Brandt*, recovery of appellate fees as damages under, 9.42
Fee-shifting statutes, appellate fees under. See **Fee-Shifting Statutes**
Lodestar method of calculating fees for appellate services
Conferencing, discussions among counsel, and moot court, appellate fees including time spent, 9.76
Contractual clauses (see Contractual clauses, appellate fees under, above)
Costs on appeal as separate item from fees on appeal, 9.32
Denial of fees by trial court, effect on fee award for appellate services, 9.33
Entitlement to appellate fees (see Entitlement to appellate fees, standards for determining, above)
Equitable theories (see Equitable theories, appellate fees under, above)
Fee-shifting statutes, appellate fees under. See **Fee-Shifting Statutes**
Multiplier factors (see Multiplier factors, below)
Post-remand motion to trial court, claiming appellate fees by, 9.34
Reasonableness of appellate services, standards for determining, 9.47
Statute or contract, compensation for appellate services if reasonable fees provided for by, 9.31-9.35
Memorandum of costs
Abandonment of appeal, time limit for submitting memorandum of costs after receiving notification of, 12.25
Verification and taxing procedures applicable to, 12.24
Motion for fees in appellate court
Application for appellate fees in trial court (see Application for appellate fees in trial court, procedure and timing of, above)
Frivolous appeal, motion for fees as sanction for, 12.14
Post-remand motion to trial court, claiming appellate fees by, 9.34
Prevailing party's motion for fees, 12.11
Multiplier factors
Enhancement of lodestar for, 10.13
Risk multipliers for, 10.43
Partially successful appeals, entitlement to fees for
California court decisions, 9.45
Federal court decisions, 9.46
Prevailing party
Motion for fees by, 12.11
Standards for determining, 12.24
Procedure for obtaining fee award for work on appellate services
Application for appellate fees in trial court (see Application for appellate fees in trial court, procedure and timing of, above)
Claiming fees (see Claiming fees for appellate services in trial court, above)
Federal appeals, 12.27
Requesting appellate court to set fee (see Requesting appellate court to set fee, below)
Remand
Discretion of appellate court to remand issue of appellate fees, 12.1
Post-remand motion to trial court, claiming appellate fees by, 9.34
Remittitur silent on fees (see Remittitur silent on fees, trial court awarding appellate fees if, below)
Remittitur silent on fees, trial court awarding appellate fees if
Allocation of costs by appellate court, trial court awarding fees regardless of, 12.4
Contract, entitlement to fees based on, 12.3
Statutory entitlement to fees, 12.2
Requesting appellate court to set fee
Amount of fee award, requesting appellate court set, 12.13
Motion for fees in appellate court, 12.11, 12.14
Statement in brief requesting fees on appeal, 12.10
Trial court, effect of appellate court's ruling on, 12.12
Time
Application for appellate fees (see Application for appellate fees in trial court, procedure and timing of, above)
Frivolous appeal, time limit for filing motion for fees as sanction for, 12.14
Prejudgment fees, time limit for filing motion for, 12.21
Statutory appellate costs, time limit for claiming, 12.24

**Application for Fees**
See also **Motions for Fees**
Appellate fees. See **Appellate Fees**
Compensability under fee-shifting statutes for time spent preparing and litigating, 9.16
Current fee rates, state court fee applications based on, 9.113
Default judgment, request for fees in, 11.28-11.29
Expert witnesses retained to support fee application, compensation for cost of, 9.22
Memorandum of costs, seeking fees in, 11.27
Multiplier applied to lodestar figure for time spent on fee application, 9.20

Separate requests for fees and costs, 11.25
Statutory fees, application for, 11.30

**Apportionment of Fees.** See **Common Fund Doctrine**

**Arbitration**
Appeals
Contract authorizing fees for arbitration proceedings, award of fees for appellate services, 9.39
Judicial review of arbitrator's award (see Judicial review of arbitrator's fee awards, below)
Standard for reviewing contract fee awards on appeal, 16.19
Claims for fees, arbitrator deciding
Generally, 14.11
Agreement's lack of provision for fee award, effect of, 14.12
Confirmation of arbitrator's fee award (see Confirmation of arbitrator's fee award, below)
Discretion of arbitrator in determining fee awards, 14.8, 14.13
Findings or conclusions by arbitrator, no requirement of, 14.14
Interim fees, arbitrator's award of, 14.13
Judicial review of arbitrator's fee awards (see Judicial review of arbitrator's fee awards, below)
Terms of arbitration agreement controlling arbitrator's ability to award fees, 14.2
Compel arbitration (see Motions to compel arbitration, compensability of time spent on, below)
Confirmation of arbitrator's fee award
Generally, 14.18
Proceedings to confirm award, recovery of fees for, 14.24
Consumer statute, arbitrator's authority to award fees on claim submitted to arbitration under, 3.104
Correction of award
Time limit for arbitrator to correct award, 14.14
Vacating award, trial court's correction of award as alternative to, 14.17
Costs
Amendment of arbitration award to include fees and costs, 14.14
CCP §998, arbitrator's enforcement of, 14.9
Discovery on fee issues, 14.13
Discretion of arbitrator
Fee awards, arbitrator's discretion in making, 14.8, 14.13
Prevailing party for purposes of award of contractual fees for work performed in arbitration, arbitrator's discretion in determining, 4.93
Enforcement of arbitration award, recovery of fees for, 4.63
Equitable apportionment doctrine, arbitrators applying, 14.5
Fee-shifting, availability in arbitration proceedings, 1.15
General availability of fees in arbitration, 14.1
Judicial review of arbitrator's fee awards
Confirmation of arbitrator's fee award, 14.18, 14.24
Deferential review of arbitrator's fee awards, 14.14
Errors of law or fact, no review of arbitration awards for, 14.15
Vacating award (see Vacating arbitrator's fee award, below)
Motions to compel arbitration, compensability of time spent on
Generally, 14.20
Cases awarding fees, 14.21
Cases denying fees, 14.22
Collective bargaining agreements, actions to compel arbitration under, 3.98, 14.23
Post-arbitration proceedings, obtaining fees for, 14.24
Pre-arbitration proceedings, obtaining fees for
Motions to compel arbitration (see Motions to compel arbitration, compensability of time spent on, above)
Work performed in preparation for arbitration, recovery of fees for, 14.19
Prevailing party
Contractual attorney fee clause, arbitrator's power to award fees to prevailing party based on, 14.4
Fee award for work performed in arbitration, arbitrator's determination of prevailing party for purposes of, 4.93
Order compelling arbitration not qualifying party as prevailing party under CC §1717, 4.94
Procedure for obtaining fee awards in arbitrations
Applicable procedures, 14.13
Arbitrator deciding fee claims (see Claims for fees, arbitrator deciding, above)
Remedy in arbitration proceedings, fees as, 11.5
Sanctions
Arbitrator awarding fees as, 14.6
CCP 128.5 sanctions, applicability to contractual arbitration proceedings, 6.45
Specific types of fees, availability of

Contract-based fees, 4.6, 14.4
Equitable doctrines, fees based on, 14.5
Sanctions (see Sanctions, above)
Statutory fees, 2.18, 14.3
Standards for determining fee award in arbitration proceedings
CCCP §998, applicability to arbitration proceedings, 14.9
Discretion of arbitrator to award fees, 14.8, 14.13
Judicial proceedings standards, applicability of, 14.7
Vacating arbitrator's fee award
Generally, 14.15
Correction of award as alternative to, 14.17
Grounds for vacating award, 14.16

**Assignment**
*Brandt* fees, insured assigning right to, 7.17
Conflict of interest in settling case and claim for fees, assignment of fees as method for minimizing, 11.15

**Audio Recordings.** See **Video or Audio Recordings**

**Bad Faith**
*Brandt* fees as damages if insurance benefits denied in bad faith. See **Damages**
Common law bad faith doctrine, compensation for time spent securing fee award under, 9.18
Damages. See **Damages**
Defined, 6.31
Equitable exception permitting fee award based on bad faith, federal courts' recognition of, 5.2
Frivolous appeal in subsequent bad faith action, no recovery of damages for, 6.67
Objective bad faith defined, 6.31
Police officers, prevailing defendant's recovery of fees in bad faith, libel, or slander actions against, 3.107, 6.5
Sanctions for actions brought in. See **Sanctions**
Subjective bad faith defined, 6.31
Uniform Trade Secrets Act authorizing fee award for bad faith claims of misappropriation of trade secrets, 3.124

**Bankruptcy and Insolvency**
Contractual fee clauses, bankruptcy law not precluding fee claims in bankruptcy court based on, 2.10

**Bifurcated Settlement.** See **Settlement**

**Block Billing.** See **Lodestar Method of Calculating Fees**

**Bonds and Undertakings.** See **Collection of Fee Awards**

**Briefs**
Amicus curiae brief. See **Amicus Curiae**
Appellate brief, requesting fees in, 12.10
Compensability of time spent drafting, 9.9

**Brown Act**
Successful action under Brown Act qualifying for fee award, 3.86

**Burden of Proof**
See also **Proof**
Appealing fee award, burden on challenger to produce adequate record, 16.17
Attorney claiming fee, burden of producing evidence supporting fee claim on, 11.46
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Motion for fees, effect of opposing counsel challenging, 11.58
Special circumstances making fee award to plaintiff unjust, defendant's burden of showing, 2.51

**Business Litigation Statutes.** See **Fee-Shifting Statutes**

**Calculation of Fees**
Generally, 8.1
Compensation, calculation of fees awarded as, 1.8
Contingency fees agreements. See **Contingency Fee Agreements**

Contract, fees set by, 8.24
Court schedule, fees set by, 8.23
Lodestar method. See **Lodestar Method of Calculating Fees**
Multiplier factors. See **Multiplier Factors**
Percentage of recovery method of calculating fees. See **Percentage of Recovery Method of Calculating Fees**
State or federal court, effect on calculation of fee, 1.12
Statutory fee cases
Generally, 8.22
Contingency fee agreements, effect of. See **Contingency Fee Agreements**
Federal law requiring use of lodestar method of calculating fees in statutory fee cases, 8.10

**California Public Records Act** See **Public Records Act**

**Cartwright Act**
Partial success rule, special rule in Cartwright Act cases, 9.68
Prevailing party's right to fees in action to enforce, 3.123

**Catalyst Theory**
Action causing defendant voluntarily afford plaintiff relief sought, availability of fee award under catalyst theory if, 2.8
Federal law
Fee-shifting statutes, applicability of catalyst rule to, 2.117
Inapplicability of catalyst theory to federal prevailing party statutes, 2.13, 2.97
Judicial imprimatur on plaintiff's actions, requirement of, 2.115
Preliminary injunction or other interim relief, effect of, 2.116
Government agencies, catalyst claims against, 2.96
Prevailing parties
California law, effect of plaintiff's lawsuit causing defendant's corrective behavior, 2.111-2.114
Causation of defendant's changed behavior, plaintiff's action as, 2.114
Federal law (see Federal law, above)
Finding that action not frivolous, unreasonable, or groundless as requirement for fee award, 2.96, 2.113
Reasonable effort to settle, requirement plaintiff make, 2.112
Settlement
Attempt to settle case as requirement for recovering fees under catalyst theory, 2.112, 9.6
Notice of claims and reasonable opportunity to settle, party required to give opposing party before filing lawsuit, 2.3
Voluntary corrective action by defendant, fees awarded if litigation results in, 5.7

**CCP §998 Settlement Offer.** See **Settlement**

**Charitably Funded Attorneys.** See **Publicly or Charitably Funded Attorneys**

**Charts, Checklists, Questionnaires, and Tables**
Attorney time record, chart, App B
Common fund, substantial benefit, and private attorney general theories, chart summarizing similarities and differences between, 5.60
Motion for fees, checklist of procedures for, 11.74

**Choice of Law**
Reciprocity of fees, effect of choice of law provisions in parties' contract on, 4.64

**Cities and Counties**
City charters and ordinances providing for fee awards, 3.105
Damages, no recovery of fees based on city's nontortious denial of plaintiff's claim for damages, 7.32
Equitable apportionment, inapplicability to county's recovery of lien for medical services to indigent patient, 5.30
Unjust eviction ordinance (City of Oakland), prevailing tenant's right to obtain fees under, 3.105

**Civil Rights**
Concurrent jurisdiction of California courts over civil rights actions under 42 USC §1983, 2.12
Expert witness fees, recovery in civil rights cases, 9.129
Federal civil rights statutes, fee awards under, 3.129
FEHA. See **Fair Employment and Housing Act (FEHA)**
Frivolous case filed by plaintiff, defendant's entitlement to fees under federal law, 2.71
Jury trial, no right to inform jury of plaintiff's right to fee award, 7.33
Technical or de minimis victories in federal civil rights cases, effect on fee award, 8.28
Unruh Civil Rights Act and Americans with Disabilities Act, fee awards under, 3.83
Waiver of fees in civil rights cases, 11.11

**Class Actions**
Common fund fee award, defendant's lack of standing to appeal, 8.12
Conflict of interest, possible recovery of fees in class action creating, 1.20
Coupons redeemed by class members, fee award based on value of, 8.20, 10.29
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Objectors to class action
Common fund doctrine, class action objector's recovery of fees under, 3.21
Discovery rights of objectors to class action fee awards, 11.55
Eligibility of class action objector to recover fee award, 2.30
Percentage of recovery method of calculating fees, use of, 8.7
Private attorney general doctrine
Financial burden of litigation, 3.68
Objectors to class actions, recovery of fees by, 3.21
Significant benefit, class action not required to establish, 3.58
Settlements
Clear sailing fee settlement defined, 8.12
Court approval of fee settlements in, 11.17
Standing of class member to appeal fee award without intervening, 11.17

**Code of Civil Procedure §128.5.** See **Sanctions**

**Code of Civil Procedure §128.7.** See **Sanctions**

**Collection of Fee Awards**
Adding party to action for purposes of facilitating fee award, 15.9
Appeal, recovery of fee award pending
Generally, 16.15
Amount of undertaking, 15.12
California courts, 15.10-15.12
Federal courts, no automatic stay of enforcement of federal statutory fee award pending appeal, 15.13
Posting of undertaking, 15.11
Staying enforcement of fee award pending appeal, undertaking as requirement for, 15.10-15.11
Undisputed sums, recovery pending appeal, 15.14
California, collecting judgment against
Generally, 15.4
Budget Act restrictions, effect of, 15.5, 15.8
Current law, 15.6
Foreign judgment for attorney fees, enforceability under Uniform Foreign Money-Judgments Recognition Act, 15.2
Government defendants, collecting fee awards from
Generally, 15.3
California (see California, collecting judgment against, above)
Federal court fee awards, collection of, 15.8
Local public entities, collecting judgment for fees from, 15.7
Writ of mandate to compel government entity to pay fee award, 15.3-15.4
Money judgment, collection of fee award as, 15.1, 15.3
Private defendants, collecting fee awards from, 15.2
Public entities (see Government defendants, collecting fee awards from, above)
Time spent collecting contractual fee awards, recovery of fees for, 15.15
Undertaking (see Appeal, recovery of fee award pending, above)
Writs
Federal government, writ of execution to collect fee award from, 15.8
State government entity, writ of mandate to compel payment of fee award by, 15.3-15.4

**Collective Bargaining Agreements**
Compelling arbitration under collective bargaining agreement, fee awards in actions, 3.98, 14.23

**Commercial Cases**
Enforcement of commercial appropriation statute, prevailing party's right to fees in action for, 3.122

**Commission on Professional Competence**
Prevailing school employees' right to receive fees in proceedings before, 13.8

**Common Fund Doctrine**
See also **Substantial Benefit Doctrine**
Generally, 5.10

Administrative agencies
Adjudicatory functions, power of agencies performing to award fees under common fund doctrine, 14.5
Equitable power of agencies to award fees under common fund doctrine, 3.34, 13.4
Apportionment doctrine (see Codification of common fund/equitable apportionment doctrine, below)
Class action objector's recovery of fees under, 3.21
Codification of common fund/equitable apportionment doctrine
Generally, 5.26
Arbitrators applying equitable apportionment doctrine, 14.5
Calculating fees in common fund cases, 5.31
County's recovery of lien for medical services to indigent patient, inapplicability of equitable apportionment to, 5.30
Labor Code §3856, codification of equitable apportionment doctrine in, 5.27
Labor Code §3860, employer's prorata share of litigation costs deducted from amount paid to employer out of settlement proceeds as reimbursement for workers' compensation expenses, 5.28
Separate counsel, inapplicability of equitable apportionment if each party represented by, 5.29
Constructive common fund doctrine
Generally, 5.25
Lodestar method of calculating fees in constructive common fund cases, 8.9, 8.13
Court approval of fee settlement in common fund fee cases, 11.17
Equitable apportionment doctrine (see Codification of common fund/equitable apportionment doctrine, above)
Federal requirements for common fund
Generally, 5.15
Control of fund by court, 5.16
Special circumstances resulting in serious inequities in proposed fee award, 5.17
Fees for fee-related services, unavailability under common fund doctrine, 9.19
Lodestar-adjustment method of calculating fees, using in common fund cases. See **Lodestar Method of Calculating Fees**
Passive beneficiaries sharing litigation costs under, 5.10
Percentage of recovery method, permissibility of using in common fund cases, 1.8, 5.18, 8.7, 8.12
Private attorney general doctrine, comparison of common fund doctrine to
Generally, 3.10, 5.21
Cases awarding fees under private attorney general doctrine despite availability of common fund, 5.23
Cases rejecting use of private attorney general doctrine if common fund available, 5.22
Chart, comparison of common fund, substantial benefit, and private attorney general theories, 5.60
Purposes of doctrines, 5.55
Purpose of, 5.55
Quasi-judicial administrative proceedings, administrative agency awarding fees to nonattorney for, 5.8
Requirements for award under
Generally, 5.11
Beneficiaries, payment of fees by, 5.14
Federal requirements (see Federal requirements for common fund, above)
Identifiable fund of money, 5.12
Litigation, requirement fund created by or resulting from, 5.13
Risk multipliers, availability in federal common fund cases, 10.46
Standing to appeal common fund fee award, 5.20, 8.12
Statutory fee awards, comparison of common fund fee awards to
Combining common fund award with statutory award, 5.19
Larger fees, common fund fee awards resulting in, 5.18
Standing to appeal fee award, 5.20
Substantial benefit doctrine, comparison of common fund doctrine to, 5.24, 5.32

**Common Interest Developments**
Prevailing party's right to fees in action to enforce government documents, 3.103

**Common Law**
Bad faith doctrine, compensation for time spent securing fee award under, 9.18
Private attorney general doctrine, award of fees in action vindicating common law rights, 3.48

**Compel Arbitration.** See **Arbitration**

**Complaints**
Dismissal of actions. See **Dismissal of Actions**
Ground for fee claim, pleading in complaint, 11.2
Grounds for fee award, no requirement complaint state, 2.4
Prayer for attorney fees in complaint, 2.4, 11.1-11.2

**Condemnation.** See **Inverse Condemnation**

**Confirmation of Arbitrator's Fee Award.** See **Arbitration**

**Conflicts of Interest**
Generally, 1.20
Settlement of case and claim for fees, conflicts of interest in. See **Settlement**

**Constitutional Law**
California Budget Act restrictions, effect on enforcement of federal court attorney fee awards, 15.8
Eligibility for fee awards, constitutionality of applying different standards for plaintiffs and defendants in determining, 2.70
Private attorney general doctrine's applicability to constitutional rights, 3.45, 5.58

**Construction and Interpretation**
Anti-SLAPP statute, broad construction of, 3.111
CCP §128.7, California courts looking to federal decisions interpreting Federal Rules of Civil Procedure 11 when interpreting, 6.10
CCP §998, interpretation of, 2.80
Civil Code §1717, interpretation of, 4.12
Common interest development covenants and restrictions, construction of, 3.103
Contracts. See **Contracts**
Equitable principles, interpretation of statutory fees in light of, 5.4
Fee-shifting statutes. See **Fee-Shifting Statutes**
Prevailing party. See **Prevailing Parties**
Private attorney general statute, construction of. See **Private Attorney General Doctrine**
Welf & I C §10962, liberal construction of, 3.84

**Constructive Common Fund Doctrine.** See **Common Fund Doctrine**

**Consultants.** See **Experts and Expert Witnesses**

**Consumer Protection**
Arbitration of claim under consumer protection statute, arbitrator's power to award fees, 14.3
Consumer Credit Reporting Agencies Act
Federal Fair Credit Reporting Act, two-sided prevailing party fee provision of California Act not preempted by, 2.78
Mandatory fee awards to prevailing plaintiffs under, 2.76
Consumers Legal Remedies Act, prevailing party's entitlement to fees under, 2.76
Fee-shifting provisions in consumer protection statutes, 3.104
Private attorney general doctrine, award of fees in action vindicating consumers' rights, 3.46

**Contempt**
Federal court's authority to impose fee award against party found guilty of civil contempt, 5.3
Statute authorizing reasonable fees and costs incurred with contempt proceeding, 6.57

**Contingency Fee Agreements**
*Brandt*, calculating fees in contingent fee case under, 7.15
Eligibility for fees under contractual provision, effect of contingency agreement on, 4.59
Income tax consequences to client of fees paid to lawyers under, 1.23
Lodestar-based fees, effect of contingency fee agreements on
Generally, 10.3
Adjustment of lodestar, effect of contingency fee agreement on, 8.36-8.37, 10.14
Factors in determining reasonableness of contingency fee agreement, 8.33
Issues raised by contingency fee agreement, 8.29
Large damage cases, lodestar-adjustment method standard in, 8.34
Primacy of lodestar method, cases establishing, 8.31
Quantum meruit, awards based on, 8.32
Weight given to existence of contingency fee agreement by courts, 8.30
Market rate for attorney services, effect on attorney charging contingent fee, 9.98
Percentage of recovery method, effect of contingency fee agreement in cases using, 8.38
Sanctions awarded in contingency fee cases, 6.22
Social security benefits claimants, contingent-fee arrangements as primary means of setting fees for, 10.30
Statutory fee cases, effect of contingency fee agreements on
Generally, 8.35
California cases not limiting fee awards based on contingency fee agreement, 8.36
Federal cases, effect of contingency fee agreement on setting reasonable fees, 8.37

**Continuance**

Statute requiring party seeking trial continuance pay opposing party's expenses, exclusion of attorney fees, 6.59

**Contractors**
Payment disputes between contractor and subcontractor, fee awards in, 3.126

**Contracts**
Generally, 1.4
Action on a contract, determining if litigation qualifies as. See **Contractual Provisions, Eligibility for Fees Under**
Amount of prevailing party's fees set by, 8.24
Appellate fees based on contract. See **Appellate Fees**
Applicability of both contractual fee-shifting clause and statutory fee-shifting clause to same action, 4.8
Arbitration agreement. See **Arbitration**
Civil Code §1717 governing fee awards for contractual causes of action
Generally, 4.2
All parties to contract, applicability of CC §1717 to, 4.17
Bilateral fee clause, applicability of CC §1717 to contracts containing, 4.18
Definition of prevailing party in, 2.79
Eligibility for fees. See **Contractual Provisions, Eligibility for Fees Under**
Entire contract, applicability of fee clause to, 4.16, 4.32
Entitlement to fees. See **Contractual Fee Clauses, Entitlement to Fees Under**
Equitable principles, courts applying to contractual fee claims, 4.21
Interpretation of, 4.12
Invalid or nonexistent contract. See **Contractual Provisions, Eligibility for Fees Under**
Noncontract causes of action, inapplicability of CC §1717 to fee claims based on, 4.27
Offset of recovered fees against opposing party's damages recovered on noncontract claims, 4.23
Other fee-shifting statutes, inapplicability of CC §1717 to requests under, 4.22
Preemptive federal law, inapplicability of CC §1717 if contract subject to, 4.24
Purposes of CC §1717, 4.10-4.11
Reciprocity of fees (see Reciprocity of fees under CC §1717, below)
Text of CC §1717, 4.9
Uniform treatment of contractual fee awards, CC §1717 establishing, 4.11
Weaker party's rights, protection of, 4.10
Collection of contractual fee awards, recovery of fees for time spending on, 15.15
Compensability of time spent litigating fee claim based on contract, 9.17
Costs, contractual agreement for recovery of non-statutory, 7.2
Dismissal of actions. See **Dismissal of Actions**
Eligibility for fees. See **Contractual Provisions, Eligibility for Fees Under**
Exception to general rule against fee award in absence of contractual authorization. See **Equity, Award of Fees Based on**
Federal court litigation, enforcement of contractual fee-shifting clauses in, 4.7
Interpretation of contracts
Greater relief under contractual cause of action, interpretation of, 4.72
Multiple contracts, construing as single contract, 4.33
Prevailing party's entitling to reasonable fees and costs, 9.126
Trial court and appellate fees, construction of contracts providing for fees to include, 9.38
Jury trial on contractual fees issues, lack of right to, 11.6
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Market rate for attorney's reasonable services establishing reasonable hourly rate, effect of contractual provision setting fee rate on, 9.102
Noncontract causes of action, contract-based fee awards for
Agreement of parties that prevailing party entitled to fees for noncontract causes of action, 4.3, 4.25
CC §1717, inapplicability to fee claims based on noncontract causes of action, 4.27-4.30
Eligibility issues effecting contract-based fees for noncontract causes of action, 4.65
Entitlement to fees under contractual fees clauses. See **Contractual Fee Clauses, Entitlement to Fees Under**
Language of fee clause determining applicability to noncontract claims, 4.26
Prevailing party on noncontract action, entitlement to fees despite not prevailing on contract claim, 4.29
Reciprocity, no requirement for awarding fees on noncontract claims, 4.28
Voluntary dismissal, party's entitlement to fees after, 4.30
Noticed motion for fees based on, 11.29
Parties providing for fees in event of litigation, 4.1
Reciprocity of fees under CC §1717
Generally, 4.12
Choice of law provisions in parties' contract, effect on reciprocity of fees, 4.64
Litigation expenses, applicability of reciprocity to, 4.14
Noncontract fee claims based on broad fee-shifting clauses, inapplicability of reciprocity to, 4.15, 4.28
Statutory fee-shifting statutes, inapplicability of reciprocity provisions to requests under other, 4.22

Unilateral fee provisions, effect of CC §1717 on, 4.13
Waiver of reciprocal right to fees under CC §1717 prohibited, 4.19
Standard for reviewing contract fee awards on appeal, 16.18
Tort claims (see Noncontract causes of action, contract-based fee awards for, above)
Trial and appellate work, contracts authorizing fees for, 1.13, 4.4

**Contractual Fee Clauses, Entitlement to Fees Under**
Bankruptcy law not precluding fee claims in bankruptcy court based on contractual fee clauses, 2.10
Civil Code §1717, prevailing party's entitlement to fees under
Generally, 4.66
CCP §998 settlement offer, effect of plaintiff accepting, 4.81
Determining prevailing party (see Determination of prevailing party on contract, below)
Differences in determining prevailing party under CCP §1032 and CC §1717, 4.68
Language of contract limiting entitlement to fees under CC §1717, 4.20
Determination of prevailing party on contract
Generally, 4.67
Affirmative relief, no requirement prevailing defendant obtain, 4.76
Altering statutory definition of prevailing party by contractual agreement prohibited, 4.70
CCP §998 settlement offer. See **Settlement**
CCP §1032 and CC §1717, difference in determining prevailing party under, 4.68
Dismissal of action (see Voluntary dismissal of action, below)
Distinction between party prevailing on contract claims and party prevailing on noncontract claims, 4.69
Equitable considerations (see Equitable considerations, prevailing party determination guided by, below)
Examples of cases determining prevailing party, 4.77
Jurisdictional limit, effect of plaintiff recovering less than, 4.82
Multiple contracts with fee-shifting clauses, determination of prevailing party for each contract, 4.75
Noncontract causes of action (see Noncontract causes of action, below)
No prevailing party on contract, court's determination of, 4.88
Only one prevailing party per contract, 4.74
Tender of sum in settlement by defendant at time of answer, defendant deemed prevailing party if tendered sum equals or exceeds amount awarded to plaintiff as damages, 4.78
Timing (see Timing of prevailing party determination, below)
Voluntary dismissal of action (see Voluntary dismissal of action, below)
Equitable considerations, prevailing party determination guided by
Generally, 4.71
Comparison of relief awarded with parties' objectives, demands, and positions, 4.72
Simple unqualified win, court's discretion limited in case involving, 4.73, 4.88
Interim relief, orders for
Miscellaneous interim orders, 4.95
Order compelling arbitration not qualifying party as prevailing party under CC §1717, 4.94
Noncontract causes of action
Distinction between party prevailing on contract claims and party prevailing on noncontract claims, 4.69
Lack of definition of prevailing party in contract, effect of, 4.90
Language of contract, prevailing party determined by, 4.89
Voluntary dismissal of noncontract causes of action based on broad contractual fee clause, effect on determining prevailing party, 4.83-4.84
Noncontract claims combined with contract claims, entitlement to fees if
Generally, 4.97
Common issues or overlapping claims, compensability of time spent on, 4.99
Impracticality of separating attorney's time into compensable and noncompensable units, effect on fee award, 4.98
Language of contract providing for fees for noncontract claims, effect of, 4.101
Success of contract claims, compensability of time spent on noncontract claims contributing to, 4.100
Nonsignatory party's entitlement to fees as prevailing party, 4.42
Timing of prevailing party determination
Generally, 4.91
Arbitrator's determination of prevailing party, 4.93
Enforcing prior judgment, compensability of services performed in, 4.96
Interim relief (see Interim relief, orders for, above)
Trial court, prevailing party determination made by, 4.92
Voluntary dismissal of action
CCP §998 settlement offer, effect of voluntary dismissal on, 4.80
Fee-shifting statutes other than CC §1717, effect of voluntary dismissal on fee awards under, 4.85
Involuntary dismissals, inapplicability of CC §1717 to, 4.87
Noncontract causes of action based on broad contractual fee clause, effect of voluntary dismissal on determining prevailing party, 4.83-4.84

No prevailing party on contact under CC §1717, voluntary dismissal resulting in, 4.83
Prohibition against fee award under CC §1717 in voluntarily dismissed cases, 4.22
Settlement of case, effect on award of fees, 4.86

**Contractual Provisions, Eligibility for Fees Under**
Generally, 4.31
Action on a contract, determining if litigation qualifies as
Generally, 4.49
Broadly worded fee clause, finding action not on a contract not precluding fee award under, 4.53
Considerations in determining if action on a contract, 4.50
Examples of cases finding action not on a contract, 4.52
Examples of cases finding action on a contract, 4.51
Multiple contracts (see Multiple contracts, below)
Applicability of contractual fee-shifting provision to action
Entire contract and all parties, applicability of fee provision to, 4.16, 4.32
Multiple contracts (see Multiple contracts, below)
Underlying contract (see Underlying contract invalid or nonexistent, availability of fees if, below)
Attorneys acting in pro per. See **Pro Per Litigants**
Charitable funded attorneys' eligibility to recover contractual fees, 2.23
Choice of law provisions in parties' contract, effect on reciprocity of fees, 4.64
Costs, recovery of (see Enforcement of judgment, fees for, below)
Enforcement of judgment, fees for
Generally, 4.62
Variety of enforcement activities, availability of fees for, 4.63
Estoppel
Disputing fee provision's applicability, party claiming fees not estopped from, 4.55
Independent right to recover fees, estoppel not basis for imposing fee award against party absent, 4.56
Nonsignator to contract claiming fees under contract equitably estopped from denying liability for fees, 4.45
Indemnity agreements
Generally, 4.57
Separate fee provision in indemnity agreement required for recovery of fees, 4.58
Invalid contract (see Underlying contract invalid or nonexistent, availability of fees if, below)
Judgment, enforcement of (see Enforcement of judgment, fees for, above)
Limits on party's eligibility for fees under contract, parties agreeing to, 4.54
Multiple contracts
Construing multiple documents as single contract, 4.33
Examples of cases involving multiple contracts, 4.34
Noncontract causes of action, eligibility issues affecting contract-based fees for, 4.65
Nonexistent contract (see Underlying contract invalid or nonexistent, availability of fees if, below)
Nonsignators to contract, fee awards against
Generally, 4.44
Examples of cases awarding fees against nonsignators, 4.46
Examples of cases refusing to award fees against nonsignators, 4.47
Split of authority regarding nonsignators claiming fees but not entitled to fees if prevailing party, 4.45
Sureties' exposure to attorney fees on their bonds, special rule for, 4.48
Nonsignatory party's eligibility for fees
Generally, 4.38-4.39
Party to contract, nonsignatory considered as, 4.41
Prevailing party entitled to fees, nonsigatory as, 4.42-4.43
"Stands in shoes" of party to contract, determining if nonsignatory, 4.40
Representation of parties without charge
Generally, 4.59
Amount of fees if party represented without charge, 4.61
Self-represented attorney and nonattorney, exception affecting, 4.60
Underlying contract invalid or nonexistent, availability of fees if
Generally, 4.35
Entire contract void for illegality, unavailability of fees if, 4.36
Illegal terms, effect of enforceable contract containing, 4.37

**Corporations**
Mutual public benefit nonprofit corporations, fee awarded to prevailing party in action to inspect records of, 3.121

**Corruption**
Arbitrator's award of fees, corruption as grounds for vacating, 14.16

**Costs**
See also **Expenses and Expenditures**
Allocation of costs by appellate court, trial court awarding fees regardless of, 12.4
Appeals. See **Appeals**
Appellate fees as costs. See **Appellate Fees**
Arbitration. See **Arbitration**
CCP §998 settlement offers. See **Settlement**
CCP §1021.5, no recovery of expert witness fees under, 9.124
Contractual agreement for recovery of non-statutory costs, 7.2
Enforcement of judgment, recovery of fees as costs. See **Contractual Provisions, Eligibility for Fees Under**
Memorandum of costs. See **Memorandum of Costs**
Money judgment, enforcing award of costs as, 15.1
Nonstatutory costs
Equitable doctrines, recovery of nonstatutory costs under, 9.131
Federal rule, recovery of nonstatutory costs and expenses as attorney fees, 9.130
Prevailing parties. See **Prevailing Parties**
Sample form, notice of motion for award of reasonable attorney fees and costs, App C
Separate requests for fees and costs, 11.25
Statutory costs, claims for, 11.45
Statutory fee-shifting cases, recovery of costs in, 9.127
Substantial benefit doctrine. See **Substantial Benefit Doctrine**

**Crimes and Criminal Proceedings**
Felony victims, recovery of damages by, 3.108
Private attorney general statute, applicability to quasi-criminal proceedings, 3.32
Punitive damages and sanctions against convicted felon suing victim for felon's injuries, 6.50

**Cy Pres Distribution**
Class action, distribution of unredeemed coupons to charitable or governmental organizations, 10.29

**Damages**
See also **Punitive Damages**
Generally, 1.6, 1.11
Americans with Disabilities Act and Unruh Civil Rights Act, recovery of fees and damages under, 3.83
Appellate fees, recovery as damages, 9.42
Bad faith (see *Brandt* fees as damages if insurance benefits denied in bad faith, below)
*Brandt* fees as damages if insurance benefits denied in bad faith
Generally, 7.9
Appellate fees, *Brandt* fees including, 7.16, 9.42
Assignment of, 7.17
Calculating fees in contingent fee case under *Brandt,* 7.15
Denial of benefits in bad faith as prerequisite for award of *Brandt* fees, 7.10, 7.14
Denial of contract in bad faith, unavailability of *Brandt* fees for, 7.11
Procedure for seeking fees as damages, 7.34
Disallowance of fees as damages
Generally, 7.25
City's nontortious denial of plaintiff's claim for damages, 7.32
Extortionate demands, fees incurred in responding to, 7.28
Fiduciary, lawsuit against, 7.31
Indemnity agreement, fees incurred in enforcement of, 7.23, 7.30
Insurer's good faith failure to defend, 7.26
Misrepresentation by agent, 7.27
Punitive damages, fees as factor in assessing, 7.33
Unreasonable fees, attorney's attempt to collect or retain, 7.29
Distinction between statutory fees and damages, 1.7
Expert witness fees and non-statutory costs, recovery as damages under contractual agreement, 7.2, 11.32, 11.42
Felony victims, recovery of damages by, 3.108
Insurance
Bad faith denial of benefits (see *Brandt* fees as damages if insurance benefits denied in bad faith, above)
Good faith failure of insurer to defend, no recovery of fees as damages, 7.26
Wrongful failure to defend, insured's suit against insurer for, 7.22
Lodestar method of calculating fees, effect of damages awarded on. See **Lodestar Method of Calculating Fees**
Pleading fees as item of damages, 11.29, 11.32, 11.42
Procedure for seeking fees as damages, 7.34

Recovery of fees as damages, 7.1
Types of actions for which fees recovered as damages
Generally, 7.3
Attorney's suit against client to recover fees, 7.21
*Brandt* fees (see *Brandt* fees as damages if insurance benefits denied in bad faith, above)
False imprisonment, 7.18
Indemnification proceedings, 7.23, 7.30
Legal malpractice actions, 7.20
Malicious prosecution, 7.19
Miscellaneous actions, 7.24
Tort of another doctrine. See **Tort of Another Doctrine**
Wrongful failure to defend, insured's suit against insurer for wrongful failure to defend, 7.22

**Declarations.** See **Affidavits and Declarations**

**Defamation.** See **Libel and Slander**

**Defaults and Default Judgments**
Application for fees in request for default judgment, 11.28-11.29

**Definitions**
Bad faith, 6.31
Bilateral attorney fee clauses, 4.18
Block billing, 9.84
Clear sailing fee settlement, 8.12
Constructive common fund, 5.25, 8.9
Cost accounting, 9.103
Defense costs, 6.4
Frivolous motion, 6.30
Functional plaintiff, 2.39
Interim fees, 11.18, 16.3
Lodestar method of calculating fees, 8.1-8.2
Objective bad faith, 6.31
Prevailing party, 2.45, 2.47
Private attorney general doctrine, 3.3
Subjective bad faith, 6.31
Successful party, 3.13

**Delay**
Employment discrimination statutes, federal defendants subject to adjustments for delay in payment in cases brought under, 9.134
Lodestar figure. See **Lodestar Method of Calculating Fees; Multiplier Factors**
Mandatory sanctions award if court finds anti-SLAPP motion frivolous or solely for delay, 6.32
Subjective standard for determining if appeal solely for delay, 6.62

**Demurrer**
CCP §128.7 sanctions, effect of order sustaining demurrer without leave to amend on motion for, 6.27

**Depositions.** See **Motions for Fees**

**Disabled Persons**
ADA. See **Americans with Disabilities Act (ADA)**
IDEA. See **Individuals with Disabilities Education Act (IDEA)**

**Disabled Persons Act (California)**
Dual-standard prevailing party provisions of ADA, preemption of two-sided provision in California's Disabled Persons Act, 2.78
Reasonable attorney fees, prevailing party's recovery of, 3.83

**Discovery**
Arbitration proceedings, discovery on fees issues in, 14.13
CCP §128.7, inapplicability to discovery motions, 6.12
Class actions, objector's discovery rights in, 11.55
Compensability of time spent on, 9.9
Motion for fees. See **Motions for Fees**
Private attorney general doctrine, permissibility of limited discovery to determine if public interest organization's litigation for

benefit of particular individuals, 3.77
Sanctions for misuse of discovery process
Compensation for time spent on discovery sanctions motion, 9.18
Electronically stored information, safe harbor for sanctions for failure to provide, 6.53
Federal law, availability of discovery sanctions under, 6.55
Immediate appeal of discovery sanctions over $5000, 16.4
Mandatory discovery sanctions, 6.52
Notice of request for sanctions, 6.54
Permissive discovery sanctions, 6.51

**Discretion of Court**
Abuse of discretion
Appeals. See **Appeals**
Current market rate, abuse of discretion to base on outdated rate determination, 9.111
Denial of all compensation for fee-related services as, 9.21
Federal common fund cases, abuse of discretion to deny risk enhancement in, 10.46
Lodestar determination, court's abuse of discretion in failing to use attorney's time records as starting point for, 9.82
Significance of benefit of case for purposes of awarding fees, abuse of discretion as standard of review for trial court rulings on, 3.57
Appellate court's discretion to remand issue of appellate fees, 12.1
Arbitrator's discretion. See **Arbitration**
Lodestar adjustment. See **Lodestar Method of Calculating Fees**
Multiple parties to action, court's discretion to award full fee or reduce fee to reflect lack of success against particular parties, 9.64
Multiplier factors, court's discretion in applying. See **Multiplier Factors**
Prevailing party. See **Prevailing Parties**
Sanctions, court's discretion in awarding. See **Sanctions**

**Discrimination**
Employment discrimination statutes, federal defendants subject to adjustments for delay in payment in cases brought under, 9.134

**Dismissal of Actions**
Anti-SLAPP motion, effect of dismissal on. See **Strategic Lawsuits Against Public Participation (SLAPP Suits)**
Prevailing party status, effect of dismissal on. See **Prevailing Parties**
Voluntary dismissal
Contractual fee clause, effect of voluntary dismissal on entitlement to fee under. See **Contractual Fee Clauses, Entitlement to Fees Under**
Noncontract claims, prevailing party's entitlement to fees after voluntary dismissal of, 4.30
Sanctions motion under CCP §128.7, effect of dismissal of complaint on, 6.14, 6.26

**Disqualification**
Attorneys
Arbitrator's failure to disclose grounds for disqualification as grounds for vacating fee award, 14.16
Ethical breach of duty as grounds for disqualifying attorney, 1.20
Services rendered before ethical breach, recovery of fees for, 1.20
Judges
Reversal of fee award on appeal, disqualification of judge issuing initial fee order, 12.23
Reversal of fee order on appeal, disqualification of judge issuing fee order, 11.52
Sanctions for frivolous challenge to, 6.42

**Double Counting.** See **Multiplier Factors**

**Drugs.** See **Alcohol and Drugs**

**Education.** See **Schools**

**Elder Abuse and Dependent Adult Civil Protection Act**
Prevailing party's recovery of fees under, 2.83, 3.106

**Electronic Discovery Act (EDA)**
Safe harbor for sanctions for failure to provide electronically stored information, 6.52

**Eligibility for Fee Award**

See also **Entitlement to Fee Award**
Generally, 2.1
Constitutionality of applying different standards for plaintiffs and defendants in determining eligibility, 2.70
Contractual provisions, eligibility for fees under. See **Contractual Provisions, Eligibility for Fees Under**
Determining if fee claimant eligible for fees
Amicus curiae, restrictions of fee awards for, 2.29
Class action objector's recovery of fee award, 2.30
In-house attorney's eligibility to recover fees, 2.25
Intervenor's entitlement to fees under fee-shifting statutes, 2.28
Nonprofit law firms and pro bono attorneys' eligibility for fees, 2.23
Out-of-state attorneys not licensed to practice in California, 2.27
Pro per litigants. See **Pro Per Litigants**
Public entities. See **Public Entities and Employees**
Third party's payment of successful attorney's fees, effect on eligibility for fee award, 2.24
Fee-shifting statutes. See **Fee-Shifting Statutes**
Irregularities in representation agreement, eligibility for fee award unaffected by, 2.34
Jurisdictional requirements for awarding fees, 2.5
Party's or attorney's right to fees
Generally, 2.31
California law, attorney's right to court-awarded fees, 2.32
Federal law, party's right to court-awarded fees, 2.33
Prelitigation settlement demands not precondition to recovery of fees, 2.3
Private attorney general doctrine, eligibility for fees under. See **Private Attorney General Doctrine**
Statutory language, eligibility for fee award depending on
Generally, 2.2
Claim-filing requirements, 2.3
Pleading requirements, 2.4
Substantial benefit doctrine, plaintiff's and defendant's eligibility for fee award, 5.42
Workers' compensation applicants, eligibility for fees representing before Workers' Compensation Appeals Board, 13.21

**Eminent Domain**
See also **Inverse Condemnation**
Lodestar-adjustment method for calculating fees in eminent domain action, 8.6
Prevailing plaintiff in eminent domain proceeding, fee award to, 3.101

**Employers and Employees**
Commission on Professional Competence, prevailing school employees' right to receive fees in proceedings before, 13.8
Discrimination statutes, federal defendants subject to adjustments for delay in payment in cases brought under, 9.134
Fair Employment and Housing Commission ability to award fees for private attorney's work, restrictions on, 13.7
Fee-shifting statutes. See **Fee-Shifting Statutes**
FEHA. See **Fair Employment and Housing Act (FEHA)**
Public employees. See **Public Entities and Employees**
Workers' compensation. See **Workers' Compensation**

**Encumbrances.** See **Liens and Encumbrances**

**Enforcement of Important Right.** See **Private Attorney General Doctrine**

**Enhancement of Fee Award.** See **Multiplier Factors**

**Entitlement to Fee Award**
See also **Eligibility for Fee Award**
Generally, 2.1
Appeal of entitlement to fee award. See **Appeals**
Appellate fees. See **Appellate Fees**
Contractual fee clauses, entitlement to fees under. See **Contractual Fee Clauses, Entitlement to Fees Under**
Indemnitee's entitlement to fees as question of law, 16.20
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Motion for fees. See **Motions for Fees**
Prevailing parties. See **Prevailing Parties**
Private attorney general doctrine. See **Private Attorney General Doctrine**
Sanctions, entitlement to fees awarded as. See **Sanctions**
State or federal court, effect of forum on entitlement to fee, 1.12

**Environmental Law**

Private attorney general doctrine, award of fees in action involving vindication of important rights, 3.46

**Equal Access to Justice Act (Federal)**
Administrative proceedings under Act, fee award for work performed in, 13.15
Broad inherent powers of California courts to define and shape equitable bases for fee awards, 5.4

**Equal Access to Justice Act (State)**
Postjudgment interest if government appeals award, 9.134
Social security
Fee-shifting in social security benefits cases, 10.30
Interrelationship between lodestar-based fee awardable under Act and contingent fees payable to attorney under Social Security Act, 8.30, 8.37
State regulatory agencies, prevailing party's recovery of fees in actions against, 3.94

**Equal Pay Act**
Recovery of fees in action under, 3.97

**Equitable Estoppel**
Nonsignator to contract claiming fees under contract equitably estopped from denying liability for fees, 4.45

**Equity, Award of Fees Based on**
Generally, 1.5
Administrative proceedings
Applicability of equitable doctrines to, 5.9
Quasi-administrative proceedings, fees awarded under equitable theories for work performed in, 13.4
Appellate fees under equitable theories. See **Appellate Fees**
Arbitration, availability of fee awards based on equitable principles, 14.5
Calculating fees (see Percentage of recovery method of calculating fees, below)
Charitable funded attorneys' eligibility to recover equitable fees, 2.23
Common fund doctrine. See **Common Fund Doctrine**
Conditions for awarding fees under equitable doctrines
Administrative proceedings, applicability of equitable doctrines to, 5.9
Prevailing party, fee claimant meeting requirements of, 5.5
Relief obtained before lawsuit file, fee award based on, 5.8
Settlement, fee award if action concluded by, 5.6
Voluntary corrective action by defendant, fees awarded if litigation results in, 5.7
Contractual fee claims, courts applying equitable principles to, 4.21
Contractual fee clauses. See **Contractual Fee Clauses, Entitlement to Fees Under**
Fee-related services, equitable theories for recovery of fees for, 5.51
Interpretation of statutory fees in light of equitable principles, 5.4
Multiplier for obtaining equitable relief, 10.29
Nonstatutory costs, recovery under equitable doctrines, 9.131
Noticed motion for fees based on equitable theories, 11.41
Percentage of recovery method of calculating fees
Common fund, fees paid from, 1.8, 5.18, 8.7, 8.12
Contingency fee agreement, effect in cases using percentage of recovery method, 8.38
Fee-related services, compensation for time spent on, 9.19
Lodestar versus percentage of fund method of calculating fees. See **Lodestar Method of Calculating Fees**
Private attorney general doctrine. See **Private Attorney General Doctrine**
Sanctions, court's lack of equitable power to award fees based on, 1.10, 6.2
Substantial benefit doctrine. See **Substantial Benefit Doctrine**
Theories for obtaining fee awards
Bad faith or vexatious litigant exception, federal courts' recognition of, 5.2
California courts, equitable exceptions recognized by, 5.2
Common fund doctrine. See **Common Fund Doctrine**
Exception to general rule against fee award in absence of statutory or contractual authorization, 5.1
Federal courts, equitable exceptions in, 5.2-5.3
Private attorney general doctrine. See **Private Attorney General Doctrine**
Substantial benefit doctrine. See **Substantial Benefit Doctrine**
Trial and appellate work, equitable doctrines authorizing fees for, 1.13

**Error**
Arbitrator's fee award, judicial review for errors of law or fact prohibited, 14.15
Lodestar figure, trial court's failure to calculate as reversible error, 9.2

**Estoppel.** See **Contractual Provisions, Eligibility for Fees Under**

**Ethical Breach by Attorney.** See **Disqualification**

**Ethical Considerations for Fee Award**
Generally, 1.17
Conflicts of interest. See **Conflicts of Interest**
Division of fees among counsel, ethical issues in, 1.19
Rules of Professional Conduct, 1.18

**Eviction**
See also **Retaliatory Eviction**
City of Oakland's unjust eviction ordinance, prevailing tenant's right to obtain fees under, 3.105

**Evidence**
Confidential settlement agreements, admissibility to determine amount of fees, 11.8
Factual contentions or allegations in document, requirement of evidentiary support for, 6.18
Motion for fees, documentation supporting. See **Motions for Fees**
Presumed reasonableness of claimed rate in absence of contradictory evidence, 9.122

**Execution, Writ of**
Collection of fee award from federal government, writ of execution for, 15.8

**Expenses and Expenditures**
See also **Costs**
California rule on recovery of
Contractual provision entitling prevailing party to reasonable fees and costs, interpretation of, 9.126
Expert witness fees, no recovery under CCP §1021.5, 9.124
Continuance, exclusion of attorney fees under statute requiring payment of opposing party's expenses, 6.59
Federal rule
Generally, 9.128
Expert witness fees, no recovery absent express statutory authorization, 9.129
Nonstatutory costs and expenses, recovery as attorney fees, 9.130
Order granting in part plaintiff's motion for attorney fees and expenses, App J
Reciprocal right to litigation expenses under CC §1717, 4.14
Vexatious litigant posting security to cover defendant's expenses and fees, requirement of, 6.7

**Experts and Expert Witnesses**
CCP §1021.5, no recovery of expert witness fees under, 9.124
Costs, expert witness fees not recoverable as, 11.45
Damages, contractual provision for recovery of expert witness fees as, 7.2, 11.32, 11.42
Fair Employment and Housing Act, award of expert witness fees under, 3.80
Federal rule, no recovery of expert witness fees absent express statutory recovery, 9.129
Fee application, compensation for cost of expert witnesses retained to support, 9.22
Fee-shifting statutes, recovery of expert witness fees under, 9.125
Individuals with Disabilities Education Act (IDEA), no recovery of expert-consultant fees under, 13.13
Market rates, expert testimony on, 9.121
Motion for fees, deposition of expert submitting declaration supporting, 11.53

**Extension of Time to File Motions for Fees.** See **Motions for Fees**

**Fair Employment and Housing Act (FEHA)**
Discretion of court to award or deny fees if prevailing plaintiff's judgment could have been rendered in limited civil case, 11.3
Fee-shifting under FEHA
Expert witness fees and attorney fees, FEHA providing for award of, 3.80
Interpretation of fee-shifting provisions in, 8.26
Prevailing defendants, examples of cases awarding fees to, 3.82
Prevailing plaintiffs, examples of cases awarding fees to, 3.81
Lodestar-adjustment method for calculating fees in FEHA actions, 8.6

**Fair Employment and Housing Commission**
Restriction on Commission's ability to award fees for private attorney's work, 13.7

**False Claims Act**

Recovery of fees in actions under, 3.127

**False Imprisonment**
Damages in false imprisonment action, recovery of fees as, 7.18

**Federal Fee-Shifting Statutes**
See also **Fee-Shifting Statutes**
Generally, 3.129
Catalyst rule, applicability to federal fee-shifting statutes, 2.117
Judicial imprimatur on plaintiff's actions, requirement under federal fee-shifting statutes, 2.115, 11.23
Pending cases, applicability of fee-shifting statutes to, 2.7
Prevailing parties. See **Prevailing Parties**
State claim-filing requirements, claims based on federal fee-shifting statutes exempt from, 2.3
State courts, federal fee-shifting statutes in
Generally, 2.12
Advantages and disadvantages of using federal fee statutes in state court, 2.13
Both state and federal law, claiming fees in same action under, 2.16
Complaint, effect of failure to plead federal statutory cause of action in, 2.15
No decision on federal claims necessary for fee award under federal law, 2.14

**Federal Preemption**
ADA. See **Americans with Disabilities Act (ADA)**
CC §1717, inapplicability if contract subject to preemptive federal law, 4.24
Labor Code §1128, federal preemption of fee provision in, 3.98

**Fee-Shifting Statutes**
See also **Federal Fee-Shifting Statutes; Prevailing Parties**
Generally, 1.3, 3.1
Appellate fees under fee-shifting statutes
Generally, 9.36
Interim fee awards in statutory fee-shifting cases, appeal of, 16.3
Inverse condemnation appellate services, 9.37
Attorneys acting in pro per. See **Pro Per Litigants**
Business litigation statutes
Contractor and subcontractor, payment disputes between, 3.126
False Claims Act, fee awards in actions under, 3.127
Prevailing parties. See **Prevailing Parties**
Public Contract Code, fees awarded in action under, 3.125
Uniform Trade Secrets Act authorizing fee award for bad faith claims of misappropriation of trade secrets, 3.124
CCP §998 settlement offers. See **Settlement**
Challenging government decision making and regulation
Brown Act, successful action qualifying for fee award, 3.86
Information Practices Act, 3.88
Judicial review actions (see Judicial review actions, below)
Political Reform Act, recovery of fees under, 3.85
Prevailing parties. See **Prevailing Parties**
Public assistance determinations, review of, 3.84
Public Utilities Code, fee awards to parties intervening on public's behalf in PUC proceedings, 3.89
School employee's right to fee award after successfully challenging dismissal or suspension, 3.99
City charter and ordinances providing for fee awards, 3.105
Civil rights statutes. See **Civil Rights**
Construction of fee-shifting statutes (see Interpretation of, below)
Consumer protection statutes, fees-shifting provisions in, 3.104
Contractual right to fees under CC §1717. See **Contracts**
Equitable exceptions to rule against fee-shifting. See **Equity, Award of Fees Based on**
Expert witness fees, recovery under fee-shifting statutes, 9.125
Federal courts, state fee-shifting statutes in
Advantages of obtaining fees in federal court under state law, 2.11
Power of federal courts to award fees under state laws, 2.10
FEHA. See **Fair Employment and Housing Act (FEHA)**
Forum, applicability of fee-shifting statutes in
Administrative proceedings, 1.14, 2.19
Arbitration proceedings, availability of statutory fees in, 2.18
Federal courts, state-fee-shifting statutes in (see Federal courts, state fee-shifting statutes in, above)
Federal fee-shifting statutes in state court. See **Federal Fee-Shifting Statutes**

Trial or appellate court services, statutes authorizing fees for, 2.17
Income tax consequences of fees awarded under fee-shifting statutes, 1.24
Interim fees. See **Interim Fees**
Interpleader statute, fee awards under, 3.128
Interpretation of
Fair Employment and Housing Act (FEHA), interpretation of fee-shifting provisions in, 8.26
Multiple fee-shifting statutes with different prevailing party standards, construction of, 2.78
Trial and appellate court services, construction of fee-shifting statutes to provide fees for, 9.36
Judicial review actions
Administrative actions other than formal administrative hearings, fee awards in actions to review, 3.91
Administrative proceeding, limits on fee awards in judicial review of, 3.90
Arbitrary and capricious action or conduct on part of agency as requirement for fee award, 3.92
Personal obligation of petitioner to pay fees, 3.93
Labor-related actions
Arbitration under collective bargaining agreement, fee awards in actions to compel, 3.98, 14.23
Labor Commissioner's decisions, review of, 3.96
Wages or benefits, fee awards in actions to recover, 3.97
Liability for fee award. See **Liability for Fee Awards**
Lodestar method, calculating fees under fee-shifting statutes using, 8.4
Merits of claim triggering potential fee award, fee-shifting statute supporting award if relief sought on fee-shifting claim obtained, 2.8
Motion for fees. See **Motions for Fees**
Multiple fee-shifting statutes, fee awards under, 2.9
Multiplier factors. See **Multiplier Factors**
Pending cases, applicability of fee-shifting statutes to, 2.6
Personal injury statutes. See **Personal Injury Statutes**
Private attorney general doctrine. See **Private Attorney General Doctrine**
Property-related actions
Eminent domain proceedings, 3.101
Inverse condemnation actions, 3.102
Prevailing parties. See **Prevailing Parties**
Real property (see Property-related actions, above)
Regulations, challenges to (see Challenging government decision making and regulation, above)
Sanctions. See **Sanctions**
SLAPP suits. See **Strategic Lawsuits Against Public Participation (SLAPP Suits)**
Trial and appellate work, fee-shifting statutes authorizing fees for, 1.13

**Fiduciaries**
Damages against fiduciary, prohibition against awarding fees as, 7.31

**Financial Burden.** See **Private Attorney General Doctrine**

**Findings**
Arbitrator deciding fee award, no requirement of findings by, 14.14
Catalyst theory, requirement of court finding case not frivolous or groundless, 2.96, 2.113
Lodestar figures, findings on, 11.65
Order awarding fees. See **Order Awarding Fees**
Prevailing parties. See **Prevailing Parties**

**Fraud and Misrepresentation**
Arbitrator's award of fees, fraud as grounds for vacating, 14.16
Damages, no recovery of fees based on agent's misrepresentations, 7.27

**Frivolous Actions**
See also **Vexatious Litigants**
Appeal, sanctions for frivolous
Generally, 6.60
Amount of sanctions for frivolous appeal, 6.69-6.71, 12.9
Appellate sanctions for appeal of sanctions order determined independently of trial court sanctions, 6.66
Awarding fees as sanctions, 12.9
Client and/or attorney, recovery of sanctions against, 6.68
Cost to court system, amount of sanctions including, 6.70
Examples of fee awards as sanctions for frivolous appeal, 6.72
Miscellaneous factors determining amount of sanctions, 6.71
Objective frivolous standard, 6.63

Partially frivolous appeal, sanctions awardable for, 6.65
Persons eligible to seek sanctions for frivolous appeal, 6.61
Procedures for obtaining award of fees as sanctions, 6.73
Relationship between objective and subjective frivolous standards, 6.64
Requesting sanctions for frivolous appeal, 12.14
Subjective standard for determining if appeal frivolous or solely for delay, 6.62
Subsequent bad faith action, no recovery of damages for frivolous appeal in, 6.67
Catalyst theory, requirement of court finding case not frivolous or groundless, 2.96, 2.113
CCP §128.5 sanctions
Applicability of CCP §128.5 to actions initiated before January 1, 1995 and to frivolous anti-SLAPP motions to strike, 6.29
Finding of frivolousness and bad faith as condition for sanctions under, 6.31
Mandatory sanctions award if court finds anti-SLAPP motion frivolous or solely for delay, 6.32
Standards for determining bad faith actions or frivolous tactics, 6.30
Prevailing defendant's entitlement to fee award. See **Prevailing Parties**
Sanctions for frivolous actions
Appeals (see Appeal, sanctions for frivolous, above)
CCP §128.5 sanctions (see CCP §128.5 sanctions, above)
Judge, sanctions for frivolous challenge to, 6.42
Represented party, no sanctions against based on frivolous legal contentions, 6.47
Standard of review on appeal (see Appeal, sanctions for frivolous, above)

**Good Faith**
Insurer's good faith failure to defend, no recovery of fees as damages based on, 7.26
Prevailing party's entitlement to fee award, losing party's good faith insufficient grounds for denying, 2.55
Settlement of fees by one defendant in good faith, effect on award assessed against nonsettling defendant, 9.80

**Government Claims Act**
Catalyst claims against government agencies, 2.96
Sanctions for actions brought under Government Claims Act, award of fees as, 6.4
Sovereign immunity. See **Sovereign Immunity**

**Habeas Corpus**
Private attorney general statute, applicability to habeas corpus proceedings, 3.32

**Habitability, Warranty of**
Breach of warranty of habitability, prevailing party's recovery of fees in action for, 3.100

**Handicapped Persons.** See **Disabled Persons**

**Harassment**
Civil anti-harassment statute, prevailing party's entitlement to fee under, 2.74, 3.109

**Hearing**
CCP §128.7, coordination of hearing dates to meet safe harbor requirements, 6.27
Motion for fees, hearing on, 11.33, 11.63

**Historical Background**
Private attorney general doctrine, 3.2

**Home Equity Sales Contract Act**
Fee-shifting provisions in, 3.104

**Hourly Rates.** See **Lodestar Method of Calculating Fees**

**Immunity**
Liability for fee award, party's immunity from, 2.36
Sovereign immunity. See **Sovereign Immunity**

**Income Tax Consequences of Fee Awards**
Generally, 1.21
American Jobs Creation Act of 2004, taxpayer's deduction of fees and costs under, 1.22
Contingency fee agreement, tax consequences to client of fees paid to lawyers under, 1.23

Fee-shifting statutes, tax consequences of fees awarded under, 1.24
Sample clause relating to taxation of fee award, 1.25

**Indemnity**
Appeal of indemnification award, split of authority concerning fees for, 9.40
Damages in indemnification action, recovery of fees as, 7.23, 7.30
Definition of indemnity agreement, 4.57
Eligibility for fees under indemnity agreement. See **Contractual Provisions, Eligibility for Fees Under**
Question of law, indemnitee's entitlement to fees as, 16.20
Sanctions in indemnity actions, award of fees as, 6.4

**Indigents**
Equitable apportionment, inapplicability to county's recovery of lien for medical services to indigent patient, 5.30

**Individuals with Disabilities Education Act (IDEA)**
Amount of fees recoverable under IDEA
Attorney-parent, no recovery of fees by, 2.21, 13.12
Expert-consultant fees, no recovery of, 13.13
Expert fees, no recovery of, 9.129
Mandatory fee award to prevailing parent or guardian under, 2.77
Preliminary administrative work, fees for, 13.16
Procedure to recover IDEA fees, 13.11
Recovery of fees for administrative representation under, 13.10

**Inferences.** See **Presumptions and Inferences**

**Information Practices Act**
Lodestar-adjustment method for calculating fees under, 8.6
Recovery of fees under, 3.88

**In-House Counsel**
Generally, 9.99
Eligibility of in-house counsel to recover fees, 2.25

**Injunctions**
Lodestar adjustment, value of injunction affecting fee under, 10.40
Prevailing parties. See **Prevailing Parties**

**Insolvency.** See **Bankruptcy and Insolvency**

**Insurance**
Appeal by insurer, *Brandt* fees including fees incurred in defending against, 7.16
Damages, recovery of fees as. See **Damages**
Eligibility for fees under contractual provision, effect of insurer paying fees on, 4.59
Insurance Commissioner's authority to award fees in proceedings about insurance rates, 13.6
Wrongful failure to defend, insured's suit against insurer for, 7.22

**Interest on Fee Awards**
Date interest begins to accrue, 9.133
Federal government as defendant, special rules involving, 9.134
Postjudgment interest on fee awards, 9.132
Prejudgment interest on attorney fees, 9.111
Sovereign immunity barring interest on fee award against federal government, 9.134

**Interests of Justice as Basis for Fee Award.** See **Private Attorney General Doctrine**

**Interim Fees**
Appeal of interim fee awards in statutory fee-shifting cases, 16.3
Arbitrator's award of, 14.13
California courts, award of interim fees in, 11.19
Contractual fee clauses. See **Contractual Fee Clauses, Entitlement to Fees Under**
Defined, 16.3
Federal courts, award of interim fees in, 11.18
Prevailing party's recovery of fees, exception for interim fees, 2.90

**Interpleader Statute**
Recovery of fees under, 3.128

**Interpretation of Cases and Statutes.** See **Construction and Interpretation**

**Intervenors**
Attorney's intervention in action to secure fee award, 11.11, 11.16, 11.70
Compensability of time spent in opposing, 9.12
Eligibility of intervenor for fee award under fee-shifting statute, 2.28
Functional plaintiff, defendant intervening as, 2.39
Liability of intervenor for fees, 2.39
Private attorney general statute
Eligibility of intervenors to recover fees under, 3.18
Liability of intervenors for fee awards under, 3.26
PUC proceedings. See **Public Utilities Commission (PUC)**
Standing of class member to appeal fee award without intervening, 11.17

**Inverse Condemnation**
See also **Eminent Domain**
Lodestar-adjustment method for calculating fees in inverse condemnation action
Generally, 8.6
Inverse condemnation appellate services, 9.37
Prevailing plaintiff's right to fees in inverse condemnation action, 3.102

**Joinder of Parties**
Tort of another doctrine, applicability to joinder of tortfeasor and third party in action, 7.5

**Joint and Several Liability for Fee Award**
Federal law, defendants' joint and several liability for fee award under, 2.43
Presumption of defendants' joint and several liability for fee award, 2.42, 9.81

**Judges**
Disqualification of. See **Disqualification**
Motion for fee, presenting to judge hearing merits of case, 11.52
Statement of decision. See **Statement of Decision**

**Judgments and Decrees**
Appeals. See **Appeals**
Arbitrator's fee award, effect of confirming. See **Arbitration**
Collection of fee awards. See **Collection of Fee Awards**
Default judgment, request for fees in, 11.28-11.29
Duration of judgment against government entity, 15.3
Eligibility for fees under contractual provision for enforcement of judgment. See **Contractual Provisions, Eligibility for Fees Under**
Hourly rates for work relating to judgments. See **Lodestar Method of Calculating Fees**
Jurisdiction of trial court to award fees after final judgment, 11.21, 11.35
Merits, judgment on
Generally, 11.20
Appeals. See **Appeals**
Drafting or reviewing judgment on merits, attorney fee considerations in, 11.22
Federal fee-shifting statutes, fee award under, 11.23
Findings on fee order, requirement of consistency with findings on merits, 11.68
Timing of fee motion, 11.24
Motion for fees, time limit for filing after notice of entry of judgment, 11.24, 11.37
Prior decrees or judgment
Lodestar figure, compensation for time spent enforcing or monitoring prior decree, 9.24
Services performed in enforcing prior judgment including contractual fee award, compensability of services performed in, 4.96
Summary judgment. See **Summary Judgment**

**Jurisdiction**
Civil rights actions under 42 USC §1983, California courts' concurrent jurisdiction over, 2.12
Motion for fees. See **Motions for Fees**
Postjudgment motion for sanctions under CCP §128.7, court retaining jurisdiction to hear, 6.27
Prerequisite to fee award, court's jurisdiction over action as, 2.5

Retaining jurisdiction to award fees, 2.5
Trial court's jurisdiction to award fees
Final judgment, trial court's jurisdiction to award fees after, 11.21, 11.35
Statutory fees, 12.2, 12.4, 12.15

**Jury Trial**
Civil rights action, no right to inform jury of plaintiff's right to fee award in, 7.33
Statutory or contractual fee issues, no entitlement to jury trial on, 11.6

**Labor Commissioner**
Review of Labor Commissioner's decisions, recovery of fees in actions for, 3.96

**Labor Unions**
Compelling arbitration under collective bargaining agreement, fee awards in actions, 3.98, 14.23
In-house counsel for union, federal restrictions on receiving fees based on market rates, 9.99
Justification for market rate fee, union attorneys showing, 9.103

**Landlord and Tenant**
Statutes for protection of tenants, fee awards under, 3.100

**Law Clerks, Hourly Fees for.** See **Lodestar Method of Calculating Fees**

**Law Enforcement Personnel**
Bad faith or libel or slander actions against police officers, prevailing defendant's recovery of fees in, 3.107, 6.5
Private attorney general doctrine, award of fees in action vindicating police officers'' rights, 3.46
Sanctions, fee award for successful defendant in bad faith action against peace officers, 6.5

**Legal Malpractice**
Damages in malpractice action, recovery of fees as, 7.20

**Liability for Fee Awards**
Generally, 2.35
Amicus curiae, public policy prohibiting fee award against, 2.40
Apportionment of fee among multiple unsuccessful parties
California law, 2.42
Federal law, joint and several liability of defendants under, 2.43
Distinction between federal and California law about requirement of imposing relief against liable party, 2.37
Immunity from award of fees, 2.36
Intervenor's liability for fees, 2.39
Joint and several liability for fee award. See **Joint and Several Liability for Fee Award**
Nonparties, imposition of fees against, 2.41
Private attorney general doctrine. See **Private Attorney General Doctrine**
Real parties in interest, 2.38

**Libel and Slander**
Police officers, prevailing defendant's recovery of fees in bad faith or libel or slander actions against, 3.107, 6.5

**Licenses**
Disciplinary proceedings against licensee, state licensing agencies recovering fees in, 13.9

**Liens and Encumbrances**
Equitable apportionment, inapplicability to county's recovery of lien for medical services to indigent patient, 5.30

**Limitation of Actions.** See **Statutes of Limitations**

**Limited Civil Case**
FEHA, court's discretion to award or deny fees if prevailing plaintiff's judgment could have been rendered in limited civil case, 11.3

**Limited Success.** See **Partial Success**

**Lis Pendens**
Expungement of lis pendens, recovery of fees in action for, 3.103

**Local Rules of Court**
See also **Rules of Court**
Sanctions under CCP §575.2 for violation of local rules, awarding fees as, 6.56, 14.6
Schedule for fees, 11.28

**Lodestar Method of Calculating Fees**
See also **Multiplier Factors**
Adjusting lodestar. See **Multiplier Factors**
Amount of damages recovered, effect on fees awarded
California law and federal law, differences between, 8.26
Federal civil rights cases, exception for technical or de minimis victories in, 8.28
Federal law not limiting fee awards based on amount of damages awarded, 8.27
No relationship between relief awarded and fee claim, 8.25
Ancillary proceedings, hourly fees for
Amicus curiae briefs closely related to litigation, compensability of time spent on, 9.9, 9.15
Compensability of time spent on ancillary proceedings closely related to litigation, 9.13
Judgment or decree, compensability for work required to protect, 9.14
Anti-SLAPP motion, applicability of lodestar adjustment method in determining prevailing party's fees, 3.116
Appeal, requirements for challenging fee award on, 9.91
Appellate services, lodestar method of calculating fees for. See **Appellate Fees**
Apportioning fees among liable parties
Good faith settlement of fees by one defendant, effect on award assessed against nonsettling defendant, 9.80
Litigation between defendants, fee award based on, 9.80
Presumption of joint and several liability of defendants for fee award, 9.81
Real parties in interest and defendants, apportioning fee award among, 9.79
Block billing
California law, 9.84
Federal law, 9.88
Burden of proof
Claimed hours, burden on party challenging, 9.90
Claimed rate of fees, burden on party challenging, 9.123
Duplication of effort, burden on party challenging hours for, 9.77
Enhancement, burden of proof on party seeking, 10.41
Market rate for fees, applicant's burden of proving, 9.120
Calculating lodestar figure
Generally, 1.8, 9.1
Importance of trial court calculating lodestar figure, 9.2
Reasonable hours (see Reasonable hours spent on case, below)
Challenging claimed rate
Burden on party challenging claimed rate, 9.123
Presumed reasonableness of claimed rate in absence of contradictory evidence, 9.122
Class actions
Future monitoring and enforcement and submission of periodic fee claims, fee award including compensation for, 9.26
Multiplier factors. See **Multiplier Factors**
Recovery of coupons by class members, fee award based on value of redeemed coupons, 8.20, 10.29
Common fund and substantial benefit cases, calculating award using lodestar versus percentage of fund method (California law)
Generally, 8.11
Amount of fund certain or easily calculable, percentage of recovery method best if, 8.14
Cross-check of percentage-based fee, lodestar-adjustment method used as, 8.15
Goal of reasonable fee under circumstances, 8.12
No preference for percentage of fund method in common fund cases by California courts, 8.13
Common fund and substantial benefit cases, calculating award using lodestar versus percentage of fund method (federal law)
Generally, 8.11
Benchmark of 25 percent for fees in common fund cases, 8.18
Class action providing for recovery of coupons by class members, fee award based on value of redeemed coupons, 8.20, 10.29
Cross-checking reasonableness of percentage method fee against lodestar, 8.19
Goal of reasonable fee under circumstances, 8.16
Multipliers in federal common fund cases, 5.25, 10.28
Preference for percentage of fund method in common fund cases, 8.13, 8.17
Common fund cases (generally)
Generally, 8.8
Constructive common fund cases, using lodestar method to calculate fees in, 8.9, 8.13
Comparable services by attorneys with comparable skills, experience, and reputation, requested rate in line with
Generally, 9.104

Current or historic rates (see Current or historic rates, use of, below)
Geographic market, determination of, 9.114-9.115
Litigation of equal complexity or difficultly, market rates determined by, 9.109
Multiplier factors. See **Multiplier Factors**
Practice area as factor in determining reasonably comparable attorneys, 9.106
Prevailing attorneys from market where rates higher than forum rates, exception for, 9.115
Reasonably comparable attorneys, determination of, 9.105-9.108
Reasonably comparable services, determination of, 9.109-9.110
Size of law firm, effect on rates, 9.108
Special qualifications of counsel justifying higher rate, 9.107
Type of task performed, rate not dependent on, 9.110
Contingency fee agreement, effect on lodestar-based fees. See **Contingency Fee Agreements**
Current or historic rates, use of
Delay in payment, enhancement of payment to compensate for. See **Multiplier Factors**
Delay in payment, using current rates to compensate for, 9.111
Exception for fee awards against United States, 9.112
State court fee applications based on current rates, 9.113
Damages (see Amount of damages recovered, effect on fees awarded, above)
Decreasing lodestar. See **Multiplier Factors**
Definition of lodestar, 8.1-8.2
Delay in payment (see Current or historic rates, use of, above)
Discretion of trial court in making lodestar adjustment
Generally, 10.4
Abuse of discretion in failing to use attorney's time records as starting point for lodestar determination, 9.82
Multiplier factors. See **Multiplier Factors**
Documenting reasonable hours (see Recordkeeping and documentation of reasonable hours, below)
Duplication of effort by counsel, compensation for
Generally, 9.72
Burden on party challenging hours for duplication under federal law, 9.77
California law, permissibility of using multiple counsel, 9.73
Federal law, denial of fees for unreasonable duplication of effort by multiple attorneys, 9.74-9.77
Fee claimants with separate interests, assessing reasonableness of claimed hours separately, 9.75
Rulings on specific types of alleged duplication, 9.76
Enforcing and monitoring activities, compensation for time spent
Class actions, fee awards including compensation for future monitoring and enforcement and submission of period fee claims, 9.26
Consent decree, compensation for work defending against third party attack in separate action, 9.25
Prior decrees, compensation for time spent enforcing or monitoring, 9.24
Federal court order specifying lodestar figures, 11.66
Federal fee-shifting statutes, restrictions on lodestar multipliers, 2.13
Fee-related services, hourly fees for
Application for fees, compensability under fee-shifting statutes for time spent preparing and litigating, 9.16
Contractual fee claim, compensability of time spent litigating, 9.17
Cost of expert witnesses retained to support fee claim, compensation for, 9.22
Enhancement of lodestar for fee-related services, 10.12, 10.19
Equitable common fund and substantial benefit theories, compensation for time spent on fee-related services under, 9.19
Examples of cases awarding substantial fees for fee litigation, 9.23
Sanctions award, compensation for time spent securing or opposing, 9.18
Standards for determining reasonableness of fee, California law, 9.20
Standards for determining reasonableness of fee, federal law, 9.21
Findings by trial court on, 11.65
Historic rates (see Current or historic rates, use of, above)
Hours spent on case (see Reasonable hours spent on case, below)
Increasing lodestar. See **Multiplier Factors**
Injunction, value of affecting fee under Lodestar adjustment, 10.40
Inverse condemnation. See **Inverse Condemnation**
Judgments and decrees
Collecting judgment, compensation for time spent, 9.9, 9.27
Enforcing and monitoring activities (see Enforcing and monitoring activities, compensation for time spent, above)
Prior decrees, compensation for time spent enforcing or monitoring, 9.24
Work required in ancillary forum to protect judgment or decree, compensation for, 9.14
Law clerks (see Paralegals and law clerks, hourly fees for, below)
Liable parties (see Apportioning fees among liable parties, above)
Limits on compensability of time spent
Generally, 9.48

Duplication of effort by counsel (see Duplication of effort by counsel, compensation for, above)
Nonfee claims joined with fees claims (see Nonfee claims joined with fee claims, compensation for time spent on, below)
Partial success. See **Partial Success**
Public versus private claims (see Public versus private claims, time spent on, below)
Special circumstances making fully compensatory award unjust, reductions based on, 9.78
Litigation activities, hourly fees for
Ancillary proceedings closely related to litigation, compensability of time spent on, 9.13
Compensability for time reasonably spent on litigation activities, 9.8
Court appearance not required for entitlement to fee, 9.10
Examples of compensable litigation activities, 9.9
Fee-related services (see Fee-related services, hourly fees for, above)
Intervenors, plaintiff recovering fees for time spent opposing, 9.12
Prelitigation activities (see Prelitigation activities, hourly fees for, below)
Third parties, fee award for work necessitated by, 9.11
Travel time during litigation, compensation for, 9.28
Market rate of attorney's services determining reasonable hourly rate
Generally, 9.93
Burden of proving, 9.120
Comparable services by other attorneys (see Comparable services by attorneys with comparable skills, experience, and reputation, requested rate in line with, above)
Contingent fee, rules applicable to attorneys charging, 9.98
Contract setting applicable rate as exception to market rate rule, 9.102
Contractual or statutory provisions requiring losing party to pay fees incurred by prevailing party, effect of, 9.94
Court schedules setting hourly rates as exception to market rate rule, 9.101
Current rates (see Current or historic rates, use of, above)
Expert testimony on, 9.121
In-house counsel's entitlement to reasonable fees based on market rates, 9.99
Labor unions. See **Labor Unions**
Method of charging for services, applicability of market-rate standard regardless of, 9.94
Paralegals and law clerks, 9.118
Private attorneys charging less than market rates, rules applicable to, 9.97
Proof (see Proof of appropriate rates, below)
Public interest lawyers, California rules applicable to, 9.95
Public interest lawyers, federal rules applicable to, 9.96
Statutes setting applicable rate as exception to market rate rule, 9.100
Monitoring activities (see Enforcing and monitoring activities, compensation for time spent, above)
Multiple attorneys (see Duplication of effort by counsel, compensation for, above)
Multiplier factors. See **Multiplier Factors**
Nonfee claims joined with fee claims, compensation for time spent on
Generally, 9.65
Close relationship between work on nonfee claims and fee claims, fee award for entire case, 9.66
Exceptions to general rule of no compensation for nonfee claims, 9.66-9.69
Particular issue relevant to fee claims and nonfee claims, fee award for work on, 9.67
Objections
Block billing, objections to, 9.84
Requested rate, objection to, 9.120
Paralegals and law clerks, hourly fees for
Generally, 9.29
Attorney performing paralegal work, compensation rates for, 9.30
Market rate fees for, 9.118
Other billing personnel, compensability of, 9.119
Percentage of recovery method of calculating fees
California law (see Common fund and substantial benefit cases, calculating award using lodestar versus percentage of fund method (California law), above)
Federal law (see Common fund and substantial benefit cases, calculating award using lodestar versus percentage of fund method (federal law), above)
Political Reform Act, applicability of lodestar method of calculating fees to actions brought under, 3.85
Prelitigation activities, hourly fees for
Administrative proceedings, compensability for prelitigation, 9.7
Catalyst theory, attempt to settle case as requirement for recovering fees under, 9.6
Compensability for time spent on case before filing, 9.6
Presumptions affecting
Generally, 9.1
Billing rates, presumption affecting reasonableness of, 9.121
Contractual fees, lodestar method presumptively reasonable for calculating, 8.5

Federal law, presumption affecting lodestar figure as reasonable fee, 9.2, 10.23
Federal law, presumption affecting reasonableness of lodestar reductions and increase, 10.7, 10.23
Joint and several liability of defendants for fee award, presumption of, 9.81
Requested rates, presumption of reasonableness affecting, 9.122
Primacy of lodestar-adjustment method
Generally, 8.3
Common fund cases, 8.8
Contractual fees, lodestar method presumptively reasonable for calculating, 8.5
Examples of cases demonstrating primacy of lodestar-adjustment method, 8.6
Examples of cases where lodestar method not used, 8.7
Federal law requiring use of lodestar method of calculating fees in statutory fee cases, 8.10
Fee-shifting statutes, calculating fees using lodestar method under, 8.4
Substantial benefit cases, 8.8
Privileged information, redaction of
California law, 9.85
Federal law, 9.89
Proof of appropriate rates
Burden of proof (see Burden of proof, above)
Burden of proof on party seeking fee award, 9.120
Methods of demonstrating market rates, 9.121
Public interest lawyers (see Market rate of attorney's services determining reasonable hourly rate, above)
Public versus private claims, time spent on
Apportioning fees between plaintiff's individual claim and time attributable to public issues in cases requiring public benefit for fee award, 9.70
No public benefit required, fee award in cases where, 9.71
Reasonable hourly rates
Challenging claimed rate (see Challenging claimed rate, above)
Comparable services by other attorneys (see Comparable services by attorneys with comparable skills, experience, and reputation, requested rate in line with, above)
Cost accounting method of determining reasonable hourly rates, courts' rejection of, 9.103
Market rate (see Market rate of attorney's services determining reasonable hourly rate, above)
Out-of-town rates, request for, 9.123
Paralegals (see Paralegals and law clerks, hourly fees for, above)
Proof (see Proof of appropriate rates, above)
Trial court determining reasonable hourly rate for each attorney claiming fees, 9.92
Undesirability of case as factor in determining, 10.48
Reasonable hours spent on case
Amicus curiae briefs, compensation for preparation of, 9.9, 9.15
Ancillary proceedings (see Ancillary proceedings, hourly fees for, above)
Appellate services. See **Appeals**
Apportioning fees among liable parties (see Apportioning fees among liable parties, above)
Billing judgment, attorneys excluding excessive, redundant, and unnecessary hours, 9.5
Compensation for all hours reasonably spent by each biller, attorneys' entitlement to, 9.3
Documenting reasonable hours (see Recordkeeping and documentation of reasonable hours, below)
Duplication of hours by counsel (see Duplication of effort by counsel, compensation for, above)
Enforcing and monitoring activities (see Enforcing and monitoring activities, compensation for time spent, above)
Fee-related services (see Fee-related services, hourly fees for, above)
Judgments (see Judgments and decrees, above)
Limits on compensability of time spent (see Limits on compensability of time spent, above)
Litigation activities (see Litigation activities, hourly fees for, above)
Paralegals and law clerks (see Paralegals and law clerks, hourly fees for, above)
Prelitigation activities (see Prelitigation activities, hourly fees for, above)
Standard for determining if time reasonably spent, 9.4
Third parties (see Third parties, below)
Recordkeeping and documentation of reasonable hours
Burden of challenging claimed hours, 9.90
California law (see Recordkeeping requirements under California fee-shifting law, below)
Federal law (see Recordkeeping requirements under federal law, below)
Importance of accurate recordkeeping, 9.82
Privileged information (see Privileged information, redaction of, above)
Recordkeeping requirements under California fee-shifting law
Block billing, objections to, 9.84
Contemporaneous records, effect of fee claimant lacking, 9.83
Detailed time records, advisability of, 9.83
Level of detail required in time records, 9.84

Redaction of privileged information from time records by fee claimant, 9.85
Recordkeeping requirements under federal law
Contemporaneous records, federal court reducing fee award in absence of, 9.86
Contemporaneous records, reconstructed records as substitute for, 9.87
Level of detail required in time records, 9.88
Redaction of privileged information, 9.89
Redaction of privileged information (see Privileged information, redaction of, above)
Sanctions, fees awarded as, 8.21
Social Security Act, interrelationship between lodestar-based fee awardable under Act and contingent fees payable to attorney under, 8.30, 8.37
Substantial benefit doctrine
Generally, 8.8
California law (see Common fund and substantial benefit cases, calculating award using lodestar versus percentage of fund method (California law), above)
Federal law (see Common fund and substantial benefit cases, calculating award using lodestar versus percentage of fund method (federal law), above)
Third parties
Consent decree, compensation for work defending against third party attack in separate action, 9.25
Work necessitated by third parties, fee award for, 9.11

**Malicious Prosecution**
Damages in malicious prosecution action, recovery of fees as, 7.19
Sanctions as alternative to malicious prosecution action, 6.43

**Malpractice.** See **Legal Malpractice**

**Mandate, Writ of**
Collection of fee award from government entity, writ of mandate to compel, 15.3-15.4
Government Code §800, requirements for fee award against respondent government entity in mandamus action, 2.81
Private attorney general doctrine, applicability to writ of mandate proceedings, 3.32

**Marital Dissolution**
Appeal in marital dissolution actions, special rules for award of fees on, 9.36

**Market Rate Determining Hourly Rate.** See **Lodestar Method of Calculating Fees**

**Medical Treatment**
Equitable apportionment, inapplicability to county's recovery of lien for medical services to indigent patient, 5.30
Termination of medical treatment, fee award to employee's successfully resisting, 3.97

**Memorandum in Support of Motion for Fees.** See **Motions for Fees**

**Memorandum of Costs**
Advantage of claiming fees through, 11.30
Appellate fees. See **Appellate Fees**
Application for fees in, 11.27
Contractual fees, effect of filing memorandum of costs for, 11.29
Judicial Council Form for, App A
Service of memorandum of costs, time limit for, 11.25

**Misappropriation of Trade Secrets.** See **Trade Secrets**

**Misconduct**
Arbitrator's award of fees, arbitrator's misconduct as grounds for vacating, 14.16

**Misrepresentations.** See **Fraud and Misrepresentation**

**Mobilehomes**
Mobilehome Residency Law, award of fees to party under, 2.83, 3.100

**Modifications.** See **Amendments and Modifications**

**Motions (Generally)**
Compel arbitration, motion to. See **Arbitration**

Compensability of time spent bringing or defending motions, 9.9
Sanctions, motion for. See **Sanctions**
Strike, motion to. See **Strategic Lawsuits Against Public Participation (SLAPP Suits)**

**Motions for Fees**
See also **Application for Fees**
Appellate court, motion for fees in. See **Appellate Fees**
Bifurcation of entitlement and amount issues, 11.34
CCP §128.7, motion for fees as sanctions under. See **Sanctions**
Collateral matter, attorney fee motion as, 11.3
Declarations
Deposition of attorneys submitting declarations supporting or opposing fee motion, 11.57
Examples of declarations used in fee motions, 11.75
Experts' and attorneys' declarations in support of fee motion, 11.53
Oral argument based on declarations filed in support of fee motion, 11.63
Sample form of declaration in support of motion for award of reasonable attorney fees, App E
Sample form of declaration in support of plaintiff's motion for award of reasonable attorney fees, App F
Supplemental declaration in support of motion for award of reasonable attorney fees, App G
Depositions
Declaration supporting or opposing fee motion, deposition of attorney submitting, 11.57
Expert submitting declaration supporting motion for fees, deposition of, 11.53
Discovery about basis for fee request
Generally, 11.54
Depositions (see Depositions, above)
Opposing counsel's fee records, discovery of, 11.56
Relevant factors, discovery limited to, 11.55
Documentation supporting initial motion for fees
Amount of fees, documentation of, 11.48
California courts, documentation required by, 11.50
Declarations (see Declarations, above)
Federal court, documentation supporting fee claim required by, 11.49
Types of forms and documents used in fee motions, 11.75
Evidence
Documentation (see Documentation supporting initial motion for fees, above)
Opponent of fee motion offering specific evidence, 11.60
Verified cost bill as prima facie evidence that costs and expenses necessarily incurred, 11.58
Extension of time (see Stipulations, below)
Federal court procedures and time limits, 11.44
Hearing on fee motion, 11.33, 11.63
Initial motion for fees
Generally, 11.46
Contents of comprehensive fee motion, 11.53
Documentation (see Documentation supporting initial motion for fees, above)
Judge hearing merits of case, presentation of fee motion to, 11.52
Record before court, entitlement to fees based on, 11.47
Small or uncontested fee matters, fee motions in, 11.51
Issues involved in, 11.33-11.34
Jurisdiction of court to hear fee motions
Generally, 11.3
Arbitration fees, 11.5
Statutory fees, 11.4
Lodestar enhancement for difficulties caused by fee-opponent's opposition to fee motion, 10.3, 10.33, 10.73
Memorandum in support of petitioner's motion for reasonable fee award
Reply memorandum in support of petitioner's motion for award of reasonable attorney fees, App H
Sample form, App D
Noticed motion for fees
Generally, 11.26
Contested cases, advantage of seeking fees by noticed motion in, 11.30
Contract, noticed motion for fees based on, 11.29
Equitable theories, noticed motion for fees based on, 11.41
Law, noticed motion for fees based on, 11.31
Memorandum in support of petitioner's motion for award of fees (see Memorandum in support of petitioner's motion for reasonable fee award, above)
Sample form, notice of motion for award of reasonable attorney fees and costs, App C
Statute, noticed motion for fees based on, 11.30

Time limit for filing, 11.30
Opposition to fee motion
Generally, 11.33
Preparing opposition papers, 11.58
Reply to opponent's objections (see Reply to opponent's objections, below)
Specific evidence, opponent offering, 11.60
Time limit for filing opposition papers, 11.62
Waiver of objections, failure to state objections resulting in, 11.59
Order awarding fees. See **Order Awarding Fees**
Outside counsel, engaging for fee motion, 11.7
Postjudgment motion for fees, effect of judgment not awarding fees or costs on, 11.20
Procedures for fee motion
Generally, 11.33
Burden of producing evidence supporting fee claim, 11.46
Checklist for motion procedure, 11.74
Deadlines, 11.62
Discovery (see Discovery about basis for fee request, above)
Federal court procedures, 11.44
Hearing on fee motions, 11.33, 11.63
Initial motion (see Initial motion for fees, above)
Opposition to fee motion (see Opposition to fee motion, above)
Reply to opponent's objections (see Reply to opponent's objections, below)
Reconsideration of fee award. See **Reconsideration of Fee Award**
Records
Discovery of opposing counsel's fee records, 11.56
Documentation supporting initial motion for fees (see Documentation supporting initial motion for fees, above)
Entitlement to fees based on record before court, 11.47
Reply to opponent's objections
Generally, 11.61
Time limit for filing and serving, 11.62
Sanctions, motion for. See **Sanctions**
Service of motion, time limit for, 11.37, 11.62
Statement of decision not required on, 11.65
Stipulations
Application for appellate fees in trial court, stipulation for extension of time to file fee motion, 12.22
Bifurcation of entitlement and amount issues, stipulation with opposing counsel for, 11.34
Extension of time to file fee motion, stipulation for, 11.36, 11.39
Timing of fee motion in federal courts, 11.44
Timing of fee motion in state courts
Generally, 11.24
Appeal of judgment on merits, trial court's jurisdiction to award fees despite, 11.21, 11.35
Contractual and statutory fee motions, filing within time to file appeal, 11.36
Equitable theories, time limit for filing fee motion based on, 11.41
Notice of entry of judgment, time limit for filing fee motion after, 11.24, 11.37
Pleading and proving fees claimed as damages at trial, 11.42
Postappeal, timing rules for fee claims, 11.43
Postjudgment work, inapplicability of time requirements to motion seeking fees for, 11.38
Service of fee motion, time limit for, 11.37, 11.62
Statutory fees, timing of motion for, 11.30
Stipulation for extension of time, 11.36, 11.39
Waiver of right to seek costs and fees, failure to file fee motion within required time resulting in, 11.40
Waiver
Effect of failing to state objections to costs and fees, 11.59
Right to seek costs and fees, failure to file motion within required time resulting in waiver of, 11.40

**Multiple Contracts**
Eligibility for fees under. See **Contractual Provisions, Eligibility for Fees Under**
Fee-shifting clauses in multiple contracts, determination of prevailing party for each contract, 4.75

**Multiplier Factors**
See also **Lodestar Method of Calculating Fees**
Generally, 10.1
Appellate services. See **Appellate Fees**
Application for fee, multiplier applied to lodestar figure for time spent on, 9.20
Burden of proof on party seeking enhancement, 10.41

California law
Contingent risk factor (see Contingent risk factor under California law, below)
Delay enhancements, availability under California law, 10.50
Differences between California and other states on application of multipliers, 10.19
Differences between California law and federal law on application of lodestar multipliers, 10.18
Double counting, prohibition against using same facts in determining lodestar and multiplier, 9.116, 10.21
Government entities, no enhancement of fees awarded to, 10.20
Independence of California law on fee awards from federal law, 10.17
Partial success, court's discretion to award fees based on, 10.53
Class actions
Coupon settlements, multipliers in class action involving, 10.29
Results obtained in class action, size of monetary recovery as indicator of, 10.40
Contingency fee agreement, effect of lodestar adjustment, 8.36-8.37, 10.14
Contingent risk factor under California law
Generally, 10.41
Appellate services, risk multipliers for, 10.43
Intertwining of multiplier based on quality of representation with contingent risk factor, 10.32, 10.37
Purpose and application of risk enhancement, 10.42
Rationale for risk enhancement, 10.41
Contingent risk factor under federal law
Common fund cases, availability of risk multipliers in, 10.46
Unavailability of risk multipliers under federal fee-shifting statutes, 10.45
Delay in payment, enhancement of lodestar figure for
Generally, 10.49
California law, availability of delay enhancements under, 10.50
Federal law, availability of delay enhancements under, 10.51
Discretion of court
Balancing factors, trial court's discretion in, 10.4
Partial success, court's discretion to award full or reduced fee for. See **Partial Success**
Unreasonable fee claim, court's discretion to reduce or deny, 10.15
Double counting, prohibition against using same facts in determining lodestar and multiplier
Generally, 10.5
California law, 9.116, 10.21
Federal law, 9.117, 10.27
Partial success, restrictions on reduction of fee for, 10.55
Examples of cases involving lodestar adjustment
Affirmation of lodestar enhancement, 10.8
Denial of lodestar enhancement, cases reversing, 10.9
Negative multipliers, cases involving, 10.11
Reversal of lodestar enhancements, 10.10
Factors justifying increase or decrease in lodestar
Generally, 8.2, 10.3
Balancing factors, trial court's discretion in, 10.4
Contingency fee agreement, effect of, 10.3
Contingent risk factor under California law (see Contingent risk factor under California law, above)
Contingent risk factor under federal law (see Contingent risk factor under federal law, above)
Delay in payment (see Delay in payment, enhancement of lodestar figure for, above)
Double counting (see Double counting, prohibition against using same facts in determining lodestar and multiplier, above)
Identity and resources of parties (see Identity and resources of parties or counsel as factors in determining fee award, below)
Miscellaneous factors in adjusting lodestar, 10.73
Partial success. See **Partial Success**
Preclusion of other employment, multiplier applied to lodestar figure based on litigation resulting in, 10.47
Public service element and motivation to represent consumers as factors in setting reasonable fee award, 10.67
Quality of representation (see Quality of representation as factor in adjusting lodestar, below)
Reasonableness of fee resulting from multiplier, requirement of, 10.6
Results obtained (see Results obtained as factor for increasing lodestar, below)
Same standards governing negative and positive multipliers, 10.7
Undesirability of case, enhancement of multiplier based on, 10.48
Federal law
Burden on party seeking adjustment to show lodestar unreasonably high or low, 10.25
Class actions involving coupon settlements, multipliers in, 10.29
Client, multiplier in cases where fees paid by, 10.30
Common fund cases, multipliers in, 5.25, 10.28
Contingent risk factor (see Contingent risk factor under federal law, above)
Delay enhancements, availability under federal law, 10.51

Determination of lodestar, adjustment of lodestar after, 10.24
Differences between California law and federal law on application of lodestar multipliers, 10.18
Double counting, prohibition against using same facts in determining lodestar and multiplier, 9.117, 10.27
Examples of lodestar adjustments under federal fee-shifting statutes, 10.26
Exceptional cases, permissibility of lodestar multipliers in, 10.25
Independence of California law on fee awards from federal law, 10.17
Partial success, reduction of fees based on, 10.54
Presumption under federal law affecting reasonableness of lodestar reductions and increases, 10.7, 10.23
Quality of representation enhancements, federal law recognizing, 10.34
Rarity of multipliers under federal fee-shifting statutes, 10.22
Undesirability of case, enhancement of multiplier based on, 10.48
Fee-related services
Enhancement of lodestar for, 10.3, 10.12, 10.19, 10.33
Risk multiplier for, 10.44
Identity and resources of parties or counsel as factors in determining fee award
Multiple law firms, award of equal shares to, 10.71
Plaintiff's financial resources as factor in awarding fees to defendant, 10.70
Publicly or charitably funded counsel, prohibition against reducing lodestar for, 10.68
Staff attorneys for legal service organizations, treatment of, 10.69
Taxpayers' payment of award as factor, 10.72
Multiple counsel, reduction of lodestar for inefficient use of, 9.73
Negative multipliers
Contingent fee agreement, prohibition against applying negative multiplier to make statutory fee consistent with fee under, 10.14
Examples of cases involving, 10.11
Same standards governing negative and positive multipliers, 10.7
Private attorney general doctrine, fees awarded to public entity not affected by multiplier based on extrinsic circumstances, 3.12
Punishing opponent for litigation strategy, prohibition against using multipliers for, 10.48
Purpose of lodestar-adjustment method of calculating fees, 10.2
Quality of representation as factor in adjusting lodestar
Examples of cases applying quality of representation factors, 10.36
Federal law on quality factors, 10.34
Fee-related services, enhancement based on extraordinary difficulties created by defendant's opposition to fee motion, 10.3, 10.33, 10.73
Novelty and difficulty of questions and skill displayed by counsel, lodestar adjustment based on, 10.31
Reduction of lodestar based on poor quality of work, 10.35
Results obtained, counsel's efficiency, and contingent risk, multipliers based on quality of representation intertwined with, 10.32, 10.37
Results obtained as factor for increasing lodestar
Generally, 10.37
Benefits flowing from litigation as consideration in assessing quality of results achieved, 10.39
Class action with monetized results, 10.40
Extent of success required, 10.38
Intertwining of multiplier based on quality of representation with results obtained factor, 10.32, 10.37
Risk enhancements (see Contingent risk factor under California law, above)
Special circumstances making fully compensatory award unjust, reductions based on, 9.78
Statement of decision on application of significant lodestar multipliers, appellate courts requiring, 10.4

**Negative Multipliers.** See **Multiplier Factors**

**New Trial**
Ambiguities or omissions in fee order, motion for new trial as means of challenging, 11.69

**Nonprofit Corporations**
Mutual public benefit nonprofit corporations, fee awarded to prevailing party in action to inspect records of, 3.121

**Nonprofit Law Firms**
Eligibility of nonprofit law firm for fee award, 2.23
Private attorney general doctrine, nonprofit law firms' recovery of fees under, 3.15

**Nonsignators to Contract.** See **Contractual Provisions, Eligibility for Fees Under**

**Notice and Notification**
Appeals. See **Appeals**

Catalyst theory, party required to give opposing party notice of claims and reasonable opportunity to settle before filing lawsuit, 2.3
CCP §128.5 sanctions, requirement of notice before imposition of, 6.39
Discovery sanctions, notice of request for, 6.54
Motion for fees, notice of. See **Motions for Fees**
Prevailing party's entitlement to fees, failure to give prelitigation notice as insufficient grounds for denial of, 2.58

**Nuisance**
Abatement action, prevailing defendant's recovery of fees, 3.103
City ordinance providing for fees in litigation to abate nuisance preempted by state law, 3.105

**Objections**
Block billing, objections to, 9.84
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Sanctions, failure to object to lack of specificity as waiver of requirement for stating reasons, 6.34

**Offer to Settle.** See **Settlement**

**Offsets.** See **Setoffs**

**Opposing Party's Liability for Fee Award.** See **Liability for Fee Awards**

**Oral Argument**
Motion for fees, oral argument on, 11.63

**Order Awarding Fees**
Generally, 11.64
Ambiguities or omissions in fee order, effect of, 11.69
Appellate review of. See **Appeals**
Direct award of fees to attorney, court ordering, 11.70
Federal court standards, requirement of clear and concise order, 11.66-11.67
Findings on elements of fee award, court specifying
Generally, 11.65
State courts allowing more general findings than federal courts, 11.68
Sample forms
Order awarding fees, App I
Order granting in part plaintiff's motion for attorney fees and expenses, App J
Stipulation for award of attorney fees, proposed order awarding attorney fees, App K

**Paralegals, Hourly Fees for.** See **Lodestar Method of Calculating Fees**

**Partial Success**
Appeals. See **Appeals**
Exceptions to partial success rule
Generally, 9.58
Cartwright Act cases, special rule in, 9.68
Common work, compensability of time spent on, 9.59
Impossibility of segregating work on fee claim from nonfee claim, no reduction of fee for work on nonfee claim, 9.69
Interrelationship between work on successful and unsuccessful claims, compensability of time, 9.61
Issues not addressed by court, compensability of time spent on, 9.62
Multiple parties to action, court's discretion to award full fee or reduce fee to reflect lack of success against particular parties, 9.64
Success of other claims, compensability of time spent on unsuccessful claims contributing to, 9.60
Ultimately successful litigation, time spent on, 9.63
Lodestar method of calculating fees, determining if reduction appropriate for partial or limited success
Generally, 9.49
Excellent results, party entitled to full compensatory fees after obtaining, 9.50
Exceptions to partial success rule (see Exceptions to partial success rule, above)
Multipliers for partial success (see Multiplier factors, court's discretion to award full or reduced fee for partial success, below)
Unsuccessful claims (see Unsuccessful or partially successful claims, compensation for time spent on, below)
Multiplier factors, court's discretion to award full or reduced fee for partial success
Generally, 10.52
Amount of damages obtained, effect on fee award, 10.56

Appellate decision reducing plaintiff's damages or other relief, reconsideration of original fee award based on, 10.62
California law requiring special circumstances for reduction of fee if substantial success obtained, 10.53
Examples of California cases applying partial success rules, 10.65
Examples of federal cases applying partial success rules, 10.66
Factors affecting court's discretion to adjust lodestar for partial success, 10.56-10.62
Federal law, reduction of fees based on, 10.54
General rules for determining adjustment based on, 10.55
Importance of rights vindicated as significant factor in determining reduction of fee for partial success, 10.57
Litigation activities, determining reasonableness of, 10.58
Negative multipliers for partial success, 9.57
Other tangible results, evaluation of party's success including, 10.61
Quantifying partial success adjustment, 10.64
Relief sought and relief obtained, request for reduction based on difference between, 10.56, 10.63
Settlement position of parties, 10.59-10.60
Technical or de minimis success, court awarding no fee in event of, 10.63
Prevailing parties
California law, prevailing party's recovery under, 2.99
Denial of entire fee, prevailing party's limited success insufficient grounds for, 2.56
Effect of prevailing plaintiff achieving partial relief, 2.86-2.87
Federal law distinguished from California law, 2.100
SLAPP suit, effect of partial success on motion to strike, 3.118
Unsuccessful or partially successful claims, compensation for time spent on, 9.51
Distinguishing between unsuccessful theories and unsuccessful claims, 9.53-9.54
Losing or unreached theories, successful plaintiff's compensation for time spent on, 9.53
Negative multipliers for partial success, 9.57
Reduction of fee for unsuccessful and unrelated claims, 9.52
Related and unrelated claims, distinction between, 9.51, 9.55-9.56
Theories and claims, distinction between, 9.54

**Peace Officers.** See **Law Enforcement Personnel**

**Penalties.** See **Sanctions**

**Percentage of Recovery Method of Calculating Fees**
Equity. See **Equity, Award of Fees Based on**
Lodestar method. See **Lodestar Method of Calculating Fees**
Substantial benefit doctrine, fee award under, 5.49

**Personal Injury Statutes**
Anti-harassment statute, prevailing party's right to fee award under, 2.74, 3.109
Elder Abuse and Dependent Adult Civil Protection Act, prevailing party's recovery of fees under, 3.106
Felony victims, civil actions by, 3.108
Police officers, prevailing defendant's recovery of fees in bad faith, libel, or slander actions against, 3.107, 6.5

**Pleadings**
Answer, prayer for attorney fees in, 11.1
CCP §128.7, applicability to pleadings signed by attorney or unrepresented party, 6.11
Claim for fees, effect of failing to plead, 11.1
Compensability of time spent drafting and revising, 9.9
Complaints. See **Complaints**
Damages, pleading fees as item of, 11.29, 11.32, 11.42
Expert witness fees, pleading and proving contractual provisions covering, 11.45
Litigation expenses, pleading requirements for, 4.14

**Police.** See **Law Enforcement Personnel**

**Political Reform Act**
Lodestar-adjustment method for calculating fees under, 8.6
Recovery of fees under, 3.85

**Preemption.** See **Federal Preemption**

**Prejudice**
Arbitrator's award of fees, prejudicial conduct by arbitrator as grounds for vacating, 14.16
Postjudgment work, prohibition against timing of fee motion resulting in unfair prejudice to fee opponent, 11.38

**Preliminary Injunctions.** See **Prevailing Parties**

**Prelitigation Activities, Recovery of Fees for.** See **Lodestar Method of Calculating Fees**

**Presumptions and Inferences**
Causative effect of lawsuit presumed if beneficial result follows court order, 2.114
Joint and several liability of defendants for fee award, presumption of, 2.42, 9.81
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Motion for fees, presumption against deposing opposing counsel, 11.57

**Prevailing Parties**
See also **Fee-Shifting Statutes**
Administrative proceedings. See **Administrative Agencies and Proceedings**
Appeals. See **Appeals; Appellate Fees**
Applicability of prevailing party concept to most fee-shifting statutes and theories, 2.44
Application for fees. See **Application for Fees**
Arbitration. See **Arbitration**
Business litigation statutes
Cartwright Act, prevailing party's right to fees in action to enforce, 3.123
Commercial appropriation statute, prevailing party's right to fees in action to enforce, 3.122
Mutual public benefit nonprofit corporations, fee awarded to prevailing party in action to inspect records of, 3.121
Calculation of fee awards for. See **Calculation of Fees**
California Disabled Persons Act, prevailing party's recovery of reasonable fees under, 3.83
Catalyst theory. See **Catalyst Theory**
CCP §128.7 sanctions, prevailing party's recovery of fees and costs in presenting or opposing motion for, 6.24
CCP §998 offer (see Settlements, below)
Challenging government decision making and regulation
California Taxpayers' Bill of Rights, prevailing party's recovery of fees under, 3.95
Public Records Act mandating fee award to prevailing plaintiffs, 2.76, 3.87
State regulatory agencies, prevailing party's recovery of fees under state Equal Access to Justice Act in actions against, 3.94
Civil Code §1717, prevailing party's right to fees under, 4.13
Commission on Professional Competence, prevailing school employees' right to receive fees in proceedings before, 13.8
Consumer protection. See **Consumer Protection**
Contractual fees. See **Contracts**
Costs
CCP §128.7 sanctions, prevailing party's recovery of fees and costs in presenting or opposing motion for, 6.24
Contractual provision entitling prevailing party to reasonable fees and costs, interpretation of, 9.126
Drug house abatement action, prevailing party's recovery of costs and fees, 3.103
Statutory costs (see Statutory costs, distinction between prevailing party for fee award and prevailing party for purposes of, below)
Definition of prevailing party
Generally, 2.45
Distinction in definition of prevailing party for purposes of attorney fees and statutory costs, 2.47
Determination of prevailing party
Generally, 2.84
Comparison of California and federal law, 2.46
Costs (see Statutory costs, distinction between prevailing party for fee award and prevailing party for purposes of, below)
Dismissal of action (see Dismissal of action, below)
Federal standard for determining prevailing party, 2.45, 11.8
Impact of case (see Impact of case as whole, prevailing party determined by, below)
Non-fee-shifting claim, relief obtained on, 2.102
Partial relief, effect of plaintiff achieving, 2.86-2.87
Preliminary injunctions (see Preliminary injunctions, below)
Procedural or technical grounds, effect of obtaining relief on, 2.101
Settlements (see Settlements, below)
Simple unqualified win, limit on court's discretion to determine prevailing party in case involving, 4.73, 4.88
Discretion of court
FEHA, court's discretion to award or deny fees if prevailing plaintiff's judgment could have been rendered in limited civil case, 11.3
Mixed results, court's discretion to find no prevailing party if litigation ends with, 4.88
No prevailing party, court's discretion to find, 2.75, 4.88
Simple unqualified win, limit on court's discretion to determine prevailing party in case involving, 4.73, 4.88
Statutes providing for discretion of court to award fees to prevailing party, 2.50
Dismissal of action
Defendant obtaining dismissal as prevailing party, 2.107

Effect of court granting dismissal and finding no prevailing party, 2.110
Plaintiff deemed successful party despite dismissal, 2.108-2.109
Eminent domain proceeding, fee award to prevailing party in, 3.101
Entitlement to fees. See **Contractual Fee Clauses, Entitlement to Fees Under**
Equity, award of fees based on, 5.5
Frivolous, groundless, or unreasonable claim by plaintiff, prevailing defendant's entitlement to fees
Generally, 2.69
California courts considering plaintiff's ability to pay in addition to finding lawsuit frivolous, 2.70
Catalyst theory, requirement court find case not frivolous or groundless, 2.96
Civil anti-harassment statute, prevailing defendant's entitlement to fee under, 2.74, 3.109
Commercial litigation under federal law, factors affecting fee award in, 2.73
Federal civil rights cases, defendant's entitlement to fees in, 2.71
Federal law, generally, 2.98
Private attorney general, fee award to prevailing defendant acting as, 2.72
Impact of case as whole, prevailing party determined by
Generally, 2.85, 2.88
CCP §998 exception to general rule, 2.89
Interim fees, exception for, 2.90
Merits of fee-shifting case (see Merits of fee-shifting case, no requirement prevailing party prove, below)
Partial success. See **Partial Success**
Pending appeal, effect of. See **Appeals**
Injunctions (see Preliminary injunctions, below)
Interpretation of prevailing party
Generally, 2.44
Special circumstances making fee award to prevailing party unfair, narrow interpretation of, 2.53-2.67
Limited success. See **Partial Success**
Lodestar method of calculating fees. See **Lodestar Method of Calculating Fees**
Merits of fee-shifting case, no requirement prevailing party prove
Generally, 2.94
California law, 2.95-2.96
Catalyst cases, requirement for proving claim has merit, 2.96
Federal law, 2.97
Relitigation of merits as part of fee motion prohibited, 2.98
Motion for fees. See **Motions for Fees**
Nonsignatory to contract as prevailing party, 4.42-4.43
Partial success. See **Partial Success**
Pending appeal, effect of. See **Appeals**
Personal injury statutes. See **Personal Injury Statutes**
Preliminary injunctions
California law, effect of party obtaining preliminary injunction, 2.105
Federal law, effect of preliminary injunction becoming moot on status as prevailing party, 2.106, 2.116
Property-related actions
Common interest developments, prevailing party's right to fees in action to enforce government documents, 3.103
Tenant protection statutes, prevailing party's right to fees under, 3.100
Settlements
California law, obtaining relief through settlement qualifying party as prevailing party, 2.103
CCP §998 exception to general rule of recovery, 2.89
CCP §998 offer, acceptance qualifying party as prevailing party, 2.103
Federal law, sufficiency of settlement memorialized by consent degree, 2.104
Federal rules affecting determination of prevailing party, 11.8
SLAPP suits. See **Strategic Lawsuits Against Public Participation (SLAPP Suits)**
Special circumstances making fee award unjust
Benefits achieved by losing party not special circumstance justifying denial of fee to prevailing party, 2.66
California law, defendant's burden of showing fee award to plaintiff unjust, 2.51
Examples of cases finding special circumstances, 2.68
Excessive fees as special circumstance justifying denial of fees, 2.67
Federal law, 2.52
Financial resources of losing party, effect of, 2.62
Free or reduced cost representation for prevailing party not grounds for denial of fee award, 2.61
Good faith of losing party not justifying denial of fees, 2.55
Limited success by prevailing party insufficient grounds for denial of entire fee, 2.56
Narrow interpretation of "special circumstances," 2.53-2.67
Prelitigation notice or necessity for suit, effect of failure to give, 2.58
Public benefit, effect of lawsuit not resulting in, 2.59
Rejection of most factors raised as special circumstances, 2.54-2.67

Resistance to action, effect of party's lack of, 2.57
Rights of losing party, effect of impact of fee award on, 2.63
Self-interest by party or incentive to sue not grounds for denial of fee, 2.60
Unnecessary participation by prevailing party as insufficient grounds for denying fee award, 2.64
Unreasonably protracting litigation insufficient grounds for denying fees, 2.65
Special qualifications, prevailing party statutes with
CCP §998, interpretation of, 2.80
CCP §1028.5, fee award to prevailing parties against state regulatory agencies, 2.82
Civil Code §1717, definition of prevailing party in, 2.79
Government Code §800, requirements for fee award against respondent government entity in mandamus action, 2.81
Miscellaneous statutes, fee awards under, 2.83
Statutory costs, distinction between prevailing party for fee award and prevailing party for purposes of
Generally, 2.47
Appellate costs, distinction between prevailing party for purposes of entitlement to appellate fees versus, 2.48
Different standards for prevailing plaintiffs versus prevailing defendants, 2.49
Tort and other noncontract claims, parties to contract agreeing that prevailing party can recover on, 4.3
Types of prevailing party statutes
Different standards for different parties, statutes providing for, 2.76
Discretion of court to award fees to prevailing party, statutes providing for, 2.50
Frivolous action by plaintiff (see Frivolous, groundless, or unreasonable claim by plaintiff, prevailing defendant's entitlement to fees, above)
Mandatory fee awards under fee-shifting statutes, 2.75
Multiple fee-shifting statutes with different prevailing party standards, construction of, 2.78
Particular parties, statutes specifying mandatory fee awards to, 2.77
Special circumstances (see Special circumstances making fee award unjust, above)
Special qualifications (see Special qualifications, prevailing party statutes with, above)

**Private Attorney General Doctrine**
Administrative proceedings, fee awards for work in
Court actions, fee awards for administrative proceedings preceding, 3.35
Court proceedings, no fee awards for work in administrative proceedings not involving, 3.34
Equitable private attorney general doctrine, administrative agencies' power to award fees under, 13.4
Equitable private attorney general doctrine, fee awards under, 5.59
Important right based on administrative decision, recovery of fee for enforcement of, 3.49
Related administrative work during or after judicial action, fee awards for, 3.36
Amicus curiae. See **Amicus Curiae**
Amount of fees, relative contribution of multiple parties as factor in determining, 3.64
Appellate courts
Enforcement of important right, publication of appellate opinion as evidence of, 3.42
Significance of benefit of case for purposes of awarding fees, abuse of discretion as standard of review for trial court rulings on, 3.57
Significant benefits conferred by appellate opinion, 3.59
Class actions. See **Class Actions**
Codification of equitable doctrine in CCP §1021.5
Generally, 3.5
Construction of CCP §1021.5 (see Construction of private attorney general statue, below)
Distinction between CCP §1021.5 and equitable private attorney general doctrine, 3.5
Invoking equitable private attorney general doctrine as separate basis for fee award, 3.9
Special circumstances, denial of fees in, 3.7
Combining awards under private attorney general statute with awards based on other fee-shifting statutes, 3.11
Comparison of private attorney general doctrine to other equitable doctrines
Common fund doctrine. See **Common Fund Doctrine**
Equitable and statutory private attorney general doctrines (see Equitable and statutory private attorney general doctrines, comparison of, above)
Substantial benefit doctrine. See **Substantial Benefit Doctrine**
Construction of private attorney general statue
Action requirement, broad interpretation of, 3.29
Broad construction of CCP §1021.5, 3.6
Federal private attorney general cases as guides in construing CCP §1021.5, 3.8
Important rights, broad construction of concept, 3.40
Substantial benefit factor, construction of, 3.51
Successful party, court's interpretation of, 3.13
Criteria for fee award under CCP §1021.5
Generally, 3.37
Enforcement of important right (see Enforcement of important right affecting public interest as criteria for awarding fees,

below)
Financial burden (see Necessity and financial burden of private enforcement as criteria for awarding fees, below)
Interrelated nature of statutory criteria, 3.38
Recovery, determining if fees paid from, 3.79
Relationship between financial burden criterion and interests of justice criterion, 3.38
Significant benefit (see Significant benefit as criteria for awarding fees, below)
Defined, 3.3
Elements and scope of CCP §1021.5
Administrative proceedings (see Administrative proceedings, fee awards for work in, above)
Criteria for fee award (see Criteria for fee award under CCP §1021.5, above)
Judicial action (see Judicial action, requirement of, below)
Successful party (see Successful party requirement under CCP §1021.5, below)
Text of CCP §1021.5, 3.12
Eligibility for fee awards under CCP §1021.5
Generally, 3.14
Amicus curiae's recovery of fees for preparation of amicus brief, 3.20
Class action objectors, 3.21
Intervenors, recovery of fees by, 3.18
Nonprofit law firms, parties represented by, 3.15
Pro bono attorneys, 3.16
Pro per attorneys and laypersons' ineligibility for fee awards, 3.22
Public entities' eligibility for fee award, restrictions on, 3.17
Successful defendants and real parties in interest, 3.19
Enforcement of important right affecting public interest as criteria for awarding fees
Generally, 3.39
Administrative decisions, rights based on, 3.49
Broad construction of concept of important rights, 3.40
Common law rights, vindication of, 3.48
Constitutional rights, 3.45, 5.58
Federal statutes, vindication of rights based on, 3.47
Minimal success, fees denied on basis of, 3.44
New law, no requirement of establishing to satisfy important right requirement, 3.41
Previously established important right, enforcement qualifying for fee award, 3.41
Publication of appellate opinion as evidence of enforcement of important right, 3.42
State statutes, vindication of rights based on, 3.46
Types of rights found important, 3.45-3.49
Unadjudicated claim of important right, fees awarded on, 3.43
Equitable and statutory private attorney general doctrines, comparison of
Statutory and constitutional rights, applicability of CCP §1021.5 to, 5.58
Viability of equitable doctrine, 5.57, 5.59
Equitable doctrine, codification of (see Codification of equitable doctrine in CCP §1021.5, above)
Federal courts' rejection of, 5.3, 5.56
Fee-related services, recovery of fees related to, 9.16
Financial burden (see Necessity and financial burden of private enforcement as criteria for awarding fees, below)
Historical origins of doctrine, 3.2
Inherent equitable authority of court to award fees, 5.54
Interpretation of private attorney general statue (see Construction of private attorney general statue, above)
Intervenors. See **Intervenors**
Judicial action, requirement of
Generally, 3.29
Broad interpretation of action requirement, 3.29
Federal court actions, applicability of CCP §1021.5 in, 3.33
Impact of case, entitlement to fees based on, 3.30
Portion of action addressing public purpose, fees limited to work on, 3.31
Quasi-criminal proceedings, applicability of statute to, 3.32
Liability for fee awards under CCP §1021.5
Generally, 3.23
Amicus curiae, 3.27
Court's liability for fees, 3.24
Intervenors and real parties in interest, 3.26
Opposing party's liability for cost of opposing amicus curiae brief, 3.27
Plaintiffs, assessment of fees against, 3.28
Private parties, restrictions on fee awards against, 3.25
Public entities, 3.24
Multiplier based on extrinsic circumstances, fees awarded to public entity not affected by, 3.12

Necessity and financial burden of private enforcement as criteria for awarding fees
Generally, 3.60
Actual cost of litigation, financial burden determined by, 3.70
Common fund, no requirement of court order that fees paid from, 3.73
Determining if private or public enforcement of statutory rights necessary, 3.61-3.63
Direct personal interests as factor in determining financial burden of litigation, 3.68-3.69
Distinguishing between time spent protecting personal rights and time protecting public interests, 3.74
Examples of cases finding burden not transcending personal interests, 3.76
Exhaustion of public enforcement by private party, no requirement for fee award, 3.62
Focus of financial burden requirement on comparing burden of bringing lawsuit to direct personal interest in case, 3.66
Free or reduced cost of representation, irrelevancy of, 3.72
Limited discovery to determine if public interest organization's litigation for benefit of particular individuals, 3.77
Method for determining if financial burden of litigation merits fee award, 3.67
Multiple private lawsuits, effect of, 3.64
Nonpecuniary interests motivating party to pursue litigation, fee award precluded by, 3.69
Pecuniary interests, 3.68
Personal stake in lawsuit, determining if financial burden disproportionate to, 3.75
Personal wealth of party claiming fees, irrelevancy of, 3.71
Prelitigation settlement efforts as factor in determining necessity for lawsuit, 3.65
Private parties litigating on same side as public entity, fees awarded to, 3.63
Public entities, fee claim by, 3.78
Relationship between financial burden criterion and interests of justice criterion, 3.38
Prevailing defendant acting as private attorney general, entitlement to fee award, 2.72
Public entities. See **Public Entities and Employees**
Purpose of, 3.4, 5.55
Relationship of private attorney general statute to other fee-shifting statutes, 3.11
Significant benefit as criteria for awarding fees
Generally, 3.50
Actual and concrete benefits, no requirement of, 3.52
Appellate courts (see Appellate courts, above)
Class action, no requirement for establishing significant benefit, 3.58
Evidence of number of affected persons, effect of, 3.57
Existing obligations, enforcement as basis for fee award, 3.55
Formal record, court looking outside in assessing impact of action, 3.56
Fundamental legislative policy, substantial benefit implied by implementation of, 3.53
Importance of right vindicated, significance of benefit dependent on, 3.54
Landlord-tenant actions conferring significant benefit on large class of person qualifying for fees, 3.100
New law, no requirement action create, 3.55
Standards for determining if significant benefit conferred on general public or large class of persons, 3.51-3.55
Substantial benefit doctrine, comparison of private attorney general doctrine to. See **Substantial Benefit Doctrine**
Successful party requirement under CCP §1021.5
Generally, 3.13
Eligibility for fee awards (see Eligibility for fee awards under CCP §1021.5, above)
Liability for fees (see Liability for fees awards under CCP §1021.5, above)
Vindication of rights
Enforcement of rights (see Enforcement of important right affecting public interest as criteria for awarding fees, above)
Significance of benefit dependent on importance of right vindicated, 3.54

**Privilege**
Redaction of privileged information from time records. See **Lodestar Method of Calculating Fees**

**Pro Bono Representation**
Private attorney general doctrine, pro bono attorneys recovering fees under, 3.16

**Proof**
See also **Burden of Proof**
Damages, proof of fees claimed as, 11.32, 11.42
Litigation expenses, proof of, 4.14
Market rate for fees. See **Lodestar Method of Calculating Fees**

**Pro Per Litigants**
Anti-SLAPP motion, prevailing defendant-attorney not entitled to fees, 3.112
Attorneys acting in pro per
California law, attorneys representing self ineligible to recover fees under, 2.20
Federal law, pro se litigants prohibited from recovering fees under, 2.21

Representing self and others, fee award for attorney, 2.20
Nonattorney representing self, ineligibility to recover fees under statutes or contracts providing for fees, 2.22
Private attorney general doctrine, pro per attorney's ineligibility to recovery fees under, 3.22
Sanctions, pro per litigants prohibited from recovering fees as, 2.20, 6.21, 6.49

**Public Assistance**
Review of entire proceedings, successful applicant's right to reasonable fees and costs, 3.84

**Public Benefits**
Private attorney general doctrine, award of fees in action to recover public benefits, 3.46

**Public Entities and Employees**
Collecting fee award from government entity. See **Collection of Fee Awards**
Damages, no recovery of fees based on city's nontortious denial of plaintiff's claim for damages, 7.32
Eligibility of public entities for fee awards
Generally, 2.26
Private attorney general statute, restrictions on public entities' eligibility for fee awards, 2.26, 3.17
Government Claims Act. See **Government Claims Act**
Judgment against government entity, duration of, 15.3
Mandate. See **Mandate, Writ of**
Private attorney general statute
Eligibility of public entities for fee awards, restrictions on, 2.26, 3.17
Liability of public entities for fees under, 3.24
Necessity and burden of private enforcement, requirement public entity show, 3.78
Vindication of public employee's rights, fee award in action resulting in, 3.46
Sanctions, restrictions on public entity's entitlement to fees as, 6.46
School employees. See **Schools**
Sovereign immunity. See **Sovereign Immunity**

**Publicly or Charitably Funded Attorneys**
Eligibility of charitably funded attorneys to recover fees, 2.23
Reduction of fee award based on publicly or charitable funding for attorneys prohibited, 10.68

**Public Policy**
Amicus curiae, public policy prohibiting fee award against, 2.40

**Public Records Act**
Lodestar-adjustment method for calculating fees under, 8.6
Prevailing plaintiff, Public Records Act mandating fee award to, 2.76, 3.87

**Public Utilities Commission (PUC)**
Authority of PUC to award fees in administrative proceedings about utility rates, 13.5
Federal court, PUC intervenor compensation statute permitting fee awards for defending PUC decisions in, 9.14
Parties intervening in PUC proceedings on behalf of public, Public Utilities Code providing for fee awards to, 3.89
Standard of review for fee awards under PUC's intervenor fee statutes, 16.20

**Punitive Damages**
See also **Damages**
Assessing punitive damages, fees as factor in, 7.33
Convicted felon suing victim for felon's injuries, punitive damages and sanctions against, 6.50

**Quantum Meruit**
Lodestar method for calculating fees, applicability to quantum meruit fee award, 10.3
Recovery of fees based on, 8.32

**Quasi-Administrative Proceedings.** See **Administrative Agencies and Proceedings**

**Questions of Law and Fact**
Indemnitee's entitlement to fees as question of law, 16.20
Private attorney general doctrine, vindication of important right as question of law, 3.42

**Real Property.** See **Fee-Shifting Statutes**

**Reasonable Hours.** See **Lodestar Method of Calculating Fees**

**Reciprocity of Fees under CC §1717.** See **Contracts**

**Reconsideration of Fee Award**
Appellate decision reducing plaintiff's damages or other relief, reconsideration of original fee award based on, 10.62
Filing motion for, 11.69

**Records and Reports**
Attorney time record, App B
Motion for fees. See **Motions for Fees**
Mutual public benefit nonprofit corporations, fee awarded to prevailing party in action to inspect records of, 3.121
Reasonable hours, documentation of. See **Lodestar Method of Calculating Fees**

**Rees-Levering Motor Vehicle Sales and Finance Act**
Fee-shifting provisions in, 3.104

**Regulations, Challenges to.** See **Fee-Shifting Statutes**

**Remand.** See **Appellate Fees**

**Remittitur.** See **Appellate Fees**

**Reports.** See **Records and Reports**

**Retail Installment Sales Act**
Fee-shifting provisions in, 3.104

**Retaliatory Eviction**
See also **Eviction**
Prevailing party's recovery of fees in action for, 3.100

**Retroactive Application of Statutes**
Pending cases arising before statute's effective date, applicability of procedural statutes to, 2.6

**Rosenthal Fair Debt Collection Practices Act**
Fee-shifting provisions in, 3.104
Lodestar method for calculating fees, 8.4

**Rules of Court**
See also **Local Rules of Court**
Sanctions, court's lack of authority under Rules of Court to award fees as, 6.2

**Safe Harbor**
CCP §128.7, safe harbor provisions of. See **Sanctions**
Electronically stored information, safe harbor for sanctions for failure to provide, 6.53

**Sanctions**
Generally, 1.10, 6.1
Anti-SLAPP motion to strike (see CCP §128.5 sanctions, below)
Appeal of sanction order. See **Appeals**
Arbitration. See **Arbitration**
Bad faith actions or actions brought without reasonable cause, fee award as sanctions for
Generally, 6.3
CCP §128.5 sanctions (see CCP §128.5 sanctions, below)
Federal court's authority to assess fees as sanctions for defendant's bad faith conduct, 5.3
Government Claims Act, fee award in actions brought under, 6.4
Indemnity action, fee awards in, 6.4
Peace officers, fee award for successful defendant in bad faith action against, 6.5
Summary judgment motions, exclusion of fees as sanctions for bad faith affidavits in, 6.58
Trade secrets, misappropriation of, 6.6
Vexatious litigants, requirement of posting sufficient security to cover defendant's expenses and fees, 6.7
CCP §128.5 sanctions
Generally, 6.8

Amount of fees, court's discretion in awarding, 6.35
Circumstances where CCP §128.5 sanctions appropriate, 6.30
Client and/or attorney, fees awarded against, 6.33
Contractual arbitration proceedings, applicability of CCP §128.5 to, 6.45
Costs or expenses unrelated to litigation, no sanctions for, 6.37
Elements of CCP §128.5 sanctions award, 6.33-6.39
Failure to object to lack of specificity for sanctions as waiver of requirement for stating reasons for sanctions, 6.34
Former defendant, sanctions against, 6.48
Frivolous actions, sanctions for. See **Frivolous Actions**
Notice before imposition of sanctions, requirement of, 6.39
Procedure for obtaining, 6.39
Public entity recovering sanctions under, 6.46
Reasons for imposing sanctions, requirement court state, 6.34
Time period for which fees may be awarded, 6.36
Time spent obtaining sanctions, fees available for, 6.38
CCP §128.7 sanctions
Generally, 6.8
Amount of sanctions court may award, 6.24
Basis for sanctions, court's explanation of, 6.23
Contingency fee case, award of fees as sanctions in, 6.22
Discovery motions, inapplicability of CCP §128.7 to, 6.12
Discretion of court in awarding fees as sanctions, 6.24
Dismissal of complaint, effect on motion for sanctions, 6.14
Elements of CCP §128.7 sanctions award, 6.20-6.23
Existing law, requirements for document's legal contentions warranted by, 6.17
Factual contentions or allegations in document, requirement of evidentiary support for, 6.18
Federal Rules of Civil Procedure 11, CCP §128.7 based on, 6.10
Improper purposes, requirement document not be for, 6.16
Improper sanctions motion, availability of sanctions for, 6.19
Limited scope of sanctions awards under, 6.8
Persons eligible to be sanctioned, 6.20, 6.47
Persons eligible to recover sanctions, 6.21-6.22
Pleading, petition, or motion signed by attorney or unrepresented party, applicability of CCP §128.7 to, 6.11
Presenting papers to court, sanctions for violating CCP §128.7 requirements for, 6.9
Prevailing party's recovery of fees and costs in presenting or opposing motion for, 6.24
Procedure for obtaining sanctions (see Procedure for obtaining sanctions under CCP §128.7, below)
Pro per litigants prohibited from recovering fees as sanctions, 2.20, 6.21, 6.49
Requirements of CCP §128.7, 6.11-6.18
Safe harbor provision (see Safe harbor provision of CCP §128.7, below)
Three conditions, sanctions if document not meeting, 6.15-6.18
Civil penalties under Labor Code, fee award in action to recover, 3.97
Discovery sanctions. See **Discovery**
Discretion of court
CCP §128.5 sanctions, court's discretion in awarding, 6.35
CCP §128.7 sanctions, court's discretion in awarding, 6.24
Entitlement to fees awarded as sanctions, factors affecting
Generally, 6.40
Administrative proceedings, limited availability of sanctions in, 6.44
Contractual arbitration proceedings, 6.45
Convicted felon suing victim for felon's injuries, punitive damages and sanctions against, 6.50
Judge, sanctions for frivolous challenge to, 6.42
Malicious prosecution action, imposition of sanctions in lieu of, 6.43
Political office controversy, 6.41
Status of parties (see Status of parties as factor affecting fee awards as sanctions, below)
Types of case, 6.41-6.45
Equitable power to award fees as sanctions, court's lack of, 1.10, 6.2
Factors affecting entitlement to fees awarded as sanctions (see Entitlement to fees awarded as sanctions, factors affecting, above)
Frivolous actions, sanctions for. See **Frivolous Actions**
Litigation conduct, sanctions for
Generally, 6.8
CCP §128.7 (see CCP §128.7 sanctions, above)
Lodestar method for calculating fees awarded as sanctions, 8.21
Nonparty's attorney, sanctions against, 2.41
Persons eligible to recover sanctions, 6.21-6.22, 6.46

Procedure for obtaining sanctions under CCP §128.7
Court's issuing order on own motion directing offending party or attorney to show cause why CCP §128.7 not violated, 6.28
Litigation sanctions, procedure for claiming fees as, 11.72
Safe harbor (see Safe harbor provision of CCP §128.7, below)
Separate noticed motion for sanctions, requirement of, 6.25
Safe harbor provision of CCP §128.7
Compliance with safe harbor provision by party seeking sanctions, 6.13, 11.72
Coordination of hearing dates to meet safe harbor requirements, 6.27
Court's own motion for sanctions, applicability of safe harbor provisions to, 6.28
Service of motion for fees initiating safe harbor period, 6.26
Voluntary dismissal of complaint during safe harbor period, effect of, 6.14, 6.26
Securing or opposing sanctions award, compensation for time spent, 9.18
Status of parties as factor affecting fee awards as sanctions
Former defendant, sanctions against, 6.48
Pro per litigant, no recovery of own attorney fees by, 6.49
Public entity, 6.46
Represented party, no sanctions against based on frivolous legal contentions, 6.47
Statutes authorizing sanctions
Bad faith affidavits in summary judgment motions, exclusion of fees as sanctions for, 6.58
CCP §128.5 sanctions (see CCP §128.5 sanctions, above)
CCP §128.7 sanctions (see CCP §128.7 sanctions, above)
Contempt proceedings under CCP §1218(a), 6.57
Frivolous appeals, statutes authorizing sanctions for. **Frivolous Actions**
Local rules of court, awarding fees as sanctions under CCP §575.2 for violation of, 6.56, 14.6
Requirement of statutory basis for awarding fees as sanctions, 6.2
Trial continuance, no attorney fees as sanctions for, 6.59
Time (see CCP §128.5 sanctions, above)
Trial court's lack of equitable power to impose fees as sanctions, 5.2

**Schools**
Commission on Professional Competence, prevailing school employees' right to receive fees in proceedings before, 13.8
Dismissal or suspension, school employee's right to fee award in successful challenge to, 3.99
IDEA. See **Individuals with Disabilities Education Act (IDEA)**

**Security**
Vexatious litigant posting security to cover defendant's expenses and fees, requirement of, 6.7

**Self-Representation**
Eligibility for fees under contractual provisions, exception for party representing self, 4.60

**Service of Process and Papers**
Memorandum of costs, time limit for serving, 11.25
Motion for fees, time limit for serving, 11.37, 11.62
Sanctions, service of motion for fees initiating safe harbor period under CCP §128.7, 6.26

**Setoffs**
Prevailing party's recovery of fees under CC §1717, setoff against opposing party's recovery of damages on noncontract claims, 4.23

**Setting Aside.** See **Vacating and Setting Aside**

**Settlement**
Bifurcated settlements
Generally, 11.13
Court approval required for, 11.10
Catalyst theory. See **Catalyst Theory**
CCP §998 settlement offer
Generally, 2.80, 4.79, 11.8
Acceptance of offer by plaintiff, effect on determining prevailing party under CC §1717, 4.81
Arbitrator's enforcement of CCP §998, 14.9
Defendant's offer exceeding plaintiff's recovery, effect of, 4.80
Prevailing party. See **Prevailing Parties**
Voluntary dismissal, effect on settlement offer, 4.80
Claim for fees, settlement of
Generally, 11.8

Conflicts of interest (see Conflicts of interest in settlement of case and claim for fees, below)
Waiver of fees (see Waiver of fees, below)
Class actions. See **Class Actions**
Compensability of time spent on settlement negotiations, 9.9
Confidential settlement agreements, admissibility to determine amount of fees, 11.8
Conflicts of interest in settlement of case and claim for fees
Generally, 1.20, 11.9
Assignment of right to fees, 11.15
Bifurcated settlements (see Bifurcated settlements, above)
Intervention by attorney seeking fees, 11.11, 11.16
Methods for handling conflicts of interest, 11.12-11.16
Retainer agreement, 11.14
Waiver of fees by party, 11.11
Court approval of settlements, 11.10, 11.17
Drafting settlements, attorney fee considerations in, 11.22
Equitable fee doctrine, fee award if action concluded by settlement, 5.6
Federal fees-shifting statutes, requirements for settlement language to qualify for fees under, 11.23
Good faith settlement of fees by one defendant, effect on award assessed against nonsettling defendant, 9.80
Multiplier factors for lodestar figure, effect of parties' settlement positions on, 10.59-10.60
Prelitigation settlement demands not precondition to recovery of fees, 2.3
Prevailing party's recovery of fees. See **Prevailing Parties**
Private attorney general doctrine, prelitigation settlement efforts as factor in determining necessity for lawsuit under, 3.65
Voluntary dismissal resulting from settlement of case, effect on award of fees under CC §1717, 4.86
Waiver of fees
Explicit waiver of fees, effect of settlement agreement failing to provide for, 11.8
Party's right to waive fees, 11.11

**Significant Benefit.** See **Private Attorney General Doctrine**

**Slander.** See **Libel and Slander**

**SLAPP Suits.** See **Strategic Lawsuits Against Public Participation (SLAPP Suits)**

**Social Security**
Contingent-fee arrangements as primary means of setting fees for social security benefits claimants, 10.30
Equal Access to Justice Act. See **Equal Access to Justice Act (State)**

**Song-Beverly Consumer Warranty Act**
Fee-shifting provisions in, 3.104

**Sovereign Immunity**
Fee award against federal government, sovereign immunity barring interest on, 9.134
Historical rates, fee awards against United States based on, 9.112

**Special Circumstances Making Fee Award Unjust.** See **Prevailing Parties**

**Spouses.** See **Marital Dissolution**

**Standard of Review on Appeal.** See **Appeals**

**Standing to Appeal.** See **Appeals**

**Stare Decisis**
Substantial benefit doctrine, stare decisis benefit not qualifying as concrete benefit under, 5.40

**Statement of Decision**
Motion for fees, statement of decision not required on, 11.65
Sample form for, App L
Significant lodestar multipliers, appellate courts requiring statement of decision on application of, 10.4

**Statutes of Limitations**
See also **Time**
Tolling time to file notice of appeal from judgment on merits, filing fee motion not resulting in, 11.21, 16.11

**Stay of Proceedings**

Anti-SLAPP statute, effect of appealing judgment awarding prevailing defendant fees, 3.120
Pending appeal, posting undertaking to stay fee award, 15.10-15.11

**Stipulations**
Amount of fees, parties stipulating to, 16.8
Application for appellate fees in trial court, stipulation for extending time to file, 12.22
Motions for fees. See **Motions for Fees**
Sample form, stipulation for award of attorney fees and proposed order awarding attorney fees, App K

**Strategic Lawsuits Against Public Participation (SLAPP Suits)**
Alternatives for claiming fees under anti-SLAPP statute, 11.26
Amount of fees, determination of
Limiting fees to work performed on anti-SLAPP motion, 3.117
Lodestar adjustment method, applicability of, 3.116
Partial success on motion to strike, effect of, 3.118
CCP §128.5 motion for sanctions for frivolous anti-SLAPP motions to strike. See **Frivolous Actions**
Dismissal of complaint, effect of (see Fee-shifting under CCP §425.16(c), below)
Fee-shifting under CCP §425.16(c)
Generally, 3.110
Amount of fees (see Amount of fees, determination of, above)
Appellate fees, 3.120
Broad construction of anti-SLAPP statute, 3.111
Dismissal of complaint before anti-SLAPP motion filed, effect of, 3.114
Dismissal of complaint while anti-SLAPP motion pending, effect of, 3.113
Prevailing parties (see Prevailing parties, below)
Timing of fee motion, 3.119
Prevailing parties
Discretion of court to award little or no fees to, 2.75
Mandatory right of prevailing party to recover attorney fees, 3.112
Motion to strike, mandatory fee award to prevailing defendant under anti-SLAPP statute, 2.76
Special motion to strike, prevailing plaintiff's right to fee award after defeating, 3.115
Public interest lawsuits, exemption from anti-SLAPP law for, 3.37, 3.111

**Strike, Motion to.** See **Strategic Lawsuits Against Public Participation (SLAPP Suits)**

**Subcontractors**
Payment disputes between contractor and subcontractor, fee awards in, 3.126

**Substantial Benefit Doctrine**
See also **Common Fund Doctrine**
Generally, 5.32
Actual and concrete benefits, conferral of
Generally, 5.37
Bringing defendant into conformity with existing law not qualifying as concrete benefit, 5.39
Pecuniary or nonpecuniary benefits, applicability of substantial benefit doctrine to, 5.38
Stare decisis benefits not qualifying as concrete benefits, 5.40
Benefits (see Actual and concrete benefits, conferral of, above)
Common fund doctrine, comparison of substantial benefit doctrine to, 5.24, 5.32
Costs (see Proportionate sharing of costs of plaintiff's fees among those benefitting from lawsuit, below)
Examples of cases
Award of fees under substantial benefit doctrine, 5.52
Denial of fees under substantial benefit doctrine, 5.53
Fees for fee-related services, unavailability under substantial benefit doctrine, 5.51, 9.19
Lodestar method of calculating fees, using in substantial benefit cases. See **Lodestar Method of Calculating Fees**
Private attorney general doctrine, comparison to
Generally, 3.10, 5.44
Benefits recovered, fees limited by, 5.50
Chart, comparison of common fund, substantial benefit, and private attorney general theories, 5.60
Combining private attorney general and substantial benefit doctrines, 5.48
Concrete benefits for other persons, applicability of substantial benefit doctrine to, 5.46
Contingent or percentage basis, fee award under substantial benefit doctrine based on, 5.49
Differences in amount of fees awarded, 5.49-5.51
Differences in types of benefits obtained, 5.45-5.48
Fee-related services, fees for, 5.51
Less tangible benefits for others, applicability of private attorney general doctrine if litigation produces, 5.47

Purpose of doctrines, 5.55
Proportionate sharing of costs of plaintiff's fees among those benefitting from lawsuit
Generally, 5.41
Examples of cases, 5.43
Plaintiff's and defendant's eligibility for fee award, 5.42
Purpose of, 5.55
Representative capacity, suit litigated in
Generally, 5.34
Ascertainable class as requirement for fee award, 5.35
Examples of cases litigated in representative capacity on behalf of ascertainable class, 5.36
Requirements for
Generally, 5.33
Actual and concrete benefits (see Actual and concrete benefits, conferral of, above)
Proportionate sharing of cost of plaintiff's fees (see Proportionate sharing of costs of plaintiff's fees among those benefitting from lawsuit, above)
Representative capacity (see Representative capacity, suit litigated in, above)
Statutory and equitable grounds, awarding fees on, 5.48

**Substitution of Attorneys**
Immediate appeal of sanctions order against attorney substituting out of case, 16.5

**Successful Party.** See **Prevailing Parties**

**Summary Judgment**
Bad faith affidavits in summary judgment motions, exclusion of fees as sanctions for, 6.58
Motion to file fees, summary judgment order not triggering time limit for, 11.37

**Sureties**
Bonds, special rule for sureties' exposure to attorney fees on, 4.48

**Surveys**
Billing rates, surveys of, 9.121
Motion for fees, survey data supporting, 11.53

**Tables.** See **Charts, Checklists, Questionnaires, and Tables**

**Taxes**
California Taxpayers' Bill of Rights, prevailing party's recovery of fees under, 3.95
Income tax. See **Income Tax Consequences of Fee Awards**

**Tenants.** See **Landlord and Tenant**

**Third Parties**
Eligibility for fee award, effect of third party paying successful attorney's fees on, 2.24
Hourly rate for work necessitated by third party actions. See **Lodestar Method of Calculating Fees**

**Third Party Tort Doctrine.** See **Tort of Another Doctrine**

**Time**
See also **Statutes of Limitations**
Appeals. See **Appeals**
Appellate fees. See **Appellate Fees**
Arbitration award, time limit for correcting, 14.14
Collection of contractual fee awards, recovery of fees for time spent on, 15.15
Extension of time to file motions for fees. See **Motions for Fees**
Judgment against government entity, duration of, 15.3
Memorandum of costs, time limit for serving, 11.25
Motion for fees, timing of. See **Motions for Fees**
Prevailing party determination under contract, timing of. See **Contractual Fee Clauses, Entitlement to Fees Under**
Reconsideration of fee award, time limit for filing motion for, 11.69
Sanctions. See **Sanctions**
SLAPP suit, timing of fee motion in, 3.119
Trial court costs, time limit for filing claim, 11.45

**Tort of Another Doctrine**
Generally, 7.4
Appellate fees, recovery of, 7.16
Bringing or defending action against third party, restriction on recovery of fees under tort of another doctrine to fees incurred in, 7.13
Circumstances in which doctrine inapplicable, 7.8
Examples of doctrine, 7.7
Joinder of tortfeasor and third party in action, applicability of doctrine if, 7.5
Limitation on recovery of fees under, 7.12
Outcome of third party lawsuit, applicability of doctrine despite, 7.6
Procedure for seeking fees as damages, 7.34

**Torts, Generally**
Contract-based fee awards for noncontract causes of action. See **Contracts**
Tort Claims Act. See **Government Claims Act**

**Trade Secrets**
Sanctions, award of fees in action for misappropriation of trade secrets, 6.6
Uniform Trade Secrets Act authorizing fee award for bad faith claims of misappropriation of trade secrets, 3.124

**Travel**
Recovery of fees for time spent traveling during litigation, 9.28

**Trespass**
Agricultural land, prevailing party's right to fees in action for trespass to, 3.103

**Trial.** See **Jury Trial**

**Undertakings.** See **Collection of Fee Awards**

**Unions.** See **Labor Unions**

**Unruh Civil Rights Act**
Damages and fees, recovery of, 3.83

**Utilities**
Prevailing party in action alleging unlawful utility shutoff or lockout, recovery of fees by, 3.100
PUC. See **Public Utilities Commission (PUC)**

**Vacating and Setting Aside**
Ambiguities or omissions in fee order, motion to vacate judgment as means of challenging, 11.69
Arbitrator's award of fees. See **Arbitration**
Judgment including fee award, motion to vacate, 11.47

**Valuation**
Coupons redeemed by class members, fee award based on value of, 8.20, 10.29
Lodestar adjustment, value of injunction affecting fee under, 10.40

**Vehicle Leasing Act**
Fee-shifting provisions in, 3.104

**Vexatious Litigants**
See also **Frivolous Actions**
Equitable exception permitting fee award based on vexatious litigant, federal courts' recognition of, 5.2
Security to cover defendant's expenses and fees, requirement vexatious litigant post, 6.7

**Video or Audio Recordings**
Hearing on motion for fees, recording of, 11.63

**Voluntary Dismissal of Action.** See **Dismissal of Actions**

**Waiver**

CC §1717, waiver of reciprocal right to fees prohibited, 4.19
Motions for fees. See **Motions for Fees**
Sanctions, failure to object to lack of specificity as waiver of requirement for stating reasons, 6.34
Settlement, waiver of fees as part of. See **Settlement**

**Warranties**
Breach of warranty of habitability, prevailing party's recovery of fees in action for, 3.100
Song-Beverly Consumer Warranty Act, fee-shifting provisions in, 3.104

**Witnesses.** See **Experts and Expert Witnesses**

**Workers' Compensation**
Eligibility to recover fees for representing workers' compensation applicants before Workers' Compensation Appeals Board, 13.21
Labor Code §3856, codification of equitable apportionment doctrine in, 5.28
Termination of medical treatment, fee award to employee's successfully resisting, 3.97

**Writs**
Appellate court
Interlocutory writs, fees for, 12.17
Original writ proceedings, appellate court determining fees in, 12.6
Original writ proceedings in appellate court, rules for obtaining appellate fees for, 9.35
Collection of fee awards. See **Collection of Fee Awards**
Execution, writ for collection of fee award from federal government, 15.8
Mandate. See Mandate, Writ of

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