

## [The Basics for Preparing a Petition Seeking Attorneys' Fees](#)

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### **The Basics for Preparing a Petition Seeking Attorneys' Fees**

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Several issues should be considered by counsel prior to beginning the task of drafting a petition seeking an award of attorneys' fees. Obviously, the applicant must be entitled to a fee award. Most frequently, entitlement to an award arises under a contract, a statute or case law granting the right to attorneys' fees. Regardless of the authority for an award, it is critical for the applicant to understand that the burden of proof will lie with the petitioner in establishing the amount, necessity and reasonableness of the fees incurred. Under the Supreme Court authority of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) the fee claimant has the burden of proving that the fees requested were both reasonable and necessarily incurred.

The fee petition is typically set up via a written motion. The motion should set forth the legal and factual basis for the award, including declarations establishing the foundational facts supporting the claim.

A successful fee petition is based on in part on a determination that the fees sought are reasonable. This is frequently referred to as the lodestar. The lodestar is described as the number of hours reasonably expended in the litigation multiplied by a reasonable hourly rate. This calculation provides the foundation for establishing the reasonableness of the lawyer's services. The applicant must be aware that various factors will justify moving the award up or down depending on the success achieved and the capability of counsel handling the case. Particular attention should also be paid to the rates sought and whether they are in compliance for the type of case in the relevant community.

The declarations submitted in support of the fee award will be scrutinized by the court and opposing counsel, particularly where numerous lawyers and paralegals participated in the case. In some cases it may also be prudent to retain an expert to provide testimony via declaration supporting the application. Where a fee request is not significant, retaining an expert may be hard to justify from an economic standpoint. However, where the fees are substantial an expert is particularly necessary to justify the award, particularly if the underlying record is not well developed.

Counsel should also expect that opposing counsel will retain their own expert to scrutinize the fee petition and the supporting declarations. Extra care should be made to establish, in the first instance, that the fees were necessary and reasonable.

As a starting point to the entire process, it is fundamental that all of the billers keep accurate and contemporaneous time records of the fees incurred. In our experience, courts will either disallow or substantially reduce the fees sought where adequate and contemporaneous time

records have not been maintained. The bills should demonstrate that time was recorded in specific detail, describing the work performed and tasks accomplished usually in one tenth of an hour increments.

The fee applicant should also keep in mind that a significant application for fees can often lead to a totally new round of litigation including writing discovery and depositions. The cost and potential recovery associated with the petition must be considered at the outset.

A successful fee application begins at the outset of the representation. The manner in which time is recorded and the format and style of the bills will play a significant role in the outcome of the petition. It is extremely important that accurate and meaningful time entries be entered on a contemporaneous basis from the beginning to end of the litigation. This greatly enhances the possibility of obtaining a successful result.