

League of California Cities  
City Attorneys' Department July 18, 2013 Webinar

## HOW TO AVOID OR REDUCE ATTORNEY'S FEES AWARDS UNDER CALIFORNIA CODE OF CIVIL PROCEDURE § 1021.5.



J. Leah Castella  
lcastella@bwslaw.com

Burke, Williams & Sorensen, LLP  
1901 Harrison Street, Suite 900  
Oakland, California 94612  
510.273.8780

burke  
BURKE, WILLIAMS & SORENSEN, LLP

### Insult to Injury

#### California Code of Civil Procedure §1021.5

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.



burke  
BURKE, WILLIAMS & SORENSEN, LLP



## Important Requirements of the Statute

### Successful Party

burke  
BURKE, WILLIAMS & SORENSEN, LLP

3



## Catalyst Plaintiffs

The lawsuit was a catalyst motivating the defendants to provide the primary relief sought.

burke  
BURKE, WILLIAMS & SORENSEN, LLP

4



### Catalyst Plaintiffs

The lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 5



### Catalyst Plaintiffs

The plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 6



### Primary Litigation Objective

Look to pleadings, trial briefs, opening statements, and similar sources to determine litigation objective.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 7



### Primary Litigation Objective

Where a litigant in a writ proceeding obtains only partial relief, the relevant inquiry for the court is whether the issues on which plaintiffs prevailed were "substantial" when compared to the requests for relief which were denied.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 8



### **Necessity and Financial Burden of Private Enforcement**

To be entitled to fees under Section 1021.5, the cost of the litigation must place a burden on the litigant that is out of proportion to the litigant's personal interest in the lawsuit.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 9



### **Necessity and Financial Burden of Private Enforcement**

Statutory purpose is to provide an incentive for plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 10



## Necessity and Financial Burden of Private Enforcement

To be entitled to fees, the litigant bears the burden of showing that their personal stake was not sufficient by itself to justify the lawsuit.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 11



## What Can You Do?

### Tip 1

*Cast Doubt on the Litigant as a Catalyst*

- a plaintiff that steps into a pre-existing regulatory investigation cannot claim fees as a catalyst
- a plaintiff who accelerates a pre-existing investigation is not a catalyst

burke  
BURKE, WILLIAMS & SORENSEN, LLP 12



## What Can You Do?

### Tip 2

*Engage the Litigant in Settlement Discussions*

- Section 1021.5 does not permit an award of attorney's fees in catalyst cases when "reasonable efforts short of litigation" would have vindicated the rights that a litigant purports to advance.

**burke**  
BURKE, WILLIAMS & SORENSEN, LLP 13



## What Can You Do?

### Tip 3

*Show that the Litigant Didn't Get What He/She Was After*

- Courts will conduct an analysis of the surrounding circumstances of the litigation and a pragmatic assessment of the gains achieved by a particular action by comparing the results of the litigation to the parties' demands and their "litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources."
- Need to take steps to get evidence of litigation objectives. Often, asking litigant what he/she wants—particular in conjunction with a settlement overture—is a good way to accomplish this objective.

**burke**  
BURKE, WILLIAMS & SORENSEN, LLP 14



## What Can You Do?

### Tip 4

*Show that the Litigant Was Really Looking After His/Her Own Interest*

- Court will engage in a "a realistic and practical comparison of the litigant's personal interest with the cost of suit."
- Burden is on the plaintiff to establish that the litigation costs transcended its personal interest.
- Need to get evidence of the litigant's personal stake in the outcome.

**burke**  
BURKE, WILLIAMS & SORENSEN, LLP 15



## What Can You Do?

### Tip 5

*Make a 998 Offer*

- Code of Civil Procedure § 998 ("Section 998") provides that a defendant may terminate a prevailing party's ability to recover statutory attorneys' fees if it tenders an offer that is not accepted and the prevailing party fails to achieve a more favorable result in the litigation.
- The offer can include non-monetary terms so long as they are sufficiently specific.
- The offer can include an agreement to pay fees as determined by a court.

**burke**  
BURKE, WILLIAMS & SORENSEN, LLP 16



## What Can You Do?

### Tip 6

*Scrutinize the Other Side's Fees*

- A trial court can reduce a fee request on the basis that the fees incurred were wasteful.
- A trial court can reduce a fee request on the basis that the fees incurred were duplicative or unnecessary.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 17



## What Can You Do?

### Tip 7

*Challenge the Rate*

- At least one court has held that, as a matter of public policy, whether or not the rate charged to a public entity is reasonable must be judged by an objective standard *from the point of view of the public entity*.
- This creates the possibility of significantly reducing the rate used to calculate the fees due.

burke  
BURKE, WILLIAMS & SORENSEN, LLP 18



**Conclusion**

- **Be aware of the risk.**
- **Know the requirements of the statute.**
- **Create a record.**
- **Scrutinize the fee request.**

**burke**  
BURKE, WILLIAMS & SORENSON, LLP 19