ATTORNEY'S FEES (2023 UPDATE)

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I. INTRODUCTION

The Texas Supreme Court reaffirmed and clarified the law of attorney's fees in Texas and clarified some pre-existing ambiguities in Texas case law in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). *Rohrmoos Venture* includes a lengthy historical review of the development of attorney's fees jurisprudence under federal and Texas law. *Id.* at 490-97.

Since *Rohrmoos Venture*, there have been other significant opinions from the Texas Supreme Court including some from May of 2022 included in this paper as well as from other courts which this paper will highlight. Issues that had been previously in doubt or on which there were conflicting authorities have been refined or become settled.

From a practical standpoint, *Rohrmoos Venture* provides the key framework for considering fee-shifting in Texas state courts:

> "In short, to secure an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of attorney's fees is legally authorized, and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process."

Id. at 487.

As to the first element, the legal authorization may be found in a contract or a statute. *Id*.[1] Failing to object to a finding for attorney's fees may waive that position even if the opposing party has no legal entitlement to attorney's fees. *Snowden v. Artesia Wells Ranch 1994, Ltd*., 13-19-00157-CV, 2020 WL 2610924, *2 (Tex. App—Corpus Christi-Edinburg May 21, 2020, no pet.) (fee shifting typically not allowed in nuisance claim but opponent waived objecting to request and finding); *see also Mortensen v. Villegas*, 630 S.W.3d 355, 365 (Tex. App.—El Paso, 2021, no pet.) ("Complaints that attorney's fees were not recoverable either by statute or by other basis may be waived on appeal if no such objection was properly made in the trial court.").

Common sources and recent cases involving the legal authorization standards are discussed in Section I of this paper including general principles. Section II of this paper discusses the Texas Supreme Court's expression of the "two-step" methodology of calculating a lodestar base (reasonable market hourly rate multiplied by reasonable amount of time to perform necessary tasks in the litigation), subject to potential adjustment.

For a variety of reasons, disputes over attorney's fees continue to arise frequently, and often with increased complexity and intensity. While disputes over attorney's fees may seem like the proverbial "tail wagging the dog", many times attorney's fees become a significant proportion of the amount at stake in a dispute or become the gulf or difference between the parties being able to resolve a dispute, which only widens over the lifecycle of a dispute. Texas' practice of having factual disputes over attorney's fees tried before juries (despite the "vanishing jury trial") contributes. Another factor is that Texas has dramatically shifted away from a traditional Anglo-American common law system to more of a code or statutory-based legal system.[2] As the cases in footnote 2 show, the Legislature has increasingly authorized the recovery of attorney's fees in statutory tort-like cases.

Attorney's fees disputes implicate access to justice issues.[3] Apart from the traditional statutory grounds, there are many other specific statutes, and recent changes providing for a state court motions to dismiss practice in the TCPA and Rule 91a where fees are at issue have increased the number of cases in which these issues arise sooner rather than later. These factors have led to attorney's fee issues appearing quite often in appeals. Some of these cases have raised many nuanced legal issues relating to the recovery of attorney's fees.

Regardless of the causes, attorney's fee disputes and opinions on attorney's fees continue to proliferate. Apart from reiterating fundamentals, this paper focuses on non-family law, non-class action caselaw on attorney's fees in the 2019-22 period. Despite the trend toward statutes and away from a purer common law system, reviewing recent opinions about fees can also

[1] There may also be common law grounds for the recovery of attorney's fees as in the case of innocent stakeholders in interpleader actions who may be able to recover attorney's fees from the interpleaded funds. *See e.g., Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830 (Tex. 2018).

[2] *See e.g.*, Tex. Bus. & Comm. Code §109.005; Tex. Civ. Prac. & Rem. Code §98B.003(a)(3); Tex. Civ. Prac. & Rem. Code §123.004; Texas Gov't. Code §423.006(b) and (d). *See e.g.*, Tex. Bus. & Comm. Code §109.005; Tex. Civ. Prac. & Rem. Code §98B.003(a)(3); Tex. Civ. Prac. & Rem. Code §123.004; Texas Gov't. Code §423.006(b) and (d); *D.K.W. v. Source for Publicdata.com*, 526 S.W.3d 619, 632 (Tex. App.—Dallas 2017, pet. denied).

[3] A thoughtful concurrence has noted that the development of the law governing attorney's fees in Texas may create "unduly formalistic" results, particularly in small or simple cases. *Auz v. Cisneros*, 477 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (Boyce, J., concurring).

assist in identifying issues in requesting and recovering attorney's fees under our current laws.

Attorney's fees are neither "costs" nor "damages" generally. *In re Xerox,* 555 S.W.3d 518, 529 n. 66 (Tex. 2018) citing *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172–76 (Tex. 2013);[4] *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037–38 (5th Cir. 2014). Additionally, a claim for attorney's fees, or more precisely an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Thole v. U. S. Bank N.A*, 140 S.Ct. 1615, 1619 (2020); *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 801 (2021); *Sealed Appellant v. Sealed Appellee*, 22-10116, 2022 WL 335927; *2 (5th Cir. Aug. 15, 2022) ("a motion for attorney fees is not a 'claim.' It is rather an 'independent proceeding' supplemental to the original proceeding" in federal court).

However, if attorney's fees are a serious issue in a case, it may be helpful to think about attorney's fees claims as similar to damages. As with any claim that must be proven or defended against, this paper approaches some evidentiary and discovery matters that arise in connection with attorney's fees beginning with an assessment of their legal framework and including the state court jury charge.

Another aspect to remember is that parties have considerable freedom to contract for alternative fee arrangements or to stipulate to different procedures. *Rohrmoos Venture,* 578 S.W.3d at 484 (unlike Chapter 38, lease in that case did not require that prevailing party recover damages); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231–33 (Tex. 2014) (rejecting argument that "one-sided" arbitration agreement regarding fees is substantively unconscionable per se).

II. GENERAL PRINCIPLES OF RECOVERY UNDER TEXAS LAW ON ATTORNEY'S FEES.

A. The American Rule and other general principles

The general rule in the American legal system is that each party must pay its own way in attorney's fees and expenses. *Rohrmoos Venture,* 578 S.W.3d at 483-84. Under the venerable and ubiquitous "American Rule," each party must pay its own attorney's fees absent a specific statutory, contractual, or other legal basis to shift attorney's fees. *Id.; Veasay v. Abbott,* 13 F.4th 362, 367 (5th Cir. 2021); *Peter v. Nantkwest, Inc*., 140 S.Ct. 365, 370 (2019) ("the bedrock principle").[5] A 2018 case interestingly notes that "The American Rule is characterized as such in contrast with the 'English Rule.' *See Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 247 (1975) ("At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party.")." *Severs v. Mira Vista HOA*, 559 S.W.3d 684, 709 n. 9 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.). Whether the law authorizes a party to recover attorneys' fees is a question of law; whereas, the reasonableness and necessity of the attorneys' fees sought is a question of fact. *Rohrmoos Venture,* 578 S.W.3d at 489.

When fee-shifting is authorized, the party seeking to recover those fees bears the burden of establishing the fees are reasonable and necessity of the requested attorney's fees. *Rohrmoos Venture,* 578 S.W.3d at 484. Fee-shifting statutes are narrowly and strictly construed. *Willacy County Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.,* 555 S.W.3d 29, 52 (Tex. 2018) (finding Tex. Tax Code § 42.29 did not authorize fee shifting for claims under Tex. Tax Code 25.25(b) as opposed to §25.25(c) or (d)); *Tejero v. Portfolio Recovery Associates, LLP*, 955 F.3d 453, 462-63 (5th Cir. 2020) (fee shifting statutes should be strictly construed against recovery because of the long-standing and deeply established nature of the so-called 'American Rule'"). Additionally, "the term "expenses" alone has never been considered to authorize an award of attorney's fees with sufficient clarity to overcome the American Rule presumption." *Peter*, 140 S.Ct. at 374.

1. Foundational principles.

In *Rohrmoos Venture*, the Texas Supreme Court identified "**a few key principles that serve as the basis for our attorney's fee jurisprudence**." 578 S.W.3d at 487. "First, the idea behind awarding attorney's fees in fee-shifting is to compensate the prevailing party generally for its reasonable losses from the litigation

[4] *See also In re Corral-Lerma*, 451 S.W.3d 385 (Tex. 2015) (citing *Nalle Plastics* and refusing to treat mandatory attorney's fees under the Texas Theft Liability Act as compensatory damages for purposes of calculating bond amount under supersedeas statute). Some attorney's fees qualify as compensatory damages if recovering for fees paid in a prior suit or similar cases. *In re Nalle Plastics*, 406 S.W.3d at 174–75 (citing *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp*., 299 S.W.3d 106, 111 (Tex. 2009)); *but see Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 272 (5th Cir. 2014) (litigation costs incurred earlier in litigation against former employee not recoverable as damages or equitable exception); *Stumhoffer v. Perales*, 459 S.W.3d 158, 168 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (property purchaser not entitled by statute to recover fees incurred in prior related lawsuit); *Great American Ins. Co. v. AFS/IBEX Fin. Servs, Inc*. 612 F.3d 800, 808 (5th Cir. 2010) (fees sought in pursuit of voluntary choice to file lawsuit not recoverable as damages).

[5] In diversity cases in the Fifth Circuit, Texas law "controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision." *Mathis v. Exxon Corp*., 302 F.3d 448, 461 (5th Cir. 2002). However, federal procedure applies.

process. The award and the ability to enforce it thus belongs to the party, not the attorney absent express statutory or contractual text mandating otherwise." *Id.* (cleaned up).

"Second, because attorney's fees awards are compensatory, fee shifting is not a mechanism for greatly improving an attorney's economic situation. Thus, only fees reasonable and necessary for the legal representation will be shifted to the non-prevailing party, and not necessarily the amount contracted for between the prevailing party and its attorney does not necessarily establish that fee as reasonable and necessary." *Id.* at 487-88; *see also Gurule v. Land Guardian, Inc.,* 912 F.3d 252, 262 (5th Cir. 2018) (Ho, J, concurring) (fee shifting is not for the benefit of attorneys but to enable litigants to obtain competent counsel and thus fee-shifting recoveries should be reasonable and in good faith pursuit of value for the client, not churning fees).

Accordingly, a "client's agreement to a certain fee agreement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary." *Rohrmoos Venture,* 578 S.W.3d at 488.

"Third, a party must be represented by an attorney to secure an award of attorney's fees." *Id.* This includes representation by in-house counsel or to compensate a law firm when one of its own lawyers is representing it, or an attorney for his or her own pro se representation, as well as the State of Texas for representation by Attorney General's Office attorneys. *Id.*

Other principles discerned or expanding on those expressly mentioned include that attorney's fees "not properly billed to one's client are also not properly billed to one's adversary" under a fee-shifting statute. *Id.* at 502 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). For some time, Texas courts on appeal conduct a "meaningful" and "important" review of billing records and practices and are particularly skeptical when an attorney treats an opposing client's liability for attorney's fees differently than one's own client. *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) ("Here, Gonzalez conceded that had he been billing his client he would have itemized his work and provided [detailed] information. A similar effort should be made when an adversary is asked to pay instead of the client."). By way of reference, one can think about the Court's case law regarding appellate review of fees similar to that of areas like excluding expert witnesses, punitive damages, and jury charges.

2. <u>The difference in statutes between merely "reasonable" and "reasonable and necessary" is immaterial.</u>

"When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary." *Rohrmoos Venture,* 578 S.W.3d at 489. Both of these "elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party." *Id. Rohrmoos Venture,* 578 S.W.3d at 489. Any distinction between the two concepts is immaterial. *Id.*

3. <u>The term "incurred" will not be presumed.</u>

"[W]hen statutes do not contain an explicit requirement that fees be 'incurred', we do not imply such a term." *Rohrmoos Venture,* 578 S.W.3d at 489. Neither will courts imply the "incurred" requirement in the context of a contractual fee-shifting provision. *Id.* at 489-90. Incurred refers to when the party becomes responsible for the obligation to pay.

4. <u>What about "fees for fees"?</u>

Some caselaw suggests a limit on recovery of "fees for seeking fees." The United States Supreme Court has applied a strict construction to a statutory fee provision applicable to professionals—and specifically attorneys—employed by the bankruptcy estate and has limited "fees seeking fees". *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158, 2169 (2015) (noting that "[t]he general practice of the United States is in opposition to forcing one side to pay the other's attorney's fees, and even is that practice is not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute" (internal citations omitted)); *see also Austin ISD v. Manbeck*, 338 S.W.3d 147, 156 (Tex. App.—Austin 2011) rev'd on other grounds 381 S.W.3d 528, 532 (Tex. 2012) (although workers' comp claimants can recover fees, the statute "does not authorize the award of fees incurred solely in pursuing the fees themselves."); *KBIDC Invs. LLC v Zuru Toys Inc.*, 05-19-00159-CV, 2020 WL 5988014, at *20 n.11 (Tex. App.—Dallas Oct. 9, 2020, pet. denied) (noting a circuit split between First Court and three other courts of appeals as to the recoverability of fees under this workers' compensation statute); *but see Aguayo v. Bassam Odeh, Inc*., 3:13-CV-2951-B, 2016 U.S. Dist. LEXIS 169702 *40 (N. D. Tex. Dec. 8, 2016) (allowing recovery of fees for litigating attorney's fee claims).[6]

[6] While the Texas Supreme Court has not squarely and definitively answered it, a recent case addressing a similar concept under the rubric of reasonableness in pursuing treble damages may be helpful. *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 492 (Tex. 2019) ("Attorney's fees spent pursuing that amount may be reasonable, assuming they satisfy other legal and factual standards applicable to reasonable fee awards. On the other hand, attorney's fees spent continuing to press for treble damages after the defendant paid all commissions due plus interest are likely not reasonable, because at that point the case should have been finished.").

A recent Texas case suggests that the recoverability of "fees for fees" may be tied to specific limitations in the statute or contract authorizing fee-shifting. *KBIDC Invs.*, 2020 WL 5988014, at *19-20 (allowing the fees for fees based on the statutory language in the Texas Theft Liability Act and rejecting proposed jury instruction).

5. Other instances where fees remain unavailable.

There are many claims on which fees are not recoverable, consistent with the American Rule. As a recent case wrote:

> "Attorneys' fees are not recoverable for a quiet title claim, *see Sani v. Powell*, 153 S.W.3d 736, 745 (Tex. App. – Dallas 2005, pet. denied); for a tortious interference with contract claim, *see Aspen Tech., Inc. V. M3 Tech., Inc.*, 569 F. App'x 259, 272 (5th Cir. 2014) (citing *Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 234 (5th Cir. 1986)); for a claim for equitable redemption, *see GAI IRA, LLC v. Wells Fargo Bank, N.A.*, Civ. A. H-14-1327, 2015 WL 3431922, at *3 (S.D. Tex. May 27, 2015); or under the FDJA, *see AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 701 (5th Cir. 2009)."

DBDFW 3, LLC v. JPMorgan Chase Bank, N.A., 3:18-cv-3148-C-BN, 2019 WL 823810 *9 (N.D. Tex. Feb. 6, 2019).

Recovery of attorney's fees is not authorized in most tort claims (*e.g.*, common law fraud) as a legal basis to shift attorney's fees under Texas law. *MBM Fin. Corp. v. The Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009); *Braxton Minerals II, LLC, v. Penn Inv. Funds*, No. 02-20-00116-CV, 2021 WL 4319711, at *3 (Tex. App.—Fort Worth Sept. 23, 2021, no pet.); *Sensible Care Holdings, LLC v. Sens*, 13-16-00422-CV, 2018 Tex. App. LEXIS 706 *15, 2018 WL 549303 (Tex. App.—Corpus Christi-Edinburg Jan. 25, 2018, pet. denied) (emphasis added) ("Attorney's fees are recoverable in breach of contract claims, but not for claims of fraud."); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304, 310–11 (Tex. 2006); *Chevron Phillips Chem. Co., LP v. Kingwood Crossings, LP,* 346 S.W.3d 37, 68 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) ("attorneys' fees are nor recoverable for prosecuting a fraud or negligent-misrepresentation claim."); *but see Bennett v. Grant*, 460 S.W.3d 220, 242 (Tex. App.—Austin 2015) (fees incurred in defending oneself from a malicious prosecution recoverable in that tort claim as damages), *aff'd in part, rev'd in part*, 525 S.W.3d 642 (Tex. 2017), cert. denied, 138 S. Ct. 1264 (2018) (attorney's fees award not contested on appeal).

Like tort plaintiffs, as a general rule, defendants are not entitled to recover attorney's fees absent a contractual, statutory, or legal basis. *See, e.g.*, *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 81 n.3 (Tex. 2003); *Seeger v. Del Lago Owners Ass'n*, 09-16-00450-CV, 2018 Tex. App. LEXIS 3129 *29-32, 2018 WL 2055435 (Tex. App.—Beaumont May 3, 2018, pet. denied) (reversing attorney's fees award that included time for defense of tort counterclaims). When the bulk of the legal work performed is in the pursuit of affirmative defenses, a party is not entitled to recover any fees unless provided for by statute or as some type of sanction. *Id.*[7] For example, defendants do not have a right to attorney's fees merely by prevailing on their defenses against claims made by plaintiffs under Chapter 38 of the Texas Civil Practices and Remedies Code. *See, e.g.*, *Am. Airlines, Inc. v. Swest, Inc.* 707 S.W.2d 545, 547–48 (Tex. 1986) (citing predecessor of Chapter 38 and noting that the term "costs" in tariff rules does not include attorney's fees); *Brockie v. Webb*, 244 S.W.3d 905, 910 (Tex. App.—Dallas 2008, pet. denied); *Energen Res. MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551, 558 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (noting defendant cannot recover fees for defending breach of contract case).

However, in some circumstances, a breach of contract defendant may recover attorney's fees for successfully defending a counterclaim where it helped prove the defendant's own affirmative breach claim. *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007); *Anglo-Dutch Petro. Int'l, Inc. v. Case Funding Network, L.P.*, 441 S.W.3d 612, 634 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (release investors had to overcome counterclaims to recover own breach claim); *Turner v. NJN Cotton Co.*, 485 S.W.3d 513, 528 (Tex. App.—Eastland 2015, pet. denied).[8]

6. Read statutes closely. For instance, for legacy cases filed before September 1, 2021, Chapter 38 applies against individual and corporation defendants, not LLCs, LLPs, or other entities.

"Any award of fees is limited by the wording of the statute or contract that creates an exception to the

[7] The reasonableness standards articulated in *Rohrmoos Venture* apply in the context of sanctions. *Nath v. Texas Children's Hosp.*, 576 S.W.3d 707, 709-10 (Tex. 2019). Even when a defendant is awarded attorney's fees as sanctions for a plaintiff's numerous frivolous pleadings, the trial court must consider to what extent the defendants' own conduct caused their attorney's fees. *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 372 (Tex. 2014).

[8] *See also Stewart Auto. Research, LLC v. Nolte*, 465 S.W.3d 307, 309–11 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that Texas Labor Code section 61.066(f) did not provide a basis for fees for plaintiff's specific type of claim, thus American Rule applies).

American Rule." *JCB, Inc.*, 597 S.W.3d at 491. A close reading of the statutory authorization for recovering fees may be wise as a number of cases have held that Chapter 38 does not apply in suits against partnerships (or limited partnerships or LLCs) because prior to the 2021 legislative amendments, the case law interpreted the statutory language as excluding these types of entities as neither "individuals" nor "corporations." *See e.g., Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 575 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *CBIF L.P., v. TGI Fridays, Inc.,* 05–15–00157–CV, 2017 Tex. App. LEXIS 3605 *68, 2017 WL 1455407, at *25 (Tex. App.—Dallas April 21, 2017, pet. denied) (fees not recoverable under Chapter 38 from limited partners or limited liability companies); *Dixie Carpet Installations, Inv. v. Residences at Riverdale, LP,* 05-18-01479-CV, 2020 WL 1547139, 2020 WL 1547139, *8 (Tex. App.—Dallas Apr. 1, 2020, no pet.) ("under § 38.001's plain language, a trial court cannot order limited liability partnerships, limited liability companies, or limited partnerships to pay attorneys' fees"); *Greco v. Nat'l Football League*, 116 F. Supp. 3d 744, 751–52 (N.D. Tex. 2015); *County of Galveston v. Triple B Services, LLP,* 498 S.W.3d 176, 189-90 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (under Section 38.001, the plaintiff must sue an "individual" or a "corporation," and cannot recover against a county).

Like other complaints, a party failing to raise this complaint at the trial court waives it on appeal. *Petrohawk Props., L.P. v. Jones*, 455 S.W.3d 753, 782–83 (Tex. App.—Texarkana 2015, pet. dism'd); *Enzo Investments, LP v. White*, 468 S.W.3d 635, 651 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). According to one case, the failure to deny with a verification (verified denial) that a defendant is not a corporation, this argument may be waived. *Top Cat Ready Mix, LLC v. Alliance Trucking, L.P.*, 05-18-00175-CV, 2019 WL 275880 *5 (Tex. App.—Dallas Jan. 22, 2019, no pet.).

After several failed attempts over the last few sessions to pass legislation amending Section 38.001 to broaden the scope of potential parties from whom a plaintiff in a contract action could recover fees, Texas law on this point changed. For lawsuits filed on or after September 1, 2021, HB 1578 amended Section 38.001 to substitute "organizations" for "corporations." In defining "organizations," the statute incorporates the broad meaning assigned under Business Organizations Code § 1.002,[9] but excludes "a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust." TEX. CIV. PRAC. & REM. CODE § 38.001(a)-(b).

7. The meaning of being a "prevailing party" has been clarified, but questions remain.

While the determination of which party "prevailed" may be straightforward in certain cases (e.g., single claim, two-party disputes), often the determination may not be so clear as parties may prevail on some claims and lose on others.

The Chapter 38 standards generally require a prevailing plaintiff to win on liability and obtain damages as discussed throughout the paper. Other statutes may also require that a party recover actual damages before being able to recover attorney's fees. *See Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 135 (Tex. 2019) (recovery of attorneys' fees under Tex. Ins. Code Ch. 541 "premised on an award of underlying 'actual damages'"). Failure to obtain actual damages may preclude fee shifting under certain statutes. *Pike v. Texas EMC Mngmt, LLC*, 610 S.W.3d 763, 794 (Tex. 2020). In some types of litigation, obtaining interim relief may warrant the statutorily-based award of attorney's fees. *Veasay v. Abbott,* 13 F.4th 362, 368-69 (5th Cir. 2021)(voting rights litigation). Also, a finding that all of the claimant's "requested relief was either expressly or impliedly denied" means that the claimant has not "substantially" prevailed in the eyes of Texas courts. *Transverse LLC v. Iowa Wireless Serv's, LLC*, 992 F.3d 336, 350 (5th Cir. 2021).

However, what constitutes a "prevailing" defendant has often been disputed. The Texas Supreme Court had previously noted that a nonsuit without prejudice does not transform a defendant necessarily into a "prevailing party." A plaintiff's mere non-suit without prejudice does not necessarily make the defendant a "prevailing party" without more. *Epps v. Fowler*, 351 S.W.3d 862, 864, 872 (Tex. 2011); *North Star Water Logic*, 486 S.W.3d at 108. A nonsuit without prejudice or Rule 41 dismissal without prejudice also does not make a defendant a prevailing party under the Defense of Trade Secrets Act. *Dunster Live, LLC v. LoneStar Logos Mngmt Co.*, 908 F.3d 948, 952-53 (5th Cir. 2018). Similarly, defeating a request for a preliminary injunction does not make a party a "prevailing party" under DTSA. *Id*.

Just this year, the Texas Supreme Court significantly discussed what a prevailing defendant is. *Sunchase IV HOA, Inc. v. Atkinson*, 643 S.W.3d 420, 423-24 (Tex. 2022). *Sunchase* did not involve Chapter 38, but rather the fee-shifting provision in the Uniform Condominium Act, Tex. Prop. Code § 82.161 and the Declaratory Judgment Act (Chapter 37). Because Sunchase was a prevailing party under the Uniform Condominium Act, the Court did not reach the Chapter

[9] This statute defines "organization" to mean "a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign." Tex. Bus. Orgs. Code § 1.002(62).

37 issue. The Court analogized to Chapter 38's fee provision and contrasted the need for a prevailing claimant to obtained "damages or otherwise obtained affirmative relief" from the trial court with a defendant seeking fees who needs only to defeat the claims and does "not need to show it was adversely affected by a violation of Chapter 82 or obtain damages to qualify as a prevailing party under Section 82.161(b)." *Sunchase*, 643 S.W.3d at 424.

Sunchase is in line with other cases finding that under a "prevailing party" provision, a defendant does not need to show that it obtained meaningful relief in the form of damages or equitable relief, but typically a defendant may prevail simply by obtaining a "take-nothing judgment." *Severs,* 559 S.W.3d at 710-12. The United States Supreme Court has similarly written this on what it means to prevail as a defendant:

> "Common sense undermines the notion that a defendant cannot "prevail" unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor. The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations. The defendant has, however, fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."

CRST Van Expedited, 136 S.Ct. at 1651.

Significantly, if a defendant can show that the plaintiff non-suited without prejudice to avoid an unfavorable ruling on the merits, fee awards under mandatory provisions such as the TTLA may be awarded. *But see Monarch Investments, LLC v. Aurrecoechea*, A-14-CA-01019-SS, 2017 U.S. Dist. LEXIS 38091, 2017 WL 1034647, at *6 (W.D. Tex. March 16, 2017) (denying fee request when party who dismissed claims did so in "attempting to heed the Court's advice rather than to avoid an unfavorable ruling on the merits."); *see also In re RTX Custom Homes*, 2017 WL 2484850 at *56-57 (denying defendant's TTLA fee request when plaintiff early in case sought to dismiss claim and did not pursue it and because defendant did not plead for fees under the TTLA); *Int'l Med. Ctr. Enters.,* 2017 Tex. App. LEXIS 10066 at *40 (nonsuit of TTLA claim not found to have been taken to avoid an unfavorable ruling on the merits so fees to defendant not available to TTLA defendant).

There are many disputes where a party "prevails" under a mandatory attorney's fees provision. *Compare Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23, 28-30 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (no fees under PIA because party did not prevail and UDJA claim was incidental to PIA relief) *with Kallinen*, 516 S.W.3d at 626-27 (fees recoverable for prevailing party in PIA case).

The concept of what it means to be a "prevailing party" continues to be hotly disputed. One recent case held that a claimant can recover under Chapter 38 as a prevailing party, even if the opponent prevails on other claims. *See e.g., Dandachli v. Active Motorwerks, Inc*., 03-19-00494-CV, 2021 WL 3118437, *4 (Tex. App.—Austin 2021, no pet.). Another recent case analyzed competing claims of "prevailing" under a partnership agreement requiring fees to be awarded to the prevailing party. *Hrdy v. Second Street Properties LLC,* 01-19-00194-CV, 2022 WL 903952, at *30 (Tex. App.—Houston [1st Dist.] March. 29, 2022, no pet. h.)(" On appeal, both sides insist they prevailed at trial.").

The *Hrdy* case—which currently has a motion for panel rehearing pending and an order issued requiring a response by June 10, 2022—illustrates some of the complexities and the opinion itself wrestles with various scenarios and how to analyze where the "prevailing party" provision requires a finding of "one" winner. The court writes that:

> "In suits with multiples [sic] claims, the prevailing party is the one "who successfully prosecutes the action or successfully defends against the action on the main issue." To prevail on the main issue, a party need not recover to the full extent of its original claims…
>
> In some cases, multiple claims may be so numerous and distinct from one another that the suit has more than one main issue… In this event, the court may need to look behind the judgment and ascertain which claims the parties focused on at trial to identify the main issues…
>
> When there is more than one main issue and both sides prevail on one or more of them, it is possible for both sides to be prevailing parties in part…
>
> Like the fee-recovery provision in *Epps*, the one in the limited partnership agreement before us contemplates a single prevailing party… What both of these provisions share in common is an understanding, indicated by the use of the definite article and singular noun with respect to the winner as well as the use of a singular noun with respect to the lawsuit, that in any given proceeding or litigation, there will be one who succeeds overall in the suit."

Hrdy, 2022 WL 903952, at *30-31. Ultimately, the court rejected one of the arguments because it could not "be right" in light of the multiple claims and what the main issues were in the case and what relief was awarded to each. *Hrdy*, 2022 WL 903952, at *35.

One 2017 opinion determined the definition of "prevailing party" considering the application of settlement credits that may reduce the judgment award of actual damages to less than $0. *Elness Swenson Graham Architects, Inc. v. RLK II-C Austin Air, LP*, 520 S.W.3d 145, 169-71 (Tex. App.—Austin, pet. denied); *but see In re RTX Custom Homes, Inc.*, 14-11732-HCM, 2017 WL 2484850 *54 (Bankr. W.D. Tex. June 8, 2017) ("Under Texas law, a plaintiff's breach of contract damages may be totally setoff resulting in no net recovery, and a plaintiff is still entitled to an award of reasonable attorney's fees."). The Fifth Circuit affirmed the denial of fees even with no damages. *Merritt Hawkins*, 861 F.3d at 156-57.

A form contract promulgated by the Texas Real Estate Commission (TREC) frequently used in residential contracts has allowed recovery of fees by defendants that prevail, even in disputes not directly involving breach of contract claims but to the "overall transaction" of a contractual home purchase. *Lawson v. Keene*, 03-13-00498-CV, 2016 Tex. App. LEXIS 1812 *11, 2016 WL 767772, at *4-5 (Tex. App.—Austin Feb. 23, 2016, pet. denied); *see also Branch v. McCaskill*, 05-21-00758-CV, 2022 WL 17974677, *4-5 (Tex. App.—Dallas Dec. 28, 2022, n.p.h.) (affirming award of fees under TREC contract where multiple theories alleged).

8. <u>The degree of success obtained is not merely an *Arthur Andersen* consideration, but a basis for appellate review and potential remand.</u>

Prevailing also may require more than a purely technical victory. Texas courts for years have emphasized proportionality to the degree of success at trial as a key component of determining a reasonable attorney's fees award and the Texas Supreme Court did so again in 2022 as in 2021. *Berry v. Berry*, 20-0687, 2022 WL 1510330, at *11 (Tex. May 13, 2022) (When it comes to attorney's fees, "the degree of success obtained" should be "the most critical factor in determining reasonableness of a fee award."); *Famers Group, Inc. v. Geter*, 620 S.W.3d 702, 713 (Tex. 2021); *see also Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547–48 (Tex. 2009) (reasoning that even uncontroverted testimony on attorney's fees could not support an award of attorney's fees seeking roughly the same amount in attorney's fees as was awarded in damages); *accord Combs v. City of Huntington*, 829 F.3d 388, 396 (5th Cir. 2016).

The Texas Supreme Court has written the following regarding what "prevailing" means: "KB Home sought over $1 million in damages, but instead left the courthouse empty-handed. 'That is not the stuff of which legal victories are made.'" *Intercont'l Grp. P'ship*, 295 S.W.3d at 657. A purely technical or *de minimis* success that may make someone a "nominal winner" "in convincing the jury that he or she was 'wronged' cannot be deemed a prevailing party in a non-Pyrrhic sense." *Id.* at 655.

Just as this paper was being finished, the Texas Supreme Court issued its opinion reaffirming that a remand of an attorney's fees award may be necessary if an appellate court "significantly reduced" the award of actual damages. *James Construction Group, LLC v. Westlake Chem. Corp*., 20-0079 at 48, 2022 WL 1594955, at *19 (Tex. May 20, 2022) (reversing and remanding attorney's fees award of nearly $3 million in light of reduction of damages award to $102,767,69). The Court noted that reversal was warranted based on "the fact that the jury's award of attorney's fees was based in part on the results obtained" which had been significantly reduced on appeal. *Id*. (quotations omitted).

In *Rohrmoos Venture,* the Texas Supreme Court noted that the trial court appeared to be "baffled by the high amount of attorney's fees for a breach of lease case." *Rohrmoos Venture,* 578 S.W.3d at 505 n. 15 (UTSW sought $1.3 million in fees in a case over a $300,000 lease dispute, the jury awarded $800,000 which was adopted in the judgment and affirmed on appeal until the Texas Supreme Court reversed it because there was legally insufficient evidence to support that award).

The Texas Supreme Court had previously found that a fee award out of proportion to a modest trial result may be rejected outright or may require a remand and retrial if the judgment is reduced on appeal. *See Bossier Chrysler-Dodge II, Inc. v. Rauschenberg*, 238 S.W.3d 376, 376 (Tex. 2007) (remanding on issue of attorney's fees in light of reduction of 87% of underlying judgment and noting that attorney's fees issues should ordinarily be retried under those circumstances unless the court is reasonably certain the jury was not significantly influenced by the erroneous damage award); *Barker v. Eckman*, 213 S.W.3d 306, 313–14 (Tex. 2006) (remanding for determination of attorney's fees after "considering both the absolute value of the difference between the erroneous and correct amount of damages, and the fact that the correct damages were one-seventh [1/7th] of the erroneous damages" there could be no certainty the jury was correct without instruction and both the absolute number and the ratio should be considered). Thus, with limited success at trial, a lodestar fee request even based on actual time records may be "excessive and improper." Although prior opinions from courts of appeals had ruled otherwise, under *James Construction Group,* 20-0079 at 48, 2022 WL 1594955, at *19, this appears now to be settled under Texas law. *But see Hobbs v. EVO, Inc*., 7 F.4th 241, 260 (5th Cir. 2021) (Although "the most critical factor in determining an attorney's fee award is the

degree of success obtained, ... a low damages award alone ... should not lead the court to reduce a fee award." Moreover, this Court "ha[s] consistently emphasized that 'there is no *per se* requirement of proportionality in an award of attorney fees."). A recent federal case has noted that a determination of mootness "neither precludes nor is precluded by an award of attorneys' fees." *Frazier v. McDonough*, 21-20375, 2022 WL 2871853, *2 n.1 (5th Cir. July 21, 2022); see also *Whitehurst v. Thomas*, 01-21-00309-CV, 2023 WL 178160, *3 (Tex. App.—Houston [1st Dist.] Feb. 7, 2023, n.p.h.) (although possession in landlord-tenant case moot, claim for attorneys' fees under Tex. Prop. Code § 24.006(a) and (b) created a live controversy).

9. Although the language and procedure of each attorneys' fees enabling statute or contract must be read closely, in the absence of other guidance, chapter 38 case law and *Rohrmoos Venture* will likely inform other attorney's fees disputes under other statutes.

There are many statutes creating exceptions to the American Rule and allowing parties to claim attorney's fees; the specifics of each claim should be consulted when making or defending against a claim for attorney's fees.[10] While not controlling or dispositive, the more developed case law under Chapter 38 may be instructive in fee disputes based on other Texas laws. *See e.g., Forte v. Walmart Stores, Inc*., 2:07-CV-00155, 2017 U.S. Dist. LEXIS 62171 *12, 2017 WL 1483386, *4 (S.D. Tex. April 24, 2017) (Texas Optometry Act's fee provision).

Where the parties fail to define the term "prevailing party", courts look to "Texas law to provide the default definition." *KB Home*, 295 S.W.3d at 650, 655-57. "A defendant can obtain actual and meaningful relief, materially altering the parties' legal relationship, by successfully defending against a claim and securing a take-nothing judgment on the main issue or issues in the case." *Rohrmoos Venture,* 578 S.W.3d at 486. In that case—as in many commercial disputes—the party was not only a plaintiff, but also a contract counterclaim defendant.

B. Breach of contract fee claims

1. The freedom to contract about fees.

A contract may specify the terms for fee-shifting and parties "are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's." *Rohrmoos Venture,* 578 S.W.3d at 484 (noting that the commercial lease in that case does not require that a party receive damages as is the case under Chapter 38). Contracting parties "are generally free to contract for attorney's fees as they see fit." *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231–33 (Tex. 2014) (rejecting argument that "one-sided" arbitration agreement regarding fees is substantively unconscionable per se); *Hjella v. Red McCombs Motors, Ltd.*, 04-20-00359-CV, 2022 WL 789501, at *5 (Tex. App.—San Antonio 2022, no pet. h.) (parties' contract provided for fees without requirement of obtaining damages); *Elekes v. Wells Fargo Bank, N.A*., 5:13-CV-89, 2014 U.S. Dist. LEXIS 81229 *16-17, 2014 WL 2700686, at *5–6 (S.D. Tex. June 11, 2014) (federal court in diversity case will enforce contractual provision for reasonable fees in defending suit under Texas law).[11]

Parties may choose to define the term "prevailing party." *Epps v. Fowler*, 351 S.W.3d 862, 864, 871 n.10 (Tex. 2011) (parties can contract for definition of term "prevailing party"). However, helpful, specific definitions appear to be rare. Parties should carefully consider the language in fee shifting arrangements as courts will scrutinize the language. *See e.g.*, *McShane v. PilePro Steel, LP*, No: 1:16-CV-964-LY, 2017 U.S. Dist. LEXIS 59496 *6-9, 2017 WL 1399703, at *6 (W.D. Tex. April 19, 2017) (noting the difference between the fees "of" the prevailing party as opposed to "incurred" by the prevailing party); *Nuvasive, Inc.,* 2014 WL 12873101 at *4 (TTLA includes term "incurred", and since party's fees were paid by other entity, this weighed against amount sought); *but see Sayers Construction, LLC v. Accordant Communications, LLC*, A-19-CV-787-LY, 2019 WL 6213160 (Nov. 21, 2019)(rejecting argument that fee award improper because opposing party had retained its attorneys on a contingency fee basis, and, therefore, paid no attorney's fees to be *reimbursed*).

If parties include other jurisdiction's laws to interpret the contract, then that law may apply the substantive issue regarding attorney's fees. *OIC Holdings, LLC v. Gleason*, 05-18-00029-CV, 2019 WL 2098616 *4 (Tex. App.—Dallas May 14, 2019, no pet.) (applying Delaware law to attorney's fees dispute regarding prevailing party). If the non-Texas jurisdiction does not recognize a right to recover (as in the case of Chapter 38's authorization of fees for a

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[10] S*ee, e.g.*, *Adkisson v. Paxton*, 459 S.W.3d 761, 779–81 (Tex. App.—Austin 2015, no pet.) (trial court authorized to award attorney's fees in Public Information Act dispute pursuant to TEX. GOV'T CODE § 554.323(b)); *Cascos v. Tarrant County Democratic Party*, 473 S.W.3d 780, 782-86 (Tex. 2015) (legal expenses related to litigation concerning primary elections under Election Code); *One World Bank v. Miller,* 05-21-00705-CV, 2023 WL 333712, *9 (Tex. App.—Dallas, Jan. 20, 2023, n.p.h.) (attorneys' fees recoverable for prevailing party under Tex. Prop. Code § 70.008 in dispute over possession of motor vehicle, motorboat, vessel, or outboard motor); *AdvanTech Construction Systems, LLC v. Michalson*, 14-21-00159-CV, 2023 WL 370513, *4-5 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, n.p.h.) (equitable and just fees recoverable in proceeding to remove invalid or unenforceable lien).

[11] Presumably parties could contract for fees and expressly waive the segregation requirement.

breach of contract), then the application of a foreign law could be outcome determinative. *Transverse LLC v. Iowa Wireless Serv's, LLC*, 992 F.3d 336, 348-49 (5th Cir. 2021).

Presentment does not apply if the authorization for fees is based on parties' contracts unless the contract so provides. *Morales v. Carlin*, 03-18-00376-CV, 2019 WL 1388524 *6 (Tex. App.—Austin Mar. 28, 2019, no pet.).

Since a judgment must conform to the pleadings, a party failing to plead for attorney's fees **under the contract** as opposed to under Chapter 38 may waive that claim for attorney's fees. *Intercont'l Grp*., 295 S.W.3d at 659; *see also Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 61(Tex. App.—Houston [1st Dist.] 2013, pet. denied); *but see Apple Texas Restaurants, Inc. v. Shops Dunhill Ratel, LLC*, 05-20-01052-CV, 2022 WL 883907, *5 (Tex. App.—Dallas March 25, 2022, pet. denied) (general pleading supported request for fees); *Kroesche v. Wassar Logistics Holdings, LLC*, 01-20-00047-CV, 2023 WL 1112002, *17 (Tex. App.—Houston [1st Dist.] Jan. 31, 2023, n.p.h.) (same); *see also Berry v. New Gainsville Livestock Auction, LLC*, 02-19-00476-CV, 2022 WL 123214, at * 7 (Tex. App.—Fort Worth Jan. 13, 2022, no pet.) (rejecting contention that pleading deficiency tried by consent).

The standard may be different in federal court, *see Al-Saud v. Yahoo Media, LP*., 754 Fed. Appx. 246, 256 (5th Cir. 2018) (considering not only the pleadings but the joint pretrial order and language in summary judgment motion); *Solferini v. Corradi USA, Inc*., 20-40645, 2021 WL 3619905, *3 (5th Cir. Aug. 13, 2021) (rejecting waiver contention when party brought claim under subrogation interest statute providing for fees and disclosing it was seeking fees in initial disclosures).

However, generally, parties would be well advised to plead the basis for the fees they seek. *See also In re RTX Custom Homes*, 2017 WL 2484850 at *56-57 (denying defendant's TTLA fee request where defendant did not plead for fees under the TTLA). In state court, a defendant may not be able to wait until after a non-suit has been filed to amend pleadings to assert a claim for attorney's fees under Chapters 38 or 37. *North Star Water Logic, LLC v. Ecolotron, Inc*., 486 S.W.3d 102, 106 (Tex. App.—Houston [14th Dist.] 2016, pet.).

Whether settlement negotiations should be considered as evidence of "success" remains an open issue. However, in the Fifth Circuit, a court **should** consider a prevailing party's rejection of a rule 68 offer of a more favorable judgment than the one obtained. *Gurule,* 912 F.3d at 261; *see also Energy Intelligence Group, Incorporated v. Kayne Anderson Cap. Advisors, LP,* 948 F.3d 261, 279-80 (5th Cir. 2020) (rejecting post-offer fees). This may be applicable under the Texas offer of judgment rule in Tex. R. Civ. P. 167 as well.

2. Chapter 38 as a basis for fees for plaintiffs in a breach of contract case.[12]

Under one of the most widely used fee statutes in business disputes in Texas, "[a] person may recover reasonable attorney's fees from an individual or corporation, . . . if the claim is for an oral or written contract." TEX. CIV. PRAC. & REM. CODE § 38.001(8). "To recover attorney's fees under Section 38.001, a party represented by an attorney must present the claim, and (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). Chapter 38 should be "liberally construed to promote its underlying purpose" of encouraging "contracting parties to pay their just debts and discourage... vexatious, time-consuming and unnecessary litigation." *Ventling v. Johnson*, 466 S.W.3d 143, 155 (Tex. 2015).

If attorney's fees are proper under Section 38.001 and supported by evidence, the trial court "has no discretion to deny" attorney's fees. *Ventling*, 466 S.W.3d at 154. Furthermore, if "trial attorney's fees are mandatory under Section 38.001, then appellate attorney's fees are also mandatory when proof of reasonable fees is presented." *Id.* [13] A zero award for attorney's fees is appropriate only if the evidence (1) failed to prove either that an attorney's services were provided or the value of the services provided or (2) affirmatively showed that no attorney's services were needed or that any services provided were of no value. *Upshaw v. Lacado, LLC*, 02-20-00031-CV, 2021 WL 3085757, at *14-15 (Tex. App.—Fort Worth July 22, 2021, no pet. h.) (trial court properly disregarded zero verdict in that case, but trial court erred in providing amount without submitting it to the jury, so a new trial on the amount of fees was warranted).

The breach of contract claimant must prevail and recover damages to recover attorney's fees. *Rohrmoos Venture,* 578 S.W.3d at 484. The Supreme Court noted that in *KB Home*, the plaintiff was not a prevailing party eligible for fees under Chapter 38 because the "plaintiff recovered no damages, secured no declaratory or injunctive relief, obtained no consent decree or

[12] Breach of contract defendants do not have a right to attorney's fees merely by prevailing on their defenses against claims made by plaintiffs under Chapter 38 of the Texas Civil Practices and Remedies Code. *Brockie*, 244 S.W.3d at 910; *Energen Res. MAQ,* 23 S.W.3d at 558

[13] A very interesting 2018 dissenting opinion contains numerous issues including discussions on attorney's fees including a reference that a party not represented by an attorney on appeal should not recover appellate fees under Chapter 38. *Swan v. Bienski Props., LP,* 10-14-00309-CV, 2018 Tex. App. LEXIS 7665 * 41 (Tex. App. Waco Sept. 19, 2018, no pet.) (Gray, C.J. dissent).

settlement in its favor and received nothing of value of any kind." *Id.* at 485.

A 2017 case found that merely obtaining specific performance does not suffice. *Thunder Rose Enterprises Inc., v. Kirk* 13-15-00431-CV, 2017 Tex. App. LEXIS 3481 *39, 2017 WL 2172468, at *14 (Tex. App.—Corpus Christi-Edinburg April 20, 2017, pet. denied); *but see Rasmusson v. LBC PetroUnited, Inc*., 124 S.W.3d 283, 287 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (specific performance sufficed when the remedy of specific performance has pecuniary value). Prevailing on a permanent injunction has been found to be "something of value" received in exchange for the contract claim and sufficient to support a fee award. *RenewData Corp. v. Strickler*, 03-05-00273-CV, 2006 WL 504998*16-17, 2006 Tex. App. LEXIS 1689 (Tex. App.—Austin March 3, 2006, pet. dism'd by agr).

Even obtaining nominal damages does not suffice: "Nominal damages are damages in name only. They are a trivial amount. They are given, not as an equivalent for the wrong, but to recognize a technical right. Nominal damages, traditionally the sum of $1 or $10, are not the type of damages which will entitle a litigant to also recover its ***attorney's fees*** under section 38.001." *Int'l Med. Ctr. Enters. v. ScoNet, Inc.,* 01-16-00357-CV, 2017 WL 4820347 *14, 2017 Tex. App. LEXIS 10066 *40 (Tex. App.—Houston [1st Dist.] Oct. 26, 2017, no pet.) (citation omitted).

A breach of a settlement agreement that satisfies the requirements of Tex. R. Civ. P. 11 creates the possibility for attorney's fees under Chapter 38. *Am Fisheries, Inc. v. Nat'l Honey, Inc.*, 585 S.W.3d 491, 505 (Tex. App.—Houston [1st Dist.] Aug. 7, 2018, pet. denied).

3. <u>Chapter 38 as a basis for fees for non-contractual theories of recovery.</u>

Chapter 38 authorizes recovery of attorney's fees to a party who successfully pursues a claim for (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract. *See id.* §§ 38.001, 38.002. "The statute does not authorize recovery of attorney's fees incurred in successfully pursuing an equitable-contribution claim." *Orr v. Broussard*, 565 S.W.3d 415, 424 (Houston [1st Dist.] 2018, no pet.)

Chapter 38 may also apply outside the typical "written contract" claim. The Fifth Circuit made an "Erie-guess" that even though fees may not be recoverable under the provisions of the Insurance Code, they may be recoverable under Chapter 38 in certain insurance contract disputes. *Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc*., 756 F.3d 825, 838 (5th Cir. 2014).

Attorney's fees may be recovered in claims asserting breach of implied warranty of title under Chapter 38. *City Direct Motor Cars, Inc. v. Expo Motorcars, LLC*, 14-13-00122, 2014 Tex. App. LEXIS 6147 *17-19, 2014 WL 2553484, at *7 (Tex. App.—Houston [14th Dist.] June 5, 2014, pet. denied). Similarly, some authority supports the argument that a party may possibly recover fees for a promissory estoppel claim under Section 38.001 although there is a split among intermediate courts. *Compare Turner*, 485 S.W.3d at 528 (finding that fees are available for promissory estoppel claims) and *Raym v. Tumelo Mngmt, LLC*, 02-21-00071-CV, 2022 WL 60722, at *3 (Tex. App.—Fort Worth Jan. 6, 2022, no pet.) (affirming award of attorney's fees for promissory estoppel) and *MedFinManager, LLC v. Salas*, 04-20-00051-CV, 2021 WL 3742681, at *7 (Tex. App.—Aug. 25, 2021, pet. denied) (same); *with Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P*., 154 S.W.3d 634, 635-39 (Tex. App.—Houston [14th Dist.] 2004, pet. abated) (finding that fees are not available for promissory estoppel claims*); Mexicans & Americans Thinking Together Foundation, Inc. v. The State of Sonora, Mexico*, SA-09-CA-598-XR, 2011 WL 13235161, at *5-6 (W.D. Tex. Aug. 9, 2011) (noting split and denying motion to dismiss based on Fifth Circuit case).[14]

Attorneys' fees are generally not recoverable for money had and received claim. *Garden Ridge, L.P. v. Clear Lake Center, L.P*., 504 S.W.3d 428, 449 (Tex. App.-Houston [14th Dist.] 2016, no pet.); *Windmill Investments, LLC v. Red Hill Realty Investors, LP*, 5:16-cv-345-OLG, 2017 WL 3713471, *1 (W.D. Tex. June 13, 2017).

Chapter 38 may also apply outside the typical "written contract" claim. However, in 2018, the Texas Supreme Court clarified that Chapter 38 cannot provide a basis for liability for a claim under the Texas Construction Trust Fund Act. *Dudley Construction, Inc. v. ACT Pipe & Supply, Inc.,* 545 S.W.3d 532, 541-42 (Tex. 2018).

Attorney's fees in a *quantum meruit* claim may be recoverable under Chapter 38. Tex. Civ. Prac. & Rem. Code. §38.001(2 and 3) *see also Shamoun & Norman, L.L.P. v. Hill*, 544 S.W.3d 724, 728, 734 (Tex. 2018) (discussing quantum meruit recovery when contingent fee contract failed the requirements of Texas law).

Pet dogs are not "stock" allowing for recovery of attorney's fees under Section 38.001(6). *Palfreyman v. Gasconnet*, 561 S.W.3d 258, 262 (Tex. App.—Houston [14th Dist.] Sept. 27, 2018, no pet.).

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[14] *See* Brett Busby, Scott K. Field, Jeff Oldham, Jason Boatright, Kem Frost, & Yvonne Ho, *Percolating Conflicts Among the Texas Appellate Courts: Challenges for Trial Advocacy*, Ch. 21 SBOT 40th Annual Adv. Civ. Trial CLE p. 3 (cataloguing cases on this conflict).

C. Declaratory Judgment Act authorizes attorney's fees claims

Another frequently used statutory authorization is the Declaratory Judgment Act or Chapter 37. TEX. CIV. PRAC. & REM. CODE § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").[15] Claims under Chapter 37 are significantly different from claims under Chapter 38.

Not every legal declaration or every declaratory judgment entitles a party to attorney's fees, otherwise Chapter 37's exception would engulf the American Rule. Stated differently, even an award of attorney's fees on declaratory judgment claims may be unwarranted under Chapter 37 where the declaratory relief is defensive, does not present new controversies other than those already before the court, or when Chapter 37 is being used merely to obtain attorney's fees not otherwise authorized. *MBM Fin.*, 292 S.W.3d at 669 n.53; *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004) (noting that trespass to try title, not Chapter 37, is sole method for determining title for real property); *CBIF,* Tex. App. LEXIS 3605 at *32-34 (chapter 37 did not provide for fees in non-compete dispute).[16] *John G. Marie Stella Kennedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002);); *Mellenbruch Family P'ship, LP v. Kennemer*, 04-17-00637-CV, 2018 WL 4096390 *11, 2018 Tex. App. LEXIS 6973 *26-28 (Tex. App.—San Antonio Aug. 29, 2018, no pet.) (a litigant asking court to determine ownership including mineral interest is not properly a declaratory judgment for which fees are available but trespass to try title); *see also Allen-Pieroni v. Pieroni*, 538 S.W.3d 631, 635-36 (Tex. App.—Dallas July 26, 2016, pet. denied) (reversing award of fees under Chapter 37 when suit was a slander of title claim).

The contention that a defensive claim for fees under Chapter 37 merely duplicates claims already before the Court or the so-called "mirror image rule" continues to be asserted as recent Texas Supreme Court cases reveal. *Transcor Astra Group, SA v. Petrobras America, Inc*., 20-0932, 2022 WL 1275238, at * 14 (Tex. Apr. 29, 2022) (rejecting contention that defensive claim merely duplicated claim before the court); *Sunchase*, 643 S.W.3d at 422 (not reaching the mirror-image rule contention because case decided under other statutory authorization for fees); *see also Ramey & Schwaller, LLP v. The Document Group, Inc.*, 01-20-00368-CV, 2022 WL 1572039, at *6 (Tex. App.—Houston [1st Dist.] May 19, 2022, no pet. h.) (sustaining objection that declaratory judgment act had no material distinction to mature breach of contract claim already in case).

However, a party may recover fees under Chapter 37 in defending against an improperly pled declaratory judgment claim. *Devon Energy Prod. Co., L.P. v. KSC Res., LLC*, 450 S.W.3d 203, 233 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). The "principle that a party may not replead a claim under the UDJA to circumvent limits on attorney's fees…does not preclude an award of fees for defending against another party's claim for declaratory relief." *Bailey v. Smith*, 581 S.W.3d 374, 396 (Tex. App.—Austin 2019, pet. denied).

Unlike Chapter 38, Chapter 37 "does not require an award of attorney fees to the prevailing party. Rather, it provides that the court 'may' award attorney fees. The statute thus affords the trial court a measure of discretion in deciding whether to award fees or not." *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). The Texas Supreme Court had a May 2020 fees opinion of significance to UDJA, noting that unlike other "prevailing party" statutes, rules, or contracts, that Chapter 37 provides a more amorphous basis for recovering attorney's fees. *Yowell v. Granite Operating Co*., 620 S.W.3d 335, 355 (Tex. 2020). A complicating aspect of the UDJA is that while the determination of whether a fee amount is reasonable and necessary under Chapter 37 is generally a question for the fact-finder, determining whether a fee is "equitable and just" is a question for the court. *See Bocquet*, 972 S.W.2d at 21 (court may conclude that no amount is equitable or just). A recent case affirmed the award of fees under Chapter 37 as being equitable and just despite accusations that the fee-claimant engaged in "bribery and other corrupt conduct" because its opponent "broke the promise it made in the settlement agreement" to never assert claims that it subsequently asserted. *Transcor Astra Group*, 2022 WL 1275238, at * 15.

In *Yowell*, the Court clarified that a party may be eligible to recover fees from an adversary under the UDJA, even when the trial court does not "consider or render judgment on the merits of that claim." *Yowell*, 620 S.W.3d at 355. Noting that the UDJA's language is broader than other fee-shifting statutes, the Court ruled in favor of a defensive award because "the UDJA does not prohibit a trial court from awarding attorney's fees to a party defending against a contingent claim for declaratory judgment." *Id.* at 356. *Yowell* therefore settles that the scope of the UDJA is broader than many have previously argued, although unanswered questions about fee shifting in circumstances that are "equitable

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[15] TUFTA, the fraudulent transfers statute, contains a similarly worded fee award statute. *See Janvey v. Dillon Gage Inc. of Dallas*, 856 F.3d 377, 392-93 (5th Cir. 2017) (citing TEX. BUS. & COM. CODE § 24.013) (no abuse of discretion in finding receiver not entitled to attorney's fees); *see also Thomas v. Hughes*, 27 F. 4th 995, 1019-20 (5th Cir. 2022) (affirming award of fees under TUFTA).

[16] *But see ConocoPhillips Co. v. Koopman*, 547 S.W.3d 858, 879 (Tex. 2018) (in some oil and gas cases where the payor does not comply with the requirements of § 91.402, TEX. NAT. RES. CODE § 91.406 may provide a basis for fees).

and just" for "any proceeding" under the UDJA remain.

Cases routinely note that the UDJA should not be a mechanism to generate fees absent a legitimate new dispute not already at issue in a case. "A counterclaim that presents no new controversy but exists solely to pave the way to an award of attorney's fees is improper." *McGehee v. Endeavor Acquisitions, LLC*, 08-18-00166-CV, 2020 WL 2060329, *10 (Tex. App.—El Paso April 29, 2020, no pet.). However, a declaratory judgment counterclaim was properly allowed and supports a grant of attorney's fees when it has "greater ramifications" than the opponent's original suit. *McGehee v. Endeavor Acquisitions, LLC*, 08-18-00166-CV, 2020 WL 2060329, *11 (Tex. App.—El Paso April 29, 2020, no pet.).

In cases under Chapter 37, a trial court does not abuse its discretion by awarding no fees to any party. *See e.g.*, *Hrdy v. Second Street Properties LLC,* 01-19-00194-CV, 2022 WL 903952, at *29 (Tex. App.—Houston [1st Dist.] March. 29, 2022, no pet. h.) (trial court could refuse to award either side fees under Chapter 37 because of their "litigation strategies"); *Severs,* 559 S.W.3d at 713; *Guajardo v. Hitt*, 562 S.W.3d 768, 783 (Tex. App.-Houston [14th Dist.] 2018, pet. denied) (trial court did not abuse its discretion in declining to award attorney's fees); *Callahan Ranch, Ltd. v. Killam*, 0-10-00802-CV, 2012 Tex. App. LEXIS 989 *25, 2012 WL 394594, at *9 (Tex. App.—San Antonio Feb. 8, 2012, pet. denied) (no abuse of discretion to deny fees under Chapter 37 on basis that both parties had legitimate rights to pursue such that it would not be equitable or just to award either side fees).

The UDJA also differs from other statutory authorizations of attorney's fees in that a party does not have to be the prevailing party to recover fees under the Act. *Feldman v. KPMG LLP*, 438 S.W.3d 678, 686 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Under section 37.009, a trial court may exercise its discretion to award attorney's fees to the prevailing party, the nonprevailing party, or neither."); *Hong Kong Dev. Inc. v. Nguyen*, 229 S.W.3d 415, 452 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 512–13 (Tex. App.—Austin 1993, writ denied) (noting that attorney's fees are not limited to prevailing party); *see also Barshop v. Medina Cnty. Underground Water Dist*., 925 S.W.2d 618, 637 (Tex. 1996) (rejecting argument that party had to substantially prevail to recover attorney's fees under Chapter 37); *Green v. Richard D. Davis, LLP*, 14-17-00278-CV, 2019 WL 6872953, *11 (Tex. App.—Houston [14th Dist.] Dec. 17, 2019, pet. denied) (contrasting court's discretion under Chapter 37 with "prevailing party" statutes). A defendant may claim entitlement to fees under Chapter 37 based on a plaintiff's declaratory judgment claim by requesting fees in its answer or counterclaim. *See Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 915–16 (Tex. 2015).

Even though the general rule is that whether a fee is reasonable and necessary under Chapter 37 is generally a question for the fact-finder while determining whether a fee is "equitable and just" is a question for the court (*Bocquet*, 972 S.W.2d at 21), if the case is tried to the bench, the trial court determines all four factors and the amount of the award generally rests in the sound discretion of the trial court, subject to review for abuse. *Anderton v. Green,* 555 S.W.3d 361, 371 (Tex. App.—Dallas 2018, no pet.).

Under Chapter 37, "the court may conclude that it is not equitable or just to award even reasonable and necessary fees." *Bocquet*, 972 S.W.2d at 21. If an appellate court reverses a declaratory judgment on appeal, the award of fees under Chapter 37 may no longer be "equitable or just" and thus may be remanded to determine whether the award should remain based on the concepts of fairness, in light of all the circumstances in the case. *Kartsotis v. Bloch*, 503 S.W.3d 506, 520-21 (Tex. App.—Dallas 2016, pet. denied).

Whether an award is "equitable or just" is not subject to a precise test and no direct evidence is required, but rather the trial court makes the determination depending "on the concept of fairness in light of all the surrounding circumstances." *Goughnour v. Patterson,* 12-17-00234-CV, 2019 WL 1031575 * 15, 18 (Tex. App.—Tyler March 27, 2019, pet. denied) (concluding it was not equitable to award fees and thus an abuse of discretion).

Additional limitations on attorney's fees for declaratory judgment claims apply in federal court. In the Fifth Circuit, a Chapter 37 claim for declaratory relief alleged in federal court cannot provide an independent basis for attorney's fees even if otherwise recoverable in state court. *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409, 412–13 (5th Cir. 2006) (concluding that Chapter 37 does not provide basis for fees award); *Utica Lloyd's of Tex. v. Mitchell,* 138 F.3d 208, 210 (5th Cir. 1998).

D. Some other statutory fee awards provisions (and common law doctrines) cited in recent case law and commonly raised

1. Texas laws

In 2018, the Texas Supreme Court rejected a claim on the facts of that case where a metropolitan transit authority sought fees under the common law rule that allows innocent stakeholders in interpleader actions "to attorney's fees to be paid out of the interpleaded funds."

Fort Worth Transp. Auth. v. Rodriguez, 547 S.W.3d 830 (Tex. 2018).[17]

Some statutes require an attorney's fees award. *See, e.g*., TEX. CIV. PRAC. & REM. CODE § 134.005(b) (under the Texas Theft Liability Act ("TTLA"), each prevailing person "***shall*** be awarded court costs and reasonable and necessary attorney's fees" (emphasis added)); *Agar Corporation, Inc. v. Electro Circuits International, LLC*, 580 S.W.3d 136, 148 (Tex. 2019) ("person who prevails" under TTLA includes defendant who obtains judgment); *Transverse LLC v. Iowa Wireless Serv's, LLC*, 992 F.3d 336, 343 (5th Cir. 2021); Civelli v. JP Morgan Securities, LLC, 57 F.4th 484, 493-94 (5th Cir. 2023) ("under Texas law, a party that prevails in a civil conspiracy claim predicated on a TTLA claim is entitled to fees"); *Merritt Hawkins Ass's, LLC v. Gresham*, 861 F.3d 143, 155-57 (5th Cir. 2017) (fees under TTLA and the Harmful Access by Computer Act TEX. CIV. PRAC. & REM. CODE § 143.002); *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 641–42 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (awarding fees to prevailing party who recovered damages under the TTLA); *Arrow Maple, LLC v. Estate of Killon*, 441 S.W.3d 702, 705–08 (Tex. App.—Houston 2014, no pet.) (dismissal with prejudice means that the parties' legal relationship has changed in a manner that materially benefits the defendant so as to qualify as a "prevailing party" under TTLA); *Spear Marketing, Inc. v. BancorpSouth Bank*, 844 F.3d 464, 470-73 (5th Cir. 2018) (award of fees proper under TTLA and under Copyright Act according to district court opinion); *but see Int'l Med. Ctr. Enters.,* 2017 Tex. App. LEXIS 10066 at *40; *Shamark Smith, Ltd. Ptnership v. Longoria*, 03-14-00698-CV, 2016 Tex. App.—LEXIS 2569 *14-17 (Tex. App. Austin March 11, 2016, no pet.) (party not entitled to fees under the TTLA when proof failed to satisfy Texas standards).

Under the Texas Citizens Participation Act (TCPA), attorney's fees are mandatory "if a court orders dismissal of a legal action under this chapter." TEX. CIV. PRAC. & REM. CODE § 27.009(a); *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). [18] While the statute affords the trial court discretion to adjust downward reasonable attorney's fees and other expenses incurred in defending against the action as justice and equity may require, the statute requires the award of fees and expenses to a successful motion and thus afford no discretion for a trial court to refuse to award any attorney's fees and other expenses when the amount of reasonable fees and other expenses incurred in defending against the action are supported by the evidence. *Sullivan*, 488 S.W.3d at 298-99.

If some but not all claims are dismissed under the TCPA, the court must still award the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action. *D Magazine Partners, L.P. v. Rosentha*l, 529 S.W.3d 429, 442 (Tex. 2017); *Infowars, LLC v. Fontaine,* 03-18-00614-CV, 2019 WL 5444400, *6 (Tex. App.—Austin Oct. 24, 2019, pet. denied) (mandatory fee award on dismissed IIED claim); *O'Gan v. Ogle*, 03-19-00234-CV, 2020 WL 217176, *4-5 (Tex. App.—Austin Jan. 20, 2020, pet. denied). If an appellate court reverses in whole or in part based on the TCPA statute, the issue of attorney's fees may be remanded for further consideration. *Elite Auto Body, LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 207 (Tex. App.—Austin 2017, pet. dism'd).

An award of reasonable attorney's fees is mandatory to the prevailing party in a dispute over a restrictive covenant pursuant to Texas Property Code section 5.006. *Zuehl Land Dev., LLC v. Zuehl Airport Flying Cmty. Owners Ass'n, Inc*., 510 S.W.3d 41, 50 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Another Property Code provision involving challenges to compliance with bylaws and declarations states that the prevailing party in an action to enforce the declaration, bylaws, or rules is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party. TEX. PROP. CODE §82.161(b); *Wheelbarger v. Landing Council of Co-Owners*, 471 S.W.3d 875, 896 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

"The DTPA requires that consumers who prevail on DTPA claims be awarded reasonable and necessary attorney's fees." *338 Inds, LLC v. Point Com, LLC*, 521 S.W.3d 430, 436 (Tex. App.—Amarillo 2017, pet. denied); *Jem Int'l, Inc. v. Warner Props., L.P*., 07-17-00042-CV, 2018 WL 4571917 *5, 2018 Tex. App. LEXIS 7764 *13 (Tex. App.—Amarillo Sept. 24, 2018, no pet.) (fee award on DTPA).

An interesting Fifth Circuit opinion noted that while the award of fees to a prevailing party in a Fair Debt Collection Practices Act is generally mandatory, there may be unusual or special "circumstances" where fees are not reasonable or warranted. *Davis v. Credit*

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[17] Another example of a common law doctrine not often seen in the case law seeks fees under the equitable recovery incurred due to a third party's wrongful act or what is sometimes referred to as the "tort of another" exception, the existence of which under Texas law is uncertain. *See Naschke v. Gulf Coast Conf.*, 187 S.W.3d 653, 655 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) *citing Turner v. Turner*, 385 S.W.2d 230, 234 (Tex. 1964) and the RESTATEMENT (SECOND) OF TORTS § 914 (1979); *see also Tex. Elec. Util. Constr. v. Infrasource Underground Const. Servs, LLC,* 12-09-00287-CV, 2010 Tex. App. LEXIS 4990 *5 (Tex. App.—Tyler June 30, 2010, pet. dismissed) (finding that "Texas intermediate appellate courts are divided on whether section 914(2) is the law in Texas.").

[18] However, a party presenting no evidence will not have fees awarded. *Fawcett v. Grosu*, 498 S.W.3d 650, 665 (Tex. App.—Houston [14th] 2016, pet. denied).

Bureau of the South, 908 F.3d 972, 976, 981 (5th Cir. 2018) (disapproving of "utilizing technical violations of the FDCPA solely as a means of generating attorney's fees."); *see also Portillo v. Permanent Workers, LLC,* 18-31238, 793 Fed. Appx. 255, 261(5th Cir. Nov. 12, 2019) (considering but declining to follow *Davis* and instead severely discounting fee request); *Ozmun v. Portfolio Recovery Associates, LLP*, 19-50397, 2022 WL 881755 *5-7 (March 24, 2022) (section 1692k(a)(3) does not authorize the award of attorney's fees against counsel, reversing the district court's judgment against plaintiff's attorneys in debt collection case); *citing Tejero*, 955 F.3d at 463. The Fifth Circuit wrote that "Notwithstanding Davis' award of statutory damages, we conclude that the extreme facts of the instant case justify the district court's denial of attorney's fees." *Davis*, 908 F.3d at 977. The Court noted as an initial matter that "we join the magistrate judge's stunned reaction to Davis' request for $130,000 in attorneys' fees" and concurred that neither the rate of $450/hour or the hours claimed were supported by the record. *Id*. at 978. In the Fifth Circuit, fee awards are reviewed for abuse of discretion, but whether a party prevailed is a legal issue reviewed de novo. *Othman v. Chertoff*, 309 Fed. Appx. 792, 794 (5th Cir. 2008) (district court remand of immigration action to Citizenship and Immigration Services did not constitute "prevailing" that would authorize fees under the Equal Access to Justice Act).

In disputes governed by the Texas Covenants Not to Compete Act, the employer may not recover attorney's fees, and under very limited circumstances, employees may recover attorney's fees upon a finding that the employer knowingly executed an unenforceable agreement for personal services. TEX. BUS. & COM. CODE §15.51(c); *Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc*., 414 S.W.3d 911, 927-29 (Tex. App.-Houston [1st Dist.] 2018, pet. denied); *Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802, 824–27, 846–47 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *but see Sanders v. Future.com, Ltd*., 2-15-00077-CV, 2017 Tex. App. LEXIS 4575 *32, 2017 WL 2180706, at *11 (Tex. App.—Fort Worth May 18, 2017, no pet.)(no abuse of discretion in denying attorney's fees where no evidence in the record proved that employer knew at the time of the covenant's execution that its restrictions were unreasonable).[19] Section 15.52 of the Act preempts Texas common law regarding covenants not to compete including the law regarding recovery of attorneys' fees. *Rieves v. Buc-ees, Ltd*., 532 S.W.3d 845, 854 (Tex. App.—Houston 14th Dist. 2017, no pet); *Perez v. Texas Disposal Systems, Inc.*, 103 S.W.3d 591, 594 (Tex. App.—San Antonio, 2003 pet. denied) ("Accordingly, we hold that the Act controls the award of attorney's fees, and section 15.52 preempts an award of fees under any other law."); *D'Onofrio v. Vacation Publications, Inc*., 888 F.3d 197, 219 (5th Cir. 2018).

However, like segregation and other attorney's fees issues, complaints about an erroneous award may be waived. *Ureteknologia de Mexico S.A. de C.V. v. Uretek (USA), Inc*., 20-20073, 2022 WL 29638, *7 (5th Cir. Jan. 3, 2022); *Butler v. Arrow Mirror & Glass*, 51, S.W.3d 787 (Tex. App.—Houston [1st Dist.] 2001, n.w.h.); *Sandberg v. STMicroelectronics, Inc*., 600 S.W.3d 511, 532-33 (Tex. App.—Dallas 2020, pet. denied); *compare with Petrohawk Props., L.P. v. Jones*, 455 S.W.3d 753, 782–83 (Tex. App.—Texarkana 2015, pet. dism'd) (argument that former version of Chapter 38 did not authorize recovery of attorneys' fees against an LP was waivable); *Enzo Investments, LP v. White*, 468 S.W.3d 635, 651 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (same). Also, attorneys' fees have been awarded in at least one case for a violation of a prior breach of a separation agreement. *Leavitt v. McLeane Co., Inc*., 03-19-00519-CV, 2021 WL 1680217, *10-11 n. 9 (Tex. App.—Austin Apr. 29, 2021, pet. denied).

The Texas statute governing fraud in a stock or real estate transaction also provides for the award of attorney's fees. TEX. BUS. & COM. CODE §27.01(e); *Lake v. Cravens*, 488 S.W.3d 867, 885 n. 34 (Tex. App.—Fort Worth, 2016, no pet.); *Swan,* 2018 Tex. App. LEXIS 7665 at *25-27. Attorney's fees are also available in adverse possession disputes. Tex. Civ. Prac. & Rem. Code §16.034 (a). *Riddle v. Smith*, 07-18-00016-CV, 2018 WL 4356496, 2018 Tex. App. LEXIS 7448 *13 n. 3 (Tex. App.—Amarillo Sept. 6, 2018, no pet.). If the trial court determines that the suit was both groundless and in bad faith, then, an awarded of costs and reasonable attorney's fees are mandatory under §16.034 (a)(1) for a prevailing record title holder defending an adverse possession claim. Attorney's fees may also be discretionally awarded to the prevailing party under §16.034 (a)(2).

The Estates Code provides for the recovery of attorney's fees in certain cases including certain fees beyond the mere filing of the guardianship application as long as the party acted in good faith and for just cause. *In re Guardianship of Burley*, 499 S.W.3d 196, 199-200 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

A 2016 case also discussed the Texas "offer of judgment" rule found in TEX. R. CIV. P. 167. *State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 100-01 (Tex. App.—Houston [14th Dist.] 2016, pet. dism'd by agr.). This case implicated attorney's fees issues in connection with Rule 167 in two ways: (1) fees were implicated and awarded under the Rule itself against State Farm who

[19] In a withdrawn and superseded opinion, the trial court had granted a j.n.o.v. that the Non-Compete Act prohibits an award of fees in a case based on breach of a non-solicitation clause. *Rhymes v. Filter Resources, Inc.,* 9-14-00482-CV, 2016 WL 5395548, at *11 (Tex. App.—Beaumont Sept. 22, 2016), *withdrawn and superseded*, 2016 WL 6809251 (agreed motion to set aside and vacate).

invoked the procedure; and (2) the court was asked to consider whether the total attorney's fees or fees as of the date of settlement rejection should be used in the post-trial calculation. *Id*. at 101. The court found that even under the lesser amount of accrued fees, the total amount of fees plus the damage award equaled approximately 93% and thus affirmed the fee award. *Id.* at 101-02.

Fees are available in certain employment disputes. *See e.g*., *River Oaks L-M, Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 232 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (claim under TCHRA, TEX. LAB. CODE § 21.259(a)); *Apache Corp. v. Davis*, 573 S.W.3d 475, 502-04 (Tex. App.-Houston [14th Dist.] Apr. 23, 2019) (employment discrimination under Labor Code), *rev'd on other grounds*, 627 S.W.3d 324, 339 (Tex. 2021). A 2016 U.S. Supreme Court decision may reinvigorate demands of employers to have their attorney's fees paid when they are prevailing parties. *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642, 1651-52 (2016) (no textual support of Eight Circuit's opinion that employers can only recover attorney's fees if they prevail "on the merits"). Particularly noteworthy is Justice Thomas' concurrence where he wrote that he *continues "*to adhere to my view that *Christiansburg* is a 'dubious precedent'", meaning the holding in *Christianburg Garment Co. v. EEOC*, which held that a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances," but that a prevailing defendant is to be awarded fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *CRST Van Expedited,* 136 S.Ct. at 1654 (Thomas, J., concurring).

Recent cases have considerably addressed the availability of attorney's fees under chapter 54 of the Business and Commerce Code, also known as the Texas Sales Representative Act. TEX. BUS. & COM. CODE §§ 54.001-.006. *JCB, Incorporated v. Horsburgh & Scott Co.*, 18-1099, 2019 WL 2406971, *8 (Tex. June 7, 2019) (answering certified question from Fifth Circuit that entitlement to attorney's fees did not require a finding of trebled damages under statute because obligation is triggered by defendant's breach, not by plaintiff's success in litigation and statute did not have a "prevailing party" component).

Governmental immunity does not preclude a claim for attorney's fees from a breach of contract claim arising from a proprietary function. *Wheelabrator Air Pollution Control, Inc., v. City of San Antonio*, 489 S.W.3d 448, 453 (Tex. 2016). In a different context, a recent case also clarified that a statutory waiver of immunity alone does not create a new ground for awarding fees. *County of Galveston,* 498 S.W.3d at 189-90 (while TEX. LOC. GOV'T CODE § 262.007 waives immunity as to potential breach of contract claims against a county, it "only opens the door to an attorney's fee claim, but does not form the substantive basis for the claim."); *see generally Manbeck v. Austin I.S.D*., 381 S.W.3d 528, 529 (Tex. 2012) (governmental immunity bars recovery of attorney's fees in workers compensation suit against school district). If a statute expressly allows recovery of attorney's fees from a governmental entity, immunity will not bar the award if the other requirements are met. *City of Houston v. Kallinen*, 516 S.W.3d 617, 625-27 (Tex. App.—Houston [1st Dist.] Feb. 28, 2017, no pet.). The Texas Supreme Court ruled in 2018 that TCPA attorney's fees claims are not barred by immunity. *State ex. Rel. Best v. Harper,* 562 S.W.3d 1, 19 (Tex. 2018) ("given the TCPA's unique role in protecting the democratic processes that allow our state to function, today we conclude that sovereign immunity does not protect the state from a counterclaim for attorney's fees under the TCPA.").

Those branded as vexatious litigants under TEX. CIV. PRAC. & REM. CODE CH. 11 may be liable for fees and attorney's fees may also be awarded against those who have engaged in sanctionable behavior under TEX. CIV. PRAC. & REM. CODE CH. 10. *Aubrey v. Aubrey*, 523 S.W.3d 299, 319-21 (Tex. App.—Dallas 2017, no pet.) (affirming sanctions, but finding that awarding fees for work in six other cases not authorized).

2. Federal laws and practice

Courts are not at liberty to disregard Supreme Court case law construing federal law. *James v. City of Boise, Idaho*, 136 S.Ct. 685, 686 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."). In *James*, the Court reversed an award of fees to the prevailing defendant in a police dog bite case under 42 U.S.C. § 1988 without first determining that the plaintiff's action was "frivolous, unreasonable, or without foundation" in that § 1983 action. *James*, 136 S.Ct. at 686-87.

Attorney's fees must be awarded to prevailing FLSA plaintiffs. *Steele v. Leasing Enterprises, Ltd.,* 826 F.3d 237, 249 (5th Cir. 2016) ("Because the FLSA mandates the award of reasonable attorney's fees and costs, we remand for the district court to determine what fees Plaintiffs should be awarded.").

In prisoner litigation cases governed by 42 U.S.C. §1997e(d), that as much of the monetary judgment as necessary, up to 25% must be applied to fees, rejecting a discretionary 12-factor approach used prior to Congressional amendment. *Murphy v. Smith*, 138 S.Ct. 784, 790 (2018).

The Supreme Court has also clarified the standard for recovering attorney's fees in copyright cases by stating that the "objective reasonableness" of the losing party's positions remain an important, but not the exclusive guidepost for a district court exercising its broad discretion in shifting fees through an award under 17 U.S.C. § 505. *Kirtsaeng v. John Wiley & Sons, Inc*., 136 S.Ct. 1979, 1983, 1989 (2016). While district courts may not award attorney's fees as a matter of

course, in making a particular case-by-case assessment, courts "must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion...to make an award even when the losing party advanced a reasonable claim." *Kirtsaeng*, 136 S.Ct. at 1985, 1983, 1989 (a presumption against granting fees "goes too far in cabining how a district court must structure its analysis"). These other factors include a party's litigation misconduct, frivolousness, motivation, and the need to advance considerations of compensation and deterrence of repeated instances of copyright infringement or overaggressive assertions of copyright claims. *Kirtsaeng*, 136 S.Ct. at 1985, 1989.

A Federal Circuit case from Texas ruled that the district court erred in **not** awarding fees in a patent infringement case. *Rothschild Connected Devices Innovations, LLC v. Guardian Protection Services, Inc.,* 858 F.3d 1383, 1387-90 (Fed. Cir. 2017) (district court "clearly erred by failing to consider Rothschild's willful ignorance of the prior art", disregarding plaintiff's conduct in other litigation, and in improperly conflating the standards of Rule 11 with the relief under § 285). *Rothschild* concludes: "This suit should never have been filed, and ADS deserves to be fully compensated for the significant attorney's fees it has incurred. To hold otherwise would only 'encourage the litigation of unreasonable [and] groundless claims." *Id*. at *1391.[20]

The Supreme Court--in the context of addressing the propriety of enhanced patent damages--referenced that it had rejected two heightened standards in the recovery of attorney's fees under 35 U.S.C. § 285: the "clear and convincing" standard and the two-part objectively baseless and subjectively made in bad faith standard the Fifth Circuit used to apply. *Halo Electronics, Inc. v. Pulse Electronics, Inc*., 136 S. Ct. 1923, 1933-34 (2016) (citing *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757-58 (2014) (subjective bad faith alone could warrant award of fees)).

Relatedly, the Fifth Circuit found the *Octane Fitness* "instructive" in interpreting the fee shifting statute in the Lanham Act (15 U.S.C. § 1117(a)) which allows for the discretionary award of fees to the prevailing party in an "exceptional" case. *Baker v. DeShong*, 821 F.3d 620, 623 (5th Cir. 2016); *Vetter v. McAtee*, 850 F.3d 178, 186 (5th Cir. 2017) (affirming denial of fees as not an exceptional case; trial court also found waiver by not including in joint pretrial order filing). The Fifth Circuit found that the standard for awarding fees is flexible and that the "clear and convincing" standard did not apply to § 1117(a) either. *Baker*, 821 F.3d at 623-24. The Fifth Circuit then "merged" the *Octane Fitness* definition into § 1117(a) so that an exceptional case is one where "(1) in considering both governing law and the facts of the case, the case stands out from others with respect to the substantive strength of a party's litigating position; or (2) the unsuccessful party has litigated the case in an 'unreasonable manner.'" *Baker*, 821 F.3d at 624.

Like Texas courts, federal courts construe the particular statute to determine whether a fee award is mandatory or discretionary. *Domain Protection, LLC v. Sea Wasp, LLC*, 23 F. 4th 529, 538 (5th Cir. 2022) (affirming denial of fees because attorney's fees are discretionary when a plaintiff proves a violation of the Stored Communications Act).

Federal statutes providing for the potential to shift attorney's fees may have particular language that may lead to disputes, like the ERISA statute that authorizes the district court "in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). Although a fee claimant need not qualify as a "prevailing party" to receive a fee award under this statute, the fee claimant must have "achieved some degree of success on the merits", reversing the granting of summary judgment on appeal is not success on the merits. *Katherine P. v. Humana Health Plan of Texas*, 962 F.3d 841, 841-42 (5th Cir. 2020); *Ariana M. v. Humana Health Plan of Texas*, 18-20700, 792 Fed. App'x. 287, 290-91 (5th Cir. Nov. 18, 2019) *cert. denied* 19-980 (2020) (district court did not abuse its discretion in refusing to award fees to plaintiff for en banc decision reversing standard of review).

Succeeding or prevailing on a federal statute authorizing fee-shifting requires the plaintiff to succeed in the action, not merely to "succeed" by settling the claim. *Tejero v. Portfolio Recovery Associates, L.L.C.,* 993 F.3d 393, 396-99 (5th Cir. 2021) (although the Fair Debt Collection Practices Act requires fee-shifting, a plaintiff's settlement does not constitute "success" under the statute's provision authorizing the award of fees).

The Supreme Court recognized that prevailing employers in Title VII cases may be awarded their attorney's fees without a showing that the employer prevailed "on the merits." *CRST Van Expedited,* 136 S.Ct. at 1651-52.

A federal court's inherent authority to award fees as part of sanctioning a litigant for bad-faith requires a "but for" nexus to the offensive conduct. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1184, 1188-89 (2017).

Federal district courts have discretion to award fees in conjunction with a remand to state court. *See e.g., Decatur Hosp. Authority v. Aetna Health, Inc*., 854 F.3d 292, 297-98 (5th Cir. 2017). A recent case noted that

[20] A district court reached the same conclusion and reversed a jury verdict based on forged documents and fake evidence where the attorneys withdrew in face of the motion. *LBDS Holdings Co., LLC v. ISOL Tech., Inc.,* 6:11-CV-428, 2015 U.S. Dist. LEXIS 191802, 2015 WL 12765990 at *2 (E.D. Tex. May 15, 2015) (awarding $738,706.47 in fees for defending the frivolous lawsuit).

attorneys' fees and pre-judgment interest includable in calculation of amount in controversy for removal purposes. *Cleartrac, LLC v. Lanrick Contractors, LLC*, 53 F. 4th 361, 365-68 (5th Cir. 2022).

III. THE TEXAS TWO-STEP PROCESS BASED ON THE LODESTAR

To the extent there was confusion about the use of the lodestar as opposed to other methods to prove up attorney's fees in cases seeking to shift fees to opposing parties before *Rohrmoos Venture*, the Texas Supreme Court resolved the confusion by unequivocally establishing the use of the "two-step" process. *Rohrmoos Venture,* 578 S.W.3d at 498-500.

The two steps involve first generating a lodestar figure (reasonable market rate for time-keeper multiplied by reasonable time for tasks) and then, to the extent there are *Arthur Andersen* considerations[21] not already included in the lodestar calculation, making adjustments. *Id.* at 500-02 ("an enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method.").[22] The Court clarified that "there is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted." *Id.* at 498-99.

The Supreme Court acknowledged language in recent cases where cases seemed to distinguish between a "traditional method" and the lodestar method. *Id.* at 500. Noting that the "two seemingly different methods for evaluating claims for attorney's fees have created confusion for practitioners and courts alike," the Court clarified that there was never a separate test but that the lodestar method was developed as a short hand, and proceeded to outline the "two step" process. *Id.* at 490. Stated differently, the Supreme Court intends:

> "the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. We reaffirm today that the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts."

Id. at 498.

The process applies to both jury trials and bench trials. *Rohrmoos Venture,* 578 S.W.3d at 494. Furthermore, it appears that the Court intends this to apply in cases even where the fee agreement is one for something other than hourly billing. *Id.* at 499 n. 10; *accord Sayers Construction,* A-19-CV-787-LY, 2019 WL 6213160 at *4-5 (rejecting argument that fee award improper because opposing party had retained its attorneys on a contingency fee basis, and, therefore, paid no attorney's fees to be *reimbursed*).

A lodestar is calculated by multiplying the number of hours reasonably expended by the attorney by an appropriate, prevailing hourly rate in the community for comparable work. *Rohrmoos Venture,* 578 S.W.3d at 498-501. Reasonable hours worked and reasonable hourly rates for that work are critical determinations for the factfinder.

"Hourly rates are to be computed according to the prevailing market rates in the relevant legal market, not the rates that lions at the bar may command." *Hopwood v. Texas*, 236 F.3d 256, 281 (5th Cir. 2000). However, there may be specialties or circumstances which warrant higher rates. *McClain v. Lufkin Indus*., 649 F.3d 374, 382 (5th Cir. 2011) (in civil rights employment litigation out of district "home" rates were proper for starting lodestar in "unusual" case where there was "abundant and uncontroverted evidence" that "no Texas attorneys were willing and able to assist in such a large case").

Billing rates may have to be reduced in applying the lodestar method to account for the reasonable relationship to the amount in controversy or complexity of the case. *Delgado,* 2017 U.S. Dist. LEXIS 119485 at *9-10 (reducing lawyer's $600/hour rate to $500/hour and making other adjustments resulting in less than half of requested fee). In calculating the lodestar, courts should exclude excessive, duplicative, or inadequately documented time. *Aguayo,* 2016 U.S. Dist. LEXIS 169702 at * 6, 9; *Delgado,* 2017 U.S. Dist. LEXIS 119485 at *9.

After making this calculation, the court may take the "base fee" or "lodestar" and decrease or enhance the lodestar based on the relative weights of the *Johnson/Arthur Andersen* considerations as long as they are not already subsumed in the first step. *Rohrmoos Venture,* 578 S.W.3d at 500. The United States Supreme Court has established a "strong presumption" against upward departures from the lodestar in determining a reasonable fee, and an enhancement for contingency fee agreements alone is not permitted. *Perdue,* 559 U.S. at 552–54. The lodestar amount is presumed reasonable if the claimant carries the burden of showing the claimed rate and number of hours are reasonable. *Rohrmoos Venture,* 578 S.W.3d at 498-99.

The Texas Supreme Court has set forth eight non-exclusive considerations for fact-finders to use to determine reasonableness of attorney's fees:

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[21] The Court employs the term "considerations" rather than "factors" because there are multiple considerations within some of the factors. *Rohrmoos Venture,* 578 S.W.3d at 500 n. 11.

[22] As an example, the "results obtained" factor is generally considered in calculating the base lodestar so it should not ordinarily provide an independent basis for increasing the fee award. *Rohrmoos Venture,* 578 S.W.3d at 500 n. 12.

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly.
2. The likelihood that the acceptance of the particular employment will preclude other employment by the attorney.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the attorney performing the services.
8. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997); *Rohrmoos Venture,* 578 S.W.3d at 494. These factors, based on Texas Disciplinary Rule 1.04(c), apply to fee awards by juries and judges. *Id. citing Young v. Qualls*, 223 S.W.3d 312, 314 (Tex. 2007).

The Fifth Circuit has articulated similar factors, set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974); *see also El Apple*, 370 S.W.3d at 761 n.1; *Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 232 (5th Cir. 2000). The *Johnson* factors are similar to the *Arthur Andersen* factors but also include: (a) the "undesirability" of the case, and (b) fee awards in similar cases. *Johnson*, 488 F.2d at 717–19. Because the *Andersen* and *Johnson* factors are so similar, the Fifth Circuit has not needed to decide whether the *Johnson* factors are necessary in Texas diversity cases. *Delgado,* 2017 U.S. Dist. LEXIS 119485 at *6 n.3. However, the failure of a district court "to either engage in a loadstar analysis or apply the *Johnson* factors in a way that facilitates meaningful review" is an abuse of discretion that can lead to reversal. *Hoenninger v. Leasing Enterprises, Ltd*, 21-50301, 2022 WL 340593, *5 (5th Cir. Feb. 4, 2022).

United States Supreme Court and Fifth Circuit authority indicates that the most important consideration in determining the propriety of an attorney's fees award is the result obtained by the plaintiff at trial. *See Farrar v. Hobby*, 506 U.S 103, 114 (1992); *Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir. 1998), *decision clarified on denial of reh'g*, 169 F.3d 223 (5th Cir. 1999). If "a plaintiff has achieved only partial or limited success, the product of hours reasonably extended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Farrar*, 506 U.S at 114 (quoting *Hensley*, 461 U.S. at 436). This is not always the case, since in some civil rights or employment cases, even a modest recovery can justify meaningful fees. *Norsworthy v. Nguyen Consulting & Servs., Inc*., 575 Fed. App'x 247, 248 (5th Cir. 2014) (noting success is not measured merely based on the recovery of monetary damages, as "a civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards") (citing *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986)). In Texas class action cases, any adjustment to the lodestar or base fee "must be in the range of 25% to 400% of the lodestar figure." *El Apple*, 370 S.W.3d at 761.

In 2017, the Fifth Circuit clarified that considering the results obtained, as ***a factor*** is proper while considering it as ***the sole factor*** is not proper. *Compare Saldivar v. Austin I.S.D.*, 675 Fed. Appx 429, 432 (5th Cir. Jan. 11, 2017) ("In sum, the district court gave adequate but limited consideration to the result obtained relative to the fee award.") *with Cervantes v. Cotter*, 686 Fed. Appx. 281, 282 (5th Cir. April 19, 2017) (judge improperly "relied solely" on the "results obtained" to reduce the lodestar warranting reversal); *see also Aguayo,* 2016 U.S. Dist. LEXIS 169702 at *53 (discussing that success is not measured by "Defendants' lowball offers" but rather by comparing the amount awarded to the amount sought).

Notably, the United States Supreme Court held that a party who secures a permanent injunction but no monetary damages may be a "prevailing party" who can recover attorney's fees in some instances. *Lefemine v. Wideman*, 133 S. Ct. 9, 11–12 (2012) (considering attorney's fees claim under 42 U.S.C. § 1988, Civil Rights Attorney's Fees Awards Act); *see also OCA Greater Houston v. Texas*, 1:15-CV-679-RP, 2018 WL 6201955 *2-3 (W.D. Tex. Nov. 28, 2018) (awarding post-judgment fees following remand from Fifth Circuit but reducing 5% due to narrowing of injunctive relief on appeal); *see also Amawi v. Paxton*, 48 F.4th 412, 418-19 (5th Cir. 2022) (reversing award of fees to sole proprietors in § 1983 case in connection with "Boycott Israel" sanctions because Fifth Circuit found them not to have been prevailing parties); *Freedom From Religion Foundation, Inc. v. Abbott*, 21-50469, 2023 WL 565082, *7-9 (5th Cir. Jan. 27, 2023) (reversing permanent injunction, maintaining declaratory relief, and remanding to district court the issue of who prevailed in dispute over Capitol Exhibit Rule and the "Bill of Rights nativity scene"). However, a plaintiff must prevail and obtain a favorable judgment in order to obtain attorney's fees under some statutes including Chapter 21 of the Texas Labor Code. *Peterson v. Bell Helicopter Textron, Inc*., 806 F.3d 335, 342 (5th Cir. 2015) (citing *Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 56 (Tex. 1998)).

IV. OTHER EVIDENCE AND PROCEDURE ISSUES INVOLVING ATTORNEY'S FEES

In an admonition to avoid "satellite litigation as to attorney's fees", the Supreme Court noted that parties "should use discovery and pretrial procedure to evaluate attorney's fees claims and the evidence supporting them, then present to the fact finder the evidence relevant to determining a reasonable and necessary fee." *Rohrmoos Venture,* 578 S.W.3d at 503.

A. Scope of Discovery

It remains to be seen how this is reconciled with the limitations on attorney's fees discovery the Supreme Court clarified in its *In re National Lloyds* opinion regarding the methods to use in the discovery process relating to the recovery of attorney's fees (as well as other expert witnesses for that matter):

"In those circumstances, however, the requesting party must follow the discovery rules applicable to testifying experts. Importantly, a party is limited in the tools available to discover information concerning expert witnesses, even though the information may otherwise be within the scope of testifying-expert discovery. "Rule 192.3(e) sets forth the *scope* of information that parties may discover about a testifying expert.... Rule 195 addresses the *methods* for obtaining such information, limiting testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses." To minimize undue expense and curb discovery abuse, Rule 195 does not provide for interrogatories or requests for production like the discovery requests at issue here. Further, because the disputed discovery requests are not permissible methods of obtaining information discoverable under Rule 192.3(e), the exception to the work-product privilege in Rule 192.5(c)(1) does not apply."

In re National Lloyds Ins. Co., 532 S.W.3d 794, 814 (Tex. 2017) (emphasis in original).

Three dissenting justices disagreed with the ruling that interrogatories and requests for production could not be proper discovery methods for obtaining opposing party's fee bills and related information. *In re National Lloyds*, 532 S.W.3d at 814, 824 (Johnson, J. dissenting); *see also Jem Int'l,* 2018 WL 4571917 at *5, 2018 Tex. App. LEXIS 7764 at *14 (noting that the amount of an opponent's fee request is a surer indicator of a reasonable fee).

The Texas Supreme Court has written that billing records and information "about opposing counsel's hourly rates, total fees, and total reimbursable expenses" of parties in a purely defensive posture (resisting a claim for attorney's fees and not seeking attorney's fees) are not relevant and therefore generally not discoverable. *In re National Lloyds Ins. Co.*, 532 S.W.3d at 810. There are "different motivations and different demands [that] drive" defendants as opposed to plaintiffs, and defendants "are not providing 'similar legal services' even in the same case." *Id.* at 810.

While the Texas Supreme Court has generally shielded from discovery the billing and similar information of parties not seeking fees, "a party may waive its work-product privilege through offensive use—perhaps by relying on its billing records to contest the reasonableness of opposing counsel's attorney fees or to recover its own attorney fees." *Id.* at 807 (in that case, the insurer defendant stipulated its own billing records would not be used to contest the plaintiff's request for attorney's fees).

Additionally, the Supreme Court clarified that a party does not waive the attorney-client privilege by designating its attorney as an expert on fees. *In re City of Dickinson*, 568 S.W.3d 642, 649 (Tex. 2019).

Given the clarified landscape or limits, Rule 194 disclosures become even more significant. Practitioners have found efforts to rely on Rule 194's mandatory disclosure requirements to be less than fully satisfactory. Nevertheless, Rule 194, its mandatory disclosure, its language about materials reviewed or relied on by experts, and its exclusion absent good cause appear to be the principal mechanism.

Parties must be aware that Rule 195 has been significantly amended for lawsuits filed on or after January 1, 2021. Among other things, the amended rule alters the procedure for designating testifying experts and protects draft expert reports from disclosure.

Many times in business disputes, both sides (or multiple parties) may have a claim for attorney's fees which may require "affirmative" expert opinion and "defensive" expert opinion testimony. A report (or even a deposition of the attorney providing the expert opinion)[23] may provide some insight on things like the exercising of billing judgment, the factual basis for the opinion (such as specific use—or lack of use—of the *Arthur Andersen* considerations), segregation, bias, or other grounds on which cross-examine the attorney's fees expert witness at trial or to controvert the testimony with other expert opinion testimony or other proof.

B. Conclusory proof or generalities will not satisfy the levels of proof required.

Consistent with a series of prior Supreme Court cases, the Court found again in *Rohrmoos Venture* that the level of proof presented was conclusory and too general to support an award of attorney's fees. *Rohrmoos Venture,* 578 S.W.3d at 498, 501-02. As the Supreme Court wrote "General, conclusory testimony devoid of any real substance will not support a fee

[23] *See, e.g.*, *Rio Grande Valley Gas*, 59 S.W.3d at 222 (noting the complaint without specific record reference of discrepancy between deposition and trial).

award." *Id.* at 501; *see also Air Jireh Service Corp. v. Weaver & Jacobs Constructors, Inc.,* 13-15-00180-CV, 2019 WL 3023315, *6-7 (Tex. App.—Corpus Christi-Edinburg July 11, 2019, no pet.) (general descriptions of hours and work insufficient and failed to satisfy level of proof); *Sloane v. Goldberg B'Nai Brith Towers*, 14-17-00557-CV, 577 S.W.3d 608, 620-22 (Tex. App.—Houston [14th Dist.] May 7, 2019, no pet.) (mere recitation of *Arthur Andersen* factors without analysis held insufficient).

The Court also clarified that *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010) (affirming attorney's fees award in health care liability dismissal context under TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1))—a health care liability claim—has limited application, was confined to a "no-evidence challenge, and should not be read, in any way, as a guiding statement of the standard for whether evidence is legally sufficient to support a fee-shifting award of attorney's fees." *Rohrmoos Venture,* 578 S.W.3d at 497.

What is **sufficient evidence**? At "a minimum evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Rohrmoos Venture,* 578 S.W.3d at 498, 502.

C. Billing records

Billing records are not required but are "strongly encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Rohrmoos Venture,* 578 S.W.3d at 502 (emphasis in original).

A good approach is for attorney's fees testimony to include an express discussion applying the *Arthur Andersen* considerations to the particular facts and circumstances of the case, having contemporaneous written time records or billing statements itemizing the work done by date, task, and time involved, and establishing the reasonableness of the rate in relation to the particular case. *Montano*, 414 S.W.3d at 736; *El Apple*, 370 S.W.3d at 762.[24] Moreover, if attempting to rely on one or more of the *Arthur Andersen* considerations to support a request for fees, having specific facts to support the particular factor is advisable. *Compare with Montano*, 414 S.W.3d at 734 ("He also claims to have turned away other business because of the time demands of the case, *although he could not remember any specific examples*." (emphasis added)); *see also River Oaks L-M, Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 232–35 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (discussing in some detail evidence presented, which was held sufficient).

> The Texas Supreme Court has written about the great value of billing records:
> Billing records constitute "communication[s] made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives." Moreover, as a whole, billing records represent the mechanical compilation of information that reveals counsel's legal strategy and thought processes, at least incidentally.

In re National Lloyds Ins. Co., 532 S.W.3d at 804 (following the "core work product" analysis of *Nat'l Union Fire Ins. Co. v. Valdez* and finding that the request for billing records and other fee information of opposing counsel not seeking to recover those fees in litigation is equivalent to asking for the litigation file and applies even if privileged information is redacted).

D. Apportionment or "Segregation": how rigorously is this enforced?

The party seeking an attorney's fees award bears the burden of proving that legal work relating to claims for which fees may be recovered has been properly segregated from legal work relating to claims for which fees are not recoverable. *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *Chapa*, 212 S.W.3d at 313–14; *Hensley*, 461 U.S. at 435 (reasoning that when a plaintiff achieves only partial success, attorney's fees should not be awarded for hours not "expended in pursuit of the ultimate result achieved"). A plaintiff cannot generally recover fees for attorney time spent on claims on which the party did not prevail or even pursue at trial. *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 769 (5th Cir. 1996).

The failure to segregate fees does not preclude an attorney's fees recovery and the issue may be remanded to the trial court on appeal. *Kinsel*, 526 S.W.3d at 428; *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 884 (Tex. 2017) (no evidence to support breach of contract claim, but evidence supported TTLA claim so remand for testimony segregating on a **claim-by-claim basis**); *Chapa*, 212 S.W.3d at 313–14; *Alliance for Good Gov't v. Coalition for Better Gov't*, 919 F.3d 291, 298 (5th Cir. 2019) (remand required to address apportionment principle in case where claims made under the Lanham Act as well as non-Lanham claims); *Getty v. Perryman*, 14-17-

[24] The Court rejected the argument that lodestar fees can *only* be established through time records or billing statements, but reiterated that "in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information." *Montano*, 414 S.W.3d at 736; *El Apple*, 370 S.W.3d at 763; *but see Kinsel,* 526 S.W.3d at 428 ("even if contemporaneous records are unavailable, we have allowed for reconstruction of an attorney's work and consideration of any evidentiary support of the time spent and tasks performed.").

00887-CV, 2019 WL 1768604 *6-7 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (even where some segregation occurred, when attorney shown on cross-examination that further segregation proper and not done, remand required); *Nuvasive, Inc. v. Lewis*, A-12-CA-1156-SS, 2014 WL 12873101 *2-3, 5 (W.D. Tex. Oct. 23, 2014) (reducing TTLA fees from $265,000 to $10,000 because segregation analysis failed to account for the small role of the TTLA claims in the case); *In re Rose*, 4:19-CV-98, 2021 WL 4307113, at *7 (E.D. Tex. Sept. 22, 2021) (bankruptcy court erred in not segregating pure bankruptcy matters from TTLA case).[25]

Failure to timely object to the absence of apportionment or segregation waives the error. *Solis*, 951 S.W.2d at 389 (holding that absent objection, complaint about failure to segregate was waived);[26] *Hruska v. First State Bank*, 747 S.W.2d 783, 785 (Tex. 1988) (same); *White v. Reeder*, 12-17-00026-CV, 2018 Tex. App. LEXIS 1230 *16-21, 2018 WL 851367 (Tex. App.—Tyler Feb. 14, 2018, no pet.) (waiver of segregation objection at charge conference due to specific objection).

A party must apportion based on separate claims, not based on the arguments underlying those claims. *See Structural Metals, Inc. v. S & C Elec. Co*., 590 Fed. App'x 298, 305–06 (5th Cir. 2014) (noting that a party may also recover for unsuccessful motions related to an ultimately successful claim). "Submitting to the jury an attorney's testimony concerning the percentage of hours relating to specific claims—even a percentage as high as 95%—is sufficient to satisfy a party's burden to segregate its attorney's fees." *Bennett*, 460 S.W.3d at 242 (citing *Chapa*, 212 S.W.3d at 314); *Rutkoski v. Evolv Health, LLC*, 05-17-00088-CV, 2019 WL 1012095 *9-10 (Tex. App.—Dallas 2019) jdgmt. vacated but not opinion due to remittitur by 2019 WL 1071838 (March 7, 2019) (affirming segregated fee award based on testimony that a 25% fee reduction was proper); *Jem Int'l,* 2018 WL 4571917 at *5, 2018 Tex. App. LEXIS 7764 at *13 (rejecting defense estimate of "at least 80%" being awarded during period when DTPA not in case where plaintiff lost on contract claim but prevailed on DTPA). Some cases discuss a "relaxed standard" by which segregation is evaluated. *Lederer v. Lederer*, 14-21-00012-CV, 2022 WL 11551156, *5 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022, no pet.).

The frequently referenced exception to the segregation requirement claiming that non-recoverable and recoverable attorney's fees are "inextricably intertwined," is often an exception to this. The law remains confused on this point. Some Texas Supreme Court cases reeled in the applicability of this exception and vigorously require apportionment, even on a claims-by-claims basis. *Chapa*, 212 S.W.3d at 313–14. A very thorough and well-reasoned 2018 opinion has gone further and noted that *Chapa* abrogated the language from *Sterling* that is often relied on by those advocating an inability to segregate. *Milliken v. Turoff*, 14-17-00282-CV, 2018 WL 1802207, 2018 Tex. App. LEXIS 2652 *11-14 (Tex. App.—Houston [14th Dist] Apr. 17, 2018, no pet.) (remanding attorney's fees issue despite stipulation on amount where prevailing party failed to segregate and opposing party objected). Another opinion forcibly and plainly explains the segregation requirement: "No matter how nominal, an unrecoverable fee that does not advance a recoverable claim must be segregated from the request for attorney's fees." *Permian Power Tong, Inc. v. Diamondback E&P, LLC*, 12-16-00092-CV, 2017 Tex. App. LEXIS 5414 *40 n.14, 2017 WL 2588158 (Tex. App.—Tyler May 31, 2017, *vacating judgment but not opinion* by 2017 Tex. App. LEXIS 6026, (Tex. App.—Tyler June 30, 2017, pet. denied) (remanding for fee segregation and fee determination); *accord Tijerina v. Wysong*, 14-15-00188-CV, 2017 WL 506779 *9 (Tex. App,--Houston [14th Dist.] Feb. 7, 2017, no pet.) (even nominal part must be segregated). However, other recent opinions have not rigidly applied the segregation requirement. *Bailey*, 581 S.W.3d at 397 (APA claims and UDJA claims both involved property interest, no need to segregate); *Green v. Villas on Town Lake Owners Ass'n*, 03-20-00375-CV, 2021 WL 4927414, *7 (Tex. App.—Austin Oct. 22, 2021, pet. filed 21-1046) (overlapping breach of fiduciary duty under condominium act and negligence); *Sensible Care Holdings*, 2018 Tex. App. LEXIS 706 at *18, (overlapping fraud and contract claims); *see also Pichardo v. Luck Cousins Trucking*, 5-16-CV-01248-RBF, 2019 WL 1572936 *4 (W.D. Tex. Apr. 10, 2019) (no need for segregation where FLSA and contract claims overlapped significantly and discreet legal services in aid of FLSA claim "almost certainly advanced the very closely related claim for breach of the employment contract.").

On the other hand, other cases including from the Texas Supreme Court seem to endorse the continuing vitality of the sufficiently "intertwined" nature of attorney's fees so as to permit recovery. *Transcor Astra Group*, 2022 WL 1275238, at * 14; *Seeger v. Del Lago Owners Association*, 09-19-00433-CV, 2022 WL 1572046, at *5-9 (Tex. App.—Beaumont May 19, 2022,

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[25] *Schimmel v. McGregor*, 438 S.W.3d 847, 862–63 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (remanding for proper fee in TCPA action); *see also Low*, 221 S.W.3d at 621–22 (remanding sanctions award under Chapter 10 for determination of propriety of award in light of court's guidelines). However, a suggested remittitur is also possible. *Enzo Investments*, 468 S.W.3d at 655.

[26] In one bench trial appeal, the court of appeals found no waiver to lack of segregation although the objection was not asserted until the trial court made its ruling awarding fees. *Anderton*, 555 S.W.3d at 372 n.4.

no pet. h.) (rejecting segregation argument based on *Rohrmoos Ventures* authorizing recovery of counterclaims and defense of breach claim).

Intertwined facts do not make fees incurred for otherwise non-recoverable (tort) claims recoverable. *Chapa*, 212 S.W.3d at 313. The party seeking to invoke this exception has the burden of demonstrating that it applies. *Id*.[27] As a 2022 case stated it: "merely because the facts concerning the different claims are intertwined does not mean the party seeking fees does not have to segregate the fees for the recoverable claims from the unrecoverable claims." *Desio v. Del Bosque*, 05-21-00022-CV, 2022 WL 500025, *4 (Tex. App.—Dallas Feb. 18, 2022, no pet. h.).

A recent Fifth Circuit opinion focusing on the degree of segregation required summarized some of the appliable law as follows:

> Where fees are authorized, "fee claimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not." The party seeking fees bears the burden of properly segregating them. An exception to the fee-segregation requirement exists "when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible." But the exception requires more than a "common set of underlying facts[;]" "it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." Whether claims are so intertwined is a "mixed question of law and fact."

Transverse LLC v. Iowa Wireless Serv's, LLC, 992 F.3d 336, 344 (5th Cir. 2021).

Segregation of attorney's fees is also necessary when there are multiple defendants and an attorneys' fee award is proper as to some, but not all. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10-11 (Tex. 1991) (ruling that segregation was required when some defendants had settled so that the remaining defendants were not charged fees for which they were not responsible). Ensuring that attorney's fees are properly segregated amongst defendants is directly related to the reasonableness and necessity of the attorney's fees. *Id.* at 11 ("In order to show the reasonableness and necessity of attorney's fees the plaintiff is required to show that the fees were incurred while suing the defendant sought to be charged with the fees on a claim which allows recovery of such fees."). Generally, one cannot obtain both an attorneys' fee award and an exemplary damage award on different causes of action when the alternative remedies are for the same injury. *Chapa*, 212 S.W.3d at 304, 310–11; *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 335–36 (5th Cir. 2008) ("Were this Court to grant both awards to ARI, we would be picking and choosing from damage elements arising under different theories, which is impermissible under Texas law."); *Quest Med., Inc. v. Apprill*, 90 F.3d 1080, 1093–94 & n.21 (5th Cir. 1996) (noting that, under Texas law, "when a party tries a case on alternative theories of recovery and a jury returns favorable findings on two or more theories, the party has a right to a judgment on the theory entitling him to the greatest or most favorable relief. . . . Apprill cannot cut and paste elements of relief arising from different theories of recovery"). In sum, a "mix and match" approach to recovery of attorney's fees may be improper. However, a mixed recovery of attorney's fees and exemplary or other tort damages may be permissible if statutorily authorized or if the recovery is for separate and distinct damages, which would require no election. *See Peterson Grp.*, 417 S.W.3d at 64; TEX. CIV. PRAC. & REM. CODE § 12.002(b) (authorizing recovery of both attorney's fees and exemplary damages in fraudulent lien claims).

E. Some jury charge and appellate issues on attorney's fees

A prevailing party bears the burden to establish that its fees are "reasonable and necessary" and a jury "does not necessarily err in awarding no attorney's fees if the party seeking them fails to establish its requested fees are 'reasonable and necessary.'" *In re Bent*, 487 S.W.3d 170, 183 (Tex. 2016) (new trial not warranted for several reasons including the failure to award fees under a mandatory fee statute).

Most state trial courts and lawyers begin their analysis with the Texas Pattern Jury Charge questions and instruction on attorney's fees. *See* PJC § 115.60 (formerly 115.47). In the 2020 PJC, the attorney's fees question in 115.60 was revised after *Rohrmoos Ventures* to incorporate its clarifications of the law. Also, the comments in PJC § 115.60 state that the *Arthur Andersen* considerations may be included in "an appropriate case . . . but only the factors that are relevant in the particular case should be included." *See also Barker*, 213 S.W.3d at 313 (referencing that trial court had instructed the jury on the factors). While the PJC is a great first resource, parties may want to include more than just the PJC language when charging a jury.

Rohrmoos Venture notes that the fact finder must determine a base lodestar figure and that in "a jury trial, the jury should be instructed that the base lodestar figure

[27] Some post-*Chapa* litigants have successfully done so. *Cf. 7979 Airport Garage, L.L.C. v. Dollar Rent a Car Sys., Inc.*, 245 S.W.3d 488, 509–10 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (concluding that unsegregated attorney's fees amount was some evidence of what segregated amount should be).

is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee." *Rohrmoos Venture,* 578 S.W.3d at 501-02.

The Court also indicated that "fact finders should be concerned with awarding reasonable and necessary attorney's fees, not with any contractual obligations that may remain between the attorney and client." *Rohrmoos Venture,* 578 S.W.3d at 502 n. 13. Accordingly, it appears that an instruction to the jury on this point should be included in the jury charge.

The party seeking attorney's fees must submit the issue to the fact-finder (jury in most state court cases) because absent a finding on the issue, the request for fees may be waived. *Ginn*, 472 S.W.3d at 847–48.

Apart from the PJC, consideration of other legal issues and objections with regard to the jury charge in the area of attorney's fees are worth considering. For instance, the law clearly requires that expert opinion on attorney's fees address segregation of fees between time spent on recoverable claims and time spent on non-recoverable claims. Instructing the jury to segregate and only award recoverable fees may be warranted. *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546–47 (Tex. 1973) (reversing unsegregated award); *Seeger v. Del Lago Owners Association*, 09-19-00433-CV, 2022 WL 1572046, at *10 (Tex. App.—Beaumont May 19, 2022, no pet. h.) (jury instruction on segregation of fees not a comment on weight of the evidence and proper because "it: (1) assisted the jury; (2) is an accurate statement of the law; and (3) finds support in the pleadings and evidence.").

If recovering actual damages is a legal prerequisite to recover attorney's fees pursuant to a specific statute or contract, the conditioning potions of the charge preceding the jury questions on fees may be modified. *See Ortiz*, 589 S.W.3d at 135 (recovery of attorneys' fees under Tex. Ins. Code Ch. 541 "premised on an award of underlying 'actual damages'").

In those circumstances, a modified predicate question may be used.[28] In cases where attorney's fees may be recoverable both as an element of damages as well as independently in connection with prosecuting the litigation, a limiting instruction to the jury clarifying may be warranted. *TGI Fridays,* 2017 WL 1455407, at *16, 24-25.

The Texas Supreme Court recently addressed the recovery of conditional appellate fees. *Yowell v. Granite Operating Co*., 620 S.W.3d 335, 355 (Tex. 2020). With regards to recovery of conditional appellate fees, the Court's core holding in *Yowell* is that, while the *Rohrmoos Venture* lodestar approach does not strictly apply to prospective appellate fees, the mere fact that the required expert testimony addresses something that is "still hypothetical"—whether an appeal will take place, how much actual fees will be incurred, and what the results of the appeal will be—does not excuse the need for competent opinion testimony. Unlike testimony regarding attorney's fees at the trial court level which involves review of bills and historical information, expert attorney's fees testimony regarding a future appeal are forward-looking and uncertain. However, that uncertainty does not relieve the party of marshaling evidence of what *Yowell* describes as what it "reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." *Yowell*, 620 S.W.3d at 355 n.12.

Practitioners must understand that *Yowell* does not fall back or defer to the historical approach to proving appellate attorney's fees. Under the historical approach, a single expert would testify about both trial and appellate fees and would opine to the effect that "$___ would be a reasonable fee for the appeal," with the number often seemingly picked out of thin air. Following the traditional approach is no longer sufficient and could well result in zero appellate fees. *Yowell* makes clear that, in effect, sufficient evidence of appellate attorney's fees will require something of a "*Rohrmoos* guess." Rather than testify with hindsight about the reasonable number of hours spent and the reasonable rates for those services, an expert must opine about the reasonable hours *expected to be spent* on an appeal and reasonable rates for those *expected* services.

Given *Yowell* and that the current PJC question on attorney's fees contains multiple blanks for appeals, parties seeking their fees would be well-advised to pay careful attention to the attorney's fees testimony on appellate fees. *See* PJC § 115.60; s*ee also Int'l Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347, 349 (Tex. 1971) (requiring proof of appellate fees be determined during initial trial). Sometimes the appellate fee awards may be very substantial. *See, e.g.*, *Rio Grande Valley Gas Co. v. City of Edinburg*, 59 S.W.3d 199, 224 (Tex. App.—Corpus Christi 2000), *aff'd in part, rev'd in part*, 129 S.W.3d 74 (Tex. 2003) (affirming fee award of approximately $2.9 million for the trial and up to $3.5 million in appellate fees through all appeals in complex case involving "an extraordinary amount of work expended in preparing and trying the case").

Failure to provide specific, legally sufficient evidence of a reasonable appellate attorneys' fee on a case may preclude recovery of an appellate fee. *Hawkins*

[28] A modification may be something like: If you have answered "Yes" to Question ____ [*breach of* Tex. Ins. Code Ch. 541 *claim*] **and awarded an amount other than zero** in Question ____ [*damages for breach of contract claim*], then answer the following question. Otherwise, do not answer the following question.

v. Walker, 233 S.W.3d 380, 399 (Tex. App.—Fort Worth 2007, no pet.); *Kinsel*, 526 S.W.3d at 428 (sparse record for appellate fees resulted in no error finding in rejection of appellate fees); *KBIDC*, 2020 WL 5988014, at *23-24; *accord Apple Texas Restaurants, Inc. v. Shops Dunhill Ratel, LLC*, 05-20-01052, 2022 WL 883907, *6-7 (Tex. App.—Dallas May 25, 2022, pet. denied).

While some courts have reversed and rendered when the evidence of appellate fees is insufficient, most remand after a so-called *Yowell* review. *See e.g., Apple Texas Restaurants, Inc. v. Shops Dunhill Ratel, LLC*, 05-20-01052-CV, 2022 WL 883907, *6-7 (Tex. App.—Dallas March 25, 2022, no pet. h.); *Jimmie Luecke Children Partnership, Ltd. v. Droemer*, 03-20-00096-CV, 2022 WL 243162, at *8 (Tex. App.—Austin Jan. 27, 2022, pet. denied).

A party opposing appellate fees must challenge the evidence or otherwise even apparently "excessive" appellate fee testimony may survive a challenge on appeal. *Permian Power Tong*, 2017 Tex. App. LEXIS 5414 at *48-51; *Saad v. Valdez*, 14-15-00845-CV, 2017 Tex. App. LEXIS 2720 *62-64, 2017 WL 1181241 (Tex. App.—Houston [14th Dist.] March 30, 2017, *vacated but not withdraw*n per 2017 Tex. App. LEXIS 46492017 Tex. App. LEXIS 2720) (affirming disputed but not controverted testimony of $20,000 for appeal). The failure to timely object to the segregation of appellate fees waives that challenge on appeal. *Garcia v. Baumgarten*, 03-14-00267-CV, 2015 Tex. App. LEXIS 7878, 2015 WL 4603866, at *6 n.4 (Tex. App.—Austin July 30, 2015, no pet.). Uncontroverted estimates of appellate fees can support a judgment. *Morales v. Carlin*, 03-18-00376-CV, 2019 WL 1388524 *8 (Tex. App.—Austin Mar. 28, 2019, no pet). While appellate courts generally remand for a determination of the amount of attorney's fees, at least one recent opinion rendered judgment when the amount was not controverted. *VSDH Vaquero Venture, LTD. v. Gross*, 05-19-00217-CV, 2020 WL 3248481, *6 (Tex. App.—Dallas June 16, 2020, no pet.). Interestingly, towards the conclusion of the case, the court noted that: "This case has been in litigation for eleven years now—five years since the jury reached a verdict—and the only issue remaining is attorney's fees. Although appellees challenged the affidavit on grounds that it was outside the scope of VSDH's expert disclosures, they did not challenge the reasonableness and necessity of the fees sought, although given the opportunity." *Id*. at *7.

The Texas Supreme Court has emphasized that "[i]f trial attorney's fees are mandatory under section 38.001, then appellate attorney's fees are also mandatory when proof of reasonable fees is presented." *Ventling*, 466 S.W.3d at 154. The Court also ruled that an award of conditional appellate fees should not start accruing post judgment interest until the appeal is finally resolved in that party's favor. *Id.* at 156.[29] The award of appellate attorney's fees should be conditioned on success on appeal. *Smith v. Reid*, 2015 Tex. App. LEXIS 6387, 2015 WL 3895465, at *11 (Tex. App.—San Antonio June 24, 2015, pet. denied). However, there appears to be a split in the circuits as to whether the judgment's failure to have express language conditioning the award of appellate fees makes them unenforceable or whether the judgment can be read to implicitly condition the award of appellate fees on a successful appeal. *In re Estate of Booth*, 4-14-00897-CV, 2014 Tex. App. LEXIS 7047, 2016 WL 3625676, at *3 (July 6, 2016, pet. denied).

Having fees conditioned is important when the reviewing court renders. *See e.g., Sky View*, 2018 Tex. 515 at *32 (rendering that party take nothing of the conditional appellate fees when opponent successfully appealed the settlement-credits issue). "An unconditional award of appellate attorney's fees is improper…The proper remedy for an unconditional award of appellate attorney's fees is to modify the judgment so that the award depends on the paying party's lack of success on appeal." *Branfman v. Alkek,* 13-18-00554-CV, 2020 WL 2776719 *4 (Tex. App—Corpus Christi-Edinburg May 28, 2020, no pet.) (citations omitted). The failure to condition appellate attorney's fees on appeal may mercifully be corrected on appeal. *Moody v. National Western Life Ins. Co*., 634 S.W.3d 256, 287 (Tex. App.—Houston [1st Dist.] 2021, no pet.).

While in Texas state court, the trial court grants prospective conditional appellate fees, federal court practice is different. *See e.g. Halprin v. FDIC*, 5:13-CV-1042-RP, 2020 WL 411045 *8 (W.D. Tex. Jan. 24, 2020) (denying without prejudice request for appellate attorney's fees under the DTPA).

A recent Fifth Circuit opinion has stated that the applicable appellate standards in federal court are as follows:

> "An award of attorney's fees is entrusted to the sound discretion of the trial court." Where a district court awards fees, our review is for abuse of discretion. But "[t]he availability of attorneys' fees—as opposed to the amount awarded—is a question of law that we review *de novo*." "We review *de novo* a district court's compliance with our mandate."

Transverse LLC v. Iowa Wireless Serv's, LLC, 992 F.3d 336, 343 (5th Cir. 2021); *accord Apple Texas Restaurants, Inc. v. Shops Dunhill Ratel, LLC*, 05-20-

[29] A helpful case discussing language for conditional award of appellate fees is *Raia v. Crockett*, 16–00562–CV, 2017 Tex. App. LEXIS 4190, 2017 WL 2062268, at *9 (Tex. App.—Austin May 10, 2017, pet. denied).

01052-CV, 2022 WL 883907, *5 (Tex. App.—Dallas March 25, 2022, no pet. h.).

F. Stipulations and judicial notice

For any number of reasons, parties may not want to have attorneys, particularly attorneys involved in trying the case, take the witness stand and testify as to attorney's fees. Even though trial courts may be experts on fees, trial courts have explained their preference that parties and their lawyers try to work out fee disputes without court intervention through stipulations or similar agreements. *See e.g., Western Healthcare, LLC v. Nat'l Fire & Marine Ins. Co*., 3:16-CV-565-L, 2016 WL 4039183, at *1 (N.D. Tex. July 28, 2016) ("*The parties are strongly admonished to reach agreement on the amount of attorney's fees*, *as "[a] request for attorney's fees should not result in a second major litigation*.") (emphasis in original).

In an admonition seeking to avoid "satellite litigation as to attorney's fees", the Supreme Court noted that parties "should use discovery and pretrial procedure" to move fee issues forward. *Rohrmoos Venture,* 578 S.W.3d at 503.

Accordingly, Texas practice (and federal practice) allow for the parties to stipulate on some or all aspects of attorney's fees. *See, e.g.*, *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 405 n.73 (Tex. 2009) (noting that parties stipulated as to reasonable attorney's fees in the trial court and on appeal in case where recovery was under TEX. WATER CODE § 36.066(g)); *Hooks v. Samson Lone Star, LP*, 457 S.W. 3d 52, 69 (Tex. 2015) (parties may stipulate to amount of attorney's fees); *Chaparral Tex.*, 2009 WL 455282, at *6 (stipulation as to reasonableness of attorneys' hourly rates, not as to the amount of time).

Parties can also stipulate to try the attorney's fees issues to the court. *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 657–58 (Tex. App.—Dallas 2015, no pet.); *Great Northern Energy, Inc. v. Circle Ridge Production, Inc.,* 528 S.W.3d 644, 676 (Tex. App.—Texarkana March 22, 2017, pet. denied).

Parties may choose to stipulate as to what is reasonable (*e.g.*, an amount of fees or a particular rate), or other relevant matters. A stipulation as to the amount, reasonableness, and necessity of fees is generally an agreement as to what amount of attorney's fees the court would award the prevailing party, <u>not a basis</u> for an award of attorney's fees. *Ashford Partners, Ltd. v. ECO Res.*, 401 S.W.3d 35, 41 (Tex. 2012); *Milliken*, 2018 Tex. App. LEXIS 2652 at *13-14) (remanding attorney's fees issue despite stipulation on amount where prevailing party failed to segregate and opposing party objected); *Peterson Grp.*, 417 S.W.3d at 59–61; *see also J.C. Penney Co. Inc. v. Ozenne*, 453 S.W.3d 509, 512–19 (Tex. App.—Dallas 2014, pet. denied) (in shareholder derivative suit, trial court did not err in awarding attorney's fees of $3.1 million, 5.5 times the lodestar amount, where the parties stipulated in settlement that the trial court would determine attorney's fees due to plaintiff's lawyers and modified statutory standard of basis for fee award in derivative suits).

A stipulation as to reasonableness alone but preserving the right to challenge this legal point has prevailed. *8305 Broadway, Inc. v. J&J Martindale Ventures, LLC*, 04-16-0447-CV, 2017 Tex. App. LEXIS 5926 *10-15, 2017 WL 2791322 (Tex. App.—San Antonio June 28, 2017, no pet.).

Once a party makes stipulations on fees, it may not complain about procedural hurdles the opposing party would normally have to meet to show a right to fees. For instance, if there is a stipulation on the reasonableness of the fees, the losing party may not later complain that the other party failed to segregate its fees. *In re Guardianship of Burley*, 499 S.W.3d at 200. Having stipulated to the reasonableness and necessity of fees in the case, billing records were no longer necessary to support an award. *Mooti,* 2014 WL 2719916, at *6. Stipulations on fees "conclusively resolve the facts stipulated and all matters necessarily included therein and bind the court." *Ezy-Lift of Ca., Inc. v. EZY Acquisition, LLC*, 10-13-00058, 2014 Tex. App. LEXIS 4190 *14, 2014 WL 1516239, at *5 (Tex. App.—Houston [1st Dist.] April 17, 2014, pet. denied) (mem. op.) (parties stipulated that $200,000 was reasonable per side; therefore "the only remaining question on attorney's fees was a legal one: was either of the parties entitled to the recovery of their attorney's fees?"). Stated differently, once the opposing party stipulates to the reasonableness of the hours billed that are claimed, "the Court need not inquire further" on that point. *City of San Antonio*, 2017 WL 1382553, at *6.

However, a stipulation must be a clear admission, not ambiguous wording. *TeleResource Corp. v. Accor N. Am.*, *Inc*., 427 S.W.3d 511, 525–26 (Tex. App.—Fort Worth 2014, pet. denied) (cross-examination of other side's fee expert that reasonableness charges were "commensurate on both sides" failed to qualify as judicial admission or unequivocal stipulation to support award). A party can also waive its right to seek attorney's fees by stipulation. *Kamat v. Prakash*, 420 S.W.3d 890, 910–11 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In non-jury cases (bench trials or arbitrations), stipulations on all or some aspects of the attorneys' fee claims occur as well. *See, e.g.*, *Ergobilt, Inc. v. Neutral Posture Ergonomics, Inc.*, Civ. A. 397CV2548L, 2004

WL 1041586, at *2, 5–6 (N.D. Tex. May 6, 2004).[30] In non-jury trial proceedings including summary judgments, sanctions motions, or other proceedings, attorney's fees testimony is routinely presented by affidavit. *Ramirez*, 534 S.W.3d 490; *Good v. Baker*, 339 S.W.3d 260, 271–72 (Tex. App.—Texarkana 2011, pet. denied) (affidavit testimony may suffice to prove up fees if submitted in correct form). However, failing to present a stipulation or any evidence in a bench trial results in the same result as a jury trial—no fees. *Dyhre v. Hinman*, 05–16–00511–CV, 2017 Tex. App. LEXIS 2440 *8-9, 2017 WL 1075614, at *4 (Tex. App.—Dallas March 22, 2017, pet. denied) "Here, there is no evidence whatsoever concerning attorney's fees. As a result, there is no evidence to support an implied finding on attorney's fees."). Fees obtained not on summary judgment or trial but on a motion to award fees pursuant to contract without objection thereby any complaint was waived. *Morales v. Carlin*, 03-18-00376-CV, 2019 WL 1388524 *7 (Tex. App.—Austin Mar. 28, 2019, no pet.).

Affidavits by attorneys opposing a fee request which specify the grounds for objections may be sufficient to raise a fact issue on the amount and/or reasonableness. *Campone v. Kline*, 03-19-00908, 2020 WL 7640040, at *7 (Tex. App.—Austin Dec. 22, 2020, no pet.); *DMC Valley Ranch, L.L.C. v. HPSC, Inc*., 05-11-01527, 2014 WL 2538880, at *3 (Tex. App.—Dallas June 5, 2014, no pet.); *Vega v. Compass Bank*, 04-13-00383, 2014 WL 953466, at *3–4 (Tex. App.—San Antonio March 12, 2014, no pet.). However, a controverting affidavit that is conclusory and fails to set forth the factual bases is insufficient to defeat a summary judgment on attorney's fees. *Fuhrmann v. C & J Gray Investments Partners, Ltd.,* 05-18-00683-CV, 2019 WL 3798181, *7 (Tex. App.—Dallas Aug. 13, 2019, no pet.); *Carto Properties, LLC v. Briar Capital, L.P.*, 01-15-01114-CV, 2018 WL 827758 *14, 2018 Tex. App. LEXIS 1186 *38 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

Competent, uncontroverted attorney's fees evidence from the party's lawyer may support a fee award if clear, positive, and direct and free from contradiction. *In re Moore*, 511 S.W.3d 278, 288 (Tex. App.—Dallas 2016, no pet.); *Classic C Homes, Inc. v. Homeowners Mang'mt Enterprises, Inc*., 02-14-00243-CV, 2015 WL 5461517, at *5 (Tex. App.—Fort Worth Sept. 17, 2015, no pet.) (clear, direct, uncontroverted evidence of fees from an interested witness will establish reasonableness and necessity where the opposing party had means and opportunity to disprove testimony but failed to do so).

Trial courts are considered experts as to the reasonableness of attorney's fees and can draw on their common knowledge and experience as lawyers and as judges in considering the testimony, the record, and the amount in controversy in determining attorney's fees. *McMahon v. Zimmerman*, 433 S.W.3d 680, 693 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Wherley v. Schellschmidt*, 3:12-CV-0242-D, 2014 WL 3513028, at *2 (N.D. Tex. July 16, 2014) (citing *Primrose Operating Co. v. Nat'l Am. Ins. Co*., 382 F.3d 546, 562 (5th Cir. 2004)).

Chapter 38 also allows the trial court to take judicial notice of aspects of attorney's fees claims under that statute. TEX. CIV. PRAC. & REM. CODE § 38.004; *Gill Sav. Ass'n v. Chair King*, 797 S.W.2d 31, 32 (Tex. 1990); *Cap Rock Elev. Corp. v. Tex. Utils. Elec. Co.*, 874 S.W.2d 92, 101 (Tex. App.—El Paso 1994, no writ) (concluding trial court may take judicial notice of customary fees even without a formal request). However, a 2015 opinion has noted that when the lodestar method is used, the Texas Supreme Court's *Long* opinion "has effectively abrogated a number of Texas precedents regarding the application of Chapter 38." *Auz*, 477 S.W.3d at 355. In 2018, an appellate opinion noted that it presumed that the trial court took judicial notice under Chapter 38 in a fee dispute. *Robinson v. Ochoa*, 13-16-0357-CV, 2018 WL 1633516 *7, 2018 Tex. App. LEXIS 2431 *19 (Tex. App.—Corpus Christi—Edinburg Apr. 5, 2018, pet. denied); *but see Logan v. Randall*, 05-19-00043-CV, 2020 WL 948381, *8 (Tex. App.—Dallas Feb. 27, 2020, pet. denied) (post *Rohrmoos Venture* but presuming trial court in bench trial took judicial notice under Chapter 38 to affirm award).

By contrast, if the basis for the fee award is not Chapter 38, then "the court may not take judicial notice that the usual and customary fees are reasonable but, rather, the party must offer legally and factually sufficient evidence on the issue." *Jones v. Patterson*, 11-17-00112-CV, 2019 WL 2051301 (Tex. App.—Eastland May 9, 2019, no pet.) (judge could not take judicial notice of fees in a TTLA case) citing *Scott v. Spalding*, 11-07-00264-CV, 2009 WL 223459 *5 (Tex. App.—Eastland Jan. 30, 2009, no pet.) (no judicial notice in DTPA case).

A trial court's determination of fees is hardly absolute and may be subject to abuse of discretion review and other limitations. *See, e.g.*, *Marauder Corp. v. Beall*, 301 S.W.3d 817, 824 (Tex. App.—Dallas 2010, no pet.) (holding trial court could not increase attorney's fees above amount found by jury); *but see Ridge Oil Co. v. Guinn Invs., Inc*., 148 S.W.3d 143, 161 (Tex. 2004) (holding trial court has discretion to conclude that a jury award of reasonable and necessary fees should be reduced based on equity and justice in Chapter 37 case).

While ordinarily, the reasonableness of fees is left to the judgment of the factfinder, an appellate court may

[30] Arbitration is the proper place to seek appellate attorney's fees, not the trial court in the post-arbitration vacate or confirm proceedings. *D.R. Horton-Texas, Ltd. v. Bernhard*, 423 S.W.3d 532, 536 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

nevertheless "exercise its discretion and render judgment for attorney's fees in the interest of judicial economy." *Spivey v. Goodwin*, 10-16-00178-CV, 2017 Tex. App. LEXIS 5215, 2017 WL 2507841 at *5 (Tex. App.—Waco June 7, 2017, no pet.).

G. Objections to evidence or the right to recover

Regardless of the procedural posture of the attorney's fees dispute, the party being asked to pay its opponents' attorney's fees may want to challenge the evidence.[31] The proper manner of evidence challenges may differ depending on the procedural posture of the dispute (trial, summary judgment, etc.). There are numerous potential objections, including the following.

1. Failure to properly disclose

A party seeking attorney's fees should disclose the expert opinions, the basis for these opinions, and other discoverable information just like expert opinions in the context of damages sought as part of a claim. *Mid Continent Lift & Equip., LLC v. J. McNeil Pilot Car Serv.*, 537 S.W.3d 660, 674-76 (Tex. App.—Austin 2017, no pet.) (affirming exclusion for failing to comply with scheduling order and discussing expert designation rules). Failure to timely disclose or failure to properly disclose may result in exclusion of the opinion evidence and therefore the factual basis to support a fee award. *OIC Holdings*, 2019 WL 2098616 at *7-9 (excluding only basis of fees because of no designation on counterclaim for fees resulting in take-nothing judgment); *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671–72 (Tex. 1990); *Green Tree Servicing, LLC v. Sanders*, 04-13-00156-CV, 2014 WL 2443811, at *4–6 (Tex. App.—San Antonio May 28, 2014, no pet.) (mem. op.) (failure to identify and disclose counsel as a testifying expert as required by TEX. R. CIV. P 194.2(f) required exclusion and the trial court abused its discretion in allowing counsel to testify regarding attorney's fees); *Progressive Cnty. Mut. Ins. Co. v. Roberson*, 11-05-00063-CV, 2006 WL 2507621, at *1–3 (Tex. App.—Eastland Aug. 31, 2006, no pet.) (mem. op.) (reversing award of attorney's fees because attorney not timely designated as expert witness and no good cause showing made to overcome automatic sanction of TEX. R. CIV. P. 193.6); *Texas Mut. Ins. Co. v. Durst*, 04-07-00862-CV, 2009 WL 490056, at *3 (Tex. App.—San Antonio Feb. 25, 2009, no pet.); *Tex. Mun. League Intergovernmental Risk Pool v. Burns*, 209 S.W.3d 806, 817–18 (Tex. App.—Fort Worth 2006, no pet.).

However, courts still allow considerable leeway in this area. *See e.g., Allstate Fire & Cas. Ins. Co. v. Howell-Herring,* 02-20-00175-CV, 2022 WL 1183336, *4-5 (Tex. App.—Fort Worth Apr. 21, 2022, no pet) (trial court did not abuse discretion in allowing undesignated expert attorney's fees witness when no surprise that claimant seeking fees); *Hsu v. Conterra Servs, LLC,* 01-20-00182-CV, 2021 WL 921672, at *4-5 (Tex. App.—Houston [1st Dist.] Mar. 11, 2021, no pet) (no undue surprise in construction prompt pay act claim even though counsel not properly designated); *VSDH Vaquero Venture, LTD. v. Gross,* 05-19-00217-CV, 2020 WL 3248481, *4-5 (Tex. App.—Dallas June 16, 2020, no pet.) (trial court abused its discretion by striking attorney's fees expert testimony despite defective designation where previous disclosure of information showed absence of unfair surprise or prejudice); *Syrian American Oil Corporation, S.A. v. Pecten Orient. Co.*, 01–15–00424–CV, 2017 WL 1955403, at *13 (Tex. App.—Houston [1stDist.] May 11, 2017, no pet.); *Beard Family P'ship v. Commercial Indem. Ins. Co.*, 116 S.W.3d 839, 850 (Tex. App.—Austin 2003, no pet.) (affirming trial court's decision that, despite failure to designate, attorney's fees expert allowed to testify because of good cause of inadvertence of counsel and absence of surprise); *Schlager v. Clements*, 939 S.W.2d 183, 192 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (affirming trial court's decision that despite non-disclosure or production of documents relied upon by experts, attorney could testify on fees). No unfair surprise where despite failure to supplement, there was no surprise when counsel admitted that he "definitely" had been made aware of the fee request weeks before trial. *Peoples Club of Nigeria, USA v. Okpara*, No 14-17-00099-CV, 2018 Tex. App. LEXIS 7708 *22-23 (Tex. App.—Houston [14th Dist.] Sept. 20, 2018, no pet.); *Schlager v. Clements*, 939 S.W.2d 183, 192 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (affirming trial court's decision that despite non-disclosure or production of documents relied upon by experts, attorney could testify on fees); *Primrose*, 382 F.3d at 563 (no abuse of discretion to allow attorney's fees testimony over Rule 26(a) and Rule 37 objection because of only partial disclosure of attorney's fees opinion and production of billing invoices).

2. Expert opinion—TRE 702–705

Lay witness testimony is not competent or admissible as to the reasonableness and necessity of attorney's fees, so expert witness testimony is required to support a fee award. *Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP*, 422 S.W.3d 821, 830 (Tex. App.—Dallas 2014, no pet.). The primary vehicle for obtaining an award of attorney's fees is expert witness testimony; lawyer-expert witnesses are potentially subject to attacks regarding qualifications, relevancy, and reliability like all other expert witnesses. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142, 147 (1999); *Gammill v. Jack Williams Chevrolet, Inc.*, 972

[31] Courts are not "obligated *sua sponte* to sift through fee records searching for vague entries or block-billing" so the failure to challenge specific billing entries may result in the fees being supported. *Wherley*, 2014 WL 3513028, at *4 n.6.

S.W.2d 713, 718–19 (Tex. 1998) (noting that all proposed expert testimony in civil cases is subject to *Daubert/Robinson* challenges and scrutiny). Cross-examination remains the primary vehicle for attacking shaky but admissible evidence. *Primrose Operating,* 382 F.3d at 562. *Daubert/Robinson's* criteria have also been applied somewhat analogously to witnesses testifying as to legal issues. *Akin v. Santa Clara Land Co., Ltd.*, 34 S.W.3d 334 (Tex. App.—San Antonio 2000, pet. denied).

For an expert's testimony to be admissible, the expert must be qualified, and the expert's opinion must be relevant to the issues in the case and based on a reliable foundation. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629–31 (Tex. 2002). The parties proffering expert testimony bear the burden of proving to the court that that the expert is qualified and that each proffered opinion is relevant and based on reliable methods, research, reasoning, and underlying data. *Gammill,* 972 S.W.2d at 718–19; *Kuhmo Tire*, 526 U.S. at 150–57. Experts are considered interested witnesses. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). An expert's conclusions, unaccompanied by the specific basis for the opinions, may be found unreliable and therefore inadmissible. *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999); *Earle v. Ratliffe*, 998 S.W.2d 882, 890 (Tex. 1999). Stated in *Daubert* terms, an award of attorney's fees "cannot be based on the *ipse dixit* of the testifying expert." *Rohrmoos Venture,* 578 S.W.3d at 486.

Historically, the threshold level of qualifications required to admit attorney expert testimony on attorney's fees is low. *See, e.g.*, *Liptak v. Pensabene*, 736 S.W.2d 953, 957–58 (Tex. App.—Tyler 1987, no writ) (no challenge to qualifications and expert relied on hearsay which is the type relied upon by attorney experts in forming opinions on the subject of reasonable attorney's fees). However, some courts recognize that just as not every doctor is competent to testify on every medical issue,[32] not every lawyer is competent to testify on every legal issue. *See, e.g.*, *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass. 1995) (holding J.D. not qualified to opine on every legal issue).

Frequently, the lawyer handling the case for the party will testify on his or her fees which will ordinarily resolve most challenges to qualifications and relevance. *Rohrmoos Venture,* 578 S.W.3d at 490. But that may not always be the case, and the situation of the trial lawyer as a witness presents additional issues and challenges discussed in Section III.C below. As the Texas Supreme Court wrote:

> If a party is concerned about the discovery of its privileged information through expert discovery, the party may designate another expert in the first place or, presumably, withdraw a currently designated expert and name another.
>
> *In re National Lloyds Ins. Co.*, 532 S.W.3d at 814 n.89.

In some instances, independent attorney's fees experts may be retained to establish the reasonableness of the attorney's fees and to prove up the attorney's fees evidence. *See, e.g.*, *Rio Grande Valley Gas*, 59 S.W.3d at 223 (noting that personal knowledge not required and experts may rely on summaries or other data reasonably relied on by experts in the relevant field).

If the reasonableness or necessity of particular types of specialized fees (*e.g.*, patent law issues) are at issue, there may be admissibility challenges to proposed testimony from lawyers unfamiliar with the relevant area of law or unfamiliar with the amounts customarily charged for performing similar work. Appellate fees or fees involving work done by foreign lawyers in foreign law matters may also be subject to qualification or reliability challenges.

3. Conclusory and other summary judgment objections

Another possible challenge to attorney's fees testimony in the context of summary judgments or other resolution of the issues on paper could include deficiencies in the affidavit or other objections. *See, e.g.*, *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013) (attorney expert affidavit was conclusory and thus no evidence to support a judgment even absent an objection to their admission). One example would be that conclusory opinions make it impossible to determine what work was actually performed or whether the work related to the issues in the motion. *See, e.g.*, *Radio Stations KSCS v. Jennings,* 750 S.W.2d 760, 761–62 (Tex. 1988); *Chapa,* 212 S.W.3d at 313–14. Merely stating a dollar amount without producing bills or other back up information may make a conclusory statement arguably the equivalent of "no evidence." *See, e.g.*, *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir. 1985) (concluding that conclusory facts and conclusions of law are not proper summary judgment evidence). A 2014 case rejected objections that an attorney's fees affidavit was conclusory and failed to offer sufficient *Arthur Andersen* evidence, defining a conclusory statement as "one that does not provide the underlying facts to support the conclusion." *Ellis v. Renaissance on Turtle Creek Condo. Ass'n, Inc.*,

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[32] *Larson v. Downing*, 197 S.W.3d 303, 304 (Tex. 2006) (reasoning M.D. not automatically qualified to testify as an expert on every medical question) (citing *Broders*, 924 S.W.2d 148, 152–54 (Tex. 1996) (reasoning mere M.D. does not enable doctors to testify as to every aspect of medicine)); *Roberts v. Williamson*, 111 S.W.3d 113, 121–22 (Tex. 2003) (concluding pediatrician with specialized knowledge could testify regarding neurological injuries even though not neurologist).

426 S.W.3d 843, 859–60 (Tex. App.—Dallas 2014, pet. denied).

Another objection in the summary judgment context may be to records that are referenced but not attached to a sworn statement. *Guthrie v. Suiter*, 934 S.W.2d 820, 824–25 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 444 (Tex. App.—El Paso 1994, writ denied).

4. Failure to satisfy procedural or other legal, requirements, a conditions precedent (e.g., presentment), or a failure to segregate

Some statutes permitting parties to recover attorney's fees may have additional procedural requirements or conditions precedent that may not have been complied with and which could form the basis for other objections. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 38.002 (30-day presentment requirement to recover fees under Chapter 38).[33] Recent cases have indicated that the presentment requirement still has teeth. *Texas Black Iron, Inc. v. Arawak Energy International Ltd*., 566 S.W.3d 801, 824-25 (Tex. App.-Houston [14th Dist.] 2018, pet. denied)) (rendering judgment where admissible summary judgment evidence failed to show presentment as a matter of law); *Puga v. New York Marine & General Ins. Co*., 2:19-CV-381, 2021 WL2637520, at *3 (S.D. Tex. June 25, 2021) (denying motion for attorney's fees because of lack of presentment before suit was filed); *Sacks v. Hall*, 481 S.W.3d 238, 250-52 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *see also Rhymes v. Filter Resources, Inc.,* 9-14-00482-CV, 2016 WL 5395548, at *12 (Tex. App.—Beaumont Sept. 22, 2016), withdrawn and superseded at 2016 WL 6809251 (agreed motion to set aside and vacate).

Perhaps no case is more compelling on the point of the presentment requirement than a Houston case finding that a party's failure to obtain a jury finding on presentment where the record contained some disputed—but not conclusive—evidence of presentment resulted in a take-nothing rendition on fees. *Svoboda v. Thai*, 01-17-00584-CV, 2019 WL 1442434 *4-7 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.) (presentment is fact issue for jury when properly contested in pleadings and not established as a matter of law); *see also Lyon v. Bldg. Galveston, Inc.*, 01-19-00571-CV, 2020 WL 7391705, at *5-6 (Tex. App.—Houston [1st Dist.] Dec. 17, 2020, pet. denied). By contrast, other cases have been more lenient on what passes as presentment. *Sandberg v. STMicroelectronics, Inc*., 05-18-01360-CV, 2020 WL 1809469, *13 (Tex. App.—Dallas Apr. 9, 2020, pet. denied) (finding demand for former employee to return computer and information sufficed).

Similarly, failing to send a pre-suit demand may preclude certain attorney's fees recoveries in insurance disputes. *J.P. Columbus Warehousing, Inc. v. United Fire & Cas. Co*., 5:18-cv-00100, 2019 WL 453378 *3-4 (S.D. Tex. Jan. 15, 2019) adopted by 2019 WL 450681 (S.D. Tex. Feb. 5, 2019) (granting motion to limit attorney's fees due to failure to give pre-suit notice).

Property Code § 24.006 has a notice provision as well. *Sloane*, 577 S.W.3d at 620 n.11.

The Texas Supreme Court in a 2018 case also referenced the excessive demand defense in a case where it found the proof insufficient to defeat the attorney's fees award. *State Farm Lloyds v. Fuentes*, 16-0369, 549 S.W. 3d 585, 587 (Tex. 2018), citing to *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981) ("Generally, a 'creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt.'"); *Svoboda*, 2019 WL 1442434 at *4 (jury answered charge question that demand was not excessive). The mere fact that a judgment amount awards less than the original claim does not render the original presented claim as excessive or that the claimant acted unreasonably or in bad faith. *Findlay*, 611 S.W.2d at 58; *City of Waco v. Kleinfelder Cent., Inc*., 6:15-CV-310 RP, 2017 U.S. Dist. LEXIS 12134 *9, 2017 WL 401281 (W.D. Tex. Jan. 30, 2017); *Benson*, 2013 Tex. App. LEXIS 14453 at *40. Not timely raising this argument may result in the "excessive demand" argument being waived. *Plains Cotton Coop Ass'n v. Gray,* 672 Fed. Appx. 372, 378 (5th Cir. 2016). Not only should this be raised, the "excessive demand" argument should be plead affirmatively. *M Scott Constr., Ltd. v. Mireles*, 14-15-00701-CV, 2016 Tex. App. LEXIS 12587 *13-14,

[33] A claimant may recover its attorney's fees under Chapter 38 by pleading and proving that it is represented by an attorney, timely presented its claim to the opposing party, and the opposing party failed to tender performance. TEX. CIV. PRAC. & REM. CODE § 38.002; *Jones v. Kelley,* 614 S.W.2d 95, 100 (Tex. 1981); *Harrison v. Gemdrill Int'l, Inc.,* 981 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Wallace Roofing, Inc. v. Benson*, 03-11-00055-CV, 2013 Tex. App. LEXIS 14453 *38, 2013 WL 6459757 (Tex. App.—Austin Nov. 27, 2013, pet. denied). No particular form of presentment is required. *Jones,* 614 S.W.2d at 100; *Tierney v. Lane, Gorman, Trubitt & Co.,* 664 S.W.2d 840, 843 (Tex. App.—Corpus Christi 1984, no writ). Nor is a claimant required to make presentment for the exact amount it is entitled to recover at trial. *Panizo v. Young Men's Christian Ass'n,* 938 S.W.2d 163, 169 (Tex. App.—Houston [1st Dist.] 1996, no writ). To place presentment at issue the party must specifically deny presentment in the answer. *Marrs & Smith P'ship v. Sombrero Oil & Gas Co., LLC*, 511 S.W.3d 53, 63-64 (Tex. App.—El Paso 2014, no pet.). An opponent's admission that the claimant presented its claim after suit had been filed and the defendant refused to tender payment within 30 days may lead to a conclusion that presentment was established as a matter of law. *Benson*, 2013 Tex. App. LEXIS 14453 at *39 n.5.

2016 WL 6990046 (Tex. App. Houston [14th Dist.] Nov. 29, 2016, no pet.).

If an adverse party wants to challenge a claimant having satisfied the presentment requirement, in addition to affirmatively pleading that all conditions precedent have not been satisfied, special exceptions can be filed and considered by the court on the point, otherwise, this could result in a waiver of the presentment requirement. *Stevens v. Avent*, 07-20-00265-CV, 2022 WL 393576, *6 (Tex. App.—Amarillo Feb. 9, 2022, no pet. h.). A party assigned rights of another may also inherit previous presentments. *Thomas v. California Golden Coast, LLC*, 01–15–01046–CV, 2017 Tex. App. LEXIS 4443, 2017 WL 2117540, at *5 (Tex. App.—Houston [1st Dist.] May 16, 2017, pet denied).

There may also be other prerequisites to recovering attorney's fees. *See, e.g.*, *Ortiz*, 589 S.W.3d at 135 (recovery of attorneys' fees under Tex. Ins. Code Ch. 541 "premised on an award of underlying 'actual damages'"); *State Farm Mut. Auto. Ins. Co. v. Nickerson*, 216 S.W.3d 823, 824 (Tex. 2006) (holding that a judgment establishing liability and underinsured status of third party motorist is prerequisite to insurer being liable for attorney's fees under Chapter 38 in UIM/UM claim); *but see Allstate Ins. Co. v. Irwin*, 627 S.W. 263, 266-67 (Tex. 2021) (UDJA can be a proper basis to recover attorneys' fees in UIM/UM dispute); *see also Tarrant Cnty. Democratic Party v. Steen*, 434 S.W.3d 188, 198 (Tex. App.—San Antonio 2014), *rev'd on other grounds*, 473 S.W.3d 780 (Tex. 2015) (statutory prerequisites or waiver of immunity from suit under Election Code); *Law Offices of Preston Henrichson, P.C. v. Starr Cnty. Hosp. Dist.*, 04-13-00324, 2014 Tex. App. LEXIS 6771, 2014 WL 2917440, at *3 (Tex. App.—San Antonio June 25, 2014, no pet.) (failure to request fees from law firm as opposed to the client in the motion failed to provide notice).

Another ground that may preclude the recovery of attorney's fees is if an ethical rule or other law precludes the recovery. For instance, failing to have a written fee agreement expressly providing who is obligated to pay the attorney's fees and the basis for payment of the attorney's fees may be fatal to the party seeking the fees. *Grantham v. J&B Sausage Co., Inc.*, 14-15-00227-CV, 2016 Tex. App. LEXIS 5168, 2016 WL 2935874, at *4 (Tex. App.—Houston [14th Dist.] May 17, 2016, no pet.) (attorney seeking payment of fees from unfunded settlement agreement suggesting that lawyer would be paid by the adverse party failed to establish the right to recover fees directly from the adverse party due to absence of a contract or *quantum meruit* and thus dismissal under TEX. R. CIV. P. 91a was proper). Having clear, written agreements regarding who will pay the lawyer and the terms for payments may be essential and even required to establish payment if payment obligations are later disputed. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638 (Tex. 2014).

Contingency fee agreements must be in writing to be enforced. *Hill,* 544 S.W.3d at 739 (Tex. 2018) (holding that a contingency fee agreement contrary to Tex. Govt Code § 82.065 violates the statute of frauds and cannot be considered evidence of reasonable value of attorney's fees services since a contingency fee must be in writing to be enforceable).[34] Nevertheless, an attorney may recover in quantum meruit. *Id.* Contingency fee agreements tend to be subject to close scrutiny and lawyers have a duty to "appreciate the importance of words." *In re Davenport*, 522 S.W.3d 452, 458 (Tex. 2017). A recent federal opinion discusses the role of contingency fee agreements in a post-*Rohrmoos Ventures* world, applying the lodestar method even when a contingency fee agreement was agreed to by the client and attorneys. *El Campo Ventures, LLC v. Stratton Securities Inc.*, 1:20-CV-00560-RP, 2022 WL 1518926, at *3-6 (W.D. Tex. Feb. 1, 2022).

5. Failure to exercise billing judgment

Failing to exercise billing judgment may lead to a reduction of requested fees. *Martinez v. Ranch Masonry, Inc.*, 18-20369, 2019 WL 258230 (5th Cir. Jan. 17, 2019) (affirming district court reduction of fees by 50%); *Tech. Pharm Servs., LLC v. Alixa Rx, LLC,* 298 F. Supp. 3d 892, 906 (E.D. Tex. 2017) (finding that firm "engaged in block billing…[and] did not always itemize time on a per-task basis" and accordingly reducing the hours by 6% for each firm or 12%); *Aguayo*, 2016 U.S. Dist. LEXIS 169702 at *27 (excessive mediation prep time in requesting 23 hours for each mediation in class action).

According to Texas Supreme Court and Fifth Circuit authority, exercising billing judgment means that charges for "duplicative, excessive, or inadequately documented work should be excluded." *El Apple*, 370 S.W.3d at 762 (citing *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993)); *see also Walker*, 99 F.3d at 769. This factor may weigh against the reasonableness of a fee request and could be the basis to object. *Gurule*, 912 F.3d at 256-61; *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799–802 (5th Cir. 2006) (reasoning downward adjustment justified where counsel has failed to exercise billing judgment); *Rouse v. Target Corp.*, 181 F. Supp. 3d 379, 388-390 (S.D. Tex. 2016) (noting duplicative and excessive time). Cuts may be made by item or may be "across-the-board" reductions, particularly when fee documentation is voluminous. *Aguayo*, 2016 U.S. Dist. LEXIS 169702 at *8. Trial

[34] An odd case provides an interesting variation. *Miller Weisbrod, LLP v. Klein Frank, PC*, 3:13-CV-2695-B, 2014 WL 3512994, at *9 (N.D. Tex. July 16, 2014).

court in best position to determine whether fees excessive or not based on monitoring the discovery and case. *Apache Corp. v. Davis*, 14-17-00306-CV, 2019 WL 1768575 *19 (Tex. App.-Houston [14th Dist.] Apr. 23, 2019), *rev'd on other grounds*, 627 S.W.3d 324 , 326 (Tex. 2021).

There may be other particular considerations in a claim for attorney's fees including overstaffing, duplicative or unnecessary work, and billing for administrative tasks. *But see Ozcelebi v. Chowdary*, 13-16-00346-CV, 2018 Tex. App.—LEXIS 7500 *86 (Tex. App.—Corpus Christi -Edinburg Sept. 13, 2018, pet. denied) (rejecting that entries are too general and overbroad to determine whether work was duplicative or excessive). Even multiple attorneys working on a matter may not be a problem, particularly if the attorneys are performing specific or discrete tasks. *OCA Greater Houston,* 2018 WL 6201955 at *4 (rejecting argument that "the fees and costs related to the three attorneys who did not argue before the Fifth Circuit to be excessive or duplicative"); *Chaparral Tex., L.P. v. W. Dale Morris, Inc*., C.A. H-06-2468, 2009 WL 455282, at *6 (S.D. Tex. Feb. 23, 2009). Work performed by in-house counsel may be recoverable as attorney's fees. *Tesoro Petrol. Corp. v. Coastal Ref. & Mktg., Inc*., 754 S.W.2d 764, 766–67 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Legal aid attorneys may also receive the same hourly rate as counsel in the private bar with comparable experience and skills. *Saldivar v. Rodela*, 894 F. Supp. 2d 916, 934 (W.D. Tex. 2012) (fee award in ICARA action).

The question of whether a pro se attorney may recover attorney's fees seems perhaps in flux or may depend on the underlying statute. Older case law supported a pro se attorney's fee recovery. *See Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex. App.—Eastland 1994, writ denied). However, more recent Texas Supreme Court and other authorities, particularly in the Texas Public Information Act (TPIA) context, suggest that pro se attorneys who "did not incur attorney's fees as that term is used in its ordinary meaning because he did not at any time become liable for attorney's fees" may not recover attorney's fees. *Jackson v. SOAH*, 351 S.W.3d 290, 300 (Tex. 2011); *accord Gahagan v. US Citizenship & Immigration Services*, 911 F.3d 298, 305 (5th Cir, 2018) (pro se attorneys may not recover fee awards under FOIA); *Franklin v. United States*, 49 F. 4th 429, 438-39 (5th Cir. 2022) (no abuse of discretion in denying fees to FOIA requestor to IRS); *York v. Texas Guaranteed Student Loan Corp*., 408 S.W.3d 677, (Tex. App.—Austin 2013, no pet.) (concluding attorney requestor who was retained by an anonymous client could not recover attorney's fees under Tex. Gov't Code § 552.323).

Under the billing judgment rule, attorney's fees should generally be based on contemporaneously created, detailed records showing appropriate hours and hourly rates. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325 (5th Cir. 1995) (finding party seeking attorney's fees failed to satisfy its burden of proving entitlement to compensation by failing to submit contemporaneous billing statements or other adequate evidence to determine reasonable hours); *Western-Southern Life*, 193 F. Supp. 3d at 782-83 (same).[35]

Travel time may properly be reduced from fee applications by courts. *In re Babcock & Wilcox Co*., 526 F.3d 824, 828 (5th Cir. 2008) (noting no consensus exists on whether non-working travel time should be discounted, but finding no abuse of discretion in the bankruptcy court reducing the travel time by half); *Kiewit Offshore Servs, Ltd. v. Dresser-Rand Global Services*, H-15-1299, 2017 WL 2599325 at *5 (S.D. Tex. June 15, 2017) (reducing non-working travel time); *Field Motor Sports*, 2016 WL 2758183, at *10 (discounting travel time by 50% as is regularly done under New York law);*Watkins*, 7 F.3d at 459. Other examples of time that may be excluded in the exercise of billing judgment include tasks not strictly related to the litigation such as press conferences and lobbying efforts. *Watkins*, 7 F.3d at 458; *DeLeon v. Abbott*, 687 Fed. Appx. 340, 344-45 (5th Cir. 2017) (Elrod, J. concurring in part and dissenting in part) (contending that media work and coordinating with favorable amicus—as opposed to responding to opposing amicus—should not be recoverable). Translation services by paralegals may also be subject to being cut or reduced. *Aguayo*, 2016 U.S. Dist. LEXIS 169702 at *7,11,17-18 (rejecting the "hard line" that translation work is categorically not "legal work").

6. Block billing

"Redaction of billing records is acceptable so long as the court has sufficient information to form an opinion on the reasonableness of the fees." *Randolph v. Dimension Films*, 634 F. Supp. 2d 779, 800 (S.D. Tex. 2009); *John Moore Services, Inc. v. Better Business Bureau of Metro. Houston, Inc*., 01-1400906-CV, 2016 WL 3162206, at *5 (Tex. App.—Houston [1st Dist.] June 2, 2016, pet. denied). Other recent cases confirm that as long as the redactions allow for sufficient determination as to "the attorney who performed the task, the date, the attorney's billing rate, the length of time to complete the task, and a description of the task", that redactions do not limit or foreclose the recovery of fees. *See e.g., THB Construction, LLC v. Holt Texas, Ltd.*, 05-20-00020-CV, 2022 WL 123105, *4 (Tex. App.—Dallas Jan. 13, 2022), judgment but not opinion

[35] While the absence of contemporaneous records does not preclude an award of fees *per se*, it certainly makes evaluating the reasonableness of a fee application more difficult because the claims for fees are based on materials recreated after the litigation's results are known and long after the services have been rendered.

vacated, 2022 WL 336559 (Tex. App.—Dallas Feb. 4, 2022, no pet.).

However, "redacted must be excluded if they do not provide sufficient information to classify or evaluate the activities or hours expended." *Randolph*, 634 F. Supp. 2d at 800; *Monarch Investments*, 2017 WL 1034647, at *4 (W.D. Tex. March 16, 2017) (discounting excessively redacted fees). Or as a 2022 case found, "counsel's invoices are so heavily redacted that no tasks are visible" thereby the failed party seeking fees "failed to produce legally sufficient evidence to support an award of fees for legal services" for a period of time, warranting reversal of the fee award. *THB Construction*, 2022 WL 123105 at *4.

Cases have indicated that even if not requested, redacted billing records should be provided if a party has the burden of proof on proving up attorney's fees, which supports the discoverability of billing records. *Western-Southern Life*, 193 F. Supp. 3d at 781.

Courts have expressed concerns also about invoices with block billing. *DeLeon*, 687 Fed. Appx. at 346 n.4 (Elrod, J. concurring in part and dissenting in part) ("The upshot of this jurisprudence is that litigants take their chances in submitting fee requests containing block-billed entries and will have no cause to complain if a district court reduces the amount requested on this basis."); *Tech. Pharm Servs.,* 298 F. Supp. 3d at 905 2017) (finding that firm "engaged in block billing…[and] did not always itemize time on a per-task basis" and accordingly reducing the hours by 6%). While block billing—or the practice of general entries for all time spent on the matter in a day rather than more detailed and separate entries for a discrete task—may be disfavored by some clients who are routinely in litigation, insurance companies, or others including some federal court opinions,[36] block billing may be adequate to support a fee award.

7. Challenge *after* the testimony as legally insufficient

A party may want to consider challenging the testimony as legally insufficient before or even after the testimony has been presented to the fact-finder over an objection or even on appeal. *Beaumont v. Basham*, 205 S.W.3d 608, 621 (Tex. App.—Waco 2006, pet. denied) ("Although an objection must be made to challenge the reliability of an expert's testimony, no trial objection is required when the testimony is challenged as conclusory or speculative and therefore non-probative on its face," meaning that it has no factual substantiation in the record (citing *Coastal Transp. Co. v. Crown Cent. Petro. Corp*., 136 S.W.3d 227, 233 (Tex. 2004))). Additionally, if a party fails to present evidence to support a fee award, such as in the case of appellate attorney's fees, a legal challenge may result in a reversal of that type of an award. *Hawkins*, 233 S.W.3d at 399. Failing to wait too long and not even challenging the amount of fees—allegedly capped in that case by a flat fee retainer—may waive the challenge. *Hyde*, 2018 Tex. App. LEXIS at *25.

Montano, a condemnation opinion where the property owner obtained an attorney's fees award under Texas Property Code section 21.019(c), remains a good illustration of the type of evidence that is legally insufficient. 414 S.W.3d at 734–37. In reversing the fee award of $339,000 as to one of the three law firms representing the landowner (while affirming the fees related to the other two), the Court wrote about the absence of billing or other time records and noted that the following testimony failed to constitute proper evidence of a reasonable fee:

- the lawyer conducted "a lot" of legal research;
- the lawyer spent "countless hours" preparing for and taking depositions and "countless" hours on motions and depositions;
- an estimate of the fees by the approximate calculation of 226 weeks on a case working "a barebones minimum" of 6 hours a week on the case;
- the lawyer spent "a lot of time getting ready for the lawsuit";
- the lawyer visited the premises "many, many times"; and
- there were "thousands and thousands and thousands of pages" generated during the representation.

Montano, 414 S.W.3d at 734, 736 (quotation marks in the original).

A recent federal district court opinion directly applied the rigorous *Rohrmoos Ventures* analysis in vacating a bankruptcy court's award of fees. *Gassaway v. TMGN 121, LLC,* 5:19-CV-082-H, 2020 WL 789199, *7-8 (N.D. Tex. Feb. 18, 2020), *appeal filed* 20-1013 (5th Cir. March 20, 2020).

8. The request for attorney's fees is premature.

Another potentially available objection is that the resolution of the dispute is not final and that therefore a determination of fees, particularly in a "prevailing party" situation, may be premature. *See e.g.*, *Hayes v. Dearborn Nat'l Life Ins. Co.,* 17-30670, 2018 U.S. App.

[36] *See, e.g.,* Cleveland, Jr. & Harrell, *Is Texas Becoming the Lodestar State?*, 75 TEX. B. J. at 702 nn.25–26 (citing various federal cases criticizing block billing in making review of discrete tasks and the reasonableness of the requested fee more difficult, sometimes leading to reduction of the requested time); *see also Wherley*, 2014 WL 3513028, at *4; *Flores*, 2011 WL 2160928, at *5 (litigants take their chances in submitting fee applications with vague tasks such as "review pleadings" or "correspondence"); *but see Ergobilt,* 2004 WL 1041586, at *9 n.16 ("The court therefore declines to disallow all of the challenged fees based on an impermissible use of block billing.").

LEXIS 21608 at *12-13 (5th Cir. Aug. 3, 2018) (Because Hayes had no "degree of success on the merits," he may not recover fees); *Mid-Continent Casualty Co. v. Petroleum Solutions, Inc.*, 4:09-0422, 2016 WL 5539895, at *43 (S.D. Tex. September 29, 2016) ("The Court does not reach the question of whether PSI is entitled to attorney's fees under [Chapter 38] because PSI has not yet prevailed on its claim for breach of contract."), *amended by* 2016 WL 7491858 (S.D. Tex. Dec. 30, 2016); *Glycobiosciences, Inc. v. Woodfield Pharmaceutical, LLC,* 4:15-CV-02109, 2016 WL 1702674, at *7 n. 6 (S.D. Tex. Apr. 27, 2016) (preliminary injunction in trade secret case merely maintained status quo, did not determine merits, and therefore fees would be premature); *Pacific Premier Bank v. Hira*, 3:17-CV-0312-B, 2018 WL 345508 *3 (N.D. Tex. July 18, 2018) (appellate fees premature); *Halprin*, 2020 WL 411045, at *8 (same).

9. Some other law applies.

The *Klaxon* rule in federal court is that state law "controls both the award of and the reasonableness of fees awarded where state laws supplies the rule of discretion." *Mathis*, 302 F.3d at 461. Two 2016 federal cases involved choice of law determinations that a jurisdiction's law other than Texas law applied. *Field Motor Sports*, 2016 WL 2758183, at *3 (New York law applied); *Western-Southern Life*, 193 F. Supp. 3d at 779 (Ohio law applied). Accordingly, another possibility in a proper case is that, if a proper showing of law other than Texas law applies (in state court that would be in accordance with either TEX. R. EVID. 202 or 203), then a law other than Texas law may apply to the fee determination. *OIC Holdings*, 2019 WL 2098616 at *4 (applying Delaware law to fee determination regarding "prevailing party").

If the non-Texas jurisdiction does not recognize a right to recover (as in the case of Chapter 38's authorization of fees for a breach of contract), then the application of a foreign law could be outcome determinative. *Transverse LLC v. Iowa Wireless Serv's, LLC*, 992 F.3d 336, 348-49 (5th Cir. 2021); *1701 Commerce Acquisition, LLC v. Macquarie US Trading, LLC.*, 02-21-00333-CV, 2022 WL 3904976, *21-27 n.3 (Tex. App.—Fort Worth Aug. 31, 2022, no pet.).

H. Federal court considerations and cost recovery issues in federal and Texas courts

Although the legal standards are similar, the procedures for recovering attorney's fees in federal courts are different. In state court, failing to timely submit attorney's fees to the factfinder—even when mandatory—will waive any fee recovery. *Hotze v. IN Mgmt., LLC*, 14-18-00995-CV, 2021 WL 3087524, at *9 (Tex. App.—Houston [14th Dist.] July 22, 2021, pet. filed, 22-0327) (reversing and rendering take-nothing judgment on attorney's fees submitted by post-trial motion without agreement to modify ordinary procedure for recovering fees). Federal courts often address these issues on motion, and the Fifth Circuit has found that not having a hearing on attorney's fees is not an abuse of discretion. *Watkins*, 7 F.3d at 460. Federal Rule of Civil Procedure 54(d)(2) provides that attorney's fees issues are to be resolved by motion after the entry of judgment except where attorney's fees are damages in the underlying case. *See Richardson*, 740 F.3d at 1038 (listing as examples of attorney's fees being considered damages if the fees are unpaid legal bills sought in a breach of contract action against a client, or if the fees are expended before litigation to obtain title from a third party who wrongfully obtained title from defendants and are an "independent ground of recovery" apart from the attorney's fees for prosecuting a debtor other suit). Significantly, *Richardson* clarified that motions for attorney's fees provided by contract are permissible under Rule 54(d)(2). *Id.* at 1039. Even if juries determine state law attorney's fees issues in state court, the judge is the proper factfinder in federal court. *Zayas*, 2017 WL 1273965, at *2.

Furthermore, different courts, districts, or divisions may further specify the manner in which the attorney's fees issues will be addressed. *See, e.g.*, W.D. Tex. L.R. CV-7(j) (specifying time frame for filing fee requests and objections, setting forth a conference requirement, and describing the manner in which fees are presented).

Failure to follow the 14-day rule may result in waiver of the right to attorney's fees. *Zimmerman v. City of Austin, Texas,* 969 F.3d 564, 570-71 (5th Cir. 2020). However, the 14-day period runs from "the entry of judgment," not from the date of the underlying judgment itself. *Thomson v. Grillehouse of Southaven, L.L.C.*, 20-60722, 2022 WL 686333, *2 (5th Cir. March 8, 2022); Fed. R. Civ. P. 54(d)(2)(B)(i). Failure to timely move for attorneys' fees may result in waiver of the recovery of fees. *Valdez v. Superior Energy Services, Inc.*, 20-40182, 2022 WL 1184371, *3 (5th Cir. 2022); *but see Thomson,* 2022 WL 686333, at *2 (14-day deadline begins to run when the clerk enters judgment).

An example of a recent award—over numerous objections—in a Texas Debt Collection Practices Act case even where no damages were awarded under that cause of action but $1,000 were awarded as damages for willfully violating an automatic bankruptcy stay. *In re Garza*, 16-70444, 2020 WL 718444 (S.D. Tex. Bkr. Feb. 12, 2020).

While the federal *Johnson* considerations are similar to the state *Arthur Anderson* considerations, they also include (a) the "undesirability" of the case; and (b) awards in similar cases. The last of these is a ground to explore in a meaningful attorney's fees dispute. Federal courts consider awards in similar cases, so providing the court with other cases—particularly published cases—where similar claims were asserted and actually tried or resolved and where attorney's fees were actually awarded may be relevant or persuasive. *Vanderbilt Mortg. & Fin., Inc. v. Flores*, Civil Action C-09-312,

2011 WL 2160928, at *5 (S.D. Tex. May 27, 2011) ("Awards in similar cases can be an illustrative benchmark for determining the appropriateness of an attorney's fee award."); *see also Black*, 2014 WL 3534991, at *9–10 (comparing time on fee request to other appellate awards). In looking at Texas DCPA cases that resulted in some award of damages and/or attorney's fees, they ranged from about $4,000 to the highest being $56,143.77 including costs. *Turner v. Oxford Mgmt. Servs., Inc*., 552 F. Supp. 2d 648, 654, 657 (S.D. Tex. 2008). Two 2009 Southern District of Texas cases discussed the "range of market rates for lawyers in the Southern District of Texas working on debt collection cases" and concluded that the prevailing market rate is $300–$350 per hour for an experienced attorney. *Memon v. Pinnacle Credit Servs., LLC*, Civ. 4:07-cv-3533, 2009 WL 6825243, at *3 (S.D. Tex. May 21, 2009); *see also Flores*, 2011 WL 2160928, at *3. In *Memon*, the Court found $300/hour to be reasonable rate for a lawyer practicing 18 years, $150/hour for associates, $95/hour for paraprofessionals, and $30/hour for clerical work. *Memon*, 2009 WL 6825243, at *4.

The federal court practice in particular lends itself to the use of reliable, relevant publications or other materials regarding attorney's fees. Additionally, "rate sheets" like those published by the State Bar of Texas may be used as part of the analysis in considering the reasonableness of the rates in a fee dispute. "In the Western District of Texas, judges frequently look to the State Bar of Texas Hourly Rate Report (Rate Report) in order to establish a reference point for reasonable hourly rates in the relevant legal market." *Am. Acad. of Implant Dentistry v. Parker*, No. AU-14-CA-00191-SS, 2018 WL 401818, at *3 (W.D. Tex. Jan. 11, 2018); *Vaquero Permian Processing LLC v. MIECO LLC,* No. P:21-CV-00050-DC, 2022 WL 2763514, at *3 (W.D. Tex. May 26, 2022); *see also Rhodes v. Vandyke,* No. MO:17-CV-00114-DC, 2018 WL 2925133, at *2 (W.D. Tex. June 11, 2018) (reviewing State Bar of Texas Hourly Rate Fact Sheet in considering reasonableness of counsel's hourly rate); *Randolph v. Dimension Films*, 634 F. Supp. 2d 779, 798 n. 3 (S.D. Tex. 2009); *Flores*, 2011 WL 2160928, at *3.

The federal court may consider customary fee arrangements. *See, e.g.*, *Salazar v. South San Antonio I.S.D.,* 5-13-CA-00940, D.E. 106, at 3 n.1 (June 18, 2015) ("The contingent fee agreement provided that in the event of a trial and jury verdict, as occurred in this case, the contingent fee would be an eye-popping 45 percent.").

One interesting 2017 opinion disagreed with other prior district court opinions about what constitutes the relevant legal "community", rejected the argument that an entire District (Southern) was the relevant one in favor of the Division where the court presides (Brownsville) as well as the "Rio Grande Valley" generally. *Zayas*, B-15-129, 2017 WL 1273965, at *4; *see also In re Perez*, 2017 WL 1839175, at *2 (Bankr. W.D. Tex. May 5, 2017) (referring to the San Antonio Division's legal community in evaluating rates); *but see Syal*, 2017 WL 1313759, at *5 (the relevant community is the Southern District of Texas, the judicial district). Nevertheless, when evaluating the specific expertise of the lawyers and other considerations in the case, the award reflected a higher rate. *Zayas*, 2017 WL 1273965, at *6.

Apart from fees, costs of court may be obtained and may require more than asking the clerk to print a sheet of taxable court costs to prove up. As in the context of attorney's fees, recoverable costs may vary considerably depending on the claims asserted, changes in laws, the forum, and other considerations. *See, e.g.*, *Marx v. Gen. Revenue Corp*., 133 S. Ct. 1166, 1171 (2013) (holding that a district court may award costs to prevailing defendants in FDCPA case at the intersection of FED. R. CIV. P. 54(d)(1) and 15 U.S.C. § 1692k(a)(3) even without a finding that the plaintiff brought the case in bad faith and for harassment); *Hunn v. Dan Wilson Homes*, 789 F.3d 573 (5th Cir. 2015) (award of attorney's fees to prevailing party in copyright action is the rule rather than exception and should be awarded routinely). Like attorney's fees, costs may need to be segregated between claims on which the party prevailed and other claims. *See, e.g.*, *Bogan v. City of Boston*, 489 F.3d 417, 430 & n.11(1st Cir. 2007) (approving deduction or exclusion of costs where bills did not show whether they pertained to successful claim); *Vela v. Napolitano*, L-05-217, 2009 WL 2215096, at *3 (S.D. Tex. July 21, 2009) (noting movant not entitled to costs for deposition used in support of claim upon which movant did not prevail).

Federal courts may only award those costs articulated in Section 1920 absent "explicit statutory or contractual authorization" to the contrary. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987); *Gaddis v. U.S.*, 381 F.3d 444, 450–451 (5th Cir. 2004); *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 529 (5th Cir. 2001). Such "explicit statutory authority" must specify something other than a blanket award of "costs" generally. *See Cook Children's Med. Cent. v. New England PPO Plan of Gen. Consolidated Mgmt., Inc.*, 491 F.3d 266, 275 (5th Cir. 2007) (citing cases noting that even statutes permitting recovery of "costs" do not provide explicit statutory authority to add costs, but empower courts to award only the types of 'costs' allowed by 28 U.S.C. § 1920). While deposition costs are taxable, fees for videotaped depositions are not recoverable as taxable costs. *Flores*, 2011 WL 2160928, at *10 (citing *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 396 (5th Cir. 2003)). Mediation fees are also not recoverable. *Id.* at *22; *Black*, 2014 WL 3534991, at *12 (mediation, travel, and postage not recoverable).

The United States Supreme Court has made clear that sections 1920 and 1821 "comprehensively" cover

the taxation of fees for litigants' witnesses. *Crawford Fitting Co.*, 482 U.S. at 442; *see also Gaddis*, 381 F.3d at 451 (noting that sections 1920 and 1821 are express limitation upon types of costs federal courts may shift). Congress meant to impose rigid controls on cost-shifting in federal courts. *Crawford Fitting*, 482 U.S. at 444. In 2019, the Supreme Court vigorously affirmed that absent express authority, federal courts "may not award litigation expenses that are not specified in §§ 1821 and 1920." *Rimini Street,* 139 S.Ct. at 877 (reversing award of $12.8 million in costs).

Telecopy expenses, express delivery charges, telephone expenses, and postal expenses are not recoverable by federal statute as they represent "overhead" costs, not litigation costs. *Embotelladora Agral Regiomontana, S.A. de C.V. v. Sharp Capital, Inc.*, 952 F. Supp. 415, 418 (N.D. Tex. 1997); *Jones v. White*, H-03-2286, 2007 WL 2427976, at *10 (S.D. Tex. Aug. 22, 2007) (denying delivery and shipping costs). Nor is computer-assisted research generally recoverable. *Embotelladora Agral*, 952 F. Supp. at 418; *see also Halliburton Energy Servs., Inc. v. M-I, LLC*, 244 F.R.D. 369, 371 (E.D. Tex. 2007) ("Miscellaneous expenses such as postage, facsimiles, electronic legal research, and travel expenses are not recoverable."). *Pro hac vice* fees may also not be recoverable "costs." *DeLeon*, 687 Fed. Appx. at 348 n.8 (Elrod, J. concurring in part and dissenting in part).

In Texas state courts, Texas Rule of Civil Procedure 131 primarily governs cost assessments. *See also* TEX. CIV. PRAC. & REM. § 31.007(b). Costs are required and a court that fails to award them when owed abuses its discretion. *Int'l Med. Ctr. Enters.,* 2017 Tex. App. LEXIS 10066 *43.

Expenses incurred in litigation are generally not recoverable unless expressly provided for by statute, rule, of under principles of equity. *Kartsotis*, 503 S.W.3d at 520 (noting that neither CPRC Chapter 37 nor 38 provide for recovery of expenses) (citing *Gumpert v. ABF Freight Sys.*, *Inc.*, 312 S.W.3d 237, 239 (Tex. App.--Dallas 2010, no pet.)). Costs of taking and filing depositions are recoverable. *Shaikh v. Aerovias de Mexico*, 127 S.W.3d 76, 82 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Shenandoah Assoc. v. J&K Props.*, 741 S.W.2d 470, 487 (Tex. App.—Dallas 1987, writ denied).[37] Apart from taxable court costs, generally, costs are not recoverable in Texas unless they are expressly provided for by statute, rule, or under principles of equity. *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. App.—Dallas 1979, writ ref'd n.r.e); *Shaikh*, 127 S.W.3d at 82. Copies are not taxable costs. TEX. R. CIV. P. 140.

I. Legal assistant or paralegal time

Attorney's fees may potentially include recovery of time for legal assistants or paralegals, but the proof must include information about the paralegals who were performing work traditionally performed by attorneys (not administrative or clerical functions) and detail:

(1) the qualifications of the legal assistant to perform substantive legal work;
(2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney;
(3) the nature of the legal work performed;
(4) the legal assistant's hourly rate; and
(5) the number of hours expended by the legal assistant.

El Apple, 370 S.W.3d at 763; *see also Gill Savings Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

One case provides detailed guidance on the recoverability of paralegal time for doing work that attorneys traditionally do as opposed to clerical work that is generally not recoverable. *City of San Antonio*, 2017 WL 1382553, at *6-8 (recommending 15% discount of paralegal time). Even if attorneys are performing the work, clerical work is not compensable. *Tow v. Speer*, H-II-3700, 2015 U.S. Dist. LEXIS 108553, 2015 U.S. Dist, LEXIS 108553 *26-28 (S.D. Tex. Aug. 17, 2015); *Imperium IP Holdings*, 2018 U.S. Dist. LEXIS 56478 at *16 (reducing fees for "largely clerical or housekeeping matters and not legal work."). However, drafting motions, reviewing filings, preparing exhibits, and preparing email responses to the Court are legal in nature not clerical.

J. Joint and several liability for fees

Case law supports the imposition of joint and several liability against non-prevailing parties who are subject to fee claims. *Anderton*, 555 S.W.3d at 374 (trial court could properly award fees against individual as well as trustee); *Lawson*, 2016 WL 767772, at *6 (equitable estoppel supported joint and several imposition of attorney's fees on party that did not sign contract with fee-shifting provision); *Quantlab Techs.*, 2018 U.S. Dist. LEXIS 100399 at *18 (awarding $3.2 million in fees against two different defendants after apportioning fees); *Carto Properties, LLC v. Briar*

[37] Costs associated with depositions on written questions may be recovered as taxable costs. *Ferry v. Sackett*, 204 S.W.3d 911, 913 (Tex. App.—Dallas 2006, no pet.) (affirming award of $10,749.29 in costs, most of which were associated with taking depositions on written questions). In reaching that conclusion, the *Ferry* court looked at Texas Civil Practice & Remedies Code section 31.007(b) as well as Texas Rules of Civil Procedure 203.2(f), 203.4, and 200.4. Federal courts have allowed recovery for costs associated with depositions on written questions. *Casarez v. Val Verde Cnty.*, 27 F. Supp. 2d 749, 751 (W.D. Tex. 1998).

Capital, L.P., 01-15-01114-CV, 2018 Tex. App. LEXIS 1186 *43, 2018 WL 827758 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (joint and several liability for fees to guarantor); *but see 8305 Broadway, Inc.*, 2017 Tex. App. LEXIS 5926 at *10-15 (no fee award against LLC by plain reading of Chapter 38, no fee against individual because party did not prevail against other defendant).

The joint and several liability issue may be specific to the case at issue. For instance, the Fifth Circuit has found that an individual was liable for fees but not the corporate entity from which the liability derivatively flowed. *Al-Saud v. Yahoo Media, LP*., 754 Fed. Appx. 246, 254 (5th Cir. 2018). In another, more recent case the Fifth Circuit affirmed the joint and several award to an individual joined after judgment had been entered. *Alliance for Good Gov't v. Coalition for Better Gov't*, 998 F.3d 661,665-69 (5th Cir. 2021), *cert. denied* 21-247 (2021).

This is proper when claims against different defendants arise out of the same transaction and are reliant on the proof or denial of the same facts. *See Roland v. Gen. Brick Sales, Inc.*, 818 S.W.2d 896, 898 (Tex. App.—Fort Worth 1991, no writ) (citing *Gill Sav. Ass'n v. International Supply*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied)); *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 684 (Tex. App.—Fort Worth 1998, pet. denied).

Joint and several liability for attorney's fees is not proper, and segregation is required, when different facts are required to establish liability against the varying defendants. *See DMC Valley Ranch, L.L.C. v. HPSC, Inc.*, 315 S.W.3d 898, 906 (Tex. App.—Dallas 2010, no pet.); *Hyde v. Hawk*, 07-16-00357-CV, 2018 Tex. App. LEXIS 5211 *22 , 2018 WL 3384870 (Tex. App.—Amarillo July 11, 2018, pet. denied) (since declaratory relief was neither requested nor awarded against individual, attorney's fees should not have been taxed against him in that capacity); *see also Energico Production, Inc. v. Frost Nat. Bank*, 2012 WL 254093, at *6 (Tex. App.—Fort Worth Jan. 26, 2012, pet. denied); *Dean v. Gladney*, 621 F.2d 1331, 1339-40 (5th Cir. 1980).

When a joint and several attorney's fees award is proper, however, a prevailing party is only entitled to one-satisfaction. *See Sky View at Las Palmas, LLC v. Martinez,* 17-0140, 2018 Tex. 515, 2018 WL 2449349 (Tex. March 20, 2018) (discussing one satisfaction rule).

K. Demonstrative evidence

Whether at trial or on paper, demonstrative evidence can help make your point about recoverable attorney's fees. A 2016 case references an exhibit used to support anticipated attorney's fee award. *In re Moore*, 511 S.W.3d at 289