

# Texas: the Lodestar State

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Texas Appellate Law Podcast

# Getting (and keeping) attorneys' fees

- ◊ When can you get them?
- ◊ Proving up trial fees;
- ◊ Proving up appellate fees;
- ◊ Potential ethical issues.



Attorneys' Fees are the exception



# How do you get them?

- ◆ Contract provisions;
- ◆ Statutory bases:
  - ◆ Tex. Civ. Prac. & Rem. Code Chapter 38;
  - ◆ Tex. Civ. Prac. & Rem. Code Section 37.009;
  - ◆ Tex. Civ. Prac. & Rem. Code Section 27.009;
  - ◆ Many, many more.



# Chapter 38

- ◇ Most common business dispute provision;
- ◇ Get fees for:
  - ◇ Contract (oral/written);
  - ◇ Services/labor/material;
  - ◇ Freight;
  - ◇ Sworn account;
  - ◇ Killed or injured stock.

# Traps

- ◆ Must recover damages to get fees (“in addition to the amount of a valid claim”);
- ◆ Must have an attorney (*Sagrado v. Ball*, 2024 WL 478078 (Tex. App.—Corpus Christi Feb. 8, 2024, no pet. h.);
- ◆ Must show presentment and non-payment within 30 days;
- ◆ Pre September 1, 2021, can’t get fees against non-corporation defendants (LLPs, LLCs, LPs, etc.).



# Declaratory judgment fees

- ◇ Section 37.009:
- ◇ Costs and;
- ◇ Fees that are “reasonable and necessary” and “equitable and just.”
- ◇ Traps:
  - ◇ Equitable and just = BIG discretion;
  - ◇ Don’t have to prevail;
  - ◇ Trespass to try title/mirror image;
  - ◇ Other repleaded claims?

# What is equitable and just?

“[T]he determination of whether an award of attorney's fees would be equitable and just is not susceptible to direct proof but instead is a matter of fairness in light of all the circumstances.”

*Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 494 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)

- ◊ Can be less than reasonable and necessary;
- ◊ Looks at all circumstances surrounding case, (inequitable conduct by either side);
- ◊ Even if stipulated fees, court can decide.



# Contractual/statutory fees

- ◇ What does the provision say?
  - ◇ Must be reasonable and necessary;
  - ◇ Prevailing party?
  - ◇ Fees “incurred”?
  - ◇ Costs too?
  - ◇ Notice required?

# Proving up fees

- ◆ *Rohrmoos Venture, Ltd. v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019).
- ◆ All lodestar, all the time;
- ◆ Reasonable and necessary apply every time;
- ◆ Time records are critical;
- ◆ Conclusory testimony won't cut it anymore.



# Getting to a lodestar

- ◇ 2 step process:
  - ◇ Step 1: Base fee (reasonable hours worked x reasonable hourly rate);
  - ◇ Step 2: Adjustments to base fee;
- ◇ Need experts (designate early);
- ◇ Need evidence (fee records/timesheets?)
- ◇ Pleading amounts in petition?

# Discovery

- ◆ Don't have to provide all the proof in discovery? *Cresson Interest, LLC v. Rooster*, No. 02-21-00366-CV, 2022 WL 3904968, at \*11 (Tex. App.—Fort Worth Aug. 31, 2022, pet. denied) (mem. op.) (rolling disclosures ok even after discovery cutoff);
- ◆ Necessary/privileged redactions are ok. *Canadian Real Estate Holdings, LP v. Karen F. Newton Revocable Tr.*, No. 05-20-00747-CV, 2022 WL 4545572, at \*4 (Tex. App.—Dallas Sept. 29, 2022, no pet.) (mem. op.);
- ◆ Block billing—make it “sufficiently itemized” to allow review. *Lederer v. Lederer*, No. 14-21-00012-CV, 2022 WL 11551156, at \*7 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022, no pet.) (mem. op.).



# Step 1

- ◇ Basic calculation: (reasonable hours worked x reasonable hourly rate);
- ◇ Really requires more:
  - ◇ Particular services performed by attorneys;
  - ◇ Who performed them;
  - ◇ Approximate time frame (records);
  - ◇ Reasonable time to perform them;
  - ◇ Reasonable hourly rate for each timekeeper.

# How?

Timekeeper	Hourly rate	Hours worked	Total
Paula Partner	\$500	150	\$75,000
Andrew Associate	\$250	250	\$62,500
Peter Paralegal	\$150	40	\$6,000

# But wait, there's more...

- ◆ Prove *why* hours/rates are reasonable;
- ◆ Need background qualifications on *all* timekeepers;
- ◆ Need basis for reasonable rate in locality;
- ◆ Need backup for hours worked/when;
- ◆ Need to tie hours/work to recoverable claims (segregation).



# Segregating fees

- ◆ Take out non-recoverable claims (*e.g.* fraud v. contract);
- ◆ Exception if claims based on same transaction and “intertwined and inseparable;”
- ◆ Burden of proof for party seeking fees;
- ◆ Keep good records, but don’t need mathematical certainty.

# The exception to segregating

◆ Inexplicably intertwined is based on the *services at issue*—not the underlying facts:

“Intertwined facts do not make tort fees recoverable; 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.”

*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006) (emphasis added).

# What does that mean?

“It is certainly true that [plaintiff’s] fraud, contract, and DTPA claims were all ‘dependent upon the same set of facts or circumstances,’ but that does not mean they all required the same research, discovery, proof, or legal expertise.”

*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006)



# Don't forget legal assistants

- ◇ *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012):
  - ◇ Qualifications;
  - ◇ “The legal assistant performed substantive work under the direction and supervision of an attorney;”
  - ◇ Nature of the legal work performed;
  - ◇ Reasonable hourly rate/hours.

# What about the *Andersen* factors?

- ◊ Taken from Rule 1.04 and adopted in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997);
- ◊ Still here—Iodestar is “a short hand version of the ... factors and was never intended to be a separate test or method.”
- ◊ Use them in explaining reasonable hourly rates/hours worked;
- ◊ Non-exclusive factors;
- ◊ Degree of success is now “the most critical factor.”



# Factors

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
- (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 lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.



# Multi-party cases

◆ What happens when multiple defendants or plaintiffs have different fees?

“By awarding essentially the same amount the trial court apparently failed to factor in all of the testimony addressing expertise and experience, as well as the distinction between a large firm's billing rate and a small firm's billing rate and the fact that Marchi's counsel had leveraged the ‘heavy lifting’ by Rial and Toye's legal team to prevail with significantly fewer hours at a significantly lower cost.”

*Mignogna v. Funimation Productions, LLC*, No. 02-19-00394-CV, 2022 WL 3486234, at \*27 (Tex. App.—Fort Worth Aug. 18, 2022, pet. denied) (mem. op.)

## Step 2: Adjustments

- ◆ Step 1 gives presumption of reasonable fee;
- ◆ Step 2 lets it move up or down if it doesn't cover reasonableness;
- ◆ Can't use factors from Step 1 as a basis to move it (*Andersen*);
- ◆ It is unreasonably low or a windfall ("specific evidence").

# Methods of proof

- ◆ Affidavits/Declarations (conclusory won't cut it, overinclude);
- ◆ Testimony (records as evidence?);
- ◆ CPRC Chapter 18 affidavit (ok for trial, not MSJ);
- ◆ Chapter 38.004 judicial notice (split on whether conclusive/rebuttable, applies elsewhere).



# Appellate fees need more

- ◆ Forecasting because not yet incurred;
- ◆ Round conclusory estimates don't work ("Reasonable fee for appeal is x");
- ◆ New requirements from *Yowell v. Granite Operating Co.*, 620 S.W.3d 335 (Tex. 2020):
  - ◆ Services the party believes will be necessary to defend the appeal; and
  - ◆ Reasonable hourly rate for those services.

# The minimum?

- ◆ “I am familiar with the process of an appeal, handling a case on appeal to the court of appeals. I am familiar with the standard rates of attorneys in the Houston, Harris County, Texas area for handling a case of this type and size that's been appealed to the court of appeals. And my opinion as to the reasonable and necessary attorney's fees in researching, preparing, and drafting a brief and presenting this case on appeal to the court of appeals would be \$30,000.”

*QJD Peking Duck Restaurant, Inc. v. TCP Spectrum Partners, Ltd.*, No. 01-22-00545-CV, 2023 WL 5436907, at \*2 (Tex. App.—Houston [1st Dist.] Aug. 24, 2023, no pet. h.) (mem. op.).

- ◆ But *Ruff v. Ruff*, No. 05-21-00157-CV, 2022 WL 420353, at \*11 (Tex. App.—Dallas Feb. 11, 2022, pet. denied) (need services, rate)



# So what works?

- ◆ “Appeal to the intermediate court of appeals: Mizell opined that an appeal through this stage would incur \$196,700 in attorney’s fees. Included in this number were the following estimates for attorneys’ work on the matter: (1) Stacey Vu working 70 hours at \$850/hour; (2) Kathy Smith working 70 hours at \$760/hour; and (3) Brooke Noble working 200 hours at \$420/hour.”

*Nath v. Tex. Children’s Hosp.*, No. 14-19-00967-CV, 2021 WL 451041, at \*13 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021, pet. denied) (mem. op.).



# Another example

“The plaintiff has filed a notice of appeal. My firm and I have substantial experience representing clients in appeals, including *briefing, drafting, and arguing appellate issues and advising clients in appellate and other post-judgment matters*. In my experience, I would anticipate the following reasonable and necessary attorneys’ fees to handle this appeal:

First or Fourteenth Court of Appeals: Zev Kusin: 100 hours (\$425/hour); Joseph Marrs 50 hours (\$475/hour); Vaibhavi Parmar 75 hours (\$250/hour); Maria Mandujano 30 hours (\$75/hour), for a total of \$87,250, plus \$1,500 in costs, for a total of \$88,750.”



*Schauble v. Schauble as Tr. of Edward R. Schauble Tr.*, No. 11-20-00181-CV, 2022 WL 2839224, at \*14 (Tex. App.—Eastland July 21, 2022, no pet.) (mem. op.) (emphasis added)

# Maybe go further?

- ◇ Break down by stages (appeal, SCOTX—PFR, BOM, OA);
- ◇ Break down tasks (record review, research/briefing, argument);
- ◇ Make fees *conditional*!!
- ◇ Check against the proposed judgment;
- ◇ Phone an appellate friend?



# Jury issues

- ♦ Jury v. judge (parties must agree on judge and can change on remand);
- ♦ *Rohrmoos*/PJC instruction (115.60):  
“A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. Do not include fees that relate solely to any other claim.”
- ♦ Consider if Step 2 language is needed re: enhancement/presumptions of reasonable from Step 1.
- ♦ Take out “if any” for mandatory fees.



# Ethical implications

- ◆ *Rohrmoos* says—*repeatedly*—that reasonableness of fee isn't measured by what you charge a client;
- ◆ Makes sense in contingent/flat fee, but creates issues for hourly;
- ◆ What happens when what your client pays isn't adjudged reasonable?

# Rule 1.04 is the standard

- ◆ Prohibits charging “an illegal fee or unconscionable fee;”
- ◆ “Unconscionable” = when “a competent lawyer could not form a *reasonable* belief that the fee is *reasonable*.”
- ◆ But judges/juries look at fees in hindsight and fee structure done in advance.

# Good news

- ◆ Reasonableness “is too vague and uncertain to be an appropriate standard in a disciplinary action.”
- ◆ And because discipline comes in hindsight, the unconscionable standard “requires that a lawyer be given the benefit of any such uncertainties for disciplinary purposes only.”
- ◆ Balance tipped by:
  - ◆ Overreaching by attorney of susceptible client; and
  - ◆ Failure at outset to give clear and accurate description of fee arrangement.



# Still a risk

- ◆ Protections from discipline don't cover fee disputes;
- ◆ Unhappy clients can still seek fee forfeiture, etc.;
- ◆ Because fiduciary, doubts outside discipline run to the client's benefit;
- ◆ Fees awarded in underlying lawsuit belong to client.

# Best practices

- ◆ Put. It. In. Writing. Every. Time.
- ◆ Explain fee calculation clearly at outset (transparency/uncertainty);
- ◆ Consider client sophistication;
- ◆ Set expectations about potential disconnect between fees paid/recovered.

# There's always hope

- ◆ *Challis v. Fiamma Statler, LP*, No. 02-22-00047-CV, 2023 WL 2534470 (Tex. App.—Fort Worth Mar. 16, 2023, no pet.) (mem. op.);
- ◆ Trial court awarded 5% of proven fees, COA reversed;
- ◆ Trial court awarded 10% of proven fees, COA reversed a second time.
- ◆ So don't give up!



# The wrap up

- ◆ Read enabling statutes/contract language closely;
- ◆ Provide back-ups for all the elements of a Step 1 calculation;
- ◆ “Specific evidence” for Step 2;
- ◆ Make sure clients understand fees paid v. potential for fees awarded.