

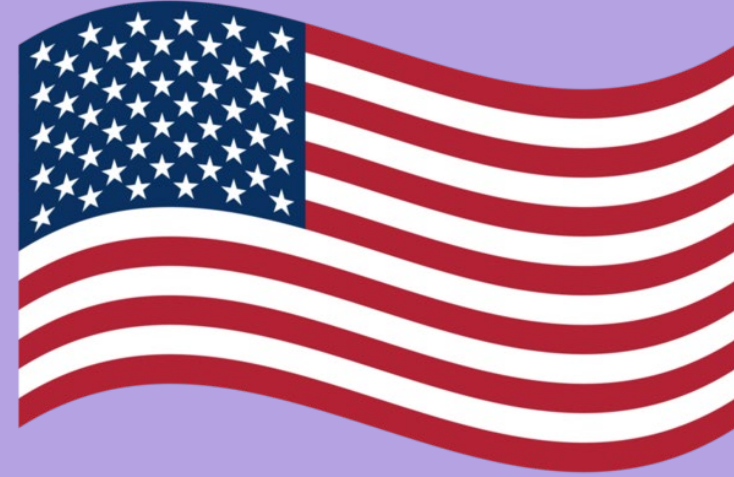


# Attorneys' Fees

Fee Recovery in Texas Courts

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# The “American Rule”



- Litigants pay their own attorneys’ fees unless a statute or contract allows for fee shifting.
- SCOTUS: “the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney’s fees would pose substantial burdens for judicial administration.”
  - *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

# The “English Rule”



- 13<sup>th</sup> Century
- Courts award fees to successful litigants
- Amounts set by statute or court practice

# How did the “American Rule” start?



- Colonies typically allowed fee awards
- Fee awards were carefully regulated as under English Rule
- American attorneys wanted freedom to contract for fair market rates

# Earliest TX Fee-Shifting Statute



- 1889 – allowed courts to award fees up to \$10 to prevailing plaintiffs on certain claims against railroad companies
  - SCOTUS held this unconstitutional under equal protection clause
- 1909 – nearly identical statute allowed fee awards to prevailing plaintiffs on certain claims against any person or corporation:
  - Personal services rendered
  - Labor done
  - Material furnished
  - Overcharges on freight or express
  - Lost or damaged freight
  - Killed or injured livestock

# Tex. Civ. Prac. & Rem. Code § 38.001(b)

- A person may recover reasonable attorney's fees from an individual or organization . . . if the claim is for:
  - Rendered services;
  - Performed labor;
  - Furnished material;
  - Freight or express overcharges;
  - Lost or damaged freight or express;
  - Killed or injured livestock;
  - **Sworn account**; or
  - **Oral or written contract.**

# Requirements to Recover Attorneys' Fees

1. Legally authorized to recover attorneys' fees; and
2. Fees are reasonable and necessary

## Types of legal authorization:

- Contractual fee provisions
  - “Parties are free to contract for a fee-recovery standard either looser or stricter than” the statutory fee-shifting provision for breach of contract cases.
    - *Mundy v. Knutson Constr. Co.*, 294 S.W.2d 371, 374 (Tex. 1956).
- Statutory fee-shifting
- Common law doctrines
  - Bad faith or misconduct in litigation
  - Common fund doctrine
  - Quantum meruit

# Must fees be “incurred”?

- Only if explicit language requires it
  - Texas courts don’t imply “incurred” requirement
- Fees are “incurred” when party becomes liable for paying them.
  - Language of engagement agreement determines when/whether party seeking fees is liable for paying fees.

# What is “reasonable and necessary”?

“A lawyer in good conscience should not charge or collect more than a reasonable fee.” - Tex. Disciplinary Rules Prof’l Conduct R. 1.04 cmt. 1

- Fee award must be both reasonable and necessary:
  - Questions of fact on which party seeking fees bears burden of proof
  - Not governed by fee agreement
  - Must use lodestar method
    - Factors in Tex. Disciplinary Rules Prof’l Conduct R. 1.04(b) (aka *Arthur Andersen* factors)
- Must present evidence of:
  - Particular services performed;
  - Who performed them;
  - Approximately when they were performed;
  - Reasonable amount of time required; and
  - Reasonable hourly rate for each person.



# Lodestar Method

Originally used to calculate fee awards in class actions

- Federal & Texas courts
- Now applies to all fee-shifting
  - *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019)
- Expert testimony required

Step 1 (“Base Lodestar”):

Reasonable and Necessary Hours

X

Reasonable Hourly Rate

=

Presumptively Reasonable Value of Attorneys’ Fees



# Lodestar Method

Step 2 (enhancement or reduction):

- Trier of fact can decide if base lodestar should be adjusted up or down using a multiplier
- Considerations used in step 1 can't be used to justify multiplier
- Appropriate range: 25% to 400%





# Reasonable Hourly Rates

- Requires expert testimony that hourly rate sought is equivalent to reasonable market rate for similar legal services in light of *Arthur Andersen* factors and other relevant factors.
- “in line with [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation”
  - *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 499 (Tex. 2019) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)).
- Expert witness should rely on “a composite of fee information for the area rather than a single data point”
  - *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 810 (Tex. 2017).

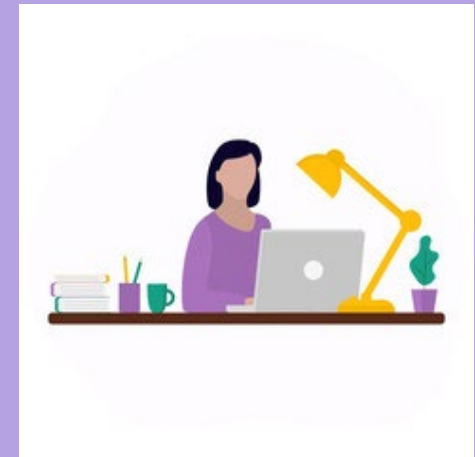


# Reasonableness of Hours Expended

- Are hours worked reasonable and necessary in light of *Arthur Andersen* factors and other relevant factors?
  - Requires expert testimony
- Exercise billing judgment to exclude duplicative, excessive, unnecessary, or inadequately documented time entries from fee request.
- Contemporaneous billing records not required but “*strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested.”
  - *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 502 (Tex. 2019) (emphasis in original).

# Work Performed by Paralegals & Legal Assistants

- Only recoverable if it is work traditionally performed by attorneys
- Must establish:
  - Paralegals or legal assistants performed substantive legal work under the direction and supervision of an attorney;
  - they have qualifications to perform that work;
  - the nature of the work performed by them;
  - their hours worked; and
  - their reasonable hourly rate.
- Clerical work is not recoverable
  - e.g., making travel arrangements; mailing, filing, and copying documents; scheduling court reporters for depositions



# Arthur Andersen Factors

1. Time & labor required, novelty & difficulty of the questions involved, and skill required to perform the legal services properly;
2. Likelihood that acceptance of representation will preclude other employment;
3. Fee customarily charged in the locality for similar legal services;
4. Amount involved and results obtained;
5. Time limitations imposed by client or circumstances;
6. Nature & length of professional relationship with client;
7. Experience, reputation, & ability of lawyer(s) performing the services; and
8. Whether fee is fixed or contingent on results obtained or uncertainty of collection before legal services have been rendered.

Note: other factors may be relevant; factors 4 & 5 can justify either base lodestar or multiplier

