RECOVERY OF ATTORNEYS' FEES

CARLOS R. SOLTERO
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701

MARCUS V. EASON
McGinnis Lochridge
711 Louisiana Street, Suite 1600
Houston, Texas 77002

State Bar of Texas
9TH ANNUAL
BUSINESS DISPUTES
Austin September 7 – 8, 2017

CHAPTER 2

CARLOS R. SOLTERO
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701
512-495-6033
Fax: 512-505-6333
csoltero@mcginnislaw.com

McGinnis, Lochridge & Kilgore, L.L.P.
Carlos represents plaintiffs and defendants in civil litigation matters and heads the firm's Litigation Practice.

Recent Experience

Carlos is Board-Certified in Personal Injury Trial Law and has tried, as either first chair or in a supporting role, a variety of cases to juries, the bench, and arbitrators. He has published and lectured in a number of areas of trial practice including Evidence, Jury Selection, *Daubert*, and Choice of Law Issues. Benchmark recognized Carlos as a Local Litigation Star in 2017 for Intellectual Property Litigation.

Activities
Robert Calvert Chapter, Inns of Court, Member (2001–2007)
State Bar of Texas; Rules Committee (2007 to present, Chair 2014–2016)
State Bar of Texas; Business, Consumer & Employment Pattern Jury Charges (Vol. 4) Committee (2001–2007, 2016-present)
The University of Texas, Lecturer (Spring 2001)
Advisory Board Member to Center for U.S. and Mexican Law

Professional Background
Yale Law School, J.D. 1994
Yale University, B.A. 1991
Admitted to Practice: Texas; Colorado; Supreme Court of the United States of America, United States Court of Appeals for the Fifth Circuit, United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas

MARCUS V. EASON
McGinnis Lochridge
711 Louisiana Street, Suite 1600
Houston, Texas 77002
(713) 615-8500
Fax: (713) 615-8585
meason@mcginnislaw.com

Marcus Eason represents plaintiffs and defendants in a wide variety of litigation matters, including complex commercial litigation and general litigation. He focuses his practice on complex commercial litigation and has actively represented clients in all aspects of the litigation process, including drafting pleadings and discovery, providing legal research, hearings, and taking depositions. Before joining the firm, Marcus interned in the office of Secretary James Baker, III, and clerked with Judge Mike Engelhart of the 151st District Court.

Activities
Houston Bar Association
Houston Young Lawyers Association

Professional Background
University of Houston Law Center, J.D., 2014
Texas A&M University, B.A., 2010
Admitted to Practice: Texas, United States District Court for the Southern District of Texas

TABLE OF CONTENTS

TABLE OF CONTENTS i
I. GENERAL PRINCIPLES OF RECOVERY UNDER TEXAS LAW ON ATTORNEYS' FEES. 1
A. American Rule: each side pays its own fees 1
B. Breach of contract fee claims 2
C. Declaratory Judgment Act fee claims 4
D. Other statutory fee awards provisions cited in recent case law 5
1. Texas laws 5
2. Federal laws 7
E. Segregation and election of remedies 8
F. *Arthur Andersen* and other factors including what a "prevailing party" is. 9
G. Legal assistant or paralegal time 12
H. Joint and several liability for fees 12
II. EVIDENCE ISSUES SURROUNDING ATTORNEYS' FEES. 12
A. Admissible evidence—relevance standard 12
B. Some jury charge and appellate issues on attorneys' fees 13
C. Stipulations and judicial notice 15
D. Objections to evidence or the right to recover 16
1. Failure to properly disclose 17
2. Expert opinion—TRE 702–705 17
3. Conclusory and other summary judgment objections 18
4. Failure to satisfy procedural or other legal, requirements, a conditions precedent (e.g., presentment), or a failure to segregate 19
5. Failure to exercise billing judgment 20
6. Challenge *after* the testimony as legally insufficient 21
7. The request for attorneys' fees is premature. 21
8. Some other law applies. 22
E. Federal court considerations and cost recovery issues in federal and Texas courts 22
F. Demonstrative evidence 24
III. DISCOVERY: WHAT IS DISCOVERABLE? 24
A. Opinions on Attorneys' Fees Claims 24
B. Fee Agreements 24
C. Billing/Time Records, Redactions, and Attorney-Client or Work Product Privileges 25
D. Segregation Evidence 27
E. Non-fee seeking attorneys' fees information (e.g., defendant in breach of contract action) are generally irrelevant and privileged. 27
F. Informal discovery 27
G. Resolve your fee issues before appeal 27

RECOVERY OF ATTORNEYS' FEES

The Texas Supreme Court has written that attorneys' fees are neither "costs" nor "damages" generally. *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172–76 (Tex. 2013); *see also In re Corral-Lerma*, 451 S.W.3d 385 (Tex. 2015) (per curiam) (citing *Nalle Plastics* and refusing to treat mandatory attorneys' fees under the Texas Theft Liability Act as compensatory damages for purposes of calculating bond amount under supersedeas statute).[1]

The Fifth Circuit echoed that pronouncement. *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037–38 (5th Cir. 2014). A June 2016 opinion from a bench trial in federal court in Houston distinguished *Richardson* on the grounds that the attorneys' fees issues in that case were clearly part of the damages claim (under the applicable substantive Ohio law) and not costs. *Western-Southern Life Assurance Co. v. Kaleh*, 193 F. Supp. 3d 756, 784 n.173 (S.D. Tex. June 16, 2016).

Nevertheless, if attorneys' fees are a serious issue in a case,[2] it may be helpful to think about attorneys' fees claims as similar to other damage claims. As with any damage claim that must be proven or defended against, this paper approaches evidentiary and discovery matters that arise in connection with attorneys' fees beginning with an assessment of their legal framework and including the state court jury charge.

Another good starting point in considering attorneys' fees issues is other recent case law discussing necessary proof of attorneys' fees. This year, the recently issued opinion *In re National Lloyds Ins. Co.*, No. 5-0591, 2017 WL 2501107 (Tex. June 9, 2017) is required reading.

The Texas Supreme Court has been clear that attorneys' fees "not properly billed to one's client are also not properly billed to one's adversary under a fee-shifting statute." *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983))). Texas courts, and particularly the Texas Supreme Court, 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 attorneys' fees differently than one's own client. *Montano*, 414 S.W.3d at 736 ("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."); *El Apple*, 370 S.W.3d at 762; *see also Long v. Griffin*, 442 S.W.3d 253, 255–56 (Tex. 2014) (per curiam).

A thoughtful concurrence has noted that the development of the law governing attorneys' fees in Texas has resulted in "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).

I. GENERAL PRINCIPLES OF RECOVERY UNDER TEXAS LAW ON ATTORNEYS' FEES.

A. American Rule: each side pays its own fees

The general rule in the American legal system is that each party must pay its own attorneys' fees and expenses. *Perdue v. Kenny A.*, 559 U.S. 542, 550 (2010). Under the venerable and ubiquitous "American Rule," each party must pay its own attorneys' fees absent a specific statutory, contractual, or other legal basis to shift attorneys' fees. *In re National Lloyds Ins. Co.*, 2017 WL 2501107 at *9; *Intercont'l Grp. P'ship v. KB Home Lone Star, L.P.*, 295 S.W.3d 650, 653 (Tex. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010) ("Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or a contract provides otherwise.").[3]

When fee-shifting is authorized, the party seeking to recover those fees bears the burden of establishing

[1] The court noted that some attorneys' 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).

[2] Some attorneys' fees awards can be quite substantial. *See e.g., Field Motor Sports, Inc. v. Traxxas, L.P.*, No. 4:14-CV-543, 2016 WL 2758183, at *13 (E.D. Tex. May 12, 2016) (awarding over $1 million in fees); *Laguna Tubular Prods Corp. v. O.C.T.G., LLP*, 2015 WL 9632964, at *2 (Tex. Dist. 190th Harris Cty. Dec. 17, 2015).

[3] 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).

the fees are reasonable and necessary. *In re National Lloyds Ins. Co.*, 2017 WL 2501107 at *9.

Fee-shifting provisions in statutes are remedial, not punitive. *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 405 (2003).

The United States Supreme Court has actively written opinions about attorneys' fees awards under federal laws, some of which are discussed in Section I.D.2 *infra*. In one of those, the Supreme Court cited to the American Rule, and applied a strict construction to a statutory fee provision applicable to professionals—and specifically attorneys—employed by the bankruptcy estate. *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)). Recovery of attorneys' fees is not authorized in most tort claims (*e.g.*, common law fraud) as a legal basis to shift attorneys' fees under Texas law. *MBM Fin. Corp. v. The Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009); *see also Chapa*, 212 S.W.3d at 304, 310–11; *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*, 60 Tex. Sup. Ct. J. 791, 2017 WL 1553157 (Tex. April 28, 2017) (attorneys' fees award not contested on appeal).

Like tort plaintiffs, as a general rule defendants are not entitled to recover attorneys' fees absent a specific statutory or legal basis. *See, e.g., Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 81 n.3 (Tex. 2003). 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.*[4] For example, Defendants do not have a right to attorneys' 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 attorneys' 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). In some circumstances, a breach of contract defendant may recover attorneys' 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).[5]

There are many statutes creating exceptions to the American Rule and allowing parties to claim attorneys' fees; the specifics of each claim should be consulted when making or defending against a claim for attorneys' fees.[6]

B. Breach of contract fee claims

Under one of the most widely pervasive fee statutes 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 (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 attorneys' fees are proper under Section 38.001 and supported by evidence, the trial court "has no

---

[4] Even when a defendant is awarded attorneys' 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).

[5] *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).

[6] According to one helpful article, Texas lawyers may have to address "over 200 statutory exceptions allowing attorneys fees to a prevailing party." *See* M.H. "Butch" Cersonsky, *Attorneys' Fees for Lawyers in Collection and Commercial Cases*, SBOT CLE Collections and Creditors' Rights Course 7 (May 2013) (referencing O'Connor's compilation of fee shifting statutes in O'Connor's CPRC Plus); *see, e.g., Adkisson v. Paxton*, 459 S.W.3d 761, 779–81 (Tex. App.—Austin 2015, no pet.) (trial court authorized to award attorneys' 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).

discretion to deny" attorneys' 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.*

However, the claimant must recover some amount of damages on its breach of contract claim to be entitled to fees under Section 38.001. *NY Pizzeria, Inc. v. Syal*, No. 3:13-CV-00335, 2017 WL 1313759, at *2 (S.D. Tex. April 5, 2017) (no fees when claimant forewent bench trial on damages after prevailing on liability); *Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc.*, 468 S.W.3d 557, 575–77 (Tex. App.—San Antonio 2014, pet. denied) (holding no Chapter 38 fees where only nominal damages awarded on contract claim, based on a presumption of an omitted finding). A 2017 case found that merely obtaining specific performance does not suffice. *Thunder Rose Enterprises Inc., v. Kirk* 13-15-00431-CV, 2017 WL 2172468, at *14 (Tex. App.— Corpus Christi-Edinburg April 20, 2017, n.p.h.).

Parties may on their own contract for the circumstances upon which attorneys' fees may be recovered because 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); *Syal*, 2017 WL 1313759, at *2 (parties contracted for award of fees to "prevailing party"). Parties "are free to contract for a fee-recovery standard either looser or stricter" than Chapter 38's standards and in those instances the parties' agreements will control. *Intercont'l Grp.*, 295 S.W.3d at 653; *Epps v. Fowler*, 351 S.W.3d 862, 864, 871 n.10 (Tex. 2011) (parties can contract for definition of term "prevailing party); *Elekes v. Wells Fargo Bank, N.A.*, No. 5:13-CV-89, 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).[7] 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 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). Where the parties fail to define the term "prevailing party", courts look to "Texas law to provide the default definition." *Syal*, 2017 WL 1313759, at *2 (citing *KB Home*, 295 S.W.3d at 650, 655-57).

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*, No. 03-13-00498-CV, 2016 WL 767772, at *4-5 (Tex. App.—Austin Feb. 23, 2016, pet. denied).

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). Attorneys' 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*, No. 14-13-00122, 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 recover fees for a promissory estoppel claim under Section 38.001. *Turner*, 485 S.W.3d at 528. Likewise, attorneys' fees in prosecuting a *quantum meruit* claim may be recoverable under Chapter 38. *Shamoun & Norman, L.L.P. v. Hill*, No. 05-13-01634-CV, 2016 WL 308696, at *16 (Tex. App.—Dallas Jan. 26, 2016, pet. filed); *Girards v. Klein Frank, P.C.*, No. 3:13-cv-2695-BN, 2016 WL 454465, at *12 (N.D. Tex. Feb. 5, 2106).

A close reading of the statutory authorization for recovering fees may be wise as a number of cases have now held that Chapter 38 does not apply in suits against partnerships (or limited partnerships or LLCs) because these type of entities are neither "individuals" nor "corporations." *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 WL 1455407, at *25 (Tex. App.—Dallas April 21, 2017, n.p.h.) (fees not recoverable under Chapter 38 from limited partners or limited liability companies); *Siwell, Inc. v. Leverage*

[7] Since a judgment must conform to the pleadings, a party failing to plead for attorneys' fees **under the contract** as opposed to under Chapter 38 will waive that claim for attorneys' 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). Although the standard is different in federal court, *See Syal*, 2017 WL 1313759, at *3, 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). A defendant cannot wait until after a non-suit has been filed to amend pleadings to assert a claim for attorneys' 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, n.p.h.).

Fin., LLC, No 5:12-CV-185-D, 2017 WL 1397818, at *2 (N.D. Tex. April 18, 2017); *Choice! Power, LP v. Feeley*, No. 01-15-00821-CV, 2016 WL 4151041, at *11 (Tex. App.—Houston [1st Dist.] Aug. 4, 2016, no pet.); *see also Greco v. Nat'l Football League*, 116 F. Supp. 3d 744, 751–52 (N.D. Tex. 2015); *Hoffman v. L & M Arts*, No.3:10-CV-0953-D, 2015 WL 1000838, at *10 (N.D. Tex. March 6, 2015); *see also County of Galveston v. Triple B Services, LLP*, 498 S.W.3d 176, 189-90 (Tex. App.—Houston [1st Dist.] May 26, 2016, pet. filed) (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).

The Legislature has considered (without passing) various bills in recent sessions to amend Section 38.001 to broaden the scope of potential parties from whom a plaintiff in a contract action could recover fees.

C. Declaratory Judgment Act fee claims

One frequently used statutory exception, the Declaratory Judgment Act or Chapter 37, expressly authorizes the recovery of reasonable and necessary fees. 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.").[8]

Not every legal declaration or every declaratory judgment entitles a party to attorneys' fees, otherwise Chapter 37's exception would engulf the American Rule. Stated differently, even an award of attorneys' 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 attorneys' 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);[9] *John G. Marie Stella Kennedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002); *see also Allen-Pieroni v. Pieroni*, No. 05-15-00774-CV, 2016 WL 4039192, at *3 (Tex. App.—Dallas July 26, 2016, pet. filed) (reversing award of fees under Chapter 37 when suit was a slander of title claim). 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).

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); *see also Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 455 (Tex. 2015). Cases also indicate that unlike the case for attorneys' fees claims premised on Chapter 38, in cases under Chapter 37, a trial court does not abuse its discretion by awarding no fees to any party. *See e.g.*, *Callahan Ranch, Ltd. v. Killam*, No. 0-10-00802-CV, 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 Declaratory Judgment Act also differs from other statutory authorizations of attorneys' 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 attorneys' 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 attorneys' 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 attorneys' fees under Chapter 37). 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 if the plaintiff improperly pled a declaratory judgment claim for which the court was without jurisdiction, the defendant may still be awarded attorneys' fees as is equitable and just under

[8] TUFTA, the fraudulent transfers statute contains a similarly worded fee award statute. *See Janvey v. Dillon Gage Inc. of Dallas*, No. 15-11211, 2017 WL 1821498, at *10 (5th Cir. May 5, 2017) (citing TEX. BUS. & COM. CODE § 24.013) (no abuse of discretion in finding receiver not entitled to attorneys' fees).

[9] *But see ConocoPhillips Co. v. Ramirez*, No. 04-15-00487-CV, 2017 WL 2457090 at *13 (Tex. App.—San Antonio June 7, 2017, n.p.h.) (in some of these oil and gas cases, TEX. NAT. RES. CODE § 91.406 may provide an alternative basis).

Chapter 37. *See Devon Energy Prod. Co., L.P. v. KSC Res., LLC*, 450 S.W.3d 203, 233 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Feldman*, 438 S.W.3d at 685–86.

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. *See Bocquet*, 972 S.W.2d at 21; *Ridge Oil Co., Inc. v. Guinn Investments, Inc.*, 148 S.W.3d 143, 162 (Tex. 2004) ("Whether it is 'equitable and just' to award less than the fees found by a jury is not a fact question because the determination is not susceptible to direct proof but is rather a matter of fairness in light of all the circumstances."); *Fuqua v. Oncor Elec. Delivery Co.*, 315 S.W.3d 552, 559–60 (Tex. App.—Eastland 2010, pet. denied) (concluding that when summary judgment resolved declaratory claim, attorneys' fees issue for jury). 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).

Additional limitations on attorneys' 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 attorneys' 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); *Self-Ins. Inst. of Am. v. Korioth*, 53 F.3d 694, 697 (5th Cir. 1995).

D. Other statutory fee awards provisions cited in recent case law

1. Texas laws

Some statutes require an attorneys' 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)); *Bacon Tomsons, Ltd. v. Chrisjo Energy, Inc.*, No: 1-15-00305-CV, 2016 WL 4217254, at *11 (Tex. App.—Houston [1st Dist.] Aug. 9, 2016, no pet.); *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*, No. 3:12-CV-3583-B, 2016 WL 193586, at *8 n.13 (N.D Tex. Jan. 14, 2016) (award of fees proper under TTLA and under Copyright Act).[10]

Under the Texas Citizens Participation Act (TCPA), attorneys' fees are mandatory "if a court orders dismissal of a legal action under this chapter." TEX. CIV. PRAC. & REM. CODE § 27.009(a). The Texas Supreme Court removed any doubt and a split in authority last year. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). While the statute affords the trial court discretion to adjust downward reasonable attorneys' 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 attorneys' 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. In reaching that conclusion, the Court applied the "last-antecedent canon" instead of the "series-qualifier canon" of construction regarding statutory construction and the absence of the comma after "other expenses" and after "legal action" indicates that the Legislature intended to limit the modifying words "justice and equity" only to the last item in the series (the expenses, and not to the attorneys' fees provision as well). *Sullivan*, 488 S.W.3d at 298-99. If an appellate court reverses in whole or in part based on the TCPA statute, the issue of attorneys' fees may be remanded for further consideration. *Elite Auto Body, LLC v. Autocraft Bodywerks, Inc.*, No. 03-15-00064-CV, 2017 WL 1833495, at * 9 (Tex. App.—Austin May 5, 2017, n.p.h.); *Serafine v. Blunt*, 466 S.W.3d 352, 364 (Tex. App.—Austin 2015, no pet.).

[10] Plaintiffs should consider statutes requiring attorneys' fees awards. For example, in Colorado, the parents of an Aurora massacre victim were ordered to pay more than $200,000 after their lawsuit against three businesses that sold the ammunition and body armor used in the massacre was dismissed. *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1228 (D. Colo. 2015) (dismissing lawsuit and awarding defendants reasonable attorneys' fees and costs pursuant to Colorado law regulating lawsuits against firearm and ammunition manufacturers and dealers); *Phillips v. LuckyGunner*, LLC, No. 14-CV-02822-RPM, 2015 WL 3799574, at *8 (D. Colo. June 17, 2015) (awarding amount of fees and costs).

When a claim has no basis in law or fact, Rule 91a requires the Court to award the prevailing party in a dispute filed under that rule its reasonable and necessary attorney fees. TEX. R. CIV. P. 91a.7. While governmental entities and public officials are exempted from the mandatory fee rule, other parties (including indigent parties) are not. *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565, at *3 (Tex. App.—Dallas May 8, 2015, no. pet.) (mem. op.). By its plain language, the trial court may not consider evidence pertaining to the underlying motion on the merits, but ***must*** consider evidence on the costs and fees issues. TEX. R. CIV. P. 91a.6–7. Frequently, parties submit affidavits seeking to establish the reasonableness of the attorneys' fees, but in some instances live testimony has also been presented to establish the reasonableness of the fees which are evaluated using the familiar *Arthur Andersen* factors. *Drake*, 2015 WL 2160565, at *3. A recent case clarified that the "safe harbor" non-suit provision of Rule 91a.5 means what it says and bars an award of attorneys' fees if the offending claim is non-suited 3 days before the hearing. *Theusen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 301-02 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

An award of reasonable attorneys' 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*, No. 07-15-00409-CV, 2017 WL 2417354 at *5 (Tex. App.—Amarillo June 2, 2017, n.p.h.).

In disputes governed by the Texas Covenants Not to Compete Act, the employer may not recover attorneys' fees, but under very limited circumstances, **employees may** recover attorneys' fees upon a finding that the employer knowingly executed an unenforceable agreement for personal services. TEX. BUS. & COM. CODE §15.51(c); *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 WL 2180706, at *11 (Tex. App.—Fort Worth May 18, 2017, n.p.h.) (no abuse of discretion in denying attorneys' fees where no evidence in the record proved that employer knew at the time of the covenant's execution that its restrictions were unreasonable).[11]

The Texas statute governing fraud in a stock or real estate transaction also provides for the award of attorneys' 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.); *Ginn*, 472 S.W.3d at 824–25.

The Estates Code provides for the recovery of attorneys' 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 attorneys' fees issues in connection with Rule 167 in two ways: (1) fees were implicated and awarded under the Rule itself against State Farm who invoked the procedure; and (2) the court was asked to consider whether the total attorneys' 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.

As do certain employment claims. *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)). A 2016 U.S. Supreme Court decision may reinvigorate demands of employers to have their attorneys' 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 attorneys' fees if they prevail "on the merits"). Particularly noteworthy is Justice Thomas' concurrence who 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

[11] 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.*, No. 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).

a prevailing plaintiff "ordinarily is to be awarded attorneys' 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 decisions have clarified that the proprietary versus governmental function familiar in the tort context also applies in the contract context with regard to cities and their potential defenses of immunity, which implicates attorneys' fees issues. Specifically, the Court wrote earlier this year:

> Just as the nature of governmental immunity does not "inherently limit [ ] the dichotomy's application to tort claims," it likewise does not inherently preclude **a claim for attorney's fees** from a breach-of-contract claim arising from a proprietary function. Therefore, we hold that Wheelabrator's claim for attorney's fees does not implicate immunity.

Wheelabrator Air Pollution Control, Inc., v. City of San Antonio, 489 S.W.3d 448, 453 (Tex. 2016) (emphasis added). 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 attorneys' fees in workers compensation suit against school district). If a statute expressly allows recovery of attorneys' fees from a governmental entity, immunity will not bar the award if the other requirements are met. *City of Houston v. Kallinen,* No. 1-12-00050-CV, 2017 WL 769904, at *5 (Tex. App.—Houston [1st Dist.] Feb. 28, 2017, no pet.).

Those branded as vexatious litigants under TEX. CIV. PRAC. & REM. CODE CH. 11 may be liable for fees and other litigation costs if engaged in sanctionable behavior under TEX. CIV. PRAC. & REM. CODE CH. 10. *Aubrey v. Aubrey*, No. 05-16-00506-CV, 2017 WL 2464678 *14-15 (Tex. App.—Dallas June 7, 2017, n.p.h.) (affirming sanctions, but finding that awarding fees for work in six other cases not authorized).

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*., No. 2:07-CV-00155, 2017 WL 1483386, at *4 (S.D. Tex. April 24, 2017) (Texas Optometry Act's fee provision).

2. Federal laws

The Supreme Court has reiterated that lower 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.

The Court clarified the standard for recovering attorneys' 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 attorneys' 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 recent 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.,* No. 2016-2521, 2017 WL 2407870 at *2-5 (Fed. Cir. June 5, 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 attorneys' fees it has incurred. To hold otherwise would only 'encourage the litigation of unreasonable [and] groundless claims." *Id*. at *6.[12]

[12] 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.,* No. 6:11-CV-428,

The Supreme Court--in the context of addressing the propriety of enhanced patent damages--referenced that it had recently rejected two heightened standards in the recovery of attorneys' 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.

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

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

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).

E. Segregation and election of remedies

The party seeking an attorneys' 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. *Chapa*, 212 S.W.3d at 313–14; *Hensley*, 461 U.S. at 435 (reasoning that when a plaintiff achieves only partial success, attorneys' fees should not be awarded for hours not "expended in pursuit of the ultimate result achieved"); *Lear Siegler Servs. v. Ensil Int'l Corp.*, No. SA-05-CV-679-XR, 2009 WL 5195884, at *2 (W.D. Tex. Dec. 18, 2009) ("The Fifth Circuit follows the general rule that successful and unsuccessful claims should be segregated when calculating attorney's fees."). 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 relating to unsuccessful claims or claims for which attorneys' fees are not recoverable may bar relief. *Chapa*, 212 S.W.3d at 313–14; *but see Solis*, 951 S.W.2d at 389 (holding that absent objection, complaint about failure to segregate was waived); *Hruska v. First State Bank*, 747 S.W.2d 783, 785 (Tex. 1988) (same); *Lakeside Village HOA v. Belanger*, No. 08-15-00214-CV, 2017 WL 2571354 * 23 (Tex. App.—El Paso June 14, 2017, n.p.h.); *Hawkins v. Walker*, 233 S.W.3d 380, 398 (Tex. App.—Fort Worth 2007, no pet.); *Lawson*, No. 03-13-00498-CV, 2016 WL 767772, at *5 (finding that eliciting testimony that party failed to segregate fees did not preserve objection to testimony or exhibit evidence).

A party must segregate 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 attorneys' fees." *Bennett*, 460 S.W.3d at 242 (citing *Chapa*, 212 S.W.3d at 314); *see also Bacon Tomsons*, 2016 WL 4217254, at *15; *Lance v. Robinson*, No. 04-14-00758-CV, 2016 WL 147236, at *16–17 (Tex. App.—San Antonio Jan. 13, 2016, pet. filed); *Smith v. Reid*, No. 04-13-00550-CV, 2015 WL 3895465, at *11 (Tex. App.—San Antonio June 24, 2015, pet. denied).

2015 WL 12765990 at *2 (E.D. Tex. May 15, 2015) (awarding $738,706.47 in fees for defending the frivolous lawsuit).

In a somewhat *Casteel*-like situation, the Texas Supreme Court found that in the absence of testimony segregating on a claim-by-claim basis when more than one basis for fees exist, remand for a new trial on attorneys' fees was required. *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, No. 15-0819, 2017 WL 2323106 at *23 (Tex. May 26, 2017) (no evidence to support breach of contract claim, but evidence supported TTLA claim).

The frequently referenced exception to the segregation requirement is applied when non-recoverable and recoverable attorneys' fees are "inextricably intertwined," although this exception has been reigned in recently. *Chapa*, 212 S.W.3d at 313–14. A prevailing party may only avoid the otherwise rigid requirement to segregate attorneys' fees when discrete legal services advance both a recoverable and unrecoverable claim that are so intertwined that they need not be segregated. *Id.* The Texas Supreme Court has limited this "intertwining exception." *MBM Fin. Corp.*, 292 S.W.3d at 667. 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.* Some post-*Chapa* litigants have successfully done so. *C.f. 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 attorneys' fees amount was some evidence of what segregated amount should be). The exception may apply when the same set of facts or circumstances apply to the causes of action so that they are "intertwined to the point of being inseparable" according to a recent case. *Pike v. Texas EMC Mngmt, LLC*, No. 10-14-00274-CV, 2017 WL 2507783 at *21 (Tex. App.--Waco June 7, 2017, n.p.h.).

Segregation of attorneys' 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 attorneys' fees are properly segregated amongst defendants is directly related to the reasonableness and necessity of the attorneys' 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 attorneys' fees may be improper. However, a mixed recovery of attorneys' 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 attorneys' fees and exemplary damages in fraudulent lien claims).

F. *Arthur Andersen* and other factors including what a "prevailing party" is.

The Texas Supreme Court has set forth eight non-exclusive factors for fact-finders to use to determine the reasonableness of attorneys' fees under Texas law:

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); *In re National Lloyds Ins. Co.*, 2017 WL 2501107 at *9-10.

These factors, based on Texas Disciplinary Rule 1.04(c), apply not only to fee awards by juries, but also to attorneys' fees awards made by judges. *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 Anderson* factors but also include: (a) the "undesirability" of the case, and (b) fee awards in similar cases. *Johnson*, 488 F.2d at 717–19.

El Apple clarified that Texas calculations of a reasonable fee award require the "lodestar" method, similar to what has long been the practice in the Fifth Circuit. *El Apple*, 370 S.W.3d at 759–62; *Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999). 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. *El Apple*, 370 S.W.3d at 759, 763, 765; *Heidtman*, 171 F.3d at 1043; *but see Hopwood v. Texas*, 236 F.3d 256, 281 (5th Cir. 2000) ("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."); *Phillips v. Mar. Ass'n, I.L.A. Local Pension Plan*, 198 F. Supp. 2d 838, 849 (E.D. Tex. 2002) (explaining that the hourly rate should be reasonable in the community where the plaintiffs brought suit, not necessarily where counsel regularly practices).

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* factors. *El Apple*, 370 S.W.3d at 765; *Heidtman*, 171 F.3d at 1043.

However, 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; *City of Burlington v. Dague*, 505 U.S 557, 562, 567 (1992); *see also El Apple*, 370 S.W.3d at 764. Upward adjustments of the lodestar figure are permissible in proper, rare, or exceptional cases supported by both specific evidence on the record and detailed findings by the court. *El Apple*, 370 S.W.3d at 765; *Perdue*, 559 U.S. at 553–57; *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993); *see also United Parcel Serv., Inc. v. Rankin*, 468 S.W.3d 609, 626–28 (Tex. App.—San Antonio 2015, pet. denied) (holding trial court did not err in refusing to apply multiplier to lodestar in context of "litigation costs" under chapter 42 of the Texas Civil Practice & Remedies Code). In 2017, significant fee awards included upward departures based on the rare and extraordinary circumstances in two interesting cases. *City of San Antonio v. Hotels.com, L.P.*, No. 5–06–CV-381–OLG, 2017 WL 1382553, at *13-15 (W.D. Tex. Apr. 17, 2017); *Ramirez*, 2017 WL 2457090 at *13.

United States Supreme Court and Fifth Circuit authority indicates that the most important consideration in determining the propriety of an attorneys' 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.*, No. 1-50372, 2017 WL 117145, at *2 (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*, No. 16-50646, 2017 WL 1403191, at * 1 (April 19, 2017) (judge improperly "relied solely" on the "results obtained" to reduce the lodestar warranting reversal)

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 attorneys' fees in some instances. *Lefemine v. Wideman*, 133 S. Ct. 9, 11–12 (2012) (considering attorneys' fees claim under 42 U.S.C. § 1988, Civil Rights Attorney's Fees Awards Act). However, a plaintiff must prevail and obtain a favorable judgment in order to obtain attorneys' fees under 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) (per curiam)).

The concept of what it means to be a "prevailing party" continues to be hotly disputed. Texas courts similarly emphasize proportionality to the degree of success at trial as a key component of determining a reasonable attorneys' fees award. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547–48 (Tex. 2009) (reasoning that even uncontroverted testimony on attorneys' fees could not support an award of attorneys'

fees seeking roughly the same amount in attorneys' 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 minimus* 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; *cf. Low v. Henry*, 221 S.W.3d 609, 621–22 (Tex. 2007) (reversing award of $50,000 attorneys' fees award as excessive and too severe in sanctions award context).

As the Austin Court of Appeals wrote this year, the determination of "prevailing party" should be considered after the application of settlement credits that may reduce the judgement award of actual damages to less than $0. *Elness Swenson Graham Architects, Inc. v. RLK II-C Austin Air, LP*, No. 03-14-00738-CF, 2017 WL 1832483, at *16-17 (Tex. App.—Austin May 3, 2017, n.p.h); *but see In re RTX Custom Homes, Inc.*, No. 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.").

A plaintiff's mere non-suit without prejudice does not necessarily make the defendant a "prevailing party" without more. *Epps*, 351 S.W.3d at 872; *North Star Water Logic*, 486 S.W.3d at 108 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. *Bacon Tomsons*, 2016 WL 4217254, at *12-14; *but see Monarch Investments, LLC v. Aurrecoechea*, A-14-CA-01019-SS, 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).

Two interesting PIA cases from Houston's First Court of Appeals this year provide some guidance as to the point at which a party "prevails" under the PIA that has a mandatory attorneys' fees provision. *Compare Nehls v. Hartman Newspapers, LP*, 01–16–00121–CV, 2017 WL 1538171 (Tex. App.—Houston [1st Dist.] April 27, 2017, n.p.h.) (no fees under PIA because party did not prevail and UDJA claim was incidental to PIA relief) *with Kallinen*, 2017 WL 769904, at *3-5 (fees recoverable for prevailing party in PIA case).

The United States Supreme Court last year wrote 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.

Under Texas law, 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 attorneys' fees in light of reduction of 87% of underlying judgment and noting that attorneys' 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 attorneys' 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."

There may be other particular considerations in a claim for attorneys' fees including overstaffing, duplicative or unnecessary work, and billing for administrative tasks. *See* Joseph F. Cleveland, Jr. & Alex Harrell, *Is Texas Becoming the Lodestar State? A Practitioner's Guide to Recovering Attorneys' Fees Under the Lodestar Method*, 75 TEX. B. J. 700, 702 (Oct. 2012). However, even multiple attorneys working on a matter may not be a problem, particularly

if the attorneys are performing specific or discrete tasks. *Chaparral Tex., L.P. v. W. Dale Morris, Inc*., C.A. No. H-06-2468, 2009 WL 455282, at *6 (S.D. Tex. Feb. 23, 2009). Work performed by in-house counsel may be recoverable as attorneys' 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 attorneys' 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); *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 attorneys' fees under TEX. GOV'T CODE § 552.323).

G. Legal assistant or paralegal time

Attorneys' 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).

A recent 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 (W.D. Tex. Apr. 17, 2017) (recommending 15% discount of paralegal time).

H. 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. *Lawson*, No. 03-13-00498-CV, 2016 WL 767772, at *6 (equitable estoppel supported joint and several imposition of attorneys' fees on party that did not sign contract with fee-shifting provision); *Carto Properties*, 2017 WL 2545091 at *15 (joint and several liability for fees to guarantor).

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 attorneys' 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.); *see also Energico Production, Inc. v. Frost Nat. Bank*, 2012 WL 254093, at *6 (Tex. App.—Fort Worth Jan. 26, 2012, pet. denied); *see also Dean v. Gladney*, 621 F.2d 1331, 1339-40 (5th Cir. 1980).

When a joint and several attorneys' fees award is proper, however, a prevailing party is only entitled to one-satisfaction.

II. EVIDENCE ISSUES SURROUNDING ATTORNEYS' FEES.

A. Admissible evidence—relevance standard

Section I above describes some common standards for recovery of attorneys' fees, which, together with other law, establishes what constitutes relevant, admissible evidence on the subject of attorneys' fees. The most common evidentiary method of proving reasonable and necessary attorneys' fees is through expert testimony from an attorney using time or billing records. *See, e.g., Thompson v. A.G. Nash & Co.*, 704 S.W.2d 822, 824 (Tex. App.—Tyler 1985, no writ).

While not every element of the *Arthur Andersen* test has to be supported by specific, detailed evidence, failure of basic supporting information like records documenting the time spent working, the hourly rates, and identifying the tasks performed, may result in a finding of "no evidence" to support a claim for attorneys' fees. *See Brockie v. Webb*, 244 S.W.3d 905, 911 (Tex. App.—Dallas 2008, pet. denied).

Recent Texas Supreme Court case law suggests that a good approach is for attorneys' fees testimony to include an express discussion applying the *Arthur Andersen* factors 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.[13] Moreover, if attempting to rely on one or more of the *Arthur Andersen* factors 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 just wrote at length on 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."[37] 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., 2017 WL 2501107 at *6 (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).

B. Some jury charge and appellate issues on attorneys' 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 attorneys' fees. *See* PJC § 115.47. The comments in PJC § 115.47 state that the *Arthur Andersen* factors 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).

The party seeking attorneys' 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; *Stern v. Marshall*, 471 S.W.3d 498, 529 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Fuqua*, 315 S.W.3d at 559; *but see Petrello v. Prucka*, 415 S.W.3d 420, 431 n.2 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (an affidavit can establish the reasonableness of attorneys' fees for summary judgment purposes); *Hooks v. Samson Lone Star, LP*, 457 S.W. 3d 52, 69 (Tex. 2015) (parties may stipulate to amount of attorneys' fees).

Parties can also stipulate to try the attorneys' 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.); *Mooti v. Aldirawi*, 10-12-00161-CV, 2014 WL 2719916, at *2 (Tex. App.—Waco June 12, 2014, pet. denied).

Apart from the PJC, consideration of other legal issues and objections with regard to the jury charge in the area of attorneys' fees are worth considering. For instance, the law clearly requires that expert opinion on attorneys' 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 is proper. *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546–47 (Tex. 1973) (reversing unsegregated award).

In cases where attorneys' 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 PJC provides a line with a dollar sign for the jury to answer four appellate fee questions. PJC § 115.47; 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

[13] 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*, No. 15-0403, 2017 WL 2324392, at *13 (Tex. May 26, 2017) ("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."). However, lawyers are "encouraged" to keep contemporaneous records of their time as they would for their own clients.

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 will preclude recovery of an appellate fee. *Hawkins v. Walker*, 233 S.W.3d 380, 399 (Tex. App.—Fort Worth 2007, no pet.); *Kinsel v. Lindsey*, No. 15-0403, 2017 WL 2324392, at *13(Tex. May 26, 2017) (sparse record for appellate fees resulted in no error finding in rejection of appellate fees).[14] The failure to timely object to the segregation of appellate fees waives that challenge on appeal. *Garcia v. Baumgarten*, No. 03-14-00267-CV, 2015 WL 4603866, at *6 n.4 (Tex. App.—Austin July 30, 2015, no pet.).

The Texas Supreme Court emphasized in 2015 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.[15] The award of appellate attorneys' fees should be conditioned on success on appeal. *Smith*, 2015 WL 3895465, at *11. 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*, No. 4-14-00897-CV, 2016 WL 3625676, at *3 (July 6, 2016, n.p.h.).

The Fifth Circuit had several relatively recent cases supporting the award of appellate attorneys' fees. *Romano Woods Dialysis Center v. Admiral Linen Service*, 653 Fed. App'x 373, 375 (5th Cir. 2016); *Spenrath v. Guardian Life Ins. Co. of Am.*, 564 Fed. App'x 93, 100 (5th Cir. 2014) (affirming appellate fee award); *Advanced Nano Coatings, Inc. v. Hanafin*, 556 Fed. App'x 316, 320–21 (5th Cir. 2014) (affirming appellate fee award). An appellate fee application was reduced when the entries had "vague time descriptions" like "work[ing] on appellate brief." *Black v. SettlePou, P.C.*, No. 3:10-CV-1418-K, 2014 WL 3534991, at *8–9 (N.D. Tex. July 17, 2014). A recent case also approved the award of additional fees following a remand on the issue of "willfulness" in an FLSA case. *Mohammadi v. Nwabuisi*, No. 16-50437, 2017 WL 318645, at *1 (5th Cir. Jan. 20, 2017).

There has been some debate as to whether Texas law should continue following this trial determination approach or whether the amount of appellate attorneys' fees is an issue better decided after all appeals have been exhausted (other than appeals from that award presumably). The proponents of this alternative approach articulate that doing so would result in appellate fees awards more accurately reflecting actual amounts (as is the case with the award of fees related to work done at the trial court level by the time of trial) rather than speculative future awards. Implementing such an approach would necessarily involve having a different jury, years later, resolve a fact issue in the case. However, Texas law generally disfavors having more than one jury resolve fact issues in the same case, and the Texas Supreme Court explicitly rejected a two-trial approach in 2007: "We decline the invitation to allow two trials on attorneys' fees when one will do." *Varner*, 218 S.W.3d at 69–70 (noting that, despite presenting no evidence of appellate or post-foreclosure attorneys' fees at the trial level, the party requested that the Supreme Court "change Texas procedure to allow post-judgment fees to be determined after appeal by remand to the trial court"). Additionally, juries already routinely determine awards of future damages in areas including lost profits, lost earning capacity, medical care, and other categories of damages which generally require some expert testimony and projections of damage estimates based on reasonable probabilities into the future.[16]

If a trial court verdict or judgment which was the basis for an award of attorneys' fees is reduced, a retrial will ordinarily be required unless the appellate court is reasonably certain the jury was not significantly influenced by the erroneous damage award. *Bossier*

[14] *See also Tex. Dep't of Mental Health v. Davis*, 775 S.W.2d 467, 473 (Tex. App.—Austin 1989, no writ) (explaining that a "communication must relate to the purpose for which the advice is sought, and the proof, express or by circumstances, must indicate a desire in the client for confidence and secrecy" in order to qualify under as attorney-client privilege); *see also Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993) ("Courts balance [the] conflict between the desire for openness and the need for confidentiality in attorney-client relations by restricting the scope of the attorney-client privilege.").

[15] A helpful recent case discussing language for conditional award of appellate fees is *Raia v. Crockett*, 16–00562–CV, 2017 WL 2062268, at *9 (Tex. App.—Austin May 10, 2017, n.p.h.).

[16] TEX. CIV. PRAC. & REM. CODE § 18.091(a) even requires a claimant to try to predict potential future tax liability: "evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law."

Chrysler-Dodge, 238 S.W.3d at 376; *Barker*, 213 S.W.3d at 306. If an appellate court finds that no breach of contract occurred or that the claimant is not legally entitled to recover damages, then an attorneys' fees award based on a reversed breach of contract claim will result in reversal of the fee award. *See, e.g.*, *Green Int'l*, 951 S.W.2d at 390 (concluding that the jury's award of zero damages despite breach finding required denial of attorneys' fees under TEX. CIV. PRAC. & REM. CODE § 38.001); *BP Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 511 (Tex. App.—San Antonio 2013, pet. denied).[17] "When an appellate court reverses a declaratory judgment, it may reverse an attorney's fee award, but it is not required to do so." *Kachina Pipeline*, 471 S.W.3d at 455 (remanding attorneys' fees because although some declarations were in plaintiff's favor, it did not prevail "on two of the primary issues in dispute"); *Mitchell v. Ballard*, 420 S.W.3d 122, 134 (Tex. App.—Texarkana 2012, no pet.).

C. 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 attorneys' fees. Accordingly, Texas practice (and federal practice) allow for the parties to stipulate on aspects of attorneys' 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 attorneys' fees in the trial court and on appeal in case where recovery was under TEX. WATER CODE § 36.066(g)); *Mooti v. Aldirawi*, 10-12-00161-CV, 2014 WL 2719916, at *6 (Tex. App.—Waco June 12, 2014, pet. denied) (evidence of attorneys' fees not required because of the parties' stipulation); *Peterson Grp.*, 417 S.W.3d at 59–61; *Chaparral Tex.*, 2009 WL 455282, at *6 (stipulation as to reasonableness of attorneys' hourly rates, not as to the amount of time).

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 attorneys' fees the court would award the prevailing party, ***not a basis*** for an award of attorney's fees. *Ashford Partners, Ltd. v. ECO Res.*, 401 S.W.3d 35, 41 (Tex. 2012); *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. filed) (in shareholder derivative suit, trial court did not err in awarding attorneys' fees of $3.1 million, 5.5 times the lodestar amount, where the parties stipulated in settlement that the trial court would determine attorneys' fees due to plaintiff's lawyers and modified statutory standard of basis for fee award in derivative suits).

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 v. Aldirawi*, No. 10-12-00161, 2014 WL 2719916, at *6 (Tex. App.—Waco June 12, 2014, pet. denied). 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*, No. 10-13-00058, 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 (W.D. Tex. Apr. 17, 2017).

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 attorneys' fees by stipulation. *Kamat v. Prakash*, 420 S.W.3d 890, 910–11 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Parties may also stipulate to take the issue of attorneys' fees away from the jury and submit those issues to the court. *See e.g.*, *Great Northern Energy, Inc. v. Circle Ridge Production, Inc.*, 06–16–00015–CV, 2017 WL 1089804, at *22 (Tex. App.—Texarkana March 22, 2017, n.p.h.).

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.*, No. Civ. A. 397CV2548L, 2004 WL 1041586, at *2, 5–6 (N.D. Tex. May 6,

[17] However, a jury finding of zero attorneys' fees may be reversed if a liability claim entitling a party to fees is proven. *Midland W. Bldg., LLC v. First Serv. Air Conditioning Contractors, Inc.*, 300 S.W.3d 738, 739 (Tex. 2009).

2004).[18] In non-jury trial proceedings including summary judgments, sanctions motions, or other proceedings, attorneys' fees testimony is routinely presented by affidavit. *Ramirez*, 2017 WL 2457090 at *12; *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 WL 1075614, at *4 (Tex. App.—Dallas March 22, 2017, n.p.h.). And, the trial judge "is not required to award attorneys' fees equal to those testified at trial, even when that testimony is uncontradicted." *338 Inds*, 2017 WL 2417354 at *6.

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. *DMC Valley Ranch, L.L.C. v. HPSC, Inc*., No. 05-11-01527, 2014 WL 2538880, at *3 (Tex. App.—Dallas June 5, 2014, no pet.); *Vega v. Compass Bank*, No. 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 attorneys' fees. *Carto Properties, LLC v. Briar Capital, L.P.*, No. 01-15-01114, 2017 WL 2545091 *14 (Tex. App.—Houston [1st Dist.] June 13, 2017, n.p.h.).

Competent, uncontroverted attorneys' 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*., No. 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 attorneys' 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 attorneys' fees. *McMahon v. Zimmerman*, 433 S.W.3d 680, 693 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Wherley v. Schellschmidt*, No. 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)).

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*., No. 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 attorneys' fees, as "[a] request for attorneys' fees should not result in a second major litigation*.") (emphasis in original).

Chapter 38 also allows the trial court to take judicial notice of aspects of attorneys' 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 v. Cisneros*, 477 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

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 attorneys' 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 nevertheless "exercise its discretion and render judgment for attorneys' fees in the interest of judicial economy." *Spivey v. Goodwin*, No. 10-16-00178-CV, 2017 WL 2507841 at *5 (Tex. App.—Waco June 7, 2017, n.p.h.).

D. Objections to evidence or the right to recover

Regardless of the procedural posture of the attorneys' fees dispute, the party being asked to pay its opponents' attorneys' fees may want to challenge the evidence.[19] The proper manner of evidence challenges

[18] Arbitration is the proper place to seek appellate attorneys' 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).

[19] Courts are not "obligated *sua sponte* to sift through fee records searching for vague entries or block-billing" so the

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 attorneys' 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. 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. *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671–72 (Tex. 1990); *Green Tree Servicing, LLC v. Sanders*, No. 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 attorneys' fees); *Progressive Cnty. Mut. Ins. Co. v. Roberson*, No. 11-05-00063-CV, 2006 WL 2507621, at *1–3 (Tex. App.—Eastland Aug. 31, 2006, no pet.) (mem. op.) (reversing award of attorneys' 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*, No. 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.).

Sometimes courts still allow some leeway in this area. *See e.g., 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, n.p.h.); *Pike*, 2017 WL 2507783 at *19 (allowing evidence despite production occurring "well into trial"); *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, attorneys' 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); *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 563 (5th Cir. 2004) (no abuse of discretion to allow attorneys' fees testimony over Rule 26(a) and Rule 37 objection because of only partial disclosure of attorneys' 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 attorneys' 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 attorneys' 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 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).

Historically the threshold level of qualifications required to admit attorney expert testimony on attorneys' 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 attorneys' fees). However, some courts recognize that just as not every doctor is competent to

failure to challenge specific billing entries may result in the fees being supported. *Wherley*, 2014 WL 3513028, at *4 n.6.

testify on every medical issue,[20] 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. *See Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010) (affirming attorneys' fees award in health care liability dismissal context under TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1)). 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 recently:

> 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., 2017 WL 2501107 at *14 n.89.

In some instances, independent attorneys' fees experts may be retained to establish the reasonableness of the attorneys' fees and to prove up the attorneys' 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). Trial courts are also presumed experts of reasonableness of fees. *Wherley*, 2014 WL 3513028, at *2.

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 attorneys' 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); *but see Garcia*, 319 S.W.3d at 642 (affirming award of attorneys' fees for health care liability claim dismissal based on a conclusory opinion from lawyer representing physician which the Supreme Court considered some legally sufficient evidence of reasonable and necessary attorneys' fees); *Bradbury v. Scott*, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (affirming conclusory opinion about appellate fee).[21] A 2014 case rejected objections that an attorneys' 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.*, 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).

---

[20] *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).

[21] Cases—even Texas Supreme Court cases like *Garcia*—supporting attorneys' fees awards in the absence of detailed billing records or other documentation must be looked at carefully in light of the Court's recent pronouncements in *El Apple* and *Montano*. *El Apple*, 370 S.W.3d at 761–62 (distinguishing Texas cases allowing attorneys' fees awards by mere affidavits or "noting that documentary evidence is not a prerequisite to an award of attorney's fees").

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 attorneys' 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).[22] Recent cases demonstrate that the presentment requirement still has teeth. *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.*, No. 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). However, failing to affirmatively plead that all conditions precedent have not been satisfied could result in a waiver of the presentment requirement. *Pike*, 2017 WL 2507783 at *20. A party assigned rights of another may also inherit previous presentments. *Thomas v. California Golden Coast, LLC*, 01–15–01046–CV, 2017 WL 2117540, at *5 (Tex. App.—Houston [1st Dist.] May 16, 2017, n.p.h.).

There may also be other prerequisites to recovering fees. *See, e.g.*, *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 attorneys' fees under Chapter 38 in UIM/UM claim); *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.*, No. 04-13-00324, 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 attorneys' 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 attorneys' fees and the basis for payment of the attorneys' fees may be fatal to the party seeking the fees. *Grantham v. J&B Sausage Co., Inc.*, No. 14-15-00227-CV, 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). In *Yates*, a lawyer provided services in defending an officer of Dynegy in both federal criminal matters and various civil matters. Initially, the Dynegy officer had told the lawyers that the company would pay the legal fees, and according to testimony, the associate received oral confirmation from an in-house attorney, saying "The Board has passed a resolution, so, yes, we are paying [the] fees," and instructing that the bills be submitted to her. *Yates*, 422 S.W.3d at 640. The company then refused to pay the fees and ultimately the lawyer lost the claim to be paid by the company because the alleged oral agreement was barred by the Statute of Frauds.

Contingency fee agreements typically must be in writing to be enforced, although a recent case provides an interesting variation. *Miller Weisbrod, LLP v. Klein Frank, PC*, No. 3:13-CV-2695-B, 2014 WL 3512994, at *9 (N.D. Tex. July 16, 2014). Texas Disciplinary Rule 1.04 provides in part that:

> A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is

[22] A claimant may recover its attorneys' 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). 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.).

> calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

In addition, where an attorney divide fees with another, the Texas Disciplinary Rules place certain conditions on fee-splitting arrangements, sometimes requiring that these agreements be memorialized in writing. *But see Miller Weisbrod, LLP*, 2014 WL 3512994, at *14 ("the summary judgment record conclusively establishes that the fee-sharing agreement was verbal"). Specifically, Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct prohibits lawyers who do not practice at the same law firm from splitting contingency fees unless: (1) there is a written fee agreement identifying the law firms; (2) the client is advised and consents in writing ahead of time; and (3) the fee is in proportion to the work done or the firms have agreed to accept joint representation. A federal district court found that the client's signature on a written agreement to have sufficed to satisfy the requirements of this rule as well as a similar provision in the Colorado rules. *Miller Weisbrod, LLP*, 2014 WL 3512994, at *9. An agreement that an attorney may recover a fee regardless of whether the attorney performs any work was found to be "unconscionable as a matter of law." *Miller Weisbrod, LLP*, 2014 WL 3512994, at *14. Eventually the fee dispute was tried to the bench and the federal magistrate judge rejected the argument that the verbal 15% fee agreement should be enforced due to a lack of a meeting of the minds on the amount of the fees and that an award of $5,000 on the alternatively plead request of *quantum meruit* was proper as the reasonable value of the work performed by the plaintiff firm to have served as local counsel in the underlying case. *Girards*, 2016 WL 454465, at *5, 12. Contingency fee agreements tend to be subject to close scrutiny and lawyers have a duty to "appreciate the importance of words." *In re Davenport*, No. 15-0882 (Tex. June 16, 2017).

Whether at summary judgment or at trial, a party disputing that the other side failed to segregate may want to object on those grounds or face a potential waiver argument. *Chapa*, 212 S.W.3d at 313–14; *Green Int'l*, 951 S.W.2d at 389 (noting that, absent objection, complaint about failure to segregate is waived); *Hruska*, 747 S.W.2d at 785; *Mooti*, 2014 WL 2719916, at *6.

If there is some evidence of attorneys' fees but the party failed to provide testimony properly segregating fees, a remand is most likely the proper remedy. *Chapa*, 212 S.W.3d at 314; *Shamoun & Norman*, 2016 WL 308696, at *17; *Kleberg County v. URI, Inc*., No. 13-14-00158-CV, 2016 WL 363114, at *10 (Tex. App.—Corpus Christi Jan. 28, 2016, pet. filed); *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); *Texas Mut. Ins. Co. v. Boetsch*, 307 S.W.3d 874, 882 (Tex. App.—Dallas 2010, pet. denied); *Nguyen*, 229 S.W.3d at 455–56; *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); *Kotz v. Murariu*, No. 04-1200420-CV, 2013 WL 6205457, at *3 (Tex. App.—San Antonio Nov. 27, 2013, no pet.) (ordering partial remand on receiver's fee request for non-lawyer work that exceeded the unopposed fee amount). However, a suggested remittitur is also possible. *Enzo Investments*, 468 S.W.3d at 655.

5. Failure to exercise billing judgment

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 v. U.S. Dept. of Housing and Urban Dev.*, 99 F.3d 761, 769 (5th Cir. 1996); *Wherley*, 2014 WL 3513028, at *1. This factor may weigh against the reasonableness of a fee request and could be the basis to object. *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); *compare with Diaz v. Doneraki Restaurants, Inc*., No. H-12-2238, 2014 WL 2332822 (S.D. Tex. May 29, 2014) (noting that the waiving of law clerk's work demonstrated billing judgment).

Under the billing judgment rule, attorneys' 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 attorneys' 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).[23]

[23] 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 created after the litigation's results are known and long after the services have been rendered.

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*, No. 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*, No. 15-51241, 2017 WL 1406499, at *2-6 (5th Cir. Apr. 18, 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). However, "fees for fees" may be recoverable as long as the amounts are reasonable. *Saldivar*, 894 F. Supp. 2d at 939 (citing *Cruz v. Hauck*, 762 F.2d 1230, 1233 (5th Cir. 1985)).

6. 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 attorneys' fees, a legal challenge may result in a reversal of that type of an award. *Hawkins*, 233 S.W.3d at 399.

Montano, a condemnation opinion where the property owner obtained an attorneys' fees award under Texas Property Code section 21.019(c), illustrates 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); *see also Maynard v. Booth*, 421 S.W.3d 182, 185 (Tex. App.—San Antonio 2013, pet. denied) (holding trial court did not abuse its discretion in limiting fee awards even if uncontroverted).

The Texas Supreme Court also has reversed a $30,000 attorneys' fees award recently because without evidence of the specific tasks, the fee testimony was legally insufficient to support an award, thereby requiring a second remand. *Long*, 442 S.W.3d at 255–56;[24] *see also Blackstone Med.*, 470 S.W.3d at 657–58 (affidavit lacked specificity needed for trial court to make meaningful lodestar determination); *Universal MRI and Diagnostics, Inc. v. Medical Lien Mngmt, Inc.*, 497 S.W.3d 653, 665 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (same and remanding).

7. The request for attorneys' 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.*, *Mid-Continent Casualty Co. v. Petroleum Solutions, Inc.*, No. 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 attorneys' fees under [Chapter 38] because PSI has not yet prevailed on its claim for breach of contract."), *amended by* 2016

[24] *Long* and at least one subsequent case, *United Nat'l Ins. Co. v. AMJ Invs., LLC*, 447 S.W.3d 1, 12 (Tex. App.—Houston [14th Dist.] 2014, pet. dismissed) mention the party's "choice" of using the lodestar method, but based on the requirement of documentation of tasks and *Arthur Andersen*, it is unclear how one would use an alternative legally effective methodology.

WL 7491858 (S.D. Tex. Dec. 30, 2016); *Glycobiosciences, Inc. v. Woodfield Pharmaceutical, LLC, No.* 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).

8. 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 v. Exxon Corp*., 302 F.3d 448, 461 (5th Cir. 2002). 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), than a law other than Texas law may apply to the fee determination.

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

Although the legal standards are similar, the procedures for recovering attorneys' fees in federal court are different. Federal courts often address these issues on motion, and the Fifth Circuit has found that not having a hearing on attorneys' fees is not an abuse of discretion. *Watkins*, 7 F.3d at 460. Federal Rule of Civil Procedure 54(d)(2) provides that attorneys' fees issues are to be resolved by motion after the entry of judgment except where attorneys' fees are damages in the underlying case. *See Richardson*, 740 F.3d at 1038 (listing as examples of attorneys' 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 attorneys' fees for prosecuting a debtor other suit). Significantly, *Richardson* clarified that motions for attorneys' fees provided by contract are permissible under Rule 54(d)(2). *Id.* at 1039. As a recent case has reiterated, even if juries determine state law attorneys' fees issues in state court, the judge is the proper factfinder in federal court. *GC Development Corp. v. Zayas*, B-15-129, 2017 WL 1273965, at *2 (S.D. Tex. March 15, 2017).

Furthermore, different courts, districts, or divisions may further specify the manner in which the attorneys' 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). According to Local Rule CV-7(j) of the Western District of Texas:

> (1) Unless the substantive law requires a claim for attorney's fees and related nontaxable expenses to be proved at trial as an element of damages to be determined by a jury, a claim for fees shall be made by motion not later than 14 days after the entry of judgment....Counsel for the parties shall meet and confer for the purpose of resolving all disputed issues relating to attorney's fees prior to making application. [in addition to a certificate of conference] The motion shall include a supporting document organized chronologically by activity or project, listing attorney name, date, and hours expended on the particular activity or project, as well as an affidavit certifying (1) that the hours expended were actually expended on the topics stated, and (2) that the hours expended and rate claimed were reasonable.

While the federal *Johnson* factors are similar to the state *Arthur Anderson* factors, 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 attorneys' 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 attorneys' fees were actually awarded may be relevant or persuasive. *Vanderbilt Mortg. & Fin., Inc. v. Flores*, Civil Action No. 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 attorneys' 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. No. 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 attorneys' fees. *See, e.g.*, Cersonsky, *Attorneys' Fees for Lawyers in Collection and Commercial Cases*, at 15 (citing *Alvarez v. AMB-Trans, Inc*., No: SA-11-CV-179-XR, 2013 WL 789238 (W.D. Tex. March 4, 2013)); Cleveland, Jr. & Harrell, *Is Texas Becoming the Lodestar State?*, 75 TEX. B. J. at 702–03 n.56 (referring to the State Bar of Texas 2009 Hourly Fact Sheet and several federal opinions); *see also 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.*, No. 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 factors in the case, the award reflected a higher rate. *Zayas*, 2017 WL 1273965, at *6.

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. *City of San Antonio v. Hotels.com, L.P.*, No. 5–06–CV-381–OLG, 2017 WL 1382553, at *8-9 (W.D. Tex. Apr. 17, 2017).

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 attorneys' 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 attorneys' fees to prevailing party in copyright action is the rule rather than exception and should be awarded routinely). Like attorneys' 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*, No. 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.

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*, No. 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*, No. 15-51241, 2017 WL 1406499, at *7 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). 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).[25] 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.

F. Demonstrative evidence

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

III. DISCOVERY: WHAT IS DISCOVERABLE?

A. Opinions on Attorneys' Fees Claims

Thinking about attorneys' fees claims as being similar in nature to other damage claims that require proof of expert testimony puts into focus that parties should request and demand disclosure of these opinions pursuant to Texas Rule of Civil Procedure 194.2(f). Other rules applicable to expert witnesses apply, so parties have the option of seeking production of documents including billing records as well as reports and drafts of reports.

Notably, interrogatories and requests for production are not proper discovery methods for obtaining the non-fee seeking opposing party's fee bills and related information. *In re National Lloyds Ins. Co.*, 2017 WL 2492001 at *1 (Johnson, J. dissenting).

Reports or affidavits are particularly helpful in preparing for objections and cross-examination at trial as well as in determining whether the party resisting an attorneys' fees claim also needs to retain or designate an expert on the reasonableness of the opponent's attorney's fees claim. However, note that seeking materials for cross-examination is not a permissible ground for obtaining the non-fee seeking opposing party's fee bills and related information. *In re National Lloyds Ins. Co.*, 2017 WL 2492001 at *2-4 (Johnson, J. dissenting).

Many times in commercial disputes, both sides (or multiple parties) may have a claim for attorneys' 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)[26] 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* factors), segregation, bias, or other grounds on which cross-examine the attorneys' fees expert witness at trial or to controvert the testimony with other expert opinion testimony or other proof.

A party seeking to recover attorneys' fees may also consider discovery requests targeted at the opponent such as sending a request for admission seeking an admission that the claimant's hourly rates are reasonable. Whether the failure to admit such a request could itself become a basis for seeking the recovery of attorney's fees under TEX. R. CIV. P. 215.4(b) appears to be an open question.

B. Fee Agreements

Fee agreements are generally discoverable and not protected by the attorney-client privilege if a party seeks attorneys' fees. *See, e.g., Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. Civ. App.—Eastland 1979, no writ) ("The general rule appears to be that the fee arrangement [between attorney and client] is not privileged."); *Duval Cnty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) ("[T]he attorney-client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney's employment, the purpose for which an attorney has been engaged, or any of the other external trappings of the relationship between the parties."); *see also Jackson Walker, LLP v. Kinsel*, No 07-13-00130-CV, 2015 WL 2085220, at *16–17 (Tex. App.—Amarillo

---

[25] 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); *Hartnett v. Chase Bank of Tex. Nat'l Ass'n*, No 3-98-CV-1061-L, 1999 WL 977757, at *3 (N.D. Tex. Oct. 26, 1999).

[26] *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).

April 10, 2015), *aff'd* No. 15-0403, 2017 WL 2324392, at *13 (Tex. May 26, 2017) (non-producing firm apologized for not producing fee agreement).[27]

While the fee arrangement between the client and the attorney will not be dispositive of any attorneys' fees issue including reasonableness,[28] the actual arrangement is frequently relevant and may be discoverable.

To the extent persons other than attorneys of record share a fee interest in the case, that may be discoverable as well. Contingent fee contracts must be in writing to be enforced and are governed in part by Texas Disciplinary Rule of Professional Conduct 1.04(d) and (f), although recovery may still be allowed under a quantum meruit theory. *Girards v. Frank*, No. 3:13-CV-2695-BN, 2016 WL 454465, at *8–10 (N.D. Tex. Feb. 5, 2016) (finding $5,000 fee proper rather than 15% contingency interest). Certain fee splitting arrangements are prohibited and could be relevant to a determination of reasonableness or recoverability of attorneys' fees. TEX. DISC. R. PROF. CONDUCT 1.04(e) & 5.04(a).

Furthermore, information regarding actual payments of attorneys' fees, including the identity of the party paying attorneys' fees, is generally discoverable and falls outside the attorney-client privilege. *See In re Grand Jury Subpoena*, 913 F.2d 1118, 1123 (5th Cir. 1990); *see also Allstate Tex. Lloyds v. Johnson*, 784 S.W.2d 100, 105 (Tex. App.—Waco 1989, no writ) (holding information about actual payment of attorneys' fees not privileged).

C. Billing/Time Records, Redactions, and Attorney-Client or Work Product Privileges

Because billing or time records are central to the opinion of reasonableness which the party seeking to recover fees will offer into evidence, they are discoverable generally. However, aspects of those records may be protectable under either the attorney-client or work product privileges.

"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.*, No. 1-1400906-CV, 2016 WL 3162206, at *5 (Tex. App.—Houston [1st Dist.] June 2, 2016, pet. denied); 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). A recent federal opinion reaffirmed that even if not requested, redacted billing records should be provided if a party has the burden of proof on proving up attorneys' fees and supports the discoverability of billing records. *Western-Southern Life*, 193 F. Supp. 3d at 781.

Some commentators and judges have suggested that "block billing" should be avoided or that parties do so at their peril of not being able to recover reduced fees. *See, e.g.*, Cleveland, Jr. & Harrell, *Is Texas Becoming the Lodestar State?*, 75 TEX. B. J. at 702; *DeLeon*, No. 15-51241, 2017 WL 1406499, at *5 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."); *Kiewit Offshore*, 2017 WL 2599325 at *5. 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

---

[27] *See Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993) ("Courts balance [the] conflict between the desire for openness and the need for confidentiality in attorney-client relations by restricting the scope of the attorney-client privilege.").

[28] *Arthur Andersen*, 945 S.W.2d at 818 (noting that mere fact of a contingent fee agreement does not ***by itself*** establish reasonableness for purposes of making the defendant pay the fee although it "should be considered by the factfinder"). *Johnson*'s holding that an attorney fee award should never exceed the amount of a contingency fee contract has been partially abrogated by *Blanchard v. Bergeron*, 489 U.S. 87, 91–94 (1989), which held that the amount of a contingency fee agreement is merely a factor to be considered, not an absolute cap on an attorney fee award. Instead, the factfinder must determine the reasonableness of a contingency fee in a specific dollar amount. *Stewart Beach Condo. H.O.A., Inc. v. Gili N Prop. Investments, LLC*, 481 S.W.3d 336, 348-49 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citing *Arthur Andersen*, 945 S.W.2d at 819); *see also J&J Sports Production, Inc. v. Palma*, No. 3:15-CV-1359-L, 2016 WL 560378, at *2 (N.D. Tex. Feb. 12, 2016) (rejecting contingency fee amount and awarding a reasonable fee of $1,000). An agreement of an hourly rate engagement does not by itself establish reasonableness of the fee. *Hawkins v. Walker*, 233 S.W.3d 380, 397 n.55 (Tex. App.—Fort Worth 2007, no pet.); *Smith v. Smith*, 757 S.W.2d 422, 424 (Tex. App.—Dallas 1988, writ denied) ("An agreement to pay an attorney's fee based upon a certain amount per hour is not proof of its reasonableness."); *Drabek v. Cavazos*, No. 13-14-00063, 2014 WL 4402501, at *3 (Tex. App.—Corpus Christi-Edinburg Aug. 29, 2014, pet. denied). Stated differently and succinctly, while a contract between a lawyer and client may establish a presumption of the agreed fee as reasonable between the parties, "this presumption does not apply to a third party from whom fees are sought." *Stewart Beach Condo.*, 481 S.W.3d at 347.

be disfavored by some clients who are routinely in litigation, insurance companies, or others including some federal court opinions,[29] block billing may be adequate to support a fee award, particularly since the Texas Supreme Court recently pronounced that time records or billing statements are not the only way to establish lodestar fees. However, the Court also reiterated in those opinions 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; *see also La Ventana Ranch Owners' Ass'n v. Davis*, 363 S.W.3d 632, 650–51 (Tex. App.—Austin 2012, pet. denied) (concluding detailed testimony without an itemized billing statement or testimony regarding the reasonableness and the necessity of each particular task sufficed to support award of attorneys' fees); *John Moore Services*, No. 1-1400906-CV, 2016 WL 3162206, at *6. "Some type of record or documentation" may very well be satisfied by what is sometimes referred to as block billing. For instance, if a person is actually in trial or at a deposition that lasts all day, a "block billing" entry may be more reasonable with respect to the value provided to the client rather than parsing parts of a trial date (*e.g.*, cross-examined witness "X," direct on witness "Y" and "objections to opponent's examination of witness "Y").

Overly-granulated or descriptive time entries can also sometimes lead to another problem. When bills are produced to the adverse party, the more detailed the time entry, the more that litigation strategy, communications with the client, investigations including lawyer's impressions of witnesses, or other typically protected "core" work product and attorney-client communications may be implicated. In production, many of these may require a judgment call as to whether to redact particular entries or not. Excessively redacted time records may themselves undermine attempts to recover attorneys' fees. *See, e.g.*, *In re Frazin*, 413 B.R. 378, 416–17 (Bankr. N.D. Tex. 2009), *aff'd in part, rev'd in part*, 723 F.3d 313 (5th Cir. 2013).

An interesting issue arising in this context is highlighted by the Texas Supreme Court case of *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437–39 (Tex. 2007) (analyzing the intersection between the "snap back" provision of work product privileged materials and the rules permitting discovery of all materials reviewed by a testifying expert and concluding that the expert disclosure rules prevailed over the snap-back provision so long as the expert intends to testify at trial). The unresolved issue—at least by the Texas Supreme Court—involves the common practice of a party seeking attorneys' fees who uses its attorney(s) of record to serve as the testifying expert witness(es) on attorneys' fees and is therefore asked to produce all materials that he or she reviewed in the case. What happens at that intersection between the attorney-client privilege and the rules permitting discovery of all materials reviewed by a testifying expert?

An intermediate court opinion distinguishes *In re Christus Spohn Hospital* on the grounds that the issue of societal interest in the importance of confidentiality in the attorney-client relationship was not squarely before the Court in that case. *In re Segner*, 441 S.W.3d 409, 412 (Tex. App.—Dallas 2013, orig. proceeding). In addition to a technical argument that the deponent was noticed under Texas Rule of Civil Procedure 199 and not 195, *Segner* followed a prior case in refusing to find a waiver of the attorney-client privilege by the designation of a witness retained to work for the trust-client as a testifying expert. *Id.* at 412–13 (citing *D.N.S., M.D. v. Schattman*, 937 S.W.2d 151, 157 (Tex. App.—Fort Worth 1997, orig. proceeding)). Specifically, the court wrote:

> Because Carter was designated as a testifying expert, the Bank could obtain the discovery permitted by Rule 192.3(e), 194.2(f), and 195. ***These rules do not extend*** to Carter's communications protected by the attorney-client privilege.

Id. at 413 (emphasis added).

Schattman cited an earlier case noting an apparent conflict between the expert disclosure rules and the "party communications" privilege, *Aetna Cas. & Sur. Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. App.—Corpus Christi 1991, orig. proceeding), but disagreed with that "apparent conflict" in the old rules and reasoned that the mere communication of privileged information to a party or witness who may testify does not waive the privilege entirely and that only information that is "otherwise discoverable" under the

[29] *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.").

text of former Rule 166(b)(2)(e) would be discoverable. *Schattman*, 937 S.W.2d at 156–57.[30]

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." *In re National Lloyds Ins. Co.*, 2017 WL 2501107 at *8 (in that case, the insurer defendant stipulated its own billing records would not be used to contest the plaintiff's request for attorneys' fees).

These cases suggest that the designation of an attorney as a testifying expert constitutes only a limited waiver making only the documents relied on discoverable. However, in the context of attorneys' fees expert testimony and the reliance on the privileged information to reach an opinion and conclusion as to reasonableness, the possibility for a different result exists.

D. Segregation Evidence

As stated above, Texas and federal case law require segregating fees. Accordingly, parties resisting claims for attorneys' fees ought to be able to discover—if requested by a discovery request such as an interrogatory or in a deposition or request for production or perhaps request for disclosure—any segregation analysis that will be presented to a fact-finder.

E. Non-fee seeking attorneys' fees information (e.g., defendant in breach of contract action) are generally irrelevant and privileged.

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 attorneys' fees and not seeking attorneys' fees) are not relevant and therefore generally not discoverable. *In re National Lloyds Ins. Co.*, 2017 WL 2501107 at *14. This very significant case discusses that "different motivations and different demands drive" defendants as opposed to plaintiffs and that defendants "are not providing 'similar legal services' even in the same case." *Id.* at *11.

F. Informal discovery

As with other aspects of disputes, publicly available sources including WESTLAW, PACER, the Internet and court records can also provide a source of discoverable information that a party may find relevant either to support its own claim for attorneys' fees or to resist an opponent's request for attorneys' fees.

G. Resolve your fee issues before appeal.

Although state and federal practice differs on this, a state court judgment is not final and appealable where claims for attorneys' fees remain and have not been resolved. *Allied Collision Center, Inc. v. Ozigbo*, 01–15–01015–CV, 2017 WL 1536482, at *1 (Tex. App.—Houston [1st Dist] April 27, 2017, n.p.h.) (appeal dismissed for want of jurisdiction); *Farm Bureau Cty Mut. Ins. Co. v. Rogers*, 455 S.W.36 161, 164 (Tex. 2015).

[30] *See also In re Mansell*, No. 04-99-00556-CV, 1999 WL 792690, at *1 (Tex. App.—San Antonio Oct. 6, 1999, no pet.) (concluding that letter to opposing counsel explaining basis of claims and application of authorities to facts at bar did not waive privileges).