



January 2003

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Recommended Citation

Ralph I. Miller & Angela C. Wennihan, *Resolving Attorneys' Fees in Texas Business Litigation*, 56 SMU L. REV. 1115 (2003)

<https://scholar.smu.edu/smulr/vol56/iss3/4>

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RESOLVING ATTORNEYS' FEES IN TEXAS BUSINESS LITIGATION

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IT is a month before trial. You are preparing witnesses and filing the necessary pre-trial documents. You look at your petition and recall—vaguely—the request for attorneys' fees that you eagerly injected into the case months or years ago. Or, perhaps you have just won a motion for summary judgment and there is nothing left to seek from the court, except perhaps . . . attorneys' fees. Appropriately, seeking attorneys' fees is not often the focus of a business litigator's practice.¹ However, skillfully requesting and obtaining attorneys' fees can create enormous client satisfaction. Clients—regardless of what they might tell us—are never eager to pay legal fees. Moreover, in the case of a contingent fee arrangement, obtaining your fee from the opposing litigant can greatly increase the monetary award to the plaintiff. Thus, after successfully pursuing a claim for your client, obtaining an award requiring the opposing side to pay your legal fees can be the icing on the proverbial legal cake.

This article is intended to provide a summary of the relevant Texas law regarding the recovery of legal fees and expenses in business litigation cases.² In Section one, we discuss the most common ways to recover legal fees in Texas business litigation cases. In Section two, the basic fee recovery statute—Texas Disciplinary Rule of Professional Conduct 1.04—is analyzed. In Section three, we discuss the mechanics of calculating the appropriate amount of a request for attorneys' fees. In Section four, we

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1. In fact, the Supreme Court once stated that "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorneys' fees would pose substantial burdens for judicial administration." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

2. This article is not intended to analyze all Texas statutes that provide for the recovery of attorneys' fees. However, this article is intended to be published annually, and later publications may focus on the recovery of attorneys' fees in other types of matters.

discuss the recovery of litigation costs and expenses. Finally, in Section five, we provide practical suggestions for the recovery of your attorneys' fees.

I. BUSINESS TORTS PROVIDING FOR THE RECOVERY OF ATTORNEYS' FEES

The general rule is that a litigant cannot recover its attorneys' fees and expenses from its opponent unless a contractual³ or statutory provision provides otherwise.⁴ Accordingly, there are four main statutes that a Texas business litigator should be familiar with regarding the recovery of attorneys' fees.⁵ Specifically, a Texas litigator should consider seeking attorneys' fees in breach of contract actions, deceptive trade practices act matters, declaratory judgment proceedings, and/or shareholder derivative actions. However, an attorney should also consider seeking attorneys' fees on equitable grounds.

A. RECOVERING ATTORNEYS' FEES IN BREACH OF CONTRACT ACTIONS

Chapter 38 of the Civil Practice and Remedies Code permits a prevailing party⁶ to recover attorneys' fees and costs in a breach of contract case.⁷ To obtain attorneys' fees under Chapter 38, a party must satisfy

3. "A contractual provision providing for attorneys' fees will establish a prima facie case that the stipulated amount is reasonable and recoverable The burden then shifts to the opposing party to plead, prove, and request an issue on an affirmative defense that: (1) the contractual amount is unreasonable, and (2) a particular known amount would be reasonable." *O'Kehie v. Harris Leasing Co.*, 80 S.W.3d 316, 319 (Tex. App.—Texarkana 2002, no pet.) (citing *F.R. Hernandez Constr. & Supply Co. v. Nat'l Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979).)

4. *See Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992); *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999); *New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967); *Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964); *Mundy v. Knutson Constr. Co.*, 294 S.W.2d 371, 373 (Tex. 1956); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 701 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Grimes v. Grimes*, 612 S.W.2d 714, 715 (Tex. App.—Houston [14th Dist.] 1981, no writ); *Simmons v. Harris County*, 917 S.W.2d 376, 378 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *State v. Estate of Brown*, 802 S.W.2d 898, 901 (Tex. App.—San Antonio 1991, no writ).

5. Other claims that a business litigator should consider seeking legal fees in connection with include federal and certain state antitrust, trade regulation, racketeering, and intellectual property claims.

6. A prevailing party is "one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention." *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (quoting *City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex. App.—Amarillo 1997, no pet.); citing *Fed. Deposit Ins. Corp. v. Graham*, 882 S.W.2d 890, 900 (Tex. App.—Houston [14th Dist.] 1994, no writ)). Furthermore, a party can "prevail" without receiving damages. *Ram-Forwarding*, 29 S.W.3d at 638; *but see Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997).

7. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2001). Chapter 38 provides: "a person may recover reasonable attorneys' fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges;

three requirements: (1) prevail⁸ and recover damages⁹ in its breach of contract action;¹⁰ (2) present evidence of a reasonable fee for the services rendered in connection with the prevailing claim; and (3) satisfy the procedural requirements of Section 38.002 regarding presentment.¹¹ Provided that a litigant satisfies these requirements, recovery of attorneys' fees under this provision is *mandatory*.¹² "A trial court has discretion to fix the amount of attorneys' fees, but it does not have the discretion to completely deny attorneys' fees if they are proper under Section 38.001."¹³

Importantly, the Texas Supreme Court has extended 38.001 to provide for the recovery of attorneys' fees for fraud claims when the fraud arises out of a breach of contract action.¹⁴ Other appellate courts have extended this exception to any "tort" that arises out of a breach of contract.¹⁵ This was true—at least in one case—when the party seeking fees did not actually prevail on the breach of contract claim.¹⁶ This is a great

(5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract." *Id.* at § 38.001. Chapter 38 does not apply to some contracts issued by insurers. *See Id.* § 38.006.

8. A prevailing party is one who is "vindicated by the trial court's judgment." *Polk v. St. Angelo*, No. 03-01-00356-C (Tex. App.—Austin May 31, 2002, no pet.) (not designated for publication) (2002 WL 1070050).

9. *See Mobile Producing Tex. & N.M., Inc. v. Cantor*, 93 S.W.3d 916 (Tex. App.—Corpus Christi 2002, no pet. h.); *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied). Even if a party "prevails," the statute requires that the party also recover damages to obtain legal fees pursuant to Section 38.001. *See Green Int'l*, 951 S.W.2d at 390; *see also Law Offices of Windle Turley v. French*, No. 2-01-080-CV (Tex. App.—Fort Worth 2003, no pet.) (not designated for publication), 2003 WL 253643, at *7 (denying attorneys' fees when no damages or anything of value awarded); *N.T. Dev., Inc. v. J.A.B.E., Inc.*, 79 S.W.3d 230 (Tex. App.—Fort Worth 2002, no pet.).

10. A defendant cannot recover fees under section 38.001 for defeating a breach of contract claim. *See Rainbow Group, Ltd. v. Johnson*, No. 03-00-00559-CV, 2001 WL 1991141, at *12 (Tex. App.—Austin Aug. 30, 2002, pet. denied). However, the "party seeking attorneys' fees need not obtain net recovery." *Gereb v. Smith Jaye*, 7 S.W.3d 272 (Tex. App.—San Antonio 2002, no pet.).

11. *See TEX. CIV. PRAC. & REM. CODE ANN.* §§ 38.001, 38.002 (Vernon 2001); *Flint & Assoc. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624 (Tex. App.—Dallas 1987, writ denied). Section 38.002 provides "(1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented." *TEX. CIV. PRAC. & REM. CODE ANN.* § 38.002 (Vernon 2001).

12. *See Cale's Clean Scene CarWash, Inc. v. Hubbard*, 76 S.W.3d 784, 787 (Tex. App.—Houston [14th District] 2002, no pet.); *Cotter v. Todd*, No. 04-01-00084-CV (Tex. App.—San Antonio Oct. 9, 2002, no pet. h.) (not designated for publication), 2002 WL 31253397, at *6; *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 23 (Tex. App.—Tyler 2000, pet. denied); *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 683 (Tex. App.—Fort Worth 1998, pet. denied); *Budd v. Gay*, 846 S.W.2d 521, 524 (Tex. App.—Houston [14th Dist.] 1993, no writ).

13. *World Help*, 977 S.W.2d at 683.

14. *See Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 31 (Tex. 1990).

15. *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 288 (Tex. App.—Corpus Christi 1992, *aff'd as modified by Schindler v. Austwell Farmers Coop.*, 841 S.W.2d 853 (Tex. 1992)) (citing *Gill Sav. Ass'n*, 797 S.W.2d at 31; *Wilson v. Ferguson*, 747 S.W.2d 499, 504 (Tex. App.—Tyler 1988, writ denied)).

16. *Adams v. H&H Meat Prods., Inc.*, 41 S.W.3d 762, 780 (Tex. App.—Corpus Christi 2001, no pet.).

opportunity to obtain attorneys' fees and should not be overlooked.

1. Presenting Evidence of a Reasonable Fee

Chapter 38 requires the litigant to present evidence regarding the reasonable nature of the fee award sought. However, the statute provides some assistance in establishing the reasonable amount of a fee. Under Section 38.003 of the Civil Practice and Remedies Code, "[i]t is presumed that the usual and customary attorneys' fees for a claim of the type described in Section 38.001 are reasonable."¹⁷ However, the fact that "usual and customary" fees are deemed *per se* reasonable does not mean that the court must award the full amount of "usual and customary fees."¹⁸ At least one court has held that the "usual and customary" fees determined by the court create a ceiling *above* which the court cannot award.¹⁹ Notwithstanding that ceiling, the same court believed that the court has discretion to award an amount *below* that ceiling.²⁰ Moreover, the presumption in favor of the reasonableness of "usual and customary" fees can be rebutted by competent evidence.²¹

The court can also "take judicial notice of the usual and customary attorneys' fees and of the contents of the case file" without receiving any other evidence in a bench trial or in a jury case in which the amount of attorneys' fees is submitted to the court with the consent of the parties.²² This means that in such circumstances, the court can determine the reasonable amount of attorneys' fees completely on its own by applying the 1.04 factors²³ to the work described in the case file and the "usual and customary" fees for a similar claim.²⁴

2. Presentment

Because it is so easily overlooked, the most difficult element to satisfy to obtain attorneys' fees in a breach of contract action is often presentment. Section 38.002 requires a litigant seeking attorneys' fees to "present the claim to the opposing party or to a duly authorized agent of the opposing party."²⁵ This means that a plaintiff seeking fees under this chapter must both plead²⁶ and "prove presentment to recover attorneys' fees claimed."²⁷ Presentment can be made either before or after suit is

17. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 2001).

18. *Bethel v. Butler Drilling Co.*, 635 S.W.2d 834, 841 (Tex. App.—Houston [14th Dist] 1982, writ ref'd n.r.e.).

19. *Id.*

20. *Id.*

21. *Id.*

22. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 2001).

23. *Infra* sec. II.

24. *Bethel*, 635 S.W.2d at 841.

25. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 2001).

26. *See Llanes v. Davila*, No. 13-02-129-CV, 2003 WL 124833, at *5 (Tex. App.—Corpus Christi Jan. 16, 2003, no pet. h.) (noting request for attorneys' fee in first amended answer, original counterclaim and referenced in responses to requests for disclosure).

27. *Vingcard A.S. v. Merrimac Hospitality Sys. Inc.*, 59 S.W.3d 847, 867 (Tex. App.—Ft. Worth 2001, pet. denied).

filed, but presentment must be made at least thirty days before judgment.²⁸ The rationale behind the presentment requirement is to enable a defendant to pay a claim before accruing attorneys' fees.²⁹ Various forms of presentment have been held to be sufficient.³⁰ The essential element is that there is notice given before judgment.³¹ However, an unreasonably excessive demand is improper and will result in the disallowal of fees.³² Further, presentment can be contractually waived.³³

B. RECOVERING ATTORNEYS' FEES IN DECLARATORY JUDGMENT ACTIONS

Section 37.009 of the Civil Practice and Remedies Code permits the recovery of costs and attorneys' fees in a declaratory judgment action.³⁴ Under section 37.009, the decision to award attorneys' fees is completely at the discretion of the trial court.³⁵ Furthermore, even a non-prevailing

28. *Id.* The pleadings themselves do not constitute demand. *Id.*; see also *Grace v. Duke*, 54 S.W.3d 338, 338-44 (Tex. App.—Austin 2001, no pet.) (“[T]he mere filing of a breach of contract suit does not constitute presentment.”).

29. *Vingcard*, 59 S.W.3d at 867.

30. *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981) (holding letter and telephone conversation informing sellers of buyers' intentions to go through with sale of property met requirements of presentment); *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (holding that oral request to tender full performance under contract, which was refused, sufficient to establish presentment); *Marifarms Oil & Gas, Inc. v. Westhoff*, 802 S.W.2d 123, 127 (Tex. App.—Fort Worth 1991, no writ) (oral demand during deposition); *De Los Santos v. S.W. Tex. Methodist Hosp.*, 802 S.W.2d 749, 757 (Tex. App.—San Antonio 1990, no writ) (original bill or invoice sent to buyer was sufficient); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (holding notice of payment due date was sufficient); *Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921, 926-27 (Tex. App.—Corpus Christi 1988, writ denied) (holding demand letter and testimony that demand was made and turned down was sufficient to establish presentment); *Bethel v. Norman Furniture Co. Inc.*, 756 S.W.2d 6, 8 (Tex. App.—Houston [1st Dist.] 1988, no writ) (demand letter attached to motion and produced during discovery but never previously sent was sufficient); *Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 470 (Tex. App.—Fort Worth 1987, writ denied) (holding discussion between attorneys regarding claim was presentment); *Plains Ins. Co. v. Evans*, 692 S.W.2d 952, 956-57 (Tex. App.—Fort Worth 1985, no writ) (same); *Tierney v. Lane, Gorman, Trubitt & Co.*, 664 S.W.2d 840, 843-44 (Tex. App.—Corpus Christi 1984, no writ) (notation on check paid under protest is presentment); *Humble Exploration Co. v. Amcap Petroleum Ass'n*, 658 S.W.2d 860, 863 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (holding discovery request sufficient); *Welch v. Gammage*, 545 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (holding that request for admission and its response in which party admitted refusal to pay a claim sufficient to establish presentment); *Hudson v. Smith*, 391 S.W.2d 441, 451 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (prior lawsuit).

31. *Vingcard*, 59 S.W.3d at 867; see also *Norman Furniture*, 756 S.W.2d at 8 (“When the question of attorneys' fees is submitted to the court, the court may consider the entire case file to determine whether presentment was made.”); *Llanes*, 2003 WL 124833, at *6 (pleading presentment and allegations that are not challenged establishes presentment); *Sanchez v. Jary*, 768 S.W.2d 933, 936 (Tex. App.—San Antonio 1989, no writ); *Wallace v. Ramon*, 82 S.W.3d 501 (Tex. App.—San Antonio 2002, no pet.).

32. *Outdoor Sys., Inc. v. BBE L.L.C.*, No. 11-01-00052-CV, 2002 WL 31520345 (Tex. App.—Eastland 2002, no pet. h.).

33. See *Escalante v. Luckie*, 77 S.W.3d 410 (Tex. App.—Eastland 2002, pet. denied).

34. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 2001).

35. See *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) (“The statute thus affords the trial court a measure of discretion in deciding whether to award attorney fees or not.”);

party can recover fees.³⁶

While the award of attorneys' fees is at the court's discretion,³⁷ the Code imposes certain limitations on that discretion.³⁸ First, the fees must be "reasonable and necessary."³⁹ Whether the fees are "reasonable and necessary" is a question reserved for the fact finder.⁴⁰ However, there must be factually sufficient evidence to support the award of fees.⁴¹ The recovery of fees must also be "equitable and just."⁴² The question of whether the award of fees is "equitable and just" is an issue to be resolved by the court.⁴³

While either party can recover attorneys' fees in a declaratory judgment action,⁴⁴ fees will not be awarded when a defendant asserts a counterclaim for a declaratory judgment that is the "mirror image" of one of the plaintiff's asserted claims.⁴⁵ However, the question often becomes whether the issue is already pending before the court when the request for a declaration is sought. If it is not, fees can be awarded as long as the

Oake v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985) ("[T]he grant or denial of attorneys' fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused that discretion."); Justice Bail Bonds v. Samaniego, 68 S.W.3d 811, 815 (Tex. App.—El Paso 2001, pet. denied); Hansen v. Academy Corp., 961 S.W.2d 329, 333 (Tex. App.—Houston [1st Dist.] 1997, writ denied); Trien v. Equity Real Estate, Inc., No. 08-99-00464-CV (Tex. App.—El Paso Nov. 8, 2001, no pet.) (not designated for publication), 2001 WL 1383115, at *4. However, it is an abuse of discretion for a court to award attorneys' fees pursuant to section 37.009 "when the statute is relied upon solely as a vehicle to recover attorneys' fees." Strayhorn v. Raytheon E-Sys., Inc., No. 03-02-00346-CV, 2003 WL 192105, at *12 (Tex. App.—Austin Jan. 30, 2003, no pet. h.).

36. Black v. City of Killeen, 78 S.W.3d 686 (Tex. App.—Austin 2002, pet. denied) ("Whether a party prevails . . . is not a determining factor in avoiding attorneys' fees."); See Hatton v. Grigar, 66 S.W.3d 545 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 637 (Tex. 1996) ("[T]he award of attorneys' fees in declaratory judgment actions is clearly within the trial court's discretion and is not dependent on a finding that a party 'substantially prevailed.'").

37. *Bocquet*, 972 S.W.2d at 20.

38. *Id.* at 20-21.

39. *Id.*

40. *Id.* at 21; Brush v. Reata Oil & Gas Corp., 984 S.W.2d 720, 729 (Tex. App.—Waco 1998, pet. denied). The fact finder can seek guidance on whether fees are "reasonable and necessary" by examining the factors provided by Texas Disciplinary Rule 1.04, discussed in detail below. See *Bocquet*, 972 S.W.2d at 21; *infra* Section II; *but see* Schwedler v. Wright, No. 07-98-0281-CV (Tex. App.—Amarillo Apr. 8, 1999, pet. denied) (not designated for publication) (1999 WL 236511, *7) (opining that *Andersen* court's use of "should" rather than "must" makes the 1.04 analysis discretionary).

41. *Bocquet*, 972 S.W.2d at 21.

42. *Id.*

43. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Bocquet*, 972 S.W.2d at 21 ("Matters of equity are addressed to the trial court's discretion . . . so is the responsibility for just decisions."); *Trien*, 2001 WL 1383115, at *4.

44. Note: only a party asserting a breach of contract can receive fees pursuant to section 38.001. See *Smith v. Tex. Farmers Ins. Co.*, 82 S.W.3d 580, 588 (Tex. App.—San Antonio 2002, pet. denied).

45. See *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 746-77 (Tex. App.—Austin 1995, writ denied); *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638-39 (Tex. App.—Austin 1992, writ denied); *John Chezik Buick Co. v. Friendly Chevrolet Co.*, 749 S.W.2d 591, 594-95 (Tex. App.—Dallas 1988, writ denied).

declaration sought does not closely resemble the plaintiff's claims.⁴⁶ Thus, a litigant should promptly assert a request for a declaratory judgment to preserve the right to recover attorneys' fees.⁴⁷

C. RECOVERING ATTORNEYS' FEES IN A DECEPTIVE TRADE PRACTICES ACTION

The Texas Deceptive Trade Practices Act (the "DTPA") also permits the recovery of attorneys' fees. In fact, any consumer who prevails on a DTPA claim "shall" be awarded court costs and attorneys' fees.⁴⁸ Conversely, a defendant may recover attorneys' fees under the DTPA if the court finds that an action was "groundless in fact or law, brought in bad faith, or brought for the purpose of harassment."⁴⁹ Whether the plaintiff or defendant recovers attorneys' fees, the fees must be "reasonable and necessary."⁵⁰

The interpretation of "reasonable" by the Texas courts in context of attorneys' fees awarded under the DTPA has produced strange results. In *Arthur Andersen & Co. v. Perry Equipment Corp.*, the Texas Supreme Court held that attorneys' fees may be reasonable as between the client and attorney for purposes of the standard set forth in Rule 104 of the Texas Disciplinary Rules of Professional Conduct, but unreasonable in the context of an award for attorneys' fees under the DTPA.⁵¹ Thus, in the case of a contingent fee contract, a consumer may need to use part of his or her DTPA recovery to compensate his or her attorney, leaving the consumer without full recovery.

1. Recovery of Attorneys' Fees by a Consumer

As mentioned above, Section 17.50(d) of the DTPA provides that a prevailing consumer "shall be awarded court costs and reasonable and necessary attorneys' fees."⁵² Since the award is mandatory, the critical determination is whether the consumer has "prevailed."⁵³ The Texas Supreme Court has interpreted the word "prevailed" liberally. The Court

46. See *BHP Petroleum Co. v. Millard*, 80 S.W.2d 838, 841 (Tex. 1990); *John G. & Marie Stella Kenedy Memorial Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002) (denying fees where declaration relief was "merely incidental" to title issues); *Brousseau*, 81 S.W.3d at 397-98; *Thomas v. Thomas*, 902 S.W.2d 621, 626 (Tex. App.—Austin 1995, writ denied); *Brush*, 984 S.W.2d at 730-31. But see *Hanzel v. Herring*, 80 S.W.3d 167 (Tex. App.—Fort Worth 2002, no pet.).

47. Of course, "a declaratory judgment action may not be used solely to obtain attorneys' fees that are not otherwise authorized by statute or to settle disputes already pending before a court." *Hopkins v. Netterville*, No. 12-20-00339-CV (Tex. App.—Tyler Jan. 16, 2002, no pet.) (not designated for publication), 2002 WL 59278, *8 (reversing attorneys' fees award).

48. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 2002).

49. *Id.* § 17.50(c).

50. *Supra* notes 41, 42.

51. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

52. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 2002).

53. See, e.g., *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002) (denying attorneys' fees for failure to prevail on DTPA claim).

has held, for example, that a consumer “prevails” if the consumer has been awarded *any* of the remedies authorized under section 17.50(b), even if a net recovery was awarded *against* the consumer.⁵⁴

Given that many suits involve successful *and* unsuccessful DTPA claims, courts require an allocation of fees between the claims unless there is a substantial overlap among the claims.⁵⁵ Additionally, an award should include appropriate amounts for appeals or be reduced if an appeal is not taken.⁵⁶

2. *Recovery of Attorneys' Fees by a Defendant*

Since the DTPA provides consumers with substantial powers against defendants, the statute could potentially be used to harass or intimidate. To prevent such abuses, the DTPA provides for an award of attorneys' fees to a defendant when the consumer's suit was “groundless in fact or law or brought in bad faith, or brought for the purpose of harassment.”⁵⁷ As with a consumer's recovery of attorneys' fees, if the defendant has met this requirement and satisfied the “prevail” requirement, the award of attorneys' fees is mandatory.

The existence of bad faith, groundlessness, or harassment is determined by the court, not the jury.⁵⁸ These terms are not defined in the DTPA, but the Texas Supreme Court has applied the definition of Rule 13 of the Texas Rules of Civil Procedure to define “groundless” for purposes of the DTPA as a suit with “no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.”⁵⁹ “Bad faith,” although not defined in DTPA case law, has been defined in many other contexts as any indicia of improper motive, such as ill will, spite, malice, reckless disregard, or dishonesty.⁶⁰ Finally, “harassment,” although not defined in the DTPA, generally means annoyance, irritation, or disturbance.⁶¹

Another protection afforded to defendants under the DTPA is the notice requirement of section 17.505, which requires that a consumer give a defendant at least sixty (60) days notice prior to filing suit.⁶² The notice must give “reasonable detail of the consumer's specific complaint” and the amount of all forms of damages, expenses, and any attorneys' fees

54. *McKinley v. Drozd*, 685 S.W.2d 7, 9 (Tex. 1985).

55. *See Williamson v. Tucker*, 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

56. *See Int'l Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347 (Tex. 1971).

57. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 2002).

58. *Id.*; *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989).

59. *Donwerth*, 775 S.W.2d at 637; *see also* TEX. R. CIV. P. 13.

60. *See McDuffie v. Blassingame*, 883 S.W.2d 329, 335 (Tex. App.—Amarillo 1994, writ denied); *Holeman v. Landmark Chevrolet Corp.*, 989 S.W.2d 395, 399 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Zak v. Parks*, 729 S.W.2d 875, 878 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Transp. Indem. Co. v. Orgain, Bell & Tucker*, 846 S.W.2d 878 (Tex. App.—Beaumont 1993), *writ denied per curiam*, 856 S.W.2d 410 (Tex. 1993).

61. *See* BLACK'S LAW DICTIONARY 721 (7th ed. 1990).

62. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 2002).

reasonably incurred by the consumer.⁶³ Failure to include attorneys' fees should not affect the sufficiency of the notice letter but, for purposes of attorneys' fees, allows for the presumption that none exist and settlement may be made without payment of such fees.⁶⁴

For a defendant, a well-drafted settlement offer letter provides the best opportunity to either recover attorneys' fees or limit its liability for the consumer's attorneys' fees in the event the consumer is ultimately successful. Under section 17.5052, if the defendant's settlement offer was the same, substantially the same, or more than the amount of damages found by the trier of fact, then the consumer's attorneys fees are limited to the amount of reasonable and necessary attorneys' fees incurred *before* the date and time of the rejected settlement offer.⁶⁵ If the defendant's settlement offer was for the full amount requested by the consumer in the notice, but the consumer rejects the offer, the rejection is evidence that the suit was brought for the purpose of harassment and the defendant may be able to recover its attorneys' fees from the consumer under Section 17.50(c), even if the case action was not groundless.⁶⁶

D. RECOVERING ATTORNEYS' FEES IN SHAREHOLDER DERIVATIVE LITIGATION

Although less common, attorneys' fees can also be awarded in shareholder derivative litigation. Upon the termination of a shareholder derivative lawsuit, the court is empowered to award attorneys' fees incurred by one or both of the parties.⁶⁷ Specifically, Article 5.14J of the Texas Business Corporation Act provides that the court may order:

(a) the domestic or foreign corporation to pay the expenses of the plaintiff incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the domestic or foreign corporation; (b) the plaintiff to pay the expenses of the domestic or foreign corporation or any defendant incurred in investigating and defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or (c) a party to pay the expenses incurred by another party (including the domestic or foreign corporation) because of the filing of a pleading, motion, or other paper, if it finds that the pleading, motion, or other paper (i) was not well grounded in fact after reasonable inquiry, (ii) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (iii) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.⁶⁸

63. *Id.*

64. *See Silva v. Porowski*, 695 S.W.2d 766 (Tex. App.—El Paso 1985, writ ref'd n.r.e.); *Minor v. Aland*, 775 S.W.2d 744 (Tex. App.—Dallas 1989, writ denied).

65. TEX. BUS. & COM. CODE ANN. §§ 17.505(h), 17.5052 (Vernon 2002).

66. *See Donwerth*, 775 S.W.2d at 638.

67. *See TEX. BUS. CORP. ACT ANN.* art. 5.14 § J (Vernon Supp. 2001).

68. *Id.*

Expenses are defined in the statute as the “reasonable expenses incurred in the defense of a derivative proceeding, including without limitation: (a) attorneys’ fees; (b) costs in pursuing an investigation of the matter that was the subject of the derivative proceeding; and (c) expenses for which the domestic or foreign corporation or a corporate defendant may be required to indemnify another person.”⁶⁹

There is little case law interpreting Article 5.14J. However, the language of the statute and the limited case law that exists makes it clear that depending on the evidence, either—or both—of the parties can collect attorneys’ fees in a derivative matter if the statutory requirements are met.

1. *Recovery of Attorneys’ Fees by a Derivative Plaintiff*

As provided above, Article 5.14J(1)(a) allows a court to award a prevailing plaintiff legal fees if the proceeding has resulted in a “substantial benefit” to the corporation.⁷⁰ Further, a plaintiff can also recover fees from corporation under Article 5.14J(1)(c) for specific improper filings by the corporation.⁷¹ Although the authors cannot locate a case directly addressing the bounds of this statute, presumably, the plaintiff could recover its fees for responding to any such pleading, motion, or other paper in the entire case—regardless of whether the proceeding ultimately resulted in a substantial benefit to the corporation.⁷²

2. *Recovery of Attorneys’ Fees by a Corporation*

As explained above, Article 5.14 also allows a court to order the plaintiff to pay the corporation’s expenses incurred in investigating and defending the shareholder derivative proceeding if the court “finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose.”⁷³ An award under this statute is discretionary, not mandatory.⁷⁴ Further, the phrase “without reasonable cause” is not defined in the statute and is obviously subject to numerous interpreta-

69. *Id.*

70. See TEX. BUS. CORP. ACT ANN. art. 5.14 § J(1)(a); *Rowe v. Rowe*, 887 S.W.2d 191, 198 (Tex. App.—Fort Worth 1994, writ denied) (“Attorneys’ fees are only recoverable by a successful plaintiff in a shareholder’s derivative suit.”); see also *Bayoud v. Bayoud*, 797 S.W.2d 304, 315 (Tex. App.—Dallas 1990, writ denied).

71. TEX. BUS. CORP. ACT ANN. art. 5.14 § J(1)(c) (Vernon Supp. 2003).

72. See *id.*

73. See *id.* The previous version of Article 5.14 was somewhat ambiguous with respect to whether the court or the jury was supposed to make the determination of whether the proceeding was brought without reasonable cause. See *Campbell v. Walker*, No. 14-96-01425-CV (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet.) (not designated for publication), 2000 WL 19143, at *3-6 (holding determination to be made by court); *Econ. Gas, Inc. v. Burke*, No. 14-93-01016-CV (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (not designated for publication), 1996 WL 220903, at *11 (concurring and dissenting opinion) (“[T]he statute, by its plain and unambiguous terms, allows ‘a finding’ of reasonable cause to be made by the court or jury.”) However, the 1997 amendments to the statute make it clear that the court is to make such determination.

74. See *Pace v. Jordan*, 999 S.W.2d 615, 625-26 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

tions. Recently, the Fourteenth District Court in *Bass v. Walker*, analyzed the meaning of this phrase.⁷⁵

In *Bass*, the plaintiffs argued that “‘without reasonable cause’ should be interpreted as a subjective standard, requiring a finding that the plaintiff knew the suit was groundless at the time he filed it.”⁷⁶ The court disagreed and held that “a plaintiff acts without reasonable cause under article 5.14F if, at the time he brings suit: (1) the claims asserted by the plaintiff in the lawsuit are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or (2) the allegations in the plaintiff’s suit are not well grounded in fact after reasonable inquiry.”⁷⁷ Although the *Bass* court did not elaborate on its rationale for developing this standard, it appears that it was guided in its interpretation of the meaning of Article 5.14J(1)(b) by the language contained in Article 5.14J(1)(c).⁷⁸

In addition to Article 5.14J(1)(b), the corporation—like the derivative plaintiff in the case of the corporation’s filings—can also recover fees from the derivative plaintiff under Article 5.14J(1)(c) for specific improper filings by the corporation. Again, the authors cannot locate controlling case law, but the language of the statute seems to provide the corporation with a second bite at the fee apple. In other words, even if the corporation cannot establish that the entire proceeding was commenced or maintained without reasonable cause or for an improper purpose, the statute seems to grant the corporation the right to test all of the pleadings, motions, and other papers filed by the plaintiff to determine if any of one or more of such filings (i) was not well grounded in fact after reasonable inquiry, (ii) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (iii) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.⁷⁹ Although this is an undoubtedly tedious task, the attorneys’ fees associated with a particular pleading or motion may be worth the effort of reviewing the entire case file prior to submitting the fee application.

E. RECOVERING FEES ON EQUITABLE GROUNDS

Notwithstanding the general rule that attorneys’ fees are not recoverable unless a contractual or statutory provision permits otherwise, “equitable principles may allow for the recovery of attorneys’ fees” if a party is required to prosecute or defend a suit because of the “wrongful act” of its opponent.⁸⁰ In *Massey v. Columbus State Bank*, the Houston Court of

75. *Bass v. Walker*, No. 14-01-00532 (Tex. App.—Houston [14th District] Mar. 6, 2003, no pet h.) (not designated for publication), 2002 WL 751047, at *5.

76. *Id.*

77. *Id.*

78. *See id.*

79. TEX. BUS. CORP. ACT ANN. art. 5.14 § J(1)(c) (Vernon Supp. 2003).

80. *See Massey*, 35 S.W.3d at 701; *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838-39 (Tex. App.—Eastland 1984, no writ); *see also Brandtjen & Kluge, Inc. v. Manney*, 238

Appeals for the First District broadly interpreted this exception by awarding fees to the plaintiffs when the defendant simply failed to answer the plaintiffs' petition and the petition included claims of "wrongful conduct" by the defendants.⁸¹ A party also may be able to recover reasonable and necessary attorneys' fees and expenses as damages when the defendant's wrongful conduct forced the plaintiff to prosecute or defend litigation in another proceeding.⁸²

The common fund doctrine is the most recognized exception to "the general rule that, absent a statutory or contractual basis for an award of attorneys' fees, each litigant must bear his own [attorneys' fees]."⁸³ "Under the common fund doctrine, the court may allow reasonable attorneys' fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefiting other parties as well as himself."⁸⁴

"The common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses."⁸⁵ The attorneys' fees are allowed as a charge against the fund.⁸⁶ An attorneys' compensation from non-contracting plaintiffs under the common fund doctrine is limited to the reasonable value of the attorneys' services benefiting them.⁸⁷ The common fund doctrine is commonly used in class actions.⁸⁸

Because of the name of this doctrine, it might seem that the fund created by the action must be for the benefit of a number of beneficiaries. However, as long as the litigant has created a fund for others, it need only establish that others have benefited in order to seek attorneys' fees from the fund based on the common fund doctrine.⁸⁹

S.W.2d 609, 611 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.). *But see* Pacesetter Pools, Inc. v. Pierce Homes, Inc., 86 S.W.3d 827 (Tex. App.—Austin 2002, no pet. h.).

81. *See Massey*, 35 S.W.3d at 701.

82. *See Lesikar v. Rappeport*, 33 S.W.3d 282, 317 (Tex. App.—Texarkana 2000, pet. denied).

83. *Tex. Farmers Ins. Co. v. Seals*, 948 S.W.2d 532, 534 n.1 (Tex. App.—Fort Worth 1997, no writ); *City of Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied).

84. *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 126 (Tex. App.—San Antonio 1995, no writ) (citing *Trustees v. Greenough*, 105 U.S. 527, 532-537 (1881); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799-801 (Tex. 1974)).

85. *Lancer*, 909 S.W.2d at 126. (citing *Greenough*, 105 U.S. at 533-534; *Knebel*, 518 S.W.2d at 799).

86. *Arnett*, 762 S.W.2d at 954; *cf. Valle v. State Farm Mut. Auto. Ins. Co.*, 5 S.W.3d 745, 746-47 (Tex. App.—San Antonio 1999, pet. denied) (holding common fund doctrine not applicable).

87. *Arnett*, 762 S.W.2d at 955.

88. *See, e.g., Arnett*, 762 S.W.2d at 954 (shareholder derivative suits); *Bayliss v. Cernock*, 773 S.W.2d 384, 386-87 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (same); *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Tex.*, 175 S.W. 816, 821 (Tex. Civ. App.—Dallas 1915, no writ) (insurance subrogation); *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 645 (Tex. App.—Waco 1993, writ denied) (upholding award of attorneys' fees to class counsel on equitable principle of "common fund").

89. *See Camden Fire Ins. Ass'n*, 175 S.W. at 817; *Libhart v. Copeland*, 949 S.W.2d 783, 803-04 (Tex. App.—Waco 1997, no writ).

II. REQUIREMENTS FOR THE RECOVERY OF ATTORNEYS' FEES

Assuming that an attorney has the right—whether by contract, statute, or in equity—to recover attorneys' fees, the next question addresses the amount of fees that can be collected. While the amount of the fee will obviously vary from case to case, one basic principle will exist—the amount of the fee must be “reasonable.” “A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable . . . [and] the reasonableness of any fee depends on the circumstances of the services.”⁹⁰ Indeed, an attorneys' fees award can be larger than a litigants' recovery on its substantive claim and still be “reasonable” in certain circumstances.⁹¹

Texas courts determine whether a fee is “reasonable” based upon the factors specified in Texas Disciplinary Rule of Professional Conduct 1.04.⁹² Those factors are:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
 2. the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
 3. the fee customarily charged in the locality for similar legal services;
 4. the amount involved and the results obtained;
 5. the time limitations imposed by the client or by the circumstances;
 6. the nature and length of the professional relationship with the client;
 7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.⁹³
- Evidence of *each* of the factors is not required to support an attorneys'

90. *Lopez v. Munoz, Hockema & Reed*, 22 S.W.3d 857, 867 (Tex. 2000) (J. Gonzales, joined by C.J. Phillips, concurring and dissenting).

91. *See Flint & Assoc.*, 739 S.W.2d at 626 (attorneys' fees awarded nearly seven times actual damages); *Hawkins v. Owens*, No. 01-99-00918-CV (Tex. App.—Houston [1st Dist.] Aug. 24, 2000, pet. denied) (not designated for publication), 2000 WL 1199254, at *9 (awarding attorneys' fees that were two and one-half times larger than the amount paid and judgment awarded, and over five and one-half times the amount of the \$5,000 judgment for contract damages when “case was transformed from what should have been a simple suit on a loan agreement to a lengthy, drawn-out battle extending from 1995 to 1999”).

92. The reasonableness of an attorneys' fee award is generally a jury question. *See City of Garland*, 22 S.W.2d at 367.

93. Tex. Disciplinary R. Prof'l Conduct 1.04; *see also Andersen*, 945 S.W.2d at 818. The opposing party's attorneys' fees are not necessarily relevant to the analysis. *See MCI Telecomm. Corp. v. Crowley*, 899 S.W.2d 399, 403 (Tex. App.—Fort Worth 1995, no pet.) (“MCI's attorneys' fees in its defense of this case are ‘patently irrelevant and are not reasonably calculated to lead to the discovery of admissible evidence.’”); *see also M.D. Mark, Inc. v. PIHI P'ship*, No. 01-98-00724-CV (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet.) (not designated for publication) (2001 WL 619604, at *12-13).

fees award.⁹⁴ However, evidence of *some* of these factors must be present to support an award.⁹⁵

A. THE ANDERSEN STANDARD

The most often cited Texas case regarding the reasonableness of contingent fee awards is *Arthur Andersen & Co. v. Perry Equipment Corp.*⁹⁶ According to *Andersen*, a trial court cannot award attorneys' fees purely on evidence of a percentage fee agreement.⁹⁷ Instead, the Court held that a trial court must take into consideration all of the Rule 1.04 factors when making an award of attorneys' fees.⁹⁸

The *Andersen* court focused on two major problems presented by basing an attorneys' fee award solely on a contingent fee contract. First, a contingent award based solely on a percentage would ignore many of the factors that courts should consider in determining reasonableness.⁹⁹ Second, since juries are often not informed of what the total amount of the judgment will be, a percentage award, without reference to the Rule 1.04 factors, can be based on pure speculation.¹⁰⁰ Accordingly, the Court held that, while a fact finder can consider the existence of a contingent fee agreement when making its findings on reasonable fees, it is prohibited from issuing an award based *purely* on a percentage calculation.¹⁰¹

In *Vingcard A.S. v. Merrimac Hospitality Systems, Inc.*, the Fort Worth Court of Appeals, interpreting *Andersen*, held that an attorney can still request that the jury calculate attorneys' fees as a percentage of damages awarded.¹⁰² Because the jury in that case "was free to reject his re-

94. *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 397 (Tex. App.—Corpus Christi 2000, no pet.); *Herring v. Bocquet*, 21 S.W.3d 367, 368 (Tex. App.—San Antonio 2000, no pet.).

95. *See Sieber & Calicutt, Inc. v. La Gloria Oil & Gas Co.*, 66 S.W.3d 340, 351 (Tex. App.—Tyler 2001, pet. denied) (upholding trial court's denial of a fee award where there was no evidence to support any of the 1.04 factors); *City of Weatherford v. Catron*, 83 S.W.3d 261, 272-73 (Tex. App.—Fort Worth 2002, no pet.) (affirming award of fees where evidence was presented of five of factors); *Checker Bag Co. v. Washington*, 27 S.W.3d 625, 640 (Tex. App.—Waco 2000, pet. denied); *Hagedorn v. Tisdale*, 73 S.W.3d 341 (Tex. App.—Amarillo 2002, no pet.). *Stover*, 17 S.W.3d at 397; *M.D. Mark, Inc.*, 2001 WL 619604, at *12-13.

96. *Arthur Andeson & Co. v. Perry Equip. Corp.*, 945 S.W.2d at 818. *Andersen* dealt specifically with the award of attorneys' fees in a DTPA action. However, courts have applied *Andersen's* holding to all proceedings where attorneys' fees are "shifted from one party to the other." *Jackson Law Office, P.C.*, 37 S.W.3d at 24.

97. *Anderson*, 945 S.W.2d at 818; *see also Seacoast, Inc. v. LaCouture*, No. 03-96-00506-CV (Tex. App.—Austin Jan. 29, 1998, pet. denied) (not designated for publication), 1998 WL 29966 at *8 (reversing fee award where evidence supporting attorneys' fee award consisted of attorney and client testifying to terms of contingent fee agreement).

98. *Anderson*, 945 S.W.2d at 818.

99. *Id.*

100. *Id.* at 819.

101. *Id.*

102. *Vingcard*, 59 S.W.3d at 870; *see also Allison v. Fire Ins. Exch.*, No. 03-01-00717-CV, 2002 WL 31833440, at *32-34 (Tex. App.—Austin Dec. 19, 2002, no pet.) (following *Vingcard* but remanding for determination of fees based on reduction of award on prevailing claims); *Frost Crushed Stone Co., Inc. v. Odell Geer Constr. Co.*, No. 10-00-282-CV, 2002 WL 31778399, at *5 (Tex. App.—Waco Dec. 11, 2002, no pet. h.).

quested percentages under the issue submitted, which required them to award only a specific dollar amount” this was held not to violate the principles articulated by the Supreme Court in *Andersen*.¹⁰³ The percentage in *Vingcard* was based upon the Rule 1.04 factors and covered all expenses and co-counsel’s attorneys’ fees.¹⁰⁴ Based on *Vingcard*, it may be possible for an attorney to request fees as a percentage of damages if that percentage is based on the Rule 1.04 factors—as opposed to merely the contingent fee agreement—and the fact finder’s award is in a dollar amount, rather than a percentage. Note, however, that the litigant must request a particular amount of fees from the jury or court.¹⁰⁵

B. APPLYING THE RULE 1.04 FACTORS

Although often cited, few cases provide a thoughtful analysis of the Rule 1.04 factors that *Andersen* demands must be considered in calculating a reasonable fee. An exception to the usual cursory treatment is the San Antonio Court of Appeals’ opinion on remand in *Herring v. Bocquet*.¹⁰⁶

In *Herring*, the San Antonio Court of Appeals carefully analyzed the request for attorneys’ fees according to the 1.04 factors.¹⁰⁷ As to the first factor—time and labor required, novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly—the *Herring* court focused on the fact that although the issues raised by the case were not particularly novel or unique, the plaintiffs’ counsel took a “confused approach to a straightforward issue” such that an otherwise simple case became complex.¹⁰⁸ Thus, the court found that defendants’ counsel was required to research numerous issues to make an “informed response” to the plaintiffs’ numerous arguments and noted that “the more novel the approach, the more difficult the research can become.”¹⁰⁹ The court of appeals also noted that the defendants’ summary judgment was detailed, addressed all of the plaintiffs’ contentions, and the exhibits included deed record excerpts, affidavits of witnesses and experts, and pages from deposition transcripts.¹¹⁰ The *Herring* court also indicated that the time expended during mediation and other settlement activities addressing the various pleadings and amended pleadings and “developing other defensive theories, including waiver, estoppel, limitations, and rati-

103. *Vingcard*, 59 S.W.3d at 870.

104. *Id.*

105. *San Antonio Credit Union v. O’Connor*, No. 04-00-00714-CV, 2002 WL 31662054, at *19 (Tex. App.—San Antonio Nov. 27, 2002, no pet. h.) (“Although evidence of a contingency fee may be considered by the factfinder in determining an appropriate amount of attorneys’ fees, a party seeking attorneys’ fees must ask the jury to award fees in a specific dollar amount, rather than merely a percentage of the total award.”).

106. *Herring*, 21 S.W.3d at 367.

107. *Id.* at 368-69.

108. *Id.* at 369 n.2.

109. *Id.* at 369.

110. *Id.*

fication” contributed to the reasonableness of defendants’ fees.¹¹¹

The Herring court also addressed the third factor of Rule 1.04—“the fee customarily charged in the locality for similar legal services.”¹¹² The court noted that the defense counsel and the defense expert testified that the fee was reasonable in light of the fee customarily charged in San Antonio for the type of litigation involved.¹¹³ With respect to the fourth factor—“the amount involved and the results obtained”—the Herring court acknowledged that the trial court had heard testimony regarding the importance of the issue to the defendants since the defendants’ ability to access their property was at stake.¹¹⁴ With no evidence to support the fifth factor—the court moved to the sixth factor, the nature and length of the professional relationship with the client—and found that the lack of a prior relationship actually supported the fee award because the likelihood of a future relationship was largely dependent on the success of the defendants’ counsel’s.¹¹⁵

Finally, on remand, the Herring court examined the seventh factor in Rule 1.04—the experience, reputation, and ability of the lawyers performing the legal services. The court noted that the lead lawyer had thirty-one years of experience, had served as “an officer and director of the San Antonio Bar Association and held the highest Martindale-Hubble rating.”¹¹⁶ The court also addressed the lead lawyer’s appropriate delegation of less-advanced legal tasks to less experienced lawyers.¹¹⁷ The defendants’ expert bolstered this evidence by testifying that the lead lawyer had “an excellent reputation in the community.”¹¹⁸

The Herring court’s elaboration of the Rule 1.04 factors is probably the most illustrative case law on the application of the Rule 1.04 factors in Texas. The only three factors that are not addressed are fairly straightforward. The second factor, whether the matter precluded the lawyer from accepting other legal matters, is easily analyzed. Likewise, the eighth factor—whether the fee was fixed or contingent—is straight forward. However, the fifth factor, the time limitations imposed by the client or by the circumstances is more complex—one should look carefully at the circumstances of the matter and evaluate whether the client, the opposing lawyer or client, the court, or other circumstances required the matter to be

111. *Id.* During this discussion, the court also discussed the number of conferences — both with co-counsel and within the firm — by defendants’ attorneys. The court noted testimony from the attorneys involved that the conferences were necessary to relay information to each other, discuss legal strategy in filing responses, and necessary to coordinate and avoid unnecessary legal fees. *Id.* Defendants’ expert witness also presented evidence that “the number of conferences was not unusual.” *Id.*

112. *Id.* at 370.

113. *Id.*

114. *Id.*

115. *Id.* However, it is notable that the sixth factor in Rule 1.04 is sometimes viewed as supporting a fee award when the lawyer has a long-standing relationship with the client.

116. *Id.*

117. *Id.*

118. *Id.*

handled against a short timetable.¹¹⁹ For example, the obvious situation is when the case involved an application for a temporary restraining order or other injunctive relief. However, it also might be the case that the court imposed an accelerated discovery schedule. Or, alternatively, the client may have required the work to be completed in an expedited fashion for business objectives. In any of these circumstances, the lawyer should consider presenting evidence pursuant to Rule 1.04(6) to support a fee award.

III. CALCULATING A REASONABLE FEE

Assuming that your client has a statutory, contractual, or equitable right to attorneys' fees, as we have just explained, the client has a right to request reasonable attorneys' fees. However, calculating the amount of attorneys' fees to request from the court or jury is not necessarily a straightforward task. First, a "reasonable fee" is not necessarily an hourly fee—you should consider whether a multiplier should be applied to your work. Second, not all fees that you have incurred on behalf of your client are recoverable in court—you must pay careful attention to each time entry submitted. Several common concerns are addressed herein.

A. USING A MULTIPLIER TO CALCULATE A REASONABLE FEE

Contrary to popular belief, a reasonable fee may not be simply the multiplication of an attorneys' rate by the number of hours expended. Sometimes, because of the circumstances of a case, an enhanced award may be appropriate. By applying a multiplier to the amount of hours expended, an attorney may be permitted to recover additional fees.

The "lodestar" method calculates attorneys' fees by "multiplying the number of hours expended by an appropriate hourly rate determined by a variety of factors, such as the benefits obtained for the [client], the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to acceptance of the . . . suit, and the hourly rate customarily charged in the region for similar legal work."¹²⁰ This number (the number of hours worked times an hourly rate determined by court) is called a lodestar, presumably because the number provides a guiding point—or lodestar—in the determination of an appropriate award.¹²¹ After the "lodestar" is calculated, the court can apply a multiplier to determine the amount of the award for attorneys' fees.¹²² Multipliers vary

119. *Id.*

120. *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) (holding that lodestar is determined by multiplying number of hours reasonably spent by an hourly rate court deems reasonable for similarly complex, non-contingent work); see *Crouch*, 853 S.W.2d at 647; *Arnett*, 762 S.W.2d at 956; *Borg-Warner Protective Servs. Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.).

121. See Scott A. Brister, *Proof of Attorneys' Fees in Texas*, 24 St. Mary's L.J. 313, 327 (1993).

122. See *Guity v. C.C.I. Enter., Co.*, 54 S.W.3d 526, 528-29 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (remanding case for evaluation of reasonable fee).

from case to case because they are determined by factors such as the complexity of the case, the skill of the attorney, the amount of recovery, and the contingent nature of the case.¹²³ As long as the resulting fee is not unreasonable, the amount of the multiplier is largely determined at the discretion of the trial court.

The Corpus Christi Court of Appeals held that a multiplier of 1.5 was appropriate in a case where the plaintiff was required to pierce multiple layers of corporate bureaucracy and the jury found for the plaintiff on all liability issues.¹²⁴ In another case, a multiplier of two (2) was held to be appropriate where the case was complex and involved numerous theories of recovery, a mountain of evidence, vigorous discovery, and a number of pre-trial hearings. In addition, the trial lasted nine days with testimony from more than twenty witnesses. The jury found in favor of the plaintiff on all issues.¹²⁵

In *Dillard Department Stores, Inc. v. Gonzales*, the El Paso Court of Appeals affirmed a multiplier of two (2) where the case “involved novel and complex issues” such that the controlling federal case law made the case “not just an uphill battle, but an exercise in windmill tilting.”¹²⁶ Further, the Dillard court noted that there was ample evidence that the matter was a “daily basis case” and that the attorney gave up multiple other cases to work on the matter.¹²⁷

On the other hand, in *Mission Park Funeral Chapel, Inc. v. Gallegos*, the court refused to apply a multiplier of three (3).¹²⁸ The court stated that there “was no testimony that a jury could appropriately use a multiplier to further increase attorneys’ fees beyond the amount calculated using an hourly fee approach,” “there was no jury instruction regarding use of a multiplier,” and “there is no authority for its use in a case such as this.”¹²⁹

B. ARE PRE-PETITION AND/OR RELATED ACTION FEES RECOVERABLE?

A common question that arises in the fee recovery stage of a case is whether attorneys’ fees incurred before the filing of a suit can be recovered. In *Williamson v. Tucker*, the Dallas Court of Appeals held that pre-petition fees incurred from the point of placing a note in the hands of an

123. See *Crouch*, 853 S.W.2d at 647; *Arnett*, 762 S.W.2d at 956.

124. *Borg-Warner*, 955 S.W.2d at 870.

125. *City of Alamo v. Espinosa*, No. 13-99-704-CV (Tex. App.—Corpus Christi Aug. 31, 2001, pet. dismissed by agr.) (not designated for publication), 2001 WL 1003309, *14; see also *Haggar Apparel Co. v. Leal*, No. 13-00-275-CV, 2002 WL 31478172, at *9 (Tex. App.—Corpus Christi Nov. 7, 2002, pet. filed) (requesting multiplier of 2.0).

126. *Dillard Dep’t Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied).

127. *Id.* at 413.

128. *Mission Park Funeral Chapel, Inc. v. Gallegos*, No. 04-00-00459-CV (Tex. App.—San Antonio, May 9, 2001, no pet.) (not designated for publication), 2001 WL 488007, at *5.

129. *Id.*

attorney for collection and participation in a related federal suit were recoverable.¹³⁰ The Texas Supreme Court subsequently cited this holding with approval in *Shook*.¹³¹ In *Shook*, the supreme court held that a bank that was forced to *defend* against a borrower's claims before recovering the outstanding balance of a note could recover all of its attorneys' fees. This was true despite the fact that counsel had actually only spent a few hours on the cause of action for collection on the note.¹³²

Similarly, legal fees in related matters can sometimes be recovered. Many times a "case" is not really one legal action, but rather several different disputes in a variety of forums. The question becomes whether fees can be collected in one action for work performed for another related—indeed, sometimes integral—matter. Several courts have determined that fees incurred in proceedings in other courts are recoverable when they relate directly to the claim for which the party was entitled to recover attorneys' fees.¹³³

C. ARE ALL FEES RECOVERABLE IF ONLY ONE CLAIM PERMITTING THE RECOVERY OF FEES IS ASSERTED?

Another common and practical problem is how to recover fees for work performed in furtherance of a breach of contract or declaratory judgment claim when a tort claim was also asserted in the same case. Assuming the statutory requirements can be satisfied, the attorney is permitted to recover fees for work performed on the contract claim, but attorneys' fees are not recoverable for the tort work.¹³⁴

Ordinarily, an attorney is required to segregate fees incurred on claims that allow for the recovery of attorneys' fees from claims that do not allow the recovery of attorneys' fees.¹³⁵ In fact, "[a] failure to segregate

130. *Williamson*, 615 S.W.2d at 892-93; *see also* *Swiss Ave. Bank v. Slivka*, 724 S.W.2d 394, 398 (Tex. App.—Dallas 1986, no writ) (holding that a party is entitled to recover attorneys fees incurred in defending a prior injunction proceeding).

131. *RepublicBank Dallas, N.A. v. Shook*, 653 S.W.2d 278, 282-283 (Tex. 1983).

132. *Id.*

133. *Gill Sav. Ass'n*, 797 S.W.2d at 32 (disapproving holding of "the court of appeals that, as a matter of law, attorneys' fees incurred in a related bankruptcy proceeding cannot be awarded in a breach of contract claim"); *Boulware v. Sec. State Bank of Navasota, Tex.*, 640 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1982, no writ) (holding that party could recover attorneys' fees incurred prosecuting related claim in court of claims to recover balance of a note); *see also* *McAdams v. McAdams*, No. 07-01-0343-CV (Tex. App.—Amarillo Mar. 1, 2002, no pet.) (not designated for publication), 2002 WL 342639, at *13 (awarding fees incurred in first trial prior to appeal).

134. *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546-47 (Tex. 1973); *Flint & Assocs.*, 739 S.W.2d at 624 ("As a rule, in a case involving more than one claim, attorney fees can be awarded only for necessary legal services rendered in connection with the claims for which recovery is authorized.")

135. *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Am. Hallmark Ins. Co. v. Lyde*, No. 05-97-01611-CV (Tex. App.—Dallas Nov. 15, 2000, no pet.) (not designated for publication), 2000 WL 1702597, at *9 ("[S]egregation of attorneys' fees is required between claims which allow recovery of fees and claims which do not."); *Geodyne Energy Income Prod. P'ship v. Newton Corp.*, No. 05-02-00070-CV, 2003 WL 152732, at *8 (Tex. App.—Dallas Jan. 23, 2003, no pet. h.).

attorneys' fees in a case containing multiple causes of action, only some of which entitle the recovery of attorneys' fees, can result in the recovery of zero attorneys' fees."¹³⁶ However, where the claims are "dependent upon the same set of facts or circumstances and are thus intertwined to the point of being inseparable, the party suing for attorneys' fees may recover the entire amount covering all claims."¹³⁷ This exception—in modern business litigation—often swallows the rule. Of course, to be entitled to all of the intertwined fees, the party seeking fees must have prevailed on the claim that provides for the recovery of fees.¹³⁸ Further, the court—not the fact finder—makes the determination of whether fees must be segregated.¹³⁹

In *City of Alamo v. Espinosa*, for example, the Corpus Christi Court of Appeals held that the issues raised in the plaintiffs' claims "stem from the same set of facts and circumstances surrounding his demotion," and thus, segregation would have been impracticable.¹⁴⁰ However, for the exception to apply, the claims must be so similar that the same facts must need to be proven for both claims.¹⁴¹ Further, to be sustained on appeal, the trial court must specifically perform this segregation analysis when evaluating the attorneys' fees award.¹⁴²

D. ARE FEES INCURRED AS A RESULT OF A COUNTERCLAIM RECOVERABLE?

Similarly, the general rule is that segregation of fees is required if a litigant prosecutes a counterclaim that permits recovery of attorneys' fees and also defends a claim in the same action. However, segregation is not required if the fees cannot be allocated between prosecuting the counterclaim and defending the claims.¹⁴³ Stated another way, if the plaintiff must defeat the counterclaim to succeed on the principal claim because they arise out of the same facts and are mutually exclusive, then the time

136. *Green Int'l Inc.*, 951 S.W.2d at 389. Of course if objection to such a failure to segregate is not made, the objection to recovery of all fees is waived. *Id.*

137. *Aiello*, 941 S.W.2d at 73; *S. Concrete Co. v. Metrotec Fin., Inc.*, 775 S.W.2d 446, 450-51 (Tex. App.—Dallas 1989, no writ); *World Help*, 977 S.W.2d at 684; *Schindler*, 829 S.W.2d at 288 (granting total amount of fees billed to matter when "causes of action are so intertwined that they are more or less inseparable"); *City of Alamo*, 2001 WL 1003309, at *13.

138. *Huddleston v. Pace*, 790 S.W.2d 47, 51 (Tex. App.—San Antonio 1990, writ denied).

139. *Merchandise Ctr., Inc. v. WNS, Inc.*, 85 S.W.3d 389, 398 (Tex. App.—Texarkana 2002, no pet.).

140. *City of Alamo*, 2001 WL 1003309, at *13.

141. *See, e.g., Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 550-51 (Tex. App.—El Paso 2001, no pet.); *Lesikar*, 33 S.W.3d at 317.

142. *Rainbow Group*, 2002 WL 1991141, at *11.

143. *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 130 (Tex. App.—Corpus Christi 1999, pet. denied); *Coleman v. Rotana, Inc.*, 778 S.W.2d 867, 873-74 (Tex. App.—Dallas 1989, writ denied); *Wilkins v. Bain*, 615 S.W.2d 314, 316 (Tex. Civ. App.—Dallas 1981, no writ) (granting all fees when "claim to recover the contract price necessarily involved the same facts as [the] counterclaim" "both arise out of the same transaction; thus, whether the contract was oral or written").

spent to defend against the counterclaim need not be segregated from the time spent pursuing the claim.

In *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, the court explained:

Attorneys' fees are available for defense of a claim or counterclaim when both the claim and counterclaim are contractual and arise from the same transaction or set of facts. In such cases, the same facts required to prosecute the claim are also required to defend against the counterclaim and a fee claimant is not required to segregate the time the attorney spends preparing his claim and the time spent defending the counterclaim.¹⁴⁴

Again, in many cases, the exception is more common than the rule.

E. ARE LEGAL ASSISTANT FEES RECOVERABLE?

The question of whether one should recover legal assistant fees may seem obvious to the practitioner. Unfortunately, it is not.

Although the Texas Supreme Court has not ruled on the issue, the leading case on the issue has been followed.¹⁴⁵ The Dallas Court of Appeals, in *Gill Savings Ass'n v. International Supply Co.*, set forth the basic test. The court held that "compensation for a legal assistant's work may be separately assessed and included in the award of attorneys' fees if a legal assistant performs work that has traditionally been done by any attorney."¹⁴⁶ To recover for the work of a legal assistant, one must establish: "(1) that the legal assistant is qualified through education, training or work experience to perform substantive legal work; (2) that substantive legal work was performed under the direction and supervision of an attorney; (3) the nature of the legal work which was performed; (4) the hourly rate being charged for the legal assistant; and (5) the number of hours expended by the legal assistant."¹⁴⁷

In addressing this case of apparent first impression, the Dallas Court of Appeals assessed the increasing use and significance of legal assistants in the day to day operations of a law firm.¹⁴⁸ The court quoted the preliminary statement of the General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys:

Providing legal services to the public at an affordable price without reduction in the quality of services finds ample support in the purpose clause of the State Bar Act as well as in the Code of Professional Responsibility. It is a goal toward which the Bar is committed, both in principle and in practice. The utilization by attorneys of the services of legal assistants is recognized as one means by which the Bar may attain this goal. With direction and supervision by an attor-

144. *Pegasus Energy Group*, 3 S.W.3d at 130.

145. See *Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 570-71 (Tex. App.—Dallas 1991, writ denied) (holding consistent with leading cases).

146. *Gill Savings*, 759 S.W.2d at 702.

147. *Id.*

148. *Id.* at 703.

ney, legal assistants can perform a wide variety of tasks which may neither constitute the unauthorized practice of law nor require the traditional exercise of an attorneys' training, experience, knowledge or professional judgment.¹⁴⁹

The guidelines go on to say:

A legal assistant is a person not admitted to the practice of law in Texas but ultimately subject to the definition of "the practice of law" as set forth in the law of the State of Texas, who has, through education, training and experience, demonstrated knowledge of the legal system, legal principles and procedures, and who uses such knowledge in rendering paralegal assistance to an attorney in the representation of that attorneys' clients. The attorney is responsible for the work of the legal assistant and the legal assistant remains, at all times, responsible to and under the supervision and direction of the attorney. The functions of a legal assistant are defined by the attorney responsible for the legal assistant's supervision and direction, and are limited only to the extent that they are limited by law.

An attorney may charge and bill a client for a legal assistant's time, but the attorney may not share legal fees with a legal assistant under his or her supervision and direction.¹⁵⁰

The *Gill Savings* court focused on the time and labor component of a reasonable fee in reaching its holding:

Properly employed and supervised legal assistants can decrease litigation expense and improve an attorneys' efficiency. . . . Further, the purpose and objective of our legal system is to provide the most equitable, efficient adjudication of litigation at the least expense practicable. Likewise, as suggested by the Guidelines, legal assistant charges are an appropriate component of attorneys' fees since an attorney would have to have performed the services if a legal assistant had not been used.¹⁵¹

The *Gill Savings* court ultimately determined that the evidence presented at trial was insufficient to support an award of attorneys' fees because the time sheets submitted did not establish (1) the qualifications, if any, of the legal assistants who performed the work; (2) whether the tasks performed by the legal assistants were of a substantive legal nature or were the performance of clerical duties; and (3) the hourly rate charged for the legal assistant.¹⁵² The court also held that without testimony identifying the initials in the timesheets, it was impossible to determine which class of professional—qualified legal assistants or legal clerks—had performed which tasks.¹⁵³

In *Moody v. EMC Services, Inc.*, the Houston Court of Appeals, Four-

149. *Id.*

150. *Id.*

151. *Id.* at 704.

152. *Id.* at 705.

153. *Id.*

teenth District followed the five-factor test established by *Gill Savings*.¹⁵⁴ Even though the claimant failed to specifically identify the legal assistants or their qualifications, the court affirmed the possibility of awarding attorneys' fees for work performed by legal assistants.¹⁵⁵

There are several lessons to learn from *Gill Savings* and its progeny. First, not all legal assistant time is recoverable. The work must be of the type that an attorney traditionally performed. This requirement is easily overlooked—as the normal practice is for the party requesting fees to submit all of its legal fees statements in a redacted form for payment by the opposing party. At least in Dallas, when seeking fees for legal assistants, the testimony supporting the reasonableness of the fees must specifically address the legal assistants' fees and specify that the work performed by the legal assistants was of the type that an attorney traditionally performed.¹⁵⁶ Second, the testimony should specify the legal assistants' qualifications and that the legal assistants performed substantive legal work that was not clerical in nature.¹⁵⁷

F. ARE APPELLATE FEES RECOVERABLE?

An additional question that often arises with respect to the recovery of attorneys' fees involves the recovery of fees for appellate work. Texas juries are routinely asked to award fees for appellate work that will only be paid in the event such work is undertaken. A fee request for appellate work should be segregated into fees for work to be performed in courts of appeals and the supreme court and supported by sufficient evidence.¹⁵⁸ Appellate fee awards are often reformed by the courts.¹⁵⁹

IV. RECOVERY OF EXPENSES.

Like attorneys' fees, expenses are not recoverable unless there is a statute that expressly provides for their recovery.¹⁶⁰ Furthermore, the Dallas Court of Appeals has held that ordinary expenses like photocopy, travel, long distance, postage, filing fees, fax charges, and messenger/courier expenses are typically not recoverable as expenses because they are considered part of "the overhead of a law practice" and can be recovered as a

154. *Moody v. EMC Servs., Inc.*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Chrysler-Plymouth City, Inc. v. Guerrero*, 620 S.W.2d 700, 706-07 (Tex. Civ. App.—San Antonio 1981, no writ) (holding that a jury award of attorney fees including potential appellate work was supported by sufficient evidence in the record); *see also Centroplex Ford, Inc. v. Kirby*, 736 S.W.2d 261, 264 (Tex. App.—Austin 1987, no writ).

159. *See Bradbury v. Scott*, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

160. "Ordinary expenses incurred by a party in prosecuting or defending suit cannot be recovered either as damages or by way of court costs in the absence of statutory provisions or usages of equity." *Flint & Assocs.*, 739 S.W.2d at 626; *see also Brandtjen & Kluge*, 238 S.W.2d at 609.

component of reasonable attorneys' fees at least pursuant to Section 38.001.¹⁶¹ These "ordinary expenses" are not recoverable as a separate category of costs.¹⁶²

As a general rule "each party to a suit shall be liable to the officers of the court for all costs incurred by himself."¹⁶³ As is often the case, however, there are many exceptions to the general rule. A careful examination of any relevant statutes and case law is necessary to determine whether specific costs are recoverable in any given case. The following discussion provides an overview of the most frequently addressed statutory provisions and case law discussing cost recovery.

A. RECOVERING COSTS

Many costs are recoverable by statute. Section 31.007 of the Civil Practice and Remedies Code allows a judge to "include in any order or judgment all costs," including:

1. Clerk's fees and any service fees due to the county;
2. Court reporter's fees for original stenographic transcripts obtained to use in the suit;
3. The fee for masters, interpreters, and guardians ad litem appointed by the court; and
4. Such other costs and fees as may be permitted by these rules and state statutes.¹⁶⁴

Further, under Rule 131 of the Texas Rules of Civil Procedure, a successful party is *entitled* to recover "all costs incurred therein" from its adversary.¹⁶⁵ "Rule 131's underlying purpose is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs."¹⁶⁶ The court can stray from this mandatory requirement only "for good cause."¹⁶⁷ "'Good cause' is an elusive concept that varies from case to case."¹⁶⁸ Generally "good cause" will be found when a party "unnecessarily prolonged proceedings, unreasonably increased costs," or generally did something that should be punished.¹⁶⁹ If the court determines costs should not be awarded, then "good cause" for such an award must be stated on the record.¹⁷⁰ Even when the trial court states good cause on the record "an appellate court should scrutinize the

161. *Flint & Assocs.*, 739 S.W.2d at 626; *Arthur's Garage, Inc. v. Racial-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 817 (Tex. App.—Dallas 1999, no pet.).

162. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2001); *Am. Hallmark Ins. Co.*, 2000 WL 1702957, at *11.

163. TEX. R. CIV. P. 140.

164. TEX. CIV. PRAC. & REM. CODE ANN. § 31.007 (Vernon 2001).

165. TEX. R. CIV. P. 131. However, it should be noted that the statute provides for recovery of costs "except where otherwise provided." *Id.*

166. *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001).

167. TEX. R. CIV. P. 141.

168. *Furr's*, 535 S.W.3d at 376-77.

169. *Id.* at 377. Potential emotional harm from assessing costs to the losing party is not "good cause" as a matter of law. *Id.*

170. *Id.*

record to determine whether it supports the trial judge's decision."¹⁷¹

B. NON-RECOVERABLE COSTS

Some costs are specifically disallowed, either by statute or case law. For example, Rule 902(10)(a) of the Texas Rules of Evidence requires a party to bear its own copying costs if it chooses to copy records attached to affidavits filed by another party.¹⁷² Texas Rule of Civil Procedure 140 prohibits including fees for copies in an award of costs.¹⁷³ Case law also disallows certain items, such as expert witness fees¹⁷⁴ and costs for certified copies of deeds used at trial.¹⁷⁵

V. PRACTICAL SUGGESTIONS FOR COLLECTING LEGAL FEES

Provided that the statute or contract provides for their recovery and that a reasonable award can be calculated, the practical considerations of actually recovering the fee must be addressed.

A. SET UP A BILLING NUMBER AS SOON AS YOU ARE ASKED TO PERFORM SERVICES

While it might seem obvious to set up a billing matter number if you plan to seek an attorneys' fees award on the basis of the hours expended in connection with a dispute, it is often—and easily—overlooked until the “matter” becomes a full blown case. The attorneys' fees lost based in the interim period between a dispute and a lawsuit can be substantial. As explained above, pre-lawsuit fees can be awarded if they are properly attributable to the case. Accordingly, to maximize your client's attorneys' fees award, you should set up a distinct billing number as soon as you are asked to perform legal services in connection with a dispute.

Another similar problem is the case of the growing billing number. The billing number is set up and used for one matter, and that matter subsequently “hatches” another legal matter. Again, as explained above, sometimes it is possible to recover legal fees for “related” legal matters. However, to ensure that your client is not denied fees based on an inability to segregate, it is advisable to be mindful of growing billing numbers and separate as soon as it appears that the second legal matter is distinct from the original legal matter.

171. *Allen v. Crabtree*, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ) (*citing* *Rogers v. Walmart Stores*, 686 S.W.2d 599 (Tex. 1985)).

172. *See Allen*, 936 S.W.2d at 8; TEX. R. CIV. EVID. 902(10)(a).

173. The rule provides that “no fee for a copy of a paper not required by law or these rules to be copied shall be taxed in the bill of costs.” TEX. R. CIV. P. 140.

174. *See City of Houston v. Biggers*, 380 S.W.2d 700, 705 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). *See also Allen*, 936 S.W.2d at 8.

175. *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *see also Allen*, 936 S.W.3d at 8.

B. RECORD YOUR TIME ACCURATELY AND PRECISELY

To recover attorneys' fees, a litigant must produce adequate documentation of the hours expended.¹⁷⁶ "Where the documentation of hours is inadequate, the district court may reduce the award accordingly."¹⁷⁷ However, there is no special documentation that is required.¹⁷⁸

Again, a recommendation to accurately record time is hardly novel advice. However, problems are common in two situations. First, a lawyer who does not normally record time—but, instead, typically earns contingent fees—is criticized for lack of documentation to support a fee request. Second, fee requests are attacked because a lawyer who normally records time has submitted vague, conclusory entries that leave the opposing party at a loss to understand what the attorney did and, if appropriate, challenge the time spent on the task as unreasonable.¹⁷⁹ The answer to both of these problems is to accurately record your time. When submitting your fee statements, you should ask yourself whether the time you spent performing a task could be discerned and evaluated from your record.¹⁸⁰ If that is not possible, you should consider deleting certain entries from your fee request.

C. REVIEW THE BILL TO ENSURE DUPLICATION WAS AVOIDED, ATTORNEYS WITH APPROPRIATE EXPERIENCE LEVELS WERE ASSIGNED TO APPROPRIATE TASKS, AND INAPPROPRIATE TASKS WERE NOT BILLED

It is a "well-settled principle that attorneys' fees must be awarded only for those lawyer hours that are reasonably necessary to adequately prosecute the case."¹⁸¹ "Attorneys' fees must not be awarded for attorney hours that are 'excessive, redundant, or otherwise unnecessary.'"¹⁸²

A common method of attacking the reasonableness of attorney billing statements is to criticize the number of attorneys involved in a particular task.¹⁸³ For example, attorneys' fees may be attacked when multiple law-

176. See *League of United Latin Am. Citizens No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1233 (5th Cir. 1997).

177. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *LULAC*, 119 F.3d at 1233 ("[i]f the applicant's documentation of the hours claimed is 'vague or incomplete,' the district court may reduce or eliminate those hours."). "Litigants take their chances when submitting . . . fee applications . . . provid[ing] little information from which to determine the 'reasonableness' of the hours expended on tasks vaguely referred to . . ." *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995); see also *Sieber & Calicutt*, 66 S.W.3d 340.

178. *Hanif v. Alexander Oil Co.*, No. 01-01-00954-CV (Tex. App.—Houston [1st Dist.] Sept. 19, 2002, no pet.) (not designated for publication, 2002 WL 31087247, at *3-4 ("None of the eight [1.04] factors mandates that time records be kept or precludes an estimate.")).

179. For example, the following entry provides little detail: "8.0—Draft correspondence; conferences regarding same."

180. Remember, however, that these statements should be redacted for privileged communications before submission.

181. *EEOC v. Clear Lake Dodge*, 60 F.3d 1146, 1154 (5th Cir. 1995).

182. *Id.* (citing *Hensley*, 461 U.S. at 434).

183. See *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 269 (Tex. App.—Austin 2002, no pet.) (arguing "defendant's several attorneys were guilty of overbilling or duplicate billing.").

yers attend a deposition or hearing. Similarly, internal conferences are often highlighted as somehow unreasonable. Another common criticism in attorneys' fee litigation is that the attorney performing the task was overqualified for the task. These critiques are often unfair, as in hindsight many aspects of a case are now clearly less important than they seemed at the time the tasks were performed.

These criticisms should be anticipated and met head on. A lawyer billing a client on the basis of hourly fee statements should routinely and carefully review his or her statements before they are sent to the client to ensure that excessive charges are never billed. This careful and contemporaneous review will save hours later in the fee recovery stage of a matter. It is obviously impossible to remember and evaluate whether each attorneys' time entry listed on years' of billing statements was appropriate. However, if the attorneys' fees statements are regularly reviewed for duplicative and inappropriate tasks, an attorney seeking fees can testify that he or she conducted this review. This is—obviously—far more persuasive than trying to recreate history at the time of a fee request.

D. PROPERLY REQUEST FEES IN PETITION OR COMPLAINT

To obtain attorneys' fees, they must be pled. However, unless challenged, even a general allegation in a petition that a party is seeking attorney fees can serve as proper notice to the opposing party.¹⁸⁴ In *Bullock v. Regular Veterans Ass'n*, the defendant's failure to point out, by special exception, the lack of specificity in the pleading with regard to the basis for attorney fees resulted in a waiver of the objection to the fee request.¹⁸⁵ Further, a general plea for reasonable attorneys' fees in a petition is sufficient to authorize an award of fees in appellate courts.¹⁸⁶

E. DESIGNATE AN ATTORNEYS' FEES EXPERT

If a request for attorneys' fees has been made, it should not be forgotten in the discovery process. An attorneys' fees expert must be identified in discovery pursuant to the Texas Rules of Civil Procedure.¹⁸⁷ Failure to comply with this requirement results in exclusion of testimony unless the proffering party demonstrates good cause for its admission.¹⁸⁸ For example, in *GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*, the plaintiff's counsel called himself as an expert witness regarding attorney fees,

184. *Bullock v. Regular Veterans Ass'n*, 806 S.W.2d 311, 314-15 (Tex. App.—Austin 1991, no writ).

185. *Id.*

186. *Ledisco Fin. Servs., Inc. v. Viracola*, 533 S.W.2d 951, 958 (Tex. Civ. App.—Texarkana 1976, no writ) (citing *Wolfe v. Speed Fab-Crete Corp. Int'l*, 507 S.W.2d 276, 281 (Tex. Civ. App.—Fort Worth 1974, no writ); see also *Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 939 (Tex. App.—El Paso 1994, no writ) (holding that attorney could recover for attorneys' fees for summary judgment motion when basis for attorneys' fees not identified in motion but pled in petition).

187. *Sharp v. Broadway*, 784 S.W.2d 669, 671 (Tex. 1990).

188. *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987).

but he had not identified himself as a testifying expert in discovery. The San Antonio Court of Appeals held that the plaintiff's counsel's testimony should have been excluded by the trial court because of the plaintiff's failure to identify their attorney as their attorneys' fees expert.¹⁸⁹

However, at least one Texas court has held that an attorney who has not been identified as an *expert* witness with regard to attorneys' fees can still testify as a *fact* witness regarding the *facts* of his representation. Thereafter, at least if fees are sought in connection with a declaratory judgment proceeding, a trial court can use this fact testimony and take judicial notice of the usual and customary attorney fees in a proceeding without receiving further evidence and can make an award.¹⁹⁰ This way around the expert testimony requirement is a clever way to request attorneys' fees if the expert witness disclosure has not been made, but the obviously preferable approach is to timely designate an attorneys' fees expert.

F. PRESENT EXPERT TESTIMONY REGARDING FEE

The last step, of course, to recovering attorneys' fees is presenting evidence to establish the reasonable amount of the fees to the fact finder.¹⁹¹ This can be accomplished in a variety of ways.

The court does not have to hold a separate hearing on attorneys' fees,¹⁹² but it can do so.¹⁹³ Because Rule 166a(c) prohibits oral testimony at summary judgment hearings, some judges choose to have a separate hearing with oral testimony on the issue of attorneys' fees.¹⁹⁴ Alternatively, attorneys' fees can be determined at trial.¹⁹⁵ This must be accom-

189. *GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*, 693 S.W.2d 617, 620-621 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *see also* *Nelson v. Schanzer*, 788 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1990, writ denied.); *but see* *Wilson v. Chazanow*, No. 13-00-665-CV, 2002 WL 959995, at *4 (Tex. App.—Corpus Christi May 9, 2002, no pet.) (affirming trial court's admission of attorney testimony when attorney was mistakenly designated as fact witness instead of expert witness in pretrial disclosures).

190. *Budd*, 846 S.W.2d at 524; TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 *et seq.* (Vernon 2001); *see also* *In re Striegler*, 915 S.W.2d 629, 643-44 (Tex. App.—Amarillo 1996, writ denied).

191. Whether a party is entitled to legal fees is an issue of law, but the reasonable amount of fees is an issue of fact. *See* *Holland*, 1 S.W.3d at 94; *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966); *Wallace v. Ramon*, 82 S.W.3d 501, 505 (Tex. App.—San Antonio 2002, no pet.).

192. For example, attorneys' fees may be granted after summary judgment based upon affidavits submitted by expert witnesses. *See, e.g.,* *Guity*, 54 S.W.3d at 528 (determining reasonable attorneys' fees in FLSA case); *Grace*, 54 S.W.3d at 338 (determining reasonable fees in contracts case). If the affidavit is not opposed, fees can be awarded on summary judgment. *See, e.g.,* *Chu v. Chew*, No. 05-00-02107-CV (Tex. App.—Dallas Jan. 17, 2002, pet. denied) (not designated for publication), 2002 WL 59269, *4.

193. *See, e.g.,* *Eller Media Co. v. Texas*, 51 S.W.3d 783, 786-87 (Tex. App.—Fort Worth 2001, no pet.).

194. *See, e.g.,* *Estate of Davis v. Cook*, 9 S.W.3d 288, 295 (Tex. App.—San Antonio 1999, no pet.).

195. *See, e.g.,* *Wayne v. Hybner*, No. 13-00-00054-CV (Tex. App.—Corpus Christi Aug. 31, 2001, no pet.) (not designated for publication), 2001 WL 1003298; *Jackson Law Office*, 37 S.W.3d at 23.

plished with expert testimony—either from the attorney seeking fees or another attorney who has studied the attorneys' actions with respect to the case.

There must be evidence in the record to support the reasonableness of the award to avoid complications on appeal.¹⁹⁶ While attorneys' fees are typically determined by the fact finder, under certain circumstances expert testimony can establish attorneys' fees as a matter of law.¹⁹⁷ Where there is testimony of attorneys' fees that is "clear, positive, and direct, and not contradicted by any other witness or attendant circumstances," attorneys' fees are established as a matter of law.¹⁹⁸ "This is especially true where the opposing party had the means and opportunity of disproving the testimony, if it were not true, and failed to do so."¹⁹⁹

In the authors' opinion, the best way to present evidence of reasonable attorneys' fees is through an expert witness. In a jury proceeding, the jury might be offended at the size of the fee the attorney is requesting. Similarly, if the attorney requesting attorneys' fees is viewed as making an admission or is otherwise impeached on cross examination, the attorney may lose credibility with the jury. Having another attorney testify about the request takes the focus off the attorney that is trying to argue the merits of the client's case.

Of course, the expert must be properly designated and prepared. Preparation will depend on the amount of the fees requested, but a safe place to start is to provide the expert with the live pleadings, any briefing on attorneys' fees, the pleading index, and statements that have been redacted for privilege. Although you will undoubtedly be busy preparing for trial or the hearing, you should, if possible, meet with the expert so that the expert can interview you about the Rule 1.04 factors.

The expert should use the Rule 1.04 factors in his or her testimony and elaborate on the applicable elements. The expert should also testify about the various additional requirements found in case law. For example, if a segregation problem is present, the expert should testify about the relationship between the various claims or the claims and the counter-claims and, if necessary, the segregation of fees. The expert should also consider legal assistant time and testify about the necessary requirements for recovering such fees. If fees for pre-petition or related matters are sought, the expert must be provided the background documents and fee statements for such work and testify accordingly. Additionally, the expert should make a reasonable estimate of the attorneys' fees necessary for the various levels of appellate review. Finally, you should determine

196. See *Estrello v. Elboar*, 965 S.W.2d 754, 759 (Tex. App.—Fort Worth 1998, no pet.) (even where there is a statute mandating the award of attorneys' fees, the party seeking recovery must put on evidence of their amount and reasonableness).

197. *Eller*, 51 S.W.3d at 786-87.

198. *Id.*; see also *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990); *Clary Corp. v. Smith*, 949 S.W.2d 452, 469 (Tex. App.—Fort Worth 1997, pet. denied); *World Help*, 977 S.W.2d at 684.

199. See *Clary*, 949 S.W.2d at 469; *World Help*, 977 S.W.2d at 684.

whether the expert should testify about reasonable costs and, if appropriate, present such testimony.

VI. CONCLUSION

It is unfortunate that the road to recovering a client's attorneys' fees is so treacherous. Without careful attention to the proper procedures—practical and legal—for recovering fees, recovery of fees can be difficult. To best navigate the path, you should be mindful of your billing practices and beware that your fee statements will ultimately be evaluated by the court. You should also be creative and expansive in seeking fees. The use of the equitable principles or a multiplier should be considered. All aspects of your fees and expenses should be critically evaluated to determine whether recovery may be possible—fees in a related case, defending in a counterclaim, etc. may be recoverable.

Like practicing law in any other field, recovering attorneys' fees is an art, not a science. To maximize client satisfaction, one should develop the art of recovering attorneys' fees.