

Proving and Defending Attorneys' Fees

**Kurt Kuhn
KUHNS HOBBS PLLC
3307 Northland Drive, Suite 310
Austin, Texas 78731**

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Proving and Defending Attorneys' Fees

The issue of attorneys' fees is often a litigation afterthought—appearing at the back of the pleadings, raised through the last witness or even after trial, and discussed at the end of the appellate opinion. It makes sense to present the merits of a case before talking about fees. But fee-shifting is becoming increasingly more available in Texas, the law more developed, and the stakes higher. Counsel cannot afford to wait until the last minute to consider the issue of attorneys' fees.

This article highlights some of the main points counsel should think about for proving up or defending against claims for attorneys' fees. As discussed below, specific procedural and evidentiary requirements for attorneys' fees vary depending on the legal basis for fee shifting. In every case, counsel should research and know the law governing the specific basis for the fees sought in their case.

I. In Texas, counsel should think of the “American Rule” as allowing fee-shifting when allowed.

One major impediment to proving or defending against attorneys' fees claims is mindset. Counsel can be focused on the law and facts as to the merits and damages in the case, and forget to think early or deep enough about the issue of attorneys' fees. This mindset likely comes from the idea that, in Texas, parties typically pay their own attorneys' fees. Even recently, the Texas Supreme Court has written that “[a]s a general rule, litigants in Texas are responsible for their own attorneys' fees and expenses in litigation.” *Ashford Partners, Ltd. v. ECO Resources, Inc.*, 401 S.W.3d 35, 41 (Tex.

2012). Texas follows what is known as the “American Rule” meaning that, “[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.” *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). But the “rule” is full of exceptions, and counsel should not be lulled into failing to properly prepare on the issue of fees.

A more accurate statement of the “American Rule” is that it prohibits fee-shifting awards unless specifically provided for by a contract or statute.¹ *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009). “Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees.” *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (2006). The right to attorneys' fees in a civil case must be express; it cannot be inferred. *Travelers Indem. Co. of Connecticut v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996). A party's right to seek an award of attorneys' fees is a question of law. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999). But in Texas, the American Rule is not the limitation that it might first appear.

Increasingly, the Texas Legislature has allowed for fee-shifting in a wide variety of cases. One Texas authority compiled non-exhaustive charts of over 200 different statutes that allow for fee-shifting. DAVID J. BECK, O'CONNOR'S TEXAS CPRC PLUS, at 1093-1108 (2017-18). Following the Legislature's mandate, the Texas Supreme Court also recently adopted Rule 91a, which allows for fee-shifting of attorneys' fees in most cases, except against government entities or officials, when there is a motion to dismiss

¹ This statement of the law can also be misleading. Even absent a statute or contract, the law allows a party to seek attorneys' fees on equitable grounds in the limited circumstances of either a common-fund case or when the fees are themselves damages. See, e.g., *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106 (Tex. 2009) (holding that award of attorneys' fees from prior lawsuit as damages in legal

malpractice case was proper and did not implicate American Rule); *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 708-09 (Tex. 1974) (holding attorneys' fees award was supported by “common fund” doctrine as a matter of equity, not as a matter of contract). A good way to understand the distinction is that neither of these instances involve “fee-shifting” of opposing parties' attorneys' fees incurred within the same case.

alleging that the case has no basis in law or fact. TEX. R. CIV. PROC. 91a. Fee-shifting provisions are also increasingly found in contracts. *See, e.g., Epps v. Fowler*, 351 S.W.3d 862, 865 n.1 (Tex. 2011) (considering fee-shifting provision in “widely used standard Texas Real Estate Commission form contract.”). Despite the intent of the American Rule, fee-shifting is increasingly possible in Texas.

Given the varied and increasing number of situations in which attorneys’ fees can be awarded, counsel should not prematurely rule out the possibility of fee-shifting in any case. Instead, as with potential damages, for both plaintiff and defense counsel, the initial analysis and research for every case should include determining whether there is any basis for seeking recovery of attorneys’ fees.

II. Caution: the rules vary, so never assume you know the rules.

Because fee-shifting in Texas is a product of statute or contract, the individual procedures and standards vary based on the particular statutory or contractual provisions at play. Counsel should never assume that the same rules apply to proving or defending fee awards that are controlled by a different fee-shifting provision.

The point was recently illustrated by the Texas Supreme Court in a case that turned on the Legislature’s placement of a comma. In *Sullivan*, the court considered the test for awarding attorneys’ fees under the Texas Citizens Participation Act. *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016). *Sullivan* was a defamation suit, and the trial court granted dismissal under the TCPA, but only awarded the defendant a small fraction of his fees. *Id.* at 295-96. Sullivan requested \$67,290 in attorneys’ fees, but the trial court found “that justice and equity necessitate Defendant’s recovery of reasonable attorney’s fees in the amount of \$6,500.” *Id.* Relying on Texas Supreme Court case law dealing with an attorneys’ fees award under the UDJA, the court of appeals affirmed. *Id.* But

the Texas Supreme Court disagreed because “the two statutes are different.” *Id.* at 296.

The Texas Supreme Court had previously held that, under the UDJA, attorneys’ fees awards must be both reasonable and necessary, as well as equitable and just. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The UDJA reads:

In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.

TEX. CIV. PRAC. & REM. CODE §37.009. By comparison, the TCPA states that:

If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party: (1) court costs, reasonable attorney’s fees, and other expenses incurred in defending against the legal action as justice and equity may require.

TEX. CIV. PRAC. & REM. CODE §27.009(a). Citing *Bocquet*, the lower courts interpreted the statutory reference to “justice and equity” in the TCPA as giving the trial court discretion to award something less than reasonable attorneys’ fees. *Sullivan*, 488 S.W.3d at 297. The Texas Supreme Court disagreed based on the lack of one comma and the placement of another.

The court held that, if the Legislature had intended the phrase “as justice and equity may require” to modify the mandatory award of reasonable attorneys’ fees, it would have inserted a comma either right before the phrase or after “other expenses,” finding that either placement would have shown that the phrase was meant to modify all the listed items. *Id.* at 298. But “their absence indicates an intent to limit the justice-and-equity modifier to the last item in the series.” *Id.* Likewise, while not definitive, the court agreed that, in the absence of such a comma, inclusion of the Oxford comma before “and other expenses” indicated that “the

Legislature intended to limit the justice-and-equity modifier to other expenses.” *Id.* at 299. Thus, unlike the UDJA, based on the placement of commas, the TCPA’s provisions do not allow courts to limit fee-shifting awards based on considerations of justice or equity, but only based on what are reasonable attorneys’ fees.

As was illustrated by *Sullivan*, counsel should be aware that the specific language authorizing fee-shifting may affect the procedures for and substance of fee awards in any number of ways. For example, the specific authorizing language may make the award of fees either mandatory or discretionary. *Bocquet*, 972 S.W.2d at 20. A provision that says a court “may” award attorneys’ fees is discretionary. *Id.* But provisions which read that a party “may recover,” “shall be awarded,” or “is entitled to” attorneys’ fees, each make the award mandatory. *Id.* Some provisions require that only a prevailing party may obtain attorneys’ fees. *Ashford Partners*, 401 S.W.3d at 40 (holding that to get attorneys’ fees under Chapter 38 for breach of contract, party must prevail on breach of contract claim and recover damages). But not all provisions do. For instance, “[a] party need not prevail to be awarded attorney’s fees under the DJA.” *Castille v. Serv. Datsun, Inc.*, No. 01-16-00082-CV, 2017 WL 3910918, at *11 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017, no pet.). And, while the Texas Supreme Court has held that a jury cannot award reasonable attorneys’ fees based solely on a contingency agreement, this approach has “no application” to a settlement agreement that allowed the court to award attorneys’ fees “for the results achieved in the Action and the risks of undertaking the prosecution of the Action on a contingency basis.” *Compare, Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (1997), with *J.C. Penney Co., Inc. v. Ozenne*, 453 S.W.3d 509, 515 n.6 (Tex. App.—Dallas 2014, pet. denied). The substantive and procedural law governing fee-shifting awards varies depending on the authorizing language.

Because the rules governing fee-shifting can vary greatly based on the wording (and the

punctuation) of the authority allowing the award, counsel should always carefully review and rely on the specific applicable text. Comparison with other similar authority can be helpful, but should be closely scrutinized. Prudent counsel should never assume fee-shifting procedures or awards are the same under different statutes or contracts.

III. There are some general concepts counsel should consider when proving up or defending against fee-shifting claims.

Although the specific requirements for proving or defending attorneys’ fee awards can differ depending on the source of the claim, there are some general concepts that carry over most cases. These are issues counsel should consider no matter what fee-shifting provision is at play.

A. Claims for attorneys’ fees should be specifically pleaded, and you should object to any failure to do so.

In most cases, a party requesting attorneys’ fees is required to specifically plead for them in order to be entitled to an award. *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015). Some courts have articulated the rule as being that, “[i]f attorney’s fees are not plead for, then they may not be awarded.” *Soria v. Hernandez*, No. 13–16–00136–CV, 2017 WL 3431667, at *6 (Tex. App.—Corpus Christi Aug. 10, 2017, no pet.). This statement may be too narrow. Instead, the rule is probably better understood as being that, a “court may award attorney’s fees if (a) the party pleaded for such relief, (b) a mandatory statute requires an award of attorney’s fees, or (c) the issue was tried by consent.” *Estate of Nunu*, No. 14-16-00394-CV, 2017 WL 5196145, at *9 (Tex. App.—Houston [14th Dist.] Nov. 2, 2017, no pet. h.). The difference in these two statements may come down to the definition of what it means to “plead” for fees.

Ideally, any request for attorneys' fees should be specifically pleaded in the petition or answer. However, the grounds for attorneys' fees are not always clear at the time these pleadings are filed, and a party can satisfy the written pleading requirement by timely filing a motion for attorneys' fees. *Good v. Baker*, 339 S.W.3d 260, 266-67 (Tex. App.—Texarkana 2011, pet. denied). “A number of courts have held . . . that a posttrial, pre-judgment filing with the court that requests attorney’s fees can serve as a trial amendment satisfying the need for pleading for attorney’s fees unless the opposing party presents evidence of surprise or the document asserts a new cause of action.” *Estate of Wright*, 482 S.W.3d 650, 660 (Tex. App.—Houston [14th Dist.] Dec. 15, 2015, pet. denied).

Counsel should make sure to specifically plead for each separate ground for which the party seeks attorneys' fees. “When . . . a party pleads a specific ground for recovery of attorneys' fees, the party is limited to that ground and cannot recover attorneys' fees on another, unpleaded ground.” *Vast Constr., LLC v. CTC Contractors, LLC*, 526 S.W.3d 709, 728 (Tex. App.—Houston [14th Dist.] July 6, 2017, no pet.). A party waives any claim to attorneys' fees by failing to specifically plead for fees or raise the issue in a motion before the question of fees is submitted to the jury. *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 659 (Tex. 2009).

As a general rule, counsel should plead for fee-shifting as early as possible, but counsel should never assume that the other side's failure to plead for fees will preclude any later award. When defending against a potential fee-shifting award, counsel should object to any failure to specifically plead for such an award or risk trial by consent. The decision of whether and exactly when to raise such an objection is a trial strategy decision that will need to be made based on the individual circumstances of the case. However, counsel defending a fee-shifting award should raise the issue once it is clear the other side is seeking fees without any supporting pleading, and before submission to the trier of fact.

If an opposing party requests attorneys' fees, but fails to properly plead the basis or the fees (or pleads to fees to which it is not legally entitled), counsel should consider filing a special exception. A court may grant a special exception if a party fails to properly plead for fees. *Hansson v. Time Warner Entm't Advance*, No. 03-01-00578-CV, 2002 WL 437297, at **3-4 (Tex. App.—Austin Mar. 21, 2002, pet. denied). If counsel fails to raise the lack of pleading issue before submission, the issue is tried by consent and cannot form the basis of a later complaint. *In re Marriage of Moore*, No. 06–10–00071–CV, 2011 WL 860525, at *2 (Tex. App.—Texarkana Mar. 11, 2011, no pet.). Likewise, counsel should be sure to plead any affirmative defense to a claim for fees, or else it will be waived. *Kinnear v. Texas Comm'n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 300 (Tex. 2000) (holding that immunity from liability from attorneys' fees was an affirmative defense that must be pleaded or is waived).

If the opposing party pleads for attorneys' fees that on the face of the pleadings have “no basis in law or fact,” counsel may also want to consider (after serious consultation with the client) whether to file a Rule 91a motion to dismiss. Rule 91a provides for dismissal of a cause of action if it has no basis in law or fact. TEX. R. CIV. P. 91a.1.

A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

Id. The term “cause of action” is not defined in the rule, but the Texas Supreme Court has defined the term, “as a fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.” *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 564 (Tex. 2014). The court has said that a “cause of action” is, similar to a claim, a legal right that a

party asserts in a lawsuit. *Id.* The motion to dismiss is decided on the pleadings, without the consideration of evidence. TEX. R. CIV. P. 91a.6. One advantage (and risk) of filing the Rule 91a motion to dismiss is that the court must award the prevailing party on the motion “all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action.” TEX. R. CIV. P. 91a.7. Because of the risk of fees and costs to either side, a motion to dismiss under rule 91a should not be taken lightly.

Moreover, counsel and client should understand that Rule 91a is a new rule, and the law is still developing. The full application of the rule is still unclear. Is a baseless claim for attorneys’ fees a “cause of action” that can be dismissed under a Rule 91a motion? Can 91a only be used to attack a claim for attorneys’ fees if the motion is directed at a corresponding legal claim? These are questions that the courts will need to decide. However, if the opposing party stands on its pleadings, the movant has the opportunity to withdraw its motion and avoid fees and costs. TEX. R. CIV. P. 91a.5; *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 299-303 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.). Rule 91a may provide a way to either obtain fees when the other side makes a baseless claim for attorneys’ fees or force the other side to withdraw the claim, but it could also provide fee-shifting when a party challenges a facially valid claim.

B. A party seeking attorneys’ fees should put on evidence of reasonable and necessary fees.

A party seeking attorneys’ fees bears the burden of proof to support the award. *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017). While the exact requirements for a particular fee-shifting provision vary, in Texas a party is generally only entitled to shift attorneys’ fees that are “reasonable” or “reasonable and necessary.” *See, e.g.*, TEX. BUS. & COM. CODE §17.50(d) (DTPA allows recovery of “reasonable and necessary fees”); TEX. CIV. PRAC. & REM. CODE §38.001 (allowing recovery

of reasonable attorney’s fees for a lawsuit for successfully prosecuting a breach of contract claim). “A reasonable fee is one that is not excessive or extreme, but rather moderate or fair.” *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010). The Texas Supreme Court has talked about what fees are “necessary” in terms of “the fees necessary to prove particular claims often turn on [] facts—how hard something was to discover and prove, how strongly it supported particular inferences or conclusions, how much difference it might make to the verdict, and a host of other details that include judgment and credibility questions about who had to do what and what it was worth.” *Chapa*, 212 S.W.3d at 313.

Not all fee-shifting statutes or contract provisions on their face require proof that fees were both reasonable and necessary, but it is hard to imagine how a fee could be “moderate and fair” and “not excessive,” while charging a client for work that is unnecessary. “Statutory fee-shifting is not a bonanza. It should take into account what the market should.” *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 766 (Tex. 2012) (Hecht, C.J., concurring). Fee-shifting does not allow a party to collect more from an adversary than it would reasonably be entitled to ask for from its own client.

Whether fees are “reasonable” or “necessary” are both fact questions. *Bocquet*, 972 S.W.2d at 21. The trial court cannot award fees without factually sufficient supporting evidence. *Id.* There are two most common methods that are used to determine a reasonable fee award: the traditional method or the lodestar method.

1. Proving reasonable attorneys’ fees through traditional evidence.

The traditional approach to proving attorneys’ fees is for an attorney—sometimes the same attorney representing the party seeking fees—to testify as an expert on what are reasonable fees for the case. Under the traditional approach, “Texas law does not require detailed billing records or other

documentary evidence as a prerequisite to awarding attorneys' fees." *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 846 (Tex. App.—Dallas 2014, no pet.). But "Texas law is clear that '[t]he issue of reasonableness and necessity of attorney's fees requires expert testimony.'" *Id.* at 830. A lay witness is not competent or admissible to testify as to reasonable and necessary attorneys' fees. *Id.* And an attorney testifying as to reasonableness must be designated as an expert. *Id.*

Often, an attorney in the case will testify about his or her own fees. "It has consistently been held that an attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charge is sufficient to support an award." *Woodhaven Partners*, 422 S.W.3d at 846

An attorney's testimony about the reasonableness of his or her own fees is not like other expert witness testimony. Although rooted in the attorney's experience and expertise, it also consists of the attorney's personal knowledge about the underlying work and its particular value to the client. The testimony is similar to that of a property owner whose personal knowledge qualifies him to give an opinion about his own property's value. The attorney's testimony is not objectionable as merely conclusory because the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee.

Garvia, 319 S.W.3d at 641.

A bare assertion by counsel that the fees are reasonable is not sufficient. *Kinsel*, 526 S.W.3d at 428. The client's contract with the attorney should be considered by the factfinder, but

cannot alone support an award for attorneys' fees. *Arthur Andersen & Co.*, 945 S.W.2d at 818 (holding contingency contract admissible, but not conclusive of reasonableness). Looking to the Rules of Professional Conduct, the Texas Supreme Court has articulated nonexclusive factors that are relevant to determining what fees are reasonable and necessary. *Id.* at 818. These factors include:

- (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.

Id. These are not an exhaustive list of factors, and not every factor has to be discussed or proven to support an award of reasonable attorneys' fees. See, e.g., *Ellis v. Renaissance on Turtle Creek Condo. Ass'n, Inc.*, 426 S.W.3d 843, 856 (Tex. App.—Dallas 2014, pet. denied) ("[E]vidence of each of the *Arthur Andersen* factors is not required to support an award of attorney's fees."). "The court can also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties." *Mercier v. Sw. Bell Yellow Pages, Inc.*, 214 S.W.3d 770, 776 (Tex. App.—Corpus Christi 2007, no pet.). However, when proving

or defending a claim of fees, counsel should make the *Arthur Andersen* factors part of any checklist for putting on witness testimony or cross examination.

When an attorney in the case offers testimony that is not contradicted by another witness, and is clear, direct and positive, free from contradiction, that testimony is, while not conclusive, some evidence to support an award of reasonable and necessary fees. *Garcia*, 319 S.W.3d at 641-42. And even if contradicted, such evidence of attorneys' fees is some evidence of reasonable and necessary fees that support an award of fees. *Midland W. Bldg. L.L.C. v. First Serv. Air Conditioning Contractors, Inc.*, 300 S.W.3d 738, 739 (Tex. 2009). Texas law has long held that, faced with disputed evidence from attorneys on the amount of reasonable fees, it is up to the factfinder to determine the amount of reasonable fees based on the evidence. *Gulf Paving Co. v. Lofstedt*, 188 S.W.2d 155, 160 (Tex. 1945).

2. Proving reasonable attorneys' fees through the lodestar method.

While Texas courts had not traditionally required detailed billing records as proof of attorneys' fee awards, under some statutes and in some types of cases, Texas has adopted the federal court's lodestar method for proving attorneys' fees. *El Apple*, 370 S.W.3d at 760. Because the standards are different, counsel proving or defending against a fee-shifting award should always determine whether the case requires the lodestar method.

Determining reasonable fees under the lodestar method is a two-step process. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. *Id.* By multiplying the number of reasonable hours by the reasonable hourly rate, the court determines the base fee or lodestar. *Id.* The court then may adjust the base fee up or down (by applying a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee

in the case. *Id.* For relevant factors, the Texas Supreme Court has pointed to the same *Arthur Andersen* factors listed above. *Id.*

Because the same reasonableness factors are applied under both the traditional and lodestar methods, counsel could mistakenly believe that the methods are the same. While Texas traditionally does not require billing records or other documentary evidence to prove a claim for attorneys' fees, under the lodestar method a party seeking fees bears the burden of documenting the hours expended on the litigation and the value of those hours. *Id.* at 761-62. Applying the lodestar calculation requires itemizing specific tasks. *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013). The movant must provide proof of: (1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked. *El Apple*, 370 S.W.3d at 763.

The law does not require that the lodestar method can only be established through time records or billing statements. *City of Laredo*, 414 S.W.3d at 736. But the trial court cannot award fees under the lodestar method without sufficient evidence indicating the actual time expended on specific tasks. *Long v. Griffin*, 442 S.W.3d 253, 255-56 (Tex. 2014). While an attorney can testify to these factors, "in all but the simplest cases, the attorney would probably have to rely on some type of record or documentation to provide this information. *El Apple*, 370 S.W.3d at 763. For this reason, when the lodestar method is used "attorneys should document their time much as they would for their own clients, that is contemporaneous billing records or other documentation recorded reasonably close to the time when the work was performed." *Id.*

If counsel fails to recognize the difference in the methods, it is possible they will accept the lodestar methods requirements by accident. Even in situations where the law would not otherwise require it, if a party chooses to prove up a fee award through the lodestar method, the

same requirements apply. *City of Laredo*, 414 S.W.3d at 736. Some courts have interpreted an attorney’s “reference to his hourly rate as an election to use the lodestar method.” *Helms v. Swansen*, No. 12–14–00280–CV, 2016 WL 1730737, at *7 (Tex. App.—Tyler Apr. 29, 2016, pet. denied) (collecting conflicting cases). But the courts of appeals seem to recognize that there are “some unanswered questions regarding when a party can be said to have elected to use the lodestar method” and what such an election means for cases covered by statutory fee claims. *Id.* at *7 n.1.

The Texas Supreme Court’s *City of Laredo* opinion provides a good example of what the standards are if a party is required or chooses to prove a case through the lodestar method. The court held that the party had chosen to rely on the lodestar method because its counsel had testified as to his opinion of reasonable fees based on an estimation of his time spent and his hourly fee. *City of Laredo*, 414 S.W.3d at 734–36. The attorney did not keep time records in the case, but estimated that he had worked on the case for 226 weeks with a minimum of six hours per week to arrive at an opinion of a reasonable fee of \$339,000. *Id.* The court reversed the fee award, holding that a lodestar calculation could not be sustained without billing records. *Id.* at 736–37. The court explained that the lodestar method required a similar effort at itemized billing that an attorney would do were he billing his own client. *Id.*

By comparison, in the same case the court sustained a smaller \$37,000 fee award for a second attorney. She, however, had kept track of her time leading up to trial, billed the client for it, and been paid \$25,000. *Id.* at 737. These records were not produced at trial, but they had not been requested. *Id.* at 735. The second lawyer also testified at trial to the estimated time she spent each day at and preparing for trial, which the court recognized as contemporaneous events and discrete tasks. *Id.* at 737. While detailed billing records should be used in all but the smallest, simplest fee claims under the lodestar method, the *City of Laredo* case presents

a good example of the type of testimony that is and is not sufficient to prove reasonable fees.

C. Discovery for Proving or Defending Against Attorneys’ Fee-Shifting Awards.

If a party is going to seek a fee-shifting award, just as they are required to prove up that award, they also open themselves up to discovery as to that proof. The same is true of a party seeking to put on evidence opposing a request for attorneys’ fees. The law is not entirely settled as to what that should look like. The Supreme Court and the Texas Supreme Court have both admonished that “[a] request for attorney’s fees should not result in a second major litigation.” *In re Nat’l Lloyds Ins. Co.*, No. 15-0591, 2017 WL 2501107, at *7 (Tex. 2017), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). But placing the attorneys in the case in the position of testifying about their fees raises issues for counsel to consider.

Attorney billing records contain work-product privilege. *In re Nat’l Lloyds Ins.*, at *7. A party can waive that privilege by offensive use, such as using the records to seek fees or to rely on its own fees to contest the reasonableness of opposing counsel’s claimed fees. *Id.* at *8. While the billing records of a party opposing a fee award would not ordinarily be relevant or discoverable, “[a]ttorney-billing information may be discoverable by virtue of the opposing party designating its counsel as a testifying expert.” *Id.* at *14.

Making a claim for attorney fees or using attorney fees as a comparator in challenging an opponent’s fee request puts a party’s attorney fees at issue in the litigation. In addition, designating counsel as an expert opens the door to expert-witness discovery as provided and limited by the Texas Rules of Civil Procedure. Outside of these scenarios and absent unusual circumstances, information about an opposing party’s attorney fees and expenses is, in the ordinary case, privileged or irrelevant and, thus, not discoverable.

Id. at *17. While the law governing discovery of attorneys' fees evidence is not entirely settled, it is clear that such requests are governed by the discovery rules. *Id.* at *15. A party seeking fees likely waives discovery of its own fee billings, as does a party defending against a fee award if they name their own attorney as an expert in the case or use their own fees in the case as a comparison to the fees sought. To avoid disclosing its own client's billing and fee information, counsel for a party opposing a fee request should consider designating an expert to testify on attorneys' fees other than counsel in the case.

IV. Segregating fees.

If the initial research in a case shows that fees may be available for some but not all claims in the lawsuit, counsel for a client seeking fee-shifting should segregate fees. Since the law only allows fee-shifting for certain claims, a party seeking its fees is required to segregate fees for claims for which fees are recoverable from those that are not. *Chapa*, 212 S.W.3d at 311. The rule is "if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees." *Id.* at 313. In both proving up and defending against fee requests, counsel should make sure that the fees sought are only for claims on which fees are recoverable.

A recognized exception to this duty to segregate arises when the attorney's fees rendered are in connection with claims "intertwined to the point of being inseparable." *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11-12 (Tex. 1991). After the Texas Supreme Court announced this exception, the courts of appeals were "flooded with claims that recoverable and unrecoverable fees are inextricable intertwined." *Chapa*, 212 S.W.3d at 312. But this exception cannot "swallow the rule" requiring segregation. *Id.* at 311. When claims depend on different underlying facts, the causes of action are distinct and require segregation. *Kinsel*, 526 S.W.3d at 427-28. And intertwined facts alone do not make unrecoverable fees recoverable. *Chapa*,

212 S.W.3d at 313. Instead, "it is only when discrete legal services advance both a recoverable and unrecoverable claim that they were so intertwined that they need not be segregated." *Id.* at 313-14. Thus, the real question is whether the discrete legal services for which fees are sought were required for a claim which allows fee-shifting.

In determining proper segregation of attorneys' fees, the court "does not look to the legal work as a whole, but parse[s] the work into component tasks." *Chevron Phillips Chem. Co. LP v. Kingwood*, No. 09-14-00316-CV, 2017 WL 4182292, at *6 (Tex. App.—Beaumont Sept. 21, 2017, no pet. h.). A "discrete legal service" includes "[r]equests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services [that] may be necessary whether a claim is filed alone or with others." *Chapa*, 212 S.W.3d at 313.

Of course, some services may advance more than one claim. *Chapa*, 212 S.W.3d at 313. "To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service." *Id.* The "double duty" standard does not allow a party to recover all fees simply under the notion that the similar tasks would have been undertaken. *Chevron Phillips Chem*, 2017 WL 4182292, at *7. Such an approach "ignores the requirement that before recovering fees incurred in pursuing an unsuccessful claim, the claimant must show that the fees 'would have been incurred on a recoverable claim alone.'" *Id.*

The requirement to segregate is not intended to create an impossible timekeeping burden. *Chevron Phillips Chem*, 2017 WL 4182292, at *8. The standard for segregation "does not require more precise proof for attorney's fees than for any other claims or expenses." *Chapa*, 212 S.W.3d at 314. Counsel should think about segregating discrete legal services for fee-shifting purposes the same as they would be for billing his or her own client. *See City of Laredo*, 414 S.W.3d at 736-37.

Ultimately, if a party puts on some evidence of reasonable attorneys' fees, a failure to properly segregate should not preclude a recovery of attorneys' fees. *Kinsel*, 526 S.W.3d at 428. Instead, the award will be remanded for reconsideration of the award. *Id.* Even if contemporaneous billing records are unavailable, the courts "have allowed for reconstruction of the attorney's work and consideration of any evidentiary support of the time spent and the tasks performed." *Id.* Thus, counsel should not let her or her own alleged failure to properly segregate stop him or her from putting on some evidence of the reasonable fees incurred.

If a party is opposing a fee-shifting award, counsel must make sure to timely object to any failure to segregate fees. If no one objects to the failure to segregate fees, then the objection is waived. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). Failing to object to the failure to segregate fees on the jury charge waives the error. *Id.* In a lawsuit that includes claims on which fees are recoverable and non-recoverable, counsel should determine whether the charge properly segregates fees, and object before submission if not.

V. Conclusion.

The notion that parties generally pay their own attorneys' fees is well-ingrained in the minds of Texas lawyers. But the "American Rule" in Texas is increasingly being limited by statute and contract provisions that allow for fee-shifting awards in a variety of lawsuits. Counsel for clients both seeking and defending against an award of attorneys' fees should make sure that consideration of the law and facts relevant to the fee award is not an afterthought.