Rohr Shock Part 2:
A Practical Guide to Recovering Attorneys' Fees

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> General, conclusory testimony devoid of any real substance will not support a fee award. Thus, a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought . . . **Importantly, however, we are not endorsing satellite litigation as to attorney's fees**.
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> –*Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501-02 (Tex. 2019).

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January 26, 2023 –

> *Rohrmoos's* sufficient evidence standard cited in over **150 opinions**.

The Texas Supreme Court's 2019 *Rohrmoos* opinion changed the legal landscape on recovery of attorneys' fees in Texas.[1] It clarified that parties must use a two-part lodestar method to calculate the attorneys' fees that could properly be shifted to an opponent,[2] and raised the evidentiary standard for proving the reasonableness and necessity of such fees.[3] And despite the Supreme Court's admonition that it was "not endorsing satellite litigation,"[4] *Rohrmoos* has led to an uptick in fights and appeals over attorneys' fees claims.[5]

If you are unfamiliar with the *Rohrmoos* case, I encourage you to stop reading and turn to Appendix A, where you will find "*Rohr* Shock: Proving up Attorneys' Fees in the Lode Star State" (Part 1). Part 1 is also a good place to start if you would like a refresher on the nitty gritty law on attorneys' fees recovery. Unlike Part 1, this paper is not a legal treatise. Instead, it is a practical guide setting out specific recommended steps for building the strongest possible fee claim—and one that is likely to withstand challenge. These steps are based on the current case law *and* on predicted developments to the law that accord with the attorneys' fees recovery principles articulated in *Rohrmoos*.

I. Let's Review: *Rohrmoos* Fee Recovery Framework

Rohrmoos established the legal framework for recovering attorneys' fees from an opposing party. To shift fees, a party must prove that (1) it is legally authorized to recover attorneys' fees, generally through a statute or contract, and (2) the requested fees are reasonable and necessary to compensate the prevailing party for its losses from litigating.[6]

The reasonableness and necessity of attorneys' fees must be determined using the two-step lodestar method.[7] Step one is the base calculation, which requires the fact finder to determine (1) the reasonable hourly rate for each timekeeper, and (2) the reasonable hours for

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[1] *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Thank you to Nicholl Wade, Catherine Saba, Will Allensworth, and Matt Ryan who assisted in writing, researching, and editing of the paper. And thanks also to Christine Davitt, the presentation whisperer.

[2] *Id.* at 501.

[3] *Id.* at 501–02.

[4] *Id.* at 502.

[5] *See, e.g.*, *Int. of J.K.R.*, No. 13-21-00058-CV, 2022 WL 16841420, at **8–9 (Tex. App.—Corpus Christi Nov. 10, 2022, no pet.); *Hazel v. Lonesome Ranch Prop. Owners Assoc.*, No. 08-20-00075-CV, 2022 WL 15431736,at **18–21 (Tex. App.—El Paso Oct. 27, 2022, no pet.); *Lederer v. Lederer*, No. 14-21-00012-CV, 2022 WL 11551156, at **3–7 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022, no pet.); *Canadian Real Est. Holdings v. Karen F. Newton Rev. Trust*, No. 05-20-00747-CV, 2022 WL 4545572, at **3–7 (Tex. App.—Dallas Sept. 29, 2022, no pet.); *Hillegeist Fam. Enters., LLP v. Hillegeist*, No. 01-21-00121-CV, 2022 WL 3162367, at **4–7 (Tex. App.—Houston [1st Dist.] Aug. 9, 2022, no pet.); *Schauble v. Schauble as Tr. of Edward R. Schauble Tr.*, No. 11-20-00181-CV, 2022 WL 2839224, at **12–14 (Tex. App.—Eastland July 21, 2022, no pet.); *Muniz v. Dugi*, No. 04-20-00528-CV, 2022 WL 1479052, at **8–9 (Tex. App.—San Antonio May 11, 2022, no pet.); *Asta Partners, LLC v. Palaniswamy*, No. 02-20-00371-CV, 2021 WL 5133888, at **12–13 (Tex. App.—Fort Worth Nov. 24. 2021, no pet.); *Person v. MC-Simpsonville, SC-1-UT, LLC*, No. 03-20-00560-CV, 2021 WL 3816332, at **5–9 (Tex. App.—Austin Aug. 27, 2021, no pet.).

[6] *Rohrmoos*, 578 S.W.3d at 487.

[7] *Id.* at 501.

the necessary services provided.[8] Each reasonable rate is then multiplied by the corresponding timekeeper's reasonable hours to produce the base amount.[9] *When supported by sufficient evidence* (more on this later), the base amount is presumed to be the reasonable and necessary fees that may be shifted.[10]

Step two requires the fact finder to decide whether to enhance or reduce the base amount based on "relevant considerations."[11] A base adjustment must be supported by specific proof showing it is necessary to achieve a reasonable fee.[12] An adjustment cannot be predicated on considerations subsumed in the step one calculation, which the *Rohrmoos* Court held usually includes:

- The time and labor required;
- The novelty and difficulty of the question involved;
- The skill required to perform the legal service properly;
- The fee customarily charged in the locality for similar legal services;
- The amount involved;
- The experience, reputation, and ability of the lawyer or lawyers performing the services;
- Whether the fee is fixed or contingent on results obtained;
- The uncertainty of collection before the legal services have been rendered; and
- The results obtained.[13]

Finally, the reasonableness and necessity of fees may not be proven with general, conclusory testimony and evidence.[14] Instead, sufficient proof of reasonableness includes, "***at a minimum***, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing the services."[15]

Although all the *Rohrmoos* standards are important, the legally sufficient evidence requirement is where the rubber meets the road for most practitioners. After all, simple multiplication of rates times hours is a manageable task—even for lawyers. The real challenge

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[8] *Id.*
[9] *Id.*
[10] *Id.* at 498, 501–02.
[11] *Id.* at 501. The *Rohrmoos* Court did not explicitly define what considerations were relevant, but its references to *Arthur Andersen* "considerations" imply that Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct (restated in *Arthur Andersen*) are the most likely source of possible bases for adjustment. *See id.* at 500, n.11–12.
[12] *Id.*
[13] *Id.* at 500–01.
[14] *Id.* at 501.
[15] *Id.* at 502 (emphasis added).

lies in taking the time both early on and throughout the life of a case to create the written records that will ensure the calculation is supported by adequate backup. The following is a practical guide for accomplishing just that.

II. Recovering Attorneys' Fees for Trial-Level Work

A. *Step 1*: Evaluate your client's ability to recover attorneys' fees.

First, you should determine if your client is legally authorized to recover fees.[16] As covered in detail in Part 1,[17] fee shifting may be authorized by one or more statutes, contracts, or both.[18] If the suit involves multiple parties or claims, you should also evaluate which parties you may shift fees to, and for what claims. As discussed later, this will help determine whether attorneys' fees segregation—the act of separating recoverable and unrecoverable fees—is likely to be required. If your case is complicated, with many parties and claims (effectively, every construction dispute), create a matrix. An example matrix from a fictional suit by an owner against a contractor, engineer, and manufacturer with a counterclaim by the contractor is shown below.

Do this early. Clients generally want to know up front if the fees they paid might one day return from money heaven. Further, this analysis (and matrix) will help you determine a litany of issues, including:

- The level of detail you should include in your time entries;
- Whether and how to segregate your time;
- Whether and whom you should designate as an attorneys' fees expert; and
- Whether you will need to produce your bills, and the extent of any redactions.

Prosecution of Owner (Plaintiff) Claims				
	Breach of Contract	*Breach of Implied Warranty*	*Negligence*	*Products Liability*
v. Contractor	Yes – Ch. 38	No?	No	---
v. Engineer	Yes – K	---	No	---
v. Manufacturer	---	---	No	No
Defense of Contractor Counterclaims				
	Breach of Contract	*Prompt Pay*		
v. Owner	No – Ch. 38	No		

[16] *See id.* at 487.

[17] App'x A at pp. 3–8. Note: At the time Part I was written, Chapter 38 of the Texas Civil Practice and Remedies Code had been construed to allow recovery of attorneys' fees only against individuals and corporations. Chapter 38 was subsequently amended and now permits recovery of attorneys' fees against individuals, corporations, and other business organizations. *See* Tex. Civ. Prac. & Rem. Code § 38.001 (2021).

[18] App'x A at pp. 3–8; *see also Rohrmoos*, 578 S.W.3d 484–85.

B. *Step 2*: Properly document your time.

1. Write detailed time entries.

The single most important thing an attorney can do to ensure that fees are recoverable is keep detailed time records. Be specific. Identify the biller who did the work, the particular work that was performed, the purpose of the work, and (where appropriate), give quantity or other context (*e.g.*, ~2,000 pages of documents reviewed).[19] Consider these examples, with corresponding "grades":

Example 1	Example 2	Grade
No time record	(8.0)	F
Attention to matter (0.5)	Prepare for trial (8.0)	D
Telephone call with client (0.5)	Review deposition and case law in preparation for trial (8.0)	C
Telephone call with Jill Jack regarding case status (0.5)	Review Jill Jack's deposition and analyzed breach-of-contract case law in preparation for trial. (8.0).	B
Telephone call with Jill Jack to discuss case status, including receipt of requests for production, gathering documents, and deadline to object and respond to requests (0.5).	Review Jill Jack's deposition (~180 pages) and prepare notes of key issues from same in preparation for taking her direct examination at trial (2.5); prepared outline for Jill Jack's direct examination based on deposition notes and identified specific exhibits to include during examination (2.0); reviewed and analyzed five Texas cases related to failure of consideration and included elements in outline for Jill Jack's direct examination (2.5).	A

[19] *See Rohrmoos*, 578 S.W.3d at 501–502; *Person*, 2021 WL 3816332, at **8–9 (rejecting billing entries that showed types of tasks but not specifics about those tasks); *Wealthmark Advisors Inc. v. Phoenix Life Ins. Co.*, No. 5:16-485, 2019 WL 13074596, at *2 (W.D. Tex. Aug. 23, 2019) (refusing to shift fees where billing entry did not include information connecting the work to a recoverable claim); *Indel Food Prod. Inc. v. Dodson Int'l Parts Inc.*, No. EP-20-CV-98-KC, 2023 WL 179970, at *6 (W.D. Tex. Jan. 11, 2023) (applying Texas law) (trial court made a downward adjustment to fees, in part, due to the fee claimant's vague time entries, noting "to justify this leviathan [fee] request, each of these time entries is logged, simply, as 'attend trial.'").

Do the "A" examples take longer to write and arguably include some privileged communications or attorney work product? You bet. But unlike "telephone call with client" or "prepare for trial," the detail also tells the fact finder exactly what the attorney was doing and why that work was necessary to advance the case. This is the "sufficient proof" that the fact finder needs to see to conclude that the time was reasonable and necessary.

2. Don't block bill.

Block billing is the general practice of including multiple tasks in a single billing time entry without indicating how much time was spent on each task.[20] For example:

> November 4, 2021: Analyzed potential defenses to Contractor's breach of contract counterclaim; telephone call with Owner client regarding calculation of liquidated damages and cost to repair defective work; met with expert to review draft certificate of merit against architect (7.2).

Block billing is disfavored by courts because it generally makes meaningful review of attorneys' fees difficult.[21] And although block billing lessens some of the tedium of timekeeping, attorneys should also disfavor it because it makes segregating fees between parties and claims nearly impossible. Imagine preparing to testify on the fees for your claim against the architect using the hypothetical time entry above—how long was that expert meeting you had 2 months ago? What if the meeting was 2 years ago? If you can't accurately quantify that time from memory and testify to it under oath, then eliminate the need to remember (or guess) and document the time for each task separately.

To be clear, block billing is not prohibited outright.[22] Several courts have found that block billing *may* be sufficient to support an attorneys' fees award.[23] In each of these cases, the block billing was limited—grouped tasks generally related to one particular service (*e.g.*, finalizing a document, filing it, and sending it to the client) and charged for less than two hours of time.[24] Bottom line, block billing *might* be acceptable for short, related tasks. But my suggestion is to eliminate the burden of having to police yourself and others on the line between good and bad block billing by banning it from your practice entirely. This also carries the foremost benefit of making your entries less susceptible to outside attack, and solidifying the ultimate goal of recovering those fees.

[20] *Lederer*, 2022 WL 11551156, at *7.
[21] *Id.*
[22] *Id.*; *Canadian Real Est.*, 2022 WL 4545572 at *5.
[23] *Id.*
[24] *Id.*

3. Record time contemporaneously, even if you aren't billing hourly.

The time an attorney spends working on a case should be recorded as reasonably close as possible in time to when the work was performed.[25] Although contemporaneous time records are not technically required, they are "*strongly* encouraged."[26] And as the Texas Supreme Court has repeatedly noted, "in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation" to provide legally sufficient proof of reasonable and necessary fees.[27] Can you "forensically" reconstruct your time at some later date? Maybe,[28] but I'm here to tell you what you *should* do to build a strong attorneys' fees claim, not what you might be able to get away with.

Importantly, contemporaneous time records should be kept regardless of the fee structure between you and your client.[29] "[A] client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary."[30] The lodestar method applies to *all* fee claims, and so counsel must provide legally sufficient evidence of the reasonable hours spent, even if the client has agreed to a contingency or flat fee.[31]

4. Use good billing judgment.

Good billing judgment is akin to the objective reasonable person test for attorneys' fees. Your guiding light should be common sense. Ensure that work is delegated to the lowest competent biller, eliminate duplicative work, and don't travel when Zoom would do.[32] If

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[25] *Rohrmoos*, 578 S.W.3d at 502.

[26] *Id.* (emphasis in original); *see also Canadian Real Est.*, 2022 WL 4545572 at *3 ("Contemporaneous billing records are the favored method of proving the reasonableness and necessity of requested fees.").

[27] *Rohrmoos*, 578 S.W.3d at 502 (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)).

[28] *See El Campo Ventures, LLC v. Stratton Securities, Inc.*, No. 1:20-CV-00560-RP, 2022 WL 1518926, at **5–6 (W.D. Tex. Feb. 1, 2022) (awarding reduced fees after admonishing Plaintiff that its "collective briefing and affidavit submissions are a clear effort to reverse-engineer a justification for an [a]ttorneys' fee award that mimics the amount they would have recovered under the contingency fee agreement. Between continued unpersuasive and erroneous legal arguments and obviously manipulative affidavits and attached billing records, it is difficult to put much stock in Plaintiff's analysis of this issue or evidence submitted.").

[29] *See Rohrmoos*, 578 S.W.3d at 498 (citing *Arthur Andersen & Co. v. Perry Equip. Corp*, 945 S.W.2d 812, 818-19 (Tex. 1997) (holding that although "[a] contingent fee may indeed be a reasonable fee from the standpoint of the parties to the contract." It is not "in and of itself reasonable for purposes of shifting that fee to the defendant." The fact finder is still required to "decide the question of attorney's fees specifically in light of the work performed in the very case for which the fee is sought.")).

[30] *Id.* at 488.

[31] *Id.*; *see also Asta Partners*, 2021 WL 5133888, at *12 ("[T]rial court's award of trial attorneys' fees based solely on the contingency fee agreement is without reference to the guiding principles set for in *Rohrmoos* and is legally insufficient."); *El Campo*, 2022 WL 1518926, at *2 (holding that Plaintiff's reference to its contingency fee agreement was insufficient and that "Plaintiff must attempt to approximate the lodestar method and submit evidence to support its belief that the attorneys' fees sought were reasonable and necessary in this case.").

[32] *Rohrmoos*, 578 S.W.3d at 498–99 (citing *El Apple*, 370 S.W3d at 762 ("Charges for duplicative, excessive, or inadequately documented work should be excluded.")); *Indel Food Prod. Inc.*, 2023 WL 179970, at *6 (reducing fees, in part, because counsel billed "fully for travel time.").

some special circumstance requires you to deviate from these practices, include that explanation when you document the time.

Consider the rate you are charging, or, for a flat or contingency fee, effectively charging.[33] An hourly rate is generally reasonable if it tracks rates for similar work in the same community, and by a lawyer with comparable skill, experience, and reputation.[34] In most cases, an experienced attorney's testimony on the reasonableness of the rates charged is sufficient evidence.[35] Rates may also be supported by more objective evidence, such as affidavits of other attorneys, the State Bar of Texas Hourly Rate Fact Sheets, and fees awarded in other cases, but such evidence is not necessarily required.[36] Finally, attorneys should not assume they can recover a higher rate in contingency cases because of the attorney's risk of loss, or because the client ultimately paid more than the lodestar amount.[37] At least one court rejected this argument, reducing a claimed $750 contingency rate to between $350 and $400 per hour.[38]

C. *Step 3*: Properly segregate your time.

As detailed in Part 1, a fee claimant has to segregate any unrecoverable time from its fee claim.[39] Fees may be (or become) unrecoverable because (i) fees are not legally authorized for a specific claim (*e.g.*, negligence), (ii) the party fails to prevail on certain claims, (iii) certain claims are settled or otherwise disposed, or (iv) the fees relate to claims against another party (*e.g.*, contractor rather than architect).[40]

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[33] *Id.* at 499, n.10 (noting that an attorney charging a client under a fee agreement other than hourly billing has the burden of showing through its expert that the rate claimed is a reasonable market rate).
[34] *Id.* at 499 (citing *Blum v. Stenson*, 465 U.S. 886, 895, n.11 (1984)).
[35] *See Canadian Real Estate*, 2022 WL 4545572, at *4 (approving attorney's testimony regarding reasonableness of rates); *Hillegeist*, 2022 WL 3162367, at **5–6 (attorney testimony regarding reasonableness of hourly rates was sufficient evidence); *Person*, 2021 WL 3816332, at **8–9 (attorney testimony regarding rates accompanied by attorney rates was legally sufficient); *but see El Campo*, 2022 WL 1189226, at **4–5 (rejecting attorney's testimony that his reasonable hourly rate was $500 but that his reasonably contingency hourly rate was $750 and awarding claimant between $350 and $400 per hour for work performed based on testimony of opposing counsel and State Bar of Texas hourly rate information).
[36] *Canadian Real Estate*, 2022 WL 4545572, at *4 (rejecting argument that rates must be supported by "hard" or "disinterested" evidence).
[37] *Rohrmoos*, 578 S.W.3d. at 502, n.13 ("We emphasize that, pursuant to an attorney-client fee agreement, a client could ultimately owe its attorney more fees than the amount of the award shifting fees to the non-prevailing party. However, fact finders should be concerned with awarding reasonable and necessary fees, not with any contractual obligations that remain between the attorney and the client.").
[38] *El Campo*, 2022 WL 1518926, at **4–5.
[39] App'x A at pp. 19–21; *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006).
[40] *See generally Chapa*, 212 S.W.3d at 313–314 (segregation between causes of action); *L&W Supply Corp. v. Kizziah*, No. 09-20-00198-CV, 2022 WL 17350942, at *7 (Tex. App.—Beaumont Dec. 1, 2022, no pet.) (segregation between parties); *Ashburn v. Myers*, No. 02-20-00183-CV, 2021 WL 1229969, at *9 (Tex. App.—Fort Worth Apr. 1, 2021, no pet.) (segregation between successful and unsuccessful claims).

But segregation of unrecoverable time is not required for "discrete legal services" that advance both recoverable and unrecoverable claims.[41] Attorneys tend to rely too heavily on this exception. Don't make that mistake. The exception is not simply whether separate claims involve intertwined facts.[42] Different claims may depend on the same set of facts, yet still require different research, discovery, proof, or legal expertise.[43] If you intend to assert that segregation is impossible, be prepared to give detailed reasons for your conclusion. A blanket statement that two claims cannot be segregated is insufficient.[44]

Attorneys should generally assume from the start that a case involving multiple causes of action or multiple parties will require some segregation. Current case law suggests that attorneys may properly segregate time by offering an opinion that a certain percentage of their total time was spent on claim(s) for which fees are recoverable.[45] But beware. The current jurisprudence relies almost entirely on the Texas Supreme Court's 2006 opinion in *Tony Gullo Motors I, L.P. v. Chapa*, holding percentage segregation acceptable because more "precise proof" is not required for "attorney's fees than for any other claims or expenses."[46] The *Chapa* approach allows attorneys to successfully offer arguably conclusory opinions on fees. This seems inconsistent with the Supreme Court's more recent holding in *Rohrmoos* that a fee award may *not* be supported by "[g]eneral, conclusory testimony devoid of any real substance."[47] Given the Court's announcement in *Rohrmoos* that "it should have been clear" since at least 2012 that the lodestar method was required to prove the reasonableness and necessity of fees[48]—it wasn't clear to anyone, including many courts of appeals[49]—we might do well to anticipate a future Supreme Court concluding that an attorney's opinion alone is not legally sufficient proof of recoverable fees.

Our advice is to keep time records that allow for detailed segregation. After all, it's better to have those records and not need them, rather than to need them and not have them. In addition to writing clear and detailed time entries that identify the parties and claims addressed, attorneys can make segregation easier by creating separate matters (*e.g.*, affirmative claim versus defensive claim, which is sometimes also necessary to satisfy insurers) or billing codes for various parties and claims. Further, consider reviewing and segregating bills monthly (*e.g.*, exporting time to Excel and sorting by sheets) when the work is fresh in everyone's minds, rather than waiting until the end of the suit to sort potentially hundreds of time entries all at once.

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[41] *Id.* at 313–314.
[42] *Id.* at 313.
[43] *Id.*
[44] *Hazel*, 2022 WL 15431736, at *21.
[45] *See, e.g.*, *Chapa,* 212 S.W.3d at 314; *Lederer*, 2022 WL 11551156 at **4–5; *Hillegeist*, 2022 WL 3162367, at *7; *Anderton v. Green*, No. 05-19-01294-CV, 2021 WL 1115549, at *3 (Tex. App.—Dallas Mar. 24, 2021, no pet.); *Sustainable Tex. Oyster Resource Management, L.L.C. v. Hannah Reef, Inc.*, 623 S.W.3d 851, 872 (Tex. App.—Houston[1st Dist.] 2020, pet. denied).
[46] *See generally id.*; *see also Chapa*, 212 S.W.3d at 314.
[47] *Rohrmoos*, 578 S.W.3d at 501; *but see Lederer*, 2022 WL 11551156, at *5 (rejecting argument that *Rohrmoos* heightened standard of proof for segregation).
[48] *Rohrmoos*, 578 S.W.3d at 487–98.
[49] *See* App'x A at pp. 13–14, n.136.

D. *Step 4:* Timely designate an expert and provide sufficient evidence of fees.

Rohrmoos did not change the need to support an award of attorneys' fees with expert testimony.[50] Accordingly, attorneys must timely designate the person(s)—either themselves or another attorney—who will testify about fees.[51] The attorneys' expert designation should include production of all bills or other time records for work to date.[52] Calendar a recurring reminder to supplement your time record production monthly[53]—it's easier than fighting a motion to exclude for untimely production.

Most importantly, put down the proverbial black marker. A fact finder cannot decipher whether your time was reasonable and necessary if your entries look like this:

> Conferred with [redacted] on [redacted]

Redactions are permitted to protect attorney-client and work-product privilege, but be judicious.[54] Overly redacted bills show only that "an attorney or other legal professional had a telephone conference with somebody about something, emailed somebody about something, discussed something with somebody, reviewed something, research something, drafted something, coordinated something, or worked on something."[55] This isn't legally sufficient to allow the fact finder to evaluate reasonableness and necessity.[56] Thus, redacting should be limited to very sensitive attorney conversations and research. Worried about giving away your dynamite strategy? Consider these examples:

Do	Don't	Rationale
Researched elements of implied warranty claim to include in motion for summary judgment.	Researched [redacted].	Opposing counsel and the court know the motion was filed and read it. You are not revealing a secret super power that you performed research to prepare the motion.
Telephone call with client to discuss responses to plaintiff's interrogatories.	Telephone call with client [redacted].	Although technically privileged, it doesn't reveal anything sensitive. No reason to open yourself up to a memory test on cross-examination.

[50] *Aguilar v. Wells Fargo Bank, N.A.*, No. 02-21-00259-CV, 2022 WL 3097290, at *1 (Tex. App.—Fort Worth Aug. 4, 2022, no pet.).
[51] *See* Tex. R. Civ. P. 195.2.
[52] Tex. R. Civ. P. 195.5(a)(4)(A).
[53] Tex. R. Civ. P. 193.5, 195.6.
[54] *See Canadian Real Estate*, 2022 WL 4545572, at * 4.
[55] *Person*, 2021 WL 3816332, at *9.
[56] *Id.*; *see also Eggemeyer v. Hughes*, 621 S.W.3d 883, 897 (Tex. App.—El Paso 2019, no pet.); *McGibney v. Rauhauser*, 549 S.W.3d 816, 821 (Tex. App.—Fort Worth 2018, pet. denied).

E. *Step 5*: Prepare to testify to reasonable rates and hours.

Whether live or by affidavit, attorney testimony about the reasonableness and necessity of fees must include the following:

1. The qualifications of each timekeeper;[57]
2. The rate being requested for each timekeeper;[58]
3. The hours being requested for each timekeeper;[59]
4. The total lodestar amount arrived at by multiplying the hours spent by each timekeeper by that timekeeper's rate;[60]
5. A reasoned opinion (*i.e.*, explain your reasoning) that each rate is consistent with the prevailing market rate for the location of the dispute;[61]
6. Discuss how the *Arthur Andersen* considerations apply to the facts of your case (*e.g.*, why the issues were complicated, and the time and labor involved in prosecuting or defending the suit);[62]
7. Use specific examples in discussing the reasonableness of the rates and hours (*e.g.*, state the specific business that had to be turned away or the risk the attorney undertook by agreeing to a contingent or flat fee arrangement);[63] and
8. Either provide an opinion on the percentage of time dedicated to recoverable fees, or better yet, state that unrecoverable time has been excluded and explain how the remaining time advanced recoverable claims.[64]

In addition to the above, it is imperative that time records are offered and admitted into the record.[65]

III. Recovering Fees for Appellate-Level Work

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[57] *L&W Supply Corp.*, 2022 WL 17350942, at *7.
[58] *Rohrmoos*, 578 S.W.3d at 501.
[59] *Id.*
[60] *Id.*
[61] *See id.* at 500–01 (holding that base calculation generally includes the fee customarily charged in the locality for similar services); *see also Blum*, 465 U.S. at 895 n.11.
[62] *Rohrmoos*, 578 S.W.3d at 500–01 (holding that base calculation includes most *Arthur Andersen* considerations and that conclusory testimony will not support a fee award).
[63] *Id.*; *see also City of Laredo v. Montano*, 414 S.W.3d 731, 734 (Tex. 2013) (noting inability of counsel to provide examples of work he had turned away).
[64] *Compare Chapa*, 212 S.W.3d at 314 (allowing attorney testimony that 95% of time was spent working on recoverable claim), *with*, *Rohrmoos*, 578 S.W.3d at 501 (rejecting general, conclusory testimony devoid of any real substance as sufficient to support a fee award).
[65] *Muniz*, 2022 WL 1479052, at * 9 (reversing and remanding attorney fee award because billing records supporting claim were not offered and admitted at trial); *but see Scott Pelley P.C. v. Wynne*, 578 S.W.3d 694, 702–03 (Tex. App.—Dallas 2019, no pet.) (rejecting argument that evidence was legally insufficient to support attorney fee award because there was no sworn expert witness testimony and exhibits handed to court reporter to be marked were never offered into evidence or admitted by concluding that billing records were "for all practical purposes, admitted.").

The *Rohrmoos* fee framework does not apply to a contingent award of appellate fees because "an objective calculation of reasonable hours worked" is impossible.[66] Unlike trial level fees, appellate fees may be properly projected based on expert opinion testimony.[67] As noted by the Supreme Court, at the point that fees are awarded by the trial court, "there is no certainty regarding who will represent the appellee . . . what counsel's hourly rate(s) will be, or what services will be necessary to ensure appropriate representation in light of the issues the appellant choses to raise."[68] Despite this uncertainty, a party seeking to recover contingent appellate fees must provide opinion testimony about (1) the services it reasonably believes will be necessary to defend the appeal, and (2) a reasonable hourly rate for those services.[69]

IV. <u>The Ending</u>

This concludes our regularly scheduled broadcast.

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[66] *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 355 (Tex. 2020) (quoting *Rohrmoos*, 578 S.W.3d at 498).
[67] *Id.*
[68] *Id.*
[69] *Id.*; *see also Canadian Real Est.*, 2022 WL 4545572, at *6 (finding testimony of appellate fees insufficient because it failed to identify the necessary services and reasonable rate for appeal).

Appendix A

Rohr Shock:

Proving Up Attorneys' Fees in the Lode Star State

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If you haven't read *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019), you should.[1] Why? Judges have. Less than a month after *Rohrmoos* was decided, I watched a Travis County District Court judge refuse to award fees in a summary judgment hearing due to insufficient evidence. The movant—a law school pal—offered an affidavit articulating the standard *Arthur Andersen* factors to prove that the requested fees were reasonable and necessary. It looked very much like every fee affidavit I had ever filed. It contained the same testimony I'd seen presented by lawyers far more competent than I. Yet, it wasn't enough. The judge said a new Texas Supreme Court case—she couldn't remember the name—required more proof and denied the request for fees. Naturally, I went back to the office and asked a bright associate to figure out what the judge was talking about. When he brought me a copy of *Rohrmoos*, I understood why the judge had trouble recalling the name.

Rohrmoos is jam-packed with important information, but the two-part standard for fee shifting first caught my attention:

> [T]o secure an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of attorney's fees is legally authorized, and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process.[2]

In my litigation practice, I've always focused on the first part of the test: Can my client recover its fees if it wins? Will it have to pay the other side's fees if it loses?

Part two—proving that the fees are reasonable and necessary—had generally gotten short shrift. And I don't think I'm alone. For many attorneys, proving up fees is often an afterthought. We designate ourselves as experts using a well-worn script, produce bills at or shortly before a hearing or trial (often heavily redacted), and make sure we have our *Arthur Andersen*[3] cheat sheet on hand to justify the total amount billed when it is time to testify.

The Supreme Court's decision in *Rohrmoos* clarifies that this approach is insufficient.[4] Instead, the reasonableness and necessity of fees must be determined using the lodestar method.[5] Further, reasonable fees cannot be proven through generalities and conclusory testimony.[6] Attorneys seeking to shift fees to the opposing party must provide legally sufficient proof of

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[1] *See* Carlos R. Soltero, Attorney's Fees – 2019 1 (2019). Special thanks to Carlos Soltero for sharing his excellent paper and his thoughts with me. If you are interested in further reading on recovering attorneys' fees, I highly recommend Mr. Soltero's paper. I also owe thanks to Nicholl Wade, Lucy Morton, Matt Roland, and Matt Ryan who assisted in the writing, researching, and editing of the paper. Finally, thanks to Christine Davitt for creating another top-notch Prezi.

[2] *Rohrmoos Venture v. UTSW DVA Helathcare*, LLP, 578 S.W.3d 469, 487 (Tex. 2019).

[3] *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (articulating eight factors a fact-finder should consider when determining the reasonableness of a fee); *see also infra* Section II.B.2.

[4] *Rohrmoos Venture*, 578 S.W.3d at 496.

[5] *Id.* at 501.

[6] *Id.* at 496.

reasonableness and necessity, which includes at a minimum: (1) the particular work performed, (2) who performed that work (3) when the work was performed, (4) the reasonable amount of time required to perform the work, and (5) the reasonable hourly rate for each person who performed that work.[7]

This paper will focus on the current requirements for successful fee-shifting and the steps and practices attorneys should undertake to comply with those requirements. Given the exorbitant costs of putting on a case, this is a high-stakes proposition—and one that all lawyers should grasp as part of the overall duty we owe to our clients.

I. Fee-Shifting Part 1: Legal Authorization

Texas follows the "American Rule," which requires each party to pay its own attorneys' fees unless recovery is authorized by statute or contract.[8] Both exceptions often apply in construction litigation because the contracts underpinning projects, and the statutes governing the industry, often provide for fee-shifting.

A. Statutorily Authorized Fee-Shifting

Numerous statutes allow, or even require, fee-shifting. This paper will focus on those most common in construction-related cases, including Chapter 38 of the Texas Civil Practice and Remedies Code,[9] the Uniform Declaratory Judgment Act,[10] the Prompt Pay Acts,[11] the Deceptive Trade Practices Act,[12] and Chapter 53 of the Texas Property Code (lien and bond claims).[13] Although each statute differs, a few important principles apply to all. First, fee-shifting statutes are generally strictly construed.[14] Second, a statute's (or contract's) use of "reasonable" fees versus "reasonable and necessary" fees is immaterial.[15] When a claimant attempts to shift fees to its opponent, it "must prove that the requested fees are both reasonable *and* necessary."[16] Finally, the statutory (or contractual) requirement that a fee be

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[7] *Id.* at 498.
[8] *Id.* at 484-85.
[9] Tex. Civ. Prac. & Rem. Code §§ 38.001-.006 (West).
[10] *Id.* at §§ 37.001-.011.
[11] Tex. Prop. Code §§ 28.001-.010 (West) (applicable to private projects); Tex. Gov't Code § 2251.001-.055 (applicable to public projects).
[12] Tex. Bus. & Comm. Code §§ 17.41-.63 (West).
[13] Tex. Prop. Code §§ 53.001-.287 (West).
[14] *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 804 (Tex. 1974) (citing *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893 (Tex. 1962) ("Statutory provisions for the recovery of attorney's fees are in derogation of the common law, are penal in nature and must be strictly construed")); *see also Willacy Cnty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 52 (Tex. 2018); *but cf.* Tex. Civ. Prac. & Rem. Code § 38.005 (stating that Chapter 38 shall be liberally construed).
[15] *Rohrmoos Venture*, 578 S.W.3d at 488-89 (offering the exemplary comparison of Tex. Bus. & Comm. Code § 17.50(d)'s use of "reasonable and necessary attorneys' fees" with Tex. Civ. Prac. & Rem. Code § 38.001's use of "reasonable attorney's" fees).
[16] *Id.* at 489 (emphasis added).

reasonable and necessary is generally a question of fact.[17] But whether a fee is equitable and just is a question of law for the court.[18]

1. *Chapter 38, Texas Civil Practice & Remedies Code (Contracts & Quantum Meruit)*

Chapter 38 of the Texas Civil Practice and Remedies Code is one of the statutes most often pled as a basis for recovery of fees in both construction and general business litigation. It allows "a person" to "recover reasonable attorney's fees from an individual or corporation" for both written and oral contract claims and suits on a sworn account.[19] The statute also provides for fee-shifting under a quantum meruit cause of action where the claim is for "rendered services," "performed labor," or "furnished material."[20]

The Texas Legislature has set Chapter 38 apart from other fee-shifting statutes by requiring that it "be liberally construed to promote its underlying purposes" of encouraging contracting parties to pay just debts and discouraging unnecessary litigation.[21] But this liberal construction mandate has limits. For instance, Chapter 38 does not provide a basis to recover fees for a claim under the Texas Construction Trust Fund Act.[22] Perhaps more importantly, Chapter 38 does not allow recovery of fees against limited partnerships, limited liability partnerships, and limited liability companies because such entities are not "individuals" or "corporations."[23]

To recover fees under Chapter 38, a party must be (1) represented by an attorney, (2) present its claim to the opposing party, and (3) prevail by recovering damages.[24] In determining whether a party prevailed, the key issue is whether the party proved an injury *and* secured "an enforceable judgment in the form of damages or equitable relief."[25] As the *Rohrmoos* Court explained: a plaintiff is not eligible to recover fees where it "recovered no

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[17] *Id.*

[18] *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

[19] Tex. Civ. Prac. & Rem. Code § 38.001(8).

[20] *See id.* at § 38.001(1)-(3); *see also, e.g.*, *Base-Seal, Inc. v. Jefferson Cnty*, 901 S.W.2d 783, 785 (Tex. App.—Beaumont 1995, writ denied).

[21] *See* Tex. Civ. Prac. & Rem. Code § 38.005; *Ventling v. Johnson*, 466 S.W.3d 143, 155 (Tex. 2015).

[22] *See Dudley Constr. Inc. v. ACT Pipe & Supply, Inc.*, 545 S.W.3d 532, 541-42 (Tex. 2018).

[23] *See 8305 Broadway Inc. v. J & J Martindale Ventures, LLC*, 04-16-00447-CV, 2017 WL 2791322, at *5 (Tex. App.—San Antonio June 28, 2017, no pet.); *CBIF Ltd. P'ship v. TGI Friday's Inc.*, 05-15-00157-CV, 2017 WL 1455407, at *25 (Tex. App.—Dallas Apr. 21, 2017, pet. filed); *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 214 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *EXCO Operating Co. v. McGee*, 12-15-00087-CV, 2016 WL 4379484, at *2 (Tex. App.—Tyler Aug. 17, 2016, no pet.); *Fleming & Associates, L.L.P. v. Barton*, 425 S.W.3d 560, 575–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). The Texas Legislature has had multiple opportunities to reform the statute to remove the perverse result of distinguishing corporations from these other corporate forms, and it has even considered specific language to do so—but to date, it has declined to make the necessary changes.

[24] *See* Tex. Civ. Prac. & Rem. Code § 38.002; *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997).

[25] *Rohrmoos Venture*, 578 S.W.3d at 485.

damages, secured no declaratory or injunctive relief, obtained no consent decree or settlement in its favor, and received nothing of value of any kind."[26]

The Texas Supreme Court has "never said whether nominal damages are enough" to recover fees under Chapter 38.[27] But several courts of appeals have concluded that nominal damages are not enough.[28] The courts of appeals have reached varying conclusions on whether equitable relief allows a plaintiff to recover attorneys' fees under Chapter 38.[29]

2. *Uniform Declaratory Judgment Act*

A party to a declaratory judgment claim may recover "reasonable and necessary attorney's fees as are equitable and just" under the Uniform Declaratory Judgment Act (UDJA), which is codified in Chapter 37 of the Texas Civil Practice and Remedies Code.[30] A fee award is not mandatory under the UDJA.[31] Instead, "the court *may* award costs and reasonable and necessary attorney's fees as are equitable and just"—or not.[32] And the court is not limited to awarding fees to the prevailing party.[33] So, a defendant may recover fees based on the plaintiff's declaratory judgment claim, provided the defendant has pled for recovery.[34]

The "equitable and just" limitation on recoverable fees is a question for the court.[35] The equity and justness of a fee award is not defined by a precise test and is not susceptible to

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[26] *Id.*

[27] *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009).

[28] *See, e.g.*, *Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc.*, 468 S.W.3d 557, 575-76 (Tex. App.—San Antonio 2014, pet. denied); *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 257 (Tex. App.—Dallas 1990, no writ); *Int'l Med. Ctr. Enters., Inc. v. ScoNet, Inc.*, No. 01-16-00357-CV, 2017 WL 4820347, at *14 (Tex. App.—Houston [1st Dist.] Oct. 26, 2017, no pet.) (explaining that nominal damages are "trivial" and damages "in name only" do not entitle a litigant to recover fees under § 38.001).

[29] *Compare Rasmusson v. LBC PetroUnited, Inc.*, 124 S.W.3d 283, 287 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (award of specific performance entitled party to recover fees), *and RenewData Corp. v. Strickler*, 03-05-000273, 2006 WL 504998, at *16-17 (Tex. App.—Austin Mar. 3, 2006, pet. dism'd by agr.) (obtaining a permanent injunction held to be "something of value" sufficient to support a fee award), *with Thunder Rose Enters. Inc. v. Kirk*, 13-15-00431-CV, 2017 WL 2172468, at *14 (Tex. App.—Corpus Christi Apr. 20, 2017, pet. denied) (award of specific performance did not entitle party to recover attorney's fees).

[30] Tex. Civ. Prac. & Rem. Code § 37.009.

[31] *See id.*; *Bocquet*, 972 S.W.2d at 20 (noting that "may award" is discretionary while "may recover" is mandatory).

[32] *See id.*; *Guajardo v. Hitt*, 562 S.W.3d 768, 783 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (trial court did not abuse its discretion by declining to award attorney's fees).

[33] *Feldman v. KPMG LLP*, 438 S.W.3d 678, 685 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Under section 37.009, a trial court may exercise its discretion to award attorney's fees to the prevailing party, the non-prevailing party, or neither").

[34] *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 915-16 (Tex. 2015); *Devon Energy Prod. Co., L.P. v. KSC Res. LLC*, 450 S.W.3d 203, 222 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

[35] *Bocquet*, 972 S.W.2d at 20.

direct proof.[36] The trial court makes the determination depending "on the concept of fairness in light of all the surrounding circumstances," and may properly conclude that it is not equitable and just to award even reasonable and necessary fees.[37] On the other hand, a court may *not* award unreasonable fees, even if the court found them to be just.[38]

3. *Public and Private Prompt Pay Acts*

Both the public and private prompt pay statutes *allow* fee-shifting.[39] On private projects, a prompt payment fee award is discretionary.[40] Like the UDJA, § 28.005 of the Texas Property Code provides that a "court may award costs and reasonable attorney's fees as the court determines equitable and just."[41] Thus, a court may award fees on a prompt pay claim to the prevailing party, the non-prevailing party, or neither.[42] By contrast, the public prompt pay statute *requires* an "opposing party" to pay reasonable fees to a prevailing plaintiff.[43] Although an "opposing party" may be an governmental entity, several courts of appeals have held that a governmental entity's immunity is not waived for an attorney fee award, rendering § 2251.043 of the Government Code unenforceable against the government.[44]

4. *Deceptive Trade Practices Act*

The DTPA requires courts to award reasonable and necessary attorneys' fees to a prevailing plaintiff.[45] To prevail, a party must recover actual damages or damages for mental anguish.[46] This requirement applies even when a party seeks only DTPA rescission because that remedy requires a showing of some actual damage or pecuniary injury.[47]

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[36] *Ridge Oil Co., Inc. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162 (Tex. 2004) (holding that equitable and just "determination is not susceptible to direct proof but is rather a matter of fairness in light of all the circumstances.").

[37] *Id.* (upholding reduction of award of reasonable and necessary fees on basis of equity and justice); *Bocquet*, 972 S.W.2d at 21 ("[T]he court may conclude that it is not equitable or just to award even reasonable and necessary fees").

[38] *Bocquet*, 972 S.W.2d at 21.

[39] *See* Tex. Prop. Code § 28.005(b); Tex. Gov't Code § 2251.043.

[40] *Id.*; *see also Village Contractors, Inc. v. Trading Fair IV, Inc.*, No. H-09-2701, 2011 WL 2693386, at *1 (S.D. Tex. July 11, 2011) (citing *Bocquet*, 972 S.W.2d at 20-21).

[41] Tex. Prop. Code § 28.005(b).

[42] *See Bocquet*, 972 S.W.2d at 20-21.

[43] Tex. Gov't Code § 2251.043 ("[T]he opposing party, which may be the governmental entity or the vendor, shall pay the reasonable attorney fees of the prevailing party").

[44] *See id.*; *Harris Cnty. Flood Control Dist. v. Great Am. Ins. Co.*, 309 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2010, pet. denied), *and McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458, 465-66 (Tex. App.—Dallas 2009, pet. denied), *cf. State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711 (Tex. App.—Austin 2007, pet. denied).

[45] Tex. Bus. & Comm. Code § 17.50(d).

[46] *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002).

[47] *Cruz v. Andres Restoration, Inc.*, 364 S.W.3d 817, 823 (Tex. 2012).

5. *Chapter 53, Texas Property Code (Lien and Bond Claims)*

Chapter 53 of the Texas Property Code authorizes the recovery of fees in a suit to foreclose a lien, to enforce a bond claim,[48] or to declare a lien or bond claim invalid or unenforceable.[49] If the suit involves a residential project, then the court may—but is not required—to award fees.[50] For all other projects, "the court shall award costs and reasonable attorney's fees as are equitable and just."[51] Although the statute's use of "shall" implies that a fee award is mandatory, a court may properly decline to award fees if they are not equitable and just.[52] Recovery of court costs and attorneys' fees is not secured by or included in the underlying lien.[53]

B. Contractual Fee Shifting

Contracting parties "are generally free to contract for attorney's fees as they see fit."[54] For example, parties may agree that fees are only recoverable by one party or side.[55] Or—as in *Rohrmoos*—they may agree that a prevailing party be awarded fees regardless of whether it recovers damages.[56] Courts will construe attorneys' fees provisions as written.[57] So, for example, conditions precedent will only apply if required in the contract.[58] And parties are free to set the standard under which fees will be recoverable—whether those be reasonable and necessary fees or those actually incurred.[59]

The standard AIA and EJCDC contract documents do not contain an attorneys' fees provision.[60] Even so, construction contracts are commonly amended to address the recovery

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[48] To avoid any doubt or confusion, this refers only to Chapter 53 bond claims.
[49] Tex. Prop. Code § 53.156.
[50] *Id.*
[51] *Id.*
[52] *See Schear Hampton Drywall, LLC v. Founders Commercial, Ltd.* 586 S.W.3d 80, 94 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (citing *Bouquet*, 972 S.W.2d at 21).
[53] *See Dossman v. Nat'l Loan Invs., L.P.*, 845 S.W.2d 384, 386-87 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
[54] *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231 (Tex. 2014).
[55] *See id.*
[56] *Rohrmoos Venture*, 578 S.W.3d at 485-86.
[57] *Id.* at 490 (citing *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018) ("[O]ur primary objective is to ascertain and give effect to the parties' intent as expressed in the instrument").
[58] *See id.* at 489-490.
[59] *See id.*
[60] *See generally, e.g.*, Am. Inst. of Architects, AIA Document A101-2017: Standard Form of Agreement Between Owner and Contractor (2017); Am. Inst. of Architects, AIA Document A201-2017: General Conditions on the Contract for Construction (2017); Eng'rs Joint Contract Docs. Comm., C-520 2018 Agreement between Owner & Contractor Stipulated Price (2018); Eng'rs Joint Contract Docs. Comm., C-700 2018 Standard General Conditions (2018).

of fees. Indeed, the newest 200 Series ConsensusDocs incorporate an "Attorney's Fee and Prevailing Party" section to "help encourage the settlement of potential litigation claims."[61]

Parties may define the requirements to be a "prevailing party any way they choose."[62] But without such agreement, a court will presume that the parties intended the term's ordinary meaning.[63] To prevail, a *plaintiff* must generally recover damages or obtain relief that "materially alters the parties' legal relationship."[64] Recovery is measured after settlement credits are applied.[65] A plaintiff that effectively leaves the courthouse empty-handed because its judgment is reduced to $0 has not prevailed.[66]

A *defendant* generally prevails when it obtains a "take-nothing" judgment or a nonsuit with prejudice.[67] This is true even if the judgment is awarded for a non-merits reason.[68] A plaintiff's nonsuit without prejudice generally *does not* make the defendant a prevailing party, unless the defendant can show the nonsuit was to avoid a mandatory fee award based on an unfavorable ruling on the merits.[69]

II. Fee-Shifting Part 2: Reasonableness and Necessity

A. Lodestar Method Required

Even when fee shifting is authorized, a party may only recover reasonable and necessary fees.[70] The burden of proof is on the party seeking fees.[71] Before *Rohrmoos*, many attorneys operated under the mistaken-but-understandable belief—more on this later—that reasonableness and necessity could be proven by either (1) the "traditional method" of reciting conformity with the *Arthur Andersen* factors, or (2) the lodestar method.[72] In fact, I'm betting that some attorneys (myself included) thought that lodestar only applied in federal court. In *Rohrmoos*, the Texas Supreme Court "clarified" that we were all wrong.[73] Lodestar is the ***only***

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[61] ConsensusDocs Guidebook 2019 Ed. at 18-19 https://www.consensusdocs.org/wp-content/uploads/2019/05/All-Associations-Guidebook-May-2019.pdf. DBIA Document 535 also contains a prevailing party clause. Design Build Inst. of Am., Document 535: Standard Form of General Conditions of Contract Between Owner and Design Builder (2010) at § 10.3.4.
[62] *Epps v. Fowler*, 351 S.W.3d 862, 871 n.10 (Tex. 2011).
[63] *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009).
[64] *Rohrmoos Venture*, 578 S.W.3d at 485-86.
[65] *See Elness Swenson Graham Architects, Inc. v. RLK II-C Austin Air, LP*, 520 S.W.3d 145, 169-71 (Tex. App.—Austin, pet. denied).
[66] *Id.*; *see also Rohrmoos Venture*, 578 S.W.3d at 485.
[67] *Severs v. Mira Vista Homeowners Ass'n, Inc.*, 559 S.W.3d 684, 707 (Tex. App.—Fort Worth 2018, pet. denied) (citing *Epps*, 351 S.W.3d at 868-89).
[68] *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1651 (2016).
[69] *Epps*, 351 S.W.3d at 870.
[70] *Rohrmoos Venture*, 578 S.W.3d at 484.
[71] *In re Nt'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017).
[72] *See Rohrmoos Venture*, 578 S.W.3d at 490.
[73] If you're in this group, don't feel bad; so were many courts of appeals. *Infra* note 136.

method for proving that fees are reasonable and necessary.[74] So, why the confusion? Read on.

B. A Lodestar is Born: History of Federal Jurisprudence

The lodestar method was first developed by the Third Circuit in 1973.[75] *Lindy* arose out of a fee award in a class action suit for price-fixing by plumbing fixture manufacturers and their trade organizations.[76] After a settlement with defendants, two attorneys representing certain class members sought and received an award of fees from a portion of the settlement funds.[77] In awarding fees, the district court articulated four factors it had considered but provided little explanation of how or why those factors were applied.[78] Class members appealed, claiming that the judge had abused his discretion, and the appellate court agreed, noting that the lower court's analysis made "meaningful review difficult."[79]

The Third Circuit Court then laid out a two-step method for determining reasonable attorney fees.[80] First, courts were to multiply the reasonable hours spent by a reasonable hourly rate for each attorney.[81] The total of this calculation "should be the lodestar[82] of the court's fee determination."[83] Second, courts must consider whether the lodestar should be adjusted based on either a contingent fee arrangement or the quality of the lawyer's services, as evidenced by the complexity of the case and the results obtained.[84]

A year after *Lindy*, the Fifth Circuit articulated a separate method "to better enable District Courts to arrive at just compensation" for fee awards: the *Johnson* Factors.[85] In *Johnson*, the plaintiffs challenged the adequacy of a $13,500 fee award for an alleged 659 hours of work over four years.[86] The district court's judgment stated that the award was based on sixty days of work at $200 per day plus three trial days at $250 per day.[87] These times and amounts had no stated correlation to the evidence submitted by the plaintiffs, and the court failed to "elucidate the factors which contributed to the decision and upon which it was based."[88] For

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[74] *See Rohrmoos Venture*, 578 S.W.3d at 496, 498.
[75] *See Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S.546, 563 (citing *Lindy Bros. Builders, Inc. of Philadelphia v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)).
[76] *Lindy*, 487 F.2d at 163.
[77] *Id.* at 164
[78] *Id.* at 166-67.
[79] *Id.* at 164, 166.
[80] *Id.* at 167-69.
[81] *Id.* at 167-68.
[82] A lodestar is a "north star" or a "star that leads and guides." Merriam Webster's Collegiate Dictionary 685 (10th ed. 1993).
[83] *Lindy*, 487 F.2d at 168.
[84] *Id.* at 168-69.
[85] *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 715 (5th Cir. 1974); *see also Rohrmoos Venture*, 578 S.W.3d at 490-91.
[86] *Johnson*, 488 F.2d at 715.
[87] *Id.* at 716.
[88] *Id.* at 716-17.

this reason, the Fifth Circuit vacated the judgment and remanded for reconsideration given these guidelines:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill required to perform the legal service properly;
4. the preclusion of other employment by the attorney due to acceptance of the case;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time limitations imposed by the client or the circumstances;
8. the amount involved and the results obtained;
9. the experience, reputation, and ability of the attorneys;
10. the 'undesirability' of the case;
11. the nature and length of the professional relationship with the client; and
12. awards in similar cases.[89]

These guidelines, derived from those recommended by the American Bar Association's Code of Professional Conduct at the time, became known as the *Johnson* factors.[90] Although several other circuits adopted *Johnson*, the factors ultimately did not give clear guidance, were sometimes subjective, placed unlimited discretion on trial judges, and produced disparate results.[91]

The Supreme Court tried to correct these issues by adopting a new, hybrid approach.[92] *Hensley v. Eckerhart* involved a § 1988 federal civil rights claim for involuntary confinement of the "criminally insane" at a state hospital in Missouri.[93] Following trial where the plaintiffs prevailed on some but not all of their claims, plaintiffs requested roughly $200,000 in attorney fees, which included an "enhancement" of more than thirty percent.[94] The district court awarded $133,000, rejecting any enhancement and reducing the base fee request for inexperience and failure to keep contemporaneous time records.[95] The Eighth Circuit affirmed, but the Supreme Court vacated and remanded, using the case as an "opportunity to clarify the proper relationship of the results obtained to an award of attorney's fees."[96]

According to the Court, determining the reasonable fee begins with a lodestar calculation of reasonable hours times a reasonable hourly rate.[97] The hours and rates were to

[89] *Id.* at 717-19.
[90] *Id.* at 720.
[91] *See Rohrmoos Venture*, 578 S.W.3d at 491 (citing *Del. Valley Citizens' Council*, 478 U.S. at 563).
[92] *See Del. Valley Citizens' Council*, 478 U.S. at 563-64 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983)).
[93] *Hensley*, 461 U.S. at 426.
[94] *Id.* at 428.
[95] *Id.* at 428-29.
[96] *Id.* at 429, 432.
[97] *Id.* at 433.

be proven by evidence, and district courts were instructed to exclude from the lodestar calculation "hours that were not 'reasonably expended.'"[98] Attorneys were also required to ensure that fees were reasonable by making "a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[99] Noting attorneys' ethical obligation to use 'billing judgment,' the court admonished: "Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* . . . ."[100]

Although the lodestar amount is a "a useful starting point" to objectively make "an initial estimate" of the value of a lawyer's services, the Court held that it does not end the inquiry.[101] Next, other factors must be considered that may justify an adjustment to the lodestar fee.[102] Although the factors were not limited to those stated in *Johnson*, this two-step process effectively integrated a *Johnson*-type test into the lodestar method.[103]

The U.S. Supreme Court further refined its two-step lodestar method in *Blum v. Stenson*.[104] There, legal aid attorneys on a § 1983 case sought an upward adjustment of their fees based on the complexity of the case, novelty of the issues, and the "great benefit" to a large class of plaintiffs.[105] On appeal, the Court clarified several key points. First, the lodestar calculation is not just an "initial estimate" but is presumed to be the reasonable fee.[106] Second, a step-two adjustment cannot be based on factors already subsumed in the lodestar amount, which include "novelty and complexity, special skill and experience of counsel, quality of representation, and results obtained."[107] Put differently, a court may not adjust a lodestar amount based on the quality of the representation because that consideration would have already been incorporated through the reasonable hourly rate.[108] Third, upward adjustments of the lodestar amount should be "rare" and "exceptional."[109] The *Blum* articulation of the lodestar method continues to guide federal courts and has heavily influenced fee-shifting jurisprudence in Texas.[110]

C. Lodestar in the Lone Star State: Development of Texas Jurisprudence

[98] *Id.* at 433-34 (citing S. Rep. No. 94-1011, p. 6 (1976)).
[99] *Id.* at 434.
[100] *Id.* (emphasis in original).
[101] *Id.*
[102] *Id.*
[103] *See id.* at 434 n.9.
[104] *Del. Valley Citizens' Council*, 478 U.S. at 564 (citing *Blum v. Stenson*, 465 U.S. 886 (1984)).
[105] *Blum*, 465 U.S. at 888-91.
[106] *Compare Hensley*, 461 U.S. at 433, *with Blum*, 465 U.S. at 897.
[107] *See Blum*, 465 U.S. at 898-901.
[108] *Id.* at 899.
[109] *Id.* at 899, 901.
[110] *See Rohrmoos Venture*, 578 S.W.3d at 493.

Like several federal circuits, Texas courts initially used a factor-based method for determining reasonable and necessary fees.[111] In *Arthur Andersen v. Perry Equipment Corp.*, the Texas Supreme Court articulated the following list of factors for consideration by fact-finders:

1. the time and labor required, 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 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 the results obtained or uncertainty of collection before legal services have been rendered.[112]

These factors repeat, almost verbatim, Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, which prohibits a lawyer from charging an illegal or unconscionable fee.[113] "A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."[114]

Ethics Tip: Texas attorneys have a fiduciary duty to charge a legal and reasonable fee in every engagement, regardless of whether the fees will be shifted to the other side.[115] The factors for determining reasonableness for fee-shifting are the same as those for determining disciplinary violations.[116] Accordingly, fees that are found to be unreasonable in the fee-shifting context might also be an ethical violation subject to disciplinary action.

The *Arthur Andersen* factors became ***the*** standard for proving reasonableness and necessity of attorney fees in Texas.[117] Indeed, until 2019, I had never encountered any attorney trying to prove fees through the lodestar method in a state court case.

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[111] *Id.* (citing *Arthur Andersen*, 945 S.W.2d at 818).
[112] *Arthur Andersen*, 945 S.W.2d at 818.
[113] *Compare id.*, *with* Tex. Disciplinary R. of Prof. Conduct 1.04(a)-(b).
[114] Tex. Disciplinary R. of Prof. Conduct 1.04(a).
[115] *See id*; *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 867 (Tex. 2000).
[116] *Compare id.*, *with Rohrmoos Venture*, 578 S.W.3d at 496 (describing lodestar as a "short-hand" version of the *Arthur Andersen* factors).
[117] *See* Michol O'Connor, O'Connor's Texas Causes of Action 1375-78 (2016) (describing the test for reasonableness and necessity by referencing *Arthur Andersen*). No reference to lodestar could be identified, although by this date the Texas Supreme Court had decided the cases that it said "should have made it clear" that lodestar was the proper method for determining the reasonableness and necessity of fees. *See Rohrmoos Venture*, 578 S.W.3d at 496.

Yet lodestar has been on the Texas legal scene for some time.[118] The Texas Supreme Court first introduced the calculation in 2012.[119] In *El Apple I Ltd. v. Olivas*, the Court considered the proper "calculation of an attorney's fee award in an employment discrimination and retaliation suit brought pursuant to the Texas Commission on Human Rights Act (TCHRA)."[120] As the Court explained, Texas courts look to federal law in construing the TCHRA because one of the statute's purposes is to harmonize state and federal employment discrimination law.[121] And so Texas courts apply the lodestar method in awarding fees in TCHRA cases.[122] The *El Apple* court explained that the lodestar method involves two steps:

> First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The court then multiplies the number of hours by the applicable rate, the product of which is the base fee or lodestar. The court may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.[123]

The factors for adjustment come straight from *Arthur Andersen* and Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.[124] Although the lower court used the lodestar method, the Texas Supreme Court overturned its fee award because the evidence of reasonable fees was legally insufficient.[125] The plaintiff's attorney testified that his firm had spent 890 hours on the case and generally described the type of work completed.[126] No time records or other documentary evidence was introduced.[127] The Court held that this evidence did not allow for meaningful review, noting that a lodestar calculation requires, at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required.[128]

For those attorneys following fee-shifting cases, *El Apple* created some confusion.[129] Did lodestar only apply to TCHRA cases because of the statute's connection to federal law? Or could a party choose between *Arthur Andersen* and lodestar?

According to the *Rohrmoos* Court, any doubt about these questions should have been resolved when *El Apple's* holding was applied under a different fee-shifting statute that did not require the lodestar method for determining the reasonableness of fees.[130] The doubt wasn't

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[118] *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012).
[119] *Rohrmoos Venture*, 578 S.W.2d at 494 (citing *El Apple*, 370 S.W.3d at 760).
[120] *El Apple*, 370 S.W.3d at 758.
[121] *Id.* at 760.
[122] *Id.*
[123] *Id.*
[124] *See id.* at 760-61.
[125] *Id.* at 759, 765.
[126] *Id.* at 759, 763.
[127] *Id.* at 763.
[128] *Id.* at 762-63.
[129] *See Rohrmoos Venture*, 578 S.W.3d at 490, 495.
[130] *Id.* at 495.

resolved, and it's easy to see why. In applying lodestar in *City of Laredo v. Montano*, the Court noted that the fee-shifting statute at issue did not require a lodestar calculation, but said:

> The property owner nevertheless ***chose*** to prove up attorney's fees using this method and so our observations in *El Apple* have similar application here.[131]

The concept that the lodestar method was a *choice* was repeated by the Texas Supreme Court a year later in *Long v. Griffin*.[132] There, the Griffins sought fees under Chapter 38 of the Texas Civil Practice and Remedies Code and the UDJA.[133] In support of their claim, the Griffins' attorney submitted an affidavit with testimony that roughly approximated the lodestar method—*i.e.*, it gave the hours worked and total fee.[134] The Supreme Court reversed because of insufficient evidence, explaining:

> This Court has made clear that a party ***choosing*** the lodestar method of proving attorney's fees must provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the fee application.[135]

Unsurprisingly, numerous courts of appeals followed suit, holding that the lodestar method was optional. [136] They were wrong. As the Supreme Court has now explained:

> Based on our recent precedent, ***it should have been clear*** that the lodestar method developed as a "short hand version" of the *Arthur Andersen* factors and was never intended to be a separate test or method.[137]

Do as I say, not as I ~~do~~ said. Jokes aside, the law in Texas is now clear: The reasonableness and necessity of legal fees may be determined ***only*** by the lodestar method.[138] Let's now take a closer look at the case that made that point.

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[131] *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (emphasis added).
[132] *Long v. Griffin*, 442 S.W.3d 253, 253 (Tex. 2014).
[133] *Id.* at 255.
[134] *Id.*
[135] *Id.* at 253 (emphasis added).
[136] *See R2 Rests., Inc. v. Mineola Cmty. Bank, SSB*, 561 S.W.3d 642, 660 (Tex. App.—Tyler 2018, pet. denied); *Propel Fin. Servs. LLC for Propel Funding Nat'l 1, LLC v. Perez*, No. 01-17-00682-CV, 2018 WL 3580935, at *4 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.); *Barnett v. Schiro*, No. 05-16-00999-CV, 2018 WL 329772, at *9 (Tex. App.—Dallas Jan. 9, 2018, no pet.); *Matlock v. Fitzgerald*, 11-15-00211-CV, 2017 WL 4844439, at *6 (Tex. App.—Eastland Oct. 26, 2017, no pet.); *Lawry v. Pecan Plantation Owners Ass'n, Inc.*, 02-15-00079-CV, 2016 WL 4395777, at *8 (Tex. App.—Fort Worth Aug. 18, 2016, no pet.); *Barton Creek Senior Living Ctr., Inc. v. Howland*, 03-13-00854-CV, 2016 WL 1756228, at *4 (Tex. App.—Austin Apr. 28, 2016, no pet.); *Circle Ridge Prod., Inc. v. Kittrell Family Minerals, LLC*, 06-13-00009-CV, 2013 WL 3781367, at *7 (Tex. App.—Texarkana July 17, 2013, pet. denied); *Concert Health Plan, Inc. v. House Nw. Partners, Ltd.*, No. 14-2-00457-CV, 2013 WL 2382960, at *9 n.17 (Tex. App.—Houston [14th Dist.] May 30, 2103, no pet.).
[137] *Rohrmoos Venture*, 578 S.W.3d at 490.
[138] *Id.* at 497-98, 501.

D. *Rohrmoos:* Case Summary and Key Principles

Rohrmoos involved a dispute over a commercial lease in Dallas.[139] UT Southwestern DVA Healthcare, LLP (UTSW) leased a building from Rohrmoos Venture for use as a dialysis clinic.[140] During the lease term, the building began to have water penetration issues, which led to criticism from state health inspectors.[141] When the issue persisted and even worsened, UTSW terminated the lease and vacated because the building was unsuitable for its intended purpose.[142] At termination, UTSW owed another $250,000 in rent for the rest of the lease term.[143] UTSW sued for breach and asked the court to declare that UTSW was justified in terminating the lease.[144] Rohrmoos Venture counterclaimed for negligence and breach of contract.[145]

At trial, UTSW's attorney tried to prove the reasonableness and necessity of the $322,000 to $400,000 his client was requesting in attorney fees by testifying that (1) he had 20 years of litigation experience; (2) his standard rate was $430 per hour; (3) he had handled similar cases; and (4) a reasonable number of hours to spend on the case was between 750 and 1,000.[146] He also testified that his actual fees were closer to $800,000 because the case had not been worked up in a reasonable fashion.[147] Counsel then offered examples of why the litigation costs were so high, which included "searching through 'millions' of e-mails and reviewing 'hundreds of thousands' of documents during discovery, over forty depositions taken, and a forty-page motion for summary judgment."[148] UTSW's attorney did not testify or offer evidence of all the work completed, nor how much time was spent on any one task.[149] Instead, he opined that the requested fees tracked three of the eight *Arthur Andersen* factors.[150] The jury found for UTSW and awarded $800,000 in fees for trial.[151]

Rohrmoos Venture appealed, claiming that the evidence could not support UTSW's fee award.[152] The Dallas Court of Appeals affirmed, holding that *El Apple* and its progeny did not apply, and thus that use of the lodestar method was not required.[153] The court also held "that billing records are not required to prove attorney's fees, and testimony about the attorney's experience, the total amount of fees, and the reasonableness of the fees complied with *Arthur Andersen* and supported the fee award."[154] The Texas Supreme Court reversed,

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[139] *Id.* at 475-76.
[140] *Id.* at 475.
[141] *Id.* at 475-76.
[142] *Id.*
[143] *Id.* at 476.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 476, 503-505.
[147] *Id.* at 476, 503.
[148] *Id.* at 476.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 478.
[153] *Id.*
[154] *Id.*

holding not only that the evidence was insufficient but also that the reasonableness and necessity of attorney's fees must be determined using the lodestar method.[155]

Rohrmoos articulated key principles that underpin fee-shifting jurisprudence and that should guide attorneys in ethical billing. First, the purpose of fee shifting is to compensate the prevailing party for its reasonable—not actual—losses resulting from the litigation process.[156] Fee-shifting is not intended to improve the attorney's economic situation.[157] So, only reasonable fees for necessary work will be shifted, and the party's fee arrangement with the lawyer does not conclusively establish that a fee is reasonable and necessary.[158] Although lawyers are ethically prohibited from charging unreasonable fees, nothing prohibits a client from agreeing to them.[159] Second, because fees compensate the litigant, the award and enforcement of a fee award belong to the party, not the lawyer.[160] Third, a party must be represented by an attorney to secure a fee award.[161] This aspect is interpreted fairly liberally, so that fees can be awarded to in-house counsel or a lawyer representing herself or her firm.[162]

E. Proving Reasonableness and Necessity of Attorneys' Fees

1. *The 2-Step Lodestar Method*

The lodestar method is a two-step process.[163] The first step is the base calculation.[164] In making this calculation, the fact-finder determines (1) the reasonable hourly rate for each attorney and legal assistant that worked on the matter, and (2) the reasonable hours for the necessary services provided.[165] Each reasonable hourly rate is then multiplied by the corresponding reasonable hours to produce a total amount.[166] When supported by sufficient evidence, this total (sometimes called the base or base lodestar amount) is presumed to reflect the reasonable and necessary fees that may be shifted.[167]

In step two, the fact-finder must determine whether an enhancement or reduction of the base amount is warranted based on "relevant considerations."[168] The *Rohrmoos* Court did not explicitly define what those considerations were, but its references to the *Arthur Andersen* "considerations" imply that the Rule 1.04 list is the most likely source of possible bases for adjustment.[169] But as in the federal courts, an adjustment of the base amount cannot be based

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155 *Id.* at 501, 506.
156 *Id.* at 487.
157 *Id.*
158 *Id.* at 487-88
159 *See id.*; *see also* Tex. R. Disciplinary Prof. Conduct 1.04(a).
160 *Id.* at 487.
161 *Id.* at 488.
162 *Id.*
163 *Id.* at 501.
164 *Id.* at 497-98, 501.
165 *Id.* at 498, 501.
166 *Id.*
167 *Id.* at 499.
168 *Id.* at 499-500, 502.
169 *See id.* at 500, n.11-12.

on a consideration subsumed in the step-one base calculation.[170] Per the Court, the base calculation usually includes "at least" the following *Arthur Andersen* considerations:

- the time and labor required;
- the novelty and difficulty of the question involved;
- the skill required to perform the legal service properly;
- the fee customarily charged in the locality for similar legal services;
- the amount involved;
- the experience, reputation, and ability of the lawyer or lawyers performing the services;
- whether the fee is fixed or contingent on results obtained;
- the uncertainty of collection before the legal services have been rendered; and
- the results obtained.[171]

This leaves three considerations available for determining an adjustment: (i) preclusion from other employment; (ii) time limits imposed by the client or circumstances; and (iii) the nature and length of the attorney's professional relationship with the client.[172] When an adjustment or reduction is sought, the movant must "produce specific evidence" showing that a higher or lower amount is necessary to achieve a reasonable fee award.[173]

2. *Supported by Legally Sufficient Evidence*

One of the most frequent reasons attorney fee awards get overturned is for lack of legally sufficient proof.[174] General conclusory testimony, of the type often offered under the *Arthur Andersen* method, is not enough.[175] "Sufficient evidence incudes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services."[176]

Contemporaneous time or billing records are not required proof but are "*strongly*" encouraged.[177] Do yourself a favor; write down your time. Bills are by far the surest method of proving the first three items on the minimum sufficient evidence list discussed by the Court. If you read deeply enough into the cases, you can find authority that might lull you into thinking bills aren't necessary—*e.g.*, "even if contemporaneous records are unavailable, we

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[170] *Id.* at 500.
[171] *Id.*
[172] *Compare id.*, *with Arthur Andersen*, 945 S.W.2d at 818.
[173] *Rohrmoos Venture*, 578 S.W.3d at 501.
[174] *See, e.g.*, *Rohrmoos Venture*, 578 S.W.3d at 506; *Long*, 442 S.W.3d at 256; *Montano*, 414 S.W.3d at 733, 736-37; *El Apple*, 370 S.W.3d at 765.
[175] *See Rohrmoos Venture*, 578 S.W.3d at 501.
[176] *Id.* at 498.
[177] *Id.* at 502 (emphasis in original).

have allowed for reconstruction of an attorney's work."[178] Don't be fooled. As the Court has noted repeatedly, "in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation" to provide legally sufficient proof.[179]

The next issue is proving the *reasonability* of hours and rates.[180] Here, the *Arthur Andersen* considerations are the primary guide.[181] Whether the hours requested are reasonable will generally depend on the time and labor required, the novelty and difficulty of the issues involved, the amount involved, and the results obtained.[182] Of these, the results obtained factor is arguably the most important.[183] In particular, courts will consider the proportionality of the fees requested to the judgment amount.[184] If a plaintiff has achieved only partial or limited success, the base lodestar amount may be excessive and subject to reduction.[185] Although the results obtained are an important factor, this (at least in the Fifth Circuit) may not be the sole factor for adjustment.[186]

In determining whether the hourly rate is reasonable, the fact-finder should generally consider the skill required to perform the work; the customary fee in the locality of the dispute; the experience, reputation, and ability of the lawyer; and whether the fee was fixed or contingent.[187] The United States Supreme Court has recognized that determining the customary fee or prevailing market rate is inherently difficult.[188] That said, an hourly rate is generally found to be reasonable if it is in line with rates for similar work in the same community, and by a lawyer with comparable skill, experience, and reputation.[189] This has historically been proven through conclusory expert attorney testimony, often by the same lawyer seeking fees.[190] Although this practice was not directly contradicted by *Rohrmoos*, practitioners seeking large fee awards may want to consider other, additional methods of proof, such as surveys or independent data.[191]

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[178] *See, e.g.*, *Kinsel v. Lindsey*, 526 S.W.3d 411, 428 (Tex. 2017).
[179] *Rohrmoos Venture*, 578 S.W.3d at 502 (quoting *El Apple*, 370 S.W.3d at 763).
[180] *See id.* at 498.
[181] *See id.* at 500.
[182] *See id.*
[183] *See Hensley*, 461 U.S. at 436 (describing the results obtained as the "most critical factor"); *see also Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir. 1998), *decision clarified on denial of reh'g*, 169 F.3d 223 (5th Cir. 1999).
[184] *See, e.g.*, *Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 258 (5th Cir. 2018); *Xinyang Hualong Minerals Co., Ltd. v. Delgado*, No. 4:16-cv-0104, 2017 WL 3236113, at *4-5 (S.D. Tex. July 28, 2017).
[185] *Hensley*, 461 U.S. at 436.
[186] *Compare Saldivar v. Austin I.S.D.*, 675 Fed. App'x 429, 432 (5th Cir. Jan. 11, 2017) (affirming districts court's adequate but limited consideration of results obtained), *with Cervantes v. Cotter*, 686 Fed. App'x 281, 282 (5th Cir. Apr. 19, 2017 (district court improperly "relied solely" on the results obtained to reduce the lodestar).
[187] *See Rohrmoos Venture*, 578 S.W.3d at 500.
[188] *Blum*, 465 U.S. at 895 n.11.
[189] *Id.*; *see also Hopwood v. Tex.*, 236 F.3d 256, 281 (5th Cir. 2000) ("Hourly rates are to be computed according to the prevailing market rates in the relevant legal market, not the rates that lions at the bar may command").
[190] *Id.*; *see also Rohrmoos Venture*, 578 S.W.3d at 490.
[191] *See Blum*, 465 U.S. at 895 n.11 ("[T]he burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community . . . .").

3. Properly Segregated Fees

A fee claimant must segregate recoverable fees from unrecoverable fees if any of the fees sought relate solely to a claim (or party)[192] for which fees are unrecoverable.[193] An exception to this general rule exists for discrete legal services that advance both recoverable and unrecoverable claims.[194] The exception *is not* simply whether separate claims involve intertwined facts.[195] Even though different claims may depend on the same set of facts, each claim does not necessarily require "the same research, discovery, proof, or legal expertise."[196] The party seeking fees bears the burden of showing that segregation is not required.[197] Further, the need to segregate fees is a question of law, and how much certain claims are segregable is a mixed question of law and fact.[198]

Tony Gullo Motors I, L.P. v. Chapa is the seminal case on fee segregation in Texas.[199] While explaining the inherent difficulty of determining which claims could be segregated, the Court found that Chapa could not recover fees for the time her attorneys spent drafting pleadings or the jury charge related to Chapa's fraud claim.[200] The Court then held that proving that discrete legal services advance both recoverable and nonrecoverable claims *does not* require attorneys to keep separate time entries for different claims:

> *Chapa's attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition*; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim.[201]

Standard requests for disclosures, proof of background facts, depositions of primary actors, discovery motions and hearings, and voir dire are examples of discrete tasks that may advance recoverable and nonrecoverable claims.[202]

Despite *Chapa*'s statement that attorneys need not keep separate time entries for separate claims, subsequent cases have held otherwise.[203] One year after *Chapa*, the Fourteenth

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[192] *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991), *holding modified by Chapa*, 212 S.W.3d 299.
[193] *Chapa*, 212 S.W.3d at 313.
[194] *Id.* at 313-14.
[195] *Id.* at 313.
[196] *Id.*
[197] *CA Partners v. Spears*, 274 S.W.3d 51, 83 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
[198] *Id.* at 81 (citing *Chapa*, 212 S.W.3d at 312-13).
[199] *Chapa*, 212 S.W.3d at 312-314.
[200] *Id.* at 313.
[201] *Id.* at 314 (emphasis added).
[202] *Id.* at 313.
[203] *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys.*, 245 S.W.3d 488, 509 (Tex. App.–Houston [14th Dist.] 2007, pet. denied); *Spears*, 274 S.W.3d at 83; *Colli v. S. Methodist Univ.*, No. 3:08-CV-1627-P, 2012 WL 13027419, at *3 (N.D. Tex. Oct. 22, 2012).

District Court of Appeals decided *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Systems, Inc.*,[204] which involved a tenant who prevailed on a breach-of-contract claim against its landlord.[205] The tenant also brought a breach-of-warranty claim in which fees were not recoverable.[206] On appeal, the landlord argued that the attorney fee award was improper because the tenant failed to segregate its fees.[207] In considering whether any of the legal work pertained solely to the warranty claim, the court interpreted *Chapa* to require a factfinder to " . . . parse the work into component tasks."[208] In its analysis, the court held that because the tenant's petition contained paragraphs related to the warranty claim and the jury charge contained two questions on the warranty claim, the tenant needed to segregate its fees—even though the jury charge and petition contained "less than a dozen sentences" related solely to breach of warranty.[209]

After *7979*, the Fourteenth District Court of Appeals went even farther, explaining that parsing the work into component tasks included " . . . *examining a pleading paragraph by paragraph* to determine which ones relate to recoverable claims."[210] The court has recently noted that this burden can be "extraordinarily difficult" to meet when the fee claimant asserts causes of action for which fees are both recoverable and unrecoverable.[211] The court provided guidance for these cases:

> [I]f the plaintiff files a pleading in which one paragraph alleges a tort cause of action for which fees are not recoverable, then the fees for the time spent in drafting that paragraph are non-recoverable, and the plaintiff must segregate the fees incurred for drafting that portion of the pleading from the fees incurred for drafting the portions of the pleading that advanced claims for which fees are recoverable.[212]

These holdings apply a stricter standard for fee segregation than contemplated in *Chapa* and depart from the holding that "Chapa's attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition."[213] As a precautionary measure, practitioners should use these cases as a framework for future billing

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[204] 245 S.W.3d at 509.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 507.
[208] *Id.* at 509 (quoting C*hapa*, 212 S.W.3d at 313 ("But when Chapa's attorneys were drafting her pleadings *or the jury charge related to fraud*, there is no question [that] those fees were not recoverable.") (emphasis original)).
[209] *Id.* (quoting *Chapa*, 212 S.W.3d at 313) ("unrecoverable fees [are not] rendered recoverable merely because they are nominal . . . . ")).
[210] *Clearview Properties, L.P. v. Prop. Tex. SC One Corp.*, 287 S.W.3d 132, 144 (Tex. App.—Houston [14th Dist.] 2009, pet denied) (emphasis added).
[211] *Milliken v. Turoff*, No. 14-17-00282-CV, 2018 WL 1802207, at *2 (Tex. App.—Houston [14th Dist.] Apr. 17, 2018) (mem. op.).
[212] *Id.*
[213] C*hapa*, 212 S.W.3d at 314.

entries when a party asserts claims where fees are both recoverable and unrecoverable. For example, in a classic construction defect claim when a plaintiff asserts both negligence and breach-of-contract claims against a general contractor, it would be prudent for the plaintiff to segregate "component tasks" for each claim—*e.g.*, "Drafted negligence section of petition (.5); drafted breach of contract section (.9)." This practice is recommended even where all claims permit the recovery of fees because a fee claimant generally cannot recover for time spent on claims it loses or does not pursue at trial.[214] A small silver lining: a failure to segregate does not automatically lead to reversal. Instead, the proper remedy is remand for reconsideration with sufficiently detailed information for a meaningful review of the fees sought.[215]

F. Lodestar in Practice: Case Studies

1. *City of Laredo v. Montano*

Conclusory, general proof insufficient; time records critical

The *Montano* case arose out of a condemnation suit.[216] The City of Laredo sought to condemn the Montanos' property in the central business district near International Bridge No. 1 to widen a street and build a pedestrian plaza.[217] The Montanos refused to sell, claiming that the condemnation was not for a public purpose, but was meant to benefit a nearby shopping center.[218] The City sued, and the case was tried to a jury.[219] The Montanos prevailed and were awarded over $450,000 in attorneys' fees.[220]

Most of the fee award was based on the testimony of two attorneys: Richard Gonzalez and Adriana Benavides-Maddox.[221] Mr. Gonzalez testified to ten general types of tasks he had performed on behalf of the Montanos over 226 weeks, including: watching 38 DVDs of city council meetings; conducting "a lot" of legal research; spending "countless hours" preparing for and taking depositions; and preparing for and trying the case.[222] Mr. Gonzalez admitted he did not keep time records because he had not intended to bill his client.[223] But he estimated that, on average, he had devoted "a barebones minimum" of six hours a week to the case.[224] Addressing some of the other *Arthur Andersen* factors, Mr. Gonzalez also testified:

- Recent case law changes made the issues novel;
- He had turned away other work—but he could not offer any specific examples; and

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[214] *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 769 (5th Cir. 1996).
[215] *Kinsel*, 526 S.W.3d at 428 (citing *Long*, 442 S.W.3d at 255).
[216] *Montano*, 414 S.W.3d at 732.
[217] *Id.* at 733.
[218] *Id.*
[219] *Id.* at 732.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 733-34.
[223] *Id.* at 734-35.
[224] *Id.* at 734.

- $340,000 in fees was small in proportion to successfully defending the condemnation of a $4-million property.[225]

Ms. Benavides-Maddox charged an hourly rate of $200 and testified that this was reasonable and customary for a lawyer of her experience.[226] She also testified to her general areas of responsibility, that she had been paid $25,000 before trial, and that she was owed another $12,000 for trial, which she calculated by estimating twelve hours of work for each of the five trial days.[227] Although Ms. Benavides-Maddox kept detailed billing records, she did not provide them because the City had not requested them.[228]

On appeal, the Texas Supreme Court reversed the trial court's award of Mr. Gonzalez's fees,[229] but affirmed the award for time spent by Ms. Benavides-Maddox. In reaching its decision, the Court explained that Mr. Gonzalez provided "no clue" how he concluded that his six-hours-a-week estimate was "conservative."[230] His testimony that he spent "a lot of time" or "countless hours" was not evidence because it failed to provide the specificity needed for a meaningful lodestar determination.[231] The Court also criticized the fact that Mr. Gonzalez testified he would have kept time records if he had intended to charge his client.[232] "A similar effort should be made when an adversary is asked to pay instead of the client."[233]

Unlike Mr. Gonzalez, Ms. Benavides-Maddox kept time records, and had billed and been paid $25,000 based on those records.[234] The Court accepted her estimate on trial time (instead of bills), noting that she had not yet had time to record the contemporaneous task and that the time was for work the opposing side had witnessed, at least in part.[235] While not perfect, this was at least some competent evidence on which the trial court could have based it award.[236]

2. *Xinyang Hualong Minerals Co., Ltd. v. Delgado*

Fees reduced for duplicative time, excessive rates, and based on results obtained

Delgado involved simple breach-of-contract and unjust-enrichment claims.[237] After modest pleading and motion practice over proper parties, the plaintiff secured a $540,000 default judgment.[238] The plaintiff then sought to recover the approximately $43,000 in

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225 *Id.*
226 *Id.* at 735.
227 *Id.*
228 *Id.*
229 *Id.* at 737.
230 *Id.* at 736.
231 *Id.*
232 *Id.*
233 *Id.*
234 *Id.* at 737.
235 *Id.*
236 *Id.*
237 *Delgado*, 2017 WL 3236113, at *4.
238 *Id.* at *1, 4.

attorneys' fees that it had actually incurred.[239] The legal work for the plaintiff was handled by two attorneys: one senior associate from DLA Piper, charging a "reduced rate" of $660 an hour and a solo practitioner billing at $300 an hour.[240] Both attorneys provided detailed time records and affidavits to support the requested fee award.[241] The district court reduced the fee award by about 25 percent, citing two primary issues.[242]

First, the fees requested by both attorneys were out of proportion to the work that was reasonable and necessary because there was "unnecessary duplication of services in prosecution of this straightforward litigation."[243] For example, both attorneys billed several hours drafting a simple five-page original complaint.[244] The court remedied this issue by excluding duplicative time.[245] Second, the court found that DLA Piper's rate was unnecessarily high and that certain simple tasks should have been delegated to a very junior associate.[246] As a result, the court reduced DLA Piper's hourly rate to $500 an hour.[247]

3. *Gurule v. Land Guardian, Inc.*

Fees reduced for poor billing practices and based on results obtained

In *Gurule*, a group of bartenders and bottle waitresses sued their employer under the Fair Labor Standards Act.[248] By trial, the only remaining plaintiff was Ms. Gurule, who claimed approximately $25,000 in unpaid wages.[249] After rejecting four separate offers to settle ranging from roughly $1,500 to $5,000, Ms. Gurule was awarded $1,131 by a jury.[250]

Ms. Gurule's request for fees was tried to the bench.[251] She sought to recover $130,000 for 281 attorney hours and 31 legal assistant hours of work.[252] The trial court rejected this number, reducing the attorney time 29% for time expended on settling parties claims, 10% for block billing, and 20% for reasonable billing judgment.[253] The court also excluded requested legal assistant fees because the record lacked any evidence of a reasonable market rate for legal assistant time.[254] After making these reductions, the court multiplied the reduced number of

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[239] *Id.* at *1.
[240] *Id*, at *4.
[241] *Id.*
[242] *Id.* at *4-5.
[243] *Id.*
[244] *Id.* at *5.
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Gurule*, 912 F.3d at 255.
[249] *Id.* at 255-56.
[250] *Id.* at 256.
[251] *Id.*
[252] *Id.* at 258.
[253] *Id.*
[254] *Id.*

hours by the attorney's rate of $450 (which it determined was reasonable) for a base lodestar amount of $62,000.[255]

Next, the court considered whether a step-two adjustment was necessary.[256] It found that half of the considerations supported an adjustment and half were neutral.[257] But the most critical consideration—degree of success obtained—supported a reduction.[258] The court explained:

> Here, only one of the four Plaintiffs prevailed at trial. Plaintiff Gurule was awarded $1,131.39 in compensatory damages, which is far less than the $25,683.66 that she requested in her disclosures. This recovery was also less than the four offers of judgment that Defendants made to Plaintiff Gurule . . . . While Defendants' offers of judgment ranged from $1,566 to $5,000, the only counter offer from Plaintiff Gurule was for $51,367.32. This number is nearly twice the amount of Plaintiff Gurule's damages disclosure and 45 times the amount of damages awarded at trial. Although there may be good reason for the gap between Plaintiffs' expectations and reality, Plaintiffs' counsel has not shown that he exercised good judgment in obtaining successful results.[259]

To account for this, the base lodestar amount was reduced by 60%, and the plaintiff was awarded $25,000 in attorney's fees.[260]

4. *Aguayo v. Bassam Odeh*

Keeping time – what not to do.

Aguayo involved FLSA claims, but in a class action against Jack in the Box.[261] Plaintiffs were employees who claimed the restaurant had forced them to create time sheets under false names so the restaurant could avoid paying overtime.[262] The plaintiffs ultimately accepted a $700,000 offer of judgment, and then sought a fee award of $1,600,000, which had been voluntarily reduced from $2,100,000.[263] Defendant sought a reduction to $550,000, arguing that the rest of the requested time was excessive, redundant, or unnecessary.[264] In support of this reduction, Defendant provided a very long and detailed list of examples covering almost every questionable and unethical billing practice imaginable.[265] Here are some highlights:

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[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Aguayo v. Bassam Odeh*, No. 3:13-CV-2951-B, 2016 WL 7178967, at *1 (N.D. Tex. Dec. 8, 2016).
[262] *Id.*
[263] *Id.* at *1-2.
[264] *Id.* at *3.
[265] *See id.* at *15.

- multiple legal assistants opening the same file;[266]
- 304 hours to draft near identical declarations;[267]
- 38 hours of preparation for a 3.5 hour deposition;[268]
- 370 hours of preparation for mediation;[269]
- timekeepers billing more than 24 hours in a day;[270]
- reviewing defendant's documents before they were produced to plaintiffs;[271]
- billing time to review documents that were never produced to plaintiffs;[272]
- deposition preparation for a deposition that had already occurred;[273]
- preparation of discovery responses after the responses were served;[274]
- billing for work on other matters;[275]
- vague time entries such as "TC Bretado";[276]
- clerical work, including calendaring deadlines and ordering transcripts;[277] and
- out-of-town co-counsel traveling to the Dallas area, where the dispute arose.[278]

Based on these and other issues, the court concluded that the number of hours billed was unreasonably high and an across-the board reduction of 35 percent was appropriate, resulting in a base calculation of $796,000.[279] After reviewing the list of potential considerations for a step-two adjustment, the court concluded that only one had not been accounted for in the lodestar calculation—results obtained.[280] This factor did not weigh in favor of either an upward or downward adjustment because plaintiffs' recovery was much less than the damages sought but also higher than many of defendant's previous settlement offers.[281]

4. *Van Dyke v. Builders West*

Objections to reasonableness and necessity may be waived.

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[266] *Id.* at *4-6.
[267] *Id.* at *7
[268] *Id.*
[269] *Id.* at *9.
[270] *Id.* at *10.
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* at *12.
[277] *Id.*
[278] *Id.*, at *13.
[279] *Id.* at *15-16
[280] *Id.* at *17-18.
[281] *Id.* at *18-19.

Van Dyke demonstrates the old adage that you don't get what you don't ask for. Here, Builders West sued a homeowner for nonpayment on an extensive renovation project.[282] In hiring its attorney, Builders West agreed to be charged $500 per hour for attorney time.[283] However, the attorney agreed to seek payment from Builders West for only $350 an hour.[284] The parties also agreed that if Builders West was awarded and paid more than $350 an hour for legal fees, it would pay the attorney for any fees over $350 per hour.[285]

After Builders West secured a successful jury award, the parties tried the issue of fees to the court by agreement.[286] Builders West sought a fee award based on a $500-per-hour rate.[287] Van Dyke objected to the request on the basis that such fees had not actually been incurred.[288] Importantly, Van Dyke *did not* contest the reasonableness or necessity of the fees.[289] The trial court awarded fees based on the $500-per-hour rate, and the court of appeals affirmed, explaining that parties are not required to show that their requested fees were actually incurred unless the statue authorizing the fee award requires such proof.[290] Here, the only basis for reversing the award was proof that the fees were not reasonable and necessary, and Van Dyke had conceded this point by failing to object.[291]

III. Practice Points for Attorneys' Fees Recovery

A. Timekeeping and Billing

Rohrmoos and other recent lodestar jurisprudence emphasize the importance of good billing practices. To ensure you have sufficient proof to support a fee award request, you should:

- Keep contemporaneous time records, regardless of the fee structure;[292]
- Itemize work by date, task, time, and biller;[293]
- Avoid block billing;[294]

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[282] *Van Dyke v. Builders West, Inc.*, 565 S.W.3d 336, 339 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).
[283] *Id.* at 345.
[284] *Id.*
[285] *Id.*
[286] *Id.* at 340.
[287] *Id.*
[288] *Id.*
[289] *Id.* at 345.
[290] *Id.* at 341, 345.
[291] *Id.* at 346.
[292] *See Rohrmoos Venture*, 578 S.W.3d at 506; *Long*, 442 S.W.3d at 256; *Montano*, 414 S.W.3d at 733, 736-37; *El Apple*, 370 S.W.3d at 765.
[293] *See Rohrmoos Venture*, 578 S.W.3d at 498 (defining minimum sufficient evidence as who, what, when, how much time, and at what rate).
[294] *See Gurule*, 912 F.3d at 258; *contra State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 100 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (holding that block billing may be detailed enough to provide the minimum sufficient evidence required by *El Apple* and *Rohrmoos*). Note that even if block billing is not *per se* improper, it may make segregation of fees difficult.

- Provide reasonably-detailed descriptions—*e.g.*, purpose, number of documents reviewed, etc.;[295]
- Show the time that is not charged to the client;[296]
- Assign tasks to the lowest capable biller.[297]

In addition, clients should be informed of time that may not be recoverable—such as travel.[298]

B. Affidavits

As discussed at the beginning of this paper, the bare-bones affidavit with the total fees requested and a recitation of the *Arthur Andersen* factors is not sufficient evidence. Instead, affidavit testimony should:

- State the reasonable rates and hours for each timekeeper;[299]
- State the total lodestar amount;[300]
- Offer an opinion that the rate is consistent with the prevailing market for the location of the dispute and explain the basis for the affiant's opinion;[301]
- Discuss how the *Arthur Andersen* considerations apply to the particular facts and circumstances of the case (*e.g.*, why the issues were complicated and/or the nature and length of the attorney's relationship with the client);[302]
- Use specific examples in discussing the reasonableness of the rates and hours (*e.g.*, state specific business that had to be turned away);[303] and
- Attach contemporaneous time records, minimizing redactions so that the trier of fact can determine what work was performed.[304]

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[295] *Rohrmoos Venture*, 578 S.W.3d at 498-99 (base lodestar calculation must "reflect hours reasonably expended for services necessary to the litigation"); *see also Aguayo*, 2016 WL 7178967, at *10-13 (identifying numerous time entries that could not be confirmed to be reasonable due to vague or incomplete time entries).

[296] A bill that shows time worked but not charged may help demonstrate good "billing judgment." *See El Apple*, 370 S.W.3d at 762 (quoting *Hensley*, 461 U.S. 434) ("In the private sector, 'billing judgment' is an important component in fee setting).

[297] *See Delgado*, 2017 WL 3236113, *5 (finding that a very junior associate should have performed most work).

[298] *See Aguayo*, 2016 WL 7178967, at *13 (refusing to award time spent traveling while no work was being performed); *see also* Tex. Disciplinary R. of Prof. Conduct 1.03 (requiring attorneys to keep their clients reasonably informed about the status of a matter and to explain a matter to the extent necessary to permit the client to make informed decisions about the representation).

[299] *Rohrmoos Venture*, 578 S.W.3d at 501 (requiring reasonable rates and hours to calculate the base lodestar amount).

[300] *Id.*

[301] *See id.* at 500-501 (holding that base lodestar calculation generally includes the fee customarily charged in the locality for similar services); *see also Blum*, 465 U.S. 895 n.11.

[302] *Rohrmoos Venture*, 578 S.W.3d at 500-501 (holding that base lodestar calculation includes most *Arthur Andersen* considerations and that conclusory testimony will not support a fee award).

[303] *Id.*; *see also Montano*, 414 S.W.3d at 734 (noting inability of counsel to provide examples of work he had turned away).

[304] *Rohrmoos Venture*, 578 S.W.3d at 502.

A template affidavit incorporating these recommendations is attached.

C. Testimony

An attorney offering live testimony of the reasonableness and necessity of legal fees should cover all of the issues listed above. In addition, a testifying attorney should be timely designated as an expert and produce all fee bills or time records he or she will rely on, so that such documents are not excluded at trial.[305] Finally, the attorney should offer the bills or time records into evidence to ensure that the record includes the minimum sufficient evidence of reasonableness and necessity.[306]

D. Jury Charge

The current pattern jury "Question on Attorney's Fees" asks the jury to determine the reasonable fee for the necessary services of the requesting party's attorney.[307] The jury is also to be instructed on the *Arthur Andersen* factors relevant to the particular case.[308] This is insufficient. Per *Rohrmoos*, jury charges should include the following instructions:

1. the method for performing the base lodestar calculation—i.e., reasonable hours x reasonable rates = base calculation; [309]
2. the base calculation is presumed to represent a reasonable and necessary amount of attorneys' fees;[310] and
3. other considerations, as specifically set out by the court, may justify a base calculation.[311]

In some cases, it may also be necessary to include an instruction that the jury should not be concerned with the contractual obligations between the attorney and the party, or the amount of fees the party has actually incurred in determining the reasonable and necessary fee.[312] Finally, the charge may also need to address segregation, either by instruction or perhaps separate jury questions for fees specifically attributable to certain claims or parties.[313]

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[305] *See id.* at 499 n.10, 502 (discussing designation of experts and importance of time records to prove reasonableness of fees); *see also* Tex. R. Civ. P. 193.6 (exclusion of evidence).
[306] *See Rohrmoos Venture*, 578 S.W.3d at 498.
[307] Comm. on Pattern Jury Charges of the State Bar of Tex., Texas Pattern Jury Charges Business, Consumer, Insurance & Employment PJC 115.60, at 521 (2016).
[308] *Id.* at 522-23.
[309] *Rohrmoos Venture*, 578 S.W.3d at 501 (discussing required jury findings and instructions).
[310] *Id.*
[311] *Id.*
[312] *Id.* at 487-88.
[313] Comm. On Pattern Jury Charges of the State Bar of Tex., *supra* note 306, at 523.

[Case Style]

AFFIDAVIT OF [INSERT ATTORNEY NAME]

STATE OF TEXAS §

§

COUNTY OF _____ §

Before me, the undersigned notary, on this day, personally appeared [insert name of attorney signing affidavit] a person whose identity is known to me. After I administered an oath to him/her, upon his/her oath, he/she said:

1. "My name is [insert attorney name]. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am a partner at the firm of [insert firm name]. The firm specializes in [insert specialization]-related legal matters and I specialize in [insert specialization].

3. I am the attorney for Plaintiff [insert name of Client] in the above-styled and numbered cause.

5. [Client's] claim was prosecuted by myself, [insert names of other attorneys and staff working on case].

6. The rate charged for my time was $_____ per hour. I have practiced law in the area of [insert specialization] for ___ years in [insert geographic area]. I am familiar with rates charged by attorneys specializing in [specialization area] law throughout the state of Texas, including in [county where lawsuit is on file] County,[314] and the rate of $____ per hour is reasonable for a lawyer of my experience offering similar services in [county where lawsuit is on file]. The rate is also reasonable considering [describe nature of matter and skill required to perform services]

7. The rate charged for [insert name of associate] time was $____ per hour. [Associate] is an associate at [firm name] who was licensed in [insert year licensed].

[314] Consider including the basis for your familiarity and knowledge or citing to independent resources like rate information published by the State Bar for attorney and legal assistant rates.

[Associate's] rate is reasonable for an associate practicing at a firm specializing in [specialization area] law and providing similar services in [county where lawsuit is on file] County.

8. The rate charged for [insert name of legal assistant/paralegal] time was $___ per hour. [Legal assistant/paralegal] is a legal assistant/paralegal at [insert firm name]. He/she has been working as a legal assistant for ___ years and has worked solely on [specialization area] matters. I am familiar with rates charged by legal assistants/paralegals specializing in [specialization area] law in Texas, including [county where suit is on file] County, and the rate of $___ per hour is reasonable for a legal assistant/paralegal providing similar services in [county where lawsuit is on file] County.

9. I have attached and incorporate by reference contemporaneous billing records kept by my firm for the time spent by all persons who performed work in connection with this dispute. Those records reflect the particular services performed, who performed the services, when the services were performed, and the amount of time required to perform the services.

10. To summarize, I spent ___ hours on this matter [insert description of tasks performed by affiant on lawsuit].

11. [Associate] spent ___ hours on this matter [insert description of tasks performed by associate on lawsuit].

12. [Legal Assistant/paralegal] spent ___ hours on this matter [insert description of tasks performed by legal assistant/paralegal on lawsuit].

13. The number of hours spent by my firm are reasonable because [describe necessity of time with explanation of amount involved, results obtained (if known), novelty and difficulty of questions involved, and any other relevant *Arthur Andersen* considerations. Be as specific as possible, and use specific examples].

14. Based on the foregoing reasonable rates and hours, the reasonable and necessary fees for prosecution of [Client's] [insert type of claim for which you're seeking attorneys' fees] claim are $ [rate x hours].

15. Optional: This calculation does not include time spent prosecuting claims (1) for which attorneys' fees are not legally recoverable, and/or (2) against other defendants.

16. Optional: The foregoing calculation does not constitute a reasonable fee because [include specific evidence for an upward or downward adjustment based on *Arthur Andersen* consideration not included in base calculation].

17. The firm has also incurred $_____ in expenses to date, which are also reflected in the contemporaneous billing records."

FURTHER AFFIANT SAITH NOT.

_____

[insert name of attorney signing affidavit]

SWORN TO and SUBSCRIBED before me by [name of attorney] on this the ____ day of _____, 2020.

_____

Notary Public, State of Texas

My Commission Expires:

36th Annual Construction Law Conference

AMY EMERSON
allensworth
aemerson@allensworthlaw.com

ROHR SHOCK PART 2:

A Practical Guide to Recovering Attorneys' Fees

APRIL 26, 2019

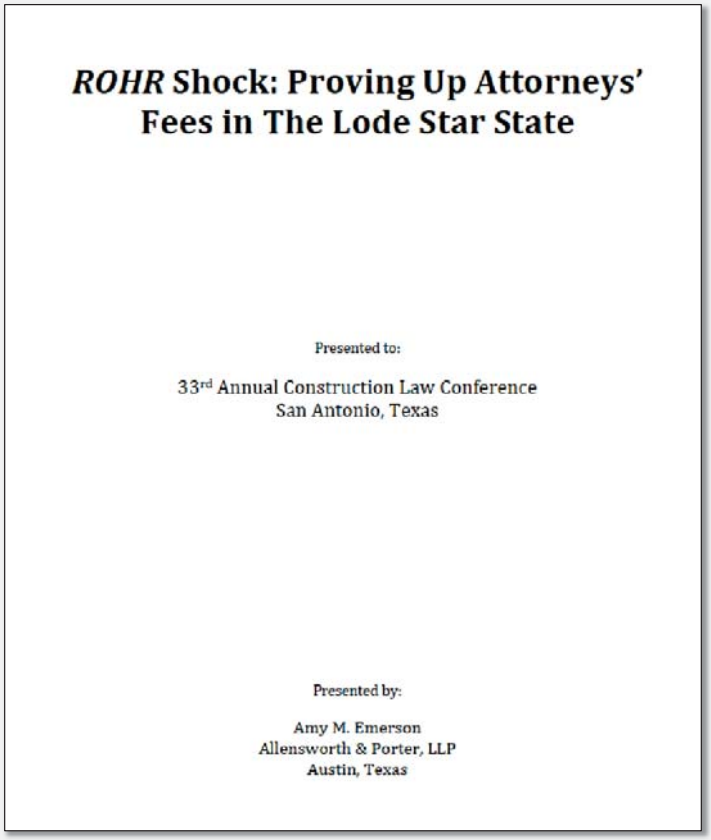
> General, conclusory testimony devoid of any real substance will not support a fee award. Thus, a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought . . . Importantly, however, we are not endorsing satellite litigation as to attorney's fees.

Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 501-02 (Tex. 2019)

JANUARY 26, 2023

Rohrmoos's sufficient evidence standard cited in over 150 opinions.

MARCH 2020



***ROHR* Shock: Proving Up Attorneys' Fees in The Lode Star State**

Presented to:

33rd Annual Construction Law Conference
San Antonio, Texas

Presented by:

Amy M. Emerson
Allensworth & Porter, LLP
Austin, Texas

ROHRMOOS FRAMEWORK

PROOF REQUIRED TO SHIFT ATTORNEYS' FEES:

1. Party is legally authorized to recover fees; and
2. The requested fees are reasonable and necessary.

PROVING R&N: 2-STEP LODESTAR METHOD

STEP 1

Base Calculation

1. Determine reasonable rate for each timekeeper
2. Determine reasonable hours for necessary services
3. Multiply reasonable rate by reasonable hours

RESULT: Presumptively Reasonably Fee*

*When supported by legally sufficient evidence

PROVING R&N: 2-STEP LODESTAR METHOD

STEP 2

Enhancing or Reducing Base Calculation

1. Based on *Arthur Andersen* considerations
2. But only to extent not covered in Step 1
3. Specific evidence of need for adjustment required

PROVING R&N: LEGALLY SUFFICIENT PROOF

MINIMUM EVIDENCE:

1. Particular services performed;
2. Who performed those services;
3. Approximately when the services were performed;
4. The reasonable amount of time to perform the services; and
5. The reasonable hourly rate for each person performing services.

RECOVERING ATTORNEYS' FEES FOR TRIAL WORK

STEP BY STEP GUIDE

1. Evaluate your client's ability to recover fees
2. Properly document your time
3. Properly segregate your time
4. Timely designate an expert and provide sufficient evidence of fees
5. Prepare to testify to reasonable rates and hours

#1 Rule: Use Common Sense

STEP 1: EVALUATE YOUR CLIENT'S ABILITY TO RECOVER FEES

- Legal authorization: statutes and contracts
- Affirmative v. Defensive
- Recoverable v. Unrecoverable
  - Causes of Action
  - Parties

STEP 1: EVALUATE YOUR CLIENT'S ABILITY TO RECOVER FEES

Multi-Party Case? → Fee Matrix

OWNER (PLAINTIFF) CLAIMS				
	Breach of Contract	*Breach of Implied Warranty*	*Negligence*	*Products Liability*
V. CONTRACTOR	Yes – Chpt. 38	No	No	---
V. ENGINEER	Yes – K	---	No	---
V. MANUFACTURER	---	---	No	No

CONTRACTOR COUNTERCLAIMS				
	Breach of Contract	*Prompt Pay*		
V. OWNER	No – Chpt. 38	No		

STEP 2: PROPERLY DOCUMENT YOUR TIME

WRITE DETAILED TIME ENTRIES

- Who – Timekeeper
- When – Date
- Particular Service – Be specific
  - Work performed
  - Purpose
  - Quantity or other context (~2,500 pages)

STEP 2: PROPERLY DOCUMENT YOUR TIME

WRITE DETAILED TIME ENTRIES

EXAMPLE 1	EXAMPLE 2	GRADE
No time record	(8.0)	F
Attention to matter (0.5)	Prepare for trial (8.0)	D
Telephone call with client (0.5)	Review deposition and case law in preparation for trial (8.0)	C
Telephone call with Jill Jack regarding case status (0.5)	Review Jill Jack's deposition and analyzed breach of contract case law in preparation for trial. (8.0).	B
Telephone call with Jill Jack to discuss case status, including receipt of requests for production, gathering documents, and deadline to object and respond to requests (0.5).	Review Jill Jack's deposition (~180 pages) and prepare notes of key issues from same in preparation for taking her direct examination at trial (2.5); prepared outline for Jill Jack's direct examination based on deposition notes and identified specific exhibits to include during examination (2.0); reviewed and analyzed five Texas cases related to failure of consideration and included elements in outline for Jill Jack's direct examination (2.5).	A

STEP 2: PROPERLY DOCUMENT YOUR TIME

DON'T BLOCK BILL

November 4, 2021: Analyzed potential defenses to ***Contractor's*** breach of contract counterclaim; telephone call with ***Owner*** client regarding calculation of liquidated damages and cost to repair defective work; met with expert to review draft certificate of merit against ***Architect*** (7.2).

- Disfavored
- Impairs fact finder review
- Difficult/impossible to segregate

STEP 2: PROPERLY DOCUMENT YOUR TIME

BLOCK BILLING

November 4, 2021: Analyzed potential defenses to Contractor's breach of contract counterclaim **(1.6)**; telephone call with Owner client regarding calculation of liquidated damages and cost to repair defective work **(1.1)**; met with expert to review draft certificate of merit against architect **(4.5)**.

DON'T BLOCK BILL*

- Disfavored, not prohibited
- **Limited** block billing okay
  - Multiple related tasks (finalized, filed, and emailed)
  - Smaller time entries (< 2 hours)
- Beware for segregation

STEP 2: PROPERLY DOCUMENT YOUR TIME

RECORD TIME CONTEMPORANEOUSLY, *EVEN IF YOU AREN'T BILLING HOURLY*

- Reasonably close in time to work
- "*Strongly* encouraged"
- Applies to contingency and flat fee work
- Forensic reconstruction dangerous

FORENSIC RECONSTRUCTION

***EL CAMPO VENTURES V. STRATTON SECURITIES* (W.D. TEX. 2022).**

- Plaintiff sought recovery of 30% contingency fee
- Court rejected; Lodestar required
- Supplemental fee request filed

EL CAMPO VENTURES V. STRATTON SECURITIES (W.D. TEX. 2022).

COURT:

Plaintiff's collective briefing and affidavit submissions are a *clear effort to reverse-engineer* a justification for an Attorneys' fee award that mimics the amount they would have recovered under the contingency fee agreement. Between continued unpersuasive and erroneous legal arguments and obviously *manipulative affidavits and attached billing records*, it is *difficult to put much stock in Plaintiff's analysis of this issue or evidence* submitted.

STEP 2: PROPERLY DOCUMENT YOUR TIME

USE GOOD BILLING JUDGMENT

- Think objective, reasonable person
- Lowest competent timekeeper
- Duplication
- Travel
- Special circumstance? Explain.
- Set client expectations

STEP 2: PROPERLY DOCUMENT YOUR TIME

USE GOOD BILLING JUDGMENT

- Rates = Market
  - Same community
  - Similar Services
  - Comparable skill, experience, reputation
- Contingency or flat fee boost?

CASE STUDY

$500 regular → $750 contingency → $350-$400 awarded

STEP 3: PROPERLY SEGREGATE TIME

GENERAL RULE: MUST SEGREGATE UNRECOVERABLE TIME

EXCEPTION: Discrete legal services that advance both recoverable and unrecoverable claim

STEP 3: PROPERLY SEGREGATE TIME

- Intertwined facts not sufficient
- Required if ***any*** fees unrecoverable
- Fees may be unrecoverable because:
  - Type of claim (e.g., negligence)
  - Success of claim
  - Different parties
  - Party/claim settled or dismissed
- Burden on party seeking fees to prove segregation not required

STEP 3: PROPERLY SEGREGATE TIME

HOW TO SEGREGATE?

- *Chapa* (Tex. 2006) and current case law = attorney percentage testimony okay
- **But** *Rohrmoos*:

> "General, conclusory testimony devoid of any real substance will not support a fee award . . . The evidence presented must be sufficient to permit the court to perform a meaningful review of [a] fee application"

STEP 3: PROPERLY SEGREGATE TIME

- Detailed time entries noting party + claim
- Separate matters (*e.g.*, affirmative v. defensive)
- Billing codes
- Review and sort time monthly → Excel

STEP 4: TIMELY DESIGNATE AN EXPERT AND PROVIDE SUFFICIENT FEE EVIDENCE

- Designate attorney timely (yourself or 3rd party)
- Produce all time records to date
- Set monthly reminder to supplement

MOST IMPORTANT: PUT THE "MARKER" DOWN

REDACTION DANGER

3/30/18	Telephone conference with S. Zweig regarding [redacted] emails regarding same.	0.3	$545	$163.50		Unintelligible
5/8/18	Conference call with J. Tedone, H Smelley and S. Zweig regarding [redacted]	0.5	$545	$272.50		Unintelligible
5/29/18	Telephone conference with H. Smelley regarding [redacted] emails regarding same	0.2	$545	$109		Unintelligible
11/15/18	Teleconference with S. Zweig regarding [redacted]	0.5	$455	$227.50		Unintelligible
12/7/18	Office conference with H. Smelley regarding [redacted]	0.2	$545	$109		Unintelligible
12/14/18	Teleconference with S. Zweig regarding [redacted]	0.4	$455	$182		Unintelligible
1/3/19	Telephone conference with H. Smelley regarding [redacted], telephone conference with J. Tedone and S. Zweig regarding [redacted]	0.4	$575	$230		Unintelligible
1/9/19	Teleconference with S. Zweig regarding [redacted]	0.2	$495	$99		Unintelligible
1/17/19	Teleconference with S. Zweig regarding [redacted]	0.1	$495	$49.50		Unintelligible

"Unintelligible"

REDACTION DANGER

LIMIT REDACTIONS TO VERY SENSITIVE COMMUNICATIONS CONVERSATIONS AND RESEARCH.

DO	DON'T	RATIONALE
Researched elements of implied warranty claim to include in motion for summary judgment.	Researched [redacted]	Opposing counsel and the court know the motion was filed and read it. You are not revealing a secret superpower that you preformed research to prepare the motion.
Telephone call with client to discuss responses to plaintiff's interrogatories.	Telephone call with client [redacted]	Although technically privileged, it doesn't reveal anything sensitive. No reason to open yourself up to a memory test on cross-examination.

STEP 5: PREPARE TO TESTIFY TO REASONABLE RATES AND HOURS

- Each timekeeper:
  - Qualifications
  - Rates
  - Hours
- Total lodestar amount
- Reasoned opinions that rates = prevailing market
- Discuss how *Arthur Andersen* factors apply, especially proportionality

STEP 5: PREPARE TO TESTIFY TO REASONABLE RATES AND HOURS

- Be specific (what business was turned away, risk taken by contingency, etc.)
- Segregation:
  - Acceptable (for now): Provide opinion on percentage of time to recoverable fees
  - Better: State unrecoverable time excluded and explain how remaining time advanced recoverable claims.
- MOST IMPORTANT: Offer and seek admission of time records

RECOVERY OF APPELLATE FEES

- Contingent Award: Lodestar does NOT apply
- Proven by expert attorney testimony
- Testimony must include:
    1. Predicted necessary services
    2. Reasonable hourly rate

QUESTIONS?