

Defendant's Attorney's Fees

by James Pikel¹

Attorney's fees are often a significant expense in a lawsuit. Naturally, every client would like to have their own attorney's fees paid by the other party, if possible. This article discusses how defendants might get their opponents to pay their attorney's fees.

1. On what bases can a party recover fees?

Under Texas law, which follows the so-called "American Rule,"² a party may only recover attorney's fees from the other party if allowed by statute, by contract, or by court rule.³

A. By Statute.

There are literally dozens of statutes in Texas law that provide for the recovery of attorney's fees, usually as part of a judgment.⁴ Among the statutes allowing for award of attorney's fees is the following non-exhaustive list:

Civil Practice & Remedies Code⁵

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² *Buckhannon Bd & Care Home, Inc., v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001).

³ *1/2 Price Checks Cashed v. United Auto Ins. Co.*, 344 S.W.3d 376, 382 (Tex.2011)(by contract or statute); *Boyaki v. John M. O'Quinn & Assoc., PLLC*, 2014 WL 4856021 at *17 (Tex.App.–Houston [1st Dist.] 2014, rev. denied)(by TRCP 13 and 215). The rules of procedure have the "same force and effect as statutes." *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex.2001).

⁴ There are also numerous federal statutes (e.g., 42 U.S.C. §1988) that allow for recovery of attorney's fees; federal law is outside the scope of this article.

⁵ Texas Civil Practice & Remedies Code, Chapter 38, allows recovery in actions involving certain services and contracts.

TCP&R Code Chapters 9 and 10 allow a defendant to recover attorney's fees for responding to frivolous or bad-faith pleadings. Chapter 134 allows the successful party – plaintiff or defendant – to recover fees, and it is a "shall" award provision.

Deceptive Trade Practices – Consumer Protection Act (DTPA)⁶

Declaratory Judgment Act⁷

Finance Code⁸

Government Code⁹

Insurance Code¹⁰

These statutes all say a prevailing defendant may recover his attorney’s fees from his opponent as part of a judgment.

Note: the Declaratory Judgment Act allows the court discretion to award fees “in equity” to either the plaintiff or defendant, even if the party to whom fees is awarded did not prevail in the action. In other words, it’s possible the “winner pays.” *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 nonprevailing party, or neither”). Fees under the statute are awarded as are “equitable and just,” meaning the court decides their award **and amount**. *Austin Jockey Club, Ltd. v. Dallas City Limits Property Co., L.P.*, 2015 WL3549645 at *8 (Tex.App.–Dallas 2015, pet. denied).

⁶ Texas Business & Commerce Code, §17.50(d)(for claimants) and 17.50(c)(for defending a frivolous DTPA claim).

⁷ Texas Civil Practice & Remedies Code, Chapter 37. This statute allows a court, in its discretion, to award attorney’s fees to any party even if the party did not “prevail” in the litigation. See, e.g., *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist. ex rel. Board of Directors*, 198 S.W.3d 300 (Tex.App.–Texarkana 2006, pet. denied). Most other statutes require – either expressly or by case law interpretation – the party recovering attorney’s fees to have been the plaintiff in the litigation, bad faith filing being the exception.

⁸ Texas Finance Code, §§305.003 (usury); 392.403 (unfair debt collection).

⁹ Texas Government Code, §§552.323 (claims for access to public records); 2253.074 (enforcing claims on payment bonds).

¹⁰ Texas Insurance Code, §542.060 (unfair claims settlement or other delays in payment).

B. By Contract.

Texas courts will enforce a contract provision if the contracting parties have agreed to an award of attorney's fees. These provisions usually provide the "prevailing" party will be allowed to recover its fees. An area of current dispute is what the word "prevailing" means, especially as it relates to defendants.

It is best – and courts will enforce it – when the parties spell out in their contract exactly how a party may be deemed the "prevailing" party and thus entitled to recover attorney's fees. One such case is *Ahmad v. Booth & Booth, Ltd.*, 2000 WL 31970 at *2 (Tex.App.–San Antonio 2000, no pet.). There, the parties had defined "prevailing party" as:

the party whose last written offer to settle the dispute, before the initiation of the proceeding/arbitration, most closely approximates the final award (excluding any award for attorney's fees, costs, and prejudgment interest, which accrue after the offer is made)

This was deemed sufficiently precise to allow recovery of fees by either party.

On the other hand, if the contract merely states that attorney's fees may be recovered by "the prevailing party" without further definition, the Supreme Court currently holds that the default definition is the one used with §38.001.¹¹

While a few recent cases¹² have found the defendant in a contract dispute to be the "prevailing" party in the absence of defining language, these rulings do not

¹¹ See *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 655 (Tex.2009).

¹² See, e.g., *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 2015 WL 5783696 (Tex.App.–Dallas 2015, pet. pending)(mem. op.). The *Rohrmoos* court attempted to distinguish *Intercontinental* by finding that UTSW was not the plaintiff in the action as was *Intercontinental*, and thus *Intercontinental* was off point. This effort to distinguish *Intercontinental* is interesting in that UTSW actually *was* the plaintiff in the trial court and pursued millions of dollars in money damages right up to the day of trial when it abandoned those claims, opting instead to use *Rohrmoos*'s alleged contract breach only defensively.

The *Rohrmoos* court cited in support only a single decision, *Johnson v. Smith*, 2012 WL 140654 at *3 (Tex.App.–Amarillo 2012, no pet.)(mem.op.), for the proposition that if a defendant/tenant in a contract action wins the case and does not have to pay the damages sought by the plaintiff/landlord, the defendant "prevails" and thus can recover its fees. However, *Johnson* cites no authority and performed no analysis in support of *its* ruling.

seem to track either the history or the express language of §38.001, both of which allow only a contract plaintiff to recover fees. Consider: fees are recovered under §38.001 “in addition to the amount of a valid claim and costs.” *Ashford Partners v. Eco Res.*, 401 S.W.3d 35, 40-41 (Tex.2012). Obviously, a prevailing defendant never has any “amount of a valid claim” that the fees would be “in addition to.” Further, the §38.002(3) prerequisite to recovery of fees could never be fulfilled by a defendant because a defendant has no claim to “tender.” The reasoning behind this rule is spelled out in several cases, including *Energen Res. MAQ, Inc. v. Dalosco*, 23 S.W.3d 551, 558 (Tex.App.–Houston [1st Dist.] 2000, pet. denied)(defendants may not recover fees under §38.001).

C. By Court Rule.

Texas Rules of Civil Procedure 13 and 215 both allow for recovery of attorney’s fees as litigation sanctions; Rule 13 for pleading or other administrative issues, and Rule 215 for discovery abuse. No distinction is made between plaintiffs and defendants. Trial courts also have “inherent authority” to sanction parties and counsel appearing before them, and such sanctions frequently include reimbursement of the opposing party’s attorney’s fees.¹³

2. How much in fees can be recovered?

A. Reasonable fees.

See also: *Helitrans Co. v. Rotorcraft Leasing Co., Inc.*, 2015 WL 593310 (Tex.App.–Houston [1st Dist.] 2015, no pet)(mem. op.); *Weng Enterprises, Inc. v. Embassy World Travel, Inc.*, 837 S.W.2d 217, 222-23 (Tex.App.–Houston [1st Dist.] 1992, no pet.)(this appears to be the first case in Texas where a court awarded a “prevailing defendant” in a contract case its attorney’s fees). The old doctrine that held a “net recovery” was the linchpin of an attorney’s fees recovery under predecessor statute Art. 2226 (see *L Q Motor Inns v. Boysen*, 503 S.W.2d 411 (Tex.App.–Dallas 1966, writ ref’d n.r.e.)), was disavowed by the Supreme Court in *McKinley v. Drozd*, 685 S.W.2d 7,11 (Tex.1985).

¹³ The Supreme Court is cautious of allowing trial courts to award attorney’s fees under “inherent authority.” See *Travelers Indemnity Co. of Connecticut v. Mayfield*, 923 S.W.2d 590, 594 (Tex.1996)(the risk of allowing “inherent authority” is it may allow an end run around the statutory scheme). But fees awarded *as sanctions* will be upheld absent a showing of clear abuse of discretion. *Cisnado v. Shady Oak Estates HOA*, 2013 WL 1511624 (Tex.App.–Houston [14th Dist.] 2013, no pet.)(mem. op.).

Note: courts do *not* have “inherent authority” to award fees in situations outside of sanctions. *Tony Gullo*, 212 S.W.3d at 311 (“Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party’s fees”).

Only reasonable fees are recoverable regardless of the fees that were actually incurred or contracted for. While the amount incurred may be some evidence of what is a “reasonable” fee, it is not conclusive. Indeed, some would argue it is not even relevant.¹⁴

We generally allow juries to determine the amount of fees that are “reasonable” even though such a determination involves complex issues regarding what attorneys do for a living.¹⁵

B. Segregation of fees between claims.

Texas requires a party seeking to shift his fees to his opponent to segregate the fees between claims if some claims allow for recovery and some do not. The classic example is a plaintiff who files claims for both breach of contract (which allows for fee shifting) and some tort such a fraud or breach of fiduciary duty (which does not). Whether this same segregation rule applies to defendants seeking their fees has not been addressed in any reported decision in Texas.

But there seems no good reason it should not also apply to defendants. After all, the reason for segregation is that the party’s attorney has spent time on both types of claims and only time spent on a fee-shifting claim should allow fee shifting.

C. Is it claims or facts that can be “intertwined”?

The “inextricably intertwined” doctrine regarding fees comes from *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex.2006). In that case, the plaintiff claimed the defendant used bait and switch tactics in selling her a car. Ms. Chapa brought suit for fraud, breach of contract, and violation of the DTPA; only the latter two claims allow for fee shifting. The jury awarded actual damages under all three claims and exemplary damages and attorney’s fees. The trial court by judgment disallowed part of the actual damages and all of the exemplary damages

¹⁴ But see *Beasley* case below regarding sanctions (only *incurred* fees recoverable).

¹⁵ The fees charged by legal assistants are recoverable as attorney’s fees but only to the extent the work of the assistant “has traditionally been done by an attorney.” *All Seasons Window & Door Mfg., Inc.*, 181 S.W.3d 490, 504 (Tex.App.–Texarkana 2005, no pet.). Whatever that means.

and attorney's fees. The court of appeals reversed, reinstated all of the jury's awards but remitted exemplary damages from \$250,000 to \$125,000. Petition was granted.

Trying to hold its fee award, the plaintiff argued that if certain facts need to be discovered and addressed in trial that support both contract and fraud causes of action, then all legal work relating to those facts should be recoverable. The Supreme Court did not agree:

Accordingly, we reaffirm the rule that if any attorney's fees relate solely to a *claim* for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined *facts* do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable *claim* that they are so intertwined that they need not be segregated.

Tony Gullo, 212 S.W.3d at 313-14 (emphasis added). Two things here: first, the issue is not whether there are *facts* relevant to both claims; the issue is whether the legal work in question advances one *claim* or the other, and only if it concerns both claims are those fees "intertwined" such that they can be fully recovered. As examples of legal work that concerns more than one cause of action, the Court offered (*id.* at 313):

Requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, voir dire of the jury, and a host of other services may be necessary whether a claim is filed alone or with others. **To the extent such services would have been incurred on a recoverable claim alone**, they are not disallowed simply because they do double service.

The Court went on to further define "intertwined" fees:

A recognized **exception to this duty to segregate** arises when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so intertwined that their "prosecution or defense entails proof or denial of essentially the same facts." Therefore, when the cause of action involved in the suit are dependent upon the same set of facts or circumstances and thus are "intertwined to the point of being **inseparable**," the party suing for attorney's fees may recover the entire amount covering all claims.

Id. at 311. For work performed the nature of which is proven to be useful to both claims (and, arguably *defense* of both claims), the party need not segregate those fees and they are recoverable. Only if a piece of work is strictly useful only to a claim for which fees are not recoverable (like a doctor's deposition for a personal injury negligence claim) will it need to be segregated and will be disallowed.

The proponent of the fees bears the burden of proof on showing which parts of its fees were generated in support of which claim. The party must also segregate between multiple *parties* from whom fees are sought if some have settled and some have not. *Id.* at 310-11.

D. Must you object to failure to segregate?

If the party against whom fees is awarded does not object to a failure of the recovering party to segregate fees between fees that are recoverable and fees that are not recoverable, the party waives any objection of "failure to segregate." *Metroplex Mailing Services, LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 901 (Tex.App.–Dallas 2013, no pet.); *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 516 (Tex.App.–Houston [1st Dist.] 2009), *rev'd o.g.*, 266 S.W.3d 447 (Tex.2008).

The *Tony Gullo* case places the burden of proof for fee recovery – when segregation is required – on the party seeking to recover his fees from the opponent. This means counsel is responsible for proffering detailed evidence (testimony and records) in support of not only the total fees sought, but how those fees should be segregated into the proper buckets, and includes the burden of proposing proper jury questions.¹⁶ Because the segregated portion of the total fees can be determined by testimony of a percentage amount, the jury question might read:

Of the amount of fees you found reasonable in response to the previous jury question [[the question on total amount]], what percentage of the work done to generate those fees do you find was attributed solely to the fraud and negligence claims?

¹⁶ Take heart: if you get an award of fees after *failing* to segregate, the remedy is remand for a new trial on fees where you may then try to segregate because "evidence of unsegregated attorney's fees is more than a scintilla of evidence of segregated attorney's fees." *Tony Gullo*, 212 S.W.3d at 312.

Answer: _____%

This puts the question somewhat backwards from the way proof is made, but is the simplest way in which the trial court may then enter a judgment for segregated fees given the burden of proof. That is, the percentage above represents the only fees that are *not* recoverable since fees for “hybrid” work are recoverable.

3. **The evidence necessary to prove the fees sought.**

Expert testimony is necessary for topics a jury is asked to consider that are not within the common knowledge of the average fact finder, even if it’s the trial court.¹⁷ Attorney’s fees have been placed in this category.¹⁸

A. *Fee statements.*

Several Texas Courts of Appeals and the Texas Supreme Court currently have differing views on this issue. The Supreme Court has been marching deliberately toward requiring details supporting fee awards that are only available from a review of billing statements “in all but the simplest cases.” *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex.2012). Yet some trial courts still refuse to allow billing statements into evidence, even though they are the “best evidence” of the actual work performed and some courts of appeal are not critical of this.¹⁹

It seems odd to require the jury to evaluate individual pieces of legal work for reasonableness and then not allow the jury to review the “best evidence” of what that work consisted of. We anticipate the Supreme Court will soon hold that billing statements *must* be introduced into evidence in all fee-shifting situations.

¹⁷ *Saulsberry v. Ross*, 485 S.W.3d 35, 45 (Tex.App.–Houston [14th Dist.] 2015, rev. denied).

¹⁸ *Twin City Fire Ins. Co. v. Vega-Garcia*, 223 S.W.3d 762, 770 (Tex.App.–Dallas 2007, rev. denied).

¹⁹ In the *Rohrmoos* case, the plaintiff did not proffer fee records into evidence as part of its attorney’s fee testimony. However, when the defendant attempted to do so, arguing from the ruling in the *El Apple* case, the trial court refused to admit them into evidence over hearsay objections. The Court of Appeals was silent on this issue.

B. Self testimony or expert?

In smaller matters, the party seeking fees will often have the attorney who performed the litigation work and tried the case also offer the expert attorney's fee testimony.

In larger or more complex cases, a party and his attorney will frequently hire a "disinterested" attorney to act as the expert to prove up – or defend against – the fees requested. This frees up the case attorney from having to "brag" about what great work he did in the case to justify his fees, and second, it means the trial attorney does not need to spend time and energy in preparing for and testifying about fees. Finally – and perhaps the best reason to hire an outside expert – it prevents the case attorney from standing for cross examination, which – if it goes badly – may disparage or diminish the force of his *merits* advocacy before the jury. Having the jury think poorly of your expert is not good, but if your expert is also the person giving the closing argument in the case, you run the risk of poisoning final argument with the damaging testimony the attorney just gave on cross examination – usually only a few hours before deliberations commence.

C. Pro se representation.

Can an attorney who represents himself recover his attorney's fees from his opponent? The answer is generally "yes." *Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex. App.–Eastland 1994, no writ)(collecting state and federal cases holding this rule applicable). However, in certain statutory cases, the answer is "no." See, e.g., *Brown v. Kleerekoper*, 2013 WL 816393 at *6 (Tex.App.–Houston [1st Dist.] 2013, rev. denied), *cert. pending* (attorney representing himself in Texas Theft Liability Act case not entitled to recover fees). *Brown* cited several federal cases in support, including *Kay v. Ehrler*, 499 U.S. 432 (1991), in which those courts denied pro se attorney litigants recovery of fees under federal statutes, including 42 U.S.C. §1988.

In-house counsel can recover fees for representing the lawyer's employer. *Tesoro Petroleum Corp. v. Coastal Ref. & Mktg, Inc.*, 754 S.W.2d 764, 766 (Tex.App.–Houston [1st Dist.] 1988, writ denied). In Texas, in-house counsel fees are determined by the "market value" approach, in which the going market rate for outside counsel is used, as opposed to the "cost-plus" approach in which the fees are calculated by reference to the actual salary, costs, and overhead of the in-house attorney. *AMX Enterp., LLP v. Master Realty Corp.*, 283 S.W.3d 506, 517-19 (Tex.App.–Fort Worth 2009, no pet.)(collecting cases on both methods).

One case has held that an attorney representing herself was not entitled to collect attorney's fees *as sanctions*. *Beasley v. Peters*, 870 S.W.2d 191, 196 (Tex.App.–Amarillo 1994, no writ)(since fees are not “incurred” by a pro se litigant, they are unrecoverable).

4. **Conclusion.**

The law relating to attorney's fees is fairly complex and attorney's fees are often a significant percentage of the monetary consideration in litigation. These two facts mean that trial counsel must become well-versed in the law related to attorney's fees, how they are proved up, and how they are awarded – as well as how to prevent their award.

In closing, this caution: it is a rare client that will be happy about paying you \$250,000 in attorney's fees while knowing that only because you messed up, his opponent did not have to reimburse them.