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Ten Questions to Ask

Recovering Attorney's Fees in Federal Court

By John W. Bridger
and David A. Kirby

Our familiarity with billing time can lead to complacency in prosecuting or defending attorney's fee requests.

Clients love nothing better than forcing the opposing party to pay their attorney's fees. Conversely, paying your opponent's fees only adds insult to injury. As practicing attorneys, we bill our clients, comply with ethical billing standards and client guidelines, often endure billing audits, and therefore, sometimes feel that we intuitively know how to recover fees or defend against a fee request. Of course, the mere fact that I drive fast on wide-open Texas highways does not mean that I am ready for the Daytona 500. Our familiarity with billing time can lead to complacency in prosecuting or defending attorney's fee requests. Other more pressing issues require our immediate attention in a case, and we think that we can always wait until the judgment is entered to determine if we even need to worry about fees. But attorney's fees are often the single largest figure contained in the judgment. This means that prosecuting or defending a fee request should begin early in a case and be developed appropriately, through discovery, motion practice, and trial (or post-judgment fee application). That said, there are hundreds of state and federal statutes authorizing fee recovery (and contractual variations), cases by the thousands establishing state and federal jurisprudence on the standards and how to calculate a fee, federal rules, and local rules, all of which may bear on a fee dispute. One of the leading Supreme Court cases on attorney's fees, *Hensley v. Eckerhart*, 461 U.S. 424 (1983), has been cited over 26,000 times alone. Anticipating every issue that might arise in your case is impossible; however, we propose the following as a starting point.

How Did We Get Here?

The first question to ask is whether your case involves diversity, admiralty, or fed-

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eral question jurisdiction, or a combination of these. The answer to this question will determine the law governing the award and calculation of attorney's fees.

In diversity actions, federal courts look to state law to determine whether a party has a right to attorney's fees and how to calculate those fees. *See Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P.*, 888 F.3d 455, 459–63 (10th Cir. 2018) (reviewing other circuits' opinions, adopting the consensus view, and distinguishing between substantive fees and procedural fees—the latter arising from conduct occurring during the litigation resulting in such things as sanctions); *Bratton v. FCA US LLC*, No. 17-cv-01458-JCS, 2018 U.S. Dist. Lexis 180975, at *6 (N.D. Cal. Oct. 22, 2018) (citing *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995)); *Morton v. Progressive N. Ins. Co.*, 498 F. App'x 835, 842 (10th Cir. 2012). If the state law generally applies the lodestar method, federal courts will often apply that method the way federal law applies it. For instance, Texas has not mandated lodestar for every case and only requires contemporaneous billing records as proof in those cases applying lodestar. Federal courts almost always require introduction of contemporaneous billing records (failing to have them will likely result in an across-the-board percentage write-down of fees), while Texas cases do not necessarily require them.

Of course, where substantive rights and methods of calculation end and evidence and procedure begin can often be a fine distinction. If the cause of action leading to a fee recovery is rooted in a federal statute or a non-diverse cause of action (or a procedural fee, such as for sanctions), then federal jurisprudence controls the substantive right to recover and how to calculate the fee.

Why Are We Here?

The next question to ask is whether the party seeking attorney's fees has pleaded a cause of action supporting that specific recovery. The one near-universal rule in American attorney's fees jurisprudence is that American courts, state and federal, follow the "American Rule" when considering a party's right to recover attorney's fees. Under this rule, "each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P. v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158, 2164 (2015). Many contracts, most statutes, and most common law causes of action, especially torts, do not provide a basis for recovering attorney's fees. The analysis, therefore, must begin with the contract or statute to determine whether it provides for fee recovery. Even if it does, courts must analyze the specific language of each statute (or contract) to assess the viability of a particular fee award, because "a statute [that] is sufficiently specific and explicit to authorize one type of fee award does not make it sufficiently specific and explicit to authorize another type of fee award." *See Gahagan v. United States Dep't of Justice*, Nos. 17-30898, 17-30901, 17-30999 Slip Op. at *3 (5th Cir. Dec. 20, 2018) (dealing with statutes and citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975)). Unfortunately, neither contractual nor statutory language is uniform, resulting in a panoply of possibilities requiring the practitioner to research the jurisprudence of the particular statute or contractual provision or assess the extent to which other statutes or contracts have truly analogous language with respect to recovering attorney's fees.

Once you know the district court's jurisdiction and the cause of action, you will know which law will govern a fee application (state or federal and statute or contract), allowing you to focus on that particular jurisprudence. For instance, many federal fee-authorizing statutes (such as the Civil Rights Act and the Equal Access to Justice Act) have their own extensive jurisprudence on fee recovery, and rarely do you need to cite cases under other statutes when the claim involves such federal statutes.

Who Is the Prevailing Party?

Generally, because, with some exceptions, only the prevailing party may recover attorney's fees, the third question is whether the requesting party actually "prevailed." This analysis begins with the statutory or contractual definition of "prevailing party." If the statute or contract so provides, its express terms prevail.

However, many statutes and most contracts do not define "prevailing party," and therefore, courts default to the judicially created definition. Generally, courts look to Supreme Court cases. *Hewitt v. Helms*, 482 U.S. 755, 757–60 (1987) (determining that respecting ordinary language requires that a "prevailing party" receive at least some relief on the merits of his or her claim before he or she can be said to prevail); *Farrar v. Hobby*, 506 U.S. 103, 111–14 (1992) (noting that "the prevailing party inquiry does not turn on the magnitude of the relief obtained" and finding that the plaintiff, awarded $1, prevailed and explaining that in civil rights cases, the plaintiff who receives some direct benefit that materially alters the relationship of the parties has prevailed); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) (adding the judicial imprimatur requirement, *i.e.*, the material alteration of the legal relationship of the parties must also be judicially sanctioned).

If the state law generally applies the lodestar method, federal courts will often apply that method the way federal law applies it. For instance, Texas has not mandated lodestar for every case and only requires contemporaneous billing records as proof in those cases applying lodestar.

The courts have developed numerous ways of measuring "prevailing," such as the main-issue and net-prevailing party approaches. *See DocMagic, Inc. v. Mortg. P'ship of Am., L.L.C.*, 729 F.3d 808, 814 (8th Cir. 2013). Determining how "prevailing

party" is defined or construed is critical in evaluating a fee application.

Contracts also can provide not only a definition of prevailing parties but all the other terms for a fee recovery, such as the scope (applying strictly to the contract claim or the whole "litigation" surrounding the parties relationship, which can include tort claims); the nature (all incurred fees or only reasonable fees, and particularly in indemnity agreements, or prosecutorial or only defense fees); the proof necessary; and the recovery procedure (motion, judge, jury, among others).

With respect to contracts providing for fee recovery, federal courts typically follow state law, which generally provides that the contract language controls, unless state law reads additional terms into the contract.

With respect to contracts providing for fee recovery, federal courts typically follow state law, which generally provides that the contract language controls, unless state law reads additional terms into the contract. *See generally ADTRAV Corp. v. Duluth Travel, Inc.*, No. 2:14-cv-56-TMP, 2018 U.S. Dist. Lexis 7327, at *67 (N.D. Ala. Jan. 17, 2018) (limiting scope of fees to those incurred after lawsuit commenced, based on a provision permitting fees incurred in the "litigation"); *Zucaro v. Patel*, No. 16-00089-N, 2016 U.S. Dist. Lexis 119864, at *22–23 (S.D. Ala. Sept. 6, 2016) (recognizing as applied to an "all costs" recovery provision that "'Alabama law reads into every agreement allowing for the recovery of attorney's fees a reasonableness limitation'"); *Balfour Beatty Rail, Inc. v. Kan. City S. Ry.*, No. 3:10-CV-1629-L, 2016 U.S. Dist. Lexis 159402, at *3–6 n.3 (N.D. Tex. Oct. 28, 2016) (recognizing that "[p]arties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38 [the Texas attorney's fee statute]"); *Zoroastrian Ctr. & Darb-E-Mehr Metro. Wash., D.C. v. Rustam Guiv Found.*, 245 F. Supp. 3d 742, 745 (E.D. Va. 2017) (recognizing that parties are similarly free to contract) (Virginia law).

When Must the Prevailing Party Make Its Fee Application?

In federal court, the starting point is Rule 54(d)(2)(A), which provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A). The motion must be made no later than 14 days after the entry of judgment. Fed. R. Civ. P. 54(d)(2)(B)(i). This procedure seems favored by the courts, and they find ways to make it apply. For one thing, the procedure is judicially efficient. That said, the party seeking fees cannot wait until the court enters the judgment to determine whether the fees are substantive and should have been proved at trial. This has be resolved well prior to trial, indeed prior to the usual federal court pretrial submissions, and preferably, before designation of experts.

The case law suggests that Rule 54(d)(2) applies to most federal statutes authorizing attorney's fees. In contract cases, despite the Advisory Committee notes on Rule 54(d)(2)(A) expressly noting that the rule does not apply to attorney's fees when sought under contractual terms, courts still seem to find ways to apply Rule 54(d)(2). *See Tech Pharmacy Servs., LLC v. Alixa Rx LLC*, 298 F. Supp. 3d 892, 899–901 (E.D. Tex. 2017); *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037–40 (5th Cir. 2014); *Bayer Cropscience LP v. Albemarle Corp.*, No. 5:14-CV-412-BO, 2018 U.S. Dist. Lexis 124281, at *9–10 (E.D.N.C. July 25, 2018) (noting that "'contractual provisions that are ambiguous or hybrid also fit within Rule 54(d)(2)(A)… because they do not clearly provide for the recovery of the fees as an element of damages so that the attorneys' fees claim should be made by motion.'" (quoting *Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 363 n.1 (4th Cir. 2005) (Wilkinson, J. concurring)).

If attorney's fees are an element of damages that substantive law requires an applicant to prove at trial, many district courts customarily bifurcate the trial, reserving jurisdiction to determine the attorney's fees amount at a later date, after they determine liability. *See TransUnion Risk & Alt. Data Sols. v. Best One, Inc. (In re TLFO, LLC)*, 571 B.R. 880, 885 (Bankr. S.D. Fla. 2017) (noting the custom and practice and citing cases). Bifurcating also allows for an evidentiary hearing as opposed to merely a submission on motions. One court has noted that neither the rule itself nor the Advisory Committee notes preclude using Rule 54(d)(2) in cases in which substantive law requires proof at trial, merely that all other cases must use Rule 54(d)(2). *See Richardson*, 740 F.3d at 1039. Likewise, some courts seem to allow the parties to agree to use the Rule 54(d)(2) procedure. *See Mansfield Heliflight, Inc. v. Bell/Agusta Aero. Co., LLC*, No. 4:06-CV-425-A, 2007 U.S. Dist. Lexis 91694, at *1–2 (N.D. Tex. July 25, 2007) (noting that the parties agreement to submit attorney's fees under Rule 54(d)(2), and involving a contract case).

Additionally, Rule 54(d)(2)(D) invites district courts to establish special streamlining procedures through local rules, making those rules critical for compliance in those districts. *See* Fed. R. Civ. P. 54(d)(2)(D). Local Rule 54 in each of the four district courts in Texas appears only to address costs, not fees; however, some of these local rules could be interpreted to cover both. However, the U.S. District Court for the District of Kansas has a Local Rule 54.2, which sets up a procedure for streamlining fee recovery. *See Fish v. Kobach*, No. 16-2105-JAR, 2018 U.S. Dist. Lexis 129180, at *6 (D. Kan. Aug. 1, 2018). Further, Rule 54(d)(2)(D) permits referral of fee disputes to special masters and magistrates, which is logical, given that the rule contemplates the possibility of evidentiary hearings and those are likely to be handled by a magistrate. *See* Fed. R. Civ. P. 54(d)(2)(D).

Unless the local rules provide otherwise, a party should undertake all the attorney's fee discovery during the normal discovery period because the Advisory Committee notes provide that discovery should be permitted only in rare cases. Discovery regard-

ing fees should be supplemented with fees billed after the close of discovery.

If an attorney's fees claim requires introducing substantive proof in the trial, the trial court's findings of fact on the fee application will be reviewed based on an abuse of discretion standard, which will be difficult to overcome. *Washington v. Phila. Cty. Court of Common Pleas*, 89 F.3d 1031, 1034–35 (3d Cir. 1996) (comparing the reasonableness of the award, reviewed by abuse of discretion, to the standards applied in calculating the fee). As explained below, district courts have the discretion to review a fee application line by line or make a percentage decrease for any number of reasons and such diminishments are difficult to overturn on appeal. *See, e.g., Dall. Indep. Sch. Dist. v. Woody*, No. 3:15-CV-1961-G, 2018 U.S. Dist. Lexis 203682 (N.D. Tex. Nov. 30, 2018) (identifying multiple deficiencies and attributing a percentage reduction to each one and eventually eliminating over half the fees).

What Is the Federal Standard for Calculating Attorney's Fees?

Ultimately, federal courts applying federal law define "[a] reasonable fee [as] one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 893 (1984) (quoting the legislative history). To accomplish that, federal courts in federal law cases use the lodestar method—the reasonable number of hours expended multiplied by the reasonable hourly rate—the result of which is presumed to be reasonable. *See Combs v. City of Huntington*, 829 F.3d 388, 393 (5th Cir. 2016) (citing and applying *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553–54 (2010)). Indeed, some courts have gone so far as to say that the lodestar method is strongly presumed to be reasonable. *See KeyCorp v. Holland*, No. 3:16-cv-1948-D, 2017 U.S. Dist. Lexis 21372, at *22 (N.D. Tex. Feb. 15, 2017) (also citing *Perdue,* 559 U.S. at 552). Then a court may enhance or decrease the amount, looking often to such considerations as the 12 *Johnson* factors, if they are not already included in the lodestar calculation. The 12 factors are listed below:

> [(1)] the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required; (4) the preclusion of other employment by the attorney; (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.

See Jimenez v. Wood Cty., 621 F.3d 372, 380 (5th Cir. 2010) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)). *See also Combs*, 829 F.3d at 393–95; *Souryavong v. Lackawanna Cty.*, 872 F.3d 122, 128–29 (3d Cir. 2017) (discussing the continuing viability of the *Johnson* factors after *Perdue*). *Johnson* was adopted by a number of circuits indirectly, with some referring to the same factors, and by other circuits directly, using the name of the circuit's decision. The *Johnson* factors derive directly from the American Bar Association Code of Professional Responsibility Disciplinary Rule 2-106 (1980). *See Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983).

As for enhancement or downward adjustment, not all of the 12 *Johnson* factors are weighted equally. The Supreme Court has stressed that "the most critical factor is the degree of success obtained." *See id.* at 436. If only partially successful, "the court may reduce fees in a number of ways, such as by eliminating specific hours or reducing the award as a whole." *Robinson v. District of Columbia*, No. 15-444, 2018 U.S. Dist. Lexis 181541, at *32 (D. D.C. Oct. 23, 2018) (quoting *Craig v. District of Columbia*, 197 F. Supp. 3d 268, 274–83 (D.D.C. 2016)). If some of the claims are distinct (as opposed to relying on intertwining facts or legal theories), a court may eliminate all time related to the unsuccessful claim. *Hensley*, 461 U.S. at 434-36. However, if the facts or legal theories are intertwined or related, a court need not reduce the award "simply because the district court did not adopt each contention raised." *Id. See also Robinson*, 2018 U.S. Dist. Lexis 181541, at *32 (explaining how to apply *Hensley* on this point). While a strict rule of proportionality has been rejected by the Supreme Court in *City of Riverside v. Rivera,* 477 U.S. 561, 578 (1986), *Rivera* was a civil rights case, and Justice Brennan noted the public benefit to such cases, compared with private litigation. *See Washington*, 89 F.3d at 1039–41; *Becker ex rel. Becker v. Tools & Metals, Inc.*, No. 3:05-CV-0627-L-BK, 2012 U.S. Dist. Lexis 187820, at *60–64 (N.D. Tex. Dec. 12, 2012) (accepting in part and rejecting in part the magistrate opinion issued in *United States ex rel. Becker v. Tools & Metals, Inc.*, No. 3:05-CV-0627-L, 2013 U.S. Dist. Lexis 46529 (N.D. Tex. 2013)); *Robinson*, 2018 U.S. Dist. Lexis 181541, *36–39.

Unless the local rules provide otherwise, a party should undertake all the attorney's fee discovery during the normal discovery period because the Advisory Committee notes provide that discovery should be permitted only in rare cases.

Disproportionality may be a stronger argument in private litigation. *See Reyelts v. Cross*, 968 F. Supp. 2d 835, 850–51 (N.D. Tex. 2013)); *Dall. Indep. Sch. Dist.*, 2018 U.S. Dist. LEXIS 203682, at *31–32 ("Nevertheless, proportionality remains 'an appropriate consideration in the typical case.'")(quoting *Combs v. City of Huntington, Texas*, 829 F.3d 388, 396 (5th Cir. 2016). Thus, a court can consider the number of successful versus unsuccessful claims or the amount of damages sought versus amount recovered and factor that into a downward adjustment. In attempting to guide a court's discretion in assessing a range of percentage for enhancement, litigants often cite other similar decisions assessing a given percentage. Researching your judge's or district court's attorney's fees precedent may provide substantial guidance on the percentage enhancement or downward adjustment to seek.

Furthermore, a downward adjustment is far more likely than upward enhancement. In *Perdue,* the Supreme Court limited the enhancement in light of "a strong presumption that the lodestar is sufficient." 559 U.S. at 546. One notable exception allowing an enhancement is a so-called enhancement due to unanticipated, out of the ordinary delay for which there must be proof in the record. *Becker,* 2012 U.S. Dist. Lexis 187820, at *68.

To determine a reasonable hourly rate, a court must "'step[ ] into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively.'"

If all else fails, a respondent can always argue that while it does not contest the reasonableness of the hourly rate or any individual time entry, the totality of the circumstances show that the total fee is excessive and unreasonable, and in rare cases, a court will agree. *Reyelts*, 968 F. Supp. 2d at 850–51. *See also Celestine v. JPMorgan Chase Bank, N.A.*, No. 17-CV-20915, 2018 U.S. Dist. Lexis 183306, at *20–21 (S.D. Fla. Oct. 24, 2018) (comparing cases and finding a successful defense in a fraction of the time submitted).

What Is a Reasonable Hourly Rate?

As explained elsewhere, "[t]he reasonable hourly rate is defined as the 'prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.'" *Tobinick v. Novella*, No. 14-80781-CV, 2018 U.S. Dist. Lexis 198671, at *8–9 (S.D. Fla. Nov. 19, 2018) (citing *ACLU v. Barnes*, 168 F.3d 423, 436 (11th Cir. 1999)). The applicant has the burden of proof to establish a reasonable rate. *Id.* at *9. As part of an applicant's proof, the applicant should introduce a thorough resume (such as an attorney's webpage, bio, brochure insert, or if none of these are available, a detailed affidavit) on each attorney or paralegal to establish skill, experience, and reputation, particularly if the hourly rates exceed the schedule, survey, or local average. Respondents should not be shy about conducting discovery to prove an applicant lacks experience, skill, or reputation. Make a plaintiff's attorney's resume part of your request for production. If the attorney does not provide a resume, find what you can on the internet or go "old school" and use Martindale-Hubbell.

To determine a reasonable hourly rate, a court must "'step[] into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively.'" *Id.* (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184, 190 (2d Cir. 2008)).

In addition to testimony of counsel, courts look to various sources for reasonable rates, including the following:

1. fee guidelines (*see Simone v. VSL Pharm., Inc.*, No. TDC-15-1356, 2018 U.S. Dist. Lexis 213324, at *5 (D. Md. Dec. 19, 2018) (citing app. B to the local rules));
2. fee matrices (*see Robinson*, 2018 U.S. Dist. Lexis 181541, at *29 (relying on the D.C. U.S. Attorney's Office fee matrix));
3. state bar surveys (*see Dall. Indep. Sch. Dist.*, 2018 U.S. Dist. Lexis 203682, at *15 (acknowledging the Tex. State Bar 2015 Hourly Fact Sheet));
4. private surveys (*see Tech Pharmacy*, 2017 U.S. Dist. Lexis 211061, at *26–27 (reviewing the 2015 Am. Intellectual Property Law Ass'n Report of the Economic Survey));
5. opposing counsel's rates (*see Dall. Indep. Sch. Dist.*, 2018 U.S. Dist. Lexis 203682, at *19–21. *Cf. Washington*, 89 F.3d at 1036 (implicitly suggesting a plaintiff deserve higher rates than the defendant in civil rights cases));
6. opinions of other courts in the same district (*see Dall. Indep. Sch. Dist.*, 2018 U.S. Dist. Lexis 203682, at *12–14); and
7. the court's own experience (*see Zendejas v. Redman*, No. 15-81229-CIV, 2018 U.S. Dist. Lexis 212062, at *11–12 (S.D. Fla. Dec. 14, 2018) (citing *Norman v. Housing Auth. of Montgomery*, 836 F. 2d 1292, 1301 (11th Cir. 1999)).

Before making a fee application or defending against one, you should determine whether the local rules, custom, or practice mandate or recommend use of a certain matrix, schedule, or survey. If so, and the applicant's rates exceed the rates, then the applicant must prove why the increased rate is appropriate. Conversely, these resources often provide the respondent with proof of excessive rates.

As stated, the hourly rates are assumed to be those in the district in which the suit is pending. However, out-of-district or other state rates may be used if the prevailing party can prove that "'local counsel was unavailable, either because they are unwilling or unable to perform or because they lack the degree of experience, expertise, or specialization required to handle properly the case.'" *Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *6 (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008)). Likewise, the "prevailing rate" is typically interpreted as the rate that is effective at the time that the work was performed; however, in prolonged litigation, rates often increase over time. Under the right circumstances, courts permit an applicant to use an interest adjustment or current rates to compensate for delay and inflation. *See id.* at *7–10. *See also Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1262 n.7 (9th Cir. 1987). Finally, experience in a specialized practice area may be considered in the rate, but an otherwise experienced counsel may not be subjected to a reduced rate merely due to a lack of experience in the specialized area. *See Dall. Indep. Sch. Dist.*, 2018 U.S. Dist. Lexis 203682, at *12–26 (extended discussion and citing cases going both ways).

How Is the Number of Hours Reasonably Expended on the Case Determined?

At least one circuit found that "'the measure of reasonable hours is determined by the professional's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done." *Zendeja*, 2018 U.S. Dist. Lexis 212062, at *13–14 (citing *Norman v. Housing Auth. of Montgomery*, 836 F. 2d 1292, 1301 (11th Cir. 1999)). More often than not, "'the court should defer to

the winning lawyer[s'] professional judgment as to how much time he was required to spend on the case…." *Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *13 (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008)). Likewise, "'[r]easonableness… should depend not on hindsight, but on whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures.'" *Simone*, 2018 U.S. Dist. Lexis 213324, at *16 (quoting *Underdog Trucking, LLC v. Verizon Servs. Corp.*, 276 F.R.D. 105, 112 (S.D.N.Y. 2011)).

However, experience shows "the number of hours reasonably expended" cannot be excessive, redundant, duplicative, unproductive, or unnecessary. *Hensley*, 461 U.S. at 434; *Becker,* 2012 U.S. Dist. Lexis 187820, at *58–59 (citing *Walker v. United States HUD*, 99 F.3d 761, 769 (5th Cir. 1996); *KeyCorp*, 2017 U.S. Dist. Lexis 21372, at *44–45.

"Billing judgment" requires an applicant to submit only reasonable fees, not simply to avoid submitting improper entries. Billing judgment focuses on writing off the excessive, redundant, duplicative, unproductive, and unnecessary, not simply removing the (1) inadequately documented time; (2) time spent on losing issues; and (3) time spent on issues that ultimately were not pursued. *See Walker*, 99 F.3d at 769. A failure to exercise billing judgment will likely result in a percentage reduction. *Cty. of Dimmit v. Helmerich & Payne Int'l Drilling Co.*, No. SA-16-CV-01049-RCL, 2018 U.S. Dist. Lexis 32631, at *7–8 (W.D. Tex. Feb. 27, 2018) (recognizing that the Fifth Circuit has found a 15 percent reduction appropriate for failing to exercise billing judgment).

In addition, an applicant should specifically eliminate distinct time spent on certain activities from the calculation. *See Hensley*, 461 U.S. at 440 (eliminating time for distinct, unsuccessful claims); *Becker*, 2012 U.S. Dist. Lexis 187820, at *51) (eliminating time spent against defendants from which the applicant did not recover where the successful defendant's conduct stemmed from separate facts); *Celestine*, 2018 U.S. Dist. Lexis 183306, at *17) (eliminating time solely addressing common law tort and other non-recoverable claims); *Walker*, 99 F.3d at 769 (eliminating time spent on contemplated but not pursued motions or claims); *Celestine,* 2018 U.S. Dist. Lexis 183306, at *20 (eliminating time for clerical or administrative tasks that did not require an attorney's education and judgment, *e.g.*, filing and transcript and document organization, regardless of who performed them). *But see Becker*, 2012 U.S. Dist. Lexis 187820, at *37–41 (allowing many administrative tasks performed by a paralegal to be billed, due to the applicant's small law office, but reducing the paralegal rate by 20 percent).

However, attorneys can bill for travel time, or at least part of it (usually 50 percent), or for that travel portion during which an applicant can show that he or she worked on related matters. *See Gruber v. Sec'y of HHS*, 91 Fed. Cl. 773, 787–91 (2010) (discussing the National Vaccine Program's standard practice of permitting only 50 percent of travel time and concluding that every case requires some individual consideration; even 50 percent might be too much). *See also Makinen v. City of N.Y.*, No. 1:11-cv-07535 (ALC) (AJP), 2016 U.S. Dist. Lexis 49293, at *9 (S.D.N.Y. April 12, 2016) (recognizing the district courts' discretion to compensate travel time at the full hourly rate but noting that the Second Circuit often reduce such attorney's fees by 50 percent). If an applicant seeks travel time, the respondent should attempt to determine whether the applicant is working under any billing guidelines, and if so, the terms for billing travel time.

In addition to properly allocating tasks to lawyers and staff, billing judgment involves avoiding duplication of effort. Often courts will defer to the prevailing counsel on how to staff the litigation. *See Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *12–16 (finding that the plaintiffs' 21 lawyers generally did not overstaff, based on their explanation of their roles and that they reduced a small number of tasks as improper for multiple lawyers to bill); *ADTRAV Corp.*, 2018 U.S. Dist. Lexis 7327, at *70–71 and 73 (eliminating time billed by the second lawyer when two lawyers attended depositions and witness interviews). *But see Simone*, 2018 U.S. Dist. Lexis 213324, at *8 and *14–15 (recognizing that "[c]ourts will reduce fee awards where a party employs 'too many professionals and too many hours devoted to the … issues'" and finding that "attorneys frequently duplicated work"). But a fee applicant must show that each lawyer made a distinct contribution consistent with the customary practice of multiple-lawyer litigation. *See Celestine*, 2018 U.S. Dist. Lexis 183306, at *18–19.

Courts also regularly recognize that law student and paralegal time is valid, as long as the work performed is that normally performed by an attorney, *i.e.*, requires some level of discretion and judgment. *See Missouri v. Jenkins*, 491 U.S. at 288. n.10; *Tobinick*, 2018 U.S. Dist. Lexis 198671, at *13–14; *Dall. Indep. Sch. Dist.*, 2018 U.S. Dist. Lexis 203682, at *25–27.

Before making a fee application or defending against one, you should determine whether the local rules, custom, or practice mandate or recommend use of a certain matrix, schedule, or survey.

Federal courts in addition have recognized Westlaw and Lexis charges as attorney's fees, explaining that "computer-based legal research decreases the time attorneys spend on legal research." *See Thomason v. Metro. Life Ins. Co.*, No. 3:14-CV-86-K, 2018 U.S. Dist. Lexis 35801, at *12 (N.D. Tex. Mar. 5, 2018) (citing *Koehler v. Aetna Health Inc.*, 915 F. Supp. 2d 789, 800 (N.D. Tex. 2013) (Furgeson, J.). *See also HCC Aviation Ins. Grp. Inc. v. Employers Reinsurance Corp.*, No. 3:05-CV-744-BH, 2008 U.S. Dist. Lexis 23221, 2008 WL 850419, at *11 (N.D. Tex. Mar. 21, 2008) (Lynn, J.).

For the most part, our clients refuse to pay computerized research charges. Their billing guidelines consider Westlaw and Lexis to be overhead. If confronted by an application including computerized research charges, you should seek discovery of the

plaintiff's firm's retention agreement and any guidelines by which the firm bills to see if the client likewise considers it overhead.

Additionally, an applicant can seek reimbursement for preparing the fee application, including editing, reviewing, and redacting billing statements. *See Tobinick*, 2018 U.S. Dist. Lexis 198671, at *17; *Becker*, 2012 U.S. Dist. Lexis 187820, at *48–57 (recognizing as valid but reducing the fee related to the application by 30 percent). *But see United States ex rel. Becker*, 2013 U.S. Dist. Lexis 46529, at *61 (reversing the magistrate's recommendation allowing time for redacting the billing statements after the magistrate had already ruled that the billing statements were not privileged). Indeed, doing so is part of billing judgment. *See Becker*, 2012 U.S. Dist. Lexis 187820, at *49 (citing *Walker*, 99 F.3d at 770).

Finding that using whole-hour increments lead to inaccurate billing records, one court rejected those records saying, "The Court will not credit inaccurate time records."

Given the billing judgment requirement, an applicant should not only keep track of the time it intends to seek but also the time that it writes off before submission. Indeed, some courts look for submission of the written-off time as proof of billing judgment. *See Tech Pharmacy*, 2017 U.S. Dist. Lexis 211061, at *23–25 (reducing the attorney's fees sought by six percent because the lead counsel's affidavit failed to refer to "a single minute that was written off as unproductive, excessive, or redundant"). However, if an applicant has agreed to work at a discounted rate and can prove that the full rate is reasonable, the argument could be made that the discounted rate covers some minor deficiencies in the submitted bills.

In attacking a fee application's statement of reasonable hours expended, the respondent should carefully and exhaustively analyze the applicant's billing records, assessing (1) how many attorneys and paralegals worked on the file and whether the number was justified or involved effort duplication; (2) review whether multiple attorneys billed for attending the same events (*e.g.*, interoffice conferences, hearings, or a trial) and determine if each person's presence was justified; (3) evaluate how much time was spent on any given task; and (4) analyze whether work was appropriately staffed. The respondent should group time spent not only on individual tasks but also for categories of tasks.

A court will require specific proof, and you must be prepared to go entry by entry, category by category, attorney by attorney with detailed analyses and summaries. Sometimes, hiring an auditing firm or attorney's fees expert may also be justified to undertake the detailed analysis.

What Form Must an Application Take?

Regardless whether submitted as a motion under Rule 54(d)(2) or introduced as evidence at trial, a fee application must be supported by two things: (1) adequate testimony (live or by affidavit), covering all the necessary areas, proving at a minimum an attorney's experience, reasonable hourly rate, and billing judgment exercised; and (2) contemporaneous billing time records. *See Hensley*, 461 U.S. at 438 n.13 (affirming a 30 percent reduction for lack of contemporaneous time records); *In re Nissan Litig.*, 2018 U.S. Dist. Lexis 154982, at *12 (holding that "'[t]he prevailing party's fee application must be supported by contemporaneous time records, affidavits, and other materials.'"); *Bratton*, 2018 U.S. Dist. Lexis 180975, at *10 (suggesting that citing other decisions and submitting affidavits of other practitioners to prove reasonable hourly rates is appropriate). While editing and revising is permitted, wholesale re-creation of billing entries from documents, calendars, and other extrinsic evidence is insufficient. *Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *19–22 (citing *Kottwitz v. Colvin*, 114 F. Supp. 3d 145, 150 (S.D.N.Y. 2015), and noting that some editing crossed the line into impermissible re-creating).

Some courts have suggested that summaries of the bills should be provided in an application. *See Norman*, 836 F.2d at 1303; *Zendejas*, 2018 U.S. Dist. Lexis 212062, at *10. However, edited submissions or summaries must be accurate. Finding that using whole-hour increments lead to inaccurate billing records, one court rejected those records saying, "The Court will not credit inaccurate time records." *Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *21–22.

Typically, adequate billing records require that each entry identify the date performed, the individual performing the task, and the hourly rate of the individual or charge for the task; describe the general subject matter of the task; and assign an amount of time to perform the task. *See generally Tech Pharmacy*, 2017 U.S. Dist. Lexis 211061, at *15–16; *Dindinger v. Allsteel, Inc.*, No. 3:11-cv-00126-SMR-CFB, 2016 U.S. Dist. Lexis 179502, at *61 (S.D. Iowa Jan. 4, 2016). As with almost everything in federal court, however, local rules, custom, or practice may require more or less. So check these before preparing or defending a fee application. With respect to individual entries, the courts seek information sufficient to allow them to evaluate the reasonableness not only of that entry but also of the overall fee request. *See generally KeyCorp*, 2017 U.S. Dist. Lexis 21372, at *40; *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970–71 (D.D.C. 2004) ("[S]upporting documentation must be of sufficient detail and probative value to enable a court to determine with a high degree of certainty that such hours were actually and reasonably expended."); *Robinson*, 2018 U.S. Dist. Lexis 181541, at *39. In the U.S. District Court for the District of Arizona, "Local Rule 54.2(e)(3) provides that time entries must record "[t]he time devoted to each individual unrelated task performed on such day[.]" *Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *22 (citing examples of proper time entries).

Regardless of the deficiency, if a court feels that it has adequate information to evaluate reasonableness, the entry will suffice, although the court might compensate by reducing the award by a percentage. But issues with a fee application form include the following:

1. overly redacted entries (*see generally Mitchell v. Chavez*, No. 1:13-cv-01324-DAD-EPG, 2018 U.S. Dist. Lexis 109386, at *22–23 (E.D. Cal. June 29, 2018); *Tech Pharmacy*, 2017 U.S. Dist. Lexis 211061, at *15–16.));
2. vague entries (*see Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *22–24, *26 (citing examples of excessively vague entries); *Washington*, 89 F.3d at 1037–38 (describing the specificity required in time entries));
3. block billing (*see Role Models*, 353 F.3d at 971 (giving examples from the fee application); *KeyCorp*, 2017 U.S. Dist. Lexis 21372, at *40–41 (providing examples and defining the disfavored practice). *See also Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *24–25 (finding billing entries satisfied jurisprudence and local rule)); and
4. billing in increments greater than one-tenth of an hour (*see Ariz. Dream Act Coal.*, 2018 U.S. Dist. Lexis 207625, at *19 (implicitly recognizing the tenth of an hour); *Fero v. Excellus Health Plan, Inc.*, No. 6:15-CV-6569 EAW, 2016 U.S. Dist. Lexis 8523, at *14 (W.D.N.Y. Jan. 25, 2016) (prospectively ordering tenth-of-an-hour increments).

Courts are more forgiving than most clients when it comes to heavily redacted entries, vague entries, and block billing, as is shown in the cited cases. With regard to redaction, it is important to ask how much an applicant truly needs to redact entries, due to how much work-product and strategy needs protecting when the application is filed, given that significant redaction will likely result in a significant percentage reduction that will not be reversed on appeal. Alternatively, consider editing an entry to avoid redaction. If an entry truly requires significant redaction to protect strategy or privileged information, consider simply not submitting the entry. Good billing judgment mandates that you not seek recovery of every last time entry. Conversely, if you are a respondent and there remain any significant redactions, request a significant percentage reduction. Also, given that you can edit, applicants should never have vague entries or block billing. Again, counsel should consider writing off entries that cannot be cleaned up without changing the substantive description. Otherwise the respondent should seek a reduction both for the poor entries and general lack of billing judgment.

What Is Needed to Object to Time Entries

When it comes to objecting to time entries, "the party opposing the fee application must satisfy his obligation to provide specific and reasonably precise objections concerning hours that should be excluded." *Tobinick*, 2018 U.S. Dist. Lexis 198671, at *10 (citing *Barnes*, 168 F.3d at 428). In fact, the respondent should object entry-by-entry as "'the court is not obligated *sua sponte* to sift through fee records searching for vague entries or block billing. It is a common practice for courts to address only those potentially inadequate entries brought to the court's attention.'" *KeyCorp*, 2017 U.S. Dist. Lexis 21372, at *22 (quoting *Hoffman v. L & M Arts*, No. 3:10-cv-953-D, 2015 U.S. Dist. Lexis 85882, 2015 WL 3999171, at *5 (N.D. Tex. July 1, 2015)).

Given this requirement, the respondent must pore over the applicant's billing records with auditor-like attention, line-by-line, making specific objections (*e.g.*, duplicative, attributable solely to a failed claim, block billing). If possible, get the billing records in a native format that will allow you to easily make spreadsheets and put the similarly defective entries into groups. Explain the deficiencies. If the form is improper, be sure to make the point that the form inhibits the court's reasonableness review.

To the extent that proof is necessary, you must supply it. Find published billing guidelines or best billing practices and introduce them to support your objections. Again, consider hiring an auditor or attorney's fees expert to perform the analysis and provide the necessary testimony. Check local rules and research case law for similar cases proving the deficiencies and establishing ranges for percentage reductions. Request a percentage reduction for each deficiency.

When Must Counsel Apply for Appellate Fees

The Federal Rules of Appellate Procedure do not contain a rule regarding submitting appellate fees. However, some circuits have a local rule governing appellate fee applications, such as the Fifth Circuit Local Appellate Rule 47.8. The rule, although relatively sparse, appears to contemplate submission of appellate fees to the appellate court. Apparently, as of March 24, 2017, the Fourth Circuit has no such local appellate rule. *Zoroastrian Ctr. & Darb-E-Mehr Metro. Wash., D.C. v. Rustam Guiv Found.*, 245 F. Supp. 3d 742, 751 (E.D. Va. 2017). Thus, the question becomes whether appellate fees must be part of an applicant's Rule 54(d)(2) application to be filed within 14 days of the judgment. Rule 54(d)(2) does not expressly address this issue. As a practitioner, it is always comforting to read: "Circuit and district courts are not in agreement on whether requests for attorney fees on appeal should be filed in the district court or in the court of appeals." *Id.* at 750 (citing cases requiring submission of or a request for appellate fees at the time of the initial Rule 54(d)(2) application and cases allowing post-appeal submission to the district court and eventually holding that Rule 54(d)(2)(B) does not apply to appellate fees and applicants have a reasonable time after issuance of an appellate opinion to apply for appellate fees in the district court).

When it comes to objecting to time entries, "the party opposing the fee application must satisfy his obligation to provide specific and reasonably precise objections concerning hours that should be excluded."

It should be noted that the Fourth Circuit considered the trial court's judgment on its award of trial attorney's fees and expressly "vacate[d] and remand[ed] the district court's attorneys' fee award for further proceedings in accordance with this opinion." *Id. at* 755. So the issue of attorney's fees, although not necessarily appellate fees,

was back within the district court's jurisdiction. Other cases refusing to award appellate fees after the appeal did not appear to have such a mandate. The *Arizona Dream Act Coalition* decision also recognized that "[t]he case law on this topic is somewhat unsettled." 2018 U.S. Dist. Lexis 207625, at *4.

Seeking appellate fees at the time of trial may seem speculative; however, the federal practice does not allow the prevailing party to seek its appellate fees for the first time on remand from the appellate court. *Id.* at *5 (following a case refusing to allow appellate fee request made for first time in district court after the appeal concluded). To reduce the risk of waiver, you should strongly consider seeking them at trial or in the Rule 54(d)(2) submission. If the district court refuses, you should pray for the relief in your brief and apply again at each level of appeal. The appellate court may make the determination or refer the appellate fee application back to the district court. However, without requesting that it do so, the appellate fee request will likely be deemed to be untimely. *Zoroastrian Ctr.*, 245 F. Supp. 3d at 749–54 (citing cases so holding).

Conclusion

As discussed, there are myriad ways that an attorney's fee claim can go wrong. If you are counsel pursuing an attorney's fee claim, start early. Endeavor to analyze the claim and begin preparing the evidence to support your claim at the beginning of your case. If you are defending against an attorney's fee claim, consistently think about when and how you can gather evidence or information to discredit or reduce a fee claim, such as during written discovery or depositions.

Starting this process early and developing a sound game plan cannot be overemphasized. A large number of cases from each circuit regarding attorney's fee claims deal with issues that could have been avoided had analysis and preparation of the claim garnered the requisite attention early in the matter. And on that point, each circuit has hundreds, if not thousands, of opinions dealing with fee claims and awards. Be sure to devote sufficient time to researching the specific jurisprudence in your circuit, paying close attention to which law (state, federal, or contract interpretation principles) applies to your claim. Even the best evidence-supported attorney's fee claims may fail if they are not presented in accordance with the law of the circuit in which your case is venued and that applies to the category of the claim.