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PROOF OF ATTORNEY'S FEES IN TEXAS*

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* Pursuant to Canon 3(A)(8) of the Texas Code of Judicial Conduct, the matters expressed in this article are neither intended to nor should be construed as a comment on a pending or impending proceeding, nor as a suggestion of a probable decision on any particular case.

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"[T]he time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration."[1]

I. INTRODUCTION

Texas, like most other states, follows the so-called American Rule whereby each party must pay its own attorney's fees. Though no common-law jurisdiction other than the United States and virtually no other industrialized democracy follows this rule,[2] several important considerations are said to support it. The primary justification is that litigants in general, and the poor in particular, might be reluctant to come to court at the risk of having to pay an opponent's fees.[3] Second, as noted in the quotation above, allowing recovery of fees

1. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citing Oelrichs v. Spain, 82 U.S. (15 Wall.) 231 (1872)).

2. Kenneth W. Starr, *The Shifting Panorama of Attorney's Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 189 (1986).

3. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

would mean additional litigation, with the attendant time and expense.[4]

In recent years, the American Rule has been partially repealed by legislation. Literally thousands of federal and state statutes now provide for recovery of fees under certain circumstances.[5] These statutes usually accommodate the primary concern of the American Rule by making fee recovery a one-way street. The party bringing the claim may recover fees if successful, but will not be liable for the other party's fees if unsuccessful. These laws rarely address the second concern, namely, the burdens attendant upon litigating fee awards.

It is the second concern that this paper addresses. The growth in the extent and effect of fee litigation makes these issues of increasing importance. Yet, the rules governing proof of attorney's fees are often complex and confusing. Hundreds of cases address proof of attorney's fees but legal digests usually scatter the cases among the titles devoted to the underlying substantive claims. Frequent legislative changes and anomalies may render prior law of limited value. Courts may or may not apply rules developed under one statute to cases controlled by another and they rarely analyze whether application is proper. In this article, some complexities will be addressed and several suggestions made to simplify proof of attorney's fees in Texas.

II. WHEN ATTORNEY'S FEES ARE RECOVERABLE

Generally, in Texas attorney's fees are recoverable only if a statute specifically provides or the parties expressly contract for such recovery.[6] A complete listing of the statutes providing for recovery of attorney's fees is beyond the scope of this article.[7] However, the vast majority of cases addressing proof of attorney's fees in Texas arise either in contract cases governed by Chapter 38 of the Texas Civil

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4. *Id.*

5. Kenneth W. Starr, *The Shifting Panorama of Attorney's Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 195 n.36 (1986).

6. New Amsterdam Casualty Co. v. Texas Indus., Inc., 414 S.W.2d 914, 915 (Tex. 1967); Mundy v. Knutson Constr. Co., 156 Tex. 211, 214, 294 S.W.2d 371, 373 (1956) (quoting William Cameron & Co. v. American Surety Co., 55 S.W.2d 1032, 1035 (Tex. Comm'n App. 1932, holding approved).

7. WILLIAM DORSANEO, 1A TEXAS LITIGATION GUIDE § 22.200 (1992). In his TEXAS LITIGATION GUIDE, Professor Dorsaneo lists over fifty such provisions. *Id.* Another source sets the total figure at more than 100. Ralph H. Brock, *Statutory Attorney Fees in Texas: 1984 Update*, 47 TEX. BAR J. 752, 754 (1984).

Practice and Remedies Code[8] (Chapter 38), or in deceptive trade practice (DTPA) claims.[9] The rules of proof applicable in Chapter 38 and DTPA cases usually apply in other contexts.[10] Nonetheless, special rules or exceptions may govern other statutory provisions[11] and these exceptions should be researched to supplement the general comments in this article.

Attorney's fees normally are available only to the party asserting a claim, whether breach of contract[12] or violation of the DTPA.[13] However, if a consumer's action is groundless and brought in bad faith or to harass, the DTPA allows the defending party to recover attorney's fees.[14] Also, in contract cases both parties often can assert that the other breached the contract, thus allowing either to recover.[15]

Attorney's fees incurred before filing suit, or even before the opposing party knows of the claim, are recoverable.[16] Fees incurred in proceedings in another court are also recoverable if they relate directly to obtaining recovery on the claim at issue.[17]

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8. TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001-.006 (Vernon 1986).

9. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987).

10. *See, e.g.*, Carlyle Real Estate Ltd. Partnership-X v. Leibman, 782 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1989, no writ) (stating that attorney's fees under turnover statute—TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(e) (Vernon 1986)—governed by Chapter 38 provisions).

11. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.005 (Vernon 1986) (mandating that Chapter 38 and DTPA provisions for fees be liberally construed); *see also* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987) (construing statutes liberally). Other statutory provisions for fees are considered penal in nature, thus requiring strict construction. Knebel v. Capital Nat'l Bank in Austin, 518 S.W.2d 795, 804 (Tex. 1974).

12. American Airlines, Inc. v. Swest, Inc., 707 S.W.2d 545, 547 (Tex. 1986); Pileco, Inc. v. HCI, Inc., 735 S.W.2d 561, 563 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). To the extent a third party beneficiary may bring suit on the contract, the third party may also recover attorney's fees. Dairyland County Mut. Ins. Co. of Tex. v. Childress, 650 S.W.2d 770, 775-76 (Tex. 1983).

13. *See* Ames v. Great Southern Bank, 672 S.W.2d 447, 450-51 (Tex. 1984) (striking defendant's claim for attorney's fees).

14. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987).

15. *See* De La Rosa v. Kaples, 812 S.W.2d 432, 433 (Tex. App.—San Antonio 1991, writ denied) (illustrating that either party can recover attorney's fees). A different rule may apply where one party's claim was undisputed. *See* Davis Masonry, Inc. v. B-F-W Constr. Co., Inc., 639 S.W.2d 448, 448 (Tex. 1982) (per curiam) (allowing only prevailing party to recover attorney's fees); Criton Corp. v. Highlands, Ins. Co., 809 S.W.2d 355, 357-58 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (noting that defendant's general and specific denials and claims for damages constitute claims upon which attorney's fees may be awarded).

16. Williamson v. Tucker, 615 S.W.2d 881, 893 (Tex. App.—Dallas 1981, writ ref'd n.r.e.).

17. *Id.*; *see* Gill Sav. Ass'n v. Chair King, Inc., 797 S.W.2d 31, 32 (Tex. 1990) (related

Attorney's fees generally are available only to a party who is at least partially successful.[18] A claimant does not need a net recovery, as a fee award cannot be defeated by offsets.[19] However, a mere technical breach without any resulting damage may not support a fee award.[20] Equitable relief will support a fee award.[21]

Generally, because attorney's fees are just one element of the total damage incurred as a result of actionable conduct, the fees are an integral part of the underlying claim. Thus, fees must be sought in the suit on the underlying claim or they will be barred under principles of res judicata.[22]

Recovery of attorney's fees under the Declaratory Judgment Act[23] is more broadly available than under other statutes. In such cases, a fee award is completely discretionary.[24] The amount of attorney's fees is an equitable decision for the court, although some courts apparently ask a jury to make an advisory fee determination.[25] The court may award fees to any party, including the party defending against the action,[26] the party who loses,[27] or no one at

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bankruptcy proceeding); Boulware v. Security State Bank of Navasota, 640 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1982, no writ) (related court of claims proceeding).

18. Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 230-31 (Tex. 1990) (requiring success under DTPA as prerequisite); LaFreniere v. Fitzgerald, 669 S.W.2d 117, 119 (Tex. 1984) (ruling under Chapter 38 that party asking for attorney's fees must be partially successful).

19. *See* Matthews v. Candlewood Builders, Inc., 685 S.W.2d 649, 650 (Tex. 1985) (allowing recovery of fees though Chapter 38 claim offset by counterclaim); McKinley v. Drozd, 685 S.W.2d 7, 9 (Tex. 1985) (not requiring net recovery because DTPA and Article 2226 claims offset by counterclaim).

20. Rodgers v. RAB Invs., Ltd., 816 S.W.2d 543, 551 (Tex. App.—Dallas 1991, no writ).

21. Carr v. Austin Forty, 744 S.W.2d 267, 271 (Tex. App.—Austin 1987, writ denied).

22. Fidelity Mut. Life Ins. Co. v. Robert P. Kaminsky, 820 S.W.2d 878, 882 (Tex. App.—Texarkana 1991, n.w.h.); John M. Gillis v. Wilbur, 700 S.W.2d 734, 736-37 (Tex. App.—Dallas 1985, no writ).

23. TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011 (Vernon 1986); *see* Emmco Ins. Co. v. Burrows, 419 S.W.2d 665, 666 (Tex. Civ. App.—Tyler 1967, no writ) (illustrating example of case where attorney's fees were readily available).

24. Oake v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985).

25. Smith v. Shar-Alan Oil Co., 799 S.W.2d 368, 374 (Tex. App.—Waco 1990, writ denied).

26. Duncan v. Pogue, 759 S.W.2d 435, 435-36 (Tex. 1988); Ritchie v. City of Fort Worth, 730 S.W.2d 448, 451 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.). However, as the Act cannot be used merely as a mirror-image counterclaim on a controversy already before the court, attorney's fees cannot be recovered in this situation. John Chezik Buick v. Friendly Chevrolet, 749 S.W.2d 591, 594-95 (Tex. App.—Dallas 1988, writ denied).

27. Tanglewood Homes Ass'n v. Henke, 728 S.W.2d 39, 44-45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); District Judges v. Commissioners Ct. of Collin County, 677 S.W.2d 743, 746 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *but cf.* Galveston County

all.[28] It is not necessary that the case actually go to trial, and fees are recoverable even if the declaratory claim is nonsuited.[29]

III. PRETRIAL PREREQUISITES

There are several prerequisites to proving attorney's fees at trial. Particularly, proof and recovery of attorney's fees may be barred unless there has been a demand, a pleading, and a designation.

A. *Demand*

Both Chapter 38 and the DTPA require that a party plead and prove demand.[30] The pleadings themselves do not constitute demand.[31] Originally, this was because fee statutes requiring demand were strictly construed.[32] Although strict construction often no longer applies, the rule probably remains because without it demand would exist in every case filed, and the requirement would be a nullity.

Under Chapter 38, the demand requirement is almost a nullity anyway. A Chapter 38 demand may be sent as late as thirty days before judgment,[33] though it is unclear what good a demand will do at that

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Comm'rs Ct. v. Lohec, 814 S.W.2d 751, 755 (Tex. App.—Houston [14th Dist.] 1991, no writ) (disallowing attorney's fees award to losing party); Advertising & Policy Comm. of the Avis Rent A Car Sys. v. Avis Rent A Car Sys., 780 S.W.2d 391, 403 (Tex. App.—Houston [14th Dist.] 1989) (denying attorney's fees award to party losing declaratory judgment), *vacated as moot*, 796 S.W.2d 707 (Tex. 1990); City of Houston v. Harris County Outdoor Advertising Ass'n, 732 S.W.2d 42, 56 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (finding abuse of discretion to award party attorney's fees when party loses declaratory judgment action).

28. City of Port Arthur v. International Ass'n of Fire Fighters, Local 397, 807 S.W.2d 894, 901 (Tex. App.—Beaumont 1991, writ denied).

29. Falls County v. Perkins & Cullum, 798 S.W.2d 868, 871 (Tex. App.—Fort Worth 1990, no writ).

30. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2) (Vernon 1986); TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon Supp. 1992); *see* Ellis v. Waldrop, 656 S.W.2d 902, 905 (Tex. 1983) (holding that recovering attorney's fees in contract claim requires pleading and proving presentment).

31. Huff v. Fidelity Union Life Ins. Co., 158 Tex. 433, 443-44, 312 S.W.2d 493, 500 (1958).

32. Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1966).

33. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(3) (Vernon 1986); Dobins v. Redden, 759 S.W.2d 477, 480 (Tex. App.—San Antonio 1988), *aff'd as modified*, 785 S.W.2d 377 (Tex. 1990); Western Cas. & Sur. Co. v. Preis, 695 S.W.2d 579, 589 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Stuckey v. White, 647 S.W.2d 35, 38 (Tex. App.—Houston [1st Dist.] 1982, no writ).

point. No particular form of demand is necessary and any written or oral communication will suffice if it shows that the claimant expects to be paid.[34] The following have been held sufficient to satisfy the demand requirement:

1. The original bill or invoice sent to a buyer;[35]
2. A notation on a check that it is paid under protest;[36]
3. A discovery request such as a request for admission;[37]
4. An oral demand at a deposition;[38]
5. A discussion among the attorneys about the claim;[39]
6. A demand letter that was never received, but was produced during discovery and attached to motions;[40] and
7. A prior lawsuit.[41]

Demand for one claim cannot serve as demand on a different claim.[42] However, citing the wrong theories does not make a demand insufficient if the underlying dispute is clear.[43]

The DTPA demand requirement is slightly more exacting. The DTPA demand must be sent sixty days before filing suit, must be in writing, and must state "in reasonable detail" the nature of the claims, the amount of actual damages, and the attorney's fees

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34. Jones v. Kelley, 614 S.W.2d 95, 100 (Tex. 1981); Criton Corp. v. Highlands Ins. Co., 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

35. De Los Santos v. Southwest Tex. Methodist Hosp., 802 S.W.2d 749, 757 (Tex. App.—San Antonio 1990, no writ); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

36. Tierney v. Lane, Gorman, Trubitt & Co., 664 S.W.2d 840, 843-44 (Tex. App.—Corpus Christi 1984, no writ).

37. Humble Exploration Co. v. Amcap Petroleum Assocs.-1977, 658 S.W.2d 860, 863 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

38. Marifarm Oil & Gas, Inc. v. Westhoff, 802 S.W.2d 123, 127 (Tex. App.—Fort Worth 1991, no writ).

39. Chandler v. Mastercraft Dental Corp. of Tex., 739 S.W.2d 460, 470 (Tex. App.—Fort Worth 1987, writ denied); Plains Ins. Co. v. Evans, 692 S.W.2d 952, 956-57 (Tex. App.—Fort Worth 1985, no writ).

40. Bethel v. Norman Furniture Co., 756 S.W.2d 6, 8 (Tex. App.—Houston [1st Dist.] 1988, no writ).

41. Hudson v. Smith, 391 S.W.2d 441, 451 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); *but cf.* Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 904 (Tex. App.—Austin 1991, no writ) (filing of suit by itself deemed insufficient).

42. High Plains Wire Line Servs. v. Hysell Wire Line Serv., 802 S.W.2d 406, 410 (Tex. App.—Amarillo 1991, no writ); Williams v. Back, 624 S.W.2d 272, 277 (Tex. App.—Austin 1981, no writ).

43. *Adams*, 754 S.W.2d at 719.

sought.[44] However, the demand need not state the particular DTPA section violated[45] nor an exact dollar figure if the amount of the demand is reasonably clear.[46] Further, if the demand is sent after filing suit but before trial, the courts may consider this error as harmless.[47]

The effect of an excessive demand depends upon the statute involved. Under Chapter 38, a demand that is unreasonably excessive will be held improper and attorney's fees will be disallowed.[48] Although a demand greater than the eventual judgment is some evidence of excessiveness, this alone will not make the demand improper.[49] However, a demand exceeding a liquidated claim and actions showing that tender of the liquidated amount is unacceptable will bar recovery.[50] Failure to credit an unrelated claim does not make a demand excessive.[51] Under the DTPA, an excessive demand does not create any bar to recovery. However, if the party receiving the demand makes a settlement offer within sixty days and the offer is substantially the same as the actual damages awarded at trial, the claimant's recovery will be limited to the amount in the settlement offer.[52]

The effect of failing to plead and prove demand also depends upon the statute involved. Under Chapter 38, such failure bars recovery of attorney's fees but does not bar recovery of any underlying award on the contract.[53] Under the DTPA, the only sanction generally entered

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44. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon Supp. 1992); Hollingsworth Roofing Co. v. Morrison, 668 S.W.2d 872, 875 (Tex. App.—Fort Worth 1984, no writ).

45. Barnard v. Mecom, 650 S.W.2d 123, 127 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

46. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 137 (Tex. 1988) (holding notice given was sufficient to meet requirements of DTPA).

47. Star-Tel, Inc. v. Nacogdoches Telecommunications, Inc., 755 S.W.2d 146, 149 (Tex. App.—Houston [1st Dist.] 1988, no writ).

48. Findlay v. Cave, 611 S.W.2d 57, 58 (Tex. 1981).

49. *Id.*

50. *Id.*; Collingsworth v. King, 283 S.W.2d 30, 33 (Tex. 1955); Strickland v. Coleman, 824 S.W.2d 188, 193 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

51. Myers v. Ginsburg, 735 S.W.2d 600, 605-06 (Tex. App.—Dallas 1987, no writ).

52. TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon Supp. 1992).

53. Texas Am. Corp. v. Woodbridge Joint Venture, 809 S.W.2d 299, 304-05 (Tex. App.—Fort Worth 1991, writ denied); Mendleski v. Silvertooth, 798 S.W.2d 30, 32 (Tex. App.—Corpus Christi 1990, no writ); Boy Scouts of Am. v. Responsive Terminal Sys., Inc., 790 S.W.2d 738, 749 (Tex. App.—Dallas 1990, writ denied); Shearer v. Allied Live Oak Bank, 758 S.W.2d 940, 946 (Tex. App.—Corpus Christi 1988, writ denied); Wilson v. Ferguson, 747 S.W.2d 499, 504 (Tex. App.—Tyler 1988, writ denied).

for failing to send notice is abatement to allow demand.[54] Thus, even if the DTPA case has already been tried, absence of demand requires remand to the trial court for demand to be sent and then the case retried.[55] If after abatement the claimant still refuses to give proper notice, then the claim may be dismissed without prejudice.[56]

Under both statutes, failure to object waives the requirement that demand be pled and proved.[57] Generally, the pleading requirement is waived absent a special exception or plea in abatement.[58] The proof requirement may be waived if: (1) the answer does not specifically deny demand after the claimant pled demand;[59] (2) there is no objection to the jury question on fees;[60] or (3) there is no objection to omission of a jury question concerning demand.[61]

As the above shows, the usefulness of the demand requirement is far outweighed by the litigation it generates. If the only purpose of requiring demand is to encourage settlement, it seems ill-suited for that purpose, especially in Chapter 38 demands which may be sent at

54. Hash v. Hines, 796 S.W.2d 312, 314-15 (Tex. App.—Amarillo 1990, no writ); HOW Ins. Co. v. Patriot Fin. Servs. of Tex., 786 S.W.2d 533, 538 (Tex. App.—Austin 1990, writ denied); The Moving Co. v. Whitten, 717 S.W.2d 117, 123-24 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); Sunshine Datsun, Inc. v. Ramsey, 680 S.W.2d 652, 654-55 (Tex. App.—Amarillo 1984, no writ); *but cf. Hollingsworth Roofing Co.*, 668 S.W.2d at 875 (barring treble damages).

55. *Hash*, 796 S.W.2d at 314-15; *HOW Ins. Co.*, 786 S.W.2d at 538.

56. Miller v. Kossey, 802 S.W.2d 873, 876-77 (Tex. App.—Amarillo 1991, writ denied).

57. Pool Co. v. Salt Grass Exploration, Inc., 681 S.W.2d 216, 219 (Tex. App.—Houston [1st Dist.] 1984, no writ).

58. *Id.*; TEX. R. CIV. P. 90; Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 496 (Tex. 1988); *Mendleski*, 798 S.W.2d at 32; Silva v. Porowski, 695 S.W.2d 766, 768 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

59. TEX. R. CIV. P. 54; White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture, 798 S.W.2d 805, 816-17 (Tex. App.—Beaumont 1990, writ dism'd); LaChalet Int'l v. Nowik, 787 S.W.2d 101, 105 (Tex. App.—Dallas 1990, no writ); Plaza Nat'l Bank v. Walker, 767 S.W.2d 276, 278 (Tex. App.—Beaumont 1989, writ denied); *see* Investors, Inc. v. Hadley, 738 S.W.2d 737, 741 (Tex. App.—Corpus Christi 1983, writ denied) (holding that proof needed regardless of pleadings); *cf.* All Valley Acceptance Co. v. Durfey, 800 S.W.2d 672, 676 (Tex. App.—Austin 1990, writ denied) (stating that general denial puts demand in issue).

60. Arch Constr., Inc. v. Tyburec, 730 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Silva*, 695 S.W.2d at 768.

61. Cielo Dorado Dev. v. Certainteed Corp., 744 S.W.2d 10, 11 (Tex. 1988) (determining that where there was some evidence of demand, issue deemed to support judgment); *Adams*, 754 S.W.2d at 719; *but cf. Jim Howe Homes, Inc.*, 818 S.W.2d at 904 (following judgment n.o.v. as proper means of preserving error); Automobile Ins. Co. of Hartford, Conn. v. Davila, 805 S.W.2d 897, 902 (Tex. App.—Corpus Christi 1991, writ denied) (holding that despite failure to object to charge, if no evidence of demand, issue could not be deemed to support judgment).

the last minute. Referral to alternative dispute resolution seems much more likely to encourage settlement than a demand letter drafted for maximum impact on the opposing party or a jury. If the purpose is to ascertain the exact amount and nature of a party's claim, special exceptions and discovery are much better suited for this purpose. The DTPA's mandatory abatement for demand is especially wasteful, requiring delay or even retrial although all the players are familiar with the claim. There is no reason for a mandatory last-minute continuance when there is no prejudice. Given the ineffectiveness of the demand requirements and the potential for wasteful appeals and retrials that they create, the legislature should consider whether this requirement perhaps does more harm than good.

However, so long as demand letters are required, they should be drafted carefully. No threats are necessary; a polite request is sufficient.[62] Demands with a bullying tone may offend jurors when introduced at trial. If the claims made in the demand prove unfounded, or the focus of the suit shifts before trial to different claims, a party's credibility and motives can be questioned. Similarly, claims stated as positive facts that are ascertainable only from sources obtained later may indicate that the claimant jumped to a conclusion and then looked for supporting facts.

B. *Pleading*

An award of attorney's fees must be supported by proper pleading.[63] The law requires no particular form and so mention of attorney's fees, even in the prayer of the complaint, will support an award for both trial and appellate work.[64] Courts have upheld attorney's fee

62. *See* Carr v. Austin Forty, 744 S.W.2d 267, 271 (Tex. App.—Austin 1987, writ denied) (stating polite request for demand is sufficient); North Am. Van Lines of Tex., Inc. v. Bauerle, 678 S.W.2d 229, 235 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (stating threat not required because purpose of notice is to inform of complaint and allow possible settlement).

63. *See* O'Connell v. Hitt, 730 S.W.2d 16, 18 (Tex. App.—Corpus Christi 1987, no writ) (holding that facts for particular relief sought must be pleas); Ortiz v. O. J. Beck & Sons, 611 S.W.2d 860, 866 (Tex. Civ. App.—Corpus Christi 1980, no writ) (following TEX. R. CIV. P. 227 requiring written pleading requesting fees).

64. Bullock v. Regular Veterans Ass'n of the U.S., 806 S.W.2d 311, 314 (Tex. App.—Austin 1991, n.w.h.); Bethel v. Norman Furniture Co., 756 S.W.2d 6, 8-9 (Tex. App.—Houston [1st Dist.] 1988, no writ); Ledisco Fin. Servs., Inc. v. Viracola, 533 S.W.2d 951, 958 (Tex. Civ. App.—Texarkana 1976, no writ); *but cf.* Rio Fresh, Inc. v. Consolidated Produce Brokers, 710 S.W.2d 174, 176 (Tex. App.—Corpus Christi 1986, no writ) (ruling that judge abused discretion in awarding fees where no evidence of request for fees).

awards despite pleadings based on the wrong ground or statute.[65] Courts have even awarded fees based on pleadings that make no mention of "attorney's fees" but merely allege an unpaid demand.[66] However, a pleading for "costs" is insufficient to support an award of attorney's fees.[67]

If a pleading requests fees when they are not recoverable, the opposing party should make a special exception to eliminate such claims.[68] If there is no pleading for fees, the opposing party must object to any jury question regarding fees or the pleading defect is waived.[69] Even if the opposing party does object, the claimant still can request a trial amendment if there is some evidence to support a fee award.[70]

Usually, the pleadings should not request a specific dollar figure, as a reasonable fee can rarely be determined with accuracy until trial. Still, a claimant may recover more than a specifically pled amount by requesting a trial amendment to conform the pleadings to the evidence.[71]

C. *Designation*

Finally, the same discovery and designation rules applicable to all

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65. *See* Canales v. Zapatero, 773 S.W.2d 659, 661 (Tex. App.—San Antonio 1989, writ denied) (allowing attorney's fees under Declaratory Judgment Act); Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 574-75 (Tex. App.—Houston [14th Dist.] 1984), *aff'd in part and rev'd in part on other grounds*, 704 S.W.2d 742 (Tex. 1986) (holding attorney's fees precluded only when plaintiff has other access to attorney's fees); Porter v. Irvine, 658 S.W.2d 711, 715 (Tex. App.—Houston [1st Dist.] 1983, no writ) (allowing attorney's fees under general pleading).

66. *See* Jones v. Kelley, 614 S.W.2d 95, 100 (Tex. 1981) (allowing attorney's fees on pleading that land was demanded but not conveyed); Stuckey v. White, 647 S.W.2d 35, 38 (Tex. App.—Houston [1st Dist.] 1982, no writ) (citing *Jones*, 614 S.W.2d at 100).

67. *See* Birdwell v. Birdwell, 819 S.W.2d 223, 229 (Tex. App.—Fort Worth 1991, no writ) (finding pleading insufficient to raise issue of attorney's fees for summary judgment purposes).

68. Stone v. Lawyers Title Ins. Corp., 537 S.W.2d 55, 62-64 (Tex. Civ. App.—Corpus Christi 1976), *rev'd in part on other grounds*, 554 S.W.2d 183 (Tex. 1977).

69. Olivares v. Porter Poultry & Egg Co., 523 S.W.2d 726, 730 (Tex. Civ. App.—San Antonio 1975, no writ).

70. *Ortiz*, 611 S.W.2d at 866.

71. Mr. W. Fireworks, Inc. v. Mitchell, 622 S.W.2d 576, 577 (Tex. 1981); Rotello v. Ring Around Prods., Inc., 614 S.W.2d 455, 463 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *see* Greehalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 939-41 (Tex. 1990) (holding that pleadings may be amended prior to judgment). Even if there is no trial amendment, the limitation to the amount pled is waived if there is no objection. Siegler v. Williams, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ).

expert testimony[72] govern proof of attorney's fees. Because the reasonableness of attorney's fees is not a matter within the common knowledge of most jurors, expert testimony is necessary.[73] A party receiving an appropriate discovery request must designate the attorney(s) who will testify concerning fees. Without this designation, expert testimony will be barred[74] or any fee award based on such testimony will be disallowed.[75]

IV. EVIDENCE

A. *Plaintiff's Case*

Generally, an attorney's fee award is a fact issue that must be supported by competent evidence.[76] The question to be determined is the reasonable fee for the case. The amount of attorney's fees actually paid, while relevant, is neither required nor sufficient. Proof of the amount of fees paid does not establish that such amount is either reasonable or necessary.[77] Similarly, proof of the agreed-upon contingency fee does not establish that this amount is either reasonable or necessary.[78] Conversely, proof of appearing pro se does not bar recovery.[79]

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72. TEX. R. CIV. P. 166b(2)(e), (6)(b).

73. *See* Thompson v. A.G. Nash & Co., 704 S.W.2d 822, 824 (Tex. App.—Tyler 1985, no writ) (refusing award of attorney's fees due to lack of supporting expert testimony).

74. Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671-72 (Tex. 1990) (per curiam); E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987); GATX Tank Erection Corp. v. Tesoro Petroleum Corp., 693 S.W.2d 617, 620 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

75. *Sharp*, 784 S.W.2d at 672; *E.F. Hutton & Co.*, 741 S.W.2d at 364; Nelson v. Schanzer, 788 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *but cf.* Gonzalez v. Stevenson, 791 S.W.2d 250, 254 (Tex. App.—Corpus Christi 1991, no writ) (remanding for new trial rather than reversing award).

76. International Sec. Life Ins. Co. v. Spray, 468 S.W.2d 347, 349 (Tex. 1971); Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1966).

77. Hill v. Pierce, 729 S.W.2d 340, 342 (Tex. App.—El Paso 1987, writ ref'd n.r.e.); Baja Energy v. Ball, 669 S.W.2d 836, 840 (Tex. App.—Eastland 1984, no writ); Morgan v. Morgan, 657 S.W.2d 484, 492 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd).

78. Fairmont Homes, Inc. v. Upchurch, 704 S.W.2d 521, 526 (Tex. App.—Houston [14th Dist.]), *modified on other grounds*, 711 S.W.2d 618 (Tex. 1986) (per curiam); King v. Ladd, 624 S.W.2d 195, 198 (Tex. Civ. App.—El Paso 1981, no writ).

79. *See* Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 400 (5th Cir. 1989) (awarding fees to attorney appearing pro se); Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc., 754 S.W.2d 764, 766-67 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (allowing fees for in-house counsel). A person or corporation represented pro se cannot recover fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(1) (Vernon 1986) (requiring representa-

Of course, no evidence is necessary if the parties can stipulate to a reasonable fee. For claimants, a stipulation removes any uncertainties of proof and avoids possible jury prejudice about the size of the fee. In return for the stipulation, the defendant may be able to negotiate a fee figure lower than the evidence might otherwise support. However, any stipulation should be drafted carefully to avoid unintended effects. For example, a party who stipulates to a reasonable fee cannot later complain that the amount includes fees that are not recoverable.[80] A party who stipulates that the judge can set a fee cannot later complain if the judge awards nothing.[81]

If there is no stipulation, then evidence must be introduced to establish the attorney's fees. The pattern for proving attorney's fees at trial usually follows that used for expert testimony in general: (1) present the expert's qualifications, and then (2) elicit the expert's opinion, and (3) her support for the opinion.

1. Qualifications

The expertise of a witness on attorney's fees stems from both legal training and experience with the type of case and fees at issue. Although a nonlawyer may have extensive knowledge of customary fees, only an attorney is qualified to assess the legal factors involved in setting a reasonable fee.[82] Familiarity with local fees may be advisable but should not be required. Licensed attorneys may practice anywhere in the state and there is no locality rule limiting attorney's fees to those charged in the vicinity.[83] A new attorney without extensive personal knowledge of fee charges can testify concerning a reasonable fee based on hearsay, pursuant to Rule 703 of the Texas Rules of Civil Evidence.[84] The fee need not be personalized to the experience of the

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tion by attorney to recover fees); Barrett v. Bureau of Customs, 651 F.2d 1087, 1090 (5th Cir. 1981) (concluding pro se litigant not entitled to recover fees).

80. Hauglum v. Durst, 769 S.W.2d 646, 651-52 (Tex. App.—Corpus Christi 1989, no writ).

81. American Bank of Waco v. Waco Airmotive, Inc., 818 S.W.2d 163, 178 (Tex. App.—Waco 1991, writ denied).

82. *But see* Austin Area Teachers Fed. Credit Union v. First City Bank, 825 S.W.2d 795, 801 (Tex. App.—Austin 1992, writ denied) (recognizing that testimony by non-attorney considered, at least where court could also take judicial notice of reasonable fees).

83. *See* Brazos County Water Control & Improvement Dist. v. Salvaggio, 698 S.W.2d 173, 178 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (holding that trier of fact should consider amount charged by other attorneys).

84. Liptak v. Pensabene, 736 S.W.2d 953, 957-58 (Tex. App.—Tyler 1987, no writ).

particular attorney involved although this is one factor in setting the amount.[85]

A party's trial attorney is qualified to testify on attorney's fees because he has personal knowledge of the work on the case.[86] If the expert witness is someone other than trial counsel, the witness should establish what depositions, pleadings, time sheets, billing summaries, conversations with counsel, or other matters the witness reviewed to establish a foundation for the expert's opinions.[87] Again, under Rule 703 the opinion is admissible even if based totally on hearsay.[88]

2. Opinion

Generally, the expert witness should state an opinion as to a "reasonable and necessary" attorney's fee on the case. Many statutes contain this language[89] and the courts recognize it as "a shorthand version" indicating all the factors that should be considered by the trier of fact.[90] Failure to introduce this proof often bars recovery of fees.[91] Strictly speaking, however, proof of a "reasonable and necessary" fee is not required by all statutes. For example, Chapter 38 does not expressly require proof that fees are "necessary,"[92] though the concept may be implied.[93] Further, Chapter 38 provides a rebut-

85. City of Amarillo v. Langley, 651 S.W.2d 906, 916 (Tex. App.—Amarillo 1983, no writ).

86. *See* Goad v. Goad, 768 S.W.2d 356, 359 (Tex. App.—Texarkana 1989, writ denied) (reasoning that attorney in best position to know fees and expenses); Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1986, no writ) (holding affidavit by attorney considered expert testimony).

87. *See Langley*, 651 S.W.2d at 915-16 (discussing computation of fees by non-trial attorney as expert).

88. *Liptak*, 736 S.W.2d at 957-58.

89. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986).

90. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991).

91. *See* American Commercial Colleges, Inc. v. Davis, 821 S.W.2d 450, 455 (Tex. App.—Eastland 1991, n.w.h.) (requiring evidence to support award of fees); Bolton v. Alvarado, 762 S.W.2d 215, 217 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (denying award for failure to prove fees).

92. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986); Murrco Agency, Inc. v. Ryan, 800 S.W.2d 600, 606 (Tex. App.—Dallas 1990, no writ) (allowing recovery of attorney's fees); Prairie Valley Indep. Sch. Dist. v. Sawyer, 665 S.W.2d 606, 611 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (finding proof of reasonableness sufficient).

93. *See* Gill Sav. Ass'n v. Chair King, Inc., 797 S.W.2d 31, 32 (Tex. 1990) (explaining requirement for reasonableness, not proof of necessity).

table presumption that customary fees are "reasonable."[94] Failure to use the magic words may not be fatal if the underlying evidence establishes that the award is reasonable and necessary.[95] As with all other forms of testimony, the attorney's testimony must be under oath, unless waived. An unsworn assertion is no evidence.[96]

The standard formula for proof is to offer testimony concerning (1) the hours of work done on the case, (2) the hourly rates of the attorneys doing the work, and (3) the total fee resulting from multiplying these figures. The resulting number is called the "lodestar" in many federal and state courts,[97] although there appears to be no reported Texas case using the term.[98] However, many Texas cases hold that proof of these elements alone is sufficient to support a fee award.[99]

Under Texas law, a plaintiff may prove that a contingency fee is a reasonable attorney's fee.[100] Several older cases have held that proof

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94. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 1986); City of Houston v. Blackbird, 658 S.W.2d 269, 271 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd). Such presumption does not apply to DTPA or other claims outside Chapter 38. *See* Hill v. Pierce, 729 S.W.2d 340, 342 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (denying attorney's fees in DTPA case); Fairmont Homes, Inc. v. Upchurch, 704 S.W.2d 521, 526 (Tex. App.—Houston [14th Dist.]) (illustrating denial of fees based on contingency), *modified on other grounds*, 711 S.W.2d 618 (Tex. 1986) (per curiam).

95. Smith v. Smith, 757 S.W.2d 423, 426-27 (Tex. App.—Dallas 1988, writ denied).

96. Bloom v. Bloom, 767 S.W.2d 463, 470-71 (Tex. App.—San Antonio 1989, writ denied).

97. *See, e.g.*, Graves v. Barnes, 700 F.2d 220, 222 (5th Cir. 1983) (focusing on method adopted in 5th Circuit); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166-69 (3d Cir. 1973) (noting factors to be considered in awarding fees); *In re* Estate of Platt, 586 So. 2d 328, 334 (Fla. 1991) (noting that "lodestar" method uses criteria set out in Code of Professional Responsibility); Vogt v. Seattle-First Nat'l Bank, 817 P.2d 1364, 1367-68 (Wash. 1991) (defining lodestar as hourly rate multiplied by hours expended).

98. *But see* City of Dallas v. Arnett, 762 S.W.2d 942, 956 (Tex. App.—Dallas 1988, writ denied) (quoting witness using term "lodestar").

99. Briercroft Serv. Corp. v. Perez, 820 S.W.2d 813, 817 (Tex. App.—Corpus Christi 1990, n.w.h.); Carr v. Austin Forty, 744 S.W.2d 267, 270-71 (Tex. App.—Austin 1987, writ denied); Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 807 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); Graves v. Sommerfeld, 618 S.W.2d 562, 954-56 (Tex. App.—Waco 1981, no writ); Volkswagen of Am., Inc. v. Licht, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ).

100. General Life & Accident Ins. Co. v. Higginbotham, 817 S.W.2d 830, 833 (Tex. App.—Fort Worth 1991, writ denied); March v. Thiery, 729 S.W.2d 889, 897 (Tex. App.—Corpus Christi 1987, no writ); Liberty Mut. Ins. Co. v. Allen, 669 S.W.2d 750, 755 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Texas Farmers Ins. Co. v. Hernandez, 649 S.W.2d 121, 124-26 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

of a reasonable contingency percentage is not evidence of a reasonable fee.[101] However, these holdings appear to have relied primarily upon former Texas Insurance Code Section 3.62; however, this section was repealed in 1991 and no longer appears to be controlling.[102] Nonetheless, some courts prefer the "lodestar" format,[103] so the better practice is to offer testimony as to both a lodestar amount and a contingency fee if applicable.

3. Support

The attorney's fee expert should present reasons supporting a stated opinion. While an expert's opinion alone may support an attorney's fee award,[104] it may be held factually insufficient without some evidence of its basis.[105] Additionally, if the expert's opinion is not persuasive, the trier of fact may award a lesser amount even if the expert's testimony is uncontradicted.[106]

The reasons cited by the expert should come from the list of legal factors that may be considered in setting a reasonable fee. Texas cases and the Disciplinary Rule of Professional Conduct list the following factors:

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101. Group Life & Health Ins. Co. v. Turner, 620 S.W.2d 670, 675 (Tex. Civ. App.—Dallas 1981, no writ); Prudential Ins. Co. of Am. v. Uribe, 595 S.W.2d 554, 570 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); Smith v. Davis, 453 S.W.2d 340, 347 (Tex. App.—Fort Worth 1970, writ ref'd n.r.e.).

102. *See* Texas Gen. Indem. Co. v. Speakman, 736 S.W.2d 874, 885 (Tex. App.—Dallas 1987, no writ) (indicating shift in law).

103. Higgins v. Smith, 722 S.W.2d 825, 828 (Tex. App.—Houston [14th Dist.] 1987, no writ).

104. *See* Great State Petroleum v. Arrow Rig Serv., 706 S.W.2d 803, 811-12 (Tex. App.—Fort Worth), *modified*, 714 S.W.2d 429 (Tex. 1986); Industrial Broadcasting Co. v. Broadcasting Equip. Sales Co., 543 S.W.2d 674, 677 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.).

105. Smith v. Smith, 757 S.W.2d 423, 525-26 (Tex. App.—Dallas 1988, writ denied); *aff'd*, 549 S.W.2d 383, 384 (Tex. 1977) ; Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); Saums v. Saums, 610 S.W.2d 242, 243-44 (Tex. Civ. App.—El Paso 1980, writ dism'd); Meshwert v. Meshwert, 543 S.W.2d 877, 879 (Tex. Civ. App.—Beaumont 1976) (mere opinion is some evidence, but whether it is insufficient evidence is for lower court), *aff'd*, 549 S.W.2d 383 (Tex. 1977).

106. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990); CPS Int'l, Inc. v. Harris & Westmoreland, 784 S.W.2d 538, 544 (Tex. App.—Texarkana 1990, no writ); Martini v. Tatum, 776 S.W.2d 666, 668-69 (Tex. App.—Amarillo 1989, writ denied); First Fed. Sav. & Loan Ass'n v. Ritenour, 704 S.W.2d 895, 902 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); Bering Int'l, Inc. v. Greater Houston Bank, 662 S.W.2d 642, 653 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); Bethel v. Butler Drilling Co., 635 S.W.2d 834, 839-42 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

1. Time and labor required;
2. Novelty and difficulty of the questions involved;
3. Skill requisite to do the work properly;
4. Preclusion of other employment;
5. Fee customarily charged;
6. Whether the fee is fixed or contingent;
7. Amount at issue and results obtained;
8. Time limits imposed by the client or circumstances;
9. Nature and length of relationship with the client; and
10. Experience, reputation, and ability of the lawyer(s) doing the work.[107]

While each of these factors may be considered, lack of evidence on any one factor will not defeat the claim for attorney's fees.[108] Further, the form of proof on each factor is flexible. For example, the first factor may be shown either by proof of the number of hours worked or by detailed proof of the type of work performed.[109] However, if the claim seeks a fee higher than a lodestar figure—factor 1 multiplied by factor 4—there should be evidence establishing why the other factors justify a higher award.[110] Otherwise the court may limit the award to the lodestar amount.[111]

While one factor to be considered is the result obtained at trial, an award of attorney's fees need not correspond directly to the verdict. In fact, it may far exceed all other damages.[112] For example, in *Flint*

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107. TEX. GOV'T CODE ANN. § 1.04 (Vernon Supp. 1992); Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 n.3 (Tex. 1991) (Gonzalez, J., concurring) (mentioning all factors except 4 and 9); Rosas v. Bursey, 724 S.W.2d 402, 410-11 (Tex. App.—Fort Worth 1986, no writ) (mentioning factors 1, 2, 3, 7, and 10); First Nat'l Bank of Mercedes v. La Sara Grain Co., 676 S.W.2d 183, 184-85 (Tex. App.—Corpus Christi 1984, no writ) (discussing factors which determine reasonableness); Knopf v. Standard Fixtures Co., Inc., 581 S.W.2d 504, 507 (Tex. Civ. App.—Fort Worth 1979, no writ); Hemphill v. S & Q Clothiers, 579 S.W.2d 564, 569 (Tex. Civ. App.—Fort Worth 1979, no writ); Braswell v. Braswell, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1972, writ dism'd) (mentioning factors 1, 2, 4, 6, 7, and 9); *cf. Ragsdale*, 801 S.W.2d at 881 (setting out somewhat different list of factors).

108. City of Amarillo v. Langley, 651 S.W.2d 906, 915-16 (Tex. App.—Amarillo 1983, no writ).

109. Hugh Wood Ford, Inc. v. Galloway, 830 S.W.2d 296, 298 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.); Brighton Homes, Inc. v. McAdams, 737 S.W.2d 340, 344 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); Maintain, Inc. v. Maxson-Mahoney-Turner, Inc. 698 S.W.2d 469, 473 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

110. Tuthill v. Southwestern Pub. Serv. Co., 614 S.W.2d 205, 212-16 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

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

112. *See, e.g.*, Hruska v. First State Bank of Deanville, 747 S.W.2d 783, 786 (Tex. 1988)

& Ass'n v. Intercontinental Pipe & Steel,[113] the Dallas Court of Appeals held that a $160,000 fee was reasonable, although the plaintiff recovered only $24,000 in damages. Judge Hecht pointed out that the defendants had counterclaimed for $525,000, and "having picked the game and set the stakes, cannot now complain of the size of the pot."[114] However, the courts will reduce an excessive fee award by remittitur. One of the most frequent grounds for doing so is an award of fees that is substantially higher than the verdict.[115]

Additional evidence is necessary if the fee claim includes work done by paralegals or legal assistants. Such fees are recoverable along with attorney's fees only if there is proof of the following:

1. The paralegal's qualifications to perform substantive legal work;
2. The direction and supervision of the paralegal's work by an attorney;
3. The nature of the work done;
4. The hourly rate charged for the legal assistant; and
5. The number of hours worked.[116]

Without such proof, paralegal fees are not recoverable.[117] Of course, these requirements can be waived if there are no objections to the evidence or no request for a limiting jury instruction.[118]

Billing and time records may be introduced as business records in support of an attorney's fees claim.[119] Yet, there are several good reasons for not introducing these records. In the first place, the effort is

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(finding $12,500 fee reasonable to recover $2,900 damages); Trice v. State, 712 S.W.2d 842, 851 (Tex. App.—Waco 1986, writ ref'd n.r.e.) (determining $46,000 fee reasonable to award in winning $79.25 and injunction); Stuckey v. White, 647 S.W.2d 35, 38-39 (Tex. App.—Houston [1st Dist.] 1982, no writ) (awarding $33,000 fee to recover $14,399).

113. 739 S.W.2d 622 (Tex. App.—Dallas 1987, writ denied).

114. *Id.* at 626.

115. *See* Jack Roach Ford v. De Urdanavia, 659 S.W.2d 725, 730 (Tex. App.—Houston [14th Dist.] 1983, no writ) (finding $28,500 fee excessive by $8,500 where recovery equaled $500); Wuagneux Builders, Inc. v. Candlewood Builders, Inc., 651 S.W.2d 919, 923 (Tex. App.—Fort Worth 1983, no writ) (stating that $15,500 fee excessive where recovery only $5,635); Allied Fin. Co. v. Garza, 626 S.W.2d 120, 126-28 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.) ($14,768 fee excessive by $7,000 where recovery only $682.34).

116. Gill Sav. Ass'n v. International Supply Co., 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied).

117. Moody v. EMC Servs., Inc., 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

118. Multi-Moto Corp. v. ITT Commercial Fin. Corp., 806 S.W.2d 560, 571 (Tex. App.—Dallas 1990, writ denied).

119. *See* TEX. R. CIV. EVID. 803(6) (stating criteria for introducing business records).

unnecessary; billing records do not have to be introduced to support a fee recovery.[120] An expert witness may testify from a review or summary of the records without introducing the records at trial.[121] Additionally, the billing records often contain either privileged information or specific items that will provide ammunition for cross-examination. Further, if the bills are admitted, the judgment may be limited to the amount indicated by the bills unless any difference is explained.[122]

B. *Defendant's Case*

Parties defending against attorney's fee claims often hesitate to introduce evidence concerning a reasonable fee for the claimant, fearing that a jury might interpret these actions as an admission of the truth of the underlying claim. Nevertheless, there are several valid reasons for offering defense evidence. Judges and jurors may be more willing to cut attorney's fees if they have some evidentiary basis for doing so. If attorney's fees are not recoverable on all claims, the defendant must introduce evidence concerning the unrecoverable fees[123] and must petition to reduce any award accordingly.[124] An award of little or no attorney's fees will be reversed for legal or factual insufficiency unless there is evidence that the award is reasonable.[125]

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120. *See* Murrco Agency, Inc. v. Ryan, 800 S.W.2d 600, 606 (Tex. App.—Dallas 1990, no writ) (finding that expert testimony could constitute necessary staff overhead).

121. *Id.*; Liptak v. Pensabene, 736 S.W.2d 953, 957-58 (Tex. App.—Tyler 1987, no writ); Rotello v. Ring Around Prods., Inc., 614 S.W.2d 455, 462-63 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

122. American Baler Co. v. SRS Sys., 748 S.W.2d 243, 260 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

123. *See, e.g.*, Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 12 (Tex. 1991); Moody v. EMC Servs., Inc., 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

124. *See, e.g.*, Coleman v. Rotana, 778 S.W.2d 867, 874 (Tex. App.—Dallas 1989, writ denied); Plains Ins. Co. v. Evans, 692 S.W.2d 952, 957 (Tex. App.—Fort Worth 1985, no writ).

125. *See* Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990) (supporting evidence should be free of contradictions); Satellite Earth Stations East, Inc. v. Davis, 756 S.W.2d 385, 387 (Tex. App.—Eastland 1988, writ denied) (determining that jury decides reasonable fees); Jess v. Libson, 742 S.W.2d 90, 92 (Tex. App.—Austin 1987, no writ) (remanding after jury awarded $1.00 against great weight of contradictory evidence); Great State Petroleum v. Arrow Rig Serv., 706 S.W.2d 803, 811-12 (Tex. App.—Fort Worth) (upholding jury award due to expert's testimony), *modified*, 714 S.W.2d 429 (Tex. 1986); Ambox, Inc. v. Stewart & Stevenson Servs., Inc., 518 S.W.2d 428, 433 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (remanding because great weight of evidence against awarding nominal damages); *cf.* Tarleton State Univ. v. K.A. Sparks Contractor, Inc., 695 S.W.2d 362, 366 (Tex. App.—Waco 1985, writ ref'd n.r.e.) (sustaining $0 award against no evidence point because some evidence that $12,000 requested was excessive).

The evidence to be introduced by the party potentially liable for attorney's fees generally follows the same rules applicable to the claimant. The Disciplinary Rule factors for setting a reasonable fee may be used to suggest a reduced fee.[126] For example, a fee may be cut based upon evidence that the case was overprepared, overtried, or overbriefed.[127] If the claimant's counsel has argued throughout trial that the issues in the case are clear, the defense can argue that the fee award should be small because the case involved no difficult questions. Inflation of the plaintiff's underlying claim at trial is likely to call for a limited fee.

Evidence that the attorney's work was poor or that excessive work was necessary because of discovery abuse may be admissible.[128] It is unclear how far a party can go in presenting evidence about pretrial discovery disputes. For example, although proof that the court has struck certain claims is normally inadmissible,[129] it is relevant if the fee award sought includes work on such claims. A case by case determination probably must be made as to whether the probative value of such evidence is substantially outweighed by the prejudice involved.[130]

To a jury member, the skill necessary to represent one of the parties deserves no more than the wages paid to a teacher or salesperson. Few jurors make anywhere near the $100 to $200 per hour often claimed as reasonable fees. They may be sympathetic to testimony that the attorney deserves much less than the customary hourly rate. Defense evidence that a claimant's fee claim is inflated may fit nicely with a general defensive position that all claims in the case are exaggerated.

Evidence regarding the claimant's time sheets and bills should be used only if the propositions they support were established during

126. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1980) (listing factors for determining fee).

127. *See, e.g.*, Cohen v. Sims, 830 S.W.2d 285, 290 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.) (stating total number of hours unreasonable due to lack of extenuating circumstances); Allied Fin. Co. v. Garza, 626 S.W.2d 120, 127 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.) (reasoning complexities resolved in first appeal should not increase attorney's fees calculated on remand).

128. CPS Int'l, Inc. v. Harris & Westmoreland, 784 S.W.2d 538, 544 (Tex. App.—Texarkana 1990, no writ).

129. *See* Haynes v. State, 727 S.W.2d 294, 297 (Tex. App.—Houston [1st Dist.] 1987, no pet.) (providing that collateral evidence may be excluded).

130. TEX. R. CIV. EVID. 403.

pretrial discovery. Counsel should avoid asking on cross-examination whether the opposing attorney brought these records. This is an improper request for production,[131] especially if the purpose is to suggest to the jury that the witness is concealing information. Additionally, even if the records are produced, they are of limited use without prior discovery and review.

C. *Chapter 38 Cases to Court*

Under Chapter 38, if a case is tried by the court, the judge may take judicial notice of (1) the contents of the file to estimate the work involved, and (2) the customary fee for the claim involved, which is presumed to be reasonable.[132] As a result, a judge may find a reasonable attorney's fee without any offer of evidence.[133] The judge may do so without any request for judicial notice[134] and without any indication in the record that judicial notice was taken.[135]

The practical effect of this judicial notice provision is to make it very unlikely that a judge's award of attorney's fees will be reversed for no evidence, unless the award is completely nonsensical.[136] A tactical advantage of the provision is that it may preserve a fee award when the claimant has failed timely to designate an expert witness. No expert testimony means no recovery in a jury trial. But by waiving the jury, the claimant may state the fees paid—a factual matter—and rely upon judicial notice to provide the rest.[137]

This does not mean the claimant should forego offering any evi-

131. *See* City of San Antonio v. Vela, 762 S.W.2d 314, 319 (Tex. App.—San Antonio 1988, writ denied) (holding oral motion for production evidence improper when written motion never filed, served on opposing counsel, or ruled on by court); Mortgage Co. of Am. v. McCord, 466 S.W.2d 868, 872-73 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

132. TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.003-.004 (Vernon 1986).

133. Coward v. Gateway Nat'l Bank of Beaumont, 525 S.W.2d 857, 859 (Tex. 1975); Bloom v. Bloom, 767 S.W.2d 463, 471-72 (Tex. App.—San Antonio 1989, writ denied); Flint & Assoc. v. Intercontinental Pipe & Steel, 739 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ denied); Ho v. Wolfe, 688 S.W.2d 693, 697-98 (Tex. App.—Amarillo 1985, no writ).

134. Holsworth v. Czeschin, 632 S.W.2d 643, 645 (Tex. App.—Corpus Christi 1982, no writ).

135. *See* Lacy v. First Nat'l Bank of Livingston, 809 S.W.2d 362, 367 (Tex. App.—Beaumont 1991, n.w.h.) (presuming that judicial notice was taken).

136. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 881 (Tex. 1990) (holding that award of $150 was abuse of discretion in light of clear and uncontradicted evidence of $22,500 in attorney's fees).

137. *Lacy*, 809 S.W.2d at 366-68.

dence of fees at a bench trial. As the Texas Supreme Court recognized over 100 years ago, the amount awarded by a trial judge without evidence "is likely to be less than that established by the testimony of the experts. . . ."[138] The court's file may reflect little of the work actually completed. If the reasons for a sizable fee are not clearly explained, the court may assume the case was overworked even if the claimant's proof is uncontradicted.[139]

It is unclear whether the judicial notice provisions of Chapter 38 apply to bench trials under other statutes. The language of Section 38.004 makes no explicit limitation to Chapter 38 claims, and the section has been used in property tax,[140] turnover,[141] and insurance code proceedings.[142] However, some courts have held judicial notice inapplicable to garnishment,[143] Family Code,[144] and DTPA proceedings.[145] One court has held that judicial notice may be taken of a proper demand letter, at least if the demand letter is in the court's file.[146]

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138. Johnson Co. v. Blanks, Walker & Co., 68 Tex. 495, 497, 4 S.W. 557, 558 (1887).

139. *See* Armstrong Forest Prods. v. Redempco, Inc., 818 S.W.2d 446, 451-53 (Tex. App.—Texarkana 1991, writ denied) (holding court justified in awarding only $7,500 in attorney's fees despite uncontroverted testimony of $23,000 in fees earned); Inwood North Homeowners' Ass'n, Inc. v. Wilkes, 813 S.W.2d 156, 157 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.) (awarding $500 rather than $1,486 in fees requested although amount earned was not disputed).

140. Atascosa County Appraisal Dist. v. Tymrak, 815 S.W.2d 364, 371 (Tex. App.—San Antonio 1991, n.w.h.); *but cf.* City of Houston v. First City, Tex., 827 S.W.2d 462, 476 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).

141. Ross v. 3D Tower Ltd., 824 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.); Carlyle Real Estate Ltd. Partnership-X v. Leibman, 782 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1989, no writ).

142. General Life & Accident Ins. Co. v. Higginbotham, 817 S.W.2d 830, 833 (Tex. App.—Fort Worth 1991, writ denied).

143. Bullock v. Foster Cathead Co., 631 S.W.2d 208, 212 (Tex. App.—Corpus Christi 1982, no writ).

144. Underhill v. Underhill, 614 S.W.2d 178, 181-82 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

145. *Coward*, 525 S.W.2d at 858-59; Leggett v. Brinson, 817 S.W.2d 154, 157 (Tex. App.—El Paso 1991, n.w.h.); Hoelscher v. GFH Fin. Servs., 814 S.W.2d 842, 845 (Tex. App.—Dallas 1991, n.w.h.); Nelson v. Schanzer, 788 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Smith v. Smith, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied); *see* Kaiser v. Northwest Shopping Ctr., Inc., 544 S.W.2d 785, 788 (Tex. Civ. App.—Dallas 1976, no writ) (stating that evidence of reasonable attorney's fees required unless suit is brought under Article 2226). However, it appears that at least one justice of the Texas Supreme Court might hold otherwise as to the DTPA. *Smith*, 757 S.W.2d at 428 (Hecht, J., dissenting).

146. Carrington v. Hart, 703 S.W.2d 814, 817-18 (Tex. App.—Austin 1986, no writ).

D. *Contractual Stipulation of Fees*

Because Chapter 38 provides for recovery of attorney's fees in contract cases, the contract itself need not specify the recovery.[147] However, many contracts do provide that if an attorney is retained for collection, a set percentage of the outstanding balance is reasonable as attorney's fees. A party relying on this type of provision must introduce it into evidence.[148]

Once introduced, recovery under a contractual stipulation is not so absolute as the language might suggest. In *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce of Brownsville*,[149] the Texas Supreme Court stated:

> Texas courts do not regard agreements to pay attorney's fees based on a percentage of the unpaid balance and interest on a promissory note as absolute promises to pay the contractual amount, but as contracts to indemnify the holder of the note for attorney's expenses actually incurred in collecting the principal and interest on the note.[150]

Thus, if the fee actually incurred is less than the contractual stipulation, recovery may be limited to this amount.[151]

A contractual stipulation does alter the burden of proof in a fee case. Introducing the contractual provision establishes a prima facie case that the stipulated amount is reasonable and recoverable.[152] The burden then shifts to the opposing party to plead, prove, and request an issue on an affirmative defense that: (1) the contractual amount is unreasonable, and (2) a particular lower amount would be reasonable.[153] If the opposing party does not plead and prove a lower amount as a reasonable fee, the stipulated fee is recoverable without

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147. First City Bank v. Guex, 677 S.W.2d 25, 30 (Tex. 1984).

148. Nationwide Life Ins. Co. v. Nations, 654 S.W.2d 860, 862 (Tex. App.—Houston [14th Dist.] 1983, no writ).

149. 578 S.W.2d 675 (Tex. 1979).

150. *Id.* at 676.

151. Rosestone Properties, Inc. v. Schliemann, 662 S.W.2d 49, 54 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

152. Scalise v. McCallum, 700 S.W.2d 682, 685 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Rosestone*, 662 S.W.2d at 54; Spring Branch Bank v. Mengden, 628 S.W.2d 130, 134 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

153. *F.R. Hernandez Constr. & Supply Co.*, 578 S.W.2d at 677; Kuper v. Schmidt, 161 Tex. 189, 191, 338 S.W.2d 948, 950 (1960); Cooper v. Supercinski, 700 S.W.2d 239, 244 (Tex. App.—Waco 1985, writ ref'd n.r.e.); Long v. Tascosa Nat'l Bank of Amarillo, 678 S.W.2d 699, 706-07 (Tex. App.—Amarillo 1984, no writ).

any proof that an attorney has been hired or paid.[154] However, even if the defendant does not establish this affirmative defense, the trier of fact still may award less than the amount provided in the note.[155]

These general rules may vary depending upon the language of the contract at issue. For example, a clause providing for a fee that is "not more than" or "not less than" a stated percentage allows for a range of fees. Thus, this clause may not carry the same presumptions that accompany a fixed-fee clause.[156] If the contract merely provides for payment of attorney's fees incurred, this amount is prima facie recoverable and the reasonableness of the award becomes an affirmative defense.[157]

A guaranty that provides for a stipulated percentage as attorney's fees is governed generally by the same rules as any other contract.[158] However, as the terms of a guaranty limit a guarantor's liability, a guaranty that requires payment of "reasonable attorney's fee" limits a provision in an underlying note for a set percentage, and evidence of a reasonable fee must be introduced.[159]

While Texas law clearly allows a fee award smaller than the stipulated percentage in a contract, there is some question whether it can be larger. Some courts hold that a contractually stipulated percentage acts as a recovery ceiling[160] while a few others suggest the

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154. *Kuper*, 161 Tex. at 189, 338 S.W.2d at 950; Evans v. Evans, 766 S.W.2d 356, 357 (Tex. App.—Texarkana 1989, no writ); Loomis v. Republic Nat'l Bank of Dallas, 653 S.W.2d 75, 79 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

155. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 881 (Tex. 1990); National Mar-Kit, Inc. v. Forrest, 687 S.W.2d 457, 460 (Tex. App.—Houston [14th Dist.] 1985, no writ); Payne v. Snyder, 661 S.W.2d 134, 143 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

156. Woods Exploration & Producing Co. v. Arkla Equip. Co., 528 S.W.2d 568, 570 (Tex. 1975); Yandell v. Tarrant State Bank, 538 S.W.2d 684, 688-90 (Tex. Civ. App.—Fort Worth 1976), *aff'd*, 561 S.W.2d 50 (Tex. 1978); Bellah v. First Nat'l Bank of Hereford, 474 S.W.2d 785, 787-88 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.).

157. Durkin v. American Gen. Fire & Cas. Co., 651 S.W.2d 41, 46 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

158. Spillman v. Self-Serv. Fixture Co., Inc., 693 S.W.2d 656, 658 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

159. Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92, 99 (Tex. App.—Austin 1990, writ denied); Simpson v. MBank Dallas, 724 S.W.2d 102, 110-11 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Houston Furniture Distrib. Inc. v. Bank of Woodlake, N.A., 562 S.W.2d 880, 884 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

160. Stokley v. Hanratty, 809 S.W.2d 924, 927 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.); Coastal Shutters & Insulation, Inc. v. Derr, 809 S.W.2d 916, 923 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.); Beltran v. Groos Bank, N.A., 755 S.W.2d 944, 950-51 (Tex. App.—San Antonio 1988, no writ); Lifemark Corp. v. Merritt, 655 S.W.2d 310, 319 (Tex.

contrary.[161] Treating the contractual stipulation as a ceiling appears to conflict with the principle stated in *Hernandez*.[162] Under *Hernandez*, the attorney's fees stipulation is interpreted as a promise to pay fees actually incurred. Fees incurred may be above as well as below the contractual stipulation. When considering whether an award can be less than the prescribed percentage, the courts uniformly treat the clause as a burden-shifting mechanism rather than an absolute floor to recovery.[163] When considering whether an award can be greater than the prescribed percentage, the stipulation should still be treated as a burden of proof mechanism rather than an absolute ceiling to recovery.

E. *Appellate Fees*

Generally, the usual proof rules apply to proof of appellate fees. There must be a statute or contract allowing appellate fees, but a general provision for "attorney's fees" will include appellate fees.[164] There must be evidence in the record to support an appellate fee award. If there is no such evidence or merely some evidence, any award will be reversed or limited to the amount supported by the evidence.[165]

As with trial fees, there is an exception for Chapter 38 cases. In a Chapter 38 case tried to the court, appellate fees can be established by judicial notice without other proof appearing in the record.[166] How-

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App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); Cheney v. Parks, 605 S.W.2d 640, 643 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

161. *See* Richardson v. Office Bldgs. of Houston, 704 S.W.2d 373, 376-77 (Tex. App.—Houston [14th Dist.] 1985, no writ) (upholding higher percentage because no statement of facts on appeal); *Lifemark Corp.*, 655 S.W.2d at 319 (barring higher percentage where claimant already recovered more than contractual percentage); Chiles v. Becker, 608 S.W.2d 816, 818-19 (Tex. Civ. App.—Dallas 1980, no writ) (barring Article 2226 claim only because not pled).

162. *Stokley*, 809 S.W.2d at 927; *Derr*, 809 S.W.2d at 923 (Murphy, J., dissenting).

163. *F.R. Hernandez Constr. & Supply Co.*, 578 S.W.2d at 677.

164. International Sec. Life Ins. Co. v. Spray, 468 S.W.2d 347, 349 (Tex. 1971).

165. Valley Coca-Cola Bottling Co. v. Molina, 818 S.W.2d 146, 149 (Tex. App.—Corpus Christi 1991, writ denied); City of Dallas v. Arnett, 762 S.W.2d 942, 958 (Tex. App.—Dallas 1988, writ denied); Delhi Gas Corp. v. Lamb, 724 S.W.2d 97, 100 (Tex. App.—El Paso 1986, writ ref'd n.r.e.); Siegler v. Williams, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ); Chrysler Corp. v. Schuenemann, 618 S.W.2d 799, 807 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

166. Gill Sav. Ass'n v. Chair King, 797 S.W.2d 31, 32 (Tex. 1990); Bethel v. Norman Furniture Co., Inc., 756 S.W.2d 6, 9 (Tex. App.—Houston [1st Dist.] 1988, no writ).

ever, judicial notice must be taken by the trial court, not an appellate court.[167]

Although the general rules are the same, appellate fees present special problems at trial because they are a future contingency.[168] Except for the penalty for frivolous appeals,[169] appellate fees must be determined at the trial court level.[170] At the time of trial, the nature and extent of any appeal is unknown. Thus, the form of proof must be altered to reflect these contingencies.

A conclusory opinion stating a particular amount as a reasonable appellate fee may be sufficient proof to support an appellate fee award.[171] The safer practice, though, is to support this opinion with an estimate of the work that will be needed and a reasonable rate for such work.[172] Contingency fee awards providing for an additional percentage to cover appeals have also been upheld.[173]

F. *Summary Proceedings*

The general rules of proof apply to an award of attorney's fees in connection with a default or summary judgment. A judgment for attorney's fees in summary proceedings must be supported by evidence.[174] Where demand is a prerequisite, failure to plead and prove

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167. Pelto Oil Co. v. CSK Oil & Gas Corp., 804 S.W.2d 583, 588 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Superior Ironworks, Inc. v. Roll Form Prods., Inc., 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990 no writ).

168. Where a party entitled to attorney's fees is successful after appeal and remand, appellate fees to date would be a known quantity, and recoverable as such. Uvalde County Appraisal Dist. v. F.T. Kincaid Estate, 720 S.W.2d 678, 682 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

169. TEX. R. APP. P. 84; McGuire v. Post Oak Lane Townhome Owners Ass'n, 794 S.W.2d 66, 69 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

170. *International Sec. Life Ins. Co.*, 468 S.W.2d at 349.

171. Bradbury v. Scott, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied); Centroplex Ford, Inc. v. Kirby, 736 S.W.2d 261, 264 (Tex. App.—Austin 1987, no writ); Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700, 706-07 (Tex. App.—San Antonio 1981, no writ).

172. Smith v. Smith, 757 S.W.2d 422, 425-26 (Tex. App.—Dallas 1988, writ denied); Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida, 596 S.W.2d 947, 953 (Tex. Civ. App.—Fort Worth 1980, no writ).

173. Bernal v. Garrison, 818 S.W.2d 79, 85 (Tex. App.—Corpus Christi 1991, writ denied); Hochheim Prairie Farm Mut. Ins. Ass'n v. Burnett, 698 S.W.2d 271, 278 (Tex. App.—Fort Worth 1985, no writ).

174. Thompson v. A.G. Nash & Co., 704 S.W.2d 822, 824 (Tex. App.—Tyler 1985, no writ); Blumenthal v. Ameritex Computer Corp., 646 S.W.2d 283, 287-88 (Tex. App.—Dallas 1983, no writ).

demand requires reversal and remand of summary proceedings.[175]

In a motion for summary judgment, the movant must both plead and prove attorney's fees as a matter of law.[176] An attorney's affidavit is sufficient to support an attorney's fees award in a summary judgment case unless the affidavit is controverted.[177] If there is no controverting affidavit, the court must grant the full amount of the fee requested.[178] Without an affidavit by either party, the court still may grant fees on summary judgment under the judicial notice provisions of Chapter 38[179] or on a contract containing a stipulated percentage fee.[180]

However, a controverting affidavit, even if it is only conclusory, creates a fact issue, thus rendering summary judgment improper.[181] If a controverting affidavit is filed, the judicial notice provisions of Chapter 38 do not apply[182] because judicial notice may provide evidence but cannot resolve conflicting evidence.[183] A controverting affi-

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175. Nettles v. Del Lingco of Houston, 638 S.W.2d 633, 635-36 (Tex. App.—El Paso 1982, no writ).

176. *See* Birdwell v. Birdwell, 819 S.W.2d 223, 229 (Tex. App.—Fort Worth 1991, no writ) (stating motion for summary judgment must plead attorney's fees separately from prayer for general relief).

177. *See, e.g.*, Owen Elec. Supply, Inc. v. Brite Day Constr., Inc., 821 S.W.2d 283, 288 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (filing affidavit by contesting party insufficient if attorney's fees controverted); Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc., 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (stating attorney's affidavit in absence of controverting evidence sufficient to support summary judgment); Querner Truck Lines, Inc. v. Alta Verde Indus., Inc., 747 S.W.2d 464, 468 (Tex. App.—San Antonio 1988, no writ) (stating that attorney's affidavit can establish reasonable attorney's fees).

178. *See* American 10-Minute Oil Change, Inc. v. Metropolitan Nat'l Bank, 783 S.W.2d 598, 602 (Tex. App.—Dallas 1989, no writ) (stating trial court has option to grant full amount or zero amount of attorney's fees).

179. Superior Ironworks, Inc. v. Roll Form Prods., Inc., 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990, no writ); Cloughly v. NBC Bank-Seguin, 773 S.W.2d 652, 657 (Tex. App.—San Antonio 1989, writ denied).

180. Kuper v. Schmidt, 338 S.W.2d 948, 950-51 (Tex. 1960); Houston Furniture Distrib., Inc. v. Bank of Woodlake, 562 S.W.2d 880, 884 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

181. Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 148-49 (Tex. App.—Houston [1st Dist.] 1986, no writ); Engel v. Pettit, 713 S.W.2d 770, 772-73 (Tex. App.—Houston [14th Dist.] 1986, no writ); Gifford v. Old Republic Ins. Co., 613 S.W.2d 43, 46 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

182. *Tesoro Petroleum Corp.*, 754 S.W.2d at 767.

183. *See* Bethel v. Butler Drilling Co., 635 S.W.2d 834, 841 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (holding that judicially noticed fee is not mandatory).

davit by a non-attorney does not create a material fact issue.[184]

While normally attorney's fees cannot be awarded upon summary judgment if there is a fact issue, an exception applies to declaratory judgment actions. Because attorney's fees in this area are left to the discretion of the court, the trial judge may award such attorney's fees following summary judgment.[185]

In default judgments, a reasonable attorney's fee is an unliquidated claim[186] requiring proof either by testimony or affidavit.[187] Again, an exception exists in Chapter 38 cases where judicial notice alone can support a default award of attorney's fees absent any contrary evidence in the record.[188] Assuming there is some evidence of attorney's fees upon default, the court need not award exactly the amount requested by uncontradicted evidence.[189] In *Ragsdale v. Progressive Voters League*,[190] the Texas Supreme Court stated that in default judgment situations, even if the evidence is clear, direct, positive, and uncontradicted, "the trial judge could find some of the claimed fees to be unreasonable, unwarranted, or some other circumstance that would make an award of the uncontroverted claim wrong."[191] Thus, the court can award less than the amount requested by looking to the contents of the court's file, the amount in controversy, and the extent to which the proceedings were uncontested.[192]

G. *Sanctions*

The Texas Rules of Civil Procedure require attorney's fees awarded

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184. *See Querner Truck Lines, Inc.*, 747 S.W.2d at 469 (finding no issue as to material fact concerning attorney's fees).

185. Elder v. Bro, 809 S.W.2d 799, 801 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Ritchie v. City of Fort Worth, 730 S.W.2d 448, 451 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

186. Wall v. Wall, 630 S.W.2d 493, 497 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

187. Siddiqui v. West Bellfort Property Owners Ass'n, 819 S.W.2d 657, 659 (Tex. App.—El Paso 1991, no writ); *Blumenthal*, 646 S.W.2d at 287-88.

188. Bloom v. Bloom, 767 S.W.2d 463, 471-72 (Tex. App.—San Antonio 1989, writ denied).

189. Inwood North Homeowners' Ass'n v. Wilkes, 813 S.W.2d 156, 157-58 (Tex. App.—Houston [14th Dist.] 1991, no writ); *Bethel*, 635 S.W.2d at 841-42.

190. 801 S.W.2d 880 (Tex. 1990) (per curiam).

191. *Id.* at 882.

192. Fonmeadow Property Owners' Ass'n v. Franklin, 817 S.W.2d 104, 105-06 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Inwood North Homeowners' Ass'n*, 813 S.W.2d at 157-58.

as sanctions to be "reasonable."[193] Current law on sanctions also requires that a fee award bear some relationship to the harm asserted.[194] Further, if the fee is ordered to be paid before judgment, the award cannot preclude continuance of the litigation.[195]

There is wide variance in practice as to the need for and nature of evidence in the record to support these fee sanctions. Some courts require no evidence to support an attorney's fee sanction,[196] while others consider oral testimony,[197] affidavits,[198] and judicial notice.[199] An unsworn statement by counsel during argument has been held sufficient,[200] and insufficient,[201] to support a sanctions fee award.

Further, the rules provide that such fees can only be awarded after a hearing.[202] However, it is unclear what procedures should govern this hearing. There is no right to a jury because the amount of the fee sanction rests in the court's discretion.[203] Requiring oral testimony and cross-examination in all cases is infeasible given the volume of sanctions litigation. Affidavits and judicial notice would be much less time-consuming and would not significantly sacrifice fairness, at least in cases where the fees requested are not substantial.

H. *Ad Litem Fees*

Fees awarded for an attorney or guardian ad litem differ in several respects from other provisions for attorney's fees. Ad litem fees are

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193. TEX. R. CIV. P. 215.

194. Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

195. Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991); Glass v. Glass, 826 S.W.2d 683, 688 n.9 (Tex. App.—Texarkana 1992, no writ).

196. Allied Assocs., Inc. v. INA County Mut. Ins. Cos., 803 S.W.2d 799, 799 (Tex. App.—Houston [14th Dist.] 1991, no writ).

197. *See, e.g.*, Fitzgerald v. Rogers, 818 S.W.2d 892, 895 (Tex. App.—Tyler 1991, no writ); Schaver v. British Am. Ins. Co., 795 S.W.2d 875, 877 (Tex. App.—Beaumont 1990, no writ).

198. Goad v. Goad, 768 S.W.2d 356, 359 (Tex. App.—Texarkana 1989, writ denied), *cert. denied*, 493 U.S. 1021 (1990).

199. Vaughn v. Texas Employment Comm'n, 792 S.W.2d 139, 144 (Tex. App.—Houston [1st Dist.] 1990, no writ).

200. *See* Hanley v. Hanley, 813 S.W.2d 511, 523 (Tex. App.—Dallas 1991, no writ) (reversing award in excess of such argument); Powers v. Palacios, 771 S.W.2d 716, 719 (Tex. App.—Corpus Christi 1989, writ denied) (holding that objection required if court waived oath).

201. *Vaughn*, 792 S.W.2d at 144.

202. TEX. R. CIV. P. 215(1)(d), 2(b), (3).

203. Brantley v. Etter, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam).

taxed as part of the costs of the proceeding[204] and consequently are normally recoverable from the losing party.[205] However, an ad litem's work is not just for the client's benefit but is also to some extent for the benefit of the parties and the court. Without an ad litem, finality of judgment would not be possible as to minors, parties served by publication, or others. Thus, for good cause shown in the record, ad litem fees may be assessed against the party who wins the litigation.[206] An ad litem fee for appeal may also be awarded regardless of success.[207]

The amount of a guardian ad litem fee is a matter for the court's discretion.[208] However, this discretion is not unbridled. The judge must consider the same factors used to set an appropriate attorney's fee in other cases.[209] Most courts have held that there is no need for evidence in the record to support an ad litem fee,[210] though the lack of a record precludes appellate review.[211] Other courts, however, have held that such evidence is preferable,[212] or even required,[213] and may not be supplied by judicial notice.[214]

V. THE SEGREGATION ISSUE

A. *General Case*

One of the thorniest and most frequently litigated issues involved in proof of attorney's fees concerns segregation of recoverable fees. Although many claims and parties may be joined in one action, fees

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204. TEX. R. CIV. P. 173, 244.

205. TEX. R. CIV. P. 131.

206. *See* Rhodes v. Cahill, 802 S.W.2d 643, 647 (Tex. 1990) (assessing fees for attorney ad litem); Rogers v. Walmart Stores, Inc., 686 S.W.2d 599, 601 (Tex. 1985) (assessing fees for attorney ad litem).

207. Cahill v. Lyda, 826 S.W.2d 932, 933 (Tex. 1992) (per curiam).

208. Simon v. York Crane & Rigging Co., Inc., 739 S.W.2d 793, 794 (Tex. 1987).

209. *Id.*; Valley Coca-Cola Bottling Co. v. Molina, 818 S.W.2d 146, 148 (Tex. App.—Corpus Christi 1991, writ denied).

210. Dover Elevator Co. v. Servellon, 812 S.W.2d 366, 368 (Tex. App.—Dallas 1991, no writ); Alford v. Whaley, 794 S.W.2d 920, 924-25 (Tex. App.—Houston [1st Dist.] 1990, no writ); Transport Ins. Co. v. Liggins, 625 S.W.2d 780, 785 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.).

211. Simon v. York Crane & Rigging Co., Inc., 739 S.W.2d 793, 795 (Tex. 1987).

212. Phillips Petroleum Co. v. Welch, 702 S.W.2d 672, 675 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

213. Brown & Root U.S.A., Inc. v. Trevino, 802 S.W.2d 13, 14 (Tex. App.—El Paso 1990, no writ).

214. *Id.* at 15.

may be recoverable only as to some, rendering recoverable only a part of the total attorney's fees incurred. Generally, a party seeking attorney's fees in such situations bears the burden of segregating work attributable to claims[215] and parties[216] as to which fees are recoverable.

Segregated fees can be proved in one of two ways. The court can admit only the evidence concerning the hours worked on recoverable claims and the segregated lodestar figure. Alternatively, a party can first prove a total fee on a case and then estimate the portion of the fee attributable to recoverable work. For example, testimony that 40% of a total fee is attributable to a recoverable claim is sufficient to support a jury award.[217] The evidence regarding work attributable to segregated claims may be a rough estimate; an exact accounting of every minute of time spent is not required.[218]

Some courts erroneously hold that the judicial notice provisions of Chapter 38 are inapplicable to segregation of fees.[219] If a court can use the file and judicial experience to determine a fee on a recoverable claim alone, there is no reason to think this method is inappropriate merely because the file includes nonrecoverable claims.

The rule requiring segregation has several exceptions. First, if the time spent on nonrecoverable claims is nominal, segregation is not required.[220] Courts may look for any separate evidence or jury question on nonrecoverable claims in deciding whether the work on these claims was nominal.[221]

Second, Texas courts do not require segregation of fees if the claims are so intertwined that it is impossible to determine which part of the

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215. Matthews v. Candlewood Builders, Inc., 685 S.W.2d 649, 650 (Tex. 1985).

216. Home Sav. Ass'n v. Guerra, 733 S.W.2d 134, 137 (Tex. 1987); Bray v. Curtis, 544 S.W.2d 816, 819-20 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

217. Schenck v. Ebby Halliday Real Estate, Inc., 803 S.W.2d 361, 369 (Tex. App.—Fort Worth 1990, no writ); *accord* Bradbury v. Scott, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (affirming fee award on testimony that 75% of total fees were attributable to recoverable claims).

218. *See* Stine v. Marathon Oil Co., 753 F. Supp. 202, 204 (S.D. Tex. 1990) (arguing that work of attorney cannot be quantified).

219. Nelson v. Schanzer, 788 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

220. Bullock v. Kehoe, 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see* Hamilton v. Texas Oil & Gas Corp., 648 S.W.2d 316, 323 (Tex. App.—El Paso 1982, no writ) (considering less than 10% of total time nominal); *see also* Creative Mfg., Inc. v. Unik, Inc., 726 S.W.2d 207, 210-11 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.) (calculating time allotted for work and claim presented).

221. *Bullock*, 678 S.W.2d at 560.

attorney's work is attributable to the nonrecoverable claim.[222] This is a corollary to the exception for nominal nonrecoverable work; if claims are very similar, then the work attributable solely to nonrecoverable matters would be slight. However, as discussed below, there is much uncertainty as to what claims meet this exception.

Even if segregation is required, it may be and frequently is waived.[223] For example, the jury question on attorney's fees ought to be limited to recoverable claims and parties.[224] However, if a party fails to object on this ground, any error is waived and an award for the total fees will be upheld.[225] Further, the objection must be specific; a general objection that does not mention segregation is insufficient.[226] Similarly, in a bench trial if there is no postjudgment objection to an unsegregated fee award, error is waived.[227]

For some years, it was unclear whether a party was required to object to unsegregated attorney's fees at the time the evidence itself was offered. Both appellate courts in Houston required parties to object when the evidence was offered.[228] Thus, objection was necessary every time unsegregated bills, time summaries, or expert testimony was offered.[229] However, in *Stewart Title Guaranty Co. v. Sterling*,[230] the Texas Supreme Court held that an objection at the jury charge stage to a question that did not segregate fees preserved error even though no one objected to the evidence when it was offered.[231] This rule is sound because the total fees in a case are some evidence of the

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222. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 13 (Tex. 1991).

223. *Home Sav. Ass'n*, 733 S.W.2d at 137; Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 823 (Tex. 1985); *Matthews*, 685 S.W.2d at 650.

224. International Sec. Life Ins. Co. v. Finck, 496 S.W.2d 544, 546-47 (Tex. 1973).

225. Hruska v. First State Bank of Deanville, 747 S.W.2d 783, 785 (Tex. 1988); *Aero Energy, Inc.*, 699 S.W.2d at 823; *Matthews*, 685 S.W.2d at 650; *cf.* Canales v. Zapatero, 773 S.W.2d 659, 661-62 (Tex. App.—San Antonio 1989, writ denied) (stating that no objection necessary if claimant's pleadings obscured need to do so).

226. Morey v. Page, 802 S.W.2d 779, 785 (Tex. App.—Dallas 1990, no writ).

227. Southern Concrete Co. v. Metrotec Fin., Inc., 775 S.W.2d 446, 450 (Tex. App.—Dallas 1989, no writ).

228. Stewart Tile Guar. Co. v. Sterling, 772 S.W.2d 242, 248-49 (Tex. App.—Houston [14th Dist.] 1989), *rev'd*, 822 S.W.2d 1 (Tex. 1991); Osoba v. Bassichis, 679 S.W.2d 119, 123 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Houts v. Barton, 657 S.W.2d 924, 926-27 (Tex. App.—Houston [1st Dist.] 1983, no writ).

229. *Stewart Title Guar. Co.*, 772 S.W.2d at 248-49; *Osoba*, 679 S.W.2d at 123; *Houts*, 657 S.W.2d at 926-27.

230. 822 S.W.2d 1 (Tex. 1991).

231. *Id.* at 12.

amount of the segregated fee. Also, this rule will work to avoid repetitious objections.

B. *Intertwined Claims*

There is no universal standard for determining which claims are sufficiently intertwined to avoid the need for segregation. Because the possible combinations of claims and parties approach infinity, determination must be made case by case. The following analysis of some categories of the claims that courts have considered may give some guidance as to how similar claims will be treated.

1. Multiple Claims Against One Party

Generally, a party must segregate work on different claims because the elements and facts to be proved in the causes of action differ. Thus, segregation is required between claims on separate contracts.[232] Segregation is also required between a claim for declaratory judgment as to ownership of a car and a claim for negligence in constructing the underlying draft to purchase the car.[233] However, even when the specific elements to be proved differ, some courts hold that because the same facts are involved, no segregation is required. Thus, breach of contract and quantum meruit claims require no segregation.[234] A party need not segregate claims for breach of contract and interference with contractual relations.[235] Actions for division of property and infliction of emotional distress in a divorce proceeding also do not require segregation.[236]

However, in a number of situations there is no consensus. In claims stemming from a "broken promise," whether pled as breach of contract, breach of warranty, fraud, misrepresentation, negligence, breach of implied duty, breach of fiduciary duty, or violation of the

232. Grider v. Boston Co., 773 S.W.2d 338, 345 (Tex. App.—Dallas 1989, writ denied).

233. First Nat'l Bank of Commerce v. Anderson Ford-Lincoln-Mercury, Inc., 704 S.W.2d 83, 85 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

234. Angroson, Inc. v. Independent Communications, Inc., 711 S.W.2d 268, 274 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Burditt v. Sisk, 710 S.W.2d 114, 116-17 (Tex. App.—Corpus Christi 1986, no writ).

235. American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp., 798 S.W.2d 274, 280 (Tex. 1990).

236. Massey v. Massey, 807 S.W.2d 391, 403-04 (Tex. App.—Houston [1st Dist.] 1991, no writ).

DTPA, some courts have held that segregation is necessary,[237] while others have held that it is not.[238] In insurance cases, some courts have held that breach of contract, violations of the insurance code, and DTPA claims on an insurance contract need not be segregated from common law claims of fraud and breach of the duty of good faith and fair dealing.[239] Other courts, however, have required segregation of breach of contract and insurance fraud claims.[240] In a particularly confused area, some courts have held that segregation is necessary for claims of slander of title and actions to remove a cloud on title.[241] Other courts have held that segregation is not necessary.[242] Still other courts have determined that attorney's fees are not recoverable for either in any event.[243]

2. Claims Against Multiple Parties

When identical claims are brought against a number of parties, segregation may not be necessary. Courts have held that no segregation

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237. Southern Concrete Co. v. Metrotec Fin., Inc., 775 S.W.2d 446, 450-51 (Tex. App.—Dallas 1989, no writ); Kosberg v. Brown, 601 S.W.2d 414, 418 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

238. Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541, 546-48 (5th Cir. 1987); Nottingham v. General Am. Communications Corp., 811 F.2d 873, 880 (5th Cir.), *cert. denied*, 484 U.S. 854 (1987); Briercroft Serv. Corp. v. Perez, 820 S.W.2d 813, 817 (Tex. App.—Corpus Christi 1990, no writ); AmSav Group, Inc. v. American Sav. & Loan Ass'n of Brazoria County, 796 S.W.2d 482, 492 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Gill Sav. Ass'n v. Chair King, Inc., 783 S.W.2d 674, 680-81 (Tex. App.—Houston [14th Dist.] 1989), *aff'd and modified*, 797 S.W.2d 31 (Tex. 1990); Service Lloyds Ins. Co. v. Greenhalgh, 771 S.W.2d 688, 695-96 (Tex. App.—Austin 1989), *rev'd on other grounds*, 787 S.W.2d 939 (Tex. 1990); Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 880 (Tex. App.—Corpus Christi 1988, writ denied); Wilson v. Ferguson, 747 S.W.2d 499, 504 (Tex. App.—Tyler 1988, writ denied); Triland Inv. Group v. Warren, 742 S.W.2d 18, 25 (Tex. App.—Dallas 1987); *rev'd on other grounds*, 779 S.W.2d 809 (Tex. 1989); Village Mobile Homes, Inc. v. Porter, 716 S.W.2d 543, 552 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

239. Paramount Nat'l Life Ins. Co. v. Williams, 772 S.W.2d 255, 266 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

240. International Sec. Life Ins. Co. v. Finck, 496 S.W.2d 544, 546-47 (Tex. 1973).

241. American Nat'l Bank & Trust Co. v. First Wis. Mortgage Trust, 577 S.W.2d 312, 320 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

242. *See* Ellis v. Waldrop, 627 S.W.2d 791, 798 (Tex. App.—Fort Worth 1982), *aff'd in part rev'd in part on other grounds*, 656 S.W.2d 902 (Tex. 1983) (holding segregation of attorney's fees not required).

243. Sadler v. Duvall, 815 S.W.2d 285, 293 (Tex. App.—Texarkana 1991, n.w.h.); *see* Ryan v. Mo-Mac Properties, 644 S.W.2d 791, 794-95 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (citing Texas statute excluding attorney's fees in certain cases); Walker v. Ruggles, 540 S.W.2d 470, 476 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (allowing recovery).

is necessary in (1) a DTPA claim brought against a manufacturer, a seller, and a finance company;[244] (2) claims against a main defendant and vicariously liable parties;[245] and (3) suits to foreclose liens against several lot-owners.[246] However, if some fees relate only to some parties, the fees may have to be segregated. Thus, segregation is necessary in an action on a construction contract against one party and to foreclose a lien against another.[247] Segregation is also required in an action against a seller for breach of a warranty deed and an action against the issuer of a title policy that failed to discover the title defect.[248]

Again, the imprecise standards for segregation have led to disparate holdings. One court held that a fee to foreclose a materialman's lien against a general contractor and an owner need not be segregated,[249] while another court held that an owner's action to void such a lien against a materialman and its finance company must be segregated.[250]

3. Claims and Counterclaims by Opposing Party

The question of segregation also occurs when a party's affirmative claim is met by a counterclaim, requiring attorney's fees for both offensive and defensive efforts. Generally, if the counterclaim seeks an offset stemming from a totally separate occurrence, segregation is required. Thus, segregation has been required when (1) a suit on an account is met by a counterclaim alleging breach of an entirely different contract,[251] (2) a defendant in the main action brings a cross-

244. Green Tree Acceptance, Inc. v. Pierce, 768 S.W.2d 416, 425 (Tex. App.—Tyler 1989, no writ).

245. Richard Gill Co. v. Jackson's Landing Owners' Ass'n, 758 S.W.2d 921, 928-29 (Tex. App.—Corpus Christi 1988, writ denied).

246. Roland v. General Brick Sales, Inc., 818 S.W.2d 896, 898 (Tex. App.—Fort Worth 1991, n.w.h.).

247. Moody v. EMC Servs., Inc., 828 S.W.2d 237, 247 (Tex. App.—Houston [14th Dist.] 1992, no writ).

248. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 12 (Tex. 1991); Stone v. Lawyers Title Ins. Corp., 537 S.W.2d 55, 62-64 (Tex. Civ. App.—Corpus Christi 1976), *rev'd in part on other grounds*, 554 S.W.2d 183 (Tex. 1977).

249. *See* Gill Sav. Ass'n v. International Supply Co., Inc., 759 S.W.2d 697, 705-06 (Tex. App.—Dallas 1988, writ denied) (finding segregation of fees not necessary when claims arise out of same transaction).

250. Oxford Fin. Cos. v. Velez, 807 S.W.2d 460, 464-65 (Tex. App.—Austin 1991, writ denied).

251. Martco, Inc. v. Doran Chevrolet, Inc., 632 S.W.2d 927, 929 (Tex. App.—Dallas 1982, no writ).

claim against third parties,[252] or (3) a suit to modify alimony draws a counterclaim for alimony arrears.[253] Conversely, if the counterclaim is a mirror image of the original claim, segregation is not required. Thus, no segregation is required if each party claims that the other broke the contract,[254] or each party claims that the other was trespassing.[255] Segregation is also not required when a suit to collect on a letter of credit is met by a counterclaim to enjoin payment of the letter of credit.[256]

The outcome is less clear if a counterclaim raises an affirmative defense. Logically, proof of different facts necessarily would be involved, as the burden of proof of such facts is allocated differently. However, some courts have not required segregation, reasoning that though the claimant did not have the burden of proof, the claimant could not have recovered on his claim without overcoming the affirmative defense. Thus, courts have held that no segregation is required when a claim on a note or account is met by a usury counterclaim,[257] a counterclaim for overcharges,[258] a counterclaim to reform or rescind the note,[259] or a counterclaim that there was fraud in the inducement.[260] In the frequently occurring situation in which a suit on a note, contract, or account is countered by DTPA, fraud, negligence, or similar claims asserting that the underlying goods or services were not as

252. Hill v. Pierce, 729 S.W.2d 340, 342 (Tex. App.—El Paso 1987, writ ref'd n.r.e.); Wood v. Component Constr. Corp., 722 S.W.2d 439, 445 (Tex. App.—Fort Worth 1986, no writ); *but cf.* Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 585 (Tex. App.—Houston [14th Dist.] 1983), *aff'd in part and rev'd in part on other grounds*, 704 S.W.2d 742 (Tex. 1986) (requiring no segregation if third party action is merely for indemnification).

253. Tibbetts v. Tibbetts, 679 S.W.2d 152, 154-55 (Tex. App.—Dallas 1984, no writ).

254. Veale v. Rose, 657 S.W.2d 834, 841 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Wilkins v. Bain, 615 S.W.2d 314, 315-16 (Tex. App.—Dallas 1981, no writ); Miller v. Patterson, 537 S.W.2d 360, 364-65 (Tex. Civ. App.—Fort Worth 1976, no writ).

255. Trice v. State, 712 S.W.2d 842, 851-52 (Tex. App.—Waco 1986, writ ref'd n.r.e.).

256. Valdina Farms, Inc. v. Brown, Beasley & Assoc., 733 S.W.2d 688, 694 (Tex. App.—San Antonio 1987, no writ).

257. RepublicBank Dallas, N.A. v. Shook, 653 S.W.2d 278, 282-83 (Tex. 1983); Schepps Grocery Co. v. Burroughs Corp., 635 S.W.2d 606, 611 (Tex. App.—Houston [14th Dist.] 1982, no writ).

258. Duval County Ranch Co. v. Alamo Lumber Co., 597 S.W.2d 528, 531 n.4 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

259. Wright v. Brooks, 773 S.W.2d 649, 652 (Tex. App.—San Antonio 1989, writ denied); *see* Williamson v. Tucker, 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (allowing attorney's fees award for counterclaim to reform promissory note); Damstra v. Starr, 585 S.W.2d 817, 820-21 (Tex. Civ. App.—Texarkana 1979, no writ) (determining that court's failure to allow counterclaim for collection of note was in error).

260. *Valdina Farms, Inc.*, 733 S.W.2d at 694-95.

promised, some courts have held that segregation is required,[261] others have held that it is not,[262] and at least one court has stated that the party need not segregate the claims, but the court must.[263]

4. Federal Practice

In the federal courts, segregation is required if the claims involved are "distinct in all respects."[264] If the claims are related, a claimant who has been awarded "substantial" relief need not segregate, while one who has been awarded "only limited success" must segregate.[265] While this solution has the advantage of making the true loser pay, its standards are just as vague and unpredictable as state law. Further, this approach would be impractical because Texas law treats attorney's fees as a fact issue for the jury rather than as a collateral matter usually determined by the court after the trial has been concluded and the loser determined.[266]

C. *Problems and Proposals Regarding Segregation*

As the above summary indicates, claimants and trial judges can rarely predict whether an appellate court will decide that segregation

261. *See* Harmes v. Arklatex Corp., 615 S.W.2d 177, 180 (Tex. 1981) (reversing attorney's fees for time spent on negligence); Crow v. Central Soya Co., Inc., 651 S.W.2d 392, 396 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (refusing to grant attorney's fees for time spent on DTPA claim); Bray v. Curtis, 544 S.W.2d 816, 820 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (noting that attorney's fees are not normally recoverable).

262. *See* Keeper v. First Care, Inc., 794 S.W.2d 879, 882 (Tex. App.—Tyler 1990, no writ) (upholding attorney's fees under DTPA); 4M Linen & Uniform Supply Co. v. W.P. Ballard & Co., 793 S.W.2d 320, 327-28 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (allowing attorney's fees award when suit on sworn account and counterclaim intertwined); Coleman v. Rotana, 778 S.W.2d 867, 874 (Tex. App.—Dallas 1989, writ denied) (granting attorney's fees arising out of same transaction); Houston Lighting & Power Co. v. Russo Properties, Inc., 710 S.W.2d 711, 715 (Tex. App.—Houston [1st Dist.] 1986, no writ) (holding that recovering fees depends on reasonableness); De La Fuente v. Home Sav. Ass'n, 669 S.W.2d 137, 145-46 (Tex. App.—Corpus Christi 1984, no writ) (upholding all intertwined fees); Building Concepts, Inc. v. Duncan, 667 S.W.2d 897, 904 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (ruling that separating not necessary with closely linked claims); First Wichita Nat'l Bank v. Wood, 632 S.W.2d 210, 215 (Tex. App.—Fort Worth 1982, no writ) (stating that some attorney's fees are inseparable); Ortiz v. O.J. Beck & Sons, Inc., 611 S.W.2d 860, 866 (Tex. Civ. App.—Corpus Christi 1980, no writ) (allowing aggregate attorney's fees of two claims).

263. Flint & Assocs. v. Intercontinental Pipe & Steel, 739 S.W.2d 622, 625-26 (Tex. App.—Dallas 1987, writ denied).

264. Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

265. *Id.*

266. White v. New Hampshire Dep't of Employment, 455 U.S. 445, 451 (1982).

is necessary in any particular case. Further, the natural hesitancy of appellate courts to require a case to be tried a second time may mean that past cases are poor predictors of future results. For example, in cases claiming both breach of contract and fraud, the Dallas Court of Appeals has affirmed findings by one trial judge that such claims were intertwined[267] and by another trial judge that they were not.[268]

Additionally, in *Stewart Title Guaranty Co.*, the Texas Supreme Court held that if segregation is required, but the only evidence is unsegregated, the remedy must be a remand to the trial court for segregation.[269] This holding reduces the harshness of a procedure that sometimes denied all fees to a party who guessed incorrectly about the need for segregation.[270] However, the holding creates a significant potential for wasted court time to address remands and retrials when a party refuses to segregate fee evidence that an appellate court later holds should have been segregated.[271]

Also, *Stewart Title Guaranty Co.* may reverse several earlier cases that allowed a trial judge to (1) refuse to submit a fee issue to the jury[272] or (2) disregard a jury answer and refuse to award a fee[273] if a claimant failed to segregate fees when necessary. If a total fee is some evidence of a segregated fee, then a trial court cannot refuse to submit an issue supported by some evidence.[274] A trial judge also cannot disregard a jury answer supported by some evidence.[275] If a jury answer is not supported by sufficient evidence, a trial court's only option is to grant a new trial.[276] What if the trial judge believes segregation

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267. Triland Inv. Group v. Warren, 742 S.W.2d 18, 25 (Tex. App.—Dallas 1987), *rev'd on other grounds*, 779 S.W.2d 808-09 (Tex. 1989).

268. Southern Concrete Co. v. Metrotec Fin., 775 S.W.2d 446, 450-51 (Tex. App.—Dallas 1989, no writ).

269. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 12 (Tex. 1991).

270. *See, e.g.*, Hill v. Pierce, 729 S.W.2d 340, 342 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (denying attorney's fees when attorney asked court to segregate but then did not); Wood v. Component Constr. Corp., 722 S.W.2d 439, 444-45 (Tex. App.—Fort Worth 1986, no writ) (disallowing award because fees not segregated); Crow v. Central Soya Co., Inc., 651 S.W.2d 392, 396 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (agreeing that attorney's fees would have been awarded if party had segregated fees).

271. *Stewart Title Guar. Co.*, 822 S.W.2d at 11.

272. Verette v. Travellers Indem. Co., 645 S.W.2d 562, 568 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Bray v. Curtis, 544 S.W.2d 816, 820 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

273. *Hill*, 729 S.W.2d at 342; *Crow*, 651 S.W.2d at 396.

274. Brown v. Goldstein, 685 S.W.2d 640, 641 (Tex. 1985).

275. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 594 (Tex. 1986).

276. *Id.*

is necessary but the claimant disagrees? Can a claimant refuse to present any evidence other than the total fee which is, after all, admissible as some evidence? Can a claimant argue to the jury that the only evidence is the total fee and then force the trial judge to choose between awarding the unsegregated fee—contrary to its holding—and ordering a new trial?

Much of this uncertainty, confusion, and potential for redundant proceedings and wasted time could be avoided simply by always requiring segregation and completely eliminating the exception for intertwined claims. The exception is judicially created and allows attorney's fees to be recovered when no statute or contract provides for them. The exception may encourage claimants to join alternative claims to intertwine a fee claim into the case. It leads to unpredictable and conflicting results because the test as to the extent of intertwining is standardless and probably indefinable.

Additionally, eliminating this exception would create little hardship on or loss for those claiming attorney's fees. If claims truly are intertwined, little time should be attributable solely to nonrecoverable work. The overhead work necessary on all claims—such as drafting pleadings, proof of background facts, depositions of the primary actors, and preparation for trial—often makes up most of the attorney's work. Because this work is necessary to prove all claims regardless of whether the fees are recoverable, the fees would have to be incurred if only recoverable claims were brought. Thus, the amount that can be fairly attributed to recoverable claims normally will be a very large percentage of the total fees incurred, at least if the claims truly overlap.

Also, eliminating the exception for intertwined claims would resolve the issue of whether the judge or jury decides the segregation question. While juries often must divide fees among segregated claims,[277] the court decides which claims must be segregated, perhaps because a jury does not know the legal elements that must be proved for particular causes of action. However, the issue is not merely a comparison of legal elements. Instead, the question is the extent to

277. *See* International Sec. Life Ins. Co. v. Finck, 496 S.W.2d 544, 546-47 (Tex. 1973) (stating jury properly limited to considering fees for collection of claim under policy); Oxford Fin. Cos. v. Velez, 807 S.W.2d 460, 464-65 (Tex. App.—Austin 1991, writ denied) (stating that fees may be segregated); Schenk v. Ebby Halliday Real Estate, Inc., 803 S.W.2d 361, 369 (Tex. App.—Fort Worth 1990, n.w.h.) (fees segregated among DTPA claim and bad faith counterclaim).

which an attorney's actions in a particular case were reasonable and necessary to prosecute recoverable claims. This is a question of fact[278] and appellate courts often rely upon the evidence in the case rather than an independent legal analysis that was unavailable to the jury.[279] In another context, in personal injury cases juries commonly rely upon the testimony of experts to decide which medical expenses were reasonable and necessary. There are few reasons why juries could not do the same for legal expenses. If the experts were to explain why particular work was reasonably necessary on a recoverable claim, the jury could then apply the law to the facts. Inconsistent results such as those noted in the summary above are tolerable in our legal system if they are the decisions made by juries based on unique fact situations. These inconsistencies are much less tolerable if they result from decisions made by judges purportedly as a matter of law.

VI. DEFENSES TO ATTORNEY'S FEES CLAIMS

Naturally, any defense that bars recovery on an underlying claim will bar recovery of attorney's fees under the DTPA and Chapter 38. Thus, a release of a claim will bar any attorney's fees recovery.[280] Sovereign immunity[281] and res judicata will also bar recovery of fees.[282] Lack of privity of contract will bar recovery in Chapter 38

278. *See* 4M Linen & Uniform Supply Co. v. W.P. Ballard & Co., 793 S.W.2d 320, 327-28 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (requiring proof of fees).

279. *Stewart Title Guar. Co.*, 822 S.W.2d at 12; Moody v. EMC Servs., Inc., 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *4M Linen & Uniform Supply Co.*, 793 S.W.2d at 327-28; Coleman v. Rotana, 778 S.W.2d 867, 874 (Tex. App.—Dallas 1989, writ denied); Village Mobile Homes, Inc. v. Porter, 716 S.W.2d 543, 552 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

280. *See* Smith v. Baldwin, 611 S.W.2d 611, 618 (Tex. 1980) (explicitly affirming holding for attorney's fees).

281. *See, e.g.*, Rodeheaver v. Steigerwald, 807 S.W.2d 790, 793 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (stating sovereign immunity bars attorney's fees award); City of Houston v. De Trapani, 771 S.W.2d 703, 708 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (determining that state immunities from liability for attorney's fees not waived); Texas Dep't of Human Servs. v. Methodist Retirement Servs., Inc., 763 S.W.2d 613, 614 (Tex. App.—Austin 1989 no writ) (holding that state immune from paying award of attorney's fees unless statute dictates otherwise); City of Houston v. Lee, 762 S.W.2d 180, 188 (Tex. App.—Houston [1st Dist.] 1988) (stating that government not liable for attorney's fees award), *rev'd on other grounds*, 807 S.W.2d 290 (Tex. 1991).

282. Fidelity Mutual Life Ins. Co. v. Robert P. Kaminsky, M.D., 820 S.W.2d 878, 882 (Tex. App.—Texarkana 1991, no writ).

cases[283] but not DTPA suits.

No attorney's fees are due from a party who can show the matter could have been resolved without resort to the courts. Thus, for claims under Chapter 38, no fees are recoverable if the amount owed is tendered within thirty days of presentment of the claim.[284] Under the DTPA, neither attorney's fees nor treble damages are recoverable if, within sixty days of presentment, a written settlement offer is made that is substantially the same as the actual damages ultimately found by the trier of fact.[285] The tender cannot be subject to unwarranted conditions[286] and must include any reasonable attorney's fees requested.[287]

Payment beyond the statutory thirty or sixty days, even full payment of the underlying debt, will not defeat the right to attorney's fees.[288] Before 1977, Article 2226 provided for recovery of fees only if the claimant "should finally obtain judgment."[289] This language had been interpreted to bar recovery of attorney's fees if the debtor paid the underlying claim before judgment, no matter how much effort had been wasted.[290] By deleting this phrase from Article 2226, the legislature allowed suit for attorney's fees regardless of full payment if the payment was not made within the statutorily required period.[291]

The defendant in a DTPA claim may also seek her own attorney's fees if the consumer's action was groundless and brought in bad faith

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283. Graham v. Turcotte, 628 S.W.2d 182, 183-84 (Tex. App.—Corpus Christi 1982, no writ).

284. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 1986).

285. TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon Supp. 1992).

286. *See* Commercial Union Ins. Co. v. La Villa Indep. Sch. Dist., 779 S.W.2d 102, 107 (Tex. App.—Corpus Christi 1989, no writ) (offering amount less than amount claimed insufficient to avoid award of fees).

287. Cail v. Service Motors, Inc., 660 S.W.2d 814, 815 (Tex. 1983).

288. Buckner Glass & Mirror, Inc., v. T.A. Pritchard Co., 697 S.W.2d 712, 714 (Tex. App.—Corpus Christi 1985, no writ) (noting that requirement for obtaining judgment to get attorney's fees is negated by statutory language).

289. Act of May 17, 1971, 62d Leg., R.S., ch. 225, 1971 Tex. Gen. Laws 563, *repealed by* Act of Sept. 1, 1985, 69th Leg., ch. 959, § 9(1), 1985 Tex. Gen. Laws 797 (codified at TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon 1971 & Supp. 1991)).

290. Johnson-Walker Moving & Storage, Inc. v. Lane Container Co., 548 S.W.2d 500, 501-02 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); National Homes Corp. v. C.J. Builders, Inc., 393 S.W.2d 949, 951-52 (Tex. Civ. App.—Houston 1965, writ dism'd).

291. *Buckner Glass & Mirror, Inc.*, 697 S.W.2d at 714; Enriquez v. K & D Dev. & Constr., Inc., 567 S.W.2d 40, 42 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *but cf.* Diaz v. Robert Ruiz, Inc., 808 F.2d 427, 428 (5th Cir. 1987) (refusing to allow attorney's fees where contract claim settled before trial).

or to harass.[292] The decision is for the court, not the jury, and the court may look to all the circumstances of the dispute, including evidence that is inadmissible.[293]

"Groundless" means "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law."[294] Claims are not groundless merely because the jury rejects them[295] or the trial court directs a verdict.[296] Conversely, a claim may be groundless even if it survives a directed verdict motion.[297]

"Bad faith" means that the claim was motivated by a malicious or discriminatory purpose.[298] "Harassment" encompasses only cases where the sole purpose of the proceeding was harassment. Seeking recovery of even a small amount of monetary damages would defeat such a finding.[299]

VII. THE JURY CHARGE

As the amount of attorney's fees is a question of fact,[300] it should be submitted to the jury if supported by some evidence. The Committee on Pattern Jury Charges of the State Bar of Texas has published suggested attorney's fees questions, both for cash[301] and contingency percentage[302] claims. Further, the Committee has suggested that a party may request an alternative submission, asking a jury to find both a cash and a percentage amount, with the claimant choosing whichever sum is more after the verdict is returned.[303] The Committee's charge does not include the list of factors that may be considered by a jury

292. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987).

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

294. *See id.* (holding that lower court erred to equate groundlessness with evidence).

295. Rutherford v. Riata Cadillac Co., 809 S.W.2d 535, 538 (Tex. App.—San Antonio 1991, writ denied).

296. Central Tex. Hardware, Inc. v. First City, Tex., 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

297. *See* Splettstosser v. Myer, 779 S.W.2d 806, 808 (Tex. 1989) (per curiam) (noting that "groundlessness" should be determined by totality of evidence).

298. *Id.*

299. *Donwerth*, 775 S.W.2d at 638.

300. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 12 (Tex. 1991); Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1966).

301. 4 STATE BAR OF TEXAS, PATTERN JURY CHARGES PJC 110.15 (1990).

302. *Id.*, PJC 110.16.

303. 4 STATE BAR OF TEXAS, PATTERN JURY CHARGES PJC 110.15 commentary at 110-27 to 110-28 (1990).

because this would be unnecessary.[304] The charge also does not include the usual "if any" language because recovery of fees under Chapter 38 and the DTPA is mandatory.[305]

The same broad inquiry into reasonableness is proper in cases where a contract sets a percentage fee. Although the potentially liable party must prove that a lesser amount is reasonable, no separate question is required because the question is implied in a finding that a lesser fee is reasonable.[306]

If attorney's fees should be segregated, the jury should be instructed to segregate and then award fees only on that work attributable to recoverable claims.[307] This can be accomplished first by conditioning the attorney's fees question on a "Yes" answer to questions relating to recoverable claims. Then, the jury can be given an instruction in the fee question similar to the following: "You are instructed to limit your answer to fees attributable to legal services performed on any claims as to which you have answered "Yes" in Question No. 1 [e.g., DTPA] or Question No. 2 [e.g., breach of contract]."

If demand is contested, a jury question on that issue should be requested. If it is not, the court will imply a finding of demand in support of the judgment if there is some evidence of demand in the record.[308] However, the court may not make this deemed finding if there is no evidence of demand.[309]

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304. *See* Fox v. Boese, 566 S.W.2d 682, 686 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (determining that reasonable fee does not require jury instruction).

305. *See* Satellite Earth Stations East, Inc. v. Davis, 756 S.W.2d 385, 387 (Tex. App.—Eastland 1988, writ denied) (declaring that consumer "shall be" awarded fees in DTPA case); Arguelles v. Kaplan, 736 S.W.2d 782, 787 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (reasoning that award of attorney's fee is question of fact for jury).

306. *See* F.R. Hernandez Constr. & Supply Co. v. Nat'l Bank of Commerce of Brownsville, 578 S.W.2d 675, 678-79 (Tex. 1979) (holding that contractual attorney's fees are presumed unreasonable).

307. *See* International Sec. Life Ins. Co. v. Finck, 496 S.W.2d 544, 546-47 (Tex. 1973) (reversing attorney's fees not based on trial prep work); Schenk v. Ebby Halliday Real Estate, Inc., 803 S.W.2d 361, 369 (Tex. App.—Fort Worth 1990, no writ) (noting that jury was instructed to separate fees).

308. *See* Cielo Dorado Dev., Inc. v. Certainteed Corp., 744 S.W.2d 10, 11 (Tex. 1988) (holding TEX. R. CIV. P. 279 requires court to deem finding of adequate notice when no objection and some evidence to support).

309. Automobile Ins. Co of Hartford, Conn. v. Davila, 805 S.W.2d 897, 902 (Tex. App.—Corpus Christi 1991, writ denied).

VIII. THE JUDGMENT

An award of attorney's fees, of course, should be included in the judgment signed by the court.[310] Unless a statute provides otherwise, the judgment should award attorney's fees to the party in the case, not the attorney.[311] Absent an order disregarding a jury verdict or a remittitur, the court must enter judgment for the amount found by a jury and not a greater[312] or lesser[313] amount. Attorney's fees should be offset in the judgment against any amount awarded to the opposing party.[314]

When an election of remedies is required, a claimant must consider the effect on any fee award. Electing a remedy for which attorney's fees are not authorized waives any fees, and any attorney's fees award should be omitted from the judgment.[315]

At the time the judgment is signed, it is unknown whether there will be an appeal. But appellate fees are recoverable only in the event of an appeal. Accordingly, a judgment including appellate fees may be drafted in one of two ways:

1. "Fee plus"—awarding the amount of attorney's fees through trial *plus* a separate amount to be awarded in the event appellate work is necessary; or
2. "Fee minus"—awarding the amount of attorney's fees for all trial and appellate work *minus* an amount to be remitted in the event appellate work is not necessary. Either form is acceptable, but the

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310. *See* TEX. R. CIV. P. 301 (dictating that one judgment must include all claims).

311. *See* TEX. FAM. CODE ANN. § 11.18(a) (Vernon 1992) (providing for payment directly to attorney).

312. CPS Int'l, Inc. v. Harris & Westmoreland, 784 S.W.2d 538, 542-43 (Tex. App.—Texarkana 1990, no writ); City of Dallas v. Arnett, 762 S.W.2d 942, 955 (Tex. App.—Dallas 1988, writ denied); Williams v. Northrup, 649 S.W.2d 740, 748 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

313. Phillips v. Phillips, 820 S.W.2d 785, 787-88 n.2 (Tex. 1991); Baker v. Int'l Record Syndicate, 812 S.W.2d 53, 56 (Tex. App.—Dallas 1991, no writ); Gerdes v. Mustang Exploration Co., 666 S.W.2d 640, 645 (Tex. App.—Corpus Christi 1984, no writ). Failure to object waives such error. Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 882 (Tex. App.—Corpus Christi 1988, writ denied).

314. Murrco Agency, Inc. v. Ryan, 800 S.W.2d 600, 603 (Tex. App.—Dallas 1990, no writ); Satellite Earth Stations East, Inc. v. Davis, 756 S.W.2d 385, 387 (Tex. App.—Eastland 1988, writ denied); Streeter v. Thompson, 751 S.W.2d 329, 331 (Tex. App.—Fort Worth 1988, no writ).

315. Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp., 797 F.2d 227, 235 (5th Cir. 1986).

first is the "better practice."[316]

A party cannot be penalized for appealing an improper judgment. Thus, the judgment should condition an award of appellate fees not just on an appeal but on an unsuccessful appeal by the party against whom fees are assessed.[317] If the award is not conditioned on an unsuccessful appeal, this condition is normally implied and the judgment so reformed on appeal.[318] If the party awarded appellate attorney's fees is completely unsuccessful on appeal, no appellate fees are recoverable.[319] If the party awarded appellate fees is successful in part, the appellate court must remand for a finding of a reasonable fee as to the successful part.[320]

In a bench trial, findings of fact and conclusions of law should be requested if a party intends to appeal a judgment for attorney's fees

316. International Sec. Life Ins. Co. v. Spray, 468 S.W.2d 347, 349-50 (Tex. 1971).

317. Smith v. Smith, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied); Memorial City Gen. Hosp. Corp. v. Cintas Corp., 679 S.W.2d 133, 139 (Tex. App.—Houston [14th Dist.] 1984, no writ); Siegler v. Williams, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ).

318. *CPS Int'l, Inc.*, 784 S.W.2d at 544; Kold-Serve Corp. v. Ward, 736 S.W.2d 750, 756 (Tex. App.—Corpus Christi 1987, writ dism'd by agr.); Jacobs v. Jacobs, 669 S.W.2d 759, 766 (Tex. App.—Houston [14th Dist.] 1984), *aff'd in part and rev'd in part on other grounds*, 687 S.W.2d 731 (Tex. 1985); Twin City Fire Ins. Co. v. Cortez, 562 S.W.2d 940, 945 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 576 S.W.2d 786 (Tex. 1978); *but cf. Siegler*, 658 S.W.2d at 241 (holding unconditioned appellate fee awards reversible error); King Optical v. Automatic Data Processing of Dallas, Inc., 542 S.W.2d 213, 218 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (disallowing unconditioned appellate fee award).

319. *See* Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (per curiam) (awarding appellate expenses); LaFreniere v. Fitzgerald, 669 S.W.2d 117, 119 (Tex. 1984); Conann Constructors, Inc. v. Muller, 618 S.W.2d 564, 569 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (awarding expenses where appellant successful). In declaratory judgment cases where the change from prevailing to losing party does not necessarily require a change in a fee recovery, remand for redetermination by the trial court is appropriate. *See* Graham v. City of Lakewood Village, 796 S.W.2d 800, 804-05 (Tex. App.—Fort Worth 1990, writ denied) (finding remand appropriate to provide for trial court discretion); Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement, 747 S.W.2d 926, 931 (Tex. App.—Dallas 1988, writ denied); *but cf.* Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc., 796 S.W.2d 763, 770-72 (Tex. App.—Dallas 1990, writ denied) (providing that appellant must invoke rule by filing point of error).

320. Southwestern Bell Tel. Co. v. Vollmer, 805 S.W.2d 825, 834 (Tex. App.—Corpus Christi 1991, writ denied); Ambassador Dev. Corp. v. Valdez, 791 S.W.2d 612, 624-25 (Tex. App.—Fort Worth 1990, no writ); *Smith*, 757 S.W.2d at 426; *Siegler*, 658 S.W.2d at 241. *But cf.* Rittgers v. Rittgers, 802 S.W.2d 109, 115 (Tex. App.—Corpus Christi 1990, writ denied) (rendering judgment denying all appellate fees even though appeal was only partially successful). In *Twin City Fire Ins. Co.*, the court suggested in dicta that an appellate court could require a remittitur if an appeal was partially successful. *Twin City Fire Ins. Co.*, 562 S.W.2d at 945. This seems inconsistent with the rule that such fees must be set by the trial court.

after a bench trial. Absent this request, all necessary findings and conclusions will be deemed in favor of the judgment.[321] Further, a finding as to a reasonable contingency percentage allows the appellate court to render judgment rather than remand if the amount of the underlying judgment has been modified on appeal.[322]

Prejudgment interest is not allowed on attorney's fees.[323] Postjudgment interest is provided by statute and is set at the lesser of 10% and the consumer credit commissioner's rate.[324] Several older cases hold that a higher contractual rate may be applied for contracts specifying a stipulated percentage of the balance as attorney's fees.[325] Postjudgment interest should not begin to run on an award of appellate fees until an appeal is perfected.[326]

Generally, a judgment setting a reasonable fee does not change the underlying fee agreement between an attorney and her client. In one case, a court limited the attorney-client contract to the amount found by the jury as a reasonable fee.[327] However, this was a class action case and the holding was based on the lack of notice to all clients in the class. The court stated that "a trial court under proper circumstances may enforce a contingent fee agreement that allows a recovery greater than the amount found by a jury as the reasonable value of the attorney's services,"[328] but the court did not indicate what those proper circumstances might be.

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321. Shenandoah Ass'n v. J & K Properties, Inc., 741 S.W.2d 470, 484 (Tex. App.—Dallas 1987, writ denied).

322. Mack v. Moore, 669 S.W.2d 415, 420 (Tex. App.—Houston [1st Dist.] 1984, no writ).

323. Hervey v. Passero, 658 S.W.2d 148, 149 (Tex. 1983) (per curiam); *Vollmer*, 805 S.W.2d at 834; McCann v. Brown, 725 S.W.2d 822, 826 (Tex. App.—Fort Worth 1987, no writ); *cf.* Smith v. Davis, 453 S.W.2d 340, 349-50 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) (disapproving of cases awarding prejudgment interest for attorney's fees).

324. TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon Supp. 1992).

325. Tsesmelis v. Sinton State Bank, 53 S.W.2d 461, 464-65 (Tex. Comm'n App. 1932, judgment adopted); Clarke v. Gauntt, 149 S.W.2d 193, 195 (Tex. Civ. App.—Waco 1941), *aff'd in part and rev'd in part on other grounds*, 161 S.W.2d 270 (Tex. Comm'n App. 1942, judgment adopted); *see also* TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 1 (Vernon Supp. 1992) (requiring that rate of interest in award be rate set in contract or be 18%); *Smith*, 453 S.W.2d at 349-50 (noting that some courts have awarded prejudgment interest when attorney's fees is set percentage).

326. *Vollmer*, 805 S.W.2d at 834 (Tex. App.—Corpus Christi 1991, writ denied); Republic Nat'l Life Ins. Co. v. Beard, 400 S.W.2d 853, 859-60 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.).

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

328. *Id.*

IX. APPEALING ATTORNEY'S FEES

As with other appellate matters, preservation of error and assignment on appeal are necessary to challenge a fee award. Objection must be made in the trial court to complain that a fee award is insufficient[329] or that there was no demand.[330] Without an assignment of error on appeal, an appellate court cannot reverse an improper denial of attorney's fees[331] nor a fee award based on testimony by an undesignated witness.[332] If no record is made for appeal, it will be hard to show that the fee award was improper based on the evidence.[333]

The standard of appellate review for attorney's fee awards made by a judge sitting as trier of fact is somewhat perplexing. Usually, findings of the judge or jury are subject to challenge for legal or factual insufficiency.[334] Jury findings as to attorney's fees are routinely reviewed upon that basis and some courts use the same standard to review fee findings by a judge.[335]

However, several cases state that a judge's award of attorney's fees should be reviewed merely for abuse of discretion.[336] This is clearly

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329. Milt Ferguson Motor Co. v. Zeretzke, 827 S.W.2d 349, 360 (Tex. App.—San Antonio 1991, n.w.h.); Texas Am. Corp. v. Woodbridge Joint Venture, 809 S.W.2d 299, 304 (Tex. App.—Fort Worth 1991, writ denied); Morey v. Page, 802 S.W.2d 779, 787 (Tex. App.—Dallas 1990, no writ).

330. All Valley Acceptance Co. v. Durfey, 800 S.W.2d 672, 676 (Tex. App.—Austin 1990, writ denied).

331. Texas Nat'l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986) (per curiam).

332. Northwest Otolaryngology Assocs. v. Mobilease, Inc., 786 S.W.2d 399, 406 (Tex. App.—Texarkana 1990, writ denied).

333. Olivares v. Porter Poultry & Egg Co., 523 S.W.2d 726, 730 (Tex. Civ. App.—San Antonio 1975, no writ); Pockrus v. Connelly, 521 S.W.2d 115, 117-18 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

334. W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 919-20 (1990); *see also* McGalliard v. Kuhlmann, 722 S.W.2d 694, 696-98 (Tex. 1986) (discussing sufficiency or evidence standard upon appellate review).

335. Texas Gen. Indem. Co. v. Speakman, 736 S.W.2d 874, 884-64 (Tex. App.—Dallas 1987, no writ).

336. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam); Inwood North Homeowners' Ass'n v. Wilkes, 813 S.W.2d 156, 157 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.); Jackson's Indus. Supplies, Inc. v. Cochran, 809 S.W.2d 802, 807 (Tex. App.—Beaumont 1991, n.w.h.); Guerra v. Brown, 800 S.W.2d 343, 345 (Tex. App.—Corpus Christi 1990, no writ); *Northwest Otolaryngology Assocs.*, 786 S.W.2d at 406; Minor v. Aland, 775 S.W.2d 744, 747 (Tex. App.—Dallas 1989, writ denied); Rosas v. Bursey, 724 S.W.2d 402, 410-11 (Tex. App.—Fort Worth 1986, no writ); City of Houston v. Blackbird, 658 S.W.2d 269, 274 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); Reintsma v. Greater Austin Apartment Maintenance, 549 S.W.2d 434, 437 (Tex. Civ. App.—Austin 1977, writ dism'd).

true for recovery under the Declaratory Judgment Act[337] or other statutes where a fee award is discretionary.[338] A court abuses its discretion only if the action taken is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law[339] or the action is contrary to the only conclusion that is compelled by the facts.[340] A court also abuses its discretion if it acts without reference to any guiding rules and principles.[341] Obviously, this is a lower standard than would be used to review a fee awarded by a jury.

Several anomalies result from this confusion. For example, in one case the only evidence supported a fee award of $10,000 but the trial court awarded no fees and the appellate court found no abuse of discretion.[342] This would not have been the result if the decision had been appealed from an identical jury verdict.[343] Another court reviewed fee awards under the Declaratory Judgment Act and Chapter 38 by the same abuse of discretion standard[344] even though fees are left entirely to the court's discretion under the first but are mandatory under the latter.

Possibly, the relaxed standard of review in bench trials may be the result of the availability of judicial notice under Chapter 38. One court has suggested that abuse of discretion review is appropriate because the judge may take notice of "various intangibles incapable of

337. Oake v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985); *see also* Pierce v. Gillespie, 761 S.W.2d 390, 397 (Tex. App.—Corpus Christi 1988, no writ) (discounting cross-point complaining denial of attorney's fees because party did not object to fee issue at trial court).

338. *E.g.* Alford v. Whaley, 794 S.W.2d 920, 924 (Tex. App.—Houston [1st Dist.] 1990, no writ) (guardian ad litem fee); Brown v. Brown, 520 S.W.2d 571, 578-79 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd) (divorce).

339. Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989).

340. Freeman v. Bianchi, 820 S.W.2d 853, 858 (Tex. App.—Houston [1st Dist.] 1991, n.w.h.).

341. Wright v. Brooks, 773 S.W.2d 649, 651 (Tex. App.—San Antonio 1989, writ denied).

342. Pontiac v. Elliott, 775 S.W.2d 395, 401 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

343. *E.g.*, Satellite Earth Stations East, Inc. v. Davis, 756 S.W.2d 385, 387 (Tex. App.—Eastland 1988, writ denied); Jess v. Libson, 742 S.W.2d 90, 92 (Tex. App.—Austin 1987, no writ); Great State Petroleum v. Arrow Rig Serv., 706 S.W.2d 803, 811-12 (Tex. App.—Fort Worth 1986, no writ); Coffey v. Young, 704 S.W.2d 591, 595 (Tex. App.—Fort Worth 1986, no writ); Gulf Oil Corp. v. Crow, 704 S.W.2d 849, 854 (Tex. App.—Corpus Christi 1985, no writ).

344. *E.g.*, Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co., 794 S.W.2d 442, 448-49 (Tex. App.—Corpus Christi 1990, writ denied).

review."[345] However, judicial notice under Chapter 38 is limited to the contents of the case file and the customary fees, matters that are neither intangible nor incapable of review.

Whatever the standard of review, as with other damage awards, courts may reduce, by remittitur, a fee award that is excessive.[346] The standard for remittitur is the same as that for factual sufficiency; only awards that are against the great weight and preponderance of the evidence may be remitted.[347] If the only evidence in the record supports an amount less than the fee award, remittitur will be granted to limit the judgment to the amount supported by the evidence.[348]

Disposition after reversal on appeal depends upon the reason for reversal, the evidence, and the type case involved. If a judgment denying all attorney's fees is reversed, the appellate court must remand to the trial court to make the finding of a reasonable fee.[349] Several exceptions exist. If the trial court has determined the applicable fee but erroneously failed to award it, the appeals court may render judgment for the amount already established.[350] Similarly, if the trial

345. Mack v. Moore, 669 S.W.2d 415, 420 (Tex. App.—Houston [1st Dist.] 1984, no writ).

346. Giles v. Cardenas, 697 S.W.2d 422, 429-30 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); Travelers Ins. Co. v. Medi-Rents, Inc., 687 S.W.2d 499, 502 (Tex. App.—Houston [14th Dist.] 1985, no writ); Jack Roach Ford v. De Urdanavia, 659 S.W.2d 725, 730 (Tex. App.—Houston [14th Dist.] 1983, no writ); Wuagneux Builders, Inc. v. Candlewood Builders, Inc., 651 S.W.2d 919, 923 (Tex. App.—Fort Worth 1983, no writ); Allied Fin. Co. v. Garza, 626 S.W.2d 120, 126-28 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.); Argonaut Ins. Co. v. ABC Steel Prods. Co., 582 S.W.2d 883, 888-89 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

347. Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 778 (Tex. 1989) (per curiam). A number of earlier cases had suggested a different standard for remittitur of attorney's fees awards based on independent appellate consideration of the testimony, the nature of the case, the amount in controversy, and the common knowledge of the justices as lawyers. *See, e.g.*, City of Dallas v. Arnett, 762 S.W.2d 942, 957 (Tex. App.—Dallas 1988, writ denied); *Giles*, 697 S.W.2d at 429; *Travelers Ins. Co.*, 687 S.W.2d at 502.

348. Valley Coca-Cola Bottling Co. v. Molina, 818 S.W.2d 146, 149 (Tex. App.—Corpus Christi 1991, writ denied); Bradbury v. Scott, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied); Delhi Gas Corp. v. Lamb, 724 S.W.2d 97, 100 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

349. First Nat'l Bank of Mercedes v. La Sara Grain Co., 676 S.W.2d 183, 185 (Tex. App.—Corpus Christi 1984, no writ). The same rule applies to an award of no appellate fees. Gunter v. Bailey, 808 S.W.2d 163, 165-66 (Tex. App.—El Paso 1991, n.w.h.).

350. Keeper v. First Care, Inc., 794 S.W.2d 879, 882-83 (Tex. App.—Tyler 1990, no writ); Rauscher Pierce Refsnes, Inc. v. Koenig, 794 S.W.2d 514, 518 (Tex. App.—Corpus Christi 1990, writ denied); Estate of Kaiser v. Gifford, 692 S.W.2d 525, 527-28 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

court has improperly calculated a stipulated percentage fee, the appeals court may render judgment for the correct amount.[351] If the expert testimony has been clear, direct, positive, and free from contradiction by other evidence or the circumstances of the case, the appellate court may render judgment for the amount stated in such testimony.[352]

If a judgment is reversed for failure to segregate fees among recoverable claims, the court must remand for segregation.[353] If a judgment granting fees is reversed for other reasons, such as the failure to offer any evidence or the failure to prove that a particular fee was reasonable, the general rule remains that the case should be remanded for a new trial.[354] However, some courts have held to the contrary.[355] Normally, judgment is rendered and the case is not remanded if there was no proof. It is unclear why an exception should be made for attorney's fees.[356]

If a summary judgment granting fees is reversed for no evidence, then a fact issue remains that must be remanded.[357] If a default judgment granting fees is reversed for no evidence, again the proper disposition appears to be a remand to receive such evidence.[358]

X. CONCLUSION

Proof of attorney's fees at trial is an issue fraught with pitfalls, op-

351. Bernal v. Garrison, 818 S.W.2d 79, 85 (Tex. App.—Corpus Christi 1991, writ denied); Hodges v. Star Lumber & Hardware Co., 544 S.W.2d 185, 187 (Tex. Civ. App.—Amarillo 1976, no writ).

352. *Ragsdale*, 801 S.W.2d at 881.

353. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991).

354. Woods Exploration & Producing Co. v. Arkla Equip. Co., 528 S.W.2d 568, 570-71 (Tex. 1975); Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1966); Smith v. Smith, 757 S.W.2d 423, 426-27 (Tex. App.—Dallas 1988, writ denied).

355. Moody v. EMC Servs., Inc., 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.); American Commercial Colleges, Inc. v. Davis, 821 S.W.2d 450, 455 (Tex. App.—Eastland 1991, n.w.h.); Bolton v. Alvarado, 762 S.W.2d 215, 217 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

356. *See* Leggett v. Brinson, 817 S.W.2d 154, 160 (Tex. App.—El Paso 1991, n.w.h.) (Osborn, C.J., dissenting) (arguing that DTPA still requires some evidence of reasonable attorney's fees before such can be awarded).

357. Pelto Oil Co. v. CSK Oil & Gas Corp., 804 S.W.2d 583, 588 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

358. Fairmont Homes, Inc. v. Upchurch, 704 S.W.2d 521, 526 (Tex. App.—Houston [14th Dist.] 1986), *modified on other grounds*, 711 S.W.2d 618 (Tex. 1986) (per curiam); Blumenthal v. Ameritex Computer Corp., 646 S.W.2d 283, 287-88 (Tex. App.—Dallas 1983, no writ).

tions, opportunities for waiver, and second chances. In view of the increasingly complex rules surrounding proof of attorney's fees, this issue can no longer be treated as an afterthought. Because of the high cost of litigation, reimbursement of attorney's fees often determines whether or not a client will view the litigation as successful. Careful thought needs to be given to the preparation of this aspect of any case.