

TEXAS YOUNG LAWYERS ASSOCIATION

ATTORNEY

BILLING GUIDE



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INTRODUCTION

The purpose of this guide is to assist lawyers in connection with attorney fee statements by addressing (1) general billing practices, (2) privileges applicable to attorney fee statements, and (3) an overview of standards for recovery of attorney's fees. This guide is not exhaustive of all issues, but is meant to provide a starting point for lawyers to develop and maintain good billing practices.

WHAT ATTORNEY'S FEES ARE REVOCABLE?

Generally, attorney's fees are recoverable if the award of attorney's fees are legally authorized and the attorney's fees are reasonable and necessary for the legal representation.

ARE ATTORNEY FEE STATEMENTS PRIVILEGED?

Attorney fee statements are privileged under both the attorney-client privilege and work product doctrine.

The attorney-client privilege protects communications between an attorney and a client that are not intended to be disclosed to third parties and are made for the purpose of facilitating the rendition of professional legal services.

The work product privilege applies to (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives, including the party's attorneys. The purpose of the work product doctrine is to protect the attorney's thought process, including strategy decisions and issue formulations, and the compilation of information to the extent it reveals the attorney's thought processes.

Attorney billing records constitute communication made in anticipation of litigation or for trial between a party and the party's representatives. Also, as a whole, billing records represent the compilation of information that reveals an attorney's legal strategy and thought processes, at least incidentally.

In short, attorney fee statements are considered privileged.

IN WHAT SITUATIONS ARE ATTORNEY FEE STATEMENTS DISCOVERABLE?

If a party is seeking recovery of its attorney's fees, then it can be required to produce redacted copies of attorney fee statements in support of its claim.

Additionally, there are some circumstances in which a party opposing attorney's fees may be compelled to produce copies of their attorney's fee statements. A party may waive its work-product privilege to attorney's fee statements by relying on its billing records to contest the reasonableness of opposing counsel's attorney fees. Additionally, if an attorney designates itself as an expert to testify to the reasonableness of attorney's fees, the attorney's fees may be discoverable under the rules governing testifying experts. In such situations, a party is entitled to expert discovery of facts known by the testifying expert relating to the expert's mental impressions and opinions formed, any bias of the expert witness, and documents provided to or reviewed by the expert in anticipation of testimony. As a result, designation of counsel as a testifying expert may provide access to information and attorney work product not otherwise discoverable in discovery.

ARE ALL ATTORNEY'S FEES INCURRED OR CONTRACTED FOR RECOVERABLE?

Only attorney's fees that are reasonable and necessary are recoverable. This means that the amount incurred by a party or contracted for does not necessarily establish that fee as reasonable and necessary. In order to recover the amount incurred or contracted for, the fee claimant has the burden of establishing the fee is both reasonable and necessary.

WHAT EVIDENCE SHOULD BE PRESENTED WHEN REQUESTING ATTORNEY'S FEES?

An attorney should discuss all of the applicable factors listed above. At a minimum, an attorney also needs to provide evidence of (1) the particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.

Additionally, the testimony regarding the fees should not be generalities, but should discuss the specific amount of time spent on the various tasks for which fees are recovered. As an example, an attorney cannot simply state that they spent 300 hours on the case and describe the various tasks performed, such as preparation and attendance for depositions, attendance at hearings, review of discovery, and trial. Instead, the attorney should provide evidence as to the specific amount of time spent performing the various tasks. As a result, it is typically helpful to introduce billing records which break down the time spent performing various tasks.

Presentation of this evidence constitutes what is referred to as the base lodestar figure which is presumed reasonable amount of attorney's fees. At this point, the award can be adjusted up or down depending on the application of the lodestar factors.

WHAT FACTORS ARE CONSIDERED IN ADJUSTING AN AWARD OF ATTORNEY'S FEES UP OR DOWN?

The Texas Supreme Court has identified non-exclusive factors as a guide in determining the reasonableness and necessity of attorney's fees. Those factors are:

1. The time and labor required;
2. The novelty and difficulty of the questions involved;
3. The skill required to perform the legal service properly;
4. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
5. The fee customarily charged in the locality for similar services;
6. The amount involved and the results obtained;
7. The time limitations imposed by the client or by the circumstances;
8. The nature and length of the professional relationship with the client;

9. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
10. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

ARE BILLING STATEMENTS REQUIRED FOR AN AWARD OF ATTORNEY'S FEES?

Contemporaneous billing records are not required to prove the requested fees are reasonable and necessary. However, contemporaneous billing records are valuable as they will allow the attorney to refer to records and documentation required to prove the reasonableness of the award. The Texas Supreme Court has strongly encouraged billing records to prove up the necessity of requested fees when the fees are contested.

WHAT SHOULD BE INCLUDED IN A TIME ENTRY?

Time entries should contain sufficient detail to determine what legal work was performed. As an example, instead of “prepare discovery”, it is recommended that a time entry specifically describe the task being performed (e.g. drafting requests for production and interrogatories). Another example would be to differentiate between time spent preparing for a hearing as opposed to attending a hearing. More detailed time entries allow a lawyer to keep the client reasonably informed regarding the status and work performed on a litigation matter, as well as assisting in determining reasonable and necessary fees in the event that attorney’s fees are recoverable for that matter.

WHAT IS BLOCK BILLING?

Block billing is the practice of including all activities performed in a single day on a particular matter into a single time entry instead of specifically identifying the amount of time spent on each activity. Although block billing is not prohibited, a better practice is to delineate the amount of time spent on each activity next to a narrative description or to make separate time entries for each activities.

ARE PARALEGAL FEES RECOVERABLE?

Yes, although paralegal fees are not automatically recoverable as a subset of attorney's fees. Instead, there must be evidence of the following:

1. The paralegals are qualified through education, training or work experience to perform substantive legal work;
2. The substantive legal work was performed under the direction and supervision of an attorney;
3. The nature of the legal work performed;
4. The hourly rate charged for the paralegal was reasonable and necessary; and
5. The number of hours expended by the paralegal was reasonable and necessary.

WHAT TYPE OF ACTIVITIES PERFORMED BY PARALEGALS ARE CONSIDERED "SUBSTANTIVE LEGAL WORK"?

Substantive legal work includes:

1. Conducting client or witness interviews;
2. Drafting documents;
3. Assisting with answering discovery;
4. Drafting correspondence;
5. Drafting pleadings;
6. Summarizing depositions;
7. Summarizing documents;
8. Attending depositions;
9. Attending court hearings; and
10. Attending trials.

Work that is typically not considered "substantive legal work" includes filing, scanning documents, copying documents, bates stamping documents, making attorney revision to a document or pleading, arranging conference calls, or emailing documents.

WHO IS ENTITLED TO RECOVER AN AWARD OF ATTORNEY'S FEES?

The purpose for awarding attorney's fees is generally to compensate the prevailing party for its reasonable losses resulting from the litigation process. Absent express statutory or contractual text mandating otherwise, the award and ability to enforce it belongs to the party and not the attorney.

SHOULD I HAVE AN ENGAGEMENT LETTER?

Engagement letters are not required unless it is a contingency fee case or a case involving association with or referral to a different law firm or lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(d),(f). However, best practice is to have an engagement letter for each matter that you undertake which clearly describes the scope of representation.

WHAT SHOULD BE INCLUDED IN AN ENGAGEMENT LETTER?

Below is a non-exhaustive list of suggested items to include in an engagement letter to better help define the attorney-client relationship:

1. Specific identification about who the client is – A lawyer should specifically identify the client represented. As an example, if a lawyer is engaged to represent an organization, the representation is for the organization and not the representative that requests representation. Specifically identifying the client will help identify and avoid conflicts of interest in connection with the representation.
2. Identify the scope of the representation – A lawyer should specifically identify the activities that will be performed. As examples, if the lawyer is engaged to represent the client in connection with a business transaction, the engagement letter should specifically identify that transaction. If the lawyer is engaged to represent the client in a litigation matter but not an appeal, the engagement letter should specify when the attorney-client relationship ends.
3. No guarantee of results – The engagement letter should state that the lawyer will represent the client, but cannot guarantee a favorable outcome.

4. Payment of Fees – The engagement letter should clearly describe the fees that will be charged and paid. This impacts several areas which may need to be addressed in the engagement letter.
 - a. Description of the Fee – If the fee is an hourly fee, it should be clearly described in the agreement as to the amount of the hourly fee and how time spent will be charged. As an example, if the lawyer’s practice is to round to a tenth of an hour, the engagement letter should specifically address that issue. If the lawyer’s rates are subject to change, the engagement letter should specifically address that issue. As an example, if the lawyer adjusts rates on a yearly basis, the engagement letter should outline the potential for a yearly adjustment.
 - b. Contingency Fee – If the matter is a contingency fee, the lawyer should clearly disclose how the fee is to be calculated. Additionally, if the fee is to increase depending on the stage of the case, i.e. settlement negotiation, filing lawsuit, trial, appeal, the engagement letter should clearly define when the fee is to increase.
 - c. Third Party Paying the Bill – A lawyer is allowed to be paid from a source other than the client if the client is informed of that fact, consents to the arrangement, and the arrangement does not compromise the lawyer’s duty of loyalty to the client. Tex. Disciplinary Rules Prof’l Conduct R. 1.08(e).
 - d. Expenses – The engagement letter should include any expenses that will be passed along to the client. Examples of expenses could include court costs, legal research fees, expert fees, copy charges, postage, travel expenses, or courier expenses. If there will be a “mark-up” of these expenses, the “mark-up” must be reasonable and the lawyer should include that information in the engagement letter. For example, if a lawyer charges \$.20 per page for copy charges but the actual cost is less than that amount, the engagement letter should specifically state the amount of the charge, although actual costs to the lawyer are less.

5. Recovery of Attorney's Fees – If the matter is one in which the client is entitled to an award of attorney's fees, the lawyer should include a statement that although the matter is one in which attorney's fees may be recoverable, the jury or Court may decline to award fees. In that event, the engagement letter should specify that the client is still obligated to pay the lawyer's fees.
6. Retainer – There are various types of retainers that could be included in an engagement letter. If the lawyer requires a retainer, the engagement letter should specifically include information about the amount of the retainer, how the retainer will be applied and under what circumstances the retainer will be returned to the client.
7. Grievance Process – Texas Government Code § 81.079 requires attorneys to disclose to clients the existence of a grievance process. That requirement may be met by including information about the grievance process in the engagement letter.
8. Texas Lawyer's Creed – The Texas Lawyer's Creed requires that lawyers advise their clients of the contents of the Texas Lawyer's Creed when undertaking representation. As a result, it is recommended that the lawyer include a copy of the Texas Lawyer's Creed when undertaking representation.

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