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IT'S TIME TO GET PAID: PRACTICE TIPS FOR SUBSTANTIATING REASONABLE ATTORNEY'S FEES AFTER *EL APPLE*

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I. INTRODUCTION

Although the Texas Supreme Court handed down its *El Apple* opinion in 2012,[1] attorneys continue to submit inadequate affidavits and fail to provide redacted fee bills in discovery, causing a number of trial courts to outright deny the recovery of attorney's fees even in cases where such fees are available under the various statutes authorizing recovery of attorney's fees. The pitfall is an easy one to fall into. That is because for nearly thirty years an attorney could submit an affidavit containing the number of hours worked, the rate charged, and a conclusory statement that the fees are "reasonable and necessary," and this would be sufficient evidence for an award of attorney's fees. This is no longer the case in Texas.[2]

II. A BRIEF HISTORY OF DETAILED ATTORNEY TIME RECORDS

For those familiar with practice before the federal courts, the necessity of keeping detailed time records is not a new concept. Beginning around 1980, attorneys seeking fee awards in employment discrimination cases have needed to present detailed hourly time records as well as segregate issues and claims in their

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1. El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 765 (Tex. 2012).
2. *El Apple I, Ltd.*, 370 S.W.3d at 765.

fee bills.[3] The *Hensley* decision of 1983 cemented that need for accurate and detailed time records for civil rights claims.[4] In *Hensley v. Echerhart*, the U.S. Supreme Court held:

> [T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked . . . and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.
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> We recognize that there is no certain method of determining when claims are "related" or "unrelated." Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures. . . . "As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims."[5]

Since 1983, the *Hensley* standard has become the de facto federal court standard generally applicable in all federal attorney-fee settings. And since *Hensley*, the federal courts have expanded and clarified the contours of what constitutes sufficient attorney time records and have established penalties for failing to provide sufficient time records. For example, the D.C. Circuit in 2004 refused to overturn a reduction of attorney's fees based on the rule established in *Hensley*.[6] The holding is instructive and highlights the legal deficiency of a number of common billing practices employed by attorneys and law firms:

> To begin with, many time records lump together multiple tasks, making it impossible to evaluate their reasonableness. . . .
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> Many time records also lack adequate detail . . . and do not adequately describe the legal work for which the client is being billed. This makes it impossible for the court to verify the reasonableness of the billings, either as to the necessity of the particular service or the amount of time expended on a given legal task. . . . The law clerk's time records, for instance, give an identical one-line entry, "[r]esearch and writing for appellate brief. . . ."

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3. Hensley v. Echerhart, 461 U.S. 424, 433–34, 437–40 (1983).

4. *Id.*

5. *Hensley*, 461 U.S. at 437 & n.12 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978)) (internal citations omitted).

6. Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 968–75 (D.C. Cir. 2004).

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> [B]ecause the time records contain so little information, we have no basis for concluding that hours that appear to be excessive and redundant are in fact anything other than excessive and redundant. . . .
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> . . . .
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> Second, several time records include tasks that do not warrant reimbursement. . . . In this circuit, the government cannot be charged for time spent in discussions with the press. . . . Nor should it have to reimburse Role Models for two hours that a partner spent "[c]ompleting application for admission to D.C. Circuit Bar" and fifteen minutes that the associate spent "[r]esearch[ing] admission to D.C. Circuit Bar [and] prepar[ing] application materials" for the partner. . . .
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> In view of all this—inadequate documentation, failure to justify the number of hours sought, inconsistencies, and improper billing entries—we will allow reimbursement for only fifty percent of the attorney hours that Role Models requests.[7]

Even when attorneys do keep contemporaneous time records, the courts may still refuse to award the full amount of attorney's fees if the descriptions are "vague" or blocked together with other tasks.[8] For example, the Bankruptcy Court for the Northern District of Illinois, in reducing a request for reimbursement for attorney's fees, noted:

> USA objects to many of the time entries pertaining to telephone conversations. Pursuant to the standards set forth in this district, a time entry of "telephone call" or "telephone call with IRS" is insufficient. The purpose and length of the conversation and the person called or calling must be clearly set forth in the application. The entries pertaining to telephone calls in the instant application are insufficient in that they fail to provide the Court with the requisite information in order to determine if the services were reasonable and necessary. . . .
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> Moreover, there are several other entries which inadequately describe the tasks performed. For instance, many of the entries reflect time expended reviewing the file, conferencing, and writing letters to the client without the requisite detailed

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7. *Id.* at 971–73 (quoting *In re* Sealed Case, 890 F.2d 451, 455 (D.C. Cir. 1989)) (internal citations omitted).

8. *See, e.g.*, *In re* Price, 143 B.R. 190, 195–96 (Bankr. N.D. Ill. 1992), *aff'd sub nom.* United States v. Price, 176 B.R. 807 (N.D. Ill. 1993), *and aff'd sub nom. In re* Price, 42 F.3d 1068 (7th Cir. 1994).

> specificity. A proper billing entry must adequately explain what services the professional was rendering at the time. With respect to conferences, the entry should note the nature and purpose of the conference as well as the parties involved.[9]

III. DETAILED ATTORNEY TIME RECORDS COME TO TEXAS

In *El Apple I, Ltd. v. Olivas*, the Texas Supreme Court addressed the calculation of reasonable attorney's fees in Texas and the proof required to establish a reasonable fee.[10] Myriam Olivas, an Applebee's restaurant manager in El Paso, filed suit against her employer, El Apple I, Ltd., (El Apple).[11] Olivas alleged that El Apple violated the Texas Commission on Human Rights Act (the TCHRA) by discriminating against her based on her sex and retaliating against her.[12] After a jury found in favor of Olivas on her retaliation claim, the trial court entered a judgment awarding Olivas compensatory damages of $1,700 for back pay, $75,000 for past compensatory damages, and $28,000 for future compensatory losses.[13] Because Olivas prevailed at trial, she submitted an application for attorney's fees, which the trial court granted.[14] On appeal, El Apple argued that the trial court abused its discretion by granting Olivas's application for attorney's fees because the court did not have sufficient evidence on which to make a reasonable assessment of the application.[15] The court of appeals disagreed with El Apple and affirmed the trial court's award of attorney's fees, holding that the affidavits were legally sufficient to support the trial court's determination of hours spent and a reasonable hourly rate and that more detailed billing records were unnecessary.[16]

The Texas Supreme Court began its analysis of the proof required to establish attorney's fees by citing to *Hensley*, stating that "a party applying for an award of attorney's fees under the lodestar method bears the burden of documenting the hours expended on the litigation and the value of those hours."[17] The Court further noted:

> [M]eaningful review of the hours claimed is particularly important because the usual incentive to charge only reasonable attorney's fees is absent when fees are paid by the opposing party. . . .

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9. *Id.*
10. El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 759 (Tex. 2012)
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 759–60.
15. *Id.*
16. *Id.* at 760.
17. *Id.* at 761 (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

> Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."[18]

The Texas Supreme Court, after analyzing *Hensley*, held that an attorney must submit "contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed."[19] These billing records must include "at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required."[20]

In *City of Laredo v. Montano*, the Texas Supreme Court reaffirmed its holding in *El Apple* and confirmed that the days of submitting conclusory affidavits and hyperbolic testimony as "evidence" for attorney's fees were gone (in most cases).[21] At issue in *City of Laredo* was the attempted condemnation of property in the central business district of Laredo owned by the Montano family.[22] In December 2004, the City of Laredo (the City) decided it needed the Montanos' property in connection with the widening of a street and the construction of a pedestrian plaza.[23] The Montanos refused to sell, claiming that the City lacked a public purpose for their land.[24] The Montanos alleged that the City's true purpose was to benefit El Portal Center, which was a private entity operating a nearby shopping center.[25]

In March 2006, the City filed suit to condemn the property, which resulted in a jury trial about four years later.[26] The jury found in favor of the Montanos and awarded attorney's fees and expenses.[27] The trial court rendered judgment on the jury verdict, awarding the Montanos $446,000 in attorney's fees through trial, additional attorney's fees on appeal, and additional sums for

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18. *Id.* at 763 (citing *Hensley*, 461 U.S. at 434).
19. *Id.*
20. *Id.*
21. *See* City of Laredo v. Montano, 414 S.W.3d 731, 736–37 (Tex. 2013).
22. *Id.* at 732–33.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

appraisals and other expenses the property owners incurred.[28] The City challenged the trial court's award of attorney's fees on appeal.[29]

During the litigation, the Montanos were represented by multiple attorneys, including Richard J. Gonzalez and Adriana Benavides-Maddox.[30] Gonzalez testified to performing the following tasks in the Montanos' defense:

> (1) making an open records request;
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> (2) searching through city council meeting minutes regarding the Montano family's property;
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> (3) watching 38 DVDs of the city-council meetings (some more than once);
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> (4) visiting the premises many times;
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> (5) conducting "a lot" of legal research;
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> (6) preparing the pleadings and motions;
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> (7) spending time in court for appearances;
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> (8) spending "countless hours" preparing for and taking depositions;
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> (9) reviewing the transcripts and DVDs of the depositions; and
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> (10) preparing for trial and trying the case.[31]

Gonzalez further testified that he worked on the case for 226 weeks, and he estimated that he devoted, on average, "a barebones minimum" of six hours a week on the Montanos' case.[32]

The Texas Supreme Court disagreed with the lower courts and held that Gonzalez failed to provide sufficient evidence for the lower court to rely on for determining the reasonableness of the attorney's fees.[33] The Texas Supreme Court noted that "Gonzalez's testimony that he spent 'a lot of time getting ready for the lawsuit,' conducted 'a lot of legal research,' visited the premises 'many, many, many, many times,' and spent 'countless' hours on motions and depositions [was] not evidence of a reasonable attorney's fee under [the] lodestar [method]."[34] In fact, the Texas Supreme Court characterized Gonzalez's testimony as "simply devoid of substance."[35]

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 733–34.
32. *Id.* at 734.
33. *Id.* at 736–37.
34. *Id.* at 736 (citing El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 763 (Tex. 2012)).
35. *Id.* at 736.

The Texas Supreme Court reaffirmed *El Apple*, noting that "a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work."[36] The Texas Supreme Court further noted that "in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information."[37] Based on this reasoning, the Texas Supreme Court reversed the award of attorney's fees to Gonzalez and remanded the case back to the trial court for further proceedings.[38]

The Texas Supreme Court, on the other hand, did not find a deficiency in Benavides-Maddox's testimony.[39] Benavides-Maddox testimony showed that she used a billing system that kept track of the time she spent on the Montanos' case, which resulted in a $25,000 bill for her trial preparation after she applied the $200 hourly rate stipulated in the contract between the Montanos and her to the hours she worked.[40] Her testimony also showed that she arrived early each day of trial and continued to work on trial preparation each day after the trial court judge dismissed the jury.[41] Benavides-Maddox estimated that she worked about twelve hours per day during the course of the five-day trial.[42] The Court noted:

> While similar to Gonzalez's estimation that he worked the case an average of six hours a week during his four-year involvement, it is also different in significant respects.
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> The billing inquiry here involves contemporaneous events and discrete tasks—the trial and associated preparation for each succeeding day. Moreover, it is a task the opponent witnessed at least in part, having also participated in the trial. Despite this knowledge, Benavides-Maddox's charges relating to the trial were not questioned on cross-examination. Unlike Gonzalez's testimony, Benavides-Maddox's testimony about her unbilled trial work is some evidence on which to base an award of attorney's fees because it concerns contemporaneous or immediately completed work for which she had not had time to bill, or presumably even record, in her billing system.[43]

The Court affirmed the award attributable to Benavides-Maddox's fees.[44]

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36. *Id.* (citing *El Apple I, Ltd.*, 370 S.W.3d at 765).
37. *Id.* at 736 (quoting *El Apple I, Ltd.*, 370 S.W. at 763).
38. *Id.* at 737.
39. *Id.*
40. *Id.* The Texas Supreme Court noted that the Montanos paid this bill. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

IV. BEST PRACTICES FOR KEEPING DETAILED ATTORNEY TIME RECORDS

As illustrated above, good timekeeping practices are necessary to justify an award of a "reasonable attorney fee." The following are three things you need to have in your time records if you are a prevailing party. If you are opposing an award of attorney's fees, the following are excellent cross-examination points:

> (1). Keep contemporaneous time records: Time should be recorded contemporaneously and should identify, at a minimum, the date, the task that was performed, who performed the work, the specific work performed, the time required for the work, and the billable rate of the timekeeper who performed the work.
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> (2). Keep detailed billing entries: Billing entries should be sufficiently detailed to identify the work performed and the purpose of the work performed as it relates to the representation of the client. Vague descriptions, as illustrated above, are disfavored by courts. Entries such as "research," "draft brief," "review file," and "telephone conference" are not sufficient to help a court ascertain whether the work performed was necessary and reasonable.
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> (3). Keep discrete time entries: "Block billing" occurs when an attorney lumps multiple tasks under one billing entry. For example, an attorney may list all of the tasks performed on a matter in a particular day in one time entry (e.g., "Review discovery, draft summary judgment motion, correspond with client re: mediation, draft letter to mediator–7.2 hrs."). Block billing is often criticized by the courts and can result in a reduction in the fees recovered.[45] Each task performed on a case should be billed separately (e.g., "Review discovery–.6 hr., draft summary judgment motion–5.8 hrs., correspond with client re: mediation–.2 hr., draft letter to mediator–.6 hr.").

V. CONCLUSION

While keeping detailed attorney time record will undoubtedly require more effort from attorneys, the result can be positive. Not only can courts better determine the necessity of the work performed and the reasonableness of the fees charged, but detailed time records give clients a better view into the litigation process and the effort behind the bills they receive.

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45. *See, e.g.*, Creecy v. Metro. Prop. & Cas. Ins. Co., 548 F. Supp. 2d 279, 287 (E.D. La. 2008) ("The practice of block-billing is disfavored because it is not the province of the Court to approximate how much time was spent on the motion to compel in block-billed entries.").