

Is Texas Becoming the **Lodestar** State?



**A Practitioner's Guide to
Recovering Attorneys' Fees
Under the Lodestar Method**

INTRODUCTION

In its recent decision in *El Apple I, Ltd. v. Olivas*, 55 Tex. Sup. Ct. J. 954 (Tex. June 22, 2012), the Texas Supreme Court explained what constitutes legally sufficient evidence to calculate a reasonable attorney's fee award using the lodestar method. Under the lodestar method, determining what constitutes a reasonable fee is a two-step process.¹ In the first step, the court determines the reasonable number of hours spent by counsel on the case and a reasonable hourly rate for the work performed.² The court then multiplies the number of hours reasonably expended by the reasonable hourly rate to arrive at the lodestar.³ In step two, the court considers whether certain factors merit an upward or downward adjustment of the lodestar in order to reach a reasonable fee award.⁴

In its analysis of the lodestar method, the Texas Supreme Court borrowed heavily from federal law and noted that in appropriate cases, Texas courts may consider "the far greater body of federal court experience with lodestar and fee shifting . . ."⁵ Although the Supreme Court implicitly limited its analysis to the fee-shifting provision in section 21.259 of the Texas Commission on Human Rights Act, Texas courts have applied the lodestar method in a variety of other contexts.⁶ The Supreme Court has now provided a decidedly-federal roadmap for applying the lodestar method to these and other future cases.

STEP ONE: CALCULATING THE LODESTAR

"The starting point for determining a lodestar fee award is the number of hours 'reasonably expended on the litigation.'"⁷ The party seeking an attorney's fee award bears the burden of documenting the hours spent on the litigation and the value of those hours, including: (1) the nature of the work, (2) who performed the services and their hourly rate, (3) when the services were performed, and (4) the number of hours worked.⁸ In documenting the hours expended, fee applicants should bear some key factors in mind:

Adequately Document Services Rendered

The Texas Supreme Court recommends that attorneys document their time with contemporaneous billing records or other similar documentation recorded at or near the time the work was performed.⁹ The fee applicant should provide the court "sufficient information to make a meaningful evaluation" and exclude hours that are duplicative, excessive, redundant, inadequately documented, or otherwise unnecessary.¹⁰

Federal courts have explained that "[a]ttorneys are not required to write a book to describe in excruciating detail the professional services rendered, however, exceptionally terse descriptions of activities do not satisfy the applicant's burden."¹¹ Where billing entries are "not illuminating as to the subject matter" or are "vague as to precisely what was done," the court is prevented from making a determination of whether the time was reasonably expended.¹² As the Fifth Circuit cautioned, litigants "take their chances" in submitting fee applications without adequate information for the court to determine the reasonableness of the hours expended.¹³ Thus, "[w]hen a prevailing party submits a fee application without proper documentation, the court has the discretion to reduce the award to a reasonable amount."¹⁴

Segregate Fees

The Texas Supreme Court has repeatedly held that "a

prevailing party must segregate recoverable from unrecoverable attorney's fees in all cases."¹⁵ If, however, discrete legal services advance both a recoverable and unrecoverable claim, and the claims are so intertwined that it is impossible to determine which part of the attorney's work is attributable to a non-recoverable claim, no segregation is required.¹⁶ But where attorney's fees "relate solely to a claim for which . . . fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees."¹⁷ An attorney may segregate the fees either by (1) proving time spent on a recoverable claim and excluding time spent on a non-recoverable claim, or (2) subtracting a percentage of the time from the total time expended on the case to account time spent on the unrecoverable claim.¹⁸

Similarly, federal courts compensate only for those hours reasonably spent in relation to recoverable claims.¹⁹ "[U]nrelated claims [should] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim."²⁰ Federal courts also require that the time spent on unsuccessful claims be deducted prior to calculating the lodestar, rather than later when considering whether to adjust the lodestar based on the degree of success achieved.²¹ Thus, specific hours for unrelated claims must be eliminated from the total sought, or the total amount must be reduced in relation to the limited success obtained.²² After all hours spent on unrelated, unsuccessful claims have been subtracted, the resulting figure represents time spent on claims that "involve a common core of facts and [are] based on related legal theories."²³

Avoid Block Billing

"Block billing" is a "time-keeping method by which each lawyer and legal assistant enter the total daily time spent working on a case, rather than itemizing the time expended on specific tasks."²⁴ Federal courts disfavor the practice of block billing because "[w]hen time records are blocked billed, the court cannot accurately determine the number of hours spent on any particular task, and the court is thus hindered in determining whether the hours billed are reasonable."²⁵ Most federal courts when considering block-billing have performed a percentage reduction in either the number of hours or in the lodestar figure.²⁶

Don't Bill for Administrative Tasks

The Texas Supreme Court permits the recovery of paralegal fees under the lodestar method.²⁷ But counsel must submit proof, such as: (1) legal assistant's qualifications; (2) that substantive legal work was performed under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended.²⁸ A fee award may only include charges for a paralegal's time "to the extent that the work performed 'has traditionally been done by any attorney.'"²⁹

Federal courts have consistently refused to award fees at a paralegal rate when the paralegal is performing only clerical tasks.³⁰ "[P]urely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them."³¹ Like Texas courts, federal courts allow recovery of paralegal fees only for work "traditionally done by an attorney."³² "Work that is legal in nature includes factual investigation, locating and interviewing witnesses, assisting in discovery, compiling statistical and financial data, checking legal citations, and drafting correspondence."³³ Activities considered "clerical or secretarial in nature, includ[e] typing, copying, or delivering pleadings."³⁴

Federal courts likewise consider whether work performed by attorneys was “‘legal work in the strict sense’ or was merely clerical work that happened to be performed by a lawyer.”³⁵ “[A]ttorneys may not be compensated at their regular hourly rates for time spent performing clerical tasks.”³⁶ “Rather, they should be compensated at the rate for clerical employees, or, if the task at issue is the type included in overhead, they should not be compensated at all.”³⁷

Staff the Case Appropriately

Where multiple attorneys staff a case, federal courts will scrutinize the fee application to determine whether any work was duplicative or unnecessary.³⁸ As one federal court observed, “[o]verstaffing inevitably leads to enormous duplication of effort, as everyone on the team immerses himself and herself in the total case.”³⁹ Thus, “hours spent in duplicative activity or spent in the passive role of an observer while other attorneys perform...” is generally not recoverable.⁴⁰ Federal courts “may take into account and discount for repetitive work, . . . [or] for hours that it deems unnecessary or excessive”⁴¹

Redact Judiciously for Privilege or Confidentiality

Many fee applications include billing entries that are at least partially redacted to preserve privileged or confidential information. Federal courts, however, have disallowed recovery of fees for billing entries that are so overly redacted the court is unable to analyze the time spent or whether the fees were reasonable or necessary.⁴² Another option is to submit the unredacted bills to the court for *in camera* review.

Demonstrate Billing Judgment

In *El Apple*, the Texas Supreme Court noted, “‘billing judgment’ is an important component in a fee setting.”⁴³ “[B]illing judgment . . . refers to the usual practice of law firms in writing off unproductive, excessive, or redundant hours.”⁴⁴ The applicant bears the burden of establishing that its counsel exercised billing judgment.⁴⁵

Federal courts require that an applicant submit evidence of billing judgment by documenting the hours charged and the hours not charged because they were unproductive, excessive or redundant.⁴⁶ “Ideally, billing judgment is reflected in the fee application, showing not only hours claimed but also hours written off.”⁴⁷ Expert testimony by the applicant’s counsel that he exercised billing judgment is inadequate, by itself, to meet the applicant’s evidentiary burden. The Fifth Circuit “has repeatedly determined that bald assertions regarding the exercise of billing judgment are insufficient.”⁴⁸ Where there is no evidence of billing judgment, federal courts will reduce the fee award by a percentage intended to substitute for the exercise of billing judgment.⁴⁹ The Fifth Circuit has approved and federal courts have imposed across-the-board reductions between 10% to 30% for lack of billing judgment.⁵⁰

Proving A Reasonable Hourly Rate

After determining the reasonable number of hours expended in the case, the court then determines the reasonable hourly rate.⁵¹ The fee applicant has the burden to provide satisfactory evidence to the court of the appropriate market rate.⁵² To determine the appropriate hourly rate, the court must consider “the attorney’s regular rates as well as prevailing rates.”⁵³ The established basis for proving the prevailing hourly rate is to present evidence demonstrating the prevailing market rate for similar services by similarly trained and experienced lawyers in the relevant legal community.⁵⁴ This evidence typically consists of affidavits of other attorneys practicing in the community.⁵⁵

Another frequently-cited source to establish the prevailing market rate is the State Bar of Texas’ Hourly Fact Sheet, which contains a summary of median hourly rates based on experience, region, and practice area.⁵⁶ Recent court decisions may also be a valuable source for prevailing market rates. Absent such evidence, federal courts rely upon their own experience and judgment to independently assess the reasonableness of the asserted rate.⁵⁷ Once the reasonable hourly rate is determined, the lodestar is calculated by multiplying the reasonable hours expended by the reasonable rate.⁵⁸

STEP TWO: ADJUSTING THE LODESTAR

In *El Apple*, the Texas Supreme Court “accept[ed] the premise [under federal law] that [the] lodestar presumptively produces a reasonable fee.”⁵⁹ But the Court noted that “exceptional circumstances may justify enhancements to the base lodestar.”⁶⁰ The Supreme Court cautioned that no enhancements could be applied until the base lodestar is known.⁶¹

Once the base lodestar has been calculated, a court may raise or lower the lodestar amount if certain relevant factors indicate an adjustment is necessary.⁶² The relevant factors the court may consider are found in the Texas Disciplinary Rules of Professional Conduct and include: “(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.”⁶³

The factors set out in the Texas Disciplinary Rules of Professional Conduct are similar to the factors set out by the Fifth Circuit in *Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), overruled on other grounds by *Blanchard v. Bergen*, 489 U.S. 87 (1989). Federal courts consider the *Johnson* factors in determining whether an upward or downward adjustment to the lodestar is warranted.⁶⁴ The Fifth Circuit explained, however, that the lodestar may not be adjusted due to a *Johnson* factor if that factor was already considered in determining the base lodestar amount.⁶⁵ In addition, the U.S. Supreme Court recently cautioned that although a district court may adjust the lodestar, such adjustments are appropriate only in “rare circumstances,” and the “lodestar figure [already] includes most, if not all, of the relevant factors constituting a reasonable attorney’s fee.”⁶⁶

CONCLUSION

The lodestar method is a relatively objective measurement for calculating an attorneys’ fees award.⁶⁷ This approach has been criticized, however, “for providing a financial incentive for counsel to expend excessive time in unjustified work and for creating a disincentive to early settlement.”⁶⁸ But as the U.S. Supreme Court

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recently stated, “[a]lthough the lodestar method is not perfect, it has several important virtues.”⁶⁹ First, the lodestar accounts for “the prevailing market rates in the relevant community.”⁷⁰ Second, “the lodestar method is readily administrable . . . and objective and thus cabins the discretion of the trial judges, permits meaningful judicial review, and produces reasonably predictable results.”⁷¹ Finally, because “the lodestar figure includes most, if not all, of the relevant factors constituting a ‘reasonable’ attorney’s fee,” there is a “strong presumption” that the lodestar figure is reasonable.⁷² “[B]ut that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.”⁷³ With the Texas Supreme Court’s recent endorsement, the lodestar method is likely to become the dominant approach for calculating attorney’s fees in Texas.

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¹ *El Apple I, Ltd. v. Olivas*, 55 Tex. Sup. Ct. J. 954, 956 (Tex. June 22, 2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 960.

⁶ Texas appellate courts have applied the lodestar method where attorneys’ fees were sought in connection with claims for breach of contract, class actions and violations of the Texas Whistleblower Act and the Texas Commission on Human Rights Act. See *Toshiba Mach. Co v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 782-83 (Tex. App.—Fort Worth 2005, pet. granted, judgment vacated w.r.m.) (breach of contract); *Stratton v. XTO Energy, Inc.*, 2012 Tex. App. LEXIS 1089 (Tex. App.—Fort Worth 2012, no pet.) (class action); *Bates v. Randall Cnty.*, 297 S.W.3d 828, 837-38 (Tex. App.—Amarillo 2009, pet. denied) (Texas Whistleblower Act); *City of Houston v. Proler*, 2012 Tex. App. LEXIS 4312, *50-53 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (Texas Commission on Human Rights Act).

⁷ *El Apple*, 55 Tex. Sup. Ct. J. at 958 (citing *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983)).

⁸ *El Apple*, 55 Tex. Sup. Ct. J. at 958.

⁹ *Id.*; see also *Bode v. United States*, 919 F.2d 1044, 1047 (5th Cir. 1990) (“The party seeking reimbursement of attorneys’ fees . . . has the burden of establishing the number of attorney hours expended, and can meet that burden only by presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement.”); *Hensley*, 461 U.S. at 437 (“The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.”)

¹⁰ *El Apple*, 55 Tex. Sup. Ct. J. at 958.

¹¹ *Wright v. Blythe-Nelson*, 2004 U.S. Dist. LEXIS 25181, *16-17 (N.D. Tex. 2004) (citations and quotations omitted); see also *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995); *Cookston v. Miller Freeman, Inc.*, 1999 U.S. Dist. LEXIS 14381, *6-7 (N.D. Tex. 1999).

¹² *Leroy v. Houston*, 906 F.2d 1068, 1079 (5th Cir. 1990).

¹³ *Kellstrom*, 50 F.3d at 327; *Von Clark v. Butler*, 916 F.2d 255, 259 & n. 6 (5th Cir. 1990) (criticizing as “scanty and lacking in explanatory detail” entries such as “telephone call,” or “trial preparation,” or “travel to Beaumont to attend deposition,” without any identification whatsoever of the subject matter); *Burke v. McDonald*, 572 F.3d 51, 64 (5th Cir. 2009) (holding that ambiguous time entries such as “strategy meeting” and “telephone conference” provide “little, if any, basis for determining what work reflected in them was done to develop what claims.”).

¹⁴ *No Barriers, Inc. v. Brinker Chili’s Tex., Inc.*, 262 F.3d 496, 500 (5th Cir. 2001).

¹⁵ *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam); *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006); *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Matthews v. Candlewood Builders, Inc.*, 685 S.W.2d 649, 650 (Tex. 1985).

¹⁶ *Chapa*, 212 S.W.3d at 313-14.

¹⁷ *Id.*

¹⁸ *Id.* at 314.

¹⁹ *Hensley*, 461 U.S. at 436; *Shipes v. Trinity Indus.*, 987 F.2d 311, 319-20 (5th Cir. 1993).

²⁰ *Hensley*, 461 U.S. at 435.

²¹ See *Burke*, 572 F.3d at 65 (approving district court’s decision to consider the results achieved in calculating the lodestar amount rather than as a part of the reduction of that amount); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 243 (4th Cir. 2009) (“After determining the lodestar figure, the court should then subtract fees for hours spent on unsuccessful claims unrelated to successful ones.”) (internal quotation marks and citations omitted); see also *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1058 (5th Cir. 1998); (Barksdale, J. concurring in part and dissenting in part) (stating that the hours expended on successful versus unsuccessful claims should be answered in the lodestar calculation prior to any adjustment).

²² *Hensley*, 461 U.S. at 436-37.

²³ *Id.* at 435.

²⁴ *Glass v. U.S.*, 335 F.Supp.2d 736, 739 (N.D. Tex. 2004) (quoting *Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1534 n. 15 (10th Cir. 1996)) (internal citations omitted).

²⁵ *Fralick v. Plumbers & Pipefitters Nat’l Pension Fund*, 2011 U.S. Dist. LEXIS 13672, *17 (N.D. Tex. 2011).

²⁶ *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, 99 F.3d 761, 773 (5th Cir. 1996) (disallowing entirety of hours claimed by paralegal because she was “always lumping all of the day’s activities together”); *Fralick*, 2011 U.S. Dist. LEXIS 13672, *11, *21, *41, *47, *49 (concluding that reductions of 10 percent to 25 percent in the hours claimed by attorneys and a paralegal were warranted due to instances of block billing); *Seastrunk v. Darwell Integrated Tech., Inc.*, 2009 U.S. Dist. LEXIS 77286, *29-30 (N.D. Tex. 2009) (collecting cases).

²⁷ *El Apple*, 55 Tex. Sup. Ct. J. at 959.

²⁸ *Id.* (citations omitted).

²⁹ *All Seasons Window & Door Mfg. v. Red Dot Corp.*, 181 S.W.3d 490, 504 (Tex. App.—Texarkana 2005, no pet.) (quoting *Clary Corp. v. Smith*, 949 S.W.2d 452, 469 (Tex. App.—Fort Worth 1997, writ denied) and citing *Gill Sav. Ass’n v. Int’l Supply Co.*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied)).

³⁰ *Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10 (1989); *Mid-Continent Cas. Co. v. Chevron Pipeline Co.*, 205 F.3d 222, 234 (5th Cir. 2000) (reversing district court awarding fees for billing entry records regarding clerical work performed by paralegals).

³¹ *Jenkins*, 491 U.S. at 288 n. 10.

³² *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982).

³³ *Filson v. Tulane Univ.*, 2010 U.S. Dist. LEXIS 110639, *13 (E.D. La. 2010) (citing *Jenkins*, 491 U.S. at 288).

³⁴ *Id.*

³⁵ *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 536 (5th Cir. 1986) (quoting *Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974)).

³⁶ *Rozell v. Ross-Holst*, 576 F.Supp.2d 527, 540 (S.D.N.Y. 2008).

³⁷ *Id.*

³⁸ See *Walker*, 99 F.3d at 768 (“If more than one attorney is involved, the possibility of duplication of effort along with proper utilization of time should be scrutinized.”); *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 552 (5th Cir. 1987).

³⁹ *Fisher Scientific Int’l, Inc. v. Modrovich*, 2005 U.S. Dist. LEXIS 40481, *24 (S.D. Tex. 2005).

- ⁴⁰ *Flowers v. Wiley*, 675 F.2d 704, 705 (5th Cir. 1982).
- ⁴¹ *Abner v. Kansas City S. Ry. Co.*, 541 F.3d 372, 383 (5th Cir. 2008); see *Fralick*, 2011 U.S. Dist. LEXIS 13672 at *31 (finding that 25.25 hours expended in drafting a complaint is excessive and reducing that total to 15 hours).
- ⁴² *Rabo Agrifinance, Inc. v. Veigel Farm Partners*, 2008 U.S. Dist. 63635, *12 (N.D. Tex. 2008); *In re Frazin (Frazin v. Haynes and Boone, LLP)*, 413 B.R. 378, 416-17 (Bankr. N.D. Tex. 2009).
- ⁴³ *El Apple*, 55 Tex. Sup. Ct. J. at 958 (quoting *Hensley*, 461 U.S. at 434 and then quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980)).
- ⁴⁴ *Walker*, 99 F.3d at 769.
- ⁴⁵ See *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 (5th Cir. 2006).
- ⁴⁶ *Id.*
- ⁴⁷ *Alberti v. Klevenhagen*, 896 F.2d 927, 930 (5th Cir. 1990); see also *Leroy v. City of Houston*, 831 F.2d 576, 586 n. 15 (5th Cir. 1987) (holding that the district court erred in accepting faulty records with no reduction of hours and disapproving billing records that were completely devoid of any hours written off).
- ⁴⁸ *Fralick*, 2011 U.S. Dist. LEXIS 13672 at *13 (citing *Saizan*, 448 F.3d at 800 and *Hopwood v. Texas*, 236 F.3d 256, 279 5th Cir. 2000)).
- ⁴⁹ *Saizan*, 448 F.3d at 799; see also *Walker v. City of Mesquite, Texas*, 313 F.3d 246, 251 (5th Cir. 2002).
- ⁵⁰ See, e.g., *Saizan*, 448 F.2d at 800 (finding the district court did not abuse its discretion by imposing a 10% across-the-board reduction in the lodestar for failure to provide evidence of billing judgment); *Cambridge Toxicology Grp. v. Exnicios*, 495 F.3d 169, 181-82 (5th Cir. 2007) (affirming 12.5% reduction for lack of billing judgment); *Hopwood v. State of Texas*, 236 F.3d 256, 279 (5th Cir. 2000) (concluding that the district court did not abuse its discretion in ordering a flat 25% reduction in attorneys' hours when counsel exhibited poor billing judgment by performing hours of duplicative and unnecessary work, expending time on non-reimbursable items, and insufficiently detailing work performed on certain motions); *Walker*, 99 F.3d at 770 (affirming the reduction of fee award by 15% for lack of billing judgment); *Humphrey v. United Way of the Tex. Gulf Coast*, 2008 U.S. Dist. LEXIS 98314, *18 (S.D. Tex. 2008) (reducing by 30% the number of hours worked due to lack of evidence of billing judgment); *Klebe v. Univ. of Tex. Health Sci. Ctr.*, 2010 U.S. Dist. LEXIS 37133, *18-19 (W.D. Tex. 2010) (reducing hours by 15% "to account for the vague time keeping and lack of demonstration of billing judgment" when "the records contain no indication of the hours the attorneys wrote off as redundant, unproductive, or excessive during this lengthy litigation"); *Fralick*, 2011 U.S. Dist. LEXIS 13672 at *15 (noting that courts in the Northern District have reduced fee awards for failure to produce sufficient evidence of billing judgment by as much 10% to 15%).
- ⁵¹ *El Apple*, 55 Tex. Sup. Ct. J. at 956.
- ⁵² *Blum v. Stenson*, 465 U.S. 886, 896, n.11 (1984); *Riley v. City of Jackson*, 99 F.3d 757, 760 (5th Cir. 1996).
- ⁵³ *Kellstrom*, 50 F.3d at 328; see also *Blum*, 465 U.S. at 895.
- ⁵⁴ *Tollett v. City of Kemah*, 285 F.3d 357, 368 (5th Cir. 2002).
- ⁵⁵ *Id.* at 368-69; see, e.g., *Watkins v. Fordice*, 7 F.3d 453, 458 (5th Cir. 1993) (party seeking fees submitted "affidavits from other attorneys in the community showing the prevailing market rates in the community").
- ⁵⁶ *Amlin Corporate Member, Ltd. v. Logistics Group Int'l, Inc.*, 2011 U.S. Dist. LEXIS 82842, *12 (S.D. Tex. 2011); see, e.g., *Merrick v. Michael J. Scott, P.C.*, 2011 U.S. Dist. LEXIS 54756, *30 (N.D. Tex. 2011); *Compass Bank v. Villarreal*, 2011 U.S. Dist. LEXIS 48271, *46 (S.D. Tex. 2011); *Kinnison v. City of San Antonio*, 2011 U.S. Dist. LEXIS 39628, *16 (W.D. Tex. 2011). The 2009 State Bar of Texas Hourly Rate Fact Sheet can be found online at http://www.texasbar.com/AM/Template.cfm?Section=Research_and_Analysis&Template=/CM/ContentDisplay.cfm&ContentID=11240.
- ⁵⁷ *Davis v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 526 F.2d 865, 868 (5th Cir. 1976).
- ⁵⁸ *El Apple*, 55 Tex. Sup. Ct. J. at 956.
- ⁵⁹ *Id.* at 960.
- ⁶⁰ *Id.*
- ⁶¹ *Id.*
- ⁶² *Id.* at 956.
- ⁶³ *Id.* at 956-57 (quoting Tex. Disc. R. Prof. Conduct 1.04(b)). In *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997), the Texas Supreme Court observed that the fact-finder should consider this eight-factor test in considering the reasonableness of an attorney's fee.
- ⁶⁴ *Saizan*, 448 F.3d at 800; see *Stratton*, 2012 Tex. App. LEXIS 1089 at *6-7 & n. 2. In *Stratton*, the Fort Worth Court of Appeals noted that the factors listed in Tex. Disc. R. Prof'l Conduct 1.04(b) are "very similar, but not identical" to the *Johnson* factors. 2012 Tex. App. LEXIS 1089 at *6. "Because they are so similar," the court referred to the Rule 1.04(b) factors and the *Johnson* factors interchangeably and "rel[ie]d on cases applying the (*Johnson* factors." *Id.* at *7-8. In *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992), the U.S. Supreme Court rejected one of the *Johnson* factors—the consideration of the contingent nature of an attorney's representation—as a basis for any enhancement to the lodestar. A nearly identical factor is listed in Rule 1.04(b). Although the Texas Supreme Court acknowledged the *Dague* holding in *El Apple*, it did not reach the enhancement issue and therefore expressed no opinion concerning whether the contingent nature of an attorney's representation should be considered. The Texas Supreme Court noted, however, that "[t]hrough not bound to adopt the federal standards, Texas courts may appropriately consider them." *El Apple*, 55 Tex. Sup. Ct. J. at 960.
- ⁶⁵ *Saizan*, 448 F.3d at 800; see *Stratton*, 2012 Tex. App. LEXIS 1089 at *8 (noting that "[s]ome *Johnson* factors may be used to determine the lodestar" and that the lodestar may only be enhanced based on factors "not already considered in the lodestar").
- ⁶⁶ *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1673 (2010) (internal quotation marks omitted).
- ⁶⁷ *El Apple*, 55 Tex. Sup. Ct. J. at 958.
- ⁶⁸ *Id.* (citing *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) and then citing to *Court Awarded Attorney Fees*, 108 F.R.D. 237, 246-49 (3d Cir. Task Force 1985)).
- ⁶⁹ *Perdue*, 130 S.Ct. at 1672.
- ⁷⁰ *Id.* (quoting *Blum*, 465 U.S. at 895).
- ⁷¹ *Id.* at 1672 (internal quotations and citations omitted).
- ⁷² *Id.* at 1673.
- ⁷³ *Id.*