

PRESENTED AT

43rd Annual Page Keeton Civil Litigation Conference

November 22, 2019

Austin, TX

Attorney's Fees - 2019

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Carlos represents plaintiffs and defendants in civil litigation matters including commercial disputes, trade secrets/non-competes, malpractice, constitutional litigation, personal injury, and wrongful death cases.

Carlos is Board-Certified in Personal Injury Trial Law and has tried, as either first chair or in a supporting role, a variety of cases to juries, the bench, and arbitrators. He has published and lectured in several areas of trial practice.

Activities

Robert Calvert Chapter, Inns of Court, Member (2001-2007)

State Bar of Texas; Rules Committee (2007 to 2016)

State Bar of Texas; Business, Consumer & Employment Pattern Jury Charges (Vol. 4) Committee (2001-2007, 2016-present)

ABOTA (2017-present)

The University of Texas, Lecturer (Spring 2001)

Advisory Board Member to Center for U.S. and Mexican Law (2012-16)

Joint Commission on Information Technology (2017-present)

Director, Texas Board of Law Examiners (2018-present)

Director, Mexican American Legal Defense and Education Fund (2018-present)

Professional Background

Yale Law School, J.D. 1994

Yale University, B.A. 1991

Admitted to Practice: Texas; Colorado; Supreme Court of the United States of America, United States Court of Appeals for the Fifth Circuit, United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas

ATTORNEY'S FEES—2019

Read *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Period.

Rohrmoos Venture reaffirmed key principles and practices and clarified some ambiguities in Texas case law before *Rohrmoos Venture*. *Rohrmoos Venture* includes a lengthy historical review of the development of attorney's fees jurisprudence under both federal law and Texas law. *Id.* at 490-97.

More importantly from a practical standpoint, *Rohrmoos Venture* provides the key framework for considering fee-shifting:

"In short, to secure an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of attorney's fees is legally authorized, and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process."

Id. at 487.

As to the first element, the legal authorization may be found in a contract or a statute. *Id.*¹ Common sources and recent cases involving the legal authorization standards are discussed in Section I of this paper including general principles. Section II of this paper discusses the Texas Supreme Court's expression of the "two-step" methodology of calculating a lodestar base (reasonable market hourly rate multiplied by reasonable amount of time to perform necessary tasks in the litigation), subject to potential adjustment.

For a variety of reasons, disputes over attorney's fees appear to be increasing in frequency, complexity, and intensity. While disputes over attorney's fees may seem like the proverbial "tail wagging the dog", many times attorney's fees become a significant proportion of the amount at stake in a dispute or become the gulf

or difference between the parties being able to resolve a dispute, which only widens over the lifecycle of a dispute. Texas' practice of having factual disputes over attorney's fees tried before juries (despite the "vanishing jury trial") contributes. Another factor is that Texas has dramatically shifted away from a traditional Anglo-American common law system to more of a code or statutory-based legal system.² Attorney's fees disputes even implicate access to justice issues.³ Apart from the traditional statutory grounds, there are many other specific statutes, and recent changes providing for a state court motions to dismiss practice in the TCPA and Rule 91a where fees are at issue have increased the number of cases in which these issues arise sooner rather than later. These factors have led to attorney's fee issues appearing quite often in appeals. Some of these cases have raised many nuanced legal issues relating to the recovery of attorney's fees.

Regardless of the causes, attorney's fee disputes and opinions on attorney's fees continue to proliferate and 2019 is no exception. Apart from reiterating fundamentals, this paper focuses on non-family law, non-class action caselaw on attorney's fees in the 2018-2019 period. Despite the trend toward statutes and away from a purer common law system, reviewing recent opinions about fees can also assist in identifying issues in requesting and recovering attorney's fees under our current laws. This paper also highlights some recent opinions, particularly from the Texas Supreme Court including *Rohrmoos Venture* and *In re National Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017) that are required reading in this area.

The Texas Supreme Court in 2018 reiterated that attorney's fees are neither "costs" nor "damages" generally. *In re Xerox*, 555 S.W.3d 518, 529 n. 66 (Tex. 2018) citing *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172-76 (Tex. 2013);⁴ *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037-38 (5th Cir.

¹ There may also be common law grounds for the recovery of attorney's fees as in the case of innocent stakeholders in interpleader actions who may be able to recover attorney's fees from the interpleaded funds. *See e.g., Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830 (Tex. 2018).

² *See e.g.,* Tex. Bus. & Comm. Code §109.005; Tex. Civ. Prac. & Rem. Code §98B.003(a)(3); Tex. Civ. Prac. & Rem. Code §123.004; Texas Gov't. Code §423.006(b) and (d). *See e.g.,* Tex. Bus. & Comm. Code §109.005; Tex. Civ. Prac. & Rem. Code §98B.003(a)(3); Tex. Civ. Prac. & Rem. Code §123.004; Texas Gov't. Code §423.006(b) and (d); *D.K.W. v. Source for Publicdata.com*, 526 S.W.3d 619, 632 (Tex. App.—Dallas 2017, pet. filed).

³ A thoughtful concurrence has noted that the development of the law governing attorney's fees in Texas may create "unduly formalistic" results, particularly in small or simple cases. *Auz v. Cisneros*, 477 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (Boyce, J., concurring).

⁴ *See also In re Corral-Lerma*, 451 S.W.3d 385 (Tex. 2015) (per curiam) (citing *Nalle Plastics* and refusing to treat mandatory attorney's fees under the Texas Theft Liability Act as compensatory damages for purposes of calculating bond amount under supersedeas statute). Some attorney's fees qualify as compensatory damages if recovering for fees paid in a prior suit or similar cases. *In re Nalle Plastics*, 406 S.W.3d at 174-75 (citing *Akin, Gump, Strauss, Hauer*

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First appeared as part of the conference materials for the
43rd Annual Page Keeton Civil Litigation Conference session
"Proving Up Attorney's Fees"