

**COLLECTING ATTORNEY'S FEES
IN CONSUMER CASES**

Consumer Law Basics - Know the Law!
The Center for Consumer Law
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Consider the consumer who has found the odometer was rolled back on the vehicle he purchased a few months ago at auction. Another consumer has been threatened by a debt collector that her hard earned wages will be garnished if she fails to pay her debt by this afternoon. There are countless scenarios of consumer rights violations the leave the consumer to wonder, "If only I could afford to hire an attorney...."

Most consumer protection statutes provide for attorney's fees and costs to the prevailing plaintiff, in essence allowing consumers to retain counsel that they otherwise might not afford.¹ Despite the fact that some consumer cases might only provide for small statutory awards or other recovery, the fee-shifting nature of consumer protection statutes permits plaintiffs retain counsel to pursue their rights.

Federal standard

Calculating Attorney's Fees

In determining attorney's fees, federal courts will use the "lodestar" method.² The number of hours reasonably expended on a case times the attorney's reasonable hourly rate sets the basis for the lodestar.³ The allowable hours will be determined by a court's review of time records supplied by counsel. The lodestar calculation will not, however, include time that is excessive or duplicative. Hourly rates are determined by the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."⁴ A number of annual reports are available to support prevailing rates, including the Laffey Matrix of Hourly Rates.⁵

Ultimately, the amount of attorney's fees is within the court's discretion. The lodestar is presumed to result in a reasonable attorney fee award. The court may, however, adjust the lodestar, effectively increasing or decreasing the attorney fee award.⁶ In making adjustments to the lodestar, courts will consider at the following 12 "*Johnson*" factors:

1. The time and labor required for litigation;
2. The novelty and difficulty of the questions presented;
3. The skills required to perform the legal services properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amount involved and the result obtained;
9. The experience, reputation and ability of the attorney;

10. The “undesirability” of the case;
11. The nature and length of the professional relationship with the client; and
12. Awards in similar cases.⁷

While all twelve factors must be considered in the court’s evaluation to adjust the lodestar, the most important factor is the result obtained.⁸ An attorney seeking to avoid a downward adjustment should address all twelve factors in his fee application.

Procedure

Federal Rule of Civil Procedure 54(d)(2) addresses attorney’s fees. Unlike the Texas system, claims for attorney fees in federal matters are usually made by motion to the court. A motion for attorneys fees must:

1. Be filed within 14 days after the entry of judgment;
2. Articulate the judgment and the statute that entitles the movant to an award;
3. Articulate the amount sought.⁹

Since the court will be applying the lodestar calculation to determine fees, the movant’s fee agreement is largely irrelevant. Unless the movant is ordered to produce his fee agreement, there is no requirement that the attorney-client retainer agreement be attached to the motion.¹⁰ More importantly, F.R.C.P. specifically requires movants to consult applicable local rules on Rule 54(d) motions.¹¹ In the Southern District of Texas, LR 54.2 adds that, “[o]bjections to allowance of the bill, the attorney’s fees, or both must be filed within five days of the bill’s filing.”¹² Ultimately, the court must find facts and state its conclusions when determining attorney fees.¹³

Texas Deceptive Trade Practices Act

Calculating Attorney’s Fees

The standards for seeking attorney fees under Texas state law are similar in many respects to federal law. The prevailing consumer is entitled to “reasonable and necessary attorneys’ fees” under the DTPA.¹⁴ While the base amount of attorney’s fees is calculated under the same lodestar as outlined above, the standards for reasonableness are set out in *Arthur Andersen & Co., v. Perry Equip. Corp.* as follows:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. The likelihood that the acceptance of a the case 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 the circumstances;
6. The nature and length of the professional relationship with the client;

7. The experience, reputation, and ability of the lawyer 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.¹⁵

Procedure

The factfinder will determine attorney fees. Attorney fees are frequently proved by in-trial testimony of the attorney. The court can also award attorney fees based on affidavit testimony.¹⁶

One of the most important considerations impacting attorney's fees in a DTPA case stems from offers of settlement under section 17.5052. The offer must include an amount as settlement of the consumer's claim for damages and a separate amount of money to cover reasonable and necessary attorneys' fees incurred as of the date of the offer.¹⁷ At trial, if the consumer plaintiff does not recover damages greater than the offer, he risks capping his damages at the amount in the offer.¹⁸ On the issue of attorneys' fees, the same plaintiff risks limiting his attorney fees to the amount incurred before the offer was effectively rejected.¹⁹

Practice tips

1. Always keep detailed time records. Keep in mind that your time records will become public record. You can (and must!) always redact privileged or confidential information before producing your time sheets. The most reliable records will be those kept contemporaneously with the service rendered.

2. If your matter contains more than one cause of action, make sure to keep track of time spent on each claim separately. If you prevail on one claim, but not all claims, you want to be able to show the amount of time spent on the prevailing claim.

3. Consider obtaining your client's declaration or affidavit to show how many attorneys or public organizations your client contacted before you were retained. Most consumer attorneys will focus their practice on one or two areas and develop their strengths to help justify how specialized the area of law may be. This is especially helpful for the practitioner who is not board certified, but highly trained and experienced in a particular area of law.

4. In the event that you have been retained by consumers on similar matters, and the retainer calls for an hourly fee, ask the consumer to sign a declaration or affidavit stating the rate they paid for the services performed. Your past clients' testimony may be helpful in establishing your hourly rate.

5. Have your consumer-law colleagues draft declarations, or even a letter to the court, indicating that the rate you are seeking is reasonable for your years of experience in handling a particular sort of case.

6. When drafting your fee application, use your best billing judgment. To the extent you feel the need to discount a particular item, show that the work was done, and note the time record as “no charge.” The goal is to show that your billing discretion is aimed at satisfying the “reasonableness” standard. At the same token, do not undercut your reasonable time. Your opposing counsel will have ample opportunity to cut into your fee application or testimony.

7. Familiarize yourself with effect of offers to settle. The ramifications are greater for DTPA cases as discussed above. While offers of judgment under F.R.C.P. 68 may only impact costs, the court may necessarily adjust an attorney fee award downward if a rejected offer is substantially greater than the actual recovery at trial.

1. *See, e.g.*, Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k(a)(3); Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691e(d); Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(3), National Consumer Law Center, Truth in Lending § 8.9; Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681n(a)(3), 1681o(a)(2); Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code § 17.50(d). *See also* National Consumer Law Center, Fair Debt Collection § 6.8; National Consumer Law Center, Credit Discrimination § 11.7.6; National Consumer Law Center, Fair Credit Reporting § 11.14 respectively.

2. *Firebush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th Cir. 1996).

3. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 404 (5th Cir. 2002).

4. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 328 (5th Cir. 1995).

5. The Laffey Matrix was prepared to address rates in the District of Columbia, but has been cited by several circuits. The matrix is available at: http://www.dsjoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html.

6. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

7. *Johnson v. Georgia Highway Expres, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

8. *Singer v. City of Waco*, 324 F.3d 813, 829 (5th Cir. 2003) (*citing Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir. 1998)).

9. F.C.R.P. 54(d)(2)(B)(i)-(iii).

10. F.C.R.P. 54(d)(2)(B)(iv).

11. F.C.R.P. 54(d)(2)(D).

12. <http://www.txs.uscourts.gov/district/rulesproc/dclclrl2005.pdf>

13. F.C.R.P. 54(d)(2)(C)

14. DTPA § 17.50(d).
15. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818-819 (Tex. 1997).
16. Texas Commerce Bank v. New, 3 S.W.3d 515, 517-518 (Tex. 1999).
17. DTPA § 17.525(d).
18. DTPA § 17.525(g).
19. DTPA § 17.525(h).