



Taming the Fee Dragon
Recovery of Attorney's Fees

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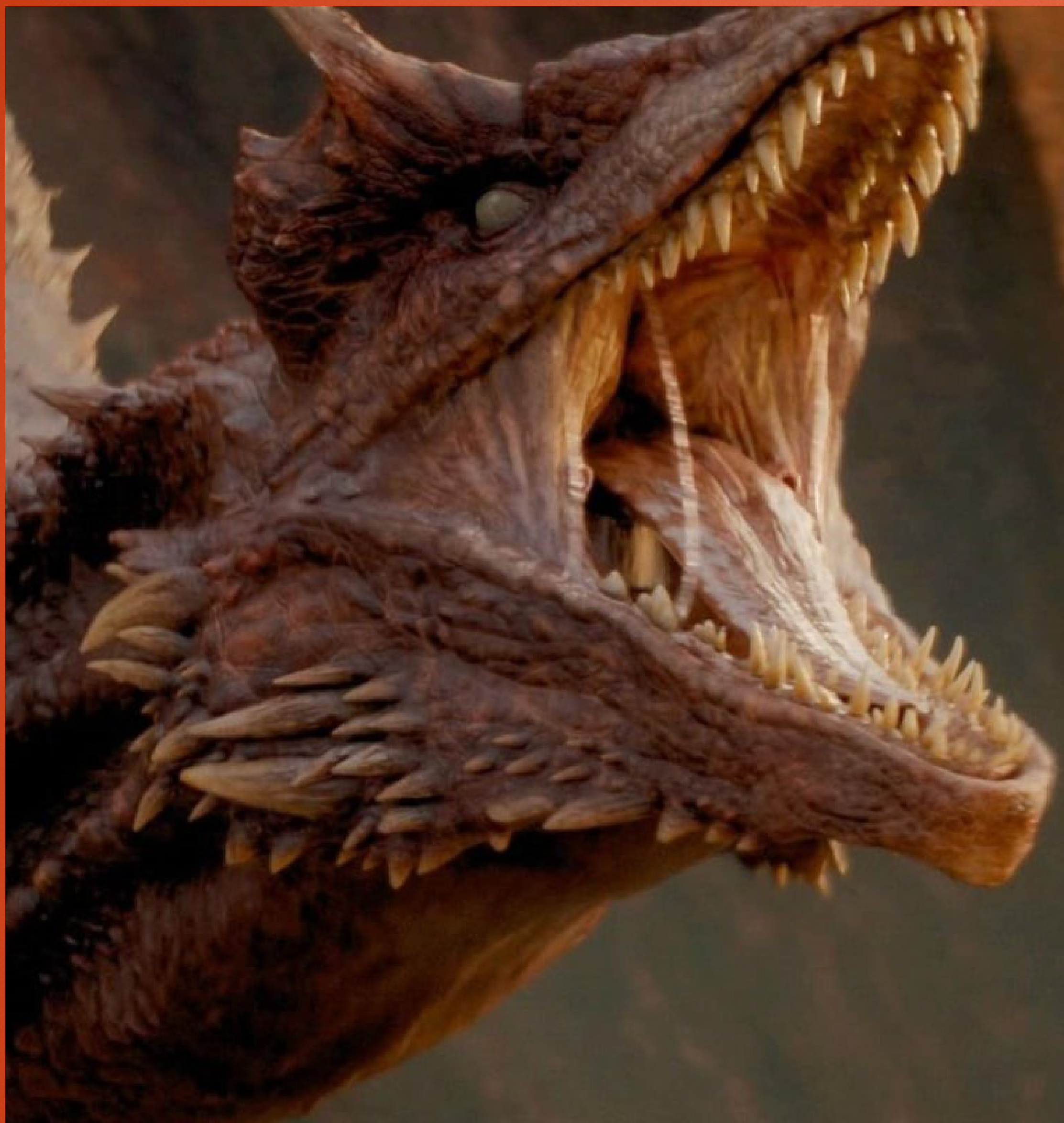
Rohrmoos Venture v. UTSW DVA Healthcare, LLP,
578 S.W.3d 469 (Tex. 2019)

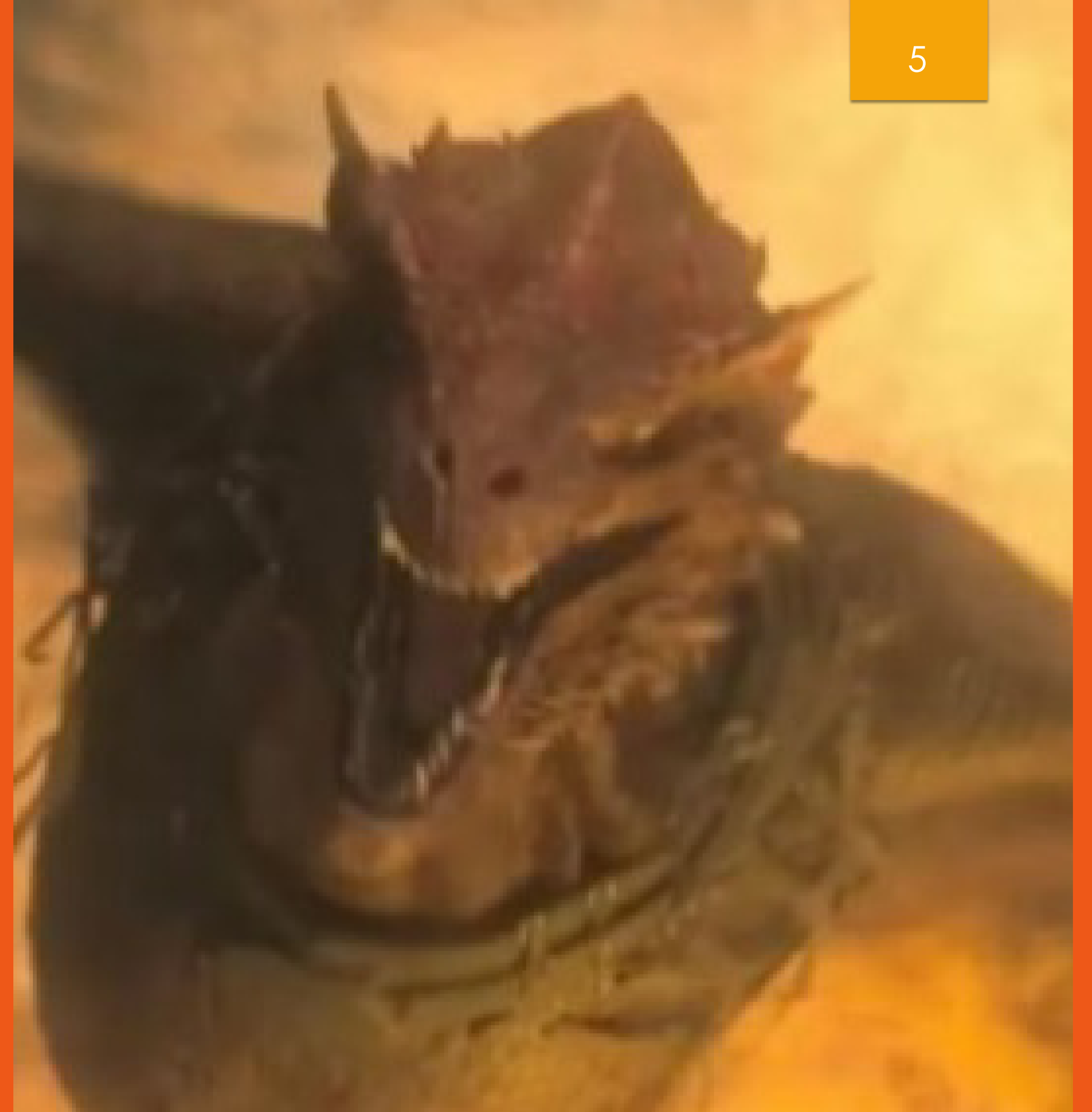


“A powerful dragon crying
its eyes out under the
moon in a deserted valley
is a sight and a sound
hardly to be imagined.”

*Voyage of the Dawn
Treader*

C.S. Lewis





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- ▶ 1. Recent Supreme Court of Texas cases
 - ▶ 2. Recent court of appeals cases
 - ▶ 3. Ethics quiz
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Recoverability of Fees – “Prevailing Party”

- ▶ *Rohrmoos*, applying CPRC Chapter 38.
 - Must prevail on a cause of action for which fees are recoverable.
 - Must recover damages.
- ▶ Nonsuits can make the other side the prevailing party.
- ▶ *Gonzalez v. Zubarik*, 2024 WL 3886434 (Tex. App.—Dallas Aug. 21, 2024, pet. filed) (briefing completed April 22, 2026).

BUT Not all statutes have a “prevailing party” requirement.

- ▶ *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481 (Tex. 2019).
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“Prevailing Party”

Webb CISD v. Marshall (Tex. 2026)

Members sued district for failing to produce information. Trial court issued temporary injunction ordering production; district complied, did not appeal. Members’ terms expired before trial, mooted remaining claims.

General rule: a temporary injunction does **not** confer prevailing-party status: temp. injunction preserves status quo; does not conclusively adjudicate the merits.

Exception: § 11.1512 authorizes **only injunctive relief**. Once the district disclosed the information, “there is no putting the genie back in the bottle.” The TI granted complete, not interim, relief.

“Prevailing Party”

Webb CISD v. Marshall (Tex. 2026)

Prevailing party: When § 11.1512’s only remedy is injunctive relief and the district complies with the TI, the board member “prevails” for fee purposes—even if the case is later mooted by expiration of the member’s term.

Segregation: Prevailing-party status is **cabined to the September 2020 TI**. Two additional years of litigation on other requests = unrecoverable. Segregation principles apply.

Concurrence (Hawkins, J.): This was not a true temporary injunction.

A conventional TI preserves the status quo pending trial and reflects a *prediction*—not a determination—about the merits. Here, the order **permanently altered** the parties’ positions—it functioned as ultimate, not interim, relief. **The label on an order does not determine its legal character.**

Proof – What does *Rohrmoos* require?

Specificity

1. The particular services performed (not just categories).
 2. Who performed those services.
 3. Approximately when the services were performed.
 4. The reasonable amount of time required to perform the services.
 5. The reasonable hourly rate for each person performing the services.
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Proof – What does *Rohrmoos* require?

- ▶ Must be evidence about the *time spent on specific tasks* to enable the fact finder to meaningfully review the requested fees. *Patriot Contracting, LLC v. Shelter Products, Inc.*, No. 01-19-00971-CV, 2021 WL 6067721 (Tex. App.—Houston [1st Dist.] Dec. 23, 2021, pet. denied).
 - ▶ **Contradicting evidence:**
 - Cannot be conclusory: testimony that \$250/hour for a 7-year lawyer in Grimes County is too high is conclusory.
 - *Iola Barker v. Hurst*, 632 S.W.3d 175 (Tex. App.—Houston [1st Dist.] 2021, no pet.)
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Redaction

- ▶ Cannot be “impossible” to determine reasonable and necessary. *Person v. MC-Simpsonville, SC-1-UT, LLC*, 2021 WL 3816332 (Tex. App.—Austin Aug. 27, 2021, no pet.).
 - ▶ A factfinder must be able to know, with the requisite specificity, what tasks were performed. *Westheimer v. Ziemer*, 702 S.W.3d 621, 633 (Tex. App.—Houston [1st Dist.] 2024, no pet.)
 - ▶ *Tite Water Energy v. Wild Willy's Welding*, 2023 WL 5615816 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, pet. denied) (extensively redacted invoices plus testimony = sufficient evidence).
 - ▶ *Calleja-Ahedo v. Compass Bank*, 2020 WL 3820420, at *12 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.) (partial redactions OK).
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Segregation

- Percentages are OK—but explain.
- No segregation required for overcoming an affirmative defense/counterclaim that defeats a fee-sustaining claim.
- Evidence of unsegregated fees is *some evidence* of segregated fees.
- **Object** to unsegregated fees – not just *Rohrmoos* objection.

➤ *Gopalan v. Marsh*, (Tex. 2026)

- Reversed/remanded conditional appellate fees.
 - Husband prevailed in part—wife was not entitled to the full \$80,000 award.
 - Entitled to fees attributable to the appellate issues on which she prevailed.
 - Evidence failed to segregate fees by issue, so remand necessary.
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Segregation

Sw. Sunrise, LLC V. John Gannon, Inc., 2026 WL 1144472, at *5 (Tex. App.—Houston [14th Dist.] Apr. 28, 2026, no pet. h.) [MRH May 13, 2026]

- Prevailing appellee may not recover the full amount of conditional appellate attorney's fees when the appellant achieved partial success on appeal.
- Southwest had prevailed on two of four issues in the prior appeal—obtaining reversal of the injunctive relief and the original chapter 38 fee award.
- Appellee must segregate appellate fees between issues on which the appellant succeeded and issues on which it did not.
- Track appellate work by issue contemporaneously, anticipating that a partial reversal will require a proportional reduction.

Pleading for Attorney's Fees

- ▶ A general prayer for attorney's fees *may suffice*. (4th, 5th, 9th.)
- ▶ *Better* to specifically plead the basis. (8th.)
 - But does that limit your bases for fees? (1st, 5th, 14th.)
- ▶ *Best to be both general and specific.*
 - E.g., “Plaintiff seeks its reasonable and necessary attorney’s fees, costs, and expenses through trial and all appeals under applicable Texas law, including but not limited to Tex. Civ. Prac. & Rem. Code § 38.001.”
- ▶ *Jones v. Uribe*, No. 07-23-00233-CV, 2024 WL 3219184 (Tex. App.—Amarillo June 27, 2024, pet. denied).

Conditional Appellate Fees

Yowell v. Granite Operating Co. (Tex. 2020)

Background:

- Oil-and-gas dispute over overriding royalty interest (ORRI) and rule against perpetuities.
- Trial court awarded Peyton Group \$220,396 in attorney's fees from Granite, including \$43,500 in *conditional appellate fees* on the indemnity claim.

Issue:

- Whether the evidence was legally sufficient to support the award of conditional appellate fees.

Holding:

- **AFFIRMED.** Uncontroverted expert opinion testimony met the standard.
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Yowell v. Granite Operating Co. (Tex. 2020)

***Rohrmoos* lodestar does not apply** to conditional appellate fees:

- Fees not yet incurred — cannot calculate “hours worked.”
- No certainty as to counsel, hourly rate, or issues to be raised on appeal.

What IS required:

- Opinion testimony about *services reasonably necessary* to defend the appeal.
 - A *reasonable hourly rate* for those services.
 - An “educated prediction” — what issues on appeal, what stages.
 - Specific tasks and contingencies.
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Hizar v. Heflin, 672 S.W.3d 774 (Tex. App.—Dallas 2023, no pet.)

- ▶ Attorney submitted affidavit estimating \$20,000 (COA), \$10,000 (PFR filing), and \$15,000 (merits briefing/argument) —no description of the specific services.
 - ▶ No hourly rate was identified for appellate work; affidavit did not tie estimates to projected hours or tasks.
 - ▶ Under *Yowell*, a party must offer opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services.
 - ▶ Evidence held legally insufficient — awards of conditional appellate fees and post-trial fees reversed and remanded for redetermination.
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Footy Rooty Dev., Inc. v. Doe (M.D.), 2025 WL 3764017
(Tex. App.—Corpus Christi—Edinburg Dec. 30, 2025, no pet.)

Affidavit:

- Hourly rate of \$300/hour.
- \$20,000 — reasonable/necessary fee for appeal to COA (initial brief, reply briefs, MRH)
- \$30,000 — reasonable/necessary fee for petition/briefing in Texas Supreme Court.

Court's analysis:

- Mirrors evidence upheld in *Yowell* : per-stage amounts with hourly rate.
- Trial court may also consider common knowledge of lawyers and judges in evaluating the request.
- Testimony was uncontested.

Result: UPHELD.

Trujillo v. Shafaii Investments, Ltd.,
2024 WL 2001612 (Tex. App.—Houston [1st Dist.] 2024)

- ▶ Affidavit identified the testifying attorney's experience and familiarity with customary Harris County fees for similar cases.
 - ▶ Affidavit separated projected fees by appellate tier: \$5,000 (COA); \$2,500 (PFR filing); \$3,500 (merits briefing/argument if review granted).
 - ▶ Affidavit stated the attorneys' hourly rates (\$480 and \$330) — distinguishing it from testimony held insufficient in *Walsh v. Gonzalez*.
 - ▶ Evidence was uncontroverted: no controverting affidavit or cross-examination on fee estimates.
 - ▶ *Court applied Yowell and affirmed: evidence need not track lodestar methodology for fees not yet incurred; specificity as to services and rate is enough.*
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In re C.J.S.,
702 S.W.3d 573 (Tex. App.—Houston [1st Dist.] 2024, no pet

Trial court awarded appellate fees in a single, unconditional, unspecified-amount sentence:

- “*The Court FURTHER ORDERS attorney fees on appeal in favor of VICTORIA STERN.*”

Two independent defects:

- unconditional award — improper because it could penalize a party for taking a *meritorious appeal*.
- no specific amount and no expert opinion testimony about services to be performed on appeal or hourly rate.

Result: REVERSED AND REMANDED.

Federal Court

- ▶ In diversity cases, consider whether the statutory basis for fees is substantive or procedural law. (The Texas DJA is procedural.)
- ▶ Always post-trial.
- ▶ Federal courts are citing and relying on *Rohrmoos* too.

Wang v. Whittenburg – Fees as Breach Damages

No. 25-0350 | Tex. 2026 (Justice Busby) | Decided May 15, 2026

Settlement breached. Trial court found \$216,112 in additional fees caused by breach in a *prior* suit. Courts below: American Rule bars recovery. SCOTX: Reversed.

THE RULE: The American Rule does not bar recovery of attorney's fees incurred in *prior litigation* as breach-of-contract damages, **so long as the breach was not a basis for the prior litigation.**

Narrow holding – applies to settlement agreements, releases, and covenants not to sue, whose breach often produces *no other form of damages*.

Wang v. Whittenburg

To recover prior-suit fees as damages, plaintiff must show:

- Fees are the natural, probable, and foreseeable consequence of the breach.
- Breach was **not a basis** for the prior suit (single-action rule bars recovery where both suits rest on the same wrongful act).
- Fees sought are **only the excess** directly attributable to the breach—not all fees incurred in the prior suit.
- Recovering these fees as actual damages satisfies the “damages” prong of CPRC § 38.001(b)(8), enabling fee recovery in the current suit as well.

Ethics!



Renegotiating a flat fee?

Attorney negotiates a fixed, flat fee for representation of his client.

As litigation progresses, the matter turns out to be greater in scope and complexity than either Attorney or his client contemplated.



Can the attorney negotiate a new fixed, flat fee even though litigation is underway?

Yes, but...

- May renegotiate if modification of the fee agreement is fair under the circumstances.
- Burden to prove “fair” on the lawyer.
- Depends on:
 - ✓ the length of the lawyer-client relationship
 - ✓ if the reasons for renegotiations could have been anticipated at the outset of representation
 - ✓ the client’s level of sophistication

BUT lawyer assumed to have taken risks when proposing/accepting original flat fee.

May a lawyer offer legal services under a subscription service fee model: the client pays a monthly fee for legal services that the client may or may not utilize?

Must the lawyer keep the fees paid by the client in the lawyer's trust account until the end of each month and make an appropriate refund upon termination?



YES

A lawyer may enter into a subscription fee agreement with a client, and charge and collect a subscription fee under that agreement.

BUT the fee may not unconscionable under the circumstances.

A lawyer should ordinarily retain subscription legal fees in the lawyer's trust account until the end of the recurring subscription period.

Impermissible: a contract provision forfeiting the entire amount of a monthly subscription fee if the subscription is cancelled before the end of the month.

Client has asked you if
Non-client (sister) can pay for
Client's attorneys' fees during
the course of litigation.

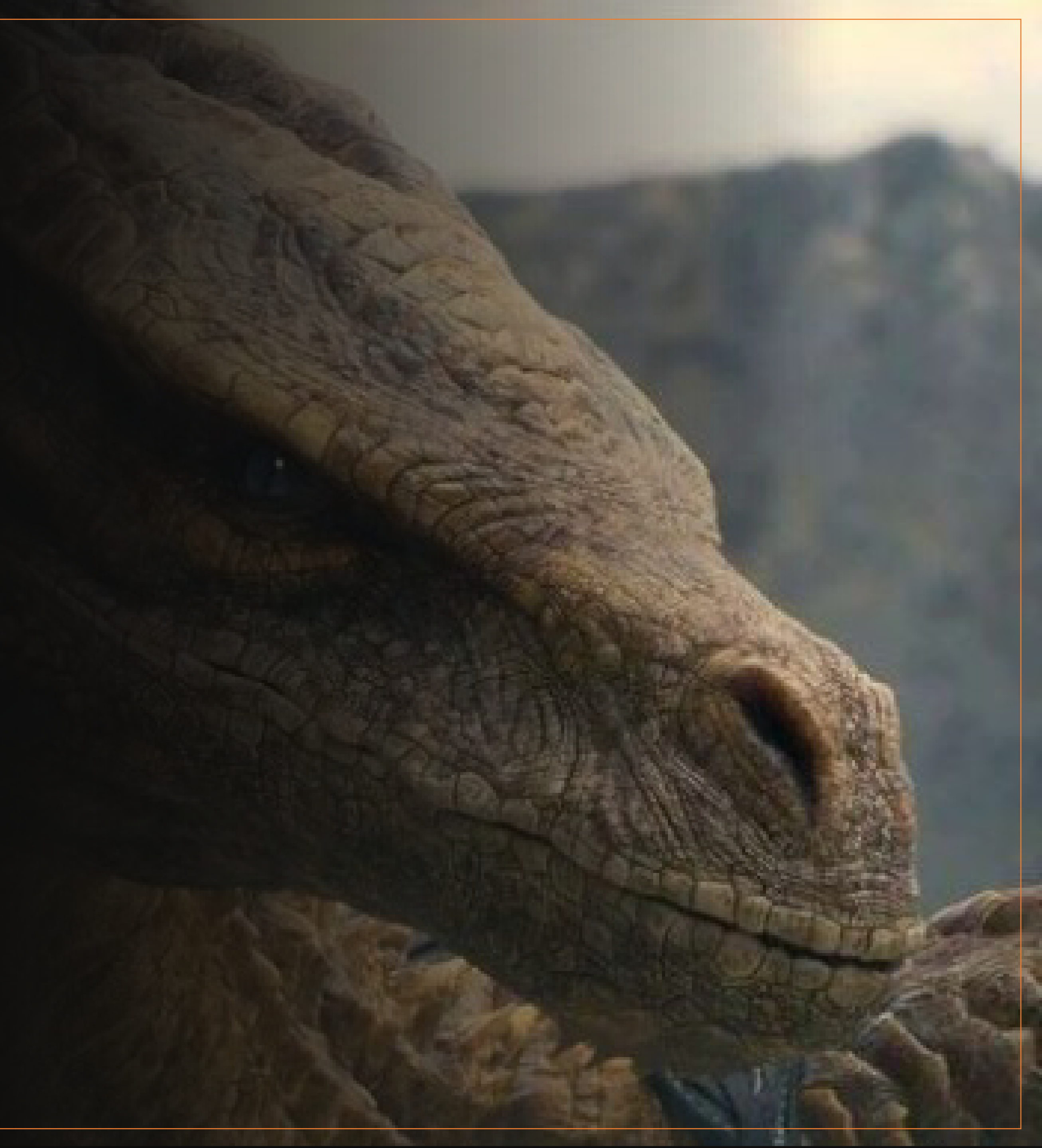
Is this permissible?



Yes, but... 2

Identify/define the following:

- Any conflicts of interest
- Confidentiality/attorney-client privilege
- Scope of the representation
- Separate written agreements/billing statements
- What if payor stops paying before lawsuit is done?





Mr. Green is retained under a contingent fee agreement but withdraws from the representation due to a nonconsentable conflict of interest discovered shortly after he filed plaintiff's lawsuit.

May Mr. Green refer his client to Mr. Blue (in another law firm) and arrange for a division of fees?

NO:

- Lawyers not in the same firm may divide fees (on the basis of the proportion of services they render or if they assume joint responsibility for the representation).
- A lawyer who withdraws from the representation based upon a nonconsentable conflict of interest may not enter into an arrangement to divide fees based on joint responsibility.
- A lawyer may not enter into an agreement to divide fees based on the proportion of services when the lawyer has not performed substantial legal services on behalf of the client, or when there is no reasonable correlation between the amount or value of service rendered and responsibility assumed and the share of the fee to be received.
- A lawyer may not enter an agreement for a pure referral fee.



But what about...

artificial intelligence?



Using her law firm's generative artificial intelligence, a lawyer creates a pleading for her client in only 15 minutes.

The Gen AI used a database of sources from the lawyer's prior pleadings created by decades of experience.

She spends 30 minutes confirming that there are no "hallucinations" or other errors.

May she bill the client for two hours of time—which is still much less than it would have taken to generate the pleading without AI?



Ummmm...

NO—the lawyer can only bill the client for 45 minutes, assuming an hourly fee agreement.

AI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time.

ABA Formal Ethics Opinion 93-379: A lawyer who agreed to bill on an hourly basis does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf.

Goal should be to compensate the lawyer “fully for time reasonably expended, an approach that if followed will not take advantage of the client,” BUT if the agreement is made on an hourly basis, it should be adhered to.

Tex. Comm. On Professional Ethics, Op. 705 (2025):

Quoting D.C. Legal Ethics Opinion 388 (2024):

...a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended...When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client.

Florida Bar Ethics Opinion 24-1: *Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time.*

- If the lawyer pays per use for a particular generative AI program, the lawyer may be able to collect those expenses from the client, as allowed by law and if the client accepts that arrangement.



“Opinion 705

. While there may be many ways that generative AI can assist in the practice of law and benefit lawyers and clients alike, Texas lawyers must always be aware of the ethical issues that may arise

...[lawyers] should not charge clients for the time “saved” by using a generative AI program.”





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