



Taming the Fee Dragon
Recovery of Attorney's Fees

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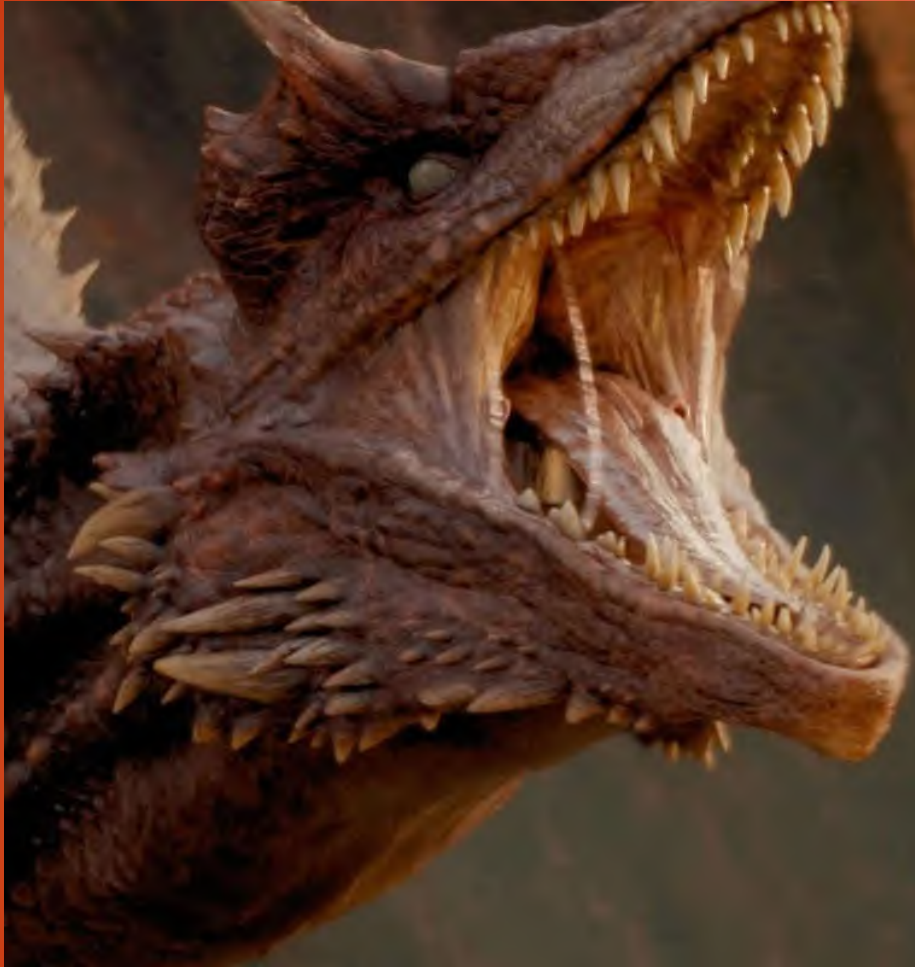
Rohrmoos Venture v. UTSW DVA Healthcare, LLP,
578 S.W.3d 469 (Tex. 2019)

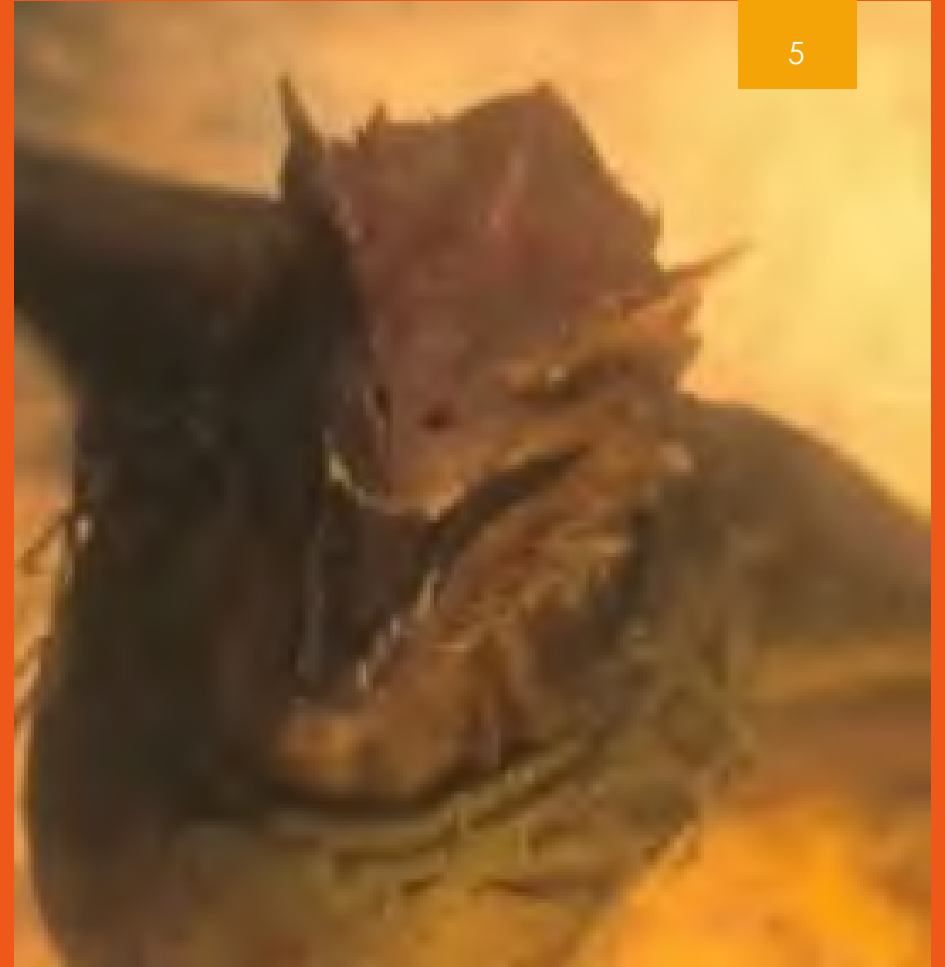


“A powerful dragon crying
its eyes out under the
moon in a deserted valley
is a sight and a sound
hardly to be imagined.”

*The Voyage of the Dawn
Treader*

C.S. Lewis







▶ 1. *Rohrmoos* refresher

▶ 2. Recent cases

▶ 3. Ethics quiz

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.)
 - ▶ *Jones v. Uribe*, No. 07-23-00233-CV, 2024 WL 3219184 (Tex. App.—Amarillo June 27, 2024, pet. denied).
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Pleading for Attorney's Fees

► *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.”

BUT you should plead specifically for relief under the contract or agreement and not just Chapter 38.

► *Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46, 60 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)

► *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009)

“Prevailing Party”

► *Rohrmoos*, applying CPRC Chapter 38.

- Must prevail on a cause of action for which fees are recoverable.
- Must recover damages.
- Must obtain “actual and meaningful relief, something that materially alters the legal relationship of the parties.”
- Nonsuits can make the other side the prevailing party.
- *Gonzalez v. Zubarik*, 2024 WL 3886434 (Tex. App.—Dallas Aug. 21, 2024, pet. denied): vacatur of summary judgment

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

► *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481 (Tex. 2019)

“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, mooting 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.**

Proving Attorney's Fees: *Rohrmoos*

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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Proving Attorney's Fees: *Rohrmoos*

- ▶ 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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Conditional Appellate Fees

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.)**

- 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



***Taylor v. Taylor*, 2025 WL 3464949 (Tex. App.—Dallas Dec. 2, 2025, pet. denied)**

- No testimony on a reasonable appellate fee to be charged or the services necessary to defend an appeal
 - No invoice with estimated legal expenses on appeal
 - No testimony to describe any relevant appellate experience by counsel
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Brown v. Brown, 2026 WL 1993056 (Tex. App.—Fort Worth June 9, 2026, no pet.)

- Attorney did not identify the services that he reasonably believed would be necessary to defend the appeal nor did he identify a reasonable hourly rate for performance of any of those services



USA Top Res. Corp. v. Ying Int'l Trade, LLC, 2026 WL 1881016 (Tex. App.—Dallas June 30, 2026, no pet.)

- Hourly rates presented in support of trial fees are insufficient to support conditional appellate fees
 - Generalized testimony concerning the blended rate of his services and those of an appellate partner is insufficient
 - Need testimony that attorney was familiar with the process of an appeal or with handling a case on appeal to the court of appeals or the Texas Supreme Court
 - Need references to specific services necessary to defend an appeal
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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.)

- Evidence involved per-stage amounts with hourly rate (approved by *Yowell*).
- Trial court may also consider common knowledge of lawyers and judges in evaluating the request.

Pioneer Nat. Res. USA, Inc. v. Elberta M. Royalty, LLC, 2026 WL 2435350 (Tex. App.—El Paso Aug. 19, 2026, no pet. h.)

- Consider the record as a whole—testimony addressing the hourly rates he would charge for appellate services, explanation of type of service provided during the appellate phases, and the exhibit demonstrating the breakdown of costs of each stage



Granbury SNF LLC v. Jackson, 2025 WL 807497 (Tex. App.—Fort Worth Mar. 13, 2025)

- Attorney testified about the various stages of the appellate process, described legal services typically performed at each stage (including preparing and briefing a petition for review and handling motions for rehearing)
- Provided opinions regarding the reasonable and necessary attorney's fees expected to be incurred for each stage of the appellate process
- Estimated the total number of attorney hours anticipated for each stage of the appeal—not just total dollar amount
- He explained that his estimates of the necessary appellate hours were based, in part, on consultations with an appellate specialist regarding the reasonable amount of time required to handle an appeal
- He testified regarding his hourly billing rate



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 1905092, at *1 (Tex. App.—Houston [14th Dist.] July 2, 2026, no pet.)

- ▶ 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.
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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*.

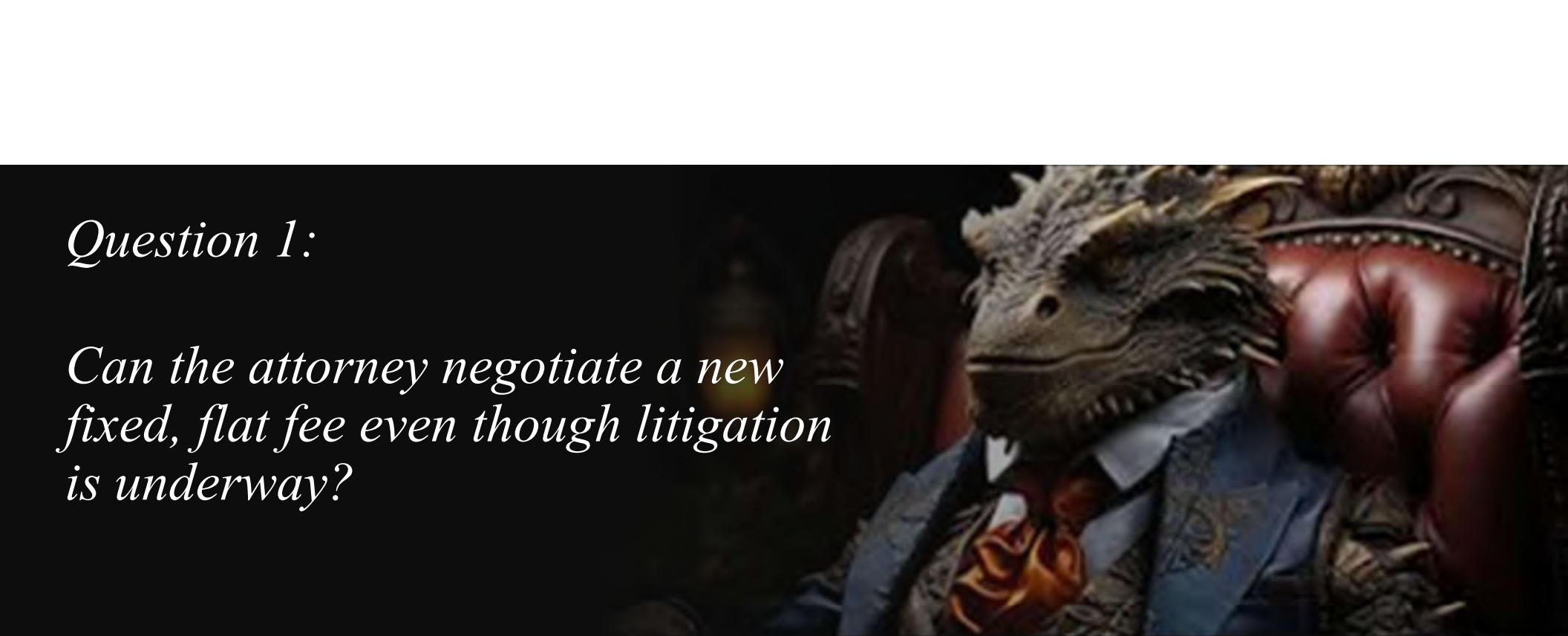
Wang v. Whittenburg

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.
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Ethics!





Question 1:

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

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.

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.

Question 2:

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 be 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.

A dramatic scene featuring two large, dark-scaled dragons with reddish-brown wings flying over a medieval town. The dragons are positioned on the right side of the frame, facing left. The town below has stone buildings and a church with a tall spire. The sky is filled with soft, white clouds. The overall tone is epic and fantastical.

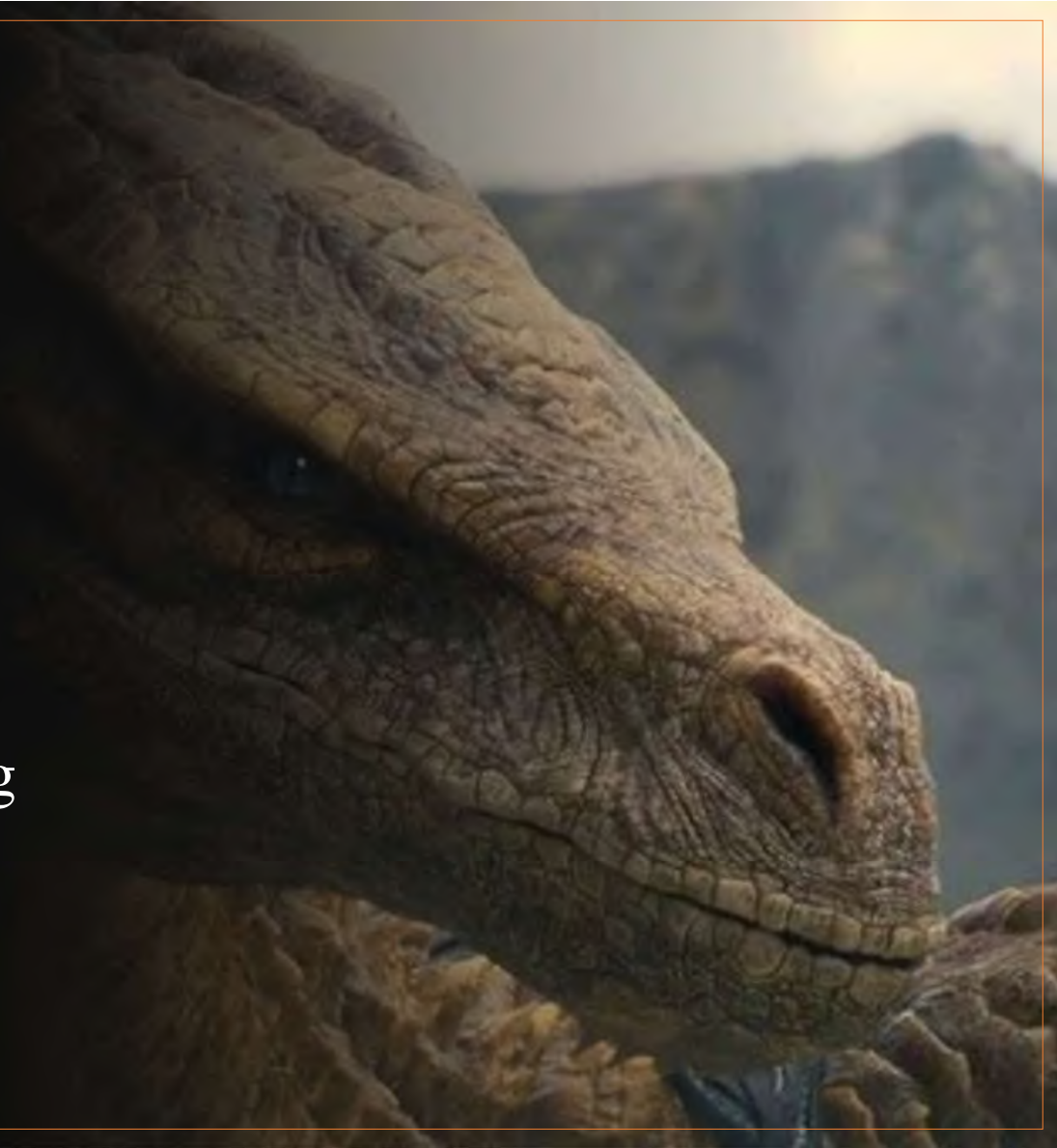
Question 3:

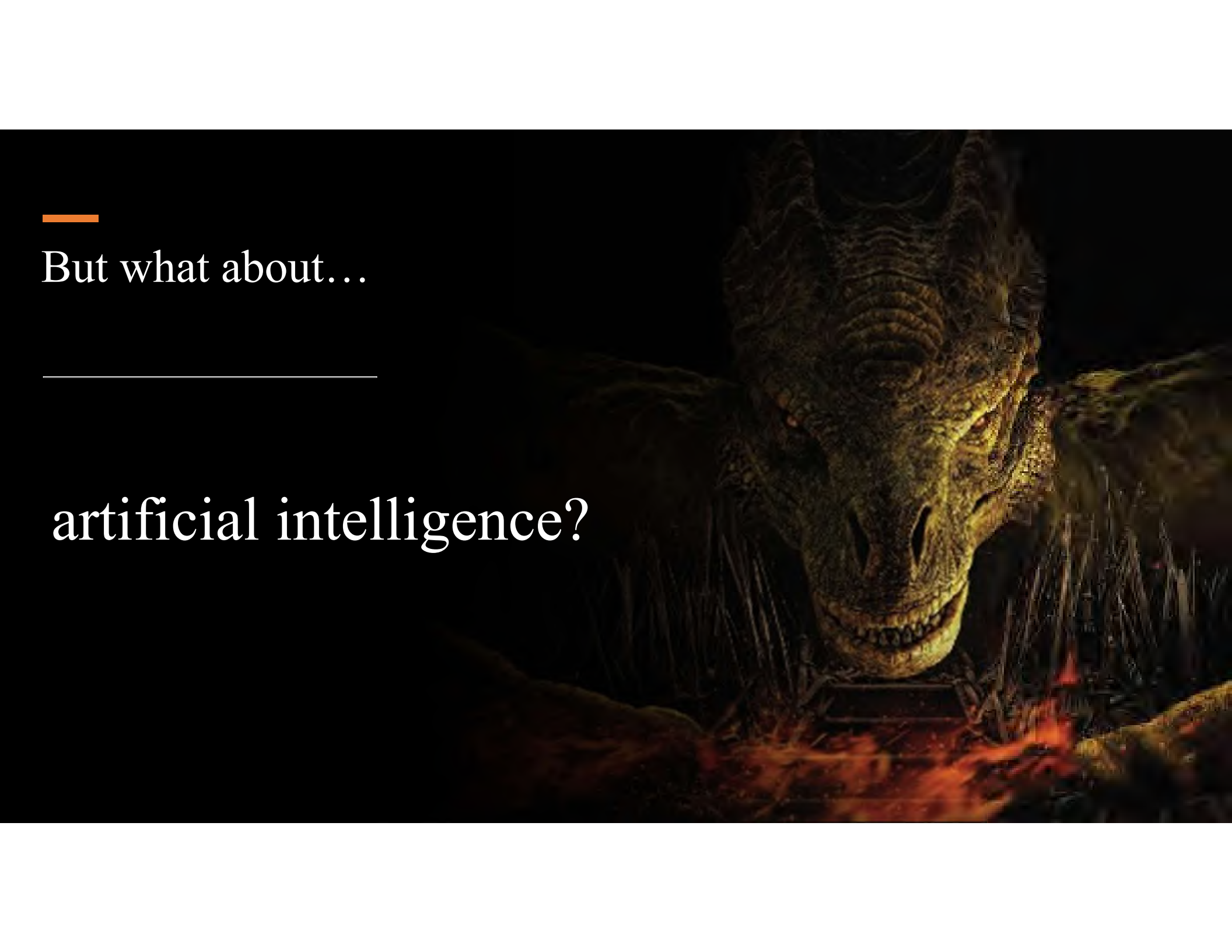
May a non-client (sister) pay
for Client's attorneys' fees
during the course of
litigation?

Yes, but...

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?





—
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.



Question 4

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.”



Va. Legal Ethics Op. 1901

When generative AI lets a lawyer produce the same work product far faster, must the fee come down?

Hourly fees — unchanged: time-based billing can only be based on actual time spent. The opinion does not disturb that rule.

Non-hourly fees — the holding: It is **not per se unreasonable** to charge the same flat or value-based fee for AI-assisted work. Rule 1.5 does **not** equate reduced time with a proportionally reduced fee.

Va. Legal Ethics Op. 1901

The Rule 1.5(a)(1) tension: “time and labor required” falls, but the “skill requisite to perform the legal service properly” may rise — prompting, verifying, supplementing, and integrating AI output, and catching hallucinations.

Results over inputs: “the amount involved and the results obtained” supports outcome-based billing. Time spent is not the preeminent factor.

Rule 1.5(b) — explain the basis: where the fee rests on skill and value rather than time, the lawyer must adequately explain it — especially when time spent drops sharply.

Rohrmoos – Survives?

[T]he lodestar method developed as a “short hand version” of the *Arthur Andersen* factors and was never intended to be a separate test or method.

The lodestar method provides for this, as it is a focused and objective analysis of whether the fees sought are reasonable and necessary, yielding a base figure that reflects most *Arthur Andersen* factors and is thus presumptively reasonable.

But that figure is subject to adjustment if the presumption is overcome by other factors not accounted for in the base lodestar figure.

Arthur Andersen Factors

1. Time and labor required, novelty and difficulty of the questions involved, and skill required to perform the legal service properly.
2. The likelihood 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.
8. Whether the fee is fixed or contingent on results obtained, or uncertainty of collection before the legal services have been rendered.



Billable Hour Survives

- ▶ **Entrenched**
Firm economics, partner metrics, and client budgets are all built on hours
- ▶ **Judgment is human**
Strategy, advocacy, and counseling still take time
- ▶ **Review/Verification takes time**
Lawyers must review and confirm every AI output — and bill for it.
- ▶ **Rates can rise**
Firms can offset efficiency by charging more per hour

Billable Hour Dies

- ▶ **Hours are no longer the measure**
Tasks that took days now take minutes — fewer hours to bill
- ▶ **No billing for time saved**
ABA Op. 512 bars charging for hours AI made unnecessary
- ▶ **Clients push back**
In-house counsel demand flat or value-based fees and refuse to pay for rote drafting
- ▶ **Competition**
 - AI-driven, fixed-fee firms undercut hourly rates
 - Courts may cut hours as unreasonable when AI could do it faster
- ▶ **Measure of associates**
The associate-hours pyramid loses its foundation.

The Future?

What does an attorneys' fees expert need to know?

How is attorneys' fees recovery affected by agents?

Will generative AI help with the development of attorneys' fees proof?



A woman with long blonde hair and black-rimmed glasses, wearing detailed medieval-style armor with a red cape, holds the head of a large, scaly dragon. The dragon's head is positioned in front of her, and she is holding its leather harness. The background features a dramatic sunset over a body of water with several smaller dragons flying in the sky. In the distance, a castle with multiple towers is visible on a hill.

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