SUPREME COURT IMPOSES NEW REQUIREMENTS ON ATTORNEY FEES

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Two recent cases effectively impose specific evidentiary requirements to successfully recover attorney's fees under a fee shirting statue: *EL Apple I, Ltd, v.Olivas,* 370 S.W.3d 757 (Tex 2012) and *City of Laredo v. Montano,* 2013 WL 5763179 (Tex.Oct. 25, 2013). These opinions indicate that litigants now can expect a heightened level of appellate scrutiny of fee awards. The lesson to be learned from these two cases is simple: keep contemporaneous time records, and use them as evidence to support a request for fees.

Olivas involved a reward for fees under the Texas Commission on Human Rights to a successful plaintiff's counsel. *Montano* involved a reward for fees under the Property Code to a property owner who had successfully defeated a condemnation proceeding. In both cases, the successful lawyers requested a specific reward, testified that they had worked sufficient hours to justify the amount requested, that the work was necessary, and that the requested fee was reasonable given the nature of the case and the result obtained. The Supreme Court reversed the fee awards in both cases for the same reason – the evidence at trial had been insufficient to enable the trial court to make an informed decision about what constituted a reasonable fee for necessary services in that case. In each, the Court held that is was an abuse of discretion to make any fee award in the absence of sufficient evidence and remanded the case for a fee determination to be made in a way that would be consistent with the standards set out in the opinion

The party applying for the fee award has the burden of proof. That party should introduce evidence of (1) the nature of the work, (2) who performed the services and their rates, (3) when the services were performed, and (4) the number of hours worked. If multiple attorneys or other legal professionals are involved in a case, the evidence must explain which person performed which task or category of tasks, and why. In *Olivas*, the Court observed that "….in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information." *Olivas*, 370 S.W.3d at 763. "To establish the number of hours reasonable spent on the case, the fee application and record must include proof documenting the performance of specific tasks, the time required for those tasks, the person who performed the work, and his or her specific rate." *Id* at 765.

Consequently, conclusory testimony from an attorney, and estimates about how much work he "probably" did, constitutes no evidence at all. In *Montano's* the successful attorney's testimony that he spent "a lot time getting ready for the lawsuit," conducted "a lot of legal research," visited the premises which were the subject of the condemnation proceedings "many, many, many, many, times," and spent "countless" hours on motions and depositions was held to be no evidence at all of a reasonable fee.
The trial court must ensure that a fee award does not gouge the opposing litigant. The Supreme Court believes that the fee shifting statutes provide incentives to expend excessive time on unjustified work and a disincentive to early settlement. To ensure that these incentives do not result in overly generous award, the evidence at trial must be sufficiently specific to enable the trial court to evaluate the work that was done, why it was necessary and why the charges were

reasonable. Fee awards cannot include charges for duplicative, excessive or inadequately documented work.

In light of these two opinions, any attorney who seeks an award of fees should offer detailed, contemporaneous time records into evidence and walk the trial court or finder of fact through them. That lawyer should be prepared to explain why each task or category of tasks was necessary, and why the person performing each task was the right person to do that. While these opinions do not say that this is the *only* way to properly prove up a request for fees, they come awfully close. Anyone who relies on less extensive documentation in support of a request for fees is taking a huge risk that fees which his or her client is entitled to recover will not be awarded.