FEE-SHIFTING:
THE RECOVERY OF IN-HOUSE LEGAL FEES

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I. INTRODUCTION

Litigation can be very expensive. The familiar “American Rule” followed in Minnesota and many other jurisdictions holds that each side bears its own attorneys’ fees and costs.¹ The attorneys’ fees associated with bringing an action are often a major factor in determining whether to bring a claim at all. Similarly, the attorneys’ fees for both plaintiffs and defendants weigh heavily in the cost-benefit analysis of whether and at what cost to ultimately settle a lawsuit. There are, however, many recognized exceptions to the American Rule where shifting of attorneys’ fees is permitted.

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¹ See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser."); Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000) (holding that under Minnesota’s common law, “each party bears [its] own attorney fees in the absence of a statutory or contractual exception”).
by statute, procedural rules, common law, or the terms of a contract.

The underlying policy rationale for fee-shifting statutes and other fee-shifting mechanisms is sometimes grounded in the concept of making an injured party whole. As one scholar notes:

Another argument for fee shifting that has a strong intuitive appeal is that refusing to award fees denies a wronged party full compensation for his injury.... Undeniably, the American rule’s effect of reducing a successful plaintiff’s recovery by the amount of his lawyer’s fee conflicts with the make-whole idea underlying much of the law of remedies.

2. See MARY FRANCES DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES chs. 29–48 (2012); ALAN HIRSCH & DIANE SHEEHEY, FED. JUD. CTR., AWARDING ATTORNEYS’ FEES AND MANAGING FEE LITIGATION 1 n.3 (2d ed. 2005), available at http://bulk.resource.org/courts.gov/fjc/attfees2.pdf; see also Marek v. Chesny, 473 U.S. 1, 23 (1985) (Brennan, J., dissenting) (“Congress has enacted well over 100 attorney’s fees statutes.”).

3. See, e.g., FED. R. CIV. P. 11 (signing of pleadings, motions, and other documents in violation of the rule), 16(f) (noncompliance with rules relating to pretrial conferences), 26(g) (certification of discovery requests, responses, and objections), 30(g)(1) (failure of party noticing deposition to attend), 30(g)(2) (failure of party noticing deposition to properly serve the witness), 37(a)(4) (conduct necessitating motion to compel discovery), 37(b) (failure to obey discovery orders), 37(d) (failure to make discovery), 56(h) (summary judgment affidavits made in bad faith).

4. See DERFNER & WOLF, supra note 2, chs. 2–4; 1 ROBERT L. ROSSI, ATTORNEYS’ FEES chs. 7–8 (3d ed. 2002 & Supp. 2012). Two of the most widely recognized exceptions are the common-benefit doctrine and the bad-faith exception. See Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Milner v. Farmers Ins. Exch., 725 N.W.2d 138, 145 (Minn. Ct. App. 2006) (“The lodestar method is appropriate in cases that secure a public or common benefit although damages may be small . . . .”); First Constr. Credit Inc. v. Simonson Lumber of Waite Park, Inc., 663 N.W.2d 14, 19 (Minn. Ct. App. 2003) (“The district court has the discretion to award costs, disbursements, and reasonable attorney fees if a party acted in bad faith.”); Heller v. Schwan’s Sales Enters., 548 N.W.2d 287, 291 (Minn. Ct. App. 1996) (“This method of allocating attorneys’ fees as a proportion of the recovery for each class member is acceptable as an application of the common-fund doctrine.”). In Minnesota, for example, an insured is entitled to attorneys’ fees and costs incurred in establishing coverage where the insurer breaches its obligation to defend the insured. See In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 422–23 (Minn. 2003).

5. See ROSSI, supra note 4, ch. 9; TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 375 (2003) (“Many types of commercial contracts contain provisions that shift responsibility for the payment of transaction costs, either generally or with respect to specific items.”).

Consistent with the make-whole concept, there is no reason that fee-shifting is necessarily limited to traditional outside counsel. In addition to outside counsel, fee-shifting may be appropriate for the recovery of “in-house” legal fees, such as corporate counsel. Fee-shifting awards may also be appropriate for government lawyers, representation of nonprofit organizations, and even representation of clients in pro bono matters. Careful evaluation of whether such fees are recoverable can not only potentially boost the ultimate recovery, but also significantly change the litigation and settlement dynamics. This article explores whether and to what extent such fees may be recovered.

II. THE LODESTAR METHOD

The starting point for evaluating potential recovery of in-house attorneys’ fees is the rules that govern the more common type of attorneys’ fees awards. Awards of attorneys’ fees are typically determined by the “lodestar” method (i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate). Like many jurisdictions, Minnesota follows the lodestar method. Factors considered in determining reasonableness under Minnesota law include: “the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement between counsel and the client.”

7. DERFNER & WOLF, supra note 2, ch. 16.01.
8. Milner, 748 N.W.2d at 620 (citing Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 542 (Minn. 1986), which approves of the “sensible and fair approach” set forth in Hensley v. Eckerhart, 461 U.S. 424 (1983)).
these factors, “Minnesota courts consider the results obtained critical to the fee award.”\(^\text{10}\) In some circumstances, the lodestar may be enhanced or reduced depending on the success.\(^{11}\) “[A]n upward adjustment of the lodestar amount is warranted only in rare cases of exceptional success.”\(^\text{12}\)

### III. RECOVERY OF IN-HOUSE ATTORNEYS’ FEES

#### A. Are In-House Counsel Fees Recoverable?

Because in-house lawyers are salaried and typically do not bill their clients for their services, the initial issue is whether the costs associated with those services are recoverable from an adverse party. A number of state and federal courts have permitted the recovery of in-house attorneys’ fees.\(^\text{13}\) Recovery of such fees has

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11. Milner, 748 N.W.2d at 624 (citing Blum v. Stenson, 465 U.S. 886, 897 (1984)). Note that although success is not necessarily dependent on the amount at issue in the case, the amount may be relevant in determining the reasonableness of hours expended. See Darula v. BMW of N. Am., LLC, No. A11-1457, 2012 Minn. App. LEXIS 440, at *15 (Minn. Ct. App. May 21, 2012). But see Green, 2011 Minn. App. LEXIS 1089, at *24 (“[W]e disagree that a district court should consider the amount involved in the litigation when awarding attorney fees,” as this approach may undermine the purpose of fee-shifting provisions.).

12. Milner, 748 N.W.2d at 624 (internal quotation marks omitted) (rejecting the district court’s award of a 1.5 multiplier for claims under section 177.27, subdivision 10 of the Minnesota Fair Labor Standards Act, where “the jury completely rejected the plaintiffs’ claim for millions of dollars in unpaid overtime compensation and the plaintiffs recovered no back pay or other monetary relief”).

been allowed in Minnesota. As the California Supreme Court explained:

We discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer. Both are bound by the same fiduciary and ethical duties to their clients. Both are qualified to provide, and do provide, equivalent legal services. And both incur attorney fees and costs within the meaning of Civil Code section 1717 in enforcing the contract on behalf of their client.

Apart from the traditional in-house corporate context, a number of courts have awarded legal fees to lawyers representing government agencies, non-profit organizations, and even pro bono
matters. This is consistent with the concept that fee-shifting is to promote adequate representation and make the prevailing party whole.

Some courts, however, have found that in-house counsel fees are not recoverable. One rationale for this position is that in-house attorneys’ fees are included within overhead. Another rationale for this position is that the attorney was acting in a “liaison” capacity between the lawyers working on the matter and the client. Thus, where counsel acts more in the role of the client or relaying client views and instructions, the more likely such activities will be viewed as “liaison” activities and thus not recoverable.

A civil rights action, reasonable fees “are to be calculated according to prevailing market rates in relevant community regardless of whether plaintiff is represented by private or nonprofit counsel”); Envtl. Def. Fund, Inc. v. Envtl. Prot. Agency, 672 F.2d 42 (D.C. Cir. 1982) (awarding attorneys’ fees to non-profit under federal statute); Consumer Union of U.S., Inc. v. Board of Governors of Fed. Reserve Sys., 410 F. Supp. 65, 65 (D.D.C. 1975) (granting attorneys’ fees to non-profit consumer educational organization when litigation was conducted by in-house attorneys); Shapiro v. Chapman, 520 A.2d 1330, 1334 (Md. Ct. Spec. App. 1987) (concluding the prevailing party in a civil rights action is entitled to attorneys’ fees under 42 U.S.C. § 1983 even if they “were represented by publicly funded, non-profit law office”).

18. See, e.g., Brown v. Comm’n for Lawyer Discipline, 980 S.W.2d 675, 683–84 (Tex. App. 1998) (holding state bar represented by private lawyers on a pro bono basis may recover reasonable attorneys’ fees); see also John F. Amer, Attorney’s Fees for In-House Counsel in Contract Actions, 23 L.A. LAW. 24, 26 (2000) (“Drexler’s reasoning supports recovery of fees in a multitude of situations, including pro bono representation, discounted rates, contingency fees, and other fee arrangements. The decision also appears to have resolved in the affirmative whether a governmental entity can recover attorney’s fees for services performed by its own, salaried attorney as the prevailing party in a contract action.”).

19. See Rowe, Jr., supra note 6, at 657.

20. See Burger King Corp. v. Mason, 710 F.2d 1480, 1499 (11th Cir. 1983) (holding that under Florida law, attorneys’ fees are recoverable as a matter of indemnification, and since the company did not pay out additional money for the services of in-house counsel, it could not claim reimbursement for this pro-rata share of its fixed corporate expense); see also In re Cummins Util., L.P., 279 B.R. 195, 207 (Bankr. N.D. Tex. 2002) (denying motion for in-house counsel fees on the grounds that “[t]his item should be included in . . . overhead”).

21. See Fed. Deposit Ins. Corp. v. Bender, 182 F.3d 1, 5 (D.C. Cir. 1999) (reversing and remanding award of in-house attorneys’ fees, in part, on the grounds that “it is not possible to determine, from the FDIC’s submissions, how much of the time in-house counsel did devote was in a capacity other than that of a mere liaison between the agency and the Justice Department attorneys who represented it in this case, a function for which the recovery of fees is not permitted”); Milgard Tempering, Inc. v. Selas Corp. of Am., 761 F.2d 553, 558 (9th Cir. 1985) (“Of course, if in-house counsel are not actively participating (e.g., acting only as liaison), fees should not be awarded.”).

22. See El Dorado Irrigation Dist. v. Trayler Bros., Inc., No. CIV. S-03-949
Where, however, in-house counsel is experienced as to the matters at issue and actively participates in the litigation, such fees have been found to be reasonable and recoverable. The rationale is that if in-house attorneys “had refrained from activity, the workload and consequently the fee application of [outside counsel] would have been increased.” Moreover, such fees are recoverable on the grounds that for every hour that in-house counsel spent on the matter, the client lost an hour of legal services that could have been spent on other matters.

B. How Is the Amount of In-House Attorneys’ Fees Computed?

Most courts award attorneys’ fees for services provided by in-house counsel by computing the value of their services in the same manner as fees are computed for outside counsel, which is referred to as the market value or market rate approach. This is basically the familiar “lodestar” method (i.e., the number of hours

LKK/GGH, 2007 WL 512428, at *5 (E.D. Cal. Feb. 12, 2007) (deducting from fee application the hours in-house counsel “appears to have been acting as a client representative and not as an attorney”).


24. See Softsolutions, Inc. v. Brigham Young Univ., 1 P.3d 1095, 1106 (Utah 2000) (“[Claimant] was required to pay consideration for the legal services received from its in-house counsel in the form of salary and other costs of employment” and was “entitled to attorney fees for the legal services of its in-house counsel.”).

25. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co., 76 F.3d 114, 115–16 (7th Cir. 1996) (holding pension fund represented by in-house counsel entitled to attorneys’ fees at market value); Milgard Tempering, 761 F.2d at 558 (instructing district court on remand to examine the “modern trend” toward calculating fees based on market rate); Cottman Transmission Sys., Inc. v. Martino, Nos. CIV.A. 92-7245, CIV.A. 92-2131, CIV.A. 92-2253, 1993 WL 541680, at *15 (E.D. Pa. Dec. 22, 1993) (“The Third Circuit has indicated that there is nothing improper about a market rate calculation for attorney fee awards for salaried in house counsel.”), vacated on other grounds, 36 F.3d 291 (3d Cir. 1994); Zacharias v. Shell Oil Co., 627 F. Supp. 31, 34 (E.D.N.Y. 1984) (“Compensating in-house or salaried employees by using an hourly rate is commonly used by courts in awarding attorneys’ fees.”); PLCM Grp. v. Drexler, 997 P.2d 511, 517, 519 (Cal. 2000) (approving of a calculation of in-house attorneys’ fees based on the “prevailing market rate”); Balkind v. Telluride Mountain Title Co., 8 P.3d 581, 588 (Colo. App. 2000) (“Salaried and public interest attorneys should be awarded attorney fees based on the prevailing market rate rather than a ‘cost-plus’ approach focusing on the attorney’s salary.”); AMX Enters., L.L.P. v. Master Realty Corp., 283 S.W.3d 506, 519 (Tex. App. 2009) (“We are persuaded by the logic of those jurisdictions that apply the market value method to calculate in-house counsel’s attorney’s fees. The market value method has the virtue of being predictable for the parties and easy to administer.”).
reasonably expended multiplied by the reasonable hourly rate).\textsuperscript{26} Other courts award fees using a “cost-plus” method.\textsuperscript{27} Regardless of which method is ultimately used, the burden is on the party seeking the award to meet all of the applicable elements. It is therefore important to be familiar with the rules and applicable factors for recovering in-house counsel fees, as well as developing a game plan for meeting those factors throughout the course of the litigation.

1. Lodestar or Market Rate Method

Courts favoring the market value approach view it as being more predictable for the parties and easier to administer, while the cost-plus approach is viewed as cumbersome, intrusive, and costly, distorting the incentives for settlement and rewarding inefficiency.\textsuperscript{28} In order to establish the hours reasonably expended, in-house counsel should maintain contemporaneous time records in sufficient detail to demonstrate what services were provided.\textsuperscript{29}

\textsuperscript{26} See Derfner & Wolf, supra note 2, ch. 16.01 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

\textsuperscript{27} Softsolutions, 1 P.3d at 1107 (“We are convinced that a cost-plus rate is the more reasonable measure of attorney fees to in-house counsel, and is consistent with the public policy that the basic purpose of attorney fees is to indemnify the prevailing party and not to punish the losing party by allowing the winner a windfall profit.”); see also PPG Indus., Inc. v. Celanese Polymer Specialties Co., 840 F.2d 1565, 1570 (Fed. Cir. 1988); Goodrich v. Dep’t of the Navy, 733 F.2d 1578, 1579–80 (Fed. Cir. 1984); Nat’l Treasury Emps. Union v. U.S. Dep’t of Treasury, 656 F.2d 848, 853 (D.C. Cir. 1981); Lacer v. Navajo Cnty., 687 P.2d 400, 404 (Ariz. Ct. App. 1984).

\textsuperscript{28} See Balkind, 8 P.3d at 588 (“Salaried and public interest attorneys should be awarded attorney fees based on prevailing market rate rather than a ‘cost-plus’ approach focusing on the attorney’s salary.”); see also Amer, supra note 18, at 26 (“By refusing to distinguish between private counsel and other counsel in the determination of fee awards in contract actions, Drexler has removed one nasty element of today’s contentious litigation by obviating any basis for full-scale discovery of corporate counsel’s compensation or any other confidential attorney-client fee arrangement.”).

\textsuperscript{29} Fair Isaac Corp. v. Experian Info. Solutions Inc., 711 F. Supp. 2d 991, 1008 (D. Minn. 2010) (“In support of its fee request, Trans Union submitted a table displaying the number of hours spent on seven different categories of tasks: (1) analysis and investigation of the breach allegations; (2) work in connection with securing a protective order regarding algorithms; (3) work on a motion to compel Fair Isaac to specify the trade secret that was allegedly misappropriated; (4) discovery related to the breach of contract claim; (5) working with experts; (6) work on the motion for summary judgment; and (7) preparation of the pending motion for fees. In addition, Trans Union has submitted the supporting billing entries, showing in detail the work Trans Union’s attorneys performed relating to the breach of contract claim.”).
This is basically no different from what outside counsel routinely submit in support of a fee application. Courts are used to seeing fairly detailed submissions that accompany fee applications and may reduce or outright deny a claim for in-house counsel fees where time records are vague, incomplete, or created after the fact. The submissions should include the identity of the attorney who rendered the services, a description of the services provided, and the amount of time devoted to the matter. Care must be taken not to simply dump voluminous time records on the court without an explanation of the rates charged or an explanation of the services rendered. To the extent that one or more of the

30. See, e.g., Fed. Deposit Ins. Corp. v. Bender, 182 F.3d 1, 5–6 (D.C. Cir. 1999) (reversing and remanding award of in-house attorneys’ fees, in part, on the grounds that the time in-house counsel devoted to the case was insufficiently documented); In re Donovan, 877 F.2d 982, 994 (D.C. Cir. 1989) (requiring “that fee applications include contemporaneous time records of hours worked and rates claimed, plus a detailed description of the subject matter of the work with supporting documents, if any”); 3M Co. v. Mohan, Civ. No. 09-1413 ADM/FLN, 2011 U.S. Dist. LEXIS 5482, at *16–17 (D. Minn. Jan. 19, 2011) (finding the lodestar amount not entirely reasonable because “some hours claimed by both Merchant & Gould and 3M in house counsel are not fully documented[; f]or example, over 150 Merchant & Gould hours are broadly listed as ‘trial preparation,’ and in-house counsel’s hours are largely estimated.”); United States ex rel. Thompson v. Walgreen Co., 621 F. Supp. 2d 710, 728 (D. Minn. 2009) (“Based on the Court’s line-by-line review, the Court recommends a reduction in the amount of $40,000, or approximately 8% of the total requested amount for fees and costs, to account for billing entries so vague that the Court is unable to determine whether or not the hours claimed were justified.”); Broad. Music, Inc. v. R Bar of Manhattan, Inc., 919 F. Supp. 656, 661 (S.D.N.Y. 1996) (“[M]otions for attorney’s fees must be based on contemporaneous time records specifying relevant dates, time spent and work done,” and “hindsight review is not an adequate substitute for contemporaneous time records.” (internal quotation marks omitted)); Ward v. Brown, 899 F. Supp. 123, 128 (W.D.N.Y. 1995) (reducing claim when no contemporaneous records were kept on the grounds that “an after-the-fact reconstruction presents the danger that the attorney’s memory, and his estimates of how long it would have taken to perform various tasks, could be faulty”); 301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass’n, 783 N.W.2d 551, 569 (Minn. Ct. App. 2010) (affirming attorneys’ fee award under section 515B.4-116 of the Minnesota Common Interest Ownership Act based on “an affidavit with an attached spreadsheet showing detailed accounts of work performed and matching billing rates”).

31. See, e.g., AMX Enters., L.L.P. v. Master Realty Corp., 283 S.W.3d 506, 515 (Tex. App. 2009) (in-house counsel submitted a sixteen-page affidavit in support of fee application, attached to which was sixteen pages of time entries reflecting work performed on the case through the end of trial); see also Ross, supra note 4, app. A, form 32.

32. See Bores v. Domino’s Pizza L.L.C., No. 05-2498 (RHK/JSM), 2008 U.S. Dist. LEXIS 87252, at *15 n.8 (D. Minn. Oct. 27, 2008) (“Here, Dominos has (inappropriately) opted to dump on the Court the voluminous time records of its
underlying claims may be subject to recovery of attorneys’ fees and others may not, the attorneys’ time entries should clearly segregate time between legal work related to recoverable claims and non-recoverable claims. The time entries should also delineate and exclude what arguably might be characterized as “liaison” activities. The failure to properly segregate may be fatal to the claim.

In some instances, the party opposing the fee application may even retain an expert to audit the bills as part of the challenge to the fee application. Careful practitioners should therefore expect a vigorous examination of their fee applications, especially where large awards are at stake, and prepare a fee application that addresses anticipated issues.

Keep in mind that the attorneys’ time records may have to be produced in discovery as part of the fee award application process. Therefore, to the extent possible, the time records should describe what was done, but not reveal the substance of counsel, with little explanation concerning the hourly rates charged and even less explanation of the propriety of the hours expended.

33. See, e.g., Sw. Stainless, L.P. v. Sappington, No. 07-CV-0334-CVE-TLW, 2010 U.S. Dist. LEXIS 30211, at *24–26 (N.D. Okla. Apr. 13, 2010) (requiring apportionment between fee-bearing and non-fee-bearing claims); AMX Enters., 283 S.W.3d at 522–23 (remanding the matter to the trial court because the claimant failed to segregate fees or demonstrate that the fees associated with recoverable claims were so intertwined with the non-recoverable claims that the fees need not be segregated).

34. See, e.g., Travelers Indem. Co. of Ill. v. Millard Refrigerated Servs., No. 8:00CV91, 2002 WL 2005717, at *2 (D. Neb. Sept. 3, 2002) (plaintiff appropriately did not seek attorneys’ fees for time spent in various meetings as a mere liaison); Transclean Corp. v. Bridgewood Servs., Inc., 134 F. Supp. 2d 1049, 1052 (D. Minn. 2001), aff’d, 290 F.3d 1364 (Fed. Cir. 2002); Declaration of Hildy Bowbeer in Support of Claim for Attorneys’ Fees and Expenses at ¶ 7, 3M Co., 2011 U.S. Dist. LEXIS 5482 (Civ. No. 09-1413 ADM/FLN), Doc. No. 216 (“In addition, in this case I and other members of the 3M in-house legal staff played a significant role in accomplishing tasks that otherwise would have been performed, and billed, by outside counsel. These tasks went far beyond the typical in-house counsel’s role as ‘liaison’ between outside counsel and our business client.”). See generally 1 DERFNER & WOLF, supra note 2, ch. 12.

35. See, e.g., King v. Turner, No. 05-388 (JRT/FLN), 2007 U.S. Dist. LEXIS 30214, at *5 (D. Minn. Apr. 24, 2007) (“Defendant submitted an affidavit of James P. Schratz that audits the fee request, and argues that the hours expended should be reduced as indicated in the auditor’s report.”).

attorney-client communications or attorney work product. It may be possible to redact sensitive entries prior to producing them or submitting them to the court, but there is a risk that the redactions will be successfully challenged, thereby potentially exposing privileged communications or work product. Heavy redaction, on the other hand, may lead the court to conclude that time was not reasonably necessary.  

As part of the fee application, it is necessary to establish a reasonable hourly rate for the attorney, including for in-house legal services.  “When determining a reasonable hourly rate, the relevant legal community is the forum in which the district court sits.” For outside counsel, this is sometimes accomplished through the use of comparable billing rate surveys. These are usually specific to a geographical area and are typically broken down by size of firm, type of activity (e.g., business law, corporate law, litigation, real estate, estate planning), and year the attorney was admitted to practice. Supporting affidavits from professional colleagues in the legal community with similar practices have also been used to support the reasonableness of hourly rates. These

37. See Bores, 2008 U.S. Dist. LEXIS 87252, at *23 (“Similarly, Dominos’ counsel has heavily redacted the time sheets submitted with the Motion, and those redactions generally leave the Court in the dark as to the precise nature of the work performed. Courts routinely reduce fee requests where redactions leave it impossible to discern the appropriateness of counsel’s work.”). Where heavy redaction is necessary, it is advisable to submit the unredacted time records to the court in camera. Id. at *23–24.

38. See Zacharias v. Shell Oil Co., 627 F. Supp. 31, 35 (E.D.N.Y. 1984) (“[In-house counsel’s] hourly billing rate was carefully calculated by determining the value of his service in Shell’s in-house legal department.”).

39. Fair Isaac, 711 F. Supp. 2d at 1009 (“The rates charged by Trans Union’s Chicago lawyers are substantially higher than the rates charged by its Minneapolis lawyers with comparable years of experience.”); see also Bores, 2008 U.S. Dist. LEXIS 87252, at *18–19 (“Dominos has made no attempt to justify the use of out-of-town counsel (with very high rates) to assist it in this matter. . . . Nor does the Court believe that these hourly rates are in line with those charged by lawyers of similar skill and experience in the Twin Cities area.”).

40. See B-K Lighting, Inc. v. Vision3 Lighting, No. CV 06-02825 MMM (PLAx), 2009 WL 3838264, at *5 (C.D. Cal. Nov. 16, 2009) (“Courts also frequently use survey data in evaluating the reasonableness of attorneys’ fees.”); Milner v. Farmers Ins. Exch., 748 N.W.2d 608, 622 (Minn. 2008) (concluding that the district court did not abuse its discretion in determining that hourly rates charged by plaintiffs’ attorneys were reasonable based on a “detailed study,” which “evidenc[ed] that their respective hourly rates are comparable to those charged by equally competent attorneys and paralegals in their respective communities” (internal quotation marks omitted)).

methods are not readily available to in-house counsel. Comparable billing rates may, however, be established indirectly through billing rate surveys or fees charged by independent counsel.\(^{42}\) In addition, many companies routinely retain outside law firms on various types of matters and in different areas of the country. The billing rates for these firms can be used as a surrogate to establish comparable billing rates for in-house legal services.

2. Cost-Plus Approach

A number of courts utilize the cost-plus approach for awards of in-house attorneys’ fees.\(^{43}\) The rationale for this approach is that the market-rate approach would award the salaried attorney’s employer with a windfall profit.\(^{44}\) Under the cost-plus approach,

(D. Minn. 2009) (five affidavits from local attorneys submitted in support of reasonableness of hourly rate); Bares, 2008 U.S. Dist. LEXIS 87252, at *19 (“Typically, such evidence would include affidavits from other lawyers opining on the reasonableness of the rates or citations to similar cases in which fees were awarded.”); Turner v. Gonzales, Civ. No. 01-1407 JMR/AJB, 2007 U.S. Dist. LEXIS 96420, at *24 (D. Minn. Nov. 20, 2007) (affidavit of James M. Gilbert, former Associate Justice of the Minnesota Supreme Court, submitted in support of plaintiff’s claim of success on the merits); King v. Turner, Civ. No. 05-388 (JRT/FLN), 2007 U.S. Dist. LEXIS 30214, at *4 (D. Minn. Apr. 24, 2007) (finding that two local attorneys who submitted affidavits in support of reasonable hourly rates were “well-qualified to opine on the reasonableness of attorneys’ fees in this jurisdiction”); Green v. BMW of N. Am., LLC, A11-581, 2011 Minn. App. LEXIS 1089, at *23 (Minn. Ct. App. Dec. 19, 2011) (affirming fee award and noting that “[t]he district court considered the experience of the attorneys, the affidavit testimony of other attorneys in the community as to a reasonable hourly rate for the work performed, and attorney-fee orders in other Minnesota consumer-rights cases, all of which indicate attorney fees of $350 to $375 are within the range of market rates”). But see In re UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1094, 1101–02 (D. Minn. 2009) (rejecting expert opinion submitted in support of fee award in securities case).

42. See Broad. Music, Inc. v. R Bar of Manhattan, Inc., 919 F. Supp. 656, 661 (S.D.N.Y. 1996) (“[A]n hourly rate based on an estimate of the fee charged by independent counsel for similar services can provide a reasonable basis for calculating such an award if other relevant criteria are satisfied.”).


44. Sofsol, 1 P.3d at 1107; see also Devine v. Nat’l Treasury Emps. Union,
fees for in-house counsel are limited to consideration actually paid or for which the party is obligated, calculated using a cost-plus rate. This methodology takes into account: (1) the proportionate share of the party’s attorney salaries, including benefits, which are allocable to the case based on the time expended; plus (2) allocated shares of the overhead expenses, which may include the costs of office space, support staff, office equipment and supplies, law library and continuing legal education, and similar expenses. Under the cost-plus method, it will still be necessary for the attorney to keep timely and accurate time records. Moreover, it may be necessary to reveal attorneys’ salaries and benefits within the company or organization, which may be a sensitive issue. In some instances, legal departments track their costs and charge them back to their clients. This provides a ready basis for developing cost-plus information. If not, it will likely be necessary to involve the financial or accounting department to develop the necessary data for presentation to the court.

IV. PRACTICAL STEPS: BEST PRACTICES

An award of attorneys’ fees is left to the sound discretion of the trial court and will only be reversed for an abuse of discretion. Judicial scrutiny of applications for such awards varies widely and can be influenced by any number of factors. In order to increase the chances of successfully recovering in-house legal fees, counsel should consider the practical steps and best practices set forth below.

A. Expressly Include Recovery of In-House Fees in the Contract. Fee-shifting provisions are common in many contracts. These provisions typically provide that a party may be liable for “reasonable attorneys’ fees” or “legal costs.” These terms are frequently not defined. At the contract drafting stage, it is important to make sure that the contract expressly provides for the recovery of in-house attorneys’ fees and perhaps the basis by which those fees will be computed. In the event of a dispute, this will reduce the potential for an argument that in-house legal costs are

805 F.2d 384, 389 (Fed. Cir. 1986) (concluding that fee awards to unions should be limited to the union’s actual costs of litigation on the grounds that to award anything other than actual costs would be unethical because the union would get a windfall by receiving more than the litigation had actually cost the union).

45. See, e.g., Becker v. Alloy Hardfacing & Eng’g Co., 401 N.W.2d 655, 661 (Minn. 1987).
not contemplated by the parties and thus are not recoverable. Even if the contract provides for the recovery of in-house fees, these fees are usually limited to the recovery of attorneys’ fees and costs associated with a breach or collection and post-judgment remedies. There is no reason, however, why fee-shifting cannot be used in negotiating certain types of business transactions. For example, a significant loan transaction may provide that if the borrower rejects the terms and conditions proposed by the lender and instead proposes extensive modifications, the borrower shall reimburse the lender for its reasonable in-house legal costs and expenses incurred in connection with the negotiations relating to modifications of the loan transaction.

B. Identify the Nature of the Claims and Defenses at Issue. At the outset of any litigation, it is important to identify the claims and defenses at issue in the litigation, whether those claims or defenses provide for recovery of attorneys’ fees, and, if so, under what conditions. If it is a breach of contract case, check to see if there is a fee-shifting provision in the contract and, if so, whether it expressly includes in-house legal fees or is broad enough to include such fees. If there is a statutory claim, check to see if attorneys’ fees are permitted and under what conditions. Where the case has multiple claims or causes of action (some of which may allow for recovery of attorneys’ fees and some of which may not), time entries should reflect work on discrete aspects of the case (e.g., breach of contract claim, statutory claim). That way, it is much easier to assemble the fee petition and for the court to easily distinguish between recoverable and non-recoverable work.

C. Assess the Likely Methodology of Computing the In-House Counsel Award. It is important to determine early in the case what method the court will most likely use in computing the fee award (e.g., lodestar or cost-plus). If the fee-shifting provision permits recovery for legal costs “incurred,” it may be necessary to utilize the cost-plus approach. If cost-plus is the likely method, begin to develop an early strategy for assembling the necessary corporate or organizational financial data. If lodestar is the likely method, immediately begin to document time spent working on the matter and assemble comparable rate data.

D. Take an Active Role in the Case. The goal here is to demonstrate that in-house counsel provided substantive legal services on behalf of the client akin to those provided by outside counsel. There are a variety of ways for in-house counsel to
establish active participation in the representation of the client. For example, it is possible for in-house counsel to be listed as “of counsel” on the pleadings or to be admitted pro hac vice for the matter. Keep in mind, however, that a formal appearance in the proceeding subjects the attorney to all of the duties and responsibilities of trial counsel. In addition, in-house counsel can actively participate in depositions and other discovery activities. An appearance “on the record” at important hearings and trial may demonstrate active participation. Time entries can also reflect substantive legal work, such as researching specific legal issues in the case, responding to discovery requests, drafting pleadings, and developing strategy for the case.

E. Develop a Detailed Biography to Support the Hourly Role. In-house counsel should be prepared to provide the court his or her relevant experience and expertise in the matter at issue. This is typically done through an affidavit or declaration describing the attorney’s professional background, practical experience, and role in the case.46 If in-house counsel brings particular expertise to the case (e.g., patent expertise for company products), that should be highlighted as well.

F. Keep Contemporaneous Time Records. Many lawyers who have transitioned to in-house positions are grateful to be relieved of the tedium of having to keep daily time sheets. However, it is back to time sheets if in-house counsel expects a court to award those fees. Moreover, time records must be kept contemporaneously. Post hoc reconstruction of the attorney’s services may very likely be rejected outright or result in a significantly reduced award.47 More detailed time entries may be required under the lodestar approach, but regardless, contemporaneous and accurate time records are essential to a successful award. Some important tips:

46. See AMX Enters., L.L.P. v. Master Realty Corp., 283 S.W.3d 506, 520 (Tex. App. 2009) (noting that in-house counsel’s “affidavit and time records recited the time and labor required to represent AMX, the fee customarily charged in the locality for similar legal services, the amounts involved, [in-house counsel’s] experience and ability, and the reasonableness and necessity of fees”); see also Derfner & Wolf, supra note 2, ch. 24.04.

47. See, e.g., Sw. Stainless, L.P. v. Sappington, No. 07-CV-0334-CVE-TLW, 2010 U.S. Dist. LEXIS 36211, at *35–36 (N.D. Okla. Apr. 13, 2010) (“The Court finds that the timekeepers’ mere recollections about the time spent on specific tasks, many of which were performed over one year before the reconstruction, are not reliable. Further, plaintiffs’ unreliable reconstructed time records remain imprecise and made it impossible for the Court to apportion fees by reviewing the records line by line.”).
A daily log or timesheet should record the services provided to the client, including the identity of the attorney or paralegal involved in rendering the services.

Avoid “blocked billing.” “The term ‘blocked billing’ refers to the ‘time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.’”

Some courts have noted that blocked billing is a problem in fee-shifting cases. Each entry should therefore identify a discrete task and record time devoted to that task.

Use reasonable time increments. The time allocated to a particular task should reflect the time actually spent working on the task rather than minimum billing increments.

Avoid “over lawyering.” Lawyers obviously need to communicate with one another, but some courts react negatively to what they perceive as over lawyering. Examples include multiple conferences and numerous attorneys appearing at depositions and court hearings.

49. See Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 971 (D.C. Cir. 2004) (reducing requested hours because counsel’s practice of blocked billing “lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness”); Aranda v. Astrue, No. CV 08-340-MA, 2011 WL 2415996, at *5 (D. Or. June 8, 2011) (“Blocked billing, which bundles tasks in a block of time, makes it extremely difficult for a court to evaluate the reasonableness of the number of hours expended.”); Okla. Natural Gas Co. v. Apache Corp., 355 F. Supp. 2d 1246, 1264 (N.D. Okla. 2004) (“Block billing is a critical problem where, for example, plaintiff alleges claims for which fees may be shifted and others for which fee-shifting is not appropriate.”).
51. See Welch v. Metro. Life Ins. Co., 480 F.3d 942, 948–49 (9th Cir. 2007) (approving an across-the-board twenty percent reduction for time billed in quarter-hour increments for phone calls, email, or the preparation and review of letters or documents); Coronado v. Astrue, 1:10-cv-00594-AWI-SKO, 2012 U.S. Dist. LEXIS 55259, at *7 (E.D. Cal. Apr. 19, 2012) (“Six-minute billing increments, which is how Ms. Bosavanh’s time entries are recorded and presented, can be problematic when small tasks that require less than six minutes are recorded separately. Six-minute billing increments can result in a rounding-up that over-calculates the time actually spent on the tasks in total.”); Melone v. Paul Evert’s RV Country, Inc., Case No. 2:08-cv-00868-GWF, 2012 U.S. Dist. LEXIS 47408, at *16 (D. Nev. Apr. 4, 2012) (reducing hours by twenty percent for matters billed at 0.3 and 0.4 hours).
- The time entries should demonstrate substantive legal work devoted to the matter (not “ministerial” activities).\(^{52}\)
- In-house activities that reflect “liaison” functions should be separately logged and excluded from the application.\(^{53}\)
- To the extent possible, comply with the organization’s billing guidelines or expectations for outside counsel. Many companies have corporate policies regarding services rendered by outside counsel. Some include detailed requirements regarding budgeting, staffing, fees, and time entries. For example, some companies require outside counsel to charge time to activity or task codes, which are then submitted electronically. While in-house counsel may not be subject to these requirements, the failure to follow corporate policies may undermine a successful fee application.
- Where part of a claim may be subject to fee-shifting, but not another part, time entries should clearly segregate between recoverable and non-recoverable activities.

G. Critically Scrutinize the Fee Application. As noted above, courts have wide discretion in awarding attorneys’ fees. The application for such an award is no less important than any other submission to the court. It should clearly provide the legal and factual basis for the award, including supporting affidavits or declarations. Tables summarizing voluminous statistical and financial information are particularly well received. Finally, make a good faith and

\(^{52}\) In re Stewart, 2004 Bankr. LEXIS 2185, at *59 n.29, *65 (disallowing in-house attorneys’ fees that were “ministerial in character requiring no significant attorney involvement” and “for lack of clarity and lack of specificity”).

\(^{53}\) Id. at *47 (“Attorney’s fees for services of in-house counsel who act primarily as liaisons between the client and outside counsel are not recoverable under a contractual or statutory provision for the recovery of attorney’s fees.”).
conservative effort to exclude from any application or petition fees that might be considered excessive, redundant, or otherwise unnecessary. The application should specifically describe any such reductions.

54. See, e.g., In re UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) ("Counsel are expected to exercise billing judgment in their fee application, making a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." (internal quotations and citation omitted)); see also Nelson v. Am. Home Assurance Co., No. 11-1161 (RHK/FLN), 2012 U.S. Dist. LEXIS 26982, at *5–7 (D. Minn. Mar. 1, 2012) (reducing plaintiffs’ fee petition of over $159,000 to $27,000, in part, on the grounds that the relatively small amount at issue and the “simple” issue in the matter should not “have necessitated the involvement of five separate attorneys, including one who billed as much as $480 per hour, as Plaintiffs’ fee request indicates”); Transclean Corp. v. Bridgewood Servs., Inc., 134 F. Supp. 2d 1049, 1052 (D. Minn. 2001), aff’d, 290 F.3d 1364 (Fed. Cir. 2002).