

ATTORNEYS' FEES IN VIRGINIA

1. *The American Rule*

The Commonwealth of Virginia adheres to the "American Rule." Under the "American Rule," a prevailing party generally *cannot* recover attorneys' fees from the losing party.

See: West Square, L.L.C. v. Communication Technologies, 274 Va. 425 (2007)

Ulloa v. QSP, Inc., 271 Va. 72, 81 (2006)

Lee v. Mulford, 269 Va. 562, 565 (2005)

2. *Exceptions to the American Rule*

A contract or statute may provide for the recovery of attorneys' fees. However, the determination and award of those fees is within the discretion of the trial court. An award or denial of attorneys' fees will only be overruled on appeal for abuse of discretion.

See: Ingram v. Ingram, 217 Va. 27 (1976).

Provided by Contract

Parties to a contract may adopt provisions that shift the responsibility of attorneys' fees to the losing party in disputes involving the contract.

See: Mullins v. Richlands Nat'l Bank, 241 Va. 447 (1991).

A prevailing party seeking to recover attorneys' fees pursuant to a contractual provision must make out a *prima facie* case that the requested attorneys' fees are reasonable and were necessary.

See: Chawla v. Burgerbusters, Inc., 255 Va. 616, 623 (1998).

Seyfarth v. Lake Fairfax Seven, 253 Va. 93 (1997).

"In determining whether a party has established a *prima facie* case of reasonableness, a fact finder may consider, *inter alia*, the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." Seyfarth, Shaw v. Lake Fairfax Seven Ltd. Partnership, 253 Va. 93, 97 (1997)

Best Practice: Highlight for the court the provision in the contract which provides attorneys' fees to the prevailing party.

Provided by Statute

Parties may claim attorneys' fees pursuant to statutory provisions in various sections of the Virginia Code. Please find listed below excerpts from the Virginia Code indicating sections in which attorneys' fees are provided. The list is in no way exhaustive.

Juvenile and Domestic Relations

- Protective Orders

Va. Code § 16.1-279.1(D): "The court may assess costs and attorneys' fees against either party regardless of whether an order of protection has been issued as a result of a full hearing."

- Temporary Orders for Support

Va. Code § 20-71.1: "In any proceeding by a spouse petitioning under § 20-71 before the juvenile and domestic relations district court or on appeal before a court of record, to be allowed support for himself or herself or the infant child or children of the defendant, the juvenile and domestic relations district court may direct the defendant, in addition to the allowance to the spouse and support and maintenance for the infant children, to pay to the spouse's attorney, upon such terms and conditions and in such time as the court shall deem reasonable, an attorneys' fee deemed reasonable by the

court for such services as said attorney before said court. Upon appeal of the matter to a court of record, the judge of the circuit court may direct that the defendant, in addition to the fees allowed to the spouse's attorney by the juvenile and domestic relations district court, pay to the spouse's attorney at such time and upon such terms and conditions as the judge deems reasonable, an attorneys' fee deemed reasonable by the court for such services of said attorney before said court of record, but in fixing said fee such court shall take into consideration the fee or fees directed to be paid by the court from which said appeal was taken."

- All Other Matters

Va. Code § 16.1-278.19: "In any matter properly before the Court, the court may award attorneys' fees and costs on behalf of any party as the court deems appropriate based on the relative financial ability of the parties."

Landlord-Tenant:

Va. Code § 55-248.21: In the case of noncompliance by a landlord of a rental agreement or of a chapter of the Virginia Residential Landlord and Tenant Act, "[t]he tenant shall be entitled to recover reasonable attorneys' fees unless the landlord proves by a preponderance of the evidence that the landlord's actions were reasonable under the circumstances."

Violation of Signing of Pleadings

Va. Code § 8.01-271.1: "If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorneys' fee."

Finding of Fraud

Pursuant to established case law, a judge may determine that attorneys' fees should be awarded in a case where fraud is proven. However, these fees are generally only awarded for fraud on a limited basis.

"In a fraud suit, a chancellor, in the exercise of his discretion, may award attorneys' fees to a defrauded party. When deciding whether to award attorneys' fees, the chancellor must consider the circumstances surrounding the fraudulent acts and the nature of the relief granted to the defrauded party." Prospect Development Company, Inc. v. Bershader, 258 Va. 75, 92 (1999)

3. What does "prevailing party" mean?

In many contract and statutory provisions, attorneys' fees may only be awarded to a prevailing party. "Prevailing party" is an important and complicated concept. However, it is beyond the scope of this vignette and will not be addressed further.

It is important to note that attorneys' fees are not awarded for unsuccessful claims.

See: Ulloa v. QSP, Inc., 271 Va. 72, 83 (2006)

4. Procedure for Making Claim for Attorneys' Fees

Listed below, please find Rule 3:25 of the Supreme Court of Virginia which relates to Claims for Attorneys' Fees. The Rule addresses when to make a claim for fees, the point at which the claim is considered waived, and the procedure for making the claim. It is important to consider the required steps for making a claim for attorneys' fees. If a claim is not made in a timely manner, it may be considered waived.

RULES OF THE SUPREME COURT OF VIRGINIA
Rule 3:25. Claims for Attorney's Fees

A. Scope of Rule. This rule applies to claims for attorneys' fees, excluding (i) attorneys' fees under § 8.01-271.1 of the Code of Virginia, and (ii) attorneys' fees in domestic relations cases.

B. Demand. A party seeking to recover attorneys' fees shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. The demand must identify the basis upon which the party relies in requesting attorneys' fees.

C. Waiver. The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorneys' fees, unless leave to file an amended pleading seeking attorneys' fees is granted under Rule 1:8.

D. Procedure. Upon the motion of any party, the court shall, or upon its own motion, the court may, in advance of trial, establish a procedure to adjudicate any claim for attorneys' fees.

5. Determining Attorneys' Fees

The prevailing party bears the burden of making out a prima facie case that the requested fees are reasonable and necessary. Through case law, the court has established factors to be considered in determining the reasonableness of fees: "[w]here [a contract] provide[s] for attorneys' fees, but [does] not fix the amount thereof, a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances of the particular case...In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances... Mullins v. Richlands National Bank, 241 Va. 447, 449 (1991).

Expert Witnesses are often utilized to establish the reasonableness and necessity of attorneys' fees: "[o]rdinarily, expert testimony will be required to assist the fact finder." Mullins v. Richlands National Bank, 241 Va. 447, 449 (1991). However, "[w]hile expert testimony ordinarily is necessary to assist the fact finder, such testimony is not required in every case.... In this case, expert testimony was not necessary because of the affidavits and detailed time records." Tazewell Oil Co., Inc. v. United Virginia Bank/Crestar Bank, 243 Va. 94, 112 (1992). Therefore, in lieu of expert testimony, affidavits and detailed time records may be submitted to the court to establish the reasonableness and necessity of attorneys' fees in some cases.

6. Pro-Bono Attorneys' Claim to Attorneys' Fees

For the past 13 years, organizations funded by the Legal Services Corporation were prohibited from seeking attorneys' fees. Congress is currently considering lifting these restrictions.

Even if the restrictions are removed, legal aid attorneys may still face challenges in recovering attorneys' fees. Generally, an award is within the discretion of the trial court. It is up to the judge to decide whether attorneys' fees will be awarded. Pro bono attorneys may experience some resistance from Judges because they do not charge their clients for their services. However, numerous court cases have addressed this issue. Courts generally have held that providing services on a pro bono basis does not prevent an attorney from being entitled to an award of reasonable attorneys' fees.

The court in Brinn v. Tidewater held that organizations providing representation on a pro bono basis are still entitled to attorneys' fees when determined by the court to be appropriate.

The claim of attorneys' fees is not denied simply because the organization receives public funding or did not expect to be paid by their client. *Brinn v. Tidewater Transp. Dist. Com'n*, 242 F.3d 227 (2001).

Additionally, the Supreme Court considered the issue when it examined whether attorneys providing *pro bono* services through a nonprofit legal organization should be paid according to market rates. The Civil Rights Attorney's Fees Awards Act of 1976, 42 USCS 1988, provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs." *Blum, Commissioner, New York State Department of Social Services v. Stenson*, 465 U.S. 886 (1994) (quoting 42 USCS 1988). The court determined that a prevailing party making a claim under 42 USCS 1988 may be awarded attorneys' fees for services according to the prevailing market rate regardless of whether the services were provided through a nonprofit legal organization. *Blum, Commissioner, New York State Department of Social Services v. Stenson*, 465 U.S. 886 (1994). Similarly, the court indicated that the attorneys' fees provision was created by the legislature for both individuals who could afford to hire counsel and those who could not. The fact that an organization agreed to take a case without compensation does not prevent them from being awarded a reasonable attorney fee. *Blanchard v. Bergeron et al.*, 489 U.S. 87 (1989).

7. Attorneys' Ethical Obligations Regarding Fees

An attorney may find herself confronted with a client who refuses to pay attorneys' fees or even defending a client who refuses to pay the fees charged by another attorney. It is important to understand the ethical obligations of attorneys relating to attorneys' fees. The Virginia Bar Association has issued various Disciplinary Rules and Ethical Opinions addressing attorneys' fees.

In the Virginia Rules of Professional Conduct, DR 2-105(A) states that "an attorney's fee must be reasonable and adequately explained to the client." In determining the reasonableness of fees, the Virginia Bar considers the same factors as the court in *Mullins v. Richlands National Bank* (discussed previously in this vignette). The reasonableness of fees is not simply assumed because the fee is set by a contract. The Virginia Bar distinguishes between contracts for attorneys' fees and other contracts. See, *Drippner v. Mutz*, 205 Minn. 497 (1939). Due to the sensitive nature of the attorney-client relationship, a contract between attorney and client should not be read like other commercial contracts. Instead, the contract must be read in conjunction with the Code of Professional Responsibility.

Further, DR 2-105(B) indicates that "upon request, an attorney shall furnish to the client the basis or rate of the attorney's fees. " Additionally, it is important to note that an attorney is under a duty to refund any portion of a retainer fee which has not actually been earned by the attorney for rendering services for which she or he was retained. (LEO: Fees-Retainer-Minimum Fee-Refund to, LE Op. 646 (1985)).

If an attorney is either considering pursuing a claim for fees against a client or defending a client against a prior representative, it should be noted that according to the Virginia Bar "[a] lawyer shall be zealous not to sue a client for a fee unless necessary to prevent gross fraud or gross imposition by the client." (LEO: Fee: Filing Lawsuit for Unpaid Fees While, LE Op. 1117 (1988)).

For further questions relating to ethical obligations of attorneys with regard to attorneys' fees the reader may refer to the complete Rules of Professional Conduct, Code of Professional Responsibility and Legal Ethical Opinions found online at the Virginia State Bar Website.

The author, **Ms. Sadie Feeley**, Harvard Law School Class of 2011, was a legal intern at Potomac Legal Aid Society during the summer of 2009, and can be reached at sfeeley@gmail.com