George Mason American Inn of Court
March 19, 2014

How to Litigate Attorneys' Fees

Presenters: Stephen Horvath; Kevin McInroy; David Karro; Gina Marine; Heather Gonzalez

Student Presenters: Corinne Stuart & Catherine Wauters

George Mason American Inn of Court
3/19 Presentation
Student Presentation: Corinne Stuart & Catherine Wauters

Topic: How to Litigate Attorneys' Fees
Description: This program will offer a soup-to-nuts presentation on determining when attorneys' fees and costs are available and how to go about getting them. It will include the following sections along with recent cases of interest for each section: (1) Overview - of American Rule, Contracts, Statutes and Sanctions (2) Proper Procedure - Timing, Rule 3:25 and Bifurcation Agreements (3) Methodology - Establishing a Threshold, Reasonableness, Proof, Costs, and Discovery Issues (4) Sanctions - Ethical Issues Related to Pleadings, Parties, Requests for Sanctions and the Inherent Power of the Court (5) The Federal Counterparts

Why Do Attorneys' Fees Matter?

- Very real effect on peoples' lives and businesses and it will impact decisions on whether to litigate
- It is a factor in competition for legal business

Overview of Attorneys' Fees

- **The English Rule**
  - Loser pays—successful litigant collects legal fees or costs from the loser, including court costs, legal fees, and other expenses such as expert witness fees.
    - Aka "cost-shifting or fee-shifting" and "indemnity for costs"
  - Seems to be the more popular approach today—USA tends to be a bit of an outlier in NOT following this rule
    - Even in US there are variations—Alaska statutes proscribe a system similar to the English Rule
    - California has a rule allowing for loser pays in a contract that lays out such an arrangement

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- **The American Rule**
  - Each side pays its own attorneys' fees unless a statute or contract provides otherwise

History of Attorneys' Fees

- **England**
  - The English rule developed out of the Code of Justinian
  - 1275 Statute of Gloucester was the statutory beginning of the modern English rule, based on the dual principles that
    - 1. The loser had done a wrong by insisting on his or her legal position, and
    - 2. Victory is not complete in civil litigation if it leaves substantial expenses unpaid
  - Subsequent legislation switched the award of attorneys' fees from being automatic to being at the Bench's discretion—but awarding attorneys' fees to the winning party to be paid by losing party is still very much the norm.

        - In the late 1800s , Order 65 RULE 1 stated that the costs shall be paid by the loser "unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for good cause, otherwise order."
    - **TODAY** – Exceptions have developed
        - In small claims cases, there are tribunals wherein each party bears its own costs and generally in county courts, small claims have to reach a certain value for costs to kick in

- **America**
    - **Colonial America**
        - Colonial legislation focused on how much attorneys could charge a client instead of on shifting to costs to be collected by the winner. Reflected distrust of attorneys by the higher classes
        - **Through 17th Cent**. -- Because the law was seen as fairly simple rules, attorneys were thought to be unnecessary and throughout the 17th century attorneys were often not permitted to receive payment for their services at all and those that did were often barred from courts.
            - Fee payments during the colonial era was a statutory matter that mostly adopted the English "loser pays" rule
        - **End of 18th Cent**. – using attny's became normal practice. Law regulated how much attny's could charge and limited how much could be ascribed to losing party.
    - **The Young Union**
        - **Early Legislation** – in 1789 and 1793, Congress passed acts that *would* allow collection of attny's fees and authorized federal courts to follow state law on attny's fees
        - 1796 Supreme Court Case of *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), set forth American Rule
            - Admiralty case where pltf was awarded damages and attorneys fees. Court struck the attny's fees, stating that it was general practice in US to eschew that.
    - **By the 19th Century**
        - The 1789 statute allowing attorneys' fees lapsed in 1800 and was not replaced with anything until 1853. Even without federal authorization to do so, during that half a century, the federal courts would borrow state laws on attorney fees and apply it in an ad hoc manner to cases for which state laws didn't apply (patnent).
        - Supreme Court holdings throughout the 1800s were inconsistent as to attorneys fees, whether they could be awarded at all and if so, as to how (separately, part of damages, etc.)/
        - Payment of attny's fees by the client instead of through recovery from a defeated opponent seemed so natural that justification didn't appear necessary
    - **Today**
        - SCOTUS in ***Fleishmann Distilling Corp. v. Maier Breing Co.***, 286 US 714, 718 (1967):

- "Since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included fees of their opponents' counsel…Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorneys' fees would pose substantial burdens for judicial administration."
- The modern rule seems to reflect a commitment to equal access to justice in the courts

- **Exceptions to the American Rule Today**
  - Contracts (though fee shifting agreements can't be contrary to public policy)
  - Common fund and Substantial Benefit Doctrines – (equitable exception used most often in class actions, mass torts, antitrust, and union litigation)
  - Contempt – party seeking to enforce final judgment through contempt proceedings may recover the cost of that.
  - Bad Faith (can be against a party OR its attorney(s))
  - Fee-Shifting Statutes and Rules of Procedure
    - Over 200 federal statutes and 2000 state statutes that provide for shifting of attorneys' fees

Benefits and Disadvantages of the English versus American Rules

- **English Rule**
  - **Possible Benefits**
    - Fuller compensation of winners claims (making one truly whole) (why should someone who is wrongfully injured be able to recover a doctor's costs but not the lawyers costs).
    - Deterring frivolous lawsuits
  - **Possible Disadvantages**
    - Discourages litigation so that not everyone gets to have a day in court. Especially with privately funded plaintiffs who do not qualify for legal aid—they are much less likely to bring an action even if it is meritorious.
      - But there is legal aid available for qualifying plaintiffs;
      - trade unions will often cover the costs of their members involved in litigation for incidents occurring both on the job and outside of work;
      - legal expense insurance
        - these protections seem to target different segments of the population to offer most of the citizens a shot at litigating

- **American Rule**
  - **Possible Benefits**
    - Greater Access to justice/court systems for more people
    - With a significantly different public welfare system than other countries using the loser-pays rule (for example—our healthcare system). In loser

pays countries, more limited access to courts might not have the same impact on a person's access to healthcare needed as the result of an accident for example.

- **Possible Disadvantages**
  - Court congestion because there is no disincentive to drop a claim so many frivolous suits wind their way through the system.
  - While generally there is a belief that it allows more claims to come to court, there is the argument that it discourages "the small claim plaintiff" from coming to court to recover.

Sources

- Herbert M. Kritzer, The English Rule, A.B.A. J. Nov 1992 at 54-55
- John F. Fargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U.L. Rev. 1567 (1993)
- David A. Root, *Attorney Fee Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and English Rule"*, 15 Ind. Int'l & Comp. L. Rev. 583 (2005).

Overview of the Source of Law for Virginia Attorneys' Fees

- The Commonwealth of Virginia generally adheres to the American Rule, which was based on case law.
  - *West Square, L.L.C. v. Communication Technologies,* 274 Va. 425 (2007)
  - *Ulloa v. QSP, Inc.*, 271 Va. 72, 81 (2006)
  - *Gimore v. Basic Industries, Inc.*, 233 Va. 485, 490 (1987).
- Exceptions by Case Law
  - Fraud
    - The award of attorneys' fees in fraud cases is also by established case law, even though it is only awarded on a limited basis. *Prospect Development Company, Inc. v. Bershader*, 258 Va. 75
  - Prevailing party prosecuting a cause of action for malicious prosecution or false imprisonment may recover attorneys' fees.
    - *Burrus v. Hines*, 94 Va. 413, 420 (1897).
  - A Trustee defending a Trust in good faith may recover attorneys' fees from the estate.
    - *Cooper v. Brodie,* 253 Va. 38, 44 (1997).
  - Common Fund Exception – *Norris v. Barbour*, 188 Va. 723, 741-42 (1949).
  - Bad Faith Exception – *Kemp v. Miller*, 166 Va. 661, 680 (1936).
- Exceptions by contract or statute
  - 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.

- By statute – parties may claim attorneys' fees pursuant to various statutory provisions in the Virginia Code (the code sections below are just a sampling of some of the Va. Code sections that provide for attorneys fees) (the following statutes are only a sampling of the statutory exceptions to the American Rule for attorneys' fees in VA)
  - J&DR
    - Protective Orders – Va. Code § 16.1-279.1(D) – court may assess 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 – allows for courts to grant attorneys' fees to be paid by the opposing party in a spousal/child support hearing.
    - 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.
  - Attorneys' Fees in Divorce cases generally
    - In any decree of divorce, the court may provide for the award of counsel fees under Va. Code § 20-79(b), and the court considers the financial situation of both parties in making its award.
      - The suit should specifically plead or request such an award and relief.
      - An award of attorneys' fees is proper even where it is determined that the marriage is void.
      - The amount of the award of attorneys' fees is generally determined by the amount of services rendered to the awarded party. *Robertson v. Robertson*, 215 Va. 425 (1975).
  - Landlord-Tenant
    - Va. Code § 55.248.21 – allows for attorneys' fees in the case of noncompliance by a landlord of a rental agreement or of a part of the Virginia Residential Landlord and Tenant Act unless the landlord proves that his actions in noncompliance were reasonable.
  - FOIA Violation
    - Va. Code § 2.1-346 allows for recovery of attorneys' fees upon winning a lawsuit for violation of FOIA.
  - Virginia Human Rights Act
    - Va. Code § 2.1-725 provides for recovery of attorneys' fees upon an employee's successful recovery against an employer for a violation of the Human Rights Act.
  - Attorneys' Fees under Va. Code § 38.2-209
    - Allows insured individuals to recover attorneys' fees in a suit against their insurer to determine coverage existing under a present policy, fidelity bond, or to determine the extent to which an insurer is responsible for compensating a covered loss.

- Costs and attorneys' fees will not be awarded unless the court determines that the insurer did not act in good faith by either denying coverage or failed or refused to make payment to the insured under a policy.
- *See, e.g.*, *Nationwide Mut. Ins. Co. v. St. John*, 259 Va 71 (2000) holding that a plaintiff was entitled to recover attorneys' fees and costs when Nationwide failed to compensate him for his claim despite having no medical evidence to the contrary that the plaintiff's injuries were not caused by the accident in question.

Overview of the Source of Law for Federal Attorneys' Fees

- Generally the American Rule governs the award of attorneys' fees in federal courts
  - *Kreischer, et al. v. The Kerrison Dry Goods Company,* 229 F.3d 1143 (4th Cir., S.C.) (2000), citing *Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L.Ed. 2d 40, 103 S. Ct. 1933 (1983).
- Except a federal court may award attorneys' fees through inherent power. At least four exceptions have been recognized (three by SCOTUS and one by 4th Cir.)
  - "Common Fund" Exception – where a party's litigation efforts directly benefit others.
    - *Kriescher, et al. v. The Kerrison Dry Goods Company,* 229 F.3d 1143 (4th Cir. 2000).
  - Where a party willfully disobeyed a court order.
    - *Kriescher, et al. v. The Kerrison Dry Goods Company,* 229 F.3d 1143 (4th Cir. 2000).
  - "Bad Faith" Exception – where a party acts in bad faith, vexatiously, or for oppressive reasons.
    - *Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46 (1991).
  - "Essential to Equity" Exception – applies only in suits in equity where the award of attorneys' fees is essential to the doing of justice
    - *Rolax v. Atlantic Coast Line R.R. Co.,* 186 F.2d 473 (4th Cir. 1951).
  - Civil Rights Cases – prevailing plaintiffs in civil rights cases may have the right to obtain attorneys' fees from defendants under USC § 1988 (enacted in 1976), which provides that the prevailing party in cases brought pursuant to USC § 1983 are entitled to fees.
    - Statute authorizes only reasonable attorneys' fees
      - Whether fees are reasonable is calculated by the lodestar method, which is generally the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).
    - While a statute does not authorize recovery of attorneys' fees for defendants, federal case law has allowed for recovery of fees where the plaintiff's claim was frivolous.
      - *See e.g., Fox v. Vice*, 2011 U.S. Lexis 4182 holding that reasonable attorneys' fees could be awarded to the defendant under 42 USC 1988 but only for costs that defendant would not have incurred "but for the frivolous claims."

        - *See also Walker v. City of Bogalusa*, City was entitled to an award of attorneys' fees from plaintiff in a case where it was frivolously alleged, without sufficient evidence that the city failed to evacuate African American residents in the same manner as non-African American residents following a chemical plant explosion.
    - FRCP Rule 68 – Offers of Judgment
        - Somewhat of a hybrid between a settlement offer and a decision on the merits. Rule 68 imposes a penalty on a plaintiff who refuses a reasonable settlement offer.
        - To avail himself of Rule 68's benefits, a defendant has to offer the plaintiff a judgment in writing, and it must remain open for 10 days. If the plaintiff does not accept the offer within 10 days, then he must beat the defendant's offer at trial.
            - If plaintiff wins at trial but doesn't recover more than defendant's offer, then plaintiff must pay the defendant's court costs.

Proof of Attorneys' Fees[1]

- An award of attorneys' fees rests within the sound discretion of the trial court.
    - *Ingram v. Ingram*, 217 Va. 27, 29 (1976).

- At the conclusion of a trial, the successful party may submit a detailed claim for its attorneys' fees with all supporting documentation and receipts, along with affidavits of expert witnesses as to the reasonableness of the charges. Opposing party may object to the reasonableness of the fees and if there is a disagreement, the court may empanel a new jury to make a factual determination on the issue
    - *Huffman v. Beverly California Corp.*, 42 Va. Cir. 205 (1997) (*citing Conway v. American National Bank*, 146 Va. 357 (1926)).
        - Where there is no conflict of evidence as to the amount of the fee, the court should decide the same, but like any other fact, if the evidence as to its amount and reasonableness is conflicting it should go to the jury. *Conway*, 131 S.E. at 805.

- Virginia Supreme Court has noted that where a contract provides for attorneys' fees but does not specify the amount, "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.... Ordinarily, expert testimony will be required to assist the fact finder."
    - *Coady v. Strategic Res., Inc.*, 258 Va. 12, 18 (1999) (quoting *Mullins v. Richlands National Bank*, 241 Va. 447 (1991)).

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[1] I'm pretty sure the burden of proof will switch depending on the case and that the court can determine which party has the burden of proof (per Chawla v. BurgerBusters, Inc., 255 Va. 616 (1998)), but I'd be lying if I said that I am saying that with 100% certainty.

- Expert testimony may not be necessary however, to determine reasonableness of a fee award where lay testimony can establish the reasonableness of the award
    - *Tazewell Oil Co., Inc. v. United Va. Bank*, 243 Va. 94, 111–12 (1992) (determining that thorough time records detailing activities for which compensation was sought and contemporaneous attorney affidavits as to reasonableness were sufficient and expert testimony was not needed to establish attorneys' fees).

History of Sanctions on Attorneys in Virginia

- Traditionally, courts have been reluctant to punish attorneys for advocacy that borders on overzealousness, so the rule has traditionally been that attorneys should not be sanctioned for "bad guesses in gray areas; they are liable for transgressing bright lines." *McVey v. Stacy,* 157 F. 3d, 271, 277 (4th Cir. 1998).
- Historically, courts of record have long held the power to discipline attorneys practicing before them.
    - *Ex Parte Fisher*, 6 Leigh (33 Va.) 619, 624 (1835) – court noted that the power to discipline attorneys was held "independently of any statutory restriction," implicitly based on the separation of powers doctrine that while the legislature could provide for state disbarment proceedings, it could not curtail a judge from controlling conduct in his/her own courtroom.
    - Supreme Court considered several cases where sanctions were imposed on attorneys and always affirmed the trial court's decision – *see, e.g. Legal Club of Lynchburg v. Light*, 137 Va. 249, 250-51 (1923) and *Norfolk and Portsmouth Bar Ass' v. Drewry*, 161 Va. 833, 836 (1934).
- Rule 11 and Code § 8.01-271.1
    - FRCP Rule 11 (promulgated in 1930s) requiring that pleadings be signed and authorizing sanctions for pleadings signed in bad faith without an adequate legal or factual basis, or for an improper purpose was not adopted in Va under Va. Code § 8.01-271.1 until 1987 by the General Assembly
        - In Virginia, a violation of 8.01-271.1 is complete as soon as the offending pleading is filed, and there is no opportunity to withdraw it.
        - Once the trial court finds that a pleading violates the statute, sanctions are mandatory.
        - The court's only discretion once the statute is violated is determining what kind of sanction is "appropriate."
- Since the adoption of Rule 11 under 8.01-271.1 recent appellate decisions have clarified certain aspects of trial courts' powers to impose sanctions or other discipline and have given guidance on what sort of conduct may be addressed in such proceedings.
    - Sharp criticism of the court, or vile language about it may result in sanctions
    - Practice of pleading a laundry list of affirmative defenses to avoid a waiver is no longer permissible. *Ford Motor Company v. Benitez,* 273 Va. 242 (2007).
        - *Benitez* has also shown us that all pleadings must have a good faith factual and legal basis.

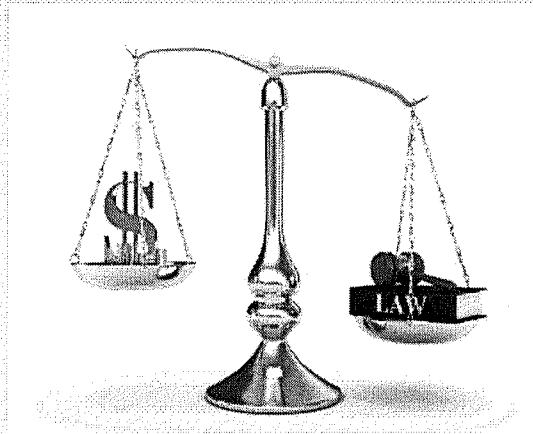
- The court may exclude evidence as a form of sanction against an attorney. I.e. in *Landrum v. Chippenham and Johnston-Willis Hospitals, Inc.*, 282 Va. 346 (2011), the trial court excluded an expert witness as a sanction for a party's failure to abide by an order that addressed earlier discovery failings.

How to Litigate Attorneys' Fees

{ George Mason American Inn of Court, 3.19.14

Why Are We Talking About Attorneys' Fees?

- Awarding of attorneys' fees has a very real impact on peoples' lives and businesses
- Impacts decision to litigate
- Factor in competition for legal business



The English Rule

Loser Pays: Successful litigant collects legal fees or costs from loser, including court costs, fees, and other expenses

The American Rule

Each side pays its own attorneys' fees unless a statute or contract provides otherwise

History of the English Rule

- 530s CE: The Code of Justinian embodied the loser plays principle
- 1275 Statute of Gloucester was the statutory beginning of the English Rule
- Later English legislation switched the award of attorneys' fees from being automatically granted to the prevailing party to being at the Bench's discretion.
- In the late 1800s, Order 65 Rule 1 stated that "unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for good cause, otherwise order."
- Today there do exist exceptions to the English Rule. For example, small claims tribunals wherein each side is responsible for its own costs.

History of the American Rule

Colonial America

- Colonial legislation focused on how much attorneys could charge a client instead of on shifting costs, reflecting a distrust of attorneys.
- In litigation generally however, where fee payments applied the colonies followed the English Rule of loser pays

The Early Union

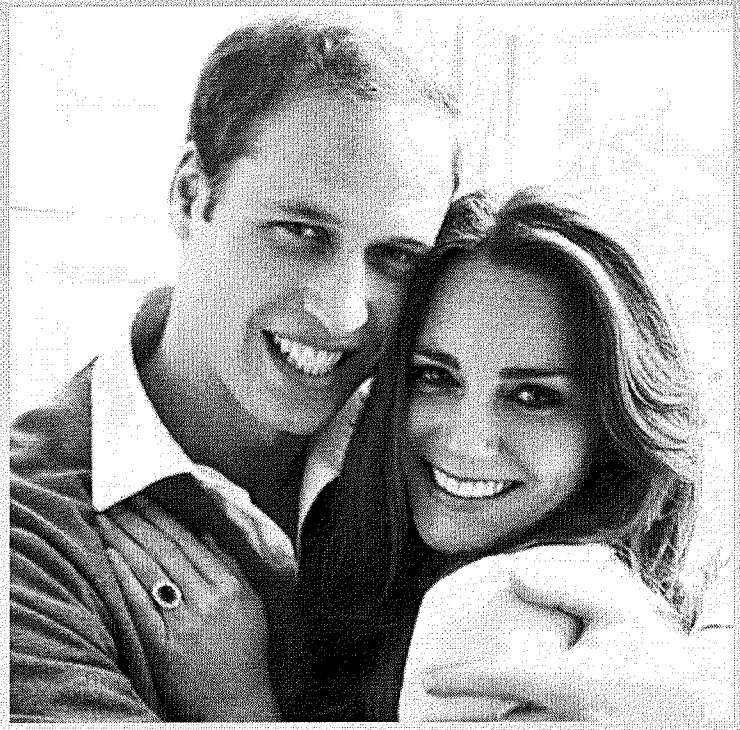
- In 17989 and 1793, Congress passed acts that allowed the collection of attorneys' fees and authorized federal courts to follow state laws
- *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) established American Rule

19th Century

- 1789 statute authorizing attorneys' fees lapsed with no replacement until 1853 but the federal courts continued to borrow state laws on attorneys fees and applied them in an ad hoc manner to cases for which state laws didn't apply.

Today

- In most jurisdictions, the American Rule is deeply entrenched and payment of attorneys' fees by the client instead of through recovery from defeated opponent is the norm

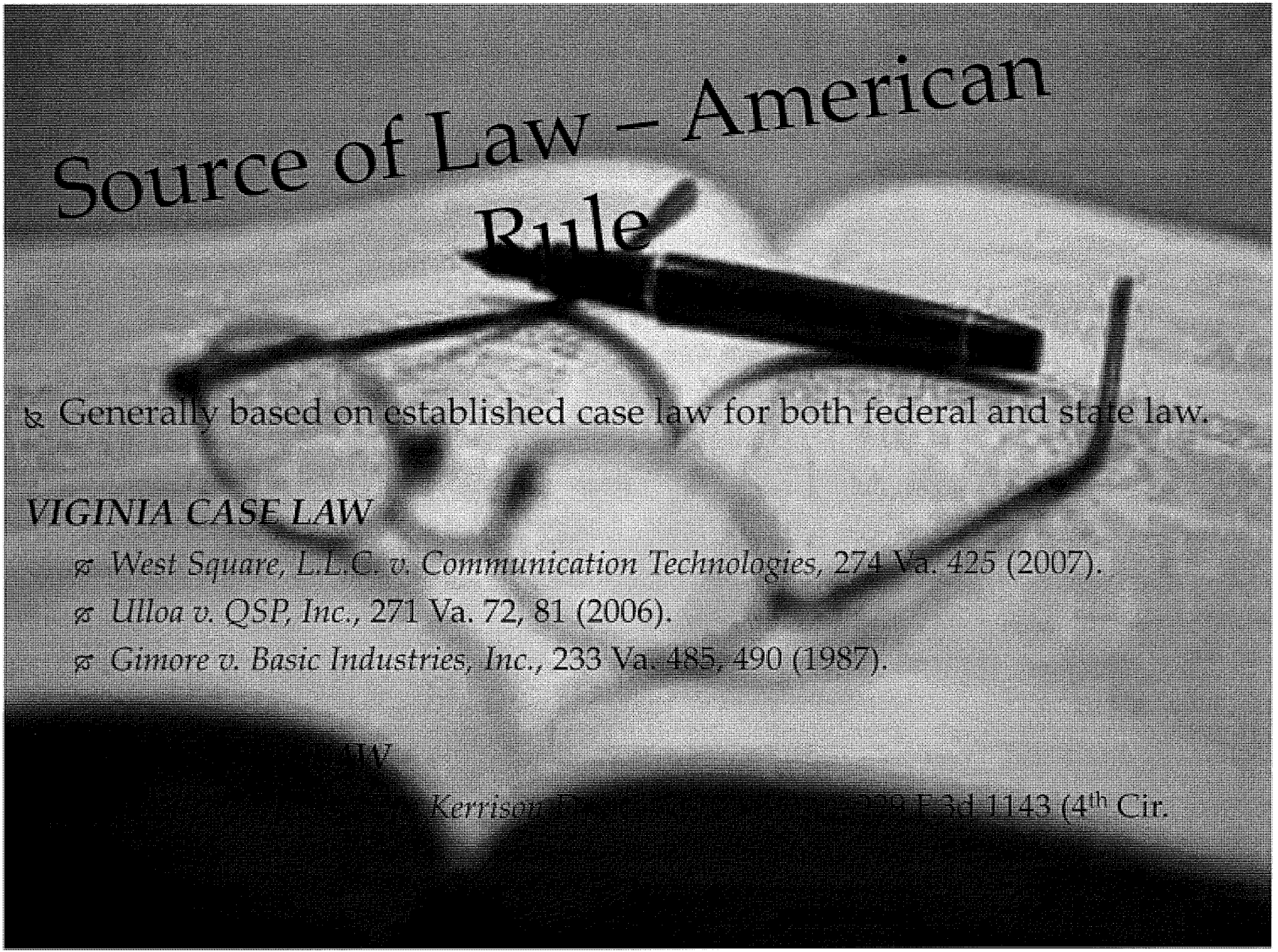


The English Rule

- Fuller compensation for prevailing parties, May deter frivolous lawsuits
- Generally discourages litigation so that not everyone may be abele to have his or her day in court

The American Rule

- Greater access to court systems for more people
- Congestion in the courts and little disincentive to drop a frivolous claim



Source of Law – American Rule

- Generally based on established case law for both federal and state law.

VIGINIA CASE LAW

- *West Square, L.L.C. v. Communication Technologies*, 274 Va. 425 (2007).
- *Ulloa v. QSP, Inc.*, 271 Va. 72, 81 (2006).
- *Gimore v. Basic Industries, Inc.*, 233 Va. 485, 490 (1987).

FEDERAL LAW

Kerrison [illegible] 39 F.3d 1143 (4th Cir.

Non-Statutory Exceptions - Virginia

- By Contract
  - Parties to a contract may adopt provisions that shift responsibility of attorneys' fees to the losing party in disputes involving a contract. *See Mullins v. Richlands Nat'l Bank*, 241 Va. 447 (1991).
  - To recover attorneys' fees pursuant to a contract, a party must make out a prima facie case that the requested attorneys' fees and costs were reasonable and necessary.
- Fraud
  - *See Prospect Development Company, Inc. v. Bershader*, 258 Va. 75 (1999).
- Malicious Prosecution & False Imprisonment
  - Prevailing party prosecuting a cause of action for malicious prosecution or false imprisonment may recover attorneys' fees.
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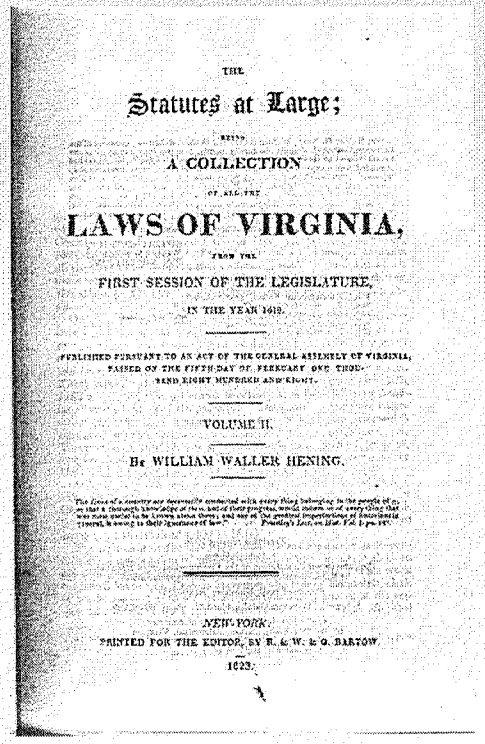
- Landlord-Tenant – Va. Code § 55.248.21
- FOIA Violation – Va. Code. § 2.1-346
- Virginia Human Rights Act – Va. Code § 2.1-725
- Insurance Claims – Va. Code. § 38.2-209



THE

Statutes at Large;

BEING

A COLLECTION

OF ALL THE

LAWS OF VIRGINIA,

FROM THE

FIRST SESSION OF THE LEGISLATURE,

IN THE YEAR 1619.

PUBLISHED PURSUANT TO AN ACT OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED ON THE FIFTH DAY OF FEBRUARY ONE THOUSAND EIGHT HUNDRED AND EIGHT.

VOLUME II.

By WILLIAM WALLER HENING.

NEW-YORK:

PRINTED FOR THE EDITOR, BY R. & W. & G. BARTOW.

1823.

Federal Non-Statutory Exceptions

- Common Fund Exception
  - *Kriescher, et al. v. The Kerrison Dry Goods Company,* 229 F.3d 1143 (4th Cir. 2000).
- Willful disobeying of a court order
  - *Kriescher, et al. v. The Kerrison Dry Goods Company,* 229 F.3d 1143 (4th Cir. 2000).
- Bad Faith Exception
  - *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).
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  - *Rolax v. Atlantic Coast Line R.R. Co.*, 186 F.2d 473 (4th Cir. 1951).

Federal Statutory Exceptions

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  - To avail himself of Rule 68's benefits, a defendant has to offer the plaintiff a judgment in writing, and it must remain open for 10 days. If the plaintiff does not accept the offer within 10 days, then he must beat the defendant's offer at trial.
    - If plaintiff wins at trial but doesn't recover more than defendant's offer, then plaintiff must pay the defendant's court costs.

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- Virginia Supreme Court has noted that where a contract provides for attorneys' fees but does not specify the amount, "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.... Ordinarily, expert testimony will be required to assist the fact finder."
  - *Coady v. Strategic Res., Inc.*, 258 Va. 12, 18 (1999) (quoting *Mullins v. Richlands National Bank*, 241 Va. 447 (1991)).

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History of Sanctions

- Traditionally, courts have been reluctant to punish attorneys for advocacy that borders on overzealousness, so the rule has traditionally been that attorneys should not be sanctioned for "bad guesses in gray areas; they are liable for transgressing bright lines."
- Historically, courts of record have long held the power to discipline attorneys practicing before them.
- Sanctions under Rule 11 and Va. Code § 8.01-271.1
- Since the adoption of Rule 11 under 8.01-271.1 recent appellate decisions have clarified certain aspects of trial courts' powers to impose sanctions or other discipline and have given guidance on what sort of conduct may be addressed in such proceedings.

CATHERINE J. WAUTERS

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EDUCATION

George Mason University School of Law, Arlington, VA
Juris Doctor Expected, May 2014
GPA/ Rank:
Honors: *George Mason Law Review*, Senior Notes Editor
Moot Court Board, Associate Justice
Best Brief for Respondents, Charleston School of Law 2014 National Moot Court Competition
Activities: Supreme Court Clinic; George Mason American Inn of Court; Military Law Society (Secretary, 2011-2013)
Publication: *No Alien Left Detained? A Not-So "Specially Dangerous" Exception to the Government's Limited Detention Authority*, 21 GEO. MASON L. REV. 275 (2013).

College of the Holy Cross, Worcester, MA
Bachelor of Arts, *magna cum laude*, Political Science, May 2008
Honors: Pi Sigma Alpha, National Political Science Honor Society; Dean's List (7 of 8 semesters)
Activities: The Beverly Connection, Founder (fundraising and raising awareness for Kenyan school) (January-May 2008)
Pedro Arrupe Immersion Program, Tanzania, Financial Records Manager and Participant (May 2008)
African Refugee Tutoring Program, Volunteer Tutor (September 2007-May 2008)
Spring Break Service Project, (Group Leader, Virginia; Volunteer, New Orleans) (March 2006 and 2008)

EXPERIENCE

U.S. Department of State, Office of the Legal Adviser, Washington, D.C. June-August 2013
Law Clerk, Office of International Claims and Investment Disputes (L/CID)
- Research liability in claims pending international commercial arbitration before the Iran-U.S. Claims Tribunal in The Hague
- Examine bilateral investment agreements and other multilateral treaty provisions relating to international investment disputes

International Rights Advocates, Washington, D.C. January-May 2013
Legal Intern
- Analyze procedural issues in Alien Tort Statute and TVPA litigation of corporate liability for human rights violations
- Draft legal memoranda concerning relevant procedural issues arising in motion practice in pending cases

National Immigration Forum, Washington, D.C. August-December 2012
Legal & Policy Intern
- Researched public records and state and federal laws regarding immigration reform and prepared memoranda
- Synthesized legislative reports and non-profit studies that impact immigration and assisted in preparing reports

Fairfax County Circuit Court, Fairfax, VA June-August 2012
Judicial Intern for The Honorable Lorraine Nordlund
- Analyzed briefs regarding issues of contract and tort law, and prepared bench memoranda for judicial review
- Reviewed and processed petitions for name changes, uncontested divorces, and concealed weapon permits

Conway, Farrell, Curtin and Kelly, P.C., New York, NY February 2010-June 2011
Litigation Department Paralegal (Insurance Defense)
- Managed over 90 files, conducting regular pleading, discovery, and investigation reviews from inception to trial
- Drafted discovery demands and responses, stipulations, affidavits, and pleadings, and prepared exhibits

Peace Corps, Benin, West Africa July 2008-January 2010
Rural Community Health Volunteer
- Initiated infant growth monitoring for over 80 children, birth to 3yrs, and provided nutritional counseling to mothers
- Collaborated with Beninese partners in community for projects including sexual health newsletter for local youth

The White House: Executive Office of the President, Washington, D.C. January-April 2007
Vetting Intern, Office of Presidential Scheduling and Appointments
- Researched proposed speech-mentions and presidential event participants as well as potential venues for presidential events
- Prepared memoranda memorializing findings from Lexis, Hoovers, Tray, Open Secrets, and other sources

OTHER

Security Clearance: Secret

C O R I N N E S T U A R T

3272 Martha Custis Drive • Alexandria, Virginia 22302
(267) 663-9952 • Stuarcm11@gmail.com

EDUCATION

GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON, VIRGINIA
Candidate for Juris Doctor, May 2014

Activities: *George Mason Law Review*, Associate Research Editor
Trial Advocacy Association, Executive Vice-President
Legal Research, Writing and Analysis Program, Writing Fellow
George Mason American Inn of Court, Secretary
George Mason Trial Advocacy Intramural Competition, Quarter-Finalist

Publication: *The Applicability of the Prior Restraint Doctrine to False Advertising Law*, 21 GEO. MASON L. REV. 531 (2014).

THE GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.
Bachelor of Arts, International Affairs, Concentration in Europe and Eurasia, magna cum laude, May 2011

Honors: Dean's List, four semesters
Elliott School of International Affairs Outstanding Academic Achievement Award
Scottish Rite Foundation Scholarship

Activities: Phi Sigma Pi National Honors Fraternity Parliamentarian
DC Reads Tutor

EXPERIENCE

OFFICE OF THE ALEXANDRIA COMMONWEALTH'S ATTORNEY, ALEXANDRIA, VA
Law Clerk (full-time), March 2012-Present

- Represent the Commonwealth during arraignment procedures and bench trials pursuant to a Third-Year Practice certificate.
- Conduct research and draft responses to defense counsels' motions and prepare briefs on contested legal issues to the court.
- Review and assist in preparation of case files by gathering all relevant information pertaining to the case including police reports, criminal records, certified prior convictions and protective orders.

DOORWAYS FOR WOMEN AND FAMILIES, ARLINGTON, VIRGINIA
Court Advocacy Intern, January 2011-August 2011

- Conducted intake meetings with domestic violence survivors in the Arlington Juvenile and Domestic Relations District Court to discuss their civil and criminal legal options.
- Assisted domestic violence survivors in completing petitions for protective orders, custody, child and spousal support, and in filing criminal charges.
- Accompanied and advocated on behalf of domestic violence survivors in all criminal and civil court hearings related to their cases.

JOAN M. WILBON & ASSOCIATES, WASHINGTON, D.C.
Legal Assistant, September 2008-August 2009 & May 2010-August 2011

- Drafted and edited legal documents pertaining to family law, probate, personal injury law, and estate planning including petitions, complaints, answers, motions, requests for production of documents, interrogatories, testamentary documents and property settlement agreements.
- Assisted attorneys with trial preparation and strategy by preparing trial notebooks and exhibits.
- Conducted intake with potential clients and corresponded with current clients regarding their cases.

THE SCOTTISH PARLIAMENT, EDINBURGH, SCOTLAND
Intern for Marlyn Glen, Former Member of the Scottish Parliament, February 2010-May 2010

- Prepared extensive report on the condition of migrant workers and trafficking in Scotland, titled, "Fact or Fable? The Truth about Migrant Worker Communities in Scotland," as published on the Scottish Parliament Equal Opportunities Committee website.
- Researched current policy issues to assist the Member with discussions on upcoming legislation.

COMMUNITY INVOLVEMENT AND LANGUAGE SKILLS

- Doorways for Women and Families, Former Volunteer Court Advocate and Volunteer Shelter Coordinator
- German, Advanced proficiency in speaking, reading and writing

How to Petition for Fees and Costs in EDVA

Prepared by Gina L. Marine, Esq.
March 19, 2014
George Mason American Inn of Court

Identify which statute allows your recovery of attorney's fees

- For example: Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k))
- In any action or proceeding under this sub-chapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person

Prevailing Party

- The term "prevailing party" is broadly construed
  - See Truesdell at 163, citing Hensley at 433
- "prevailing party" = a party that succeeds on any significant issue in litigation and attains some of the benefit sought in bringing suit
  - See Hensley at 433)
- Can be a prevailing party even if not successful in all claims

When to File

- After entry of judgment
- Fees: within 14 days, unless statute or court order provides otherwise
  - Reference: Fed. R. Civ. P. 54(d)(2)(B)(i) http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf
- Costs: within 11 days, unless such time is extended by order of the Court
  - Reference: Local Rule 54(D) http://www.vaed.uscourts.gov/localrules/LocalRulesEDVA.pdf

What Forms to File

- Bill of Costs
  - Form AO 133 (Rev 12/09) http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO133.pdf
  - This form identifies the taxable costs (more on that later)
- Memorandum in Support of Petition for Fees and Costs

Form AO 133

UNITED STATES DISTRICT COURT

for the

_____ District of _____

)
)
v.) Case No.:
)
)

BILL OF COSTS

Judgment having been entered in the above entitled action on _____ against _____ ,
Date

the Clerk is requested to tax the following as costs:

Fees of the Clerk ..... $_____

Fees for service of summons and subpoena ..... _____

Fees for printed or electronically recorded transcripts necessarily obtained for use in the case ..... _____

Fees and disbursements for printing ..... _____

Fees for witnesses *(itemize on page two)* ..... _____

Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case. ..... _____

Docket fees under 28 U.S.C. 1923 ..... _____

Costs as shown on Mandate of Court of Appeals ..... _____

Compensation of court-appointed experts ..... _____

Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828 ..... _____

Other costs *(please itemize)* ..... _____

TOTAL $_____

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

❒ Electronic service ❒ First class mail, postage prepaid

❒ Other: _____

s/ Attorney: _____

Name of Attorney: _____

For: _____ Date: _____
Name of Claiming Party

Taxation of Costs

Costs are taxed in the amount of _____ and included in the judgment.

By:

UNITED STATES DISTRICT COURT

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME , CITY AND STATE OF RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
					TOTAL		

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:
"Sec. 1924. Verification of bill of costs."
"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28, which reads in part as follows:
"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:
RULE 54(d)(1)

Costs Other than Attorneys' Fees.
Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 day's notice. On motion served within the next 7 days, the court may review the clerk's action.

RULE 6

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after service and service is made under Rule5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 58(e)

Cost or Fee Awards:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Attachments to Form AO 133

- Attachment #1: Itemization of Bill of Costs
  - Annotate with footnotes for further explanation as to why costs are necessary or explanation as to why not seeking to recover a particular cost
- Attachment #2: Documents to support each cost
- Attachment #3: Declaration of Lead Counsel (costs only, not fees)

Memorandum in Support of Petition for Fees and Costs

- Procedural History
- Argument (include references to attached exhibits)
- Exhibits
  - Declarations of Lead Counsel (fees and costs)
  - Declarations of Local Counsel (fees)
  - Declaration of Fee Expert (as deemed necessary)
  - Expert Witness Fee Statements
  - Summary of Time Records
  - Summary of Non-Taxable Costs
- Conclusion – Relief Requested

Key Points to Address in Argument Section of Memorandum

How Court Determines Award*

*Adapted from Taylor Case

#1: What is the appropriate amount of the "attorney's fees" award?

- Use 4th Circuit's three-step formula (Grissom & Robinson)
- Step 1: Determine Lodestar figure (reasonable hours expended X reasonable hourly rate)
  - *Guided by the 12 Johnson/Barber Factors*
- Step 2: Adjust Lodestar figure (subtract the fees for hours spent on unsuccessful claims unrelated to successful claims)
- Step 3: Award = percentage of the remaining amount, depending on the "degree of success" enjoyed by the plaintiff
  - Standard established by Hensley

Lodestar (reasonable hourly rate)

- Burden on Petitioners to demonstrate rate requested is reasonable
- Declarations of Lead Counsel
  - Set forth in detail your credentials and experience, as well as qualifications of other attorneys working on the case with you
  - Explain reason each expense was incurred and each was necessary
  - Explain timekeeping practices
  - Address 12 Johnson/Barber factors
- Declarations of Local Counsel
  - Must be familiar with your specific skills and more generally with the type of work in the relevant legal community (i.e. must do same/similar work and know you)
  - Recommend providing two
- Summary of Time Records
  - Include self-audit (e.g. breakdown of "no charge" amounts and timekeepers removed)
  - Use a chart that with columns to show each timekeeper's experience, actual rate, Laffey matrix range, and Reilly matrix range
  - Include copies of referenced matrices
- Use Vienna Metro Matrix (by Craig Reilly)

Lodestar (reasonable hours expended)

- Exclude excessive, unnecessary and redundant hours and also time spent litigating discrete and unsuccessful claims (Hensley)
- May be awarded for time spent on unsuccessful claims if such claims are interconnected to the successful claims (i.e., the claims rest on the same facts or related legal theories, or arise from a common nucleus of facts and are based on related legal theories, or substantially interrelated)
- Must exercise "billing judgment" (not just raw totals of hours spent – must winnow hours actually expended down to the hours reasonably expended)
- Guided by three Barber/Johnson factors
  - amount in controversy and the results obtained
  - the novelty and difficulty of the questions presented
    - if not novel, show that it involved an overwhelming number of documents and discovery (e.g. had to respond to vigorous defense)
  - the time and labor expended on the litigation as a whole

Loadstar (adjustment)

- Focus on the significance of the overall relief obtained in relation to hours reasonably expended
  - Excellent results ➔ full fee (or in some cases, an enhanced reward)
  - Partial or limited success (even when non-frivolous, interrelated claims and good faith) ➔ may either identify the specific hours that should be eliminated or simply reduce the award to account for the limited success (no precise rule or formula)
    - Guided by Hensley
      - Whether the successful claims are related to the unsuccessful claim
      - Whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award (i.e., the significance of the overall relief obtained by plaintiff in relation to the hours reasonably expended on litigation)

12 Johnson/Barber Factors

1. The time and labor expended
2. The novelty and difficulty of the questions raised
3. The skill required to properly perform the legal services rendered
4. The attorney's opportunity costs in pressing the instant litigation
5. The customary fee for like work
6. The attorney's expectations at the outset of the litigation

12 Johnson/Barber Factors

7. The time limitations imposed by the client or circumstances
8. The amount in controversy and the results obtained
9. The experience, reputation and ability of the attorney
10. The undesirability of the case within the legal community in which the suit arose
11. The nature and length of the professional relationship between attorney and client; and
12. Attorney's fees awards in similar cases

Hensley Standard

- The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988.
- Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.
- Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.
- But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Laffey Matrix

- Not adopted in EDVA
- Used to determine prevailing market rates for litigation counsel in the Washington, D.C. area
- Developed by the Civil Division of the United States Attorney's Office for the District of Columbia based on rates allowed in Laffey case
- Updated for 2014
- Find Laffey Matrix here: http://www.justice.gov/usao/dc/divisions/Laffey_Matrix%202014.pdf

Adjusted Laffey Matrix

- Not adopted in EDVA
- Developed by Dr. Michael Kavanaugh, an economist from Ohio
- Uses a national index (captures supply and demand factors particular to the legal services market as well as inflation) rather than a local index (which chiefly captures inflation effects), and more contemporary observations
- Updated for 2014
- Find Adjusted Laffey Matrix here: http://www.laffeymatrix.com/see.html

Reilly Matrix

- Adopted by EDVA
- a.k.a. Vienna Metro Matrix
- A matrix of hourly rates for complex civil litigation in Northern Virginia
- Developed by Craig C. Reilly in the Vienna Metro Case
- Last updated 2011
- Find Reilly Matrix here: http://www.virginiabusinesslitigationlawyer.com/Vienna%20Metro.pdf

#2: What is the appropriate amount of the "costs" award?

- Burden on prevailing party to demonstrate that costs are allowable, then shifts to non-prevailing party to identify any impropriety
- 4th Cir presumption = prevailing party will be awarded costs (Fells)
  - Unless a federal statute, these rules, or a court order provides otherwise, costs —other than attorney's fees—should be allowed to the prevailing party (Fed. R. Civ. P. 54(d)(1))
- Determine Taxable Costs (28 U.S.C. § 1920)
  - Costs assessed by Clerk
- Determine Non-Taxable Costs (e.g. 42 U.S.C. § 1988)
  - Costs determined by Judge
- Adjust Figure (subtract the costs for hours spent on unsuccessful claims unrelated to successful claims)

Taxable Costs

- Fees of the Clerk
- Fees for service of summons and subpoena
- Fees and disbursements for printing
- Docket fees
- Compensation of court-appointed experts

Taxable Costs

- **Fees for printed or electronically recorded transcripts necessarily obtained for use in the case** (i.e. whether it was necessary to counsel's effective performance and proper handling of case)
  - State why used (e.g. during discovery, to assist in trial prep, for post-trial briefing that the Court requested)
  - Deposition transcripts (when the taking of the deposition is reasonably necessary at the time of its taking)
    - relevant and material for the preparation of litigation
    - does not have to be used at trial

Taxable Costs

- **Fees for witnesses**
  - Witness fees at trial or deposition
    - $40/day + fees, mileage, and subsistence
    - For those who appeared and for those who, believed to be necessary, appeared but did not testify
    - Attach documents to establish amounts incurred

Taxable Costs

- **Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case**
  - "Materials" = broadly interpreted (papers, graphs, charts, photographs or other like materials used as exhibits)
  - Examples:
    - electronic data received in discovery
    - trial exhibits
    - internal copying of trial exhibits
  - Must show reasons for each copying charge (only to the extent copies were used as court exhibits or were furnished to the court or opposing counsel)

Non-Taxable Costs

- Expert witness fees and services
- Copying
- Faxes
- Fed Ex
- Travel and Parking
- Messenger service
- Postage

Non-Taxable Costs

- Private process server fee
- Telephone
- Legal research
- Videographer services (when necessarily obtained for use in the case)
  - e.g. necessary to demonstrate their lack of credibility

Document, Document, Document

- For costs, must provide documentation in support of each expense
  - Examples:
    - Invoice + copy of check paying invoice
    - Invoice marked paid
    - Expert Witness Fee Statements

Case Citations

- Taylor v. Republic Services, Case No. 1:12-cv-00523 (GBL-IDD) (E.D. Va. Jan. 29, 2014) (Doc. 320)
- McAfee v. Boczar, 738 F.3d 81 (4th Cir. 2013)
- Evergreen Sports LLC, v. SC Christmas Inc., et al., Case No. 3:12cv911 (HEH) (E.D. Va. Oct. 4, 2013) (Doc. 78)
- Vienna Metro LLC v. Pulte Home Corp., No. 1:10cv502 (GBL) (E.D. Va. Aug. 24, 2011) (Doc. 263)
- Robinson v. Equifax Info. Serv., LLC, 560 F.3d 235, 243-44 (4th Cir. 2009)
- Fells v. Virginia Dep't of Transp., 605 F. Supp. 2d 740, 742 (E.D. Va. 2009)

Case Citations

- Grissom v. Mills Corp., 549 F.3d 313, 320-21 (4th Cir. 2008)
- Barber v. Kimbrells, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978)
- Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985)
- Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 163 (2002) (citing Hensley, 461 U.S. at 433)
- Hensley v. Eckerhart, 461 U.S. 424 (1983)

Sample Pleadings, Forms and Select Cases available on the Inn's website

- Bill of Costs and Attachments
- Memorandum in Support of Fees and Costs Award
- Declaration of Lead Counsel (fees and costs)
- Ex 1-6 of Declaration of Lead Counsel
- Declaration of Fee Expert
- Declaration of Local Counsel (fees)
- Addendum to Memorandum
- Laffey Matrix
- Adjusted Laffey Matrix
- Reilly Matrix
- Taylor Case
- Evergreen Sports Case
- Vienna Metro Case
- Available on Google Drive: https://drive.google.com/folderview?id=0B5oI94vdKBevVXA0SVlXMGxxLVU&usp=sharing

Practice Tips

- Petitions always opposed
- Expect high level of scrutiny
- Decided (almost always) on paper
- Expect opposition to question/attack experience and skill level
- Be as detailed as possible in explaining fees and costs (and provide documentary support)
- Consider whether to reference the opposing party's bad behavior
- Consider whether to use an expert to support your petition
- Monitor applicable case law on fees (consider whether to amend Memorandum when appropriate)
- Reasonable rates are getting higher . . . so it is a great time to be a Petitioner!

Special Thank You

To my friend, former law school classmate and fellow Inn member, Carla Brown of Charlson Bredehoft Cohen & Brown, P.C., who graciously provided me not only with a crash course in this subject matter (about which I previously knew nothing!), but also provided forms with permission to share them.

THANK YOU!

Now we want to hear from you!

- When have you found it necessary to use a fee expert to support your petition?
- Describe a circumstance when you had costs disallowed due to lack of sufficient detail? What was missing?
- Fee awards in small v. large firms. Is there a difference?
- How do you define a "limited success" case?
- What impact, if any, has the opposing party's bad behavior had on your fee award?
- What are some examples of your fee award victories? And, to what, do you attribute the success?
- What are some examples of your fee award losses? And, to what, do you attribute the loss?

David Karro
Briefs4lawyers@gmail.com
703-532-9344
703-963-8775 (cell)

A Few Tips for Defending Against Fee Awards in Federal Courts

1. Pick your fights; quibbling can be expensive.
    a. Unsuccessful challenges to motions for attorneys' fees can prove costly. *Mammano v. Pittston Co.*, 792 F.2d 1242, 1246 (4th Cir. 1986) ("Upon remand, the district court shall award reasonable attorneys' fees in accordance with this opinion for services rendered at the administrative, trial and appellate level, *including those expended to resolve the issue of attorneys' fees*." (citation omitted, emphasis added.))
    b. If you are opposing a motion for attorneys' fees:
        i. You have already lost the case and the plaintiff has established he was wronged.
        ii. The plaintiff is asking to be made whole for having to overcome your efforts to deny him the relief the court has awarded him.
        iii. You are asking the court to reopen a case it thought was closed, to revisit events that it has already decided, and make tedious billing judgments as it decides what it should have cost the plaintiff to win what your should not have taken from him.
        iv. You are not likely to get the benefit of the doubt.
    c. In those circumstances, you want solid reasons for arguing that your adversary is over-reaching, not just arguable positions. *Cf. Rum Creek Coal Sales, Inc. v. Caperton*, 31 F. 3d 169, 181 (4th Circuit 1994) ("A request for attorney's fees should not result in 'a second major litigation.'" (citation omitted))
    d. As to appeals, the Fourth Circuit has made it clear it is not interested in closely policing district court fee awards. *See McAfee* v. *Boczar*, 738 F.3d 81, 91 (4th Cir. 2013) ("Although [the] rates [allowed by the district court] would appear excessive to almost any lay observer, and some members of the judiciary would deem them exorbitant, the district court's findings to the contrary are entitled to our deference. As a result, we are unable to disturb its finding that the requested hourly rates are reasonable.")
    e. Settle attorneys' fees issues if you can. There are consequences to losing, and you might as will submit to anything remotely close to reasonable with grace.

2. The procedure you are entitled to demand.
    a. The Fourth Circuit has held: "Claims for attorney fees are items of special damage which must be specifically pleaded under Federal Rule of Civil Procedure 9(g). . . . In the absence of allegations that the pleader is entitled to attorney's fees, therefore, such fees cannot be awarded. In the present case. . . . If attorney fees per se are special damages which must be specifically pleaded, 'special' attorney's fees, such as pre-foreclosure fees and costs, are a fortiori special damages which must be pleaded." *Maidmore Realty Co., Inc. v. Maidmore Realty Co., Inc.*, 474 F.2d 840, 843 (3d Cir. 1973).
    b. Awards of attorneys' fees in the Eastern District are governed by Fed.R.Civ.P. 54(d) (2), which provides: "A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages," and, in the absence of a statute or court order "be filed no later than 14 days after the entry of judgment; specify the judgment and the statute, rule, or other grounds entitling the movant to the award; state the amount sought or provide a fair estimate of it; and disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made."
    c. The Western District's Local Rule 54 modifies the Federal Rule to allow 21 days for filing the motion, and requiring "a memorandum setting forth the nature of the case, the claims as to which the party prevailed, the claims as to which the party did not prevail, a detailed description of the work performed broken down by hours or fractions thereof expended on each task, the attorneys customary fee for such like work, the customary fee for like work prevailing in the attorney's community, a listing of any expenditures for which reimbursement is sought, any additional factors which are required by the case law, and any additional factors that the attorney wishes to bring to the Court's attention."
3. Know your adversary's authority for claiming fees.
    a. Since there is no general right to attorneys' fees, a party seeking them must rely on a specific statute, rule, common law doctrine, or contractual provision (as in a lease allowing reasonable attorneys' fees if a party has to sue for damages.) *See, Nelson v. Green*, 2014 WL 131055 (W.D.Va., 1/14/2014) ("The Third Amended Complaint now seeks attorneys' fees only as a general matter. As a general matter, 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser'. . . . A few exceptions apply, "such as when the losing party has willfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." (citations omitted.))

b. The statutes, rules, and doctrines authorizing awards of fees do not use identical language and are sometimes designed to achieve different purposes. The differences in language and purpose can be significant. *E.g. Marek v. Chesny*, 473 U.S. 1, 9 (1985) (statutory entitlement to attorney's fees "as part of the costs" means attorneys' fees are to be treated as costs for purposes of offers of judgment, which in turn means that the loss of the right to seek "costs" in certain situations following an offer of judgment is the loss of the right to seek attorney's fees in those circumstances.)

4. The plaintiff must be a *prevailing* party for purposes of fee-shifting statutes.

a. Parties must prevail if they are to be eligible for attorneys' fees. "[A] party has prevailed if there has been a 'material alteration of the legal relationship of the parties' and there is a "judicial imprimatur on the change." *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir., 2013).

b. However, a party does not have to prevail on every issue to be a prevailing party. *G. ex rel. Ssgt R.G. v. Fort Bragg Dependent Schs.*, 324 F.3d 240, 255 (4th Cir. 2003). ("[T]o merit attorneys' fees under the [Individuals with Disabilities Education Act], a plaintiff does not need to prove that he 'substantially prevailed,' . . . . '[O]btaining judicially sanctioned and enforceable final relief on some claims is sufficient.'" (citation omitted)).

c. A party may prevail on some issues and lose on others, and may yet be a prevailing party as to the issues he won. *McAfee v. Boczar*,738 F.3d 81, 91 (4th Cir (4th Cir., 2013) ("[T]he limited success achieved by McAfee — reflected by the jury's decision not to award anything for deprivation of liberty, great inconvenience, great insult and humiliation, and mental anguish, or make an award of punitive damages — undermines the attorney's fee award being appealed.")

d. To be a prevailing party, a litigant must win *something* he set out to win. *Mercer v. Duke University*, 401 F.3d 199, 205 (4th Cir, 2005) (requiring "courts to consider the relief that was sought by the plaintiff, not the relief that was most important to the plaintiff.") In *Johnson v. City of Aiken*, 278 F.3d 333 (4th Cir. 2002), the plaintiffs sued law enforcement officers for searching their automobiles and won 35 cents. That entitled them to recover their costs, but did not make them prevailing parties for purposes of an attorneys' fee award" "[W] hen the recovery of monetary damages is the purpose of the claim, a plaintiff who receives only nominal damages has succeeded in only a technical sense." *Id.* at 338.

e. Winning preliminary relief is usually not enough to qualify a party as a prevailing party. *Smyth ex rel. Smyth v. Rivero,* 282 F.3d 268, 277 (4th Cir, 2002) ("[W]e hold that the preliminary injunction entered by the district court does not satisfy the prevailing party standard of [42 U.S.C.] § 1988(b)." (footnote omitted.))

f. A party who settles a claim:

i. can be a "prevailing party" for purposes of an award of attorneys' fees if the settlement is embodied in a court order decree, but not otherwise; "[W]ithout a '*judicially sanctioned* change in the legal relationship of the parties, a party [who has settled a claim] has not prevailed." *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (citation omitted, emphasis added.)

ii. *Smythe* reversed an earlier line of cases allowing plaintiffs who entered into purely private agreements in consideration for dismissing a case to qualify as prevailing parties. Now the terms of the settlement must be integrated into court orders or consent decrees. *Id.* 282 F. 3d. at 281 n.10.

5. An attorney seeking an award of fees must show his charges are reasonable.

a. Attorneys claiming fees under fee –shifting statutes "are under a duty to minimize expenses." *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995) (affirming district court's refusal to compensate several lawyer where one was enough.)

i. The work the lawyer wants to be paid for has to be described clearly enough to allow an assessment of its reasonableness. *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92, 97 (4th Cir. 1993). ("[W]e can outline the appropriate tack a fee applicant should follow when seeking to recover attorneys' fees pursuant to 42 U.S.C. § 1988. First, the applicant must make every effort to submit time records which specifically allocate the time spent on each claim. Second, those records should attempt to specifically describe the work which the fee applicant allocated to unsuccessful claims so as to assist the district court in determining the reasonableness of the fee request. In establishing these guidelines, we recognize that some claims may have such a common core of facts and legal theories so as to prevent any allocation of the fees to the applicant's separate claims. However, we hereby admonish all parties that a blind adherence to this argument runs the risk of incurring a complete denial of fees.")

6. When objecting to an award of attorney's fees, try to avoid focusing on the *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974) case; it's a plaintiff's case, not yours.

   a. The *Johnson* case is frequently cited by plaintiffs seeking attorneys' fees. Written at a time when the courts were anxious to encourage lawyers to represent people claiming civil rights violations, the opinion's tone suggests a more generous approach to awards than more modern cases, setting out a multitude of considerations, that have been largely simplified by modern decisions. *See Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship*, 730 F.Supp.2d 513, 520 (E.D. Va., 2010) ("The Court need not address all twelve factors independently because "such considerations are usually subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.")

   b. Fourth Circuit cases like *McAfee v. Boczar*, 738 F.3d 81 (4th Cir. 2013) tend to be more measured in tone, and it is best to use their language as much as possible, if you are trying to keep fees down.

> The proper calculation of an attorney's fee award involves a three-step process. First, the court must "determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." . . . To ascertain what is reasonable in terms of hours expended and the rate charged, the court is bound to apply the factors set forth in Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 717–19 (5th Cir.1974).5 Id. at 243–44. Next, the court must "subtract fees for hours spent on unsuccessful claims unrelated to successful ones." Id. at 244. Finally, the court should award "some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff." Id. Although the district court in this case adequately performed the first two steps, it erred on the third. That is, it overstated McAfee's success.

738 F.3d at 88.

   c. Petitions for fees often cite *Johnson* for the proposition that the lodestar figure the court arrives at can be adjusted upwards. The proper response: the "The Supreme Court has indulged a 'strong presumption' that the lodestar number represents a reasonable attorney's fee. The Court recently explained that this presumption can only be overcome 'in those rare circumstances where the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.'" *McAfee v. Boczar*, 738 F.3d 88, 89 (4th Cir. 2013) (citation omitted.)

Ten (10) Tips for Counsel Seeking to Recover Attorney's Fees in Virginia Courts

By: Kevin D. McInroy, Esq.

I. Draft your contract clause

A. The contract is the law between the parties. It can stipulate –

1. the procedures for recovery
   a. e.g., bifurcation; by post-trial motion
   b. discovery on the issue (if any)
2. the trier of the issue
   a. e.g., judge, not jury to decide
3. the acceptable forms of proof to be considered
   a. e.g., affidavits (thus avoiding a hearsay objection)
4. who recovers –
   a. "prevailing party,"
   b. "substantially prevailing party"
   c. other
5. which party can recover –
   a. bilateral (any prevailing party) or only one of the parties
   b. e.g., "if Company must sue to enforce its rights under this agreement . . . "
6. what's recoverable; e.g., –
   a. just "attorney's fees" or "all costs incurred, including attorney's fees"
      (1) paralegal
      (2) court reporter
      (3) expert witnesses
      (4) other?
   b. attorney's fees incurred before litigation
      (1) investigation
      (2) demand
   c. attorney's fees incurred in negotiations and/or settlement

B. Example provision –

1. In any suit, action or proceeding to enforce any term or provision of this Agreement, the prevailing party shall be entitled to an award of all costs incurred in connection with said litigation, including but not limited to reasonable attorney's fees, as determined post-trial by the court on the basis of the parties' written submissions including affidavits.

II. Have a signed retainer agreement w/ client that addresses the fees and costs you will seek

A. reported decisions show judges liking to see/rely on it
B. address: does client pay for travel time? what rate?

III. Keep Rule 3:25 in mind

A. Fees must be claimed in initial pleading
   1. e.g., complaint, answer, counterclaim, etc.
B. Claim must identify the basis
   1. i.e., specify the exception to the American Rule
C. Claim is waived, unless so pled, or leave to amend is granted.
D. Bifurcate the issue, by Order, OR
   1. be prepared to prove the fees as an element of damages in case in chief
   2. Lee v. Mulford, 269 Va. 562 (2005) (jury verdict for Plaintiff on promissory note foreclosed Plaintiff's right to recover attorney's fees post-trial, because the issue was neither presented to the jury nor preserved for the court)

IV. When in Fairfax, do . . . . Fairfax Circuit Procedures Manual (2010) –

A. Confirms affidavits acceptable to recover attorney's fees on default judgments and uncontested cases
B. Provides form affidavit
C. Invites motion to determine *the procedure* for proving attorneys fees
   1. affidavits and/or expert testimony
   2. otherwise, must identify experts on issue per standard pre-trial Order
D. Addresses when a statute is the basis of recovery –
   1. award usually determined by judge post-trial
   2. except, beware: Va. Consumer Protection Act cases

V. Keep reasonably detailed billing records

A. so that time spent and costs incurred on successful claims – or those claims which are "attorney's fees eligible" – can be sorted from the others
B. sufficiently detailed and specific
C. consider not "lumping"
   1. i.e., the practice of showing just one time entry for several different tasks performed
   2. also referred to as "clumping," "mixed entries," and "block entries"
   3. generally criticized by the courts, and a basis for reducing the award requested
   4. e.g., Guidry v. Clare, 442 F. Supp. 2d 282, 294 (E.D. Va. 2006):

> Inadequate documentation includes the practice of grouping, or "lumping," several tasks together under a single entry, without specifying the amount of time

spent on each particular task. *See, e.g., In re Great Sweats, Inc.*, 113 B.R. 240, 244 (Bankr. E.D. Va. 1990) [**27] (disapproving the practice of "lumping" several tasks under a single entry without specifying the amount of time spent on each task so that no accurate determination of the reasonableness of the time expended can be made); *In re WHET, Inc.*, 58 B.R. 278, 280 (Bankr. D. Mass. 1986) (noting that "lumping" a day's activities makes attorneys' records of absolutely no value for any analytical purpose). * * * Lumping and other types of inadequate documentation are thus a proper basis for reducing a fee award because they prevent an accurate determination of the reasonableness of the time expended in a case.

5. Garbarino v. Corsair Studio, Inc., 2006 U.S. Dist. LEXIS 43909, 10-11 (S.D.N.Y. June 27, 2006) :

> I find, however, that the number of hours claimed should be reduced because several of the entries in the time records lacks sufficient detail -- they give a total number of hours for multiple tasks without delineating how much time was spent on each task individually, making it impossible to determine how many hours were spent on certain tasks. * * * Even if the time expended on these tasks was reasonable, the vagueness of the entries alone are [*11] enough to reduce the fee. *See Goldberg v. Blue Ridge Farms, Inc., supra*, 2005 U.S. Dist. LEXIS 42907, 2005 WL 1796116 at *3 ("Courts routinely reduce fee awards where time sheets contain such 'mixed entries' that do not provide the adversary the definiteness required to dispute their accuracy."), citing *Domegan v. Ponte*, 972 F.2d 401, 425 (1st Cir. 1992), *vacated and remanded on other grounds*, 507 U.S. 956, 113 S. Ct. 1378, 122 L. Ed. 2d 754 (1993), and *In re Donovan*, 278 U.S. App. D.C. 194, 877 F.2d 982, 995 (D.C. Cir. 1989); *U.S. Football League v. NFL*, 704 F. Supp. 474, 477 (S.D.N.Y.), aff'd, 887 F.2d 408 (2d Cir. 1989) (reducing fees because some entries in time records were vague).

6. Vitug v. Multistate Tax Comm'n, 883 F. Supp. 215, 224 (N.D. Ill. 1995):

> Equally problematic is the failure to disclose time spent on separate tasks performed in the same day. As exemplified by some of the passages above, in almost

every billing of more than two hours, several tasks are listed with no corresponding time allocated for each task - this practice has been disfavored as it makes evaluation of said services impossible. *See Domegan v. Ponte*, 972 F.2d 401, 425 (1st Cir. 1992) (criticized "mixed entries" - the lumping together of different activities), *vacated and remanded on other grounds*, 113 S. Ct. 1378 (1993).

D. And avoid including attorney-client confidences
   1. billing records are essential evidence in the recovery of attorney's fees
   2. redaction can be time-consuming, inaccurate, and successfully objected to

VI. **Keep in mind the Chawla "reasonableness" factors, *as you bill* –**
   A. Time and effort expended
   B. Nature of the services rendered
   C. Complexity of the services
   D. Value of the services to the client
   E. Results obtained
   F. Whether fees are consistent with those generally charged for similar services by others
   G. Necessity and appropriateness of services.
      1. Chawla v. Burgerbusters, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).

VII. Don't forget to claim/prove FUTURE attorney's fees and costs
   A. "If future services of an attorney will be required in connection with a case, the fact finder should make a reasonable estimate of their value. In so doing, the fact finder should estimate the time to be consumed, the effort to be expended, the nature of the services to be rendered, and any other relevant circumstances."
      1. Mullins v. Richlands Nat'l Bank, 241 Va. 447, 449 (Va. 1991)
   B. Articulate exactly what future services are anticipated and WHY they are anticipated
      1. e.g.,
         a. Defendant says he is judgment proof, plans to file for bankruptcy, has hidden his assets, or vows to resist payment of the judgment.
         b. Defendant has made a fraudulent conveyance [specify}, and plaintiff will have to file suit to set it aside and sell the real estate.
         c. Defendant has limited assets [detail]
         d. Defendant is resisting payment of other judgments [detail]

VIII. Keep handy cases, e.g., –

A. fee recovery not necessarily limited by amount recovered or amount in dispute

1. Coady v. Strategic Resouces, Inc., 258 Va. 12, 18 (1999)

B. fee recovery not necessarily limited by amount spent by opponent in case

1. Cangiano v. LSH Building Co., 271 Va. 171, 186 (2006)

IX. Consider Rule 1:1A after petition for appeal denied

A. Provides right to claim attorney's fees and costs incurred in defending judgment on appeal, where circuit court awarded them

B. Must be filed w/in 30 days of denial of petition

C. It is filed in same case that was appealed (case is reinstated on the docket)

D. Disposition of petition for award yields new (second!) final order

X. Consider asking Va. S. Ct to remand case for award of attorney's fees –

A. where Court reverses and enters final judgment in your favor

1. if contract or statute allowed for such an award, and it was pled and sought in the circuit court

Attorney's Fees:
Defenses to Claims in Virginia

I. Failure to Comply with Rule 3:25

Argument in support of Demurrer:

For each of the three Counts in his Complaint, Plaintiff seeks "reasonable attorneys' fees." Compl. at 6 and 7. However, Plaintiff fails to identify the basis on which he seeks attorney's fees as required by Virginia Supreme Court Rule 3:25(B), which provides as follows:

Claims for Attorney's Fees

Demand. -- A party seeking to recover attorney's 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 attorney's fees.

Argument:

Entirely absent from Plaintiff's Complaint is an alleged legal basis for his claim to attorneys' fees under any of the three asserted counts – indeed, there do not appear to be any recognized grounds in Virginia for the recovery of attorney's fees in the tort claims brought by Plaintiff. Accordingly, pursuant to Rule 3:25, Plaintiff's claim for attorneys' fees is legally deficient, and as such, it cannot survive Defendant's demurrer thereto.

II. Unreasonable (Generally)

a. Background: "An award of attorney's fees is a matter submitted to the trial court's sound discretion and is reviewable on appeal only for an abuse of discretion." *Cooke v. Cooke*, 23 Va. App. 60, 65, 474 S.E.2d 159 (1996); *Graves v. Graves*, 4 Va. App. 326, 333, 357 S.E.2d 554, 558 (1987). The "key to a proper award of counsel fees" is "reasonableness under all of the circumstances." *Cooke v. Cooke*, 23 Va. App. 60, 65, 474 S.E.2d 159 (1996); *McGinnis v. McGinnis*, 1 Va. App. 272, 277, 338 S.E.2d 159, 162 (1985). "To promote this determination, evidence in the record must explain or justify the amount of the award." *Cooke v. Cooke*, 23 Va. App. 60, 65-66, 474 S.E.2d 159 (1996); *Westbrook v. Westbrook*, 5 Va. App. 446, 458, 364 S.E.2d 523, 530 (1988). In determining whether requested attorneys' fees are reasonable, a court may consider the following factors:

1. The time and effort expended by the attorney;
2. The nature of the services rendered;
3. The complexity of the issues involved;
4. The value of the services to the client;
5. The amount in controversy;
6. The results obtained;
7. Whether the fees incurred were consistent with those generally charged for similar services;
8. Whether the services were necessary and appropriate; and
9. Future collection efforts by attorneys.

Chawla v. Burgerbuster, 255 Va. 616, 449 S.E.2d 829 (1998); *First Am. Bank v. MacDonald*, 30 Va. Cir. 299 (Fairfax County 1993); *Sugarland Run Homeowners Ass'n Inc. v. Couzins*, 28 Va. Cir. 334 (Loudoun County 1992).

b. A 92% reduction in the requested fees was not an abuse of discretion where the fees claimed in the attorney's affidavit were *unreasonable* because the work was often duplicative and constituted overkill, and the hours spent bore no relation to the result achieved. *Greenwald Cassell Assoc., Inc. v. Guffey*, 19 Va. App. 179, 180, 450 S.E.2d 181 (1984).

c. Fees requested in attorney's affidavit were *unreasonable* where less than $600 was spent on resolving the matter and over $5,400 was spent on collecting the attorney's fee. *Sugarland Run Homeowners Ass'n. Inc. v. Couzins*, 28 Va. Cir. 334 (Loudoun County 1992).

III. Unreasonable (Contract)

a. Where attorneys' fees are provided in a contract, the burden is on the non-moving party to show that the attorneys' fees requested are excessive or unreasonable. *Conway v. Am. Nat. Bank*, 146 Va. 357, 364-65, 131 S.E. 803 (1926); *First Am. Bank v. MacDonald*, 30 Va. Cir. 299 (Fairfax County 1993). Parties may provide for a specific amount or a percentage of attorney's fees in a contract, but if the contract is silent as to the amount of attorneys' fees to be awarded, a court will determine and award "reasonable attorney's fees." *Carpenter Landscape Serv. v. Fort Myer Const. Co.*, 39 Va. Cir. 390 (Fairfax County 1996).

b. The fee stipulated by contract is prima facie reasonable and should be paid unless the non-moving party can establish that the fees are excessive or unreasonable. *Conway v. Am. Nat. Bank*, 146 Va. 357, 364-65, 131 S.E. 803 (1926); *Parksley Nat. Bank v. Accomac Banking Co., Inc.*, 166 Va. 459, 462, 186 S.E. 38 (1936); *First Am. Bank v. MacDonald*, 30 Va. Cir. 299 (Fairfax County 1993); *Commonwealth Ex. Rel. SEAA v. Outlaw*, 9 Va. Cir. 280 (Richmond 1987).

c. Despite a contractual provision addressing payment of attorneys' fees, the court has the power to reduce the amount of attorneys' fees if the court finds the fees to be unreasonable or unconscionable. *Richardson v. Breeding*, 167 Va. 30, 33, 187 S.E. 454 (1936); *Cox v. Hagan*, 125 Va. 656, 679, 100 S.E. 666 (1919); *Triplatt v. Second National Bank*, 121 Va. 189, 193, 92 S.E. 897 (1917); *First Am. Bank v. MacDonald*, 30 Va. Cir. 299 (Fairfax County 1993).

IV. Plea in Bar: The "American Rule"

Recovery barred by the "American Rule," which strictly limits a party's entitlement to recover from another party his legal fees and expenses. *See above.*

V. Motion *in limine* to Exclude Evidence of Attorneys' Fees Where He Failed to Designate an Expert or Produce Invoices and Affidavits in Discovery

Argument:

> *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.*
>
> *Here, the Plaintiff has affirmatively represented to the court that he intends not to call any expert witness relating to attorneys' fees (or at all, on any subject), and he concedes that he identified no expert witness in discovery. This is consistent with his interrogatory responses, which declined to identify any persons as potentially being called to provide expert testimony. Accordingly, given his*

failure to comply with the discovery rules, see, e.g., Va. Sup. Ct. R. 4:1(b)(4)(A), and given his failure to designate expert witnesses when required by the Pretrial Scheduling Order, see Uniform Pretrial Sched. Order ¶ III, Plaintiff should not be permitted to surprise Defendants by presenting any expert evidence or testimony relating to the alleged reasonableness of his attorneys' fees in the previous cases.

Furthermore, Plaintiff has not produced any affidavits or invoices in support of his claim for attorneys' fees. Therefore, Plaintiff's reliance on Tazewell and Seyforth is misplaced. In both of the exceptions cited above, the party seeking reimbursement of fees offered/proffered comprehensive evidence from its lawyers. In the Tazewell case, unrefuted affidavits were submitted from attorneys, which described the necessity and reasonableness of the fees incurred. Likewise, in the Seyfarth case, the plaintiff proffered that a lawyer from its firm would testify "about the nature of the legal services provided to the defendants, the complexity of those services, the value of those services to the defendants, and that the services were necessary and appropriate." 253 Va. At 97, 480 S.E.2d at 473. The Virginia Supreme Court ruled in both cases that the detailed factual evidence offered/proffered in support of the claim for attorneys' fees was sufficient for the fact finder to infer the "necessity" and "reasonableness" of the fees.

This case is distinguishable from Tazewell and Seyforth. First, there is an apportionment issue in this case regarding claims upon which Plaintiff did not prevail, which appears to be absent in those cases. Second, Plaintiff offers none of the factual evidence upon which the Tazewell and Seyforth rulings relied. Plaintiff never produced his lawyers' bills in discovery; nor did he produce affidavits justifying the time consumed, the effort expended, the nature of the services rendered, or any other attending circumstances necessary for a determination of reasonableness of the Plaintiff's attorneys' fees. Plaintiff also failed to identify witnesses from his attorneys' law firm who could provide testimony regarding the "nature," "complexity," or "value" of the services rendered to Plaintiff or that the services were "necessary and appropriate." Accordingly, Plaintiff should be precluded from admitting any evidence in support of his claims for attorneys' fees.

VI. Failure to Allocate Fees among the Various Causes of Action at Issue

Argument:

In a case involving a claim for attorneys' fees, a party is only entitled to recover fees for the portions of the cause on which he prevailed. Chawla v. BurgerBusters, Inc., 255 Va. 616, 621, 499 S.E.2d 829, 821-32 (1998). Moreover, he must apportion his attorneys' fees among his various causes of action to account for counts on which he did not prevail and to account for counts under which he is not entitled to recover attorneys' fees. Ulloa v. QSP, Inc., 271 Va. 72, 83, 624 S.E.2d 43, 50 (2006). Therefore, any attorney time spent researching, preparing and serving discovery and/or litigating the dismissed

Counts must be excised from Plaintiff's attorneys' fees claim. It is Plaintiff's burden to apportion the attorneys' fees to those counts upon which he prevailed.

Here, Plaintiff has utterly failed to provide any evidence demonstrating the allocation of his attorneys' fees among his various theories of recovery; nor has he provided any information demonstrating which fees were allocable to causes of action that he lost. Accordingly, Plaintiff's failure to allocate fees is fatal to his claim.

VII. Domestic Relations Cases

§ 16.1-278.19. Attorney's Fees.

"In any matter properly before the court, the court may award attorney's fees and costs on behalf of any party as the court deems appropriate, based on the relative financial ability of the parties."

Argument:

The standard in domestic relations cases is "need and ability to pay." Thus, Plaintiff's claim for fees must fail because Plaintiff neglected to introduce evidence of income.

VIII. Defenses to Common Law Indemnification Claim by Agent

a. Discuss *Cohen v. Ruskin,* Alexandria Circuit Court Case No. CL11-5257 (jury denied agent's claim for indemnification of attorneys' fees incurred in prior lawsuit with principal)

b. The exception for recovery of attorneys' fees incurred in defending a suit brought by a third party does not apply where the fees and related legal expenses were incurred in former litigation "between the same parties." *Hiss v. Friedberg,* 201 Va. 572, 579 (1960)

c. When the expense incurred is due to the agent's own fault, indemnification is inappropriate. *See* Restatement (Third) Of Agency § 8.14 cmt. b (2006) ("A principal's duty to indemnify does not extend to losses that result from the agent's own negligence, illegal acts, or other wrongful conduct."); *see also Long v. Vlasic Food Prods. Co.*, 439 F.2d 229, 231 (4th Cir. 1971) (agent has burden to show reasonableness and good faith). And specifically, in the context of litigation *by third parties* (but never between principal and agent themselves), the Restatement (Third) of Agency provides that indemnity is appropriate "so long as the agent acted reasonably and in good faith." *Id.* at cmt. d.

d. When the expense stems from activity taken in the agent's individual capacity and outside the scope of his duties to the principal, indemnification is inappropriate. *See* Restatement (Third) Of Agency § 8.14, Reporter's Note b (2006) (citing *In re Miller*, 290 F.3d 263, 267 (5th Cir. 2002)).

e. When the agent's expense is of no benefit to the principal, indemnification is inappropriate. *See* Restatement (Third) Of Agency § 8.14 cmt. b (2006) ("An agent's right to be indemnified by the principal for payments made to third parties is not unlimited. If the agent acted without actual authority in making the payment, the principal has a duty to indemnify the agent only if the principal benefited from the payment and the agent did not act officiously in making it. An agent acts officiously in making a payment without actual authority when, under the circumstances, the agent's action was not excusable.")

IX. Equitable Defenses in Fraud Cases

"The Court's equitable powers permit an award of attorney's fees in a fraud case. 'Equity deals with the substance and not the form, and will grant such relief as far as possible by allowing compensation for the damages sustained by reason of the fraud.'" *Anderson v. Sharma*, 38 Va. Cir. 22, 33 (Fairfax County 1995) (citing *Millboro Co. v. Augusta Corp.*, 140 Va. 409, 421, 125 S.E. 306 (1924)).

a. Laches bars prosecution of an equitable claim after an unconscionable amount of time has passed and the defendant has been prejudiced by the delay in assertion of plaintiff's rights.

b. Unclean hands is a doctrine barring relief to a plaintiff who has been guilty of inequitable conduct, and hence is one who should not benefit from the relief of a court of equity.

c. Equitable estoppel may also be a defense to an equitable claim where a person has reasonably relied on a statement or conduct relating to present or past events, which was intended to be relied on, and which resulted in a detrimental change of position by the relying party.