

2016 EDITION

Attorney Fees and Sanctions — Virginia and Federal Courts

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Putting Law Into Practice™



Attorney Fees and Sanctions - Virginia and Federal Courts

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VIRGINIA LAWYERS PRACTICE HANDBOOK

ATTORNEY FEES AND SANCTIONS
VIRGINIA AND FEDERAL COURTS

Second Edition

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CHAPTER 1

VIRGINIA ATTORNEY FEE AWARDS

1.1 GENERAL OVERVIEW

1.101 Virginia Follows American Rule. In general, attorney fees are not recoverable as damages.¹ Virginia follows the “American rule” in that, absent a specific contractual or statutory provision to the contrary, attorney fees are generally not recoverable by a prevailing party.²

A. Shifting Responsibility by Contract. Parties to a contract may choose to adopt provisions that shift the responsibility of attorney fees to the losing party in disputes involving the contract.³

B. Authority of Trial Courts. While trial courts possess inherent power to supervise the conduct of attorneys practicing before them and to discipline an attorney who engages in misconduct, they do not have the power to impose as a sanction the award of attorney fees to opposing parties absent statutory authorization.⁴

1.102 General Approach to Awarding Fees. The general approach to awarding attorney fees when statutorily or otherwise available is set out in *Chawla v. BurgerBusters, Inc.*⁵ A party who wishes to recover attorney fees must establish as a part of the prima facie case that the fees are reasonable. The court may consider, among other things, any of seven listed factors to determine what a reasonable fee award should be. The seven factors are:

1. The time and effort expended by the attorney;
2. The nature of the services rendered;
3. The complexity of the services;

¹ *East Tex. Salvage & Mach. v. Duncan*, 226 Va. 160, 161, 306 S.E.2d 896, 897 (1983).

² *Lee v. Mulford*, 269 Va. 562, 565, 611 S.E.2d 349, 350 (2005).

³ *Ulloa v. QSP, Inc.*, 271 Va. 72, 624 S.E.2d 43 (2006); *Mullins v. Richlands Nat'l Bank*, 241 Va. 447, 449, 403 S.E.2d 334, 335 (1991).

⁴ *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007).

⁵ 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).

4. The value of the services to the client;
5. The results obtained;
6. Whether the fees incurred were consistent with those generally charged for similar services; and
7. Whether the services are necessary and appropriate.⁶

1.103 Exceptions in Which Fees Are Allowed. In addition to the five exceptions discussed in this paragraph, the court may otherwise determine an award is equitable.⁷

A. Fraud at Common Law. The court has discretion to award reasonable fees to the defrauded party.⁸ However, the award of fees is limited to where the defrauded party is seeking equitable relief.⁹

B. Malicious Prosecution or False Imprisonment. Fees are permitted to the prevailing plaintiff in cases of malicious prosecution or false imprisonment.¹⁰

C. Suits Against Third Parties. When a party prevails in a suit he or she was forced to bring against a third party because of the defendant's breach, the attorney fees for that third-party suit may be recovered from the original breaching party.¹¹

D. Divorce and Domestic Support Obligations. A spouse is entitled to recover attorney fees in some cases of divorce or domestic support, particularly if the litigation was protracted due to the other spouse's recalcitrance or failure to pay already assessed domestic support.¹²

⁶ *Id.* (citing *Seyfarth, Shaw v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 96, 480 S.E.2d 471, 473 (1997)).

⁷ Va. Code § 17.1-600; *City of Richmond v. Henrico Cnty.*, 185 Va. 859, 41 S.E.2d 35 (1947).

⁸ *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 301 (1999). *But cf. Tauber v. Commonwealth ex rel. Kilgore*, 263 Va. 520, 546-47, 562 S.E.2d 118, 132-33 (2002) (court did not abuse discretion in declining to award fees).

⁹ *Bershader v. Prospect Dev. Co.*, 47 Va. Cir. 20, 34 (Fairfax 1998) (Stitt, J.); *see also Oswald v. Holtzman*, 90 Va. Cir. 9 (Fairfax 2015) (Devine, J.). *Contra Doddy v. Zedd Auctioneers, Ltd.*, 77 Va. Cir. 272 (Norfolk 2008) (Martin, Jr., J.).

¹⁰ *Prospect Dev. Co.*, 258 Va. at 92, 515 S.E.2d at 300 (citing *Burruss v. Hines*, 94 Va. 413, 420, 26 S.E. 875, 878 (1897)); *Bolton v. Vellines*, 94 Va. 393, 404, 26 S.E. 847, 850 (1897).

¹¹ *Hiss & Rutledge v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (1960).

¹² *Carswell v. Masterson*, 224 Va. 329, 295 S.E.2d 899 (1982).

E. Trustees. When a trustee must defend the trust in good faith in a suit brought against it, attorney fees may be recovered.¹³

1.2 PROCEDURE

1.201 Rule 3:25. Claims for attorney fees are covered by Rule 3:25 of the Rules of the Supreme Court of Virginia, which was added by order of February 27, 2009 and became effective May 1, 2009. The rule reads as follows:

Rule 3:25. Claims for Attorney's Fees

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

B. 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.

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 attorney's fees, unless leave to file an amended pleading seeking attorney's 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 attorney's fees.

1.202 Time for Making Demand for Fees. Rule 3:25 of the Rules of the Virginia Supreme Court states that parties seeking to recover attorney fees should include the demand for those fees in the complaint, counterclaim, cross claim, third-party pleading, or responsive pleading. That

¹³ *Cooper v. Brodie*, 253 Va. 38, 480 S.E.2d 101 (1997).

demand should identify the basis on which the party relies in requesting attorney fees.

The court's jurisdiction to award attorney fees is lost 21 days after entry of a final order, unless the final order reserves jurisdiction to the trial court to award attorney fees at a later time.¹⁴ A court order is final where it disposes of the whole subject, gives all relief that was contemplated, and leaves nothing to be done in the cause save to superintend ministerially the execution of the decree.¹⁵

In *Ey v. Blume*,¹⁶ the defendant's motion for attorney fees and sanctions was denied, when at no time between the entry of the first nonsuit order and the entry of the second nonsuit order did the defendant make a subsequent demand for attorney fees in accordance with Rule 3:25, which applies to claims for nonsanctionable fees. The only matter filed between the two nonsuits was defendant's motion for fees and sanctions pursuant to section 8.01-271.1. As a result, there was no claim for attorney fees, as opposed to sanctions, pending at the time the court entered the final nonsuit order.

1.203 Fee Requests Must Be Pleaded with Specificity. When a contract provides for fee recovery in a specific type of dispute, an attorney's request for fees must indicate exactly what services the attorney provided on each separate issue. Otherwise, there is no recovery.¹⁷

In *Shen Valley Masonry, Inc. v. Thor, Inc.*,¹⁸ the court stated

Thor's responsive pleading sought the following relief: WHEREFORE, having fully responded to the allegations stated in the Complaint, Thor requests that this Court dismiss the Complaint with prejudice, grant Thor its attorneys' fees and expenses to the extent allowed by law, and grant such further and other relief as this Court deems just and proper. This does not meet Rule 3:25's specificity requirement.

¹⁴ Rule 1:1.

¹⁵ *Rebarick v. Georgetown Woods Owners Ass'n*, 62 Va. Cir. 155 (Fairfax 2003) (Thacher, J.).

¹⁶ CL-2014-10534, 2016 Va. Cir. LEXIS 6, 6-8 (Fairfax Feb. 5, 2016).

¹⁷ *Prologis Trust v. DuPont Commercial Flooring Sys.*, 63 Va. Cir. 347 (Loudoun 2003) (Chamblin, J.).

¹⁸ 81 Va. Cir. 89, 91 (Roanoke City 2010) (Apgar, J.).

Rule 3:25 would bar Thor from recovering attorney fees, but the court declined to apply it retroactively.

1.204 Proof of Fees Must Be Presented at Trial. Absent agreement of the parties with the concurrence of the court, or pursuant to contract or statute with specific provisions, a litigant is not entitled to bifurcate the issues and have the matter of attorney fees decided by the trial court in post-verdict proceedings.¹⁹ A “[p]laintiff cannot adopt a litigation strategy that allows it to reserve for another day the reasonableness of the fees associated with [an] action. . . .”²⁰

In *Trimark Corp. v. Affectionate Pet Care, L.L.C.*,²¹ the defendant was not entitled to bifurcate the issue of attorney fees in a post-trial proceeding since the plaintiff had the right to insist that the issue be submitted to the jury, and there was no agreement of the parties to reserve the matter for a post-trial proceeding.

In a suit arising from the termination of a corporation’s chief executive officer from employment, the trial court granted the plaintiff’s unopposed pretrial motion to defer the issue of attorney fees and expenses until after the trial, and both parties endorsed the order as “agreed.” After trial, the court denied the plaintiff’s motion for attorney fees, finding the basis for the demand was not sufficiently pled pursuant to Rule 3:25. The trial court then granted the plaintiff’s motion for leave to amend, pursuant to Rule 1:8, and awarded attorney fees. On appeal, the attorney fee award in regard to the severance agreement was sustained, the court relying on the admission, in the defendant’s brief, that the plaintiff had disclosed before trial that he planned to seek fees with respect to the severance agreement.²²

1.3 TYPE OF CASES WHERE ATTORNEY FEES AWARDED PURSUANT TO STATUTE

1.301 Prevailing Party.

A. “Prevailing Party” Defined. A party is a “prevailing party” and entitled to an award of attorney fees “if he succeeds on ‘any significant issue in litigation which achieves some of the benefit [he] sought in bringing

¹⁹ *Lee v. Mulford*, 269 Va. 562, 611 S.E.2d 349 (2005).

²⁰ *Fairfax Square LLC v. Hermes of Paris, Inc.*, 89 Va. Cir. 406, 420 (Fairfax 2015) (Tran, J.).

²¹ 88 Va. Cir. 406, 408 (Fairfax 2014).

²² *Online Res. Corp. v. Lawlor*, 285 Va. 40, 736 S.E.2d 886 (2013).

suit.”²³ “Prevailing party” is a “party in whose favor a judgment is rendered, regardless of the amount of damages awarded.”²⁴ “Prevailing party” is the “successful party.”²⁵ There is no prevailing party in a nonsuited action.²⁶ When a nonsuited action is refiled, there is no basis to seek the fees incurred in the prior action because they are distinct actions and no party prevailed in the prior action.²⁷

B. Examples of Prevailing Parties Statutes.

1. Virginia Consumer Protection Act. Under the Virginia Consumer Protection Act, codified at section 59.1-207.14 of the Virginia Code,

[a]ny consumer who suffers loss by reason of a violation of any provision of this chapter may bring a civil action to enforce such provision. Any consumer who is successful in such an action or any defendant in any frivolous action brought by a consumer shall recover reasonable attorney fees, expert witness fees and court costs incurred by bringing such actions.

Consumers that prevail on allegations of fraud are entitled to recover attorney fees in addition to any punitive damages the jury may award. Attorney fees serve a separate purpose of encouraging private enforcement.²⁸ Where a statute provides for recovery of “reasonable” fees, the court will apply the seven *Chawla v. BurgerBusters, Inc.* factors to determine reasonableness.²⁹

The ratio of attorney fees to recovery is not necessarily relevant under fee-shifting statutes because those statutes are designed to encourage private enforcement of the statute. Attorneys should not be penalized for pursuing cases in which the potential monetary recovery is small. As long as the value of services rendered by counsel is significant and successful in

²³ *Commonwealth v. Lotz Realty Co.*, 237 Va. 1, 11, 376 S.E.2d 54, 59 (1989).

²⁴ *Sheets v. Castle*, 263 Va. 407, 413, 559 S.E.2d 616, 620 (2002).

²⁵ *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 548-49, 587 S.E.2d 521, 523 (2003).

²⁶ *Sheets*, 263 Va. at 414, 559 S.E.2d at 620.

²⁷ *Tureson v. Open Sys. Scis. of Va., Inc.*, 86 Va. Cir. 473 (Fairfax 2013) (Maxfield, J.).

²⁸ *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 587 S.E.2d 581 (2003) (litigant entitled to \$34,183 in attorney fees and costs, in addition to \$100,000 punitive and \$4,000 compensatory damages).

²⁹ *Couch v. Manassas Autocars, Inc.*, 77 Va. Cir. 30 (Prince William 2008) (Alston, J.).