

## RECOVERING ATTORNEY'S FEES IN COMMERCIAL LITIGATION

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### 1. GENERAL RULE

#### 1. State Court

1. **Rule:** Virginia adheres to the “American Rule” regarding recovery of attorney fees which provides that attorney’s fees are not recoverable as damages absent contractual or statutory authority. Mullins v. Richlands Nat. Bank, 241 Va. 447, 403 S.E.2d 334 (1991); State Farm Fire and Cas. Co. v. Scott, 236 Va. 116, 372 S.E.2d 383 (1988); East Texas Salvage & Mach. v. Duncan, 226 Va. 160, 306 S.E.2d 896 (1983); see also Ryder v. Petrea, 243 Va. 421, 416 S.E.2d 686 (1992)(finding no exception to the American Rule in this case and denying request for attorney’s fee). See Sections I and II, infra.

#### 2. Other Exceptions:

1. Attorney’s fees may also be recovered pursuant to the Rules of the Supreme Court of Virginia. See Section IV, infra.
2. Attorney’s fees may also be recovered as damages where the defendant’s conduct has forced the plaintiff to maintain or defend a suit against a third party. See Section V, infra.

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3. **Rationale:** The general rule was developed because there is no fixed standard by which the honorarium can be measured. Some counsel demand more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is a danger of abuse. Kemp v. Miller, 166 Va. 661, 186 S.E. 99 Va. 161 (1936).

2. Federal Court

1. **Rule:** Federal Courts also follow the American Rule, which provides that, absent a contrary provision of statute, rule of court, or contract, or a contrary requirement of applicable state law, the prevailing party in an action in federal court is not entitled to counsel fees. Turja v. Turja, 118 F.3d 1006 (4th Cir. 1997); TransDulles Center, Inc. v. USX Corp., 976 F.2d 219 (4th Cir. 1992).

2. **Exceptions to the American Rule Applicable in Federal Court:**

1. The Fund or Common Benefit Theory: A federal court has the discretion to award counsel fees to a party who, having a common interest with other persons, maintains a suit for common benefit and at his own expense, resulting in the creation or preservation of a “fund” in which all those having a common interest share. The United States Supreme Court upheld such attorney’s fees awards in Mills v. Electric Auto-lite Co., 396 U.S. 375 (1970), and Hall v. Cole, 412 U.S. 1 (1973).

(1) In Mills, the plaintiffs were shareholders bringing a derivative suit which benefited all the shareholders of the corporation. The Court reasoned that by taxing the defendant corporation with attorney’s fees, all of the benefiting shareholders shared the cost. Mills v. Electric Auto-lite Co., 396 U.S. 375 (1970).

(2) In Hall, the plaintiff union members sued the union and benefited all the members of the union by the lawsuit. The Court

reasoned that by taxing the defendant union with attorney's fees all of the benefiting union members share the costs. Hall v. Cole, 412 U.S. 1 (1973).

- (3) The fund theory does not authorize an award of attorney's fees where taxing defendant with attorney's fees would spread the cost only among the defendant's shareholders, not among the general public which benefited from the lawsuit. Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1161 (C.D. Cal. 1976).
- (4) No attorney's fees were awarded where the Fourth Circuit reversed grant of injunction and remanded case with instructions to dismiss the action and the District Court declined to find that Plaintiff's actions constituted a "substantial benefit." Allen v. Lloyd's of London, 975 F. Supp. 802 (E.D. Va. 1997).

2. The Conduct Theory: In extraordinary cases involving groundless, oppressive, vexatious conduct, a federal court has authority, in the interest of justice, to award counsel fees. Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836 (E.D. Va. 1968); Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (4th Cir. 1951).

## 2. STATUTORY AUTHORITY

1. In some instances the Virginia Code provides that attorney's fees **may** be awarded, in the court's discretion, while in others the Code mandates that fees **shall** be awarded. The following are Virginia Code Sections related, or tangentially related, to commercial or business litigation matters where attorney's fees may/shall be recovered:
  1. Va. Code '2.1-346 -- **Violations of the Freedom of Information Act**. If the court finds a denial by a board, bureau, commission etc. of the state government to be a violation of the Freedom of Information Act, the petitioner

**shall** be entitled to reasonable attorney's fees from the public body.

2. Va. Code ' 8.01-42.1(B) -- **Racial, religious or ethnic harassment.** Any aggrieved party who initiates and prevails in an action for racial, religious or ethnic harassment **may**, in the court's discretion, recover reasonable attorney's fees.
3. Va. Code ' 8.01-92 -- **Partition actions.** In a partition suit where there are unrepresented shares, the court **shall** allow reasonable fees to the attorney bringing the action on account of the services rendered to the parcener(s) unrepresented by counsel. See Buchanan Realty Corp. v. Looney, 201 Va. 432, 111 S.E.2d 410 (1960) (attorney's fee should be paid by landowners in proportion to their respective interests).
4. Va. Code ' 8.01-266 -- **Removal and Frivolous Motions.** A party having to remove a suit to a proper forum or defend against a frivolous motion to transfer to a convenient venue **may** recover reasonable attorney's fees.
5. Va. Code ' 8.01-271.1 -- **Signing of pleadings, motions, and other papers.** If a pleading, motion or other paper is signed or made in violation of this good faith rule, the court shall impose upon the person who signed the paper or made the motion, an appropriate sanction which **may** include reasonable attorney's fees.
  1. The Virginia Supreme Court overturned a trial court's award of attorney's fees to plaintiff based on trial court's determination that defendant, zoning board, filed a defense not warranted by existing law. The Court found that the zoning board reasonably believed that it was authorized to act on a request for rezoning and therefore was justified in filing its defensive pleading. See County of Prince William v. Rau, 239 Va. 616, 391 S.E.2d 290 (1990).
  2. Where an ambiguous letter was sent from reverend to couples making couples question the validity of their marriages, couples sued reverend and court

denied cross motions for attorney's fees finding that the action for declaratory judgment was not frivolous. Gottlieb v. Crouch, 44 Va. Cir. 268 (Arlington 1998).

3. Court denied attorney's fee to husband where wife moved for increased spousal support alleging that brain injury prevented her from earning income but failed to prove her allegations. Zoll v. Zoll, 44 Va. Cir. 249 (Fairfax County 1997).
4. Court sanctioned petitioner to reimburse the Commonwealth in its efforts to respond to petition on behalf of the Governor where petitioner's numerous, identical petitions had been rejected by various courts and judges of the Commonwealth. Davis v. Allen, 44 Va. Cir. 237 (Richmond 1997).
5. Court ordered defendant to pay plaintiff reasonable attorney's fees where defendant failed to appear for trial, defendant contested notice, a new trial was set, and defendant failed to appear at the new trial. Lininado v. Jefferson, 43 Va. Cir. 228 (Richmond 1997).
6. Attorney's fees awarded where court found that husband's unconscionability claim was unfounded and interposed for an improper purpose. Goodin v. Goodin, 42 Va. Cir. 89 (Loudoun County 1997).
7. Court found action unfounded and ordered creditor to pay garnishee's attorney's fees where there was no service on the garnishee and no indication that at the time of execution of the garnishment summons that the garnishee was either indebted to the judgment debtor or entitled to recover from the judgment creditor upon any claims for such property. Berge v. Novitsky, 37 Va. Cir. 147 (Loudoun County 1995).
6. Va. Code ' 8.01-380(B) -- **Nonsuit**. The code provides for one nonsuit as of right; if additional nonsuits are requested and allowed, the trial court **may** assess costs and reasonable attorney's fees against the nonsuiting party.

7. Va. Code ' 9-6.14:21 -- **Recovery of attorney's fees from agency.** Under ' 9-6.14:15 et seq., the Court Review chapter of the Administrative Process Act, plaintiff can contest case decisions regarding the grant or denial of aid to dependent children, Medicaid, food stamps, general relief, auxiliary grants, or state/local hospitalization. If plaintiff prevails on the merits and the agency's position was not substantially justified, plaintiff **shall** be entitled to recover a reasonable attorney's fee.
  
8. Va. Code ' 11-33 -- **Costs and attorney's fee in suit on credit card.** If credit cardholder receives credit card from issuer without requesting the card, does not consent in writing to issuance of such a credit card and does not use the credit card yet is compelled to defend a suit by issuer for any amount owing because of use of the credit card, a court **shall** award defendant cardholder reasonable attorney's fees if the request, consent or use required above is denied and not proved by the issuer.
  
9. Va. Code ' 13.1-329 -- **Marketing contracts.** An association and its members may make and execute a marketing contract requiring members to sell, for any period of time, all or part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. A corporation conducting a public tobacco warehouse who knowingly solicits to breach a marketing contract with the association **shall** pay to the association a reasonable attorney's fee.
  
10. Va. Code ' 18.2-500 -- **Business conspiracy.** Persons injured under Code ' 18.2-499 (conspiracies to injure businesses, trades and reputations are punishable as misdemeanors) **may** sue for injuries and recover a reasonable attorney's fee.
  1. The Virginia Supreme Court upheld an award to the plaintiff of \$472,000 in attorney's fees based on time records and affidavits in which attorneys attest to the accuracy of time billed and reasonableness of hourly rates. Tazewell Oil Co. v. United Virginia Bank, 243 Va. 94, 413 S.E.2d 611 (1992).

2. Court awarded defendant its reasonable attorney's fees based on a finding that defendant had substantially prevailed in action under '18.2-499. Dove v. Dayton Town Council, 39 Va. Cir. 159 (Rockingham County 1996).
11. Va. Code ' 19.2-69 -- **Civil action for unlawful interception, disclosure or use**. Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this section **shall** be entitled to recover a reasonable attorney's fee.
12. Va. Code ' 36-85.26 -- **Dealer alterations**. A manufacturer **shall** be entitled to a reasonable attorney's fee from dealer if dealer modifies manufactured home after shipment from manufacturer's plant and manufacturer fulfills warranty on modified item.
13. Va. Code ' 36-96.1 -- **Private right of action under Virginia Fair Housing Law**. If a Court finds that a discriminatory practice has occurred or is about to occur in violation of the Virginia Fair Housing Law, the Court **may** award attorney's fees to plaintiff.
14. Va. Code ' 38.2-209 -- **Bad faith denial of insurance coverage**. Where court finds that insurer, not acting in good faith, denies coverage, insured **shall** be entitled to reasonable attorney's fees.
15. Va. Code ' 38.2-807 -- **Unlicensed insurer**. In action against an unlicensed insurer, a court **may** award plaintiff a reasonable attorney's fee if (1) the insurer has failed to make payment in accordance with the terms of the contract for thirty days after demand prior to the commencement of the action and (2) the court concludes that the refusal was vexatious and without reasonable cause.
16. Va. Code ' 38.2-1916.2 -- **Insurance rate fixing**. The Commission **may** require an insurer, rate service organization, or other person, who knowingly or willfully violates any provision of ' 38.2-1916 (prohibiting insurers and rate service organizations from monopolistic

combinations, rate fixing, restraints of trade and other efforts to lessen competition) to pay attorney=s fees.

17. Va. Code ' 55-79.84(E) -- **Lien for assessments**. This section provides that the unit owner's association shall have a lien on every condominium unit for unpaid assessment levied against the condominium unit. Any Judgment or decree in an action brought pursuant to this section **shall** include, without limitation, reimbursement of attorney=s fees.
18. Va. Code ' 55-82 – **Creditor's suit to avoid gifts, etc.** If gift is held to be void, the court **shall** allow counsel for the creditor a reasonable attorney's fee to be paid out of proceeds of sale as long as the fee does not affect a prior lien creditor.
19. Va. Code ' 55-248.2 – **Tenant's remedies**. Tenant **may** recover a reasonable attorney's fee if landlord willfully violates the Residential Landlord-Tenant Act. For specific statutes, see " 55-248.21, 55-248.22, 55-248.23, 55-248.25, and 55-248.26.
20. Va. Code ' 55-515 -- **Property Owner's Act**. A prevailing party in a suit for noncompliance under the Virginia Property Owner's Act **shall** be entitled to recover reasonable attorney's fees.
21. Va. Code ' 59.1-9.12(b) -- **Antitrust**. Any person injured in his business or property by reason of violation of the Virginia Antitrust Act **may** recover attorney's fees.
22. Va. Code ' 59.1-21.23(d) -- **Equal Credit Opportunity Act**. In the case of any successful action to enforce a liability under the Equal Credit Opportunity Act, reasonable attorney's fees **shall** be added to any damages awarded by the court.
23. Va. Code ' 59.1-68.3 -- **Home Solicitation Sales Act and Private right of action under criminal statute prohibiting misrepresentations in sales**.
  1. Home Solicitation: A court **may** award attorney's fees to any person who suffers as a result of a

violation of Title 59.1, Chapter 21, the Home Solicitation Sales Act.

2. Misrepresentation in Sales: A court **may** award attorney's fees to any person who suffers as a result of a violation of Title 18.2, Chapter 6, Article 8, Va. Code " 18.2-214 to 18.2-246. This article prohibits, for example, tampering with trademark or identification marks (' 18.2-214); untrue, deceptive or misleading advertising (' 18.2-216); advertising merchandise for sale with intent not to sell at price or terms advertised (' 18.2-217); misrepresentation as to source of merchandise (' 18.2-222); regulating sale of merchandise marked "gold" (' 18.2-235); and use of games, lotteries etc. for promoting sale of certain products.
  
24. Va. Code ' 59.1-204 -- **Consumer Protection Act**. Any person who suffers loss as a result of a violation of the Consumer Protection Act **may** recovery reasonable attorney's fees.
  
25. Va. Code ' 59.1-207.14 -- **Virginia Lemon Law**. A consumer who is successful in a Lemon Law suit or a defendant in a frivolous Lemon Law action **shall** recover a reasonable attorney's fee.
  
26. Va. Code ' 59.1-338.1 -- **Misappropriation of trade secrets**. A court **may** award attorney's fees for bad faith or willful and malicious misappropriation. See American Sales Corp. v. Adventure Travel, Inc., 862 F. Supp. 1476 (E.D. Va. 1994) (denying request for attorney's fees under the Uniform Trade Secrets Act for misappropriation of trade secrets in form of a customer list where the misappropriation was not shown to be willful or malicious).
  
27. Va. Code ' 59.1-352 -- **Farm machinery suits**. Dealer **may** recover reasonable attorney's fees where supplier violates Title 59.1, Chapter 27, setting out the statutory requirements for conduct between the supplier of farm equipment and the farm machinery dealership.
  
28. Va. Code ' 65.2-308 -- **Retaliatory discharge**. Where a plaintiff/ employee proves retaliatory discharge by his

employer for filing a worker's compensation case, the court "shall have jurisdiction ... to order ... attorney's incurred in connection with the suit.

2. Federal Statutes

1. 15 U.S.C. '1-7 -- **Sherman Act**. Attorneys fees **shall** be awarded in antitrust suits for violation of Sherman Act pursuant to '4 of the Clayton Act. See Section II, B, 2 infra. See also Blue Shield of Va. v. McCready, 457 U.S. 465 (1982); Sun Publishing Co. v. Mecklenburg News, Inc., 823 F.2d 818 (4th Cir. 1987).
2. 15 U.S.C. '15(a) -- **Clayton Act**. Section 4 of the Clayton Act provides that "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" **shall** recover reasonable attorney's fees.
  1. Award of attorney's fees as part of costs of successful antitrust suit is mandatory. Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir. 1976).
  2. The amount of attorney's fees to be awarded is within the discretion of the trial court. Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D. N.Y. 1970).
  3. Where prevailing party elects remedy provided by state law, and thereby forgoes its treble damage award, it should forego entire remedy provided by federal law, including attorney's fees. Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc., 845 F.2d 404 (2d Cir. 1988).
  4. Prevailing antitrust plaintiff is entitled to recover reasonable attorney's fees for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or to protect client's interest in pursuit of successful recovery of antitrust damages. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir. 1982).
  5. In granting relief under the Robinson-Patman Act, 15 U.S.C. ' 13 *et seq.*, courts may, acting pursuant to '4 for the Clayton Act, 15 U.S.C. '15(a), award attorney's fees. See e.g., David R. McGeorge Car

Co. v. Leyland Motor Sales, 504 F.2d 52 (4th Cir. 1974).

3. 15 U.S.C. '1117(a) -- **Lanham Act**. In Aexceptional cases, a court **may**, in its discretion, award reasonable attorney's fees for violation of the Lanham Act.
  1. The Fourth Circuit has given "exceptional" a different meaning depending on whether a plaintiff or a defendant prevails. Brenco, Inc. v. Roller, 1996 U.S. App. LEXIS 18171 (4th Cir. 1996).
  2. The Fourth Circuit has interpreted '1117 to require that a prevailing plaintiff "show that the defendant acted in bad faith." Playboy Enterprises v. Asiafocus Int'l, Inc., 1998 U.S. Dist. LEXIS 10359 (E.D. Va. 1998); Scotch Whisky Ass'n v. Majestic Distilling Co., Inc., 958 F.2d 594, 599 (4th Cir.), cert. denied, 506 U.S. 862, 113 S. Ct. 181, 121 L. Ed. 2d 126 (1992). "In reaching this conclusion, the Fourth Circuit relied upon legislative history referring to acts characterized as "malicious, fraudulent, deliberate and willful." Cardservice Int'l, Inc. v. McGee, 950 F. Supp. 737, 742 (E.D. Va. 1997).
  3. A prevailing plaintiff must prove defendant's bad faith, but a prevailing defendant may receive an award of attorney's fees on a showing of "something less." Brenco, Inc. v. Roller, 1996 U.S. App. LEXIS 18171 (4th Cir. 1996).
  4. In Playboy Enterprises, the Court held that the case was exceptional, that defendants' acts rose to the level of bad faith misconduct and that attorney's fees were appropriate where defendants willfully participated in the infringing acts and the defendants blatantly continued to participate in the infringement, even after plaintiff's cease-and-desist demand. Playboy Enterprises v. Asiafocus Int'l, Inc., 1998 U.S. Dist. LEXIS 10359 (E.D. Va. 1998).
  5. The case is not exceptional and request for attorney's fees is denied where a remanufacturer of

bearings alleges that a reconditioner of bearings has violated the Lanham Act; the remanufacturer mails notice to the reconditioner's customers including the unproven allegations; the reconditioner counterclaims for defamation; and a jury finds for the defendant, reconditioner, on its defamation claim. Brenco, Inc. v. Roller, 1996 U.S. App. LEXIS 18171 (4th Cir. 1996).

4. 15 U.S.C. '2310(d) -- **Magnuson-Moss Act**. If consumer prevails in action claiming violation of the Magnuson-Moss Act, then consumer **may** recover "attorneys' fees based on actual time expended."
  1. Consumer is entitled to attorney's fee. See FTC v. PPG Indus., 628 F. Supp. 881 (1996).
  2. Counsel may recover multiplier added to base attorney's fee because "a risk multiplier is based on actual time expended." See Skelton v. General Motors Corp., 661 F. Supp. 1368 (1987).
  3. Trial court did not err in awarding a reduced attorney's fee because statute permits the court to exercise its judgment to award no attorney's fees, to award fees based on time only, or to award fees pursuant to its discretion. See Hanks v. Pandolfo, 38 Conn. Supp. 447, 450 A.2d 1167 (1982).
5. 17 U.S.C. '505 -- **Copyright Act**. "The court in its discretion ... **may** also award a reasonable attorney's fee to the prevailing party as part of the costs." (Emphasis added).
  1. Defendant was held to be a "prevailing party" on copyright counts and attorney's fees were properly awarded where a court entered summary judgment in favor of defendant on claim alleging that defendant had committed copyright violations. Cramer v. Crestar Fin. Corp., 1995 U.S. App. LEXIS 25906 (4th Cir. 1995).
  2. A court should be guided by the following factors in determining whether to award costs and attorney's fees to a prevailing party under ' 505:

- (1) the motivation of the parties;
  - (2) the objective reasonableness of the legal and factual positions advanced;
  - (3) the need in particular circumstances to advance considerations of compensation and deterrence; and
  - (4) any other relevant factor presented. Lieb v. Topstone Indus., 788 F.2d 151, 156 (3d Cir. 1986); see also Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 n.19 (1994) (citing these factors with approval).
3. Meritless suit brought to harass newspaper for its fair use of church documents in news article on church actions against critics justifies award of attorney's fees to successful newspaper. Religious Technology Ctr. v. Lerma, 908 F. Supp. 1362 (E.D. Va. 1995).
  4. Defenses that are poor in both law and facts and litigation tactics that are disruptive and irrelevant to issues are considered in granting costs and attorney's fees to successful plaintiff. Superior Form Builders v. Dan Chase Taxidermy Supply Co., 881 F. Supp. 1021 (E.D. Va. 1994).
  5. Successful defense of a meritless claim of infringement justifies award of attorney's fees. Diamond Star Bldg. Corp. v. Sussex Co. Builders, 30 F.3d 503 (4th Cir. 1994).
  6. 35 U.S.C. '285 -- **Patent**. In a case of patent infringement, the court, in exceptional circumstances, **may** award reasonable attorney's fee to the prevailing party.
    1. Basis for awarding fees under 35 U.S.C. ' 285 must be exceptional; award should not be made in ordinary or typical patent infringement suits. See Continental Art Co. v. Bertolozzi, 177 F.2d 772 (7th Cir. 1956).

2. Where patent is procured by inequitable conduct before the Patent and Trademark Office and a frivolous infringement claim is pursued, case is exceptional and warrants award of attorney's fee. Mark Indus. v. Mobile Scaffolding Mgt. & Sales, Inc., 17 U.S. PQ.2d 1735 (1990).
3. Award of attorney's fee against manufacturer and supplier of material and method who undertook defense of infringement action against vendee was upheld. Court found that manufacturer and supplier were parties under the statute. See Tidewater Patent Dev. Co. v. Kitchen, 421 F.2d 680 (4th Cir. 1970).
4. Where infringement is not willful, no attorney's fees should be awarded. See U.S. Pipe & Foundry Co. v. W. Iron Co., 246 F. Supp. 424 (W. D. Va. 1965).
5. In unjustified litigation, attorney's fee may be awarded to defendant. However, in this case, the court held that defendant who prevailed in main case and lost his counterclaim was not entitled to attorney's fee. See American Chain & Cable Co., 199 F.2d 325 (4th Cir. 1952).
6. No attorney's fees should be awarded where neither party had an "open and shut" case. See Western Elec. v. Stewart-Warner Corp., 631 F.2d 333 (4th Cir. 1980).

### 3. CONTRACTUAL AUTHORITY

1. Parties may contract for payment of an attorney's fees. Parties may provide for a specific amount or a percentage of attorney's fees in the contract. If the contract is silent as to the amount of attorney's 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).
2. 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).

3. While a provision in a contract to pay an attorney's fee is binding on the parties to the contract, the court has the power to reduce the amount of attorney's fees contracted for 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).
4. The burden is on the non-moving party to show that the attorney's 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).
5. Unless there is some evidence of unreasonableness or fraud, the amount contracted for should be upheld. Commonwealth Ex. Rel. SEAA v. Outlaw, 9 Va. Cir. 280 (Richmond 1987).

4. AUTHORITY CONFERRED BY RULES OF THE SUPREME COURT OF VIRGINIA

1. Rule 4:5(g): Depositions.
  1. Subsection (1) -- If the party giving notice of the taking of a deposition fails to attend and proceed with the deposition and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees;
  2. Subsection (2) -- If the party giving notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving notice to pay to such other party the reasonable expenses incurred by him

and his attorney in attending, including reasonable attorney's fees.

2. Rule 4:12: Motion for Court Order Compelling Discovery.

1. Subsection (a) (4) -- If the motion is granted, the Court shall require the party or deponent whose conduct necessitated the motion or the attorney or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

If the motion is denied, the court shall require that the moving party or the attorney advising the motion or both of them to pay to the party or the deponent who opposed the motion the reasonable expenses incurred including attorney's fees.

2. Subsection (c) – Attorney's fees can be recovered for proving the genuineness of a document or the truth of a matter it fails to admit a fact in response to a Request for Admission if that fact is later proven by the opposing party.
3. Subsection (d) – Attorney's fees can be recovered for the failure of a party to attend at the party's own deposition or serve answers to interrogatories or Respond to Request for Inspection.

5. AUTHORITY CONFERRED BY THE FEDERAL RULES OF CIVIL PROCEDURE

1. Rule 11 of the Federal Rules of Civil Procedure -- **Signing of Pleadings, Motions and Other Papers; Representations to Court; Sanctions.** If a court determines that a pleading, motion other paper has been presented for an improper purpose in violation of Rule 11(b), the Court may impose an appropriate sanction upon the attorneys, law firms, or other parties that have violated subdivision (b) or are responsible for the violation. A motion for sanctions shall be served on the party but shall not be filed with or presented to the Court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. Fed. R. Civ. Proc. 11(c)(1)(A).

1. The Court denied a request for attorney's fees pursuant to Rule 11 where, 18 days after Rule 11 motion was served on the plaintiff, plaintiff moved for leave to file second amended complaint, which sought dismissal of defendant *without prejudice*. The court found that plaintiff's actions complied with the withdrawal requirement of Rule 11(c)(1)(A) as defined by the advisory committee notes. Dee-K Enterprises, Inc. v. Heveafil Sdn., 177 F.R.D. 351 (E.D. Va. 1998); see also Fed. R. Civ. Proc. 11, Advisory Committee Notes.
  2. Attorney's fees awarded pursuant to Rule 11 are appropriate in a civil rights action where the court found that the plaintiff failed to conduct a reasonable investigation of either fact or law and that plaintiff offered no factual basis to demonstrate the action constituting the conspiracy, the acts that violated plaintiff's civil rights, or the resulting injury to plaintiff. Davis v. Hudgins, 896 F. Supp. 461 (E.D. Va. 1995).
2. Rule 68 of the Federal Rules of Civil Procedure -- **Offer of Judgment**. If a plaintiff rejects a defendant's formal settlement offer and if "judgment finally obtained by the offeree is not more favorable than the offer, the plaintiff must pay the costs incurred after the making of the offer."
1. Rule 68 does not mention attorney's fees; nevertheless, the United States Supreme Court held that where the statute underlying the cause of action defines "costs" to include attorney's fees, such fees are included as costs for purposes of Rule 68. Marek v. Chesny, 473 U.S. 1 (1985); Henderson v. Sterling, Inc., 1998 U.S. App. LEXIS 7437 (4th Cir. 1998).
  2. Although Rule 68 provides for an award of attorney's fees to defendant where the judgment rendered is not more favorable to the plaintiff than the offer, Rule 68 does not provide for an award of attorney's fees to the defendant where judgment is rendered in favor of the defendant. Carr v. Super 8 Motel Developers, Inc., 964 F. Supp. 1046 (E.D. Va. 1997) (holding that Rule 68 was inapplicable in this case).

6. RECOVERY OF ATTORNEY'S FEES AS DAMAGES IN LITIGATION CAUSED BY A THIRD PARTY

1. Attorney's fees are also recoverable as damages where a litigant has been required to expend attorney's fees to defend or prosecute an action caused by the improper conduct of another party.
2. Where defendants, settlement attorneys in sale of property, breached their employment contract thus causing plaintiffs to sue landowner for breach of warranty, plaintiffs were properly allowed to recover from defendants the reasonable amount of attorney's fees incurred in the action against landowner. Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (1960).
  1. **Facts:** Plaintiff purchased property from defendant-landowner and hired defendant-attorneys to act as settlement attorneys and to conduct a title search on the property. Based on information that another party had rights to the property under an unrecorded lease, plaintiff placed the cash deposit and note to purchase the property in escrow with the attorneys with instructions to transfer the funds to landowner only upon procuring title insurance guarantying title free of all encumbrances. Attorneys secured insurance and paid the purchase money and delivered the note to the defendant-landowner. The title insurance failed to protect the plaintiffs because it excepted rights of parties in possession.
  2. **Procedure:** Plaintiff sued both landowner and attorneys for breach of warranty. Plaintiff settled with landowners and sued attorneys for damages from breach of contract of employment including attorney's fees expended in the suit against the landowner.
  3. **Rationale:** The Court reasoned that attorneys were properly held liable for attorney's fees expended in litigation between the plaintiff and the landowner because it was the defendants' breach of contract which made the action necessary and the employment of counsel in that action was a direct and necessary consequence of that breach.
3. Where plaintiffs were forced to defend a suit by purchasers as a result of a broker's acts or omissions, plaintiff may recover from

broker reasonable attorney's fees incurred in defending purchaser's suit. Owen v. Shelton, 221 Va. 1051, 1055-56, 277 S.E.2d 189 (1981).

1. **Facts:** Plaintiff's hired defendant-broker to find a buyer for their property. Broker found a buyer and the parties agreed on a closing date. Buyer failed to arrange financing and the closing date was postponed. Plaintiff instructed broker to collect interest on the purchase price from the original closing date until the actual closing occurred. Buyer presented a check for the interest at closing, but protested plaintiffs' right to collect interest and reserved the right to litigate the matter. Without disclosing buyer's objection, broker accepted the check, delivered the deed to the purchaser and disbursed the proceeds of the sale.
2. **Procedure:** After closing, buyer sued plaintiffs for recovery of the interest payment. Thereafter, plaintiffs sued broker for recovery of attorney's fees expended in defending the suit.
3. **Rationale:** The Court reasoned that plaintiffs were entitled to recover reasonable attorney's fees as damages for breach of contract.

## 7. DETERMINATION OF REASONABLE ATTORNEY'S FEES

1. "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).
2. 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).
3. "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).

4. In determining whether requested attorney's 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).
5. Courts have routinely calculated "reasonable" attorney's fees by reviewing affidavits of an attorney's time spent on the case or by determining an appropriate percentage of the damages awarded:
  1. Cases in which courts review affidavit of time spent by attorney:
    1. Court awarded an attorney's fee of \$18,512.50 where party submitted an affidavit which detailed counsel fees totaling \$31,572.52. The court noted that the "animus between the parties" and "their procedural posturing" had generated "extensive hearings" involving "numerous issues." Cooke v. Cooke, 23 Va. App. 60, 66, 474 S.E.2d 159 (1996).
    2. Appellate court upheld trial court's determination that attorney's fees claimed in attorney's fee affidavit were *unreasonable* where the trial court

found that the work was often duplicative, the work constituted overkill, and that the hours spent bore no relation to the result achieved. The appellate court held that the trial court's 92% reduction in the requested fees was not an abuse of discretion. Greenwald Cassell Assoc., Inc. v. Guffey, 19 Va. App. 179, 180, 450 S.E.2d 181 (1984).

3. Court found fees requested in attorney's affidavit *unreasonable* where less than \$600 were spent on resolving the matter and over \$5,400 were spent on collecting the attorney's fee. Sugarland Run Homeowners Ass'n. Inc. v. Couzins, 28 Va. Cir. 334 (Loudoun County 1992).
4. While expert testimony ordinarily is necessary to assist the fact finder in determining reasonable attorney's fees, such testimony is not required in every case. Tazewell Oil Co. v. United Va. Bank/Crestar Bank, 243 Va. 94, 413 S.E.2d 611 (1992); Mullins v. Richlands National Bank, 241 Va. 447 (1991).
  - (1) Expert testimony was not required to prove reasonableness of attorney's fees because the affidavits and detailed time records were wholly unrefuted by any evidence offered by defendant. Tazewell Oil Co. v. United Va. Bank/Crestar Bank, 243 Va. 94, 413 S.E.2d 611 (1992).
  - (2) "The opinion evidence of expert witnesses as to the value of an attorney's services is not conclusive or binding either on the court or on the jury. It is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed. Beale v. King, 204 Va. 443, 446, 132 S.E.2d 476 (1963); University Support Services, Inc. v. Galvin et al., 32 Va. Cir. 47 (Fairfax County 1993).

2. Cases in which courts determine fees using a percentage of award:
  1. Court found that 25% of the unpaid balance of a note constituted a reasonable attorney's fee where the balance was approximately \$56,000 and attorney had incurred costs of \$3,361 in fees calculated on an hourly basis. First Am. Bank v. MacDonald, 30 Va. Cir. 299 (Fairfax County 1993) (attorney's fee provided for in contract).
  2. Court found that 30% of unpaid balance on note was a reasonable attorney's fee where the parties contracted for attorney's fees of 30% if the note was referred to an attorney for collection. Commonwealth Ex. Rel. SEAA v. Outlaw, 9 Va. Cir. 280 (Richmond 1987).
  3. A Circuit Court found a District Court's attorney's fee award of 10% of a principal amount due on notes to be *unreasonable* where the percentage bore no relation to the attorney's time, the attorney's effort, or the nature of the services. 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 by estimating the time to be consumed, the effort to be expended, the nature of the services to be rendered and any other relevant circumstances. Mullins v. Richlands Nat'l Bank, 241 Va. 447, 403 S.E.2d 334 (1991).