ASSESSING ATTORNEY'S FEES AGAINST PERSONS OTHER THAN THE CLIENT OR THE UNITED STATES

I. GENERAL LAW—THE AMERICAN RULE

Historically, English common law required that the losing party incur the cost of litigation for his opponent. This included attorney's fees as well as court costs. Today, unlike its English counterpart, the "American Rule" states that a litigant is not entitled to collect attorney's fees from the opposing party in the absence of a statute, a court rule, or a contractual provision. This rule is consistently applied throughout the United States and within the separate states.

Under certain circumstances, a party or his attorney may also be entitled to recover attorney's fees from a third party, although not necessarily from the party's opponent, despite the absence of a statute or contract. For example, in some jurisdictions under the "Common Fund Doctrine," if the attorney's efforts have created a fund where those efforts have conferred a substantial benefit on others, the attorney fees may be paid out of the fund or by the benefited persons.1 Also, a few states have adopted the "private attorney general" exception to the American Rule, under which fees may be allowed absent statutory authorization where litigation vindicates a public policy, but attempts to have such a broad rule recognized have generally been unsuccessful.2

In most instances, granting of attorney's fees from one other than the client or the United States occurs upon statutory authorization. Such authorization within the statute must be "explicitly" allowed before the attorney's fees are granted. Each jurisdiction has its own set of statutes which authorize fee assessment against third parties or fee shifting to the defendant. The number of such statutes within each state can be quite large,3 and these statutes are subject to change with each legislative ses-


2. The Supreme Court held that only Congress could authorize the "private attorney general" doctrine or any other exception to the "American Rule." Thus federal jurisdictions do not recognize judicially created exceptions to the American Rule. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1974).

3. See, e.g., Covenant Mut. Ins. Co. v. Young, 225 Cal. Rptr. 2d 861 (Cal. Ct. App. 1986) (case noted that there were at least 210 fee-shifting statutes in that state).
sion. Therefore, the form and the function of statutes authorizing awards of attorney's fees are in constant flux. However, there are certain areas of law in which most states do authorize fee assessment as a matter of public policy. These areas include proceedings related to incompetent persons, consumer protection actions, contempt proceedings, domestic relations proceedings, estate and trust matters, interpleader actions, lien enforcement or mechanic's lien actions, mandamus proceedings, partition proceedings, actions to quiet title, and worker's compensation proceedings.

II. STATE STATUTORY AUTHORIZATION TO ASSESS ATTORNEY'S FEES

A. Proceedings Related to an Inquisition Into Competency or Sanity

Relying on statutory provisions, many state courts have required a person found incompetent or insane, or such a person's estate, to pay the attorney's fees of the petitioner in an inquisition into sanity.\(^4\) The rationale for this fee shifting lies in the theory that the services of the attorney for the petitioner are essential for the protection of the person found incompetent or insane, and that he and his estate should be held liable for the fees as necessaries.\(^5\) Generally, if a good faith petitioner fails to prove the insanity or incompetency of the defendant, he must pay his own costs and attorney fees but not the costs of the defense.\(^6\) Further, if the one alleged to be incompetent is found to be incompetent, the defense attorney hired by the incompetent to protect his rights is entitled to compensation out of the incompetent's estate even though the finding was unfavorable to the client.\(^7\)


\(^6\) See Baum v. Greenwald, 49 So. 836 (Miss. 1909).

\(^7\) See *In re* Hellwege, 55 So. 661 (La. 1911); Darby v. Cabanne, 1 Mo. App. 126 (Mo. Ct. App. 1876); *In re* Frankish, 98 A. 395 (N.Y. App. Div. 1916).
B. Consumer Protection Actions

Virtually all states have enacted consumer protection legislation which makes it unlawful for the commercial dealer to use or otherwise engage in deceptive acts or practices in the conduct of trade or commerce. Most of these states also provide for costs and attorney's fees to be paid by the defendant to the prevailing plaintiff in deceptive trade actions. The rationale behind these acts lies in the fact that attorneys may be unwilling to represent these consumer protection actions because the rewards are often small. Therefore, as a matter of public policy, the legislatures want to encourage individual consumers to maintain private actions against deceptive commercial dealers.

Conversely, in some states, prevailing defendants in a deceptive trade practice action may be awarded attorney's fees if they satisfy all the statutory requirements. Such requirements may include establishing that the plaintiff maintained the action knowing it was groundless, or otherwise commenced in bad faith.

C. Contempt Proceedings

If authorized by statute, attorney's fees may be awarded to the prevailing party both in civil and criminal contempt proceedings. Where the assessment of attorney fees for contemptuous actions is recognized, the amount assessed is within the discretion of the court; however, the main determining factor when computing the amount of assessment is the

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9. See id.; see also Serbert, Enforcement of State Deceptive Trade Practice Statutes, 42 Tenn. L. Rev. 689 (1975).
existence of willful misconduct on the part of the contemnunt party. Such statutory fee shifting has been enacted to discourage bad faith conduct within litigation and the filing of frivolous lawsuits.\textsuperscript{13}

\textbf{D. Domestic Relations}

Most states authorize awards of attorney's fees and costs in domestic relations actions such as divorce actions, child custody proceedings, alimony and child support modification proceedings, actions for maintenance without a divorce or by legal separation, and paternity actions. The purpose of awarding attorneys fees in divorce and other domestic relations proceedings is to guarantee the dependent or unemployed spouse—often the wife—an efficient preparation of his or her case and a fair and impartial trial thereafter.\textsuperscript{14} In other words, allowance of attorney's fees is to equalize the status of the parties by ensuring that neither party is forced to suffer unduly as a consequence of the termination of the marriage.\textsuperscript{15}

It is established that the award of fees lies within the discretion of the trial court based upon the facts and circumstance of each case.\textsuperscript{16} Although it is well within the court's power to assess fees, parties do not have an absolute right to receive them. Rather, the award is based upon equitable principles. Further, although the fees belong to the counsel of the dependent or unemployed spouse, the award is not for the benefit of the attorney, but is for the equitable objective of putting each spouse on substantially even terms.\textsuperscript{17} Proper factors which courts typically consider in determining whether to award fees and the amount of such fees are:

\begin{itemize}
  \item \textit{See also} \textit{Fed. R. Civ. P. 11.} Federal Rule 11 and many states' rules of civil procedure authorize assessment of attorney fees for bad-faith conduct of the parties when filing unreasonable pleadings or motions.
  \item \textit{See} Hale v. Hale, 772 S.W.2d 628 (Ky. 1989); Lampton v. Lampton, 721 S.W.2d 736 (Ky. 1986); Sullivan v. Levin, 555 S.W.2d 261 (Ky. 1977) (allowance of fee is error if there is an absence of a showing of a financial imbalance between the parties and if both parties oppose such an allowance).
\end{itemize}
(1) whether the party seeking fees is financially unable to pay the fees; (2) whether the opposing party has the financial means and ability to pay; and (3) the extent of the services that could be anticipated.18

E. Estates and Trusts

The right of an executor, administrator, or trustee to an allowance in the settlement of his account for all necessary expenses incurred in the care, management, and settlement of the estate entrusted to him includes a right to the allowance of reasonable attorney's fees incurred in any necessary litigation, or in other matters concerning the estate and requiring legal services.19 If the attorney's services are necessary and beneficial to the estate or trust, then the representative of that estate or trust may receive an allowance for attorney's fee. Even if the administrator or executor is qualified as an attorney, he or she may properly employ an outside attorney to render legal services for the estate.20 However, he cannot employ counsel at the expense of the trust or estate to do things for which he is being compensated, nor can he engage an attorney at the estate or trust's expense to represent him in an individual capacity.21 Furthermore, fees incurred by the representative of the trust or estate for legal service in fruitless suits,22 or unsuccessful attempts to remove a co-trustee,23 or made necessary because of his own improper acts24 have all been disallowed.

F. Interpleader

Many states have adopted the equitable practice of interpleader within their statutory scheme, and of those states a handful have also made

19. See Smith v. Massachussets Mut. Life Ins. Co., 156 So. 498 (Fla. 1934); Carpenter's Adm'r v. Demoisy, 36 S.W.2d 27 (Ky. 1931); In re Estate of Schultd, 457 N.W.2d 837 (S.D. 1990).
20. See In re Estate of Parker, 251 P. 907 (Cal. 1926).
22. See In re Stanton, 84 N.Y.S. 46 (N.Y. Sup. Ct. 1903).
provisions for attorney’s fees to an interpleading stakeholder. Generally, a
person, corporation or firm which holds property or money for which
there are two or more adverse claimants may file a bill of interpleader,
and upon depositing the money or property with the court, is entitled to
release from liability and to recover costs and a reasonable attorney’s
fee. 25 It has been held that the amount awarded to the interpleading
stakeholder lies within the discretion of the court absent statutory lan-
guage to the contrary. 26

G. Mechanic’s Liens

Statutes which provide for attorney’s fees in mechanic’s lien litiga-
tion—foreclosure of the lien—are prevalent from state to state. Typically,
the statutes provide that the lien claimant or the prevailing party may
recover costs and reasonable attorney’s fees. 27 Determination of a “rea-
sonable” fee is within the discretion of the court. 28 Statutes which allow
fees for the lien claimant and not to the defendant or other litigants have
faced state constitutional attacks. 29

H. Mandamus Proceedings

Several states have statutes which authorize attorney’s fees to a
successful party pursuant to a mandamus proceeding. 30 However, statutes
which provide only for costs as damages may or may not be construed to
include attorney’s fees depending upon the jurisdiction. 31 Absent statuto-

25. See Burks v. Burks, 257 S.W.2d 369 (Ark. 1953); Driscoll v. Norwich Sav.
Soc’y, 93 A.2d 925 (Conn. 1952); Furness v. Park, 570 P.2d 854 (Idaho 1977);
Contanza v. Cannata, 36 So. 2d 627 (La. 1948).
27. See Skidmore v. Eby, 262 P.2d 370 (N.M. 1953); Beach Resorts Int’l, Inc.
1960).
29. See Davidson v. Jennings, 60 P. 354 (Colo. 1900) (successful state constitu-
tional attack based on provisions which state that the court shall be open to every-
one and that rights and justice shall be administered without sale, denial, or delay).
James & Co. v. Odom, 558 So. 2d 1209 (La. Ct. App. 1990); State ex rel. Wolff v.
Guerkind, 109 P.2d 1094 (Mont. 1941).
31. Compare State ex rel. Pacific Bridge Co. v. Washington Toll Bridge Auth.,
ry authorization, some states award fees to successful parties in mandamus proceedings based upon equitable theories such as common fund doctrine\textsuperscript{32} or bad-faith litigation.\textsuperscript{33}

I. Partition Proceedings

Absent express statutory language, there is no allowance of attorney’s fees in a partition proceeding. However, with statutory authorization, attorney’s fees are recoverable where the attorney’s services are for the common benefit of all the parties against whom the fees are charged to the extent that such parties are amicable and friendly.\textsuperscript{34} A suit for the common benefit of all the parties implies that the parties must be satisfied with the result of the partition. Therefore, where there is a contest to the results or a suit between adversaries, fees will be denied unless the adversarial parties consent otherwise. The amount of fees is at the trial court’s discretion and will not be disturbed unless there is a clear abuse of discretion.\textsuperscript{35} Fees are equitably apportioned among the parties to the partition in such a way that each party will pay his or her respective share.\textsuperscript{36}


J. Actions to Quiet Title

In a few states, there are statutory provisions for attorney’s fees in actions to quiet title. In those states, fees may be awarded as an item of cost. The court may award fees at its discretion as long as the amount is reasonable.\footnote{37}

K. Worker’s Compensation Proceedings

Most states have some statutory provisions dealing with worker’s compensation cases and the allowance of attorney’s fees for the successful claimant, however, the provisions between jurisdictions vary considerably. Basically there are four main types of statutory provisions: (1) those relating to the payment of fees out of the compensation of the injured employee, and regulating or specifying the manner and circumstances under which such payment may be made;\footnote{38} (2) those specifying that the employee’s attorney’s fees are payable by the employer in addition to compensation because the employer failed to comply with the provisions of the act;\footnote{39} (3) those which vest discretion in the official conducting the hearing to award and set fees to the prevailing party;\footnote{40} and (4) those which allow fees as part of the cost of an appeal or review of the decision made by the compensation board or court conducting the original proceedings.\footnote{41}

Most worker’s compensation statutes are enacted by state legislatures as a matter of public policy to enable injured workers to obtain legal services over controverted claims. If an injured worker has a legitimate claim, attorneys will be more likely to represent the case knowing that attorney’s fees are recoverable if the claim is meritorious.\footnote{42} Furthermore,

\footnote{42} See Ohio Cas. Group v. Parrish, 350 So. 2d 466 (Fla. 1977).
courts have required employers to pay employees—or their survivors—attorney’s fees when the employer and its compensation carrier reap the benefits of a successful action against a third party tortfeasor. The rationale behind this policy lies in the idea that employers should not benefit from the employee’s efforts in litigating job-related injuries.\(^{43}\)

Other factors considered in the assessment of fees include the employee’s incurment of extra expense in litigating a just claim,\(^{44}\) the employer’s failure to comply with the compensation board’s award of compensation,\(^{45}\) the employer’s arbitrary delay of payment,\(^{46}\) or the employer’s wrongful denial of coverage.\(^{47}\) In setting the amount of attorney’s fees to be allotted, unless otherwise provided by the statute, it is within the court’s discretion to set reasonable fees while keeping in mind the nature of the injury and other surrounding circumstances.\(^{48}\)

III. CONCLUSION

Like many areas of the law, the general rule against assessment of attorney’s fees against the opposing party or a third party has been burdened with a multitude of exceptions. In fact, the exceptions are so numerous that one might view the American Rule as the exception rather than the rule. Furthermore, the statutes that authorize fee assessment vary tremendously from jurisdiction to jurisdiction. The above outlined areas—proceedings related to incompetent persons, consumer protection actions, contempt proceedings, domestic relations proceedings, estate and trust matters, interpleader actions, lien enforcement or mechanic’s lien actions, mandamus proceedings, partition proceedings, actions to quiet title, and worker’s compensation proceedings—are areas which commonly provide for attorney’s fees, but this list is not exhaustive. Therefore, good

\(^{43}\) See Hall v. Young’s Dairy Products Co., 569 P.2d 907 (Idaho 1977) (trial court awarded fees to the employee’s survivors to be paid from the proceeds of the suit in view of the fact that services of the survivor’s attorney were beneficial to the employer in collection of damages from a tort-feasor).


\(^{45}\) See Board of Educ. v. Industrial Comm., 140 N.E. 39 (Ill. 1923).

\(^{46}\) See Bowens v. General Motors Corp., 608 So. 2d 999 (La. 1992).


\(^{48}\) See Ellis v. Industrial Comm’n, 64 P.2d 363 (Utah 1937).
attorneys must always keep in mind that fee assessment might be authorized in any particular case, and they should research relevant state statutes before filing a claim.

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