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Attorney's Fees; Statutes & Law In Pennsylvania

A Guide to Fee-Shifting Rules and Statutes

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Attorney's Fees in Pennsylvania

Introduction

Attorney's fees statutes are commonly referred to as fee-shifting statutes. The number of statutes that include fee-shifting provisions continues to grow. This attorney's fees book is by no means intended as a complete treatise on any and all law that might include fee-shifting provisions. The intent of this book is to provide a general overview on how fee-shifting provisions are handled by courts and to cover the Pennsylvania Rules of Civil Procedure, Pennsylvania Rules of Appellate Procedure, and Pennsylvania statutes that include fee-shifting provisions. This book also touches on how fee-shifting provisions are handled in federal courts and in other state courts.

Chapter 1 discusses general information and concepts concerning fee-shifting provisions. This discussion is necessary and will hopefully be useful to anyone using this book, since many of the rules and statutes that include fee-shifting provisions provide little assistance on how they are to be handled. Chapter 1 is intended to assist the reader in understanding the differences in fee-shifting provisions and how they are generally handled by the courts. Be aware that not all of the areas discussed in Chapter 1 are handled uniformly throughout Pennsylvania courts, as is true with many areas of law.

Chapter 2 (Pennsylvania Rules of Civil Procedure), Chapter 3 (Pennsylvania Rules of Appellate Procedure), and Chapter 4 (Pennsylvania statutes) provide the text of the rules and statutes. Following the text of each statute is a summary of the rule or statute, with a focus on the fee-shifting provision. The summary identifies what kind of fee-shifting provision the rule or statute includes and discusses any differences from how fee-shifting provisions are generally handled (see Chapter 1 for how fee-shifting provisions are generally handled). Additional references are included under most rules or statutes. The references include secondary sources that may be helpful and common law cases that discuss and/or cite to the specific rule or statute. The references are not all-inclusive, but are sources that the author has found to be useful and may assist anyone using this book in finding further helpful sources of information.

Chapter 1 – General Concepts Concerning Attorney's Fees

1. The "American Rule"

Attorney's fees statutes are commonly referred to as fee-shifting statutes. A vast majority of Pennsylvania statutes do not include fee-shifting provisions, but the number continues to grow. The reason a majority of statutes do not include fee-shifting provisions is because courts throughout the United States follow the "American Rule."

The "American Rule" provides that each party must pay their own attorney's fees. Fox v. Vice, 131 S. Ct. 2205 (2011); Krassnoski v. Rosey, 454 Pa. Super. 78, 83, 684 A.2d 635, 637 (1996). The American Rule is followed throughout the United States. The Pennsylvania version of the American Rule is expressed in 42 Pa.C.S.A. § 1726(a)(1), which states, "Attorney's fees are not an item of taxable costs except to the extent authorized by section 2503 (relating to right of participants to receive counsel fees)." Krassnoski, at 84, 684 A.2d at 638; see 42 Pa.C.S.A. § 2503. Therefore, a statutory provision must explicitly allow for the recovery of attorney's fees because the words "costs", "expenses", and "damages" do not generally include attorney's fees. Merlino v. Delaware County, 556 Pa. 422, 426, 728 A.2d 949, 951 n. 2 (1999); Twp. of Marple v. Weidman, 149 Pa. Commw. 286, 289, 613 A.2d 94, 95 (1992); Corace v. Balint, 418 Pa. 262, 271, 210 A.2d 882, 887 (1965). Attorney's fees "may not be taxed to [a] party absent express statutory authorization, a clear agreement of the parties, or some other established exception." De Lage Landen Fin. Serv., Inc., v. Rozentsvit, 939 A.2d 915, 923 (Pa. Super. 2007); Cleveland Asphalt v. Coalition, 886 A.2d 271, 282 n. 6 (Pa. Super. 2005) (quoting Lavelle v. Loch, 532 Pa. 631, 617 A.2d 319 (1992)); Astrue v. Ratliff, 130 S.Ct. 2521 (2010) (statutes such as the Equal Access to Justice Act that award attorney fees to the prevailing party are exceptions to the "American Rule" that each litigant bear his own attorney's fees); Trizechahn Gateway, LLC v. Titus, 976 A.2d 474, 482-83 (Pa. Super 2009); Gall v. Crawford, 982 A.2d 541, 549 (Pa. Super 2009); Petow v. Warehime, 996 A.2d 1083, 1087-88 (Pa. Super 2010) (a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception); In re Nomination Petition of Lawrence M. Farnese, 17 A.3d 357, 360 (Sup. Ct. Pa. 2011) (election code regulations with respect to attorney fees are consistent with the general policy of the American Rule, where shifting of costs is exceptional); Cresci Construction Servs. v. Martin, 64 A.3d 254 (Pa. Super 2013) (appellant failed to establish any authority or exception to support an award of attorney fees, and the court found no abuse of discretion by the trial court).

The American Rule is in direct contrast to the English Rule, which requires the losing party to pay the prevailing party's attorney's fees. One argument in favor of the English Rule is that it makes the successful party whole because all costs and counsel fees are paid by the losing party. Rodulfa v. United States, 295 F. Supp. 28, 29 (D.D.C. 1969). Several arguments in support of the American Rule include,

> 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 the fees of their opponents' counsel. Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citations omitted). Statutes permitting attorney's fees are said to be in derogation of common law, Cleveland Asphalt, 886 A.2d at 282, and are usually intended to serve a particular public policy purpose. Allowing the recovery of attorney's fees in civil rights cases "serves as a 'private attorney general,' helping to ensure compliance with civil rights laws and benefiting the public by 'vindicating a policy that Congress considered of the highest priority.'" Martin v. Frankin Capital Corp., 126 S. Ct. 704, 709 (2005) (quoting Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968)); Fox v. Vice, 131 S. Ct. 2205 (2011). Allowing the recovery of attorney's fees under remedial statutes "signals the General Assembly's intent 'to encourage potential plaintiffs to seek vindication of important rights and to deter defendants from conduct violating those rights.'" Krebs v. United Refining Co., 893 A.2d 776, 788 (Pa. Super. 2006) (quoting Krassnoski, 454 Pa. Super. 78, 684 A.2d at 637-38). Courts throughout the United States have recognized the importance of allowing fee-shifting statutes in certain situations. See, e.g., Graziano v. Harrison, 950 F.2d 107, 113 (3rd Cir. (N.J.) 1991) (to encourage private litigants to enforce specific statutes or rights, acting as private attorney generals); Shadis v. Beal, 685 F.2d 824, 832 (3rd Cir. (Pa.) 1982) (to encourage compliance with the law); Thurber v. Bill Martin Chevrolet, Inc., 487 A.2d 631, 635 (Me. 1985) (to encourage those who might have a valid claim to pursue it where it might otherwise be impractical, and to assist parties in finding effective legal representation); Kessler v. Associates Fin. Serv. of Hawaii, Inc., 639 F.2d 498, 499 (9th Cir. (Ha.) 1981) (to make litigants whole); Associated Indem. Corp. v. Warner, 694 P.2d 1181, 1183 (Ariz. 1985) (to mitigate the burden of the expense of litigation); Lincoln Street Realty Co. v. Green, 373 N.E.2d 1172, 1174 (Mass. 1978) (to deter illegal conduct and punish those who violate certain laws); and Twp. of South Whitehall v. Karoly, 891 A.2d 780, 783 (Pa. Commw. 2006) (to promote the early resolution of cases). "Not all fee-shifting statutes are the same and care is required in comparing such statutes, as the language or purpose of a particular fee-shifting provision will affect its construction and, hence, its application." Lucchino v. DEP, 809 A.2d 264, 268 (Pa. 2002). Pennsylvania courts have held that foreign judgments awarding attorney's fees pursuant to the English rule may be enforceable, and not repugnant to Pennsylvania public policy. Olympus Corp. v. Canady, 962 A.2d 671, 677-78 (Pa. Super 2008).

2. Waiver of Attorney's Fee; Litigating Under English Rule; Contractual Fee-Shifting Agreements

The parties may agree to waive attorney's fees or to litigate under the English Rule. If the parties agree to waive attorney's fees as a part of a settlement agreement, the court will usually enforce the agreement. Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531 (1986). "[W]here one party expressly contracts to pay the other's fees, such an obligation

will be enforced." Putt v. Yates-American Mach. Co., 722 A.2d 217, 226 (Pa. Super. 1998). When a contract includes a provision providing for the "costs of collection" or "reasonable collection and legal costs," it will usually "include reasonable attorney's fees in the event that it is necessary to institute legal action to collect." Rozentsvit, 939 A.2d at 923; Wrenfield Homeowners Ass'n, Inc. v. DeYoung, 410 Pa. Super. 621, 629, 600 A.2d 960, 964 (1991).

Where a contract agreement provides that the breaching party must pay the other party's attorney's fees, the court will only permit the non-breaching party to recover reasonable attorney's fees, not actual attorney's fees. See McMullen v. Kutz, 925 A.2d 832, 835 (Pa. Super. 2007) (concluding "when a contract provides for the award of counsel fees, bud does not specify that they must be reasonable, the trial court must nonetheless examine the fees for reasonableness"); McMullen v. Kutz, 985 A.2d 769, 776-77 (Pa. Super. 2009). In other words, even when the contract providing for attorney's fees does not specify that they must be reasonable, a reasonableness requirement is implicit in the agreement. Id. at 834. Courts will construe contractual fee shifting provisions in accordance with their plain and ordinary meaning. Boro Construction, Inc. v. Ridley School District, 992 A.2d 208, 220 (Pa. Super. 2010). However, even where a contract authorizes fee shifting in a particular amount, that amount must be reasonable under the circumstances. Graystone Bank v. Grove Estates, LP, 58 A.3d 1277 (Pa. Super 2012) (fee shifting provision in warrant of attorney confessing judgment contained in promissory note signed by developer and providing that bank was entitled to 10% of the outstanding loan balance, was subject to a reasonableness standard). In addition, a provision in a contract requiring payment of attorney fees must not be ambiguous. Trizechahn Gateway, LLC v. Titus, 976 A.2d 474, 482-83 (Pa. Super 2009) (lease provision that required tenant to pay attorney's fees if legal action was required was not ambiguous).

Attorney's fees can be awarded for breach of various agreements where the agreement provides for attorney's fees under certain circumstances. In re Estate of Johnson, 970 A.2d 433, 440 (Pa. Super 2009) (holding that ex-wife was not entitled to attorney fees and legal costs incurred in prosecuting alleged breach of marital dissolution agreement (MDA) by estate of father, since executor's conduct in not paying a few hundred dollars in medical expenses was not dilatory, obdurate, or vexatious).

As a matter of first impression, the Superior Court held when an insurance policy does not grant the insurer the right to recover defense costs, insurer will not be permitted to recover defense costs expended when defending under a reservation of rights. American and Foreign Ins. v. Jerry's Sport, 948 A.2d 834 (Pa. Super. 2008). This holding opposes a majority of jurisdictions, "which have found a right of reimbursement based on the existence of an implied contract between the insurer and its insured created through a reservation of rights letter, in addition to unjust enrichment of the insured from the insurer's coverage of defense costs for claims that were determined to not be within the coverage provided by the policy." Id. at 844 (citing Buss v. Superior Court, 939 P.2d 766 (Cal. 1997)). In Jerry's Sport, the Court explained that the insurer has a duty to defend whenever allegations contained in the underlying complaint are either actually or

potentially within the scope of the insurance agreement, there is no unjust enrichment because an insurer benefits by preserving its right to control the defense and its ability to take actions to mitigate any future indemnification responsibilities, and undertaking the defense pursuant to a reservation of a right to reimbursement not included in the insurance policy is an attempt by the insurer to unilaterally modify the written insurance contract. Id. at 845-852. The Court reasoned:

> A reservation of rights letter does not create a contract allowing an insurer to recoup defense costs from its insured, but rather, is a means to assert defenses and exclusions which are already set forth in the policy. Certainly, if an insurer wishes to retain its right to seek reimbursement of defense costs in the event it later is determined that the underlying claim is not covered by the policy, the insurer is free to include such a term in its insurance contract. Absent such a provision in the policy, an insurer should not be permitted to unilaterally amend the policy by including the right to reimbursement in its reservation of rights letter.

Id. at 849 (quoting LA Weight Loss Ctrs., Inc. v. Lexington Ins. Co., 2006 WL 689109 (Pa. C.P. 2006)).

3. Two Broad Categories: (1) Attorney's Fees Available to One Party Versus Both Parties & (2) "May" Versus "Shall" Provisions

Attorney's fee provisions fit into several broad categories. First, whether the statute allowing for attorney's fees makes the fees available to one party or both parties. The former category authorizes only one side to recover attorney's fees (e.g., plaintiff or defendant), while the latter category authorizes attorney's fees to whichever party prevails. Sometimes statutes that make attorney's fees available to both parties have different standards depending on whether the party requesting attorney's fees is a plaintiff or defendant.

Second, whether the statute states attorney's fees "shall" or "may" be awarded. Be aware that the language of the statute and the legislative intent may not render all "shall" statutes as mandatory and all "may" statutes as discretionary. When an award of attorney's fees is discretionary, the trial court should consider "whether an award of fees would, in the circumstances of the particular case under consideration, promote the purposes of the specific statute involved." Krassnoski, 454 Pa. Super. at 85, 684 A.2d at 639. After all, the general intent of a rule permitting the recovery of attorney's fees is not to penalize all parties who do not prevail in an action. Twp. of South Strabane v. Piecknick, 546 Pa. 551, 559-60, 686 A.2d 1297, 1301 (Pa. 1996). For example, in a divorce action, attorney's fees are to be construed narrowly; "counsel fees are awarded only upon a showing of need." McCoy v. McCoy, 888 A.2d 906, 910 (Pa. Super. 2005). Compared to cases brought under the Civil Rights Act, which require attorney's fees to be construed broadly; "prevailing party should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Krebs, 893 A.2d at 789.

The same is true in federal court. Federal Rule 54(d)(1) gives federal district courts discretion to award costs to the prevailing party unless a federal statute says otherwise. Marx v. General Revenue Corp., 133 S. Ct. 1166 (2013) (the attorney fee provision of the FDCPA does not provide otherwise, and thus, a district court may award attorney fees and costs to a prevailing party in a case brought pursuant to FDCPA without finding that the plaintiff brought the case in bad faith and for the purpose of harassment).

4. Prevailing Party

When a statute or contract provision permits or requires attorney's fees to be paid to the prevailing party, it is necessary to define "prevailing party." In Profit Wize Marketing v. Wiest, 2002 Pa. Super. 380, 812 A.2d 1270 (2002), the Superior Court had to address the issue of what prevailing party means in a contract, for purposes of whether a party was entitled to attorney's fees after the parties reached a settlement. The Court stated:

> "prevailing party," is commonly defined as 'a party in whose favor a judgment is rendered, regardless of the amount of damages awarded.' While this definition encompasses those situations where a party receives less relief than was sought or even nominal relief, its application is still limited to those circumstances where the fact finder declares a winner and the court enters judgment in that party's favor. *Such a pronouncement does not accompany a compromise or settlement*.

Id. at 380, 812 A.2d 1275-75 (citations omitted) (emphasis added). The Court noted, Black's Law Dictionary, 7th ed. at 1206, defined prevail as, "to obtain the relief sought in an action; to win a lawsuit." Id. at 380, 812 A.2d at 1275. Most settlement agreements are the result of compromise and neither party usually emerges as the clear winner. Id. The parties are still free to define who the prevailing party is in a settlement, what criteria might constitute a prevailing party in the case of a settlement, or to incorporate the allocation of attorney's fees and costs into the settlement agreement. Id. at 380, 812 A.2d at 1276. The Court was aware that its definition of "prevailing party," with respect to settlement agreements, was in conflict with many federal cases. See, e.g., Barrios v. California Interscholastic Fed'n, 277 F.3d 1128 (9th Cir. 2002) (plaintiff constitutes a "prevailing party" entitled to attorney fees and costs under the Americans With Disabilities Act, 42 U.S.C.A. § 12205, where settlement is reached between the parties); Disabled in Action of Pennsylvania v. Pierce, 789 F.2d 1016 (3rd Cir. 1986) (plaintiff is a "prevailing party" that is entitled to an award of expenses under the Civil Rights Attorney's Fee Award Act, 42 U.S.C.A. § 1988, where it obtained a significant amount of relief through a settlement);); Lefemine v. Wideman, 133 S. Ct. 9 (2012) (abortion protestor was the "prevailing party" entitled to attorney fees under the Civil Rights Attorney Award Act because when an injunction awarded him actual relief on the merits of his claim that materially altered the legal relationship between the parties by modifying defendant's behavior in a way that directly benefits plaintiff); D.F. v. Collingswood Borough Board of Ed., 694 F.3d 488 (3d Cir. 2012) (determination that student in a case brought for violation of the Individuals with Disabilities in Education

Act (IDEA) was the prevailing party and was entitled to attorney fees was not an abuse of discretion); Lima v. Newark Police Dept., 658 F.3d 324, 332 (3d Cir. 2011) (under § 1988, a "prevailing party" is one who has been awarded some relief by the court); Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566 (1992) (an individual who obtains significant relief in a settlement under the Civil Rights Attorney's Fee Awards Act may constitute a "prevailing party"). The Court noted the General Assembly is free to define "prevailing party" however it likes, Profit Wize Marketing, 2002 Pa. Super. 380, 812 A.2d at 1277 n. 4, but in the absence of clear language in a statute or contract, a party to a settlement will not be entitled to attorney's fees. Note that some Pennsylvania statutes do confer prevailing party status on a party in a settlement agreement. See 71 P.S. § 2032 (defining "prevailing party" for purposes of awarding attorney fees as "a party in whose favor an adjudication is rendered on the merits of the case … or who obtains a favorable settlement approved by the Commonwealth Agency initiating the case"); Interfaith Community Organization v. Honeywell Int'l, Inc., 726 F.3d 403 (3d Cir. 2013) (where a plaintiff has prevailed in its underlying claim, a defendant in a fee shifting case cannot recover attorney's fees under the offer of judgment rule, because under those circumstances, it cannot be said that the plaintiff's action was frivolous, unreasonable, or without foundation).

To determine whether a party is the prevailing party under a state or federal statute, a two part test is applied: 1) whether the plaintiffs achieved relief; and 2) whether there is a causal connection between the litigation and the relief from the defendant. D.F. v. Collingswood Borough Board of Ed., 694 F.3d 488 (3d Cir. 2012).

5. Equity Power of the Court & Standard of Review

"The imposition of costs and counsel fees is an exercise of the equity powers of the court." Larry Pitt & Assoc. v. Long, 716 A.2d 695, 702 (Pa. Commw. 1998). "Courts possess great latitude and discretion in awarding attorney's fees when authorized by statute." James Corp. v. North Allegheny Sch. Dist., 938 A.2d 474, 489 (Pa. Commw. 2007). The court of first instance determines whether to allow counsel fees and the appropriate fee award, and its judgment will not be disturbed on appeal except for palpable abuse of discretion ("Abuse of Discretion Standard"). Twp. of South Whitehall v. Karoly, 891 A.2d 780, 785 (Pa. Commw. 2006). The Court in Karoly, 891 A.2d at 784-85 (quoting In re Trust Estate of LaRocca, 431 Pa. 542, 548-49, 246 A.2d 337, 340 (1968)), explained the reason for this deferential standard:

> The amount of fees to be allowed to counsel, always a subject of delicacy if not difficulty, is one peculiarly within the discretion of the court of first instance. Its opportunities of judging the exact amount of labor, skill and responsibility involved, as well as its knowledge of the rate of professional compensation usual at the time and place, are necessarily greater than ours, and its judgment should not be interfered with except for plain error.

6. Determining a Reasonable Fee

Once a court has determined that an award of attorney's fees is appropriate, the court must then determine what a reasonable attorney's fee is. "Traditionally, the determination of the amount of attorney's fees and interest awarded is left to the trial judge" and not the jury, unless explicitly stated otherwise. Birth Center v. St. Paul Co., Inc., 727 A.2d 1144, 1160 (Pa. Super. 1999). "As a general rule, the method of determining a fee for legal services provided on an hourly basis is to multiply the total number of hours reasonably expended by the reasonable hourly rate"; this is known as the "lodestar" method. Signora v. Liberty Travel, Inc., 886 A.2d 284, 293 (Pa. Super. 2005); Krebs, 893 A.2d at 792-93. The lodestar fee is assumed to give an estimate of a reasonable fee, which "a court has the discretion to adjust ... in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement. Signora, 886 A.2d at 293; see also McKenna v. City of Philadelphia, 582 F.3d 447, 455-56 (3d Cir. 2009) (lodestar estimation detailed); Roethlein v. Portnoff Law Assoc., Ltd., 25 A.3d 1274, 1282 (Pa. Super. 2011) (lodestar method is the starting point for calculating an award of attorney's fees); Lohman v. Borough, 374 F.3d 163, 167 (3d Cir. 2009) (consideration of settlement negotiations, for example, may contribute to departing from the lodestar fee). Of these adjustment factors, "the prevailing party's degree of success is the critical consideration in determining an appropriate fee award." Signora, 886 A.2d at 293.

In Perdue v. Kenny, the Supreme Court of the United States held that the calculation of an attorney's fee based on the lodestar may be increased due to superior attorney performances, but only in extraordinary circumstances. 130 S. Ct. 1662, 1671-75 (2010). The "strong presumption" that the lodestar is reasonable may be overcome "in those rare circumstances in which the lodestar does not adequately account for a factor that may be properly considered in determining a reasonable fee." Id. McKenna, 582 F.3d at 445-56 (district court has discretion to adjust lodestar upward or downward based on the results obtained in a case).

However, the court may not lower an attorney's fee to achieve proportionality with the size of the verdict because "an approach that emphasizes financial recovery could serve as a disincentive for attorneys to pursue actions under remedial statutes where the financial recovery may be low, or where successful litigation under the statute may result in a declaratory judgment or injunction." Krebs, 893 A.2d at 790. For such reasons, attorney's fees may still be awarded under the Declaratory Judgment Act. In addition, the attorney's fees awarded may exceed recovered damages. Id. at 491; see Mountain View Condominium Assoc. v. Bomersbach, 734 A.2d 468 (Pa. Commw. 1999) (court awarded more than $46,000 in attorney's fees where damages were less than $3,500). Courts are to exclude from the determination of the lodestar, any hours not reasonably expended. McKenna, 582 F.3d at 445-56.

The forum rate rule says that the relevant rate for calculating attorney's fees if the relevant rate in the forum. There are two exceptions to that rule. First, the need for special expertise of counsel from a distant district must be shown, or second, it must be

shown that local counsel is unwilling to handle the case. Interfaith Community Organization v. Honeywell Int'l, Inc., 726 F.3d 403 (3d Cir. 2013) (plaintiffs adequately demonstrated that its local counsel in New Jersey was unwilling to handle the case, sufficient for an exception to the forum-rate to apply).

An attorney fee can be divided between multiple attorneys or law firms where specified by prior agreement. Ruby v. Abington Mem. Hosp., 50 A.3d 128 (Pa. Super 2012).(law firm initially retained by client was entitled to 75% of attorney fees where lawyer handling matter left the firm and took client with him, based on a provision in an employment agreement with original firm).

7. Who May Award Attorney's Fees

Only components of the unified judicial system have authority to award attorney's fees, unless specific authority is granted by statute. Independence Blue Cross v. W.C.A.B. (Frankford Hosp.), 820 A.2d 868, 874 (Pa. Commw. 2003); see 42 Pa.C.S.A. § 2503. Although the court has the authority to *sua sponte* raise the issue of attorney's fees as costs under some statutes, Ramich v. W.C.A.B. (Schatz Electric, Inc., 564 Pa. 656, 770 A.2d 318 (2001); Kulp v. Hrivnak, 765 A.2d 796, 799 (Pa. Super. 2000), a party should always petition the court for attorney's fees. A court should grant leave to amend a claim to include a request for fees and costs when no prejudice can be shown. Solebury Twp. v. Dep't of Environmental Protection, 863 A.2d 607, 610 (Pa. Commw. 2004). If the petition is not made timely, the court lacks jurisdiction to award such fees. Grove v. Scott, 17 Pa. D. & C. 4th 212, 217 (1992); see 42 Pa.C.S.A. § 5505;);but see Sebelius v. Cloer, 133 S. Ct 1886 (2013) (Supreme Court held that an untimely, but unsuccessful petition brought under the National Childhood Vaccine Injury Act (NCVIA) in good faith and a reasonable basis that it is filed with the clerk of the Court of Federal Claims is eligible for an award of attorney fees). Pre-litigation conduct also cannot be a basis for an award of attorney's fees under 42 Pa. C.S. Section 2503(9). Bucks County Servs., Inc. v. Philadelphia Parking Authority, 71 A.3d 379 (Pa. Cmwlth. 2013).

8. Petitioning the Court

The court in Shevchik v. Zwergel, 8 Pa. D. & C. 4th 66, 67 (1990), explained that under 42 Pa.C.S.A. § 2503, a request for attorney's fees:

> …should be raised at the conclusion of the underlying action, utilizing the record and history in the underlying action as a basis to support the claim. To hold otherwise would raise an ancillary matter in every litigation that would serve only to complicate the issues and perhaps even keep a jury from embarking on a rightful path. These are matters that are best decided by the court upon a petition at the conclusion of the case. In this manner the issues would be reserved for the court and not be entwined with the issues being tried by a jury. Accordingly, the right to bring such a claim is

> preserved but separated and heard when all the facts in the underlying case are known.

See also 25A Standard Pennsylvania Practice 2d § 127:53. This reflects the approach that is preferred by many Pennsylvania courts; however, some judges have argued that a petition for attorney's fees should be made prior to the entry of final judgment. See Miller Electric Co., 907 A.2d 1051 (Baer, J., dissenting). A party must make a motion to the court for attorney's fees within ten days of final judgment. See Pa. R.C.P. 227.1 (pertaining to post-trial relief). A "petition to assess collection and legal costs" is intended to serve the same function as a post-trial motion for attorney's fees, and therefore, should not be treated differently. DLL Financial Serv., Inc. v. Rozentsvit, 939 A.2d 915, 923 (Pa. Super. 2007).

When a party appeals the trial court's order, thus triggering Pa. R.A.P. 1701(a) (providing that, "the trial court … may no longer proceed further in the matter" once an appeal has been taken), the trial court may still rule on a timely motion for attorney's fees since the motion is a separate, but connected, matter. Old Forge Sch. Dist. v. Highmark, Inc., 924 A.2d 1205, 1211 (Pa. 2007).

9. Appealability of Attorney's Fees

"It is settled law that counsel fees cannot be sued for separately from the principal claim," because the matter is connected but ancillary to the underlying action, and the allowance of such would "constitute an impermissible splitting of but one cause of action." Miller Electric Co. v. DeWeese, 589 Pa. 167, 907 A.2d 1051, 1055, 1057 (2006). Although attorney's fees may not be sued for separately, they may be appealed separately from the underlying action only when the appellant does not challenge the merits of the underlying action." Kulp, 765 A.2d at 798-99. Generally, a party cannot appeal an order denying attorney's fees unless it is a final order reduced to judgment. Hall v. Lee, 285 Pa. Super. 542, 545-48, 428 A.2d 178, 179-81 (1981). Finality is required so that all appeals may be brought together in order to prevent piecemeal litigation. Miller Electric Co., 589 Pa. 167, 907 A.2d 1060 (Baer, J., dissenting) (quoting Vaccone v. Syken, 899 A.2d 1103, 1107 (Pa. 2006)). The court possesses the inherent power to stay further proceedings on the same cause of action (no matter what the form of action is) until the costs have been paid. National Retailers Mut. Ins. Co. v. Sley Sys. Garages, Inc., 44 Pa. D. & C. 598, 599-600 (1942).

10. Hearing on Attorney's Fees; Due Process Requirements

Due process requirements, such as fair notice and an opportunity for a hearing on the record (or to present a defense in some manner), apply to attorney's fees. Sometimes the language of the statute providing for attorney's fees is enough to put a party on notice that they will be responsible for the opposing party's attorney's fees. Ramich, 564 Pa. at 668, 770 A.2d at 325. Additionally, an opportunity to defend may sometimes be satisfied by having an opportunity to create a record that demonstrates attorney's fees are not warranted. Id. The party seeking attorney's fees bears the burden of proving entitlement

to such fees. Commw., Dep't of Transp., Bureau of Driver Licensing v. Smith, 145 Pa. Commw. 164, 168, 602 A.2d 499, 501 (1992) (citing Jones v. Muir, 511 Pa. 535, 542, 515 A.2d 855, 859 (1986)).

Generally, the party requesting attorney's fees will file a fee petition, describing the work done and the amount requested. The party opposing the award of attorney's fees will then have an opportunity to file an answer to challenge the work done and fee requested. Failure to object to the fee petition or particular items therein may constitute a waiver. Karoly, 891 A.2d at 785. In the absence of an objection, the court will usually grant the items and fee requested. If necessary, the court will then hold a fee hearing to determine whether attorney's fees are warranted and what would constitute a reasonable fee in the particular case. If the record clearly supports an award of attorney's fees, a hearing is not required. Kulp, 765 A.2d at 800.

11. Appellate Review of an Award of Attorney's Fees

If the trial court does not explain the basis and standard for an award of attorney's fees, the appellate court will remand the matter. Old Forge Sch. Dist. v. Highmark, Inc., 924 A.2d 1205, 1213 (Pa. 2007); Sec. Mut. Life Ins. Co. of New York v. Contemporary Real Estate Assoc., 979 F.2d 329, 332 (3rd Cir. 1992) (federal court applying Pennsylvania law). In Sec. Mut. Life Ins. Co. of New York, the Circuit Court reversed and remanded the district court's decision awarding attorney's fees because, "it conducted no hearing and made no findings of fact as to the reasonableness of the fees requested and gave no statement as to the standard governing its award," and therefore, the Circuit Court could not "adequately review the reasonableness of the action of the district court in awarding counsel fees under the circumstances." Id. An appellate court will also reverse a trial court's grant of attorney's fees "where the decision is based on factual findings with no support in the evidentiary record or legal factors other than those that are relevant to such an award." Holz v. Holz, 850 A.2d 751, 760 (Pa. Super. 2004). When reviewing the grant of attorney's fees, an appellate court must consider,

> the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; ... the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

Id. at 761 (citing LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968). "An appellate court has no power under any statute or rule to award counsel fees for proceedings below and can only award fees for vexatious or obdurate conduct through a frivolous appeal." Piecknick, 546 Pa. at 558 n. 4, 686 A.2d at 1300; see Pa. R.A.P. 2744. The appellate court may remand the case to the trial court to determine reasonable attorney's fees for a frivolous appeal. Id. at 557, 686 A.2d at 1300; see Pa. R.A.P. 2744.

12. Multiple Claims

If multiple claims are raised – some of which permit the recovery of attorney's fees and others that do not – only time spent on the claims permitting attorney's fees can be recovered. Karoly, 891 A.2d at 785 n. 7 (citing Neal v. Bavarian Motors, Inc., 882 A.2d 1022 (Pa. Super. 2005)). If multiple claims are raised – some of which the plaintiff is successful on and others that the plaintiff is unsuccessful on – only time spent on successful claims can be recovered. Karoly, 891 A.2d at 786. "Once the prevailing party has established the relatedness of the claims it is the opposing party's 'burden to establish a basis for segregating the hours spent on the successful and unsuccessful claims.'" Id. (quoting Okot v. Conicelli, 180 F. Supp. 2d 238 (2002)). So long as the client retains a "material interest" in the fee litigation, attorney's fees may include the reasonable time spent preparing and litigating the fee petition. Birth Center, 727 A.2d at 1161. The Superior Court defines "material interest" as, "whether a client has anything to lose if the counsel fees are denied. If counsel must prevail on the fee petition to get paid at all, then the client has nothing to lose if counsel fees are denied because the client is not liable for the fees." Id. at 1161 n. 13. It should go without saying that an award for attorney's fees may only include what could properly be billed to the client; if it is not billable to the client, it is not billable to the opposing party as a part of costs. In Vitac Corp. v. W.C.A.B. (Rozanc), 578 Pa. 574, 582-83, 854 A.2d 481, 486 (2004), the Pennsylvania Supreme Court permitted the services of paralegals, law clerks, and recent law school graduates to be itemized as attorney's fees under section 440(a) of the Workers' Compensation Act. The Court noted, "allowing the recovery of paraprofessional fees as a component of statutory attorney's fees is likely to promote the public's interest in efficient lawyering by helping to ensure that some tasks will be assigned to lower-cost personnel." Id. at 582, 854 A.2d at 485-86.

13. Sovereign Immunity

Costs, including attorney's fees, cannot be imposed upon the Commonwealth unless a statute clearly imposes liability, Richmond v. Pennsylvania Higher Ed. Assistance Agency, 6 Pa. Commw. 612, 615, 297 A.2d 544, 546-47 (1972), or the Commonwealth waives its sovereign immunity from suit. Inmates of B-Block v. Jeffes, 87 Pa. Commw. 98, 102-03, 483 A.2d 569, 571-72 (1984). However, sovereign immunity will not shield the Commonwealth or an entity thereof when it makes a frivolous appeal. Pennsylvania, Dep't of Transp. v. W.C.A.B. (Tanner), 654 A.2d 3, 6 (Pa. Commw. 1994). General immunity from liability for costs, including attorney's fees, usually extends to state officers, boards, or other agencies, counties, municipalities and federal agencies. Richmond, 6 Pa. Commw. 612, 297 A.2d 544, 547; In re Handel, 570 F.3d 140, 144 (3d Cir. 2009)..

14. Miscellaneous Information

Several comments about what may be included as reasonable attorney's fees. In Krebs, 893 A.2d at 792 (citations omitted), the Court noted:

> [T]he form of fee arrangement between the prevailing party and counsel will generally have little or nothing to do with whether the purposes of the statute are served in the *decision to award* fees and costs. An award of attorneys' fees and costs may be appropriate even when the attorney has agreed to bring an action under the statute free of charge. Further, a contingency fee agreement may not serve as an artificial ceiling, but it is only one of potentially many factors which should be used to determine the *reasonableness* of attorneys' fees already awarded.

A trial court may apply a multiplier based upon the contingencies and quality of work performed. Signora, 886 A.2d at 293 (court applied a contingency multiplier of 1.5 to attorney's fee in class action suit); see Pa. R.C.P. 1716(5). Such contingency fee arrangements, however, can be limited by statute. Seitzinger v. Commonwealth of Pennsylvania, 25 A.3d 1299 (Pa. 2011) (upholding statute that placed a 20% ceiling on contingency fees attorney's could claim in a successful worker's compensation case); Attorney's fees are permitted in *pro bono* cases because it encourages competent attorneys to accept such cases. Krassnoski, 454 Pa. Super. at 84, 684 A.2d at 638. "[W]here a counsel fees award is made in which counsel has acted *pro bono*, the award should be made directly to counsel in order to avoid a windfall to the plaintiff." Id. at 84 n. 3, 684 A.2d at 638. A *pro se* equivalent of attorney's fees may not be awarded to a *pro se* litigant. Westmoreland County Indus. Dev. Auth. v. Allegheny County Bd. of Prop. Assessment, Appeals and Review, 723 A.2d 1084, 1087 (Pa. Commw. 1999). Travel time and other out-of-pocket expenses may sometimes be included in a fee petition. Cleveland Asphalt, 886 A.2d at 283. Generally, the client is liable for attorney's fees when the attorney harms a third person by the execution of matters within his authority. American Mut. Liability Ins. Co. v. Zion & Klein, P.A., 339 Pa. Super. 475, 480, 489 A2d 259, 262 (1985). Awarding of attorneys fees in a statute that does not specifically specify for attorney's fees is within the discretion of the court. For example, under 29 U.S.C.S. § 1132(g)(1), the Third Circuit stated that the decision to award attorney's fees and costs to a party achieving some degree of success on the merits is entirely within the discretion of a district court. Thus, after concluding that a party has achieved success on the merits, a court may consider whether an award of attorney's fees is appropriate using five factors. They are: (1) the offending parties' culpability or bad faith; (2) the ability of the offending parties to satisfy an award of attorneys' fees; (3) the deterrent effect of an award of attorneys' fees against the offending parties; (4) the benefit conferred on members of the plan as a whole; and (5) the relative merits of the parties' position. Templin v. Independence Blue Cross, 2011 U.S. Dist. LEXIS 98482, *1 (E.D. Pa. Aug. 19, 2011).