

Law & Justice Interim Committee – 64<sup>th</sup> Montana Legislature  
June 28, 2016, State Capitol, Room 102  
**Overview of Attorney Fees and Court Costs**

A. Introduction

B. Questions/Outline

- What are they?
- How do you get them?
- How do you collect?

C. Court Costs – What are they?

1. Title 25. Part 5 MCA Claiming Costs; 25-10-501 Bill of Costs

The party in whose favor judgment is rendered and who claims the party's costs shall deliver to the clerk and serve upon the adverse party, within 5 days after the verdict or notice of the decision of the court ... a memorandum of the items of the party's costs and necessary disbursement in the action or proceeding. The memorandum must be verified by the oath of the party, the party's attorney or agent, or the clerk of the party's attorney, stating that to the best of the person's knowledge and belief, the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

2. 25-10-502 Procedure upon objection to the bill of costs. – 5 day objection

D. Court Costs – How do you get them? How do you collect?

1. 25-10-503 How costs on appeal claimed

Whenever costs are awarded to a party by an appellate court, if the party claims the costs, the party shall, within 30 days ... deliver to the clerk a memorandum of the party's costs, verified as prescribed in 25-10-501, and then the party may have an execution for the costs upon a judgment.

2. 25-10-504 Clerk to include costs in judgment

The clerk shall include in the judgment entered by the clerk the costs., if the costs have been taxed or ascertained.

E. Attorney Fees – What are they?

1. Attorney Fees – Title 25, part 3, MCA – Attorney fees; 25-10-301

Determining compensation of attorneys

The measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of the parties, except that in probate proceedings the court may fix and allow compensation of attorneys representing administrators, executors, guardians, trustees and agents appointed by the court.

## 2. Rule 4 Montana Rules of Appellate Procedure - How and when to take an appeal or cross-appeal

(1) Judgments defined.

(a) Final judgment. A final judgment conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding, including any necessary determination of the amount of costs and attorney fees awarded or sanction imposed.

## F. Attorney Fees – How do you get them? How do you collect?

### 1. The “American Rule”

Montana Courts follow the “American Rule,” under which a party is generally not entitled to fees absent a specific contractual or statutory provision. *Bitterroot River Protective Association v. Bitterroot Conservation District*, 2011 MT 51.

[E]xceptions to the American Rule should only be applied in rare instances when a party has been forced to defend against a wholly frivolous or malicious action. *Boehm v. Cokedale*, 2011 MT 224.

### 2. Contractual Basis for Attorney Fee Awards – Award of fees where contract entitles prevailing party to attorney fees.

[F]inding...clearly the prevailing party and there was no dispute the agreement provision applied because both parties sought fees under it. *Gibson v. Paramount Homes, LLC*, 2011 MT 112.

Because the agreement provided fees to prevailing party, appellate fees also must be awarded. *Estate of Donald v. Kalispell Regular Medical Center*, 2011 MT 166.

[T]he parties’ marital dissolution settlement agreement entitled...to recover costs and attorney’s fees. *In re Marriage of Hart*, 2011 MT 102.

No fees under rental agreement where language did not clearly and unequivocally require award of attorney’s fees. *Benintendi v. Hein*, 2011 MT 298.

Homeowner argued that he had a reciprocal right to recover attorney fees based on 28-3-704 MCA, under which contractual rights to attorney fees are treated as reciprocal. The Montana Supreme Court held that Homeowner was not entitled to the benefit of 28-3-704 because the contractual agreement pertained only to attorney fees in pursuit of assessments, whereas Homeowner had incurred attorney fees in pursuit of a declaratory judgment. *Beeb v. Board of Directors of the Bridger Creek Subdivision Community Association*, 2015 MT 183.

### 3. Statutory Basis for Attorney Fee Awards – Some examples

[T]he legislature is the appropriate forum to address whether attorney’s fees should be allowed as an element of damages. *Jacobsen v. Allstate Insurance Company*, 2009 MT 248.

a. Uniform Declaratory Judgment Act – 27-8-313 MCA

Under the Uniform Declaratory Judgment Act pursuant to 27-8-313, MCA (permitting relief in a declaratory judgment action whenever “necessary and proper”). *Hughes v. Ahlgren*, 2011 MT 189.

Applying the “necessary or proper” language of 27-8-313, MCA, the Court held that attorney’s fees were appropriate as supplemental relief ... *Svee v. City of Helena*, 2014 MT 311.

b. Dissolution of Marriage – 40-4-110 MCA

Under 40-4-110(1), MCA, a district court may order a party to pay the other party’s reasonable attorney’s fees incurred during the proceeding. An award under the statute “must be reasonable, necessary, and based upon competent evidence.” *Stevens v. Stevens*, 2011 MT 106.

The Montana Supreme Court held that although it is not required that the district court hold a separate hearing on the reasonableness of an attorney fee award when trial testimony estimates the amount owed to a party, a party’s testimony at trial that she would owe her attorney \$22,000 by the end of the trial was not sufficient to support a determination that the fees requested were reasonable in a dissolution proceeding. *Crowley v. Crowley*, 2014 MT 42.

c. Landlord-Tenant – 70-24-442 MCA

70-24-442(1), MCA allowing fees to prevailing party in a landlord-tenant action, is *discretionary*. It does not mandate an award of fees in a rental dispute. *Benintendi v. Hein*, 2011 MT 298.

d. Construction Lien – 71-3-124 MCA

71-3-124 entitles prevailing party in construction lien enforcement action to recover reasonable attorney fees incurred in both the District Court and on appeal. *Mountain West Bank, N.A. v. Cherrad, LLC*, 2013 MT 99.

e. Right to Know – 2-3-221 MCA

Section 2-3-221, MCA, provides for an award of attorney fees to a prevailing party seeking to enforce the person’s rights under Article II, section 9, of the Montana Constitution.

f. Condemnation Actions – Montana Constitution, Article II, 29

The Montana Supreme Court found that landowners were entitled to attorney fees pursuant to Mont. Const., art. II, 29 when a city seized landowners’ property for public use without compensation, forcing landowners to commence litigation to protect their rights. *Wohl v. City of Missoula*, 2013 MT 46

#### 4. Fees against a Government Entity – Some examples

- a) Civil Rights Attorney's Fee Award Act of 1976
- b) Equal Access to Justice Act

As a practical matter, if the government fails to follow the Constitution, statute, or regulation, or takes an action that a court finds to be arbitrary and capricious, the plaintiff will have a good argument for attorney's fees. *Native Ecosystems Council v. Weldon*, 921 F. Supp. 2d 1069(D. Mont. 2013)

A party who prevails in litigation against the government has a better chance of recovering fees than someone who prevails in litigation against a private party.

If constitutional rights are involved, an award of attorney's fees is likely.

#### 5. Attorney Fees – How to collect?

- a. Attorney Fees in Judgment (Rule 4 M.R.A.P.) – Judgment lien
- b. Execution on Judgment