

## Attorney Fees Clause

by

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A sizable proportion of litigation results in legal fees exceeding the damages that were sought and awarded. Numerous surveyors have opted not to pursue unpaid fees from the client because the cost of collecting the fee is not worth the amount sought.

One contract clause that will often reduce the cost of collection is a section in the contract shifting the prevailing party's attorney fees and litigation costs to the losing party.

Attorney Fees & Litigation Costs: In any litigation between the Client and Surveyor for fees provided for in this contract, the party prevailing in the litigation shall be compensated by the loser for attorney fees and court costs to recover fees.

Many people have the mistaken impression that the loser must always pay the prevailing party's attorney fees. Shifting the prevailing party's attorney fees to the loser is common in other countries but is not allowed in the United States absent statute, vexatious litigation, or contract. (The responsibility for each side to pay their own legal fees is so distinctly a part of the judicial system in the United States that it is known as the "American Rule").

Accordingly, the surveyor that does not wish to pay attorney fees and litigation costs in order to collect their fee must include a provision in the contract to provide for the client to pay for the surveyor's attorney fees and litigation costs.

There are limitations to this clause that reduce its effectiveness. First and foremost, only reasonable fees can be collected. Since only reasonable fees can be sought and collected, the surveyor cannot always expect to be compensated for the best legal representation for all legal avenues that were pursued. The standard of reasonable fees has been defined in some cases to mean that the cost of only minimally acceptable legal representation will be compensated using a rate that is standard for the locality.

Often in litigation, complete victory seldom occurs. Accordingly, the term "prevailing" is subject to interpretation. The prevailing party is defined as the party that on a practical level is said to have succeeded in achieving a measure of their goals when compared against the other party. Accordingly, if a surveyor seeks \$1,000 in fees that the client denies entirely and the surveyor is awarded only \$500 in fees as a result of the judgment, the surveyor would be considered to be the prevailing party. On the other hand, if the client made claim they only owed the surveyor \$400 when the surveyor was demanding \$1000, the client, on a practical level, would be said to have prevailed. If the action was voluntarily dismissed there would not be a prevailing party. The court often determines who was the prevailing party as part of the judgment.

The contract clause, such as the previous example, often limits collection of fees and litigation costs to the terms set forth in the clause. In the previous example, the clause only applies to litigation costs over fees. The focus on fees tends to favor the surveyor since most litigation over the surveyor's fee is initiated by the surveyor. Where the surveyor litigates over the fee and the client counterclaims claiming shoddy surveying services, only those attorney fees related to the claim of fees and not the counterclaim are covered by the contract.

Another limitation of the previous clause is the exclusion of attorney fees and costs arising from alternate dispute resolution such as arbitration. Only litigation is covered in the previous clause.

The contract clause can be re-written to cover all litigation involving a service contract.

Attorney Fees & Costs: In any action incurred to enforce this contract or defend services provided according to the contract, the prevailing party shall be entitled to reasonable attorney's fees.

As with other contract clauses, only the parties to the contract can seek relief under the clause, barring a state statute providing otherwise. Accordingly, litigation involving a third party will not shift the attorney fees and costs to the third party.

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