

Fee Shifting Statutes Under California Law

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Under California Law numerous exceptions exist to the traditional “American Rule” wherein each party is required to pay their own attorneys’ fees in litigation. The exceptions exist in three general categories.

- **Provisions provided by contract authorizing the award of fees**
- **State statutes which authorize fee awards in particular actions including but not limited to CCP § 1021.5. The statute is known as the Private Attorney General Rule**
- **Theories rooted in equity and fee awards for wrongful conduct**

The potential for a fee award is a critical consideration for a party to consider when initiating or defending litigation. Obviously, the cost of litigation including a fee award, can become a substantial factor in developing litigation strategy. Therefore, in the initial planning for litigation, it is important to determine whether a statute, a common law theory, or a contractual provision might provide for some form of fee shifting.

There are literally hundreds of California statutes which provide for fee shifting in numerous areas including but not limited to the Government Code, civil rights, consumer protection, employment, general civil procedure, immigration and real property.

An important consideration on the topic of fee shifting is that such awards are constrained by ethical considerations. For example, California Rule of Professional Conduct 4-200 provides as follows:

- A. A member should not enter into an agreement for, charge, or collect an illegal or unconscionable fee.
- B. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into . . . The following factors are considered:
 1. The amount of the fee in proportion to the value of the services performed.
 2. The relevant sophistication of the member and the client.

3. The novelty and difficulty of the question involved and the skill required to perform the legal services properly.
4. The likelihood, if apparent to the client, that the acceptance of a particular employment will preclude other employment by the member.
5. The amount involved and the results obtained.
6. The time limitations imposed by the client or by the circumstances.
7. The nature and length of the professional relationship with the client
8. The experience, reputation, and the ability of the attorneys performing the services.
9. Whether the fee is fixed or contingent.
10. The time and labor required.
11. The informed consent of the client to the fee.

All of the factors noted here are important in calculating the amount of fee award. Counsel should also use care to avoid conflicts of interest when an attorney is settling the merits of a case and the fee award simultaneously. That scenario can create a situation creating adversity between the lawyer and the client.