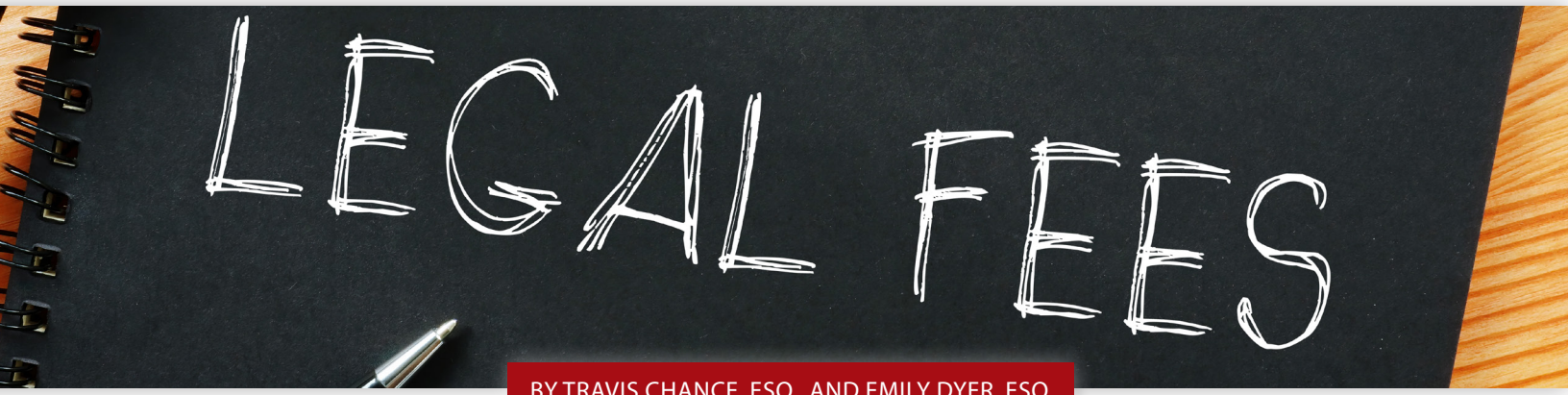
Preplanning for Attorneys' Fees in Complex or Multiparty Cases



BY TRAVIS CHANCE, ESQ., AND EMILY DYER, ESQ.

Planning early for how your client may be able to recover attorneys' fees can help avoid costly fee disputes later and improve the chances of securing maximum fee awards.

The potential to recover attorneys' fees is often one of the top considerations for civil attorneys when deciding whether to take a new case and advising a client about the risks and realities of litigating a dispute. Nevada, like all states, follows the American Rule – that parties bear their own attorneys' fees unless a statute, rule, or contract allows shifting fees from one party to another. Accordingly, attorneys must sift through contractual terms or review applicable statutes and rules for those magical words allowing for fee awards.

While determining whether there is an avenue to recover fees can be a crucial factor in a client's decision to proceed with a case, it should not then be put on the shelf to age and be litigated if and when the time to move for fees comes along. In complex or multiparty cases, the available avenues to recover attorneys' fees should be considered with each billing entry and throughout the litigation. The authority that may allow a prevailing party to recover fees may not extend to fees incurred in pursuing all claims, or against all the losing parties. Thus, practitioners should be cognizant of the issue of apportionment—both from the perspective of the party seeking fees and the one defending against requests for fee awards.

Apportionment Standard under Nevada Law

The leading Nevada case on apportionment is *Mayfield v. Koroghli*, 124 Nev. 343 (2008). In *Mayfield*, the Nevada Supreme Court considered for the first time the "propriety of apportioning costs when the prevailing party pursued similar claims, based on the same factual circumstances, against multiple defendants."[1] In doing so, the court adopted the reasoning in *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101 (1996), as modified on denial of reh'g (Mar. 22, 1996), holding that where claims are brought under the same facts against multiple defendants, the district court has the discretion to determine whether apportioning costs among the defendants would be "impracticable by the interrelationship of the claims" such that apportionment is not required.[2] In exercising its discretion, the district court must "attempt to apportion the costs before determining that apportionment is impracticable" and make specific findings that apportionment is impracticable because the claims are "inextricably intertwined" under the circumstances.[3] While *Mayfield* concerned apportioning costs, this analysis has been extended to attorneys' fees. *See, e.g.*, *Fortunet, Inc. v. Rosten*, 542 P.3d 750 (Nev. 2024).

Recent Nevada appellate court decisions have reaffirmed this apportionment analysis, with the high court remanding fee orders that failed to make the required findings. *See, e.g.*,

201 N. 3rd St. LV, LLC v. Hogs & Heifers of Las Vegas, Inc., 537 P.3d 133 (Nev. 2023); *Seibel v. PHWLV, LLC*, 561 P.3d 590 (Nev. 2024).

The Practical Considerations of Apportioning Fees and Costs

Who bears the burden of apportionment?

Although Nevada has adopted the apportionment requirement on fee-eligible claims, there is little guidance as to the actual apportionment analysis that courts must perform. For example, it is unclear from *Mayfield*, or the subsequent cases applying it, which party bears the burden of apportionment.

One possibility, which appears to be the majority approach, is that the burden is on the moving party to affirmatively apportion the requested fees or show that apportionment would be impracticable when establishing its entitlement to and the reasonableness of its fees.[4]

A second possibility is that the burden is on the opposing party to dispute entitlement or reasonableness by arguing the requested fees should be apportioned because they are not recoverable as to certain parties or claims.[5]

A third possibility—and, from a recent footnote in a Nevada Supreme Court decision, the one that may apply under Nevada law—is that the district court is obligated to conduct the apportionment analysis even if neither party raises the issue.[6]

Surveying courts outside of Nevada, a majority of courts tend to place the burden on the moving party to apportion the time spent on work related to an applicable claim or against a certain party, as appropriate. One of the leading California cases on this issue, *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 813 (2004), as modified (Oct. 13, 2004), confirms the moving party bore the "burden of demonstrating how the fees for legal work attributable to both the contract and the tort recoveries should be apportioned."

That said, alternative authority, including guidance from the Ninth Circuit, places the burden on the nonmoving party to apportion when challenging the accuracy and reasonableness of the requested fees.[7]

Given the silence of Nevada law on the issue and apparent split among other courts, both sides of a fee dispute should be mindful of the apportionment burden, depending on the specific facts of the case.

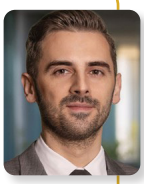
What is the appropriate method for apportioning fees?

Like with most fee-related issues, the district court has significant discretion in awarding fees. Beyond that, there is no Nevada authority providing guidance to district courts or litigants on how to apportion fees. Courts that have confronted the issue have taken varying approaches. For example, some courts have reduced the total fee award by a percentage to account for work on claims for which fees cannot be recovered.[8] The certain percentage used to reduce the fee award is based on the specific circumstances, such as the court's familiarity with the issues, the filings and time devoted to the applicable claims and/or the allocations lobbied for by the parties. The court in *Cassim* opted for a more formulaic approach by allocating time entries between recoverable and non-recoverable claims, determining a percentage between those two categories, and applying that percentage to any time entries with mixed or indiscernible work.

The choice of apportionment methodology is primarily going to turn on the sufficiency of the billing entries. Consequently, parties on both sides should consider the avenues to recover fees, if any, early in a case and adjust their billing practices to more clearly state the work performed if there is a possibility that only fees could be recovered for some claims or against certain adversaries. Doing so may allow a moving party to more easily apportion their fees, which could save time and effort litigating apportionment and may result in a larger award.

Parties should also be thoughtful about discovery, and to avoid lumping all the opposing parties or claims together, which will later complicate their ability to determine what work was performed on the fee-eligible claims. Similarly, parties should consider fee apportionment when planning for trial to later argue apportionment is or is not impracticable, e.g., strategically staging trial evidence, considering which claims and against which defendants should proceed to trial, etc.

While there are some situations in which the claims or parties are so "inextricably intertwined" where apportionment is impracticable, parties should be hesitant to bank on that conclusion or otherwise opt to be less specific with their billing entries to argue that all the work was related to all the claims or parties. Those approaches may lead to unfavorable consequences, like denial of the requested fees or a lengthy and expensive fee dispute, which may necessitate an evidentiary hearing and/or experts on apportionment.[9]



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ENDNOTES:

1. 124 Nev. at 353.
2. *Id.*
3. *Id.* at 353–54.
4. *See, e.g.*, *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 915 F.Supp.2d 1179, 1188 (D. Nev. 2014) (citing *Hensley v. 29724865.1 Eckerhart*, 461 U.S. 424, 433, 437 (1983)) ("[T]he party seeking fees bears the burden of establishing entitlement to fees and submitting supporting evidence.")
5. *See generally, e.g.*, *Pearson v. Clark Cnty.*, No. 2:04-CV-942-BES-RJJ, 2008 WL 117889, at *2 (D. Nev. Jan. 7, 2008) (recognizing the opposing party's burden to rebut the requested fees, including "the accuracy and reasonableness of the hours charged.")
6. *201 N. 3rd St. LV, LLC*, 537 P.3d at 133 n.1 (rejecting argument that appellants did not raise apportionment below, because "these issues did not arise until after the district court entered its fee and cost orders"); *see also Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 590-91 (1994), *holding modified for other reasons by Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823 (1998) ("In the 'relatively unsettled' area of the law concerning apportionment of fees assessments, … it appears that the trial judge's discretion is tempered only by reason and fairness." (citation omitted)
7. *See, e.g.*, *In re Bartenwerfer*, No. 20-60020, 2021 WL 3560671, at *2 (9th Cir. Aug. 12, 2021) (citing the "burden-shifting framework" in *Gates v. Deukmejian*, 987 F.2d 1392, 1397–98 (9th Cir. 1992) ("The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.")
8. *See, e.g.*, *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1157 (9th Cir. 2002).
9. *See, e.g.*, *Richardson v. Commc'ns Workers of Am., AFL-CIO*, 530 F.2d 126, 133 (8th Cir. 1976), *disapproved of on other grounds by Shimman v. Int'l Union of Operating Eng'rs, Loc. 18*, 744 F.2d 1226 (6th Cir. 1984) (affirming "low" fee award where moving party failed to apportion); *Effective Teleservices, Inc. v. Smith*, 132 So. 3d 335, 338 (Fla. Dist. Ct. App. 2014) (fee hearing and use of expert). *See generally In re Crystal Cathedral Ministries*, No. 2:12-BK-15665-RK, 2016 WL 1212408, at *5 (Bankr. C.D. Cal. Mar. 28, 2016) (explaining that when apportioning fees by claims, "'the impossibility of making an exact apportionment does not relieve the district court of its duty to make some attempt to adjust the fee award in an effort to reflect an apportionment.'" (citation omitted)

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