

No Kings: Attorneys Fees and the American Rule vs. the English Rule

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Vocabulary and Context

<u>English Rule</u>	Fee structure in which the party who loses the lawsuit pays for the opposing parties' attorneys fees and other litigation expenses.
<u>American Rule</u>	Fee structure in which each party pays for the cost of their own litigation.

Term(s):

- Fee shifting statute: a type of statute which shifts legal fees from one litigant to another within at least one area of litigation.
- Discretion: the power of a judge to use their own reason and judgement to make official decisions within rules and principles of law.



History of the Rules

- The Supreme Court of the United States first acknowledged the American rule in the 1796 case, *Arcambel v. Wiseman* :
“The general practice of the United States is in opposition to [shifting attorneys fees to losing party]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”
 - The “general practice” mentioned is rooted in the then new country’s desire for freedom from oppression, which depended on equal access to the courts.
- The Court later stated that “one should not be penalized for merely defending or prosecuting a lawsuit [...] or 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.”

Benefits of the Rules



American Rule

- Encourages litigation.
- Reduces plaintiffs' financial risk when seeking "their day in court."
 - A losing plaintiff does not pay the defendant's legal fees.
- More court cases result in legal reform.



English Rule

- Prevents expensive/frivolous litigation.
- Compensates winning plaintiffs in full by covering their fees.
- Reduces the caseload of courts.



Downsides of the Rules



American Rule

- Requires defendants to pay legal fees for litigation.
- More litigation can overburden courts.



English Rule

- Discourages litigation.
- Plaintiffs incur financial risk.
- Fewer cases result in less legal accountability.



The United States follows the American rule... mostly.

Although the American Rule is the general rule governing, there are several exceptions where fee shifting occurs:

- Contractual Agreements
- Statutory Exceptions
- Court-Created Exceptions



The Exceptions

Contract

- Parties are allowed to agree to contractual terms which require fees to be shifted if litigation arises from the contract.

Statute

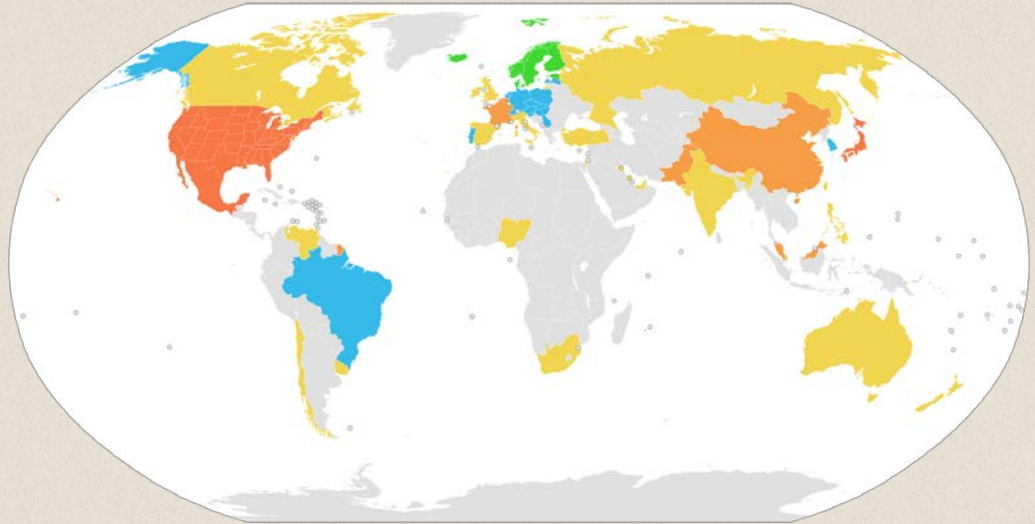
- States or the federal government may create statutory exceptions where the losing litigant must pay opposing counsel's fees.

Common Law

- Malicious Prosecution: Fee shifting is acceptable when a plaintiff brings a groundless suit against a defendant.
- In *Alyeska Pipeline Service v. Wilderness Society* (1975), The Supreme Court did not create a generalized rule about shifting fees in public interest cases, but held Congress may do so.

The American Rule and English Rule Around the World

- Judicial systems around the world have different standards in which judges have more discretion about fee-shifting.
- Alaska is a notable exception to the American Rule within the United States.
 - Alaska Rule of Civil Procedure 82 provides that if you are held liable, some or all of the attorney fees of the person making a claim against you must be paid by you.
 - The amount is determined by statute and/or court discretion.



Fee Shifting Statutes in New Mexico

New Mexico Civil Rights Act NMSA 1978, § 41-4A-5

- **The court may exercise its discretion and award a prevailing plaintiff(s) reasonable attorney fees and costs to be paid by the defendant(s).**
 - Similar to other civil rights statutes, such as the New Mexico Human Rights Act.
 - Provision incentivizes individuals to pursue claims for violations of their state constitutional rights without the financial burden of legal fees, provide they succeed in their claims.



Other Statutes:

- The Whistleblower Protection Act NMSA 1978, § 10-16C-1 through 10 - 16C-6
- The Unfair Practices Act NMSA 1978, § 57-12-1 through 57 -12-26
- The Inspection of Public Records Act NMSA 1978, § 14-2-5

Other Fee Shifting Provisions in NM:

New Mexico courts may also award attorney fees under certain circumstances outside of statutory provisions.

Ex: *State ex rel. New Mexico State Highway and Transp. Dept. v. Baca* , 1995-NMSC-033, 120 N.M. 1.

- The NM Supreme Court affirmed the malicious prosecution exception to the American Rule.
 - Rationale: promote judicial efficiency, regulate backlogs, and deter frivolous filings
- The NM Supreme Court held that a court's inherent power extends only to conduct occurring before the court or in direct defiance of the court's authority.

Takeaways:

1. **Judicial restraint:** Courts can only act within narrow common-law exceptions to fill gaps.
2. **Legislative primacy:** The Legislature controls the broader policy decisions about when attorney fees should or should not be recoverable.

Legislative action can reduce uncertainty, prevent inconsistent application, and promote efficiency.

NM: American or English?

The American rule generally applies in New Mexico, under which each party bears its own attorney fees unless a statute, court rule, or contractual agreement provides otherwise.