Attorneys' Fees, Litigation Expenses and Statutory Costs in NM CRA Cases

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New Mexico has a Civil Rights Act!

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§ *-*-*. Attorney fees

In any action brought under the New Mexico Civil Rights Act, the court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant.

L. 2021, Ch. 119, § 5, eff. July 1, 2021.

The Discretionary Fee Award

When an award of attorney fees is discretionary, "the exercise of that discretion must be reasonable when measured against objective standards and criteria." *Lenz v. Chalamidas (Lenz I),* 109 N.M. 113, 118, 782 P.2d 85, 90 (1989); *Autovest, L.L.C. v. Agosto*, No. A-1-CA-37459, 2021 WL 1232415, at *8 (N.M. Ct. App. Mar. 31, 2021). Despite that "the award of attorney's fees in a workmen's compensation case is discretionary with the court, *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 582 P.2d 1270 (1978), a court of appeals decision to award no fees for the appeal was an abuse of discretion where employee's attorney obtained increased success for his client on appeal (award to worker increased from $37,500 to $54,000). *Herndon v. Albuquerque Public Schools*, 1978-NMSC-090, ¶ 2, 92 N.M. 287. "When a successful claimant is not awarded attorney fees or when the fees awarded are too low, the above policy [recognizing that "[w]hen a successful claimant is not awarded attorney fees or when the fees awarded are too low,"] tends to be frustrated." *Fryar v. Johnsen*, 1979-NMSC-080, ¶ 7, 93 N.M. 485, 486.

Reasonable Fees

As with all attorneys' fees, the award must be for "reasonable" fees. *See*, NMRA 16-105. The factors set out in Rule 16-105 are commonly known as the *Fryar* factors. *See*, *Fryar,* 93 N.M. at 487.

> NMRA, RULE 16-105. FEES
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> A. Determination of reasonableness. … The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

"The factors specified in Subparagraphs (1) through (8) [of Rule 15-105(A)] are not exclusive. Nor will each factor be relevant in each instance." Committee Commentary to Rule 15-105(A).

"Application of these factors, … is not a rigid, mechanical process, and the weight accorded each factor will vary from case to case." *Lenz v. Chalamidas (Lenz II)*, 1991-NMSC-099, ¶ 2, 113 N.M. 17, 18.

> These criteria relate generally to mathematic calculations that a district court must conduct in the face of competing arguments by the parties: (1) what hourly rate is the lawyer entitled to per hour, (2) how many hours should the project require, and (3) what do other lawyers bill for similar work?

ACLU of New Mexico v. Duran, 2016-NMCA-063, ¶ 41, 392 P.3d 181, 191 (citing *Rio Grande Sun,* 2012–NMCA–091, ¶ 13, 287 P.3d 318).

<u>Browning on New Mexico Fee Law</u>

> New Mexico law requires courts to undertake a detailed five-factor analysis. *See Rivera–Platte v. First Colony Life Ins. Co.,* 143 N.M. 158, 184, 173 P.3d 765, 791 (Ct.App.2007)("In New Mexico, a court determines the reasonableness of attorney fees by applying the *Fryar* factors found in Rule 16–105.")(citing *In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig.,* 140 N.M. 879, 908, 149 P.3d 976, 1005 (Ct.App.2006)). The relevant factors are: (i) the time and labor required—the novelty and difficulty of the questions involved and skill required; (ii) the fee customarily charged in the locality for similar services; (iii) the amount involved and the results obtained; (iv) the time limitations that the client or the circumstances imposed; and (v) the experience, reputation, and ability of the lawyer or lawyers performing the services. *Mountain Highlands, LLC v. Hendricks,* 2010 WL 1631856, at *4 (citing *State ex rel. Conley Lott Nichols Mach. Co. v. Safeco Ins. Co. of Am.,* 100 N.M. 440, 446, 671 P.2d 1151, 1157 (Ct. App.), *cert. denied,* 100 N.M. 327, 670 P.2d 581 (1983)). It is possible that a court could, in some circumstances, evaluate the work in a relatively small case without substantial documentation, such as affidavits or timesheets. The trial judge has, after all, played a part in the litigation and seen much of the work product of the attorneys. On the other hand, in most cases, particularly larger cases, the attorneys perform much work that the court never sees. To make an informed analysis of these five factors, therefore, the court must be aware not only of the total fees incurred, but also the work performed and the time taken to perform it. The court will likely already be aware of the fees customarily incurred for similar services and the result obtained. The court must be informed, however, if there were any time limitations that the client or circumstances imposed. Finally, unless the bar for that particular legal work in the jurisdiction is small or already known to the judge, the court will need help—most likely by affidavit testimony from other attorneys—to properly assess the experience, reputation, and ability of the lawyers seeking fees.

Pedroza v. Lomas Auto Mall, Inc., 716 F. Supp. 2d 1031, 1041–42 (D.N.M. 2010), *vacated on other gr'ds*, No. CIV 07-0591 JB/RHS, 2013 WL 4446770 (D.N.M. Aug. 2, 2013).

The Social Importance of a Fully Compensatory Attorney' Fee Award in Cases Involving Claims with Statutory Fee Shifting Provision

"[F]ee shifting" [is] defined as "the imposition of the cost of litigation on the party who unsuccessfully resists a statutorily-compelled, socially beneficial action." *Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 9, 287 P.3d 318 (*citing In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig.,* 2007–NMCA–007, ¶ 34, 140 N.M. 879 (observing that the lodestar method of calculating attorney fees "is ordinarily used in statutory fee-shifting cases because it provides adequate fees to attorneys who undertake litigation that is socially beneficial")).

Said another way, "[f]ee-shifting statutes … provide for defendants to pay the reasonable attorney fees of prevailing plaintiffs in order to encourage private litigants and their lawyers to prosecute claims on behalf of the public." *Vinyard v. New Mexico Human Services Department*, No. A-1-CA-36717, ¶38, 2019 WL 6728859 (11/12/19), *10, *citing Rio Grande Sun*, ¶ 19.

"[A]ttorney fees awarded "should reflect the full amount of fees fairly and reasonably incurred by [the p]laintiff in securing an award" under the statutory scheme. *Jones,* 1998–NMCA–020, ¶ 25, 124 N.M. 606. Without this incentive, prospective plaintiffs might have difficulty pursuing their claims and enforcing IPRA on behalf of the public. *Id." Rio Grande Sun,* ¶19.

The Lodestar Method of Calculating an Attorneys' Fee Award

The lodestar method (hours times hourly rates) applies to calculate the attorneys' fees awarded in a fee-shifting case "'because it provides adequate fees to attorneys who undertake litigation that is socially beneficial, *irrespective of the pecuniary value to the [plaintiffs].'*" *Vinyard*, ¶ 38 (*quoting Microsoft Corp.*, 2007-NMCA-007, ¶ 34) (emphasis added).

"A lodestar is determined by multiplying counsel's total hours reasonably spent on the case by a reasonable hourly rate." *Id.* "The lodestar provides an objective basis for valuing the attorney's services[.]" *Id. See also, Kennedy v. Dexter Consol. Sch.*, 2000-NMSC-025, ¶ 34, 129 N.M. 436. Under the lodestar method, district courts should consider [the *Fryar* factors, see *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979)] "(1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services." *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 24, 136 N.M. 647 (internal quotation marks and citation omitted). "The factors are not of equal weight, and all of the factors need not be considered." *Atherton v. Gopin*, 2012-NMCA-023, ¶ 6 (internal quotation marks and citation omitted).

> No proportionality test constrained the district court, which used appropriate methodology to calculate the lodestar—taking steps to ensure that the number of hours and hourly rates were reasonable—and then to determine whether a multiplier was warranted and if so, what the multiplier should be. This established methodology produced a fee award significantly greater than the verdict, but that does not mean that the court misapplied the law or otherwise abused its discretion.

Vinyard, ¶ 38. *See also, Lucero v. Aladdin Beauty Colls., Inc.,* 1994–NMSC–022, ¶ 4, 117 N.M. 269, 871 P.2d 365 (noting that "one of the policies embodied in the [Human Rights] Act is to encourage lawyers to take cases involving alleged violations of the Act" by providing for the award of attorney fees). We hold that attorneys' fees, along with costs and actual damages, are sufficient incentives for New Mexico public officials to "remain accountable to the people they serve." *San Juan,* 2011–NMSC–011, ¶ 16, 150 N.M. 64.

<u>Waiver</u>

An attorney representing him or herself waives attorneys' fees under a statutory fee award provision. *Faber v. King*, 2015-NMSC-015, ¶ 34, 348 P.3d 173.

<u>Distinguishing the Mandatory Fee Award in WPA Cases from the Discretionary Fee Award in CRA Cases</u>

Caveat – unlike most New Mexico statutes with fee-shifting provisions, the Whistleblower Protection Act (WPA) has a mandatory fee provision, which has led to different treatment than the many state statute providing for a fee award to a prevailing party plaintiff in the discretion of the court.

> Attorney fees under the WPA, in contrast [to statutes requiring prevailing party status before plaintiff may be awarded fees], depend on whether a public employer is found to have violated the provisions of the WPA, and are not conditioned on an employee's status as a prevailing party. Had the Legislature intended to limit WPA attorney fee awards to only prevailing parties, then it would have written that language into the statute, as it has in other statutes.

Maestas v. Town of Taos, 2020-NMCA-027, ¶ 20 (11/5/19), 464 P.3d 1056, 1063, *cert granted*, No. S-1-SC-38171 (4/27/20) (district court's denial of attorney fees to plaintiff who obtained a verdict finding defendant violated the Act, but was awarded no damages, reversed; held, fee award determined by liability finding not by award of damages). But, said the appellate court, the lodestar method still applies, and the "amount involved and results obtained" remain relevant to the award of fees. *Id.*, ¶ 22.

Accordingly, in a fee application made under the NM CRA, a prevailing plaintiff who cites to WPA fee cases must do so with care since some of the fee principles in those cases are the same but others differ from those applicable in statutory cases such as those brought under the NM CRA.

<u>Informing the Jury about Attorneys' Fees</u>

Similarly, beware when the jury starts asking questions during its deliberations about attorneys' fees in a case with a fee-shifting provision. In *Vinyard*, defendant sought reversal of a substantial verdict to the plaintiff and an even higher fee award,

> because the judge erroneously answered the jury's questions about attorney fees and costs. During its deliberations, the jury asked, "Who pays court costs? Lawyer fees? How much are lawyer fees—in percentage or set money?" After discussing these questions with counsel and hearing argument about how to respond to the question, the district court answered as follows over Defendant's objection: Plaintiff "has a contingency fee agreement with her attorneys—meaning [P]laintiff pays a percentage of any recovery awarded to her to her attorneys for their fees. If [Plaintiff] prevails, the court will determine the appropriate amount[s] of attorney[ ] fees and costs." Defendant argues that this answer could have caused the jury to award damages in an amount greater than the damages Plaintiff actually suffered. Defendant's theory is that the jury might have added some amount to its damages award to compensate Plaintiff for the attorney fees that the jury believed would be deducted from her award. When, as in this case, the district court's jury instructions accurately state the law, our standard of review for instructions and answers that the district court gives to jury questions is abuse of discretion.
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> We do not agree with the premise of Defendant's argument—that the court's answer invited the jury to award damages to compensate Plaintiff for her attorney fees and costs. The court explained that "the court will determine the appropriate amount[s] of attorney[ ] fees and costs." Because this communicated to the jury that it had no role to play in awarding damages for fees and costs, the district court did not abuse its discretion.
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> … .
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> The record confirms that the jury followed the damages instructions. The jury did not return a general verdict stating the total amount of damages. Instead, the jury completed a special verdict form that only allowed the jury to make entries for the three categories of damages included in the jury instructions: back pay with interest, front pay, and emotional damages. … The verdict form did not include damages to compensate Plaintiff for attorney fees or costs.

Vinyard, No. A-1-CA-36717, ¶¶ 24-25, 27, 2019 WL 6728859 (11/12/19), *7-*8.

<u>Standards of Review in Attorneys' Fees Decisions</u>

Evidentiary support for a fee award, in the form of "detailed time records," is required when the attorneys' fee is subject to calculation pursuant to the lodestar method, *Kennedy*, ¶ 36, but an evidentiary hearing is not. *Cf., Lopez v. K.B. Engineering Co.*, 1981-NMCA-011, 95 N.M. 507.

Contemporaneous timekeeping is not required, and reconstructed time records are permissible. *See, e.g.*, *Kennedy*, ¶ 36; *Ramos v. Lamm*, 713 F.2d 546, 553, n. 2 (10th Cir. 1983); *Usrey v. Wilson*, 66 P.3d 1000 (Okla. Ct. App. 2003) (permissible under Oklahoma law to base a fee award "... on a reconstruction of the time spent on a case based on other records which verify the activity in the case, such as the court file or the attorney's copies of letters, pleadings or file memoranda").

Caveat, reconstructed time records are subject to special scrutiny. *Ramos*, 713 F.2d at 553 n. 2 (since "reconstructed time records generally represent an overstatement or understatement of time actually expended," courts are instructed to "give special scrutiny to any reconstruction or estimates of time expended and make reductions when appropriate").

Abuse of discretion standard applies to a fee award. *ACLU,* 2016-NMCA-063, ¶ 24. "A factual determination by the district court that an IPRA fee request is reasonable when weighed against the results obtained in the litigation will be disturbed only when the award is contrary to logic and reason." *Id.*, ¶ 41 (internal quotation marks and citation omitted). "The test is not what [this Court] would have done had we heard the fee request, but whether the [district] court's decision was clearly against the logic and effect of the facts and circumstances before the court." *Vinyard*, ¶ 31. "In other words, we will not attempt to stand in the shoes of the district court judge, substituting our judgment for hers." *Id.*

But issues of statutory interpretation are subject to de novo review. *Id.*, ¶ 24.

Hourly Rates

Evidence, usually in the form of affidavits, both by the attorney seeking fees to establish his or her standard hourly rate as well as skill and experience, and one or more other lawyers to attest to comparable market rates, is required. A court may consider the lawyer's "ability," "which the district court was in the best position to assess, having observed his work throughout the litigation." *Nava*, 2004-NMSC-039, ¶ 24. The court may not substitute his or her judgment for the evidence on hourly rates but "[t]he judge, familiar with the case and the normal rates in the area, may rely on his [or her] own knowledge to supplement the evidence regarding a reasonable hourly rate." *Microsoft Corp.*, 2007-NMCA-007, ¶ 65. *See also, Rio Grande Sun*, ¶ 14.

It was no abuse of discretion to award fees to one of plaintiff's counsel at differing rates, a lower rate for times when the attorney was a paralegal and a law clerk, and a higher rate for his time spent after becoming licensed lawyer. *Vinyard*, at * 9.

Multiplier Available in Cases with Statutory Fee-Shifting Provision

"An award based on a lodestar may be increased by a multiplier if the [district] court finds that a greater fee is more reasonable after the court considers the risk factor and the results obtained." *Atherton*, 2012-NMCA-023, ¶ 7, 272 P.3d 700 (internal quotation marks and citation omitted). The *Atherton* court found that the district court could apply a multiplier to a lodestar fee in a UPA case because "[t]he UPA does not limit the fees in any way. *Id.*, ¶ 5. *See also, Microsoft Corp.*, 2007-NMCA-007, ¶ 75 (reviewing lodestar determination for abuse of discretion).

In *Vinyard*, the award of a multiplier was supported by the district court's findings that "Plaintiff's counsel won a verdict in "a high-risk case;" that the case was "highly contentious" and heavily litigated; that counsel financed the litigation and would have to finance the appeal; and would have to wait to be paid for two to four years. *Vinyard*, ¶ 35. The *Vinyard* court further rejected defendant's argument based on proportionality because none of the cases defendant relied on involved fee-shifting statutes. *Id.*, ¶ 38. "Fee-shifting statutes involve different considerations. They provide for defendants to pay the reasonable attorney fees of prevailing plaintiffs in order to

encourage private litigants and their lawyers to prosecute claims on behalf of the public. In such statutory fee cases, attorney fees awarded should reflect the full amount of fees fairly and reasonably incurred by the plaintiff in securing an award under the statutory scheme because without the incentive of such compensation, prospective plaintiffs might have difficulty pursuing their claims." *Id.* (alteration, internal quotation marks, and citation omitted).

Calculating a Fee When Time Spent on the Case includes Time Spent on Claims Lacking a Statutory Fee-Shifting Provision

> … The UPA claim was only one of a number of claims alleged in the complaint. It was based on the Bank's demand for payment despite notice of revocation and its practice of refusing to recognize claims against it pursuant to the FTC Holder Clause. In addition to this claim, Plaintiffs alleged breach of warranties, right to revoke, breach of contract, and commercial defamation. These claims were distinct from the UPA claim. While it is true that some facts are common to all the claims, it is still possible to separate the claims and the proofs required for each.
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> Because the UPA claim was the only claim for which Plaintiffs could be awarded attorney fees, the trial court was obligated to separate the claims and determine the amount of time spent on each. *See Gonzales v. N.M. Dep't of Health,* 2000–NMSC–029, ¶¶ 35–36, 129 N.M. 586, 11 P.3d 550 (holding that in a case where the attorney fees were governed by the Human Rights Act, when plaintiff is only partially successful, the trial court cannot award fees for hours spent on the entire litigation). Plaintiffs argue that there was no evidence that the UPA claims were separate or could be separated from the other claims. They argue that it was the burden of the Bank to show that the time was separable. We disagree. Once Plaintiffs made their claim for the attorney fees, it was left to the discretion of the trial court to make the award based upon Plaintiffs' proof of the reasonableness of the fees. *Hinkle[, Cox, Eaton, Coffield & Hensley v. Cadle Co.],* 115 N.M. [152,] 155, 848 P.2d at 1082. The Bank did not have to object to the time or show that it was separate. It was for the trial court to review the claim made by Plaintiffs and in its discretion determine what fees to award. We cannot say that the trial court abused its discretion by reducing the request for attorney fees to that amount relating solely to the UPA claim.

Jaramillo v. Gonzales, 2002-NMCA-072, ¶¶ 40-41, 132 N.M. 459, *cert. denied*, No. 27,490 (5/28/02)

Where the court in its discretion concludes that certain time spent on both fee-generating and non-fee-generating claims is "inextricably intertwined," *Hinkle*, 115 N.M. at 158, it "may properly award fees for UPA work that overlaps factually with another claim." *Chavarria v.* _______, 2005-NMCA-82, ¶44, 137 N.M. ___, 799, *citing Jaramillo*, 2002-NMCA-72, ¶40.

> [W]hen the attorney's services are rendered in pursuit of multiple objectives, some of which permit an award of fees and some of which do not, *the court must make a reasoned estimate, based either on evidence or on its familiarity with the case at trial, of the proportion or quantum of services that are compensable ... .*

Economy Rentals, Inc. v. Garcia, 112 N.M. 748, 765, 819 P.2d 1306, 1323 (1991) (emphasis added).

<u>It is the Duty of the Trial Court and the Party Seeking Attorneys' Fees, Not the Party Opposing the Fee Award, to Segregate.</u>

After defending against a "baseless" UPA claim, Defendant was awarded fees but only as to work done defending the UPA claim. Defendant refused to split out the work done only on the UPA claim. The trial court's decision to deny a fee award as a result was affirmed because the defendant, seeking fees, failed to segregate the work on separate claims, which justified the order denying fees. *Dean v. Brizuela*, 2010-NMCA-076, 148 N.M. 548.

> Thus, it has long been the rule in New Mexico that a party is only entitled to those fees resulting from the cause of action for which there is authority to award attorney fees.
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> Our Supreme Court has continued to direct that recoverable fees be segregated from non-recoverable fees to ensure that only those fees for which there is authority to award attorney fees are in fact awarded. In *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co.,* 115 N.M. 152, 157–58, 848 P.2d 1079, 1084–85 (1993), the trial court awarded attorney fees to the plaintiff for work related both to the prosecution of its action on an open account, for which attorney fees are authorized, and to its defense on the defendant's counterclaim for an account stated, for which an award of attorney fees is not authorized. The Supreme Court reversed the summary judgment in the plaintiff's open account claim. *Id.* at 158, 848 P.2d at 1085. This in turn also required a reversal of the attorney fees awarded because the statute authorizing attorney fees in an action on open account did not also authorize an award of attorney fees in an action for an account stated. *Id.* The Court added:
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>> Some of the work may be inextricably intertwined, making it difficult or impossible to segregate some of the time worked on the complaint from work related to the counterclaims. Nevertheless, the trial court should attempt to distinguish between the two types of work to the extent possible. Accordingly, we vacate the entire award of attorney's fees. If, on remand, [the plaintiff] prevails on its complaint and the trial court awards a reasonable attorney's fees, the award should be limited, to the extent feasible, to work related to prosecution of the complaint.
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> *Id.*
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> We have also adhered to these requirements. For example, in *Jaramillo,* the trial court determined that only a portion of the attorney fees requested by the plaintiffs were related to the UPA claim which they succeeded in prosecuting and, accordingly, made a reduction to the amount claimed. 2002–NMCA–072, ¶ 38, 132 N.M. 459, 50 P.3d 554. On appeal, we said that the trial court was required to review the request for attorney fees "and determine what portion of the work done was attributable to the UPA claim." *Id.* ¶ 39.

> … In *J.R. Hale Contracting Co. v. Union Pacific Railroad,* 2008–NMCA–037, ¶¶ 92, 95, 143 N.M. 574, 179 P.3d 579, we agreed that an award of attorney fees under a statutory claim which allows an award for attorney fees, which is joined with non-statutory claims must be limited to the work done on the statutory claim. We acknowledged that in certain cases it could be difficult or impossible to segregate the work performed on different claims because such work was "inextricably intertwined." *Id.* ¶ 95 (internal quotation marks and citation omitted). The burden of showing this to be the case … is with the attorney who seeks the attorney fees award. *Id.*

Dean, ¶¶ 16-18.

Fees for Fees

Attorneys' fees for work to secure a fee award are recoverable under statutory fee-shifting provisions. *ACLU*, ¶¶ 23, 55 (noting ACLU awarded fees in district court for time incurred to obtain fee award; fee award affirmed on appeal as no abuse of discretion); *Love v. Mayor, City of Cheyenne, Wyo.*, 620 F.2d 235, 237 (10th Cir. 1980).

A fee application should not result in second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), a sentiment repeated by the New Mexico appellate courts. *See, e.g., Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 480, 697 P.2d 156, 163 (Ct. App. 1985) (citations omitted).

Appellate fees

Appellate fees are recoverable under statutory fee-shifting provisions. *ACLU*, ¶ 55. *See also,* NMRA, Rule 12-403 ("In all proceedings in the appellate court the party prevailing *shall* recover the party's costs[, to] include ... reasonable attorney fees for services rendered on appeal in causes where the award of attorney fees is permitted by law[.]" (emphasis added).

Appellate fees are generally computed by the district court on remand by order of the appellate court. *See, e.g., ACLU*, ¶ 55 (concluding prevailing party on appeal entitled to appellate attorney fees; remanding to district court for proceedings including assessment of appellate fees); *San Juan Agric. Water Users Ass'n v. KNME-TV*, No. A-1-CA-35839, ¶ 52, 2019 WL 2089540, at *10 (N.M. Ct. App. Apr. 16, 2019).

No Obligation to Formally Request Fees

While the better practice is to formally move for attorney' fees, "'where a party is entitled to attorney fees as a matter of law, the district court must award the fees even where the prevailing party fails to request those fees by formal motion … .'" *San Juan Agric. Water Users Ass'n*, ¶ 52 (*quoting Aguilera v. Palm Harbor Homes, Inc.,* 2004-NMCA-120, ¶ 16, 136 N.M. 422, 99 P.3d 672). *See also,* NMRA, Rule 12-403 (appellate fees).

This rule not requiring a party seeking fees to make a formal request is directly the opposite of the rule in the federal courts. *See*, *Hoyt v. Robson Companies, Inc.*, 11 F.3d 983, 985 (10th Cir. 1993) ("application for appeal-related attorneys' fees must first be made to" appellate court).

Gross Receipts Tax

Statutory attorneys' fees include applicable gross receipts tax. *Rio Grande Sun*, ¶ 26. *Cf.*, *Breen v. State Tax'n & Revenue Dep't*, 2012-NMCA-101, ¶ 28, 287 P.3d 379, 388.

Statutory Costs and Litigation Expenses

A statutory award of attorney fees "seeks to make a Plaintiff whole." *San Juan Agric. Water Users Ass'n*, ¶ 49. "An award of attorney fees, along with costs and damages, helps ensure the entire IPRA enforcement process is virtually costless to a successful litigant." *Id.*, ¶ 50.

"'[O]ut-of-pocket expenses'" can be recovered as part of a statutory fee award "if the costs are 'items that are normally itemized and billed in addition to the [attorney's] hourly rate.'" *O Centro Espirita Beneficente Unio Do Vegetal v. Duke*, 343 F.Supp.3d 1050, 1099-1100 (D.N.M. 2018) (§1983 action) (*quoting Brown v. Gray*, 227 F.3d 1278, 1297 (10th Cir. 2000)(*quoting Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983) (alterations omitted). Out of pocket expenses include photocopying, mileage, meals, and postage, "if attorneys in the areas normally bill those costs separately to clients." *Id.*, *citing Sussman v. Patterson*, 108 F.3d 1206, 1213 (10th Cir. 1997). The rulings in the state courts have followed the principles enunciated in *Ramos*. *See*, *e.g., Albuquerque Commons Partnership v. City Council of the City of Albuquerque*, 2009-NMCA-65, ¶¶ 61-65, 212 P.3d 1122, *cert. denied in relevant part,* No. 31,725 (6/22/09) (affirming district court award of litigation expenses and statutory costs in state court § 1983 action).

"[T]ravel costs are compensable as part of the attorney fees awarded by a court where fee-shifting statutes are involved." *Maras v. Credit Bureau of Raton*, 801 F.2d 1197, 1208 (10th Cir. 1986).

In a UPA case, the defense argued that despite provisions in the UPA statutes allowing attorneys' fees *and* costs to a prevailing party plaintiff, plaintiff was limited to statutory costs under Rule 1-054. Plaintiff's successful response was as follows:

> If the "costs" allowable under these statutes mean nothing more than the statutory costs allowed under Rule 1-054, the words "and costs" in those three statutes are superfluous. The legislature is deemed to know when it enacts legislation what prior law entails. The words "and costs," then, must mean something more than statutory costs allowable under Rule 1-054. What they mean is litigation costs, that is, those expenses which are not routinely absorbed in law office overhead, some of which overlap with the statutory costs allowable under Rule 1-054 but some of which do not, and are compensable not under Rule 1-054 but under the fee award statutes such as those in issue here. Indeed, more recently enacted legislation makes clear what the three, older statutes in issue in this motion left ambiguous, that the "costs" recoverable by a prevailing party together with attorneys' fees provided for by statute are "*litigation* costs." *See, e.g.,* New Mexico Whistleblower Protection Act, NMSA 10-16C-4(A) (2008) (emphasis supplied).

Statutory interest on Attorneys' Fee Award

Sovereign immunity is waived for interest where the statute expressly provides for an interest award against the State. *Velasquez v. Regents of Northern New Mexico College*, 2021-NMCA-007, ¶ 87, 484 P.3d 970, *cert. denied*, No. S-1-SC-38542 (2/12/21). A statutory award of attorney fees "seeks to make a Plaintiff whole." *San Juan Agric. Water Users Ass'n*, ¶ 49. The NM CRA provides for interest on judgments: "Interest shall be allowed on judgments against a public body [and] computed daily from the date of the entry of the judgment until the date of payment." L. 2021, Ch. 119, § 6(A), eff. July 1, 2021. This provision should apply as well to any judgment on an award of fees and litigation expenses in a NM CRA case.