

## CRITICISM OF ATTORNEYS' FEES REQUIRES ADAPTATION TO A NEW MARKET

In the United States, awarding costs to a prevailing litigant is commonplace. Although governed by state and federal statutes, the “American Rule”<sup>1</sup> is often viewed as an excessive and calculated move by attorneys designed to make the rich richer and leave clients writing the check. It is a battle waged on the ground of attorneys seeking just compensation for their abilities in navigating an often inaccessible system, while clients strive to save costs in fear of spending more than practicable in order to sustain their businesses and prevail in countersuits. The contravening interests result in negative attention toward the legal profession. Simply, clients want more for less. And when attorneys cannot deliver without a high cost, clients are turning to other outlets to address the same needs without the high price tag.

Whether the law firm is a corporate behemoth or a non-profit organization, criticism is constant over “redundant” or “excessive” fees.<sup>2</sup> More so than clients or the media, the courts are often at odds with lawyers and the high costs associated with litigation, and few hesitate to show their displeasure when awarding or denying attorneys’ fees. One Pennsylvania judge likened a fee request to “an attempted bank robbery [rather] than a genuine effort to recover a reasonable fee bill.”<sup>3</sup> The judge also decried the practice of billing in six-minute increments even though some activities, such as drafting a short email, take far less time.<sup>4</sup> Other judges have called fee requests “astonishing” and “outrageous,” and then have denied multiple petitions to the prevailing party.<sup>5</sup> These defeats are then reported in the media to demonstrate the absurdity of attorneys’ fee awards. In turn, the news reaches potential or current clients and results in lower retention of large and costly law firms.

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1. Terese A. West, *Everybody Pays: Attorney Fees and the American Rule*, LAW MOSS (April 2013), <http://www.lawmoss.com/content/uploads/2013/04/EVERYBODY-PAYS-Atty-Feesthe-American-Rule-West-MB-Winter-2013-Newsletter.pdf>.

2. Sherman Smith, *Kobach Attorney Says ACLU Fees For Contempt Are Redundant, Excessive*, TOPEKA CAPITAL J. (Jun. 5, 2018), [www.cjonline.com/news/20180605/kobach-attorney-says-aclu-fees-for-contempt-are-redundant-excessive](http://www.cjonline.com/news/20180605/kobach-attorney-says-aclu-fees-for-contempt-are-redundant-excessive).

3. Debra Cassens Weiss, *Lawyer’s Fee Request Felt ‘Like an Attempted Bank Robbery,’ Federal Judge Says*, ABA J. (Sept. 12, 2017), [http://www.abajournal.com/news/article/lawyers\\_fee\\_request\\_felt\\_like\\_an\\_attempted\\_bank\\_robbery\\_federal\\_judge\\_says](http://www.abajournal.com/news/article/lawyers_fee_request_felt_like_an_attempted_bank_robbery_federal_judge_says).

4. *Id.*

5. Kathryn Rubino, *Biglaw Firm Gets Benchslapped Over ‘Astonishing’ Fee Request*, ABOVE THE LAW (June 4, 2018), <https://abovethelaw.com/2018/06/biglaw-firm-gets-benchslapped-over-astonishing-fee-request>; Christine Simmons, *Blasting Greenberg Traurig Request, Judge Says Fees ‘Zooming Out of Control’*, N.Y. L. J. (July 13, 2018), <https://www.law.com/newyorklawjournal/2018/07/13/blastng-greenberg-traurig-request-judge-says-fees-zooming-out-of-control>.

Amplifying the annoyance directed at the legal profession are headlines depicting attorneys as greedy and unworthy of the costly services they provide. The awarding of attorneys' fees is almost as widely reported as the outcomes of the cases themselves. Within days of the issuance of the *Masterpiece Cakeshop* opinion, reporters turned their focus on the high costs of attorneys' fees charged in the case.<sup>6</sup> An article in the Denver Business Journal analyzed the time spent by the attorneys representing the Colorado Civil Rights Commission who brought suit against the cakeshop while preparing for the appeal—the figure totaled approximately \$125,000.<sup>7</sup> In another article addressing costs associated with class action cases, a reporter asked whether plaintiffs' attorneys are “heroes or villains.”<sup>8</sup> Even in the midst of intense focus on President Trump's immigration policies, below-the-fold articles decried the lack of funding available to provide necessary legal services to immigrants; Time Money waded into the debate by reporting that the 18 million dollars raised on behalf of the Refugee and Immigrant Center for Education and Legal Services would, in reality, “get[] eaten up fast when dealing with things like attorney fees.”<sup>9</sup> And because nonprofits are required to make their annual tax returns publicly available, discretion between the client and attorney is at risk because the public and the media are able to dissect attorneys' fees under a microscope without context.<sup>10</sup>

Even the American Bar Association (ABA) opposes awarding attorney fees in certain types of cases. It recently filed an amicus brief urging the Federal Circuits to preclude the imposition of attorneys' fees on patent applicants.<sup>11</sup> In support of its argument, attorneys for the ABA wrote that imposing high fees in patent cases would bar “equal access to justice,” and cause small business owners and individuals to forgo important procedures in gaining access to and credit for their work.<sup>12</sup> The contempt directed toward attorneys for their high costs is not new. But as companies grow and become more financially savvy, the negative light in which attorneys' fees are viewed may ultimately hinder those working on behalf of these corporations as the companies seek to cut costs—often taking

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6. Monica Vendituoli, *Here's How Much the Colorado Bakery Case Cost the State in Attorney Fees*, DENVER BUS. J. ONLINE (Jun. 19, 2018), <https://www.bizjournals.com/denver/news/2018/06/19/colorado-bakery-case-attorney-fees-supreme-court.html>.

7. *Id.*

8. David Lat, *Attorneys Fees in Class Actions: Too Low, Too High, or Just Right?*, ABOVE THE LAW (Nov. 16, 2011), <https://abovethelaw.com/2011/11/attorneys-fees-in-class-actions-too-low-too-high-or-just-right/?rf=1>.

9. Alix Langone, *This Nonprofit Just Got \$18 Million to Help Immigrants Detained at the Border – But It's Still Not Enough*, TIME: MONEY (Jun. 25, 2018), <http://time.com/money/5317688/texas-raices-fundraiser-money>.

10. See Jim Schutze, *State Fair Paid \$1,200 to Have Lawyers Read an Observer Story*, DALLAS OBSERVER (May 28, 2018), <http://www.dallasobserver.com/news/state-fair-of-texas-paid-lawyers-1200-to-read-one-observer-story-10730355> (where attorneys working for a state fair billed 1.6 hours to read a newspaper article).

11. See Brief for NantKwest as Amici Curiae Supporting Plaintiff-Appellee, *Nantkwest v. Joseph Matal*, No. 1:13-CV-01566-GBL-TCB, 2018 WL 648652 (C.A. Fed. Cir. Jan. 23, 2018).

12. *Id.* at \*118.

scissors to attorneys' bills first. The sentiment behind these examples varies from disdain to frustration in seeing attorneys' fees rise as litigation becomes more complex, but they routinely have the same effect: lower retention of attorneys' services and clients seeking ancillary services at a lower cost while dealing with litigation in-house.

There is no question the legal profession is saturated and small practitioners suffer along with large law firms when competing for industry work. While studies attribute the lack of work to stiff competition in the legal field, a more likely reasoning is because of the availability of lower cost options in fields tangentially related to law. The Pittsburgh Business Times reported that at least 27% of law firm leaders at firms with more than 1,000 attorneys say they have lost business to accounting firms, and viewed this as a potential threat.<sup>13</sup> Deloitte, one of the world's largest accounting organizations, published a global research study in 2016 regarding changes to the legal industry and the need for a "new type of legal service provider."<sup>14</sup> The study examined the needs of businesses wanting more for less, a trend that is prompting changes in the ways top law firms conduct business. In-house counsel are taking larger roles in litigating smaller claims and working with corporate clients. And where clients are turning to large firms to handle work, they are seeking lower costs or looking elsewhere.

To counter this, some of the nation's largest firms have settled on a new business plan in response to these concerns: the development and growth of subsidiaries and ancillary businesses. Law firms can now be a one-size-fits-all business, with the ability to offer clients everything from advanced technical services to non-lawyer assistance in evaluating litigation potential of certain types of claims. In 2018, Reed Smith, a nationally ranked law firm, made news for the creation and launch of GravityStack, a subsidiary designed to provide a web-based platform for advanced technical and legal services to clients.<sup>15</sup> Non-lawyers and lawyers can work together in these businesses to ensure access is given to all clients and can control the costs of these services before putting them in the hands of clients.

But at what cost are these businesses running? There are ethical boundaries that firms cannot cross. Further firms risk thinly spreading resources in their desire to provide subsidiary services while also remaining focused on their legal practice. The District of Columbia is the only jurisdiction in the United States that allows fee sharing with non-lawyers.

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13. Patty Tascarella, *Who Law Firms Are Losing Business To*, PITTSBURGH BUS. TIMES (May 21, 2018), <https://www.bizjournals.com/pittsburgh/news/2018/05/21/who-law-firms-are-losing-business-to.html>.

14. DELOITTE, *FUTURE TRENDS FOR LEGAL SERVICES* (2016), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Legal/dttl-legal-future-trends-for-legal-services.pdf>.

15. Legal Insider, *Reed Smith Launches Legal Tech Subsidiary GravityStack*, LEGAL TECH. (Apr. 25, 2018), <https://www.legaltechnology.com/latest-news/reed-smith-launches-legal-tech-subsidiary-gravitystack/>.

Bringing in non-lawyer assistance to manage portions of the law firm's business, or allowing the firm's leadership to wear multiple hats to run ancillary practices while keeping the focus on the law firm, can cause disruption amongst the service providers. Where is the benefit, then, in hiring a large law firm that cannot adequately allocate its resources?

Law firms must adapt to remain competitive in a market where non-lawyers can offer assistance akin to lawyers' costly services. The negative attention directed at the legal industry will require law firms to develop and alter business practices in order to stay out of the headlines. If costs cannot be lowered, firms under public scrutiny for high fees can establish subsidiaries in order to offer clients more for less. Ultimately, law firms are not disappearing, but must change their business models to stay relevant.

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