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FEATURE ARTICLE

# A Brief History of Lawyers' Fees

What better time than the quiet days of summer to review one of the most basic and most important sets of rules regarding lawyer behavior—rules regulating fees? Model Rule 1.5 is the basis for the regulation of fees in most jurisdictions in the United States. In this series of articles, we will go over Rule 1.5 as it has been adopted in Kansas and Missouri and explore its many complexities. Before looking at the present rule, it will be useful—and, hopefully, entertaining—to take a brief glance at the history of the ways in which American lawyers have charged clients for their work during the past several centuries.

During antiquity and the Middle Ages, lawyers were, in theory, not supposed to charge clients for the work they did for them.[1] In Rome, the reward for doing legal work was the gratitude one could expect from happy clients and the political support that was supposed to follow a successful career as an advocate. In the Middle Ages, lawyers were not supposed to charge for their services because their ability to practice as a professional was deemed to derive from professional knowledge—knowledge that was not "earned" through study and experience, but was instead a "gift of God" ("scientia donum dei est"). In fact, we know that medieval lawyers did receive fees for their services, although they were supposed to be paid only if they were successful in their representation of their clients. One major effect of these regulations of legal fees that extended into the modern period and into Anglo-American law was the prohibition against a lawyer suing a client to recover an unpaid legal fee.[2]

By the time the United States had become a nation, legal fees were a subject of some interest to state legislatures. Fundamentally, legislators were suspicious of legal fees and lawyers. Many believed legislative regulation of legal fees was necessary to prevent lawyers from charging excessive fees, which they worried would result in unequal access to courts based upon clients' wealth and resources, and, ultimately, systemic unfairness in the justice system. (Much of this has a very "modern" sound to it, and echoes of these fears may still be heard in the language of Rule 1.5 and the Comments thereto.)

In the first decades of American history, the solution to this perceived problem was for legislatures to publish the maximum fees that lawyers might charge their clients. Given the popular suspicion against lawyers and lawyer fees, it is not at all surprising that these fees were rather low.

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1 On the history of legal fees in the U.S., see Broward, "Legal Fees Historically Considered," 50 Am. L. Rev. 554 (1916); Kellen Funk, *The Lawyers' Code: The Transformation of American Legal Practice* (PhD Princeton, 2018), esp. at 345ff.

2 See, 3 Blackstone, *Commentaries* 28. Blackstone opposed permitting lawyers to sue clients to recover fees both on the basis that Roman advocates were prohibited from doing so and because lawyers were "gentlemen" and gentlemen did not sue their clients for fees.

New York, for instance, had detailed legislation that laid out the fees that lawyers could charge for various activities. These fees generally treated law work as "piece work" (i.e., lawyers were paid a specific amount for each task). The most common fee was a small amount permitted to lawyers for each "folio," or sheet of paper, the lawyer produced in the course of a representation. This meant, for instance, that a lawyer in a normal lawsuit might be limited to a total fee of $3.75! In 2022 dollars that fee was equal to just shy of $125.

Few contemporary lawyers would consider a fee of $3.75 adequate remuneration for handling a client's case. By today's standards, as set out in Rule 1.5, such a fee would almost certainly be considered unreasonable"—unreasonably low. When you add in the fact that it was generally believed that a lawyer could not sue a client to recover an unpaid fee, even one as low as those set by the legislature, it becomes clear that enforcement of these early, antebellum "ethical" restrictions on lawyers' fees was extremely problematic. The result, of course, was that lawyers and clients tended to ignore the statutory limits on fees.

The unrealistic and unreasonable statutory limits in lawyers' fees and lawyers' rights to sue to recover unpaid fees came before the New York courts in 1840 in the landmark case of *Sevens & Cagger v. Adams*, 23 Wend. 57 (1840).[3] The facts in *Cagger* are relatively simple. Lawyers began as attorneys and, after a period of years, became qualified as counselors as well. The lawyer in this case represented a client in an action, and they had agreed by contract that the client would pay the lawyer $300 for his services. Unfortunately for the lawyer, a statute limited the lawyer's fee to $3.75. The client insisted that this was all he owed his counsel. The trial court found the client's argument absurd and interpreted the statute to mean that the fee was limited to $3.75 when a party had to pay an opponent's lawyer. But, as to fees charged by lawyers to their own clients, the statutory fee restriction was inapplicable.

Through this rather ingenious bit of statutory interpretation, statutory limitations on the fees lawyers charged to their clients were removed. Indeed, the ultimate result of this ruling was to leave the amount of fees completely to negotiation between lawyer and client. There was no limitation as to the fee charged and, therefore, there was no analogue to the modern ethical requirement that a lawyer's fee be reasonable (or "not unreasonable" as in some states, including Missouri).

The demise of the statutory limits on fees meant that lawyers could charge whatever the market would bear for their services—and many did.

Perhaps, the most famous antebellum legal fee was that charged by Abraham Lincoln to the Illinois Central railroad. Although most Americans think of Lincoln's pre-Presidential career as that of a simple country lawyer, the truth is that Lincoln was recognized to be one of the best lawyers in Illinois and a brilliant courtroom advocate. This enabled him to charge high fees when his clients could afford them. Lincoln was also a "railroad lawyer" involved in the lucrative practice of assisting railroads in their quests for rights of way.

One of Lincoln's clients was the Illinois Central Railroad. In one hotly contested and politi-

3 See, Funk, above n. 1 for a detailed discussion of *Cagger* and its context.

cally sensitive case in which Lincoln assisted the ICR, Lincoln charged the railroad a fee of $5,000. Although certain executives of the railroad were outraged at the size of the fee, the company eventually paid up.[4] To gain some sense of just how large a fee Lincoln charged, the value of $5,000 in 2022 dollars was $187,733.12!

Although lawyers like Lincoln, Daniel Webster, and Rufus Choate (the leading American lawyers of their period) could charge enormous fees, most ordinary lawyers did not charge clients these large sums. A survey of lawyers' fees from the years before the Civil War shows that most lawyers charged between $5.00 and $25.00 for simple trials or the preparation of legal documents.[5] Although these charges were relatively low, lawyers could live quite comfortably on them because the cost of living was also relatively low.[6]

Nineteenth century writers on legal ethics like David Hoffman and George Sharswood, although they did not focus on excessive fees in their published works, were nevertheless concerned that lawyers be cautioned not to allow greed to determine their charges. David Hoffman famously wrote in his *Fifty Resolutions in Regard to Professional Deployment*:[7]

> Avarice is one of the most dangerous and disgusting of vices. Fortunately its presence is oftener found in age than in youth; for if it be seen as an early feature in our character it is sure, in the course of a long life, to work a great mass of oppression, and to end in both intellectual and moral desolation. Avarice gradually originates every species of indirection. Its offspring is meanness; and it contaminates every pure and honorable principle. It cannot consist with honesty scarce a moment without gaining the victory. Should the young practitioner, therefore, on the receipt of the first fruits of his exertions, perceive the slightest manifestations of this vice, let him view it as his most insidious and deadly enemy. Unless he can then heartily and thoroughly eradicate it, he will find himself, perhaps slowly, but surely, capable of unprofessional, means, and, finally, dishonest acts which, as they cannot be long concealed, will render him conscious of the loss of character; make him callous to all the nicer feelings; and ultimately so degrade him, that he consents to live upon arts, from which his talents, acquirements, and original integrity would certainly have rescued him, had he, at the very commencement, fortified himself with the resolution to reject all gains save those acquired by the most strictly honorable and professional means. I am, therefore, firmly resolved never to receive from any one a compensation not justly and honorably my due, and if fairly received, to place on it no undue value, to entertain no affection for money, further than as a means of obtaining the goods of life; the art of using money being quite as important for the

4 H. Pratt, *The Personal Finances of Abraham Lincoln* (1943), at 49-53.

5 See, M.H. Hoeflich, "Lawyers' Everyday Lives in Bygone Diaries. Durably Ephemeral Perspectives on the Day-to-Day of 19th-Century American Lawyers," *Green Bag* , vol. 24, no. 4 (2021).

6 Ibid.

7 David Hoffman, *Fifty Resolutions on Professional Deportment* (1836), available online at https://lonang.com/commentaries/curriculum/professional-deportment/.

> avoidance of avarice, and the preservation of a pure character, as that of acquiring it.[8]

In future months we will explicate the modern ethics rules on legal fees, but as we do so it is useful to keep in mind that public and legislative concern over lawyers' fees extends back to the very beginnings of our nation.

## NEW AUTHORITY

# Pronoun Preferences

Over the past several years, many businesses, social organizations, and educational institutions have led initiatives to encourage individuals to declare their preferred gender pronouns. We now often see this reflected in the signature to emails, where many people have added a set of preferred pronouns. In some cases, the preferred pronouns will be gender specific, e.g., "she/her/hers." In other cases, they will be "gender neutral," e.g., "they/them."

Many legal organizations have adopted new policies regarding the pronouns an individual wants to be associated with. For instance, Jenner & Block, Davis Polk & Wardwell, and other large firms have adopted permissive policies on pronoun use and let employees and partners choose the pronouns they prefer.[9] Some Canadian courts have also endorsed a permissive pronoun policy:

> "Providing a forum of justice that is impartial, fair, consistent, and assures equal access for everyone is part of the mission of the Provincial Court of British Columbia," its notice read. "According people dignity and respect by using their correct titles and pronouns is one aspect of such a forum… Using incorrect gendered language for a party or lawyer in court can cause uncomfortable tension and distract them from the proceedings that all participants should be free to concentrate on."[10]

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8 Ibid., Resolution no. 49.

9 See, Bloomberg Law, "Jenner & Block Latest Firm to Roll Out Preferred Pronoun Policy," available online at https://news.bloomberglaw.com/us-law-week/jenner-block-latest-firm-to-roll-out-preferred-pronoun-policy.

10 S. Peters, "Respecting pronouns is a professional responsibility," available online at https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2021/respecting-pronouns-is-a-professional-responsibili.

But the United States has yet to see a great deal of law regarding lawyers' and judges' ethical obligations with respect to an individual's pronoun choice.

However, in January 2021, the New York courts issued Judicial Ethics Opinion 21-09, which deals with one particular aspect of this issue. The question presented to the Ethics Commission was:

> A judge asks if they may "require a singular pronoun be used for a singular person" in order to "keep order in the courtroom, and to have a clear record." That is, when a party expresses a preference for gender-neutral plural pronouns (they/them), the judge wishes to require them to instead choose a singular pronoun, he/him or she/her. The judge is concerned that the use of "they" could create confusion in the record as to the number of persons to whom a speaker is referring.

It seems clear that the question posed by the judge in this case was not hypothetical, but, rather, arose from a request by a lawyer, court employee, or party in the judge's courtroom. It is also clear from later parts of the opinion that the judge in this case wanted to impose a rule that required all the individuals in the courtroom to be referred to by singular pronouns. This, of course, is a policy quite different from that adopted by the law firms mentioned above and by the Canadian courts. It is also probably fair to assume that the situation described and the policy proposed by the judge was not unique and similar questions to those discussed in this opinion will arise in courts around the United States. Thus, this New York opinion is likely to be read by judges and lawyers throughout the nation.

The opinion begins its substantive analysis by restating several of the basic provisions of Code of Judicial Conduct, as adopted in New York. It highlights the requirement that judges avoid any "appearance of impropriety," stating that this requirement necessitates:

> The "courthouse and courtroom must convey to the public that everyone who appears before the court will be treated fairly and impartially."

The opinion goes on to conclude that the requirement of judicial impartiality extends to pronoun preferences of those in a courtroom:

> We can see no reason for a judge to pre-emptively adopt a policy barring all court participants, in all circumstances, from being referred to by singular "they," which is one of three personal pronouns in the English language. That is, "they" has been recognized as a grammatically correct use for an individual…

And:

> Adopting and announcing the sort of rigid policy proposed here could result in transgender, nonbinary or gender fluid individuals feeling pressured to choose between the ill-fitting gender pronouns of "he" or "she." This could not only make them feel unwelcome but also distract from the adjudicative process. Thus, as an ethical matter, we believe the described policy, if adopted, could undermine public

confidence in the judiciary's impartiality.

Although the opinion recognizes that judges have authority "to ensure the clarity of the record as needed" by "adopting reasonable procedures in their discretion," it unambiguously concludes that a judge may not force an individual to use or be referred to by a pronoun against that individual's expressed preference.

The issue of individual choice of pronouns is a somewhat "hot topic" politically at the present time—one many judges and lawyers may want to avoid. But those with responsibilities in regard to judicial and lawyer conduct will inevitably encounter this issue in the next few years. Whether other state authorities will follow New York's opinion in these matters remains to be seen.

## ETHICS & MALPRACTICE RESEARCH TIP

# New Articles Drawn from the Current Index of Legal Periodicals

A. Noelle Wyman & Sam Heavenrich, "Vaccine Hesitancy and Legal Ethics," 35 *Georgetown Journal of Legal Ethics* 1 (2022), available at https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-35-issue-1-winter-2022/.

This is an absolutely fascinating and very thoughtful article on the ways in which legal ethics impact the current controversies over vaccine hesitancy and disinformation. The following is a quote from the article's introduction:

> "In Part I, we introduce the concept of vaccination as a moral obligation for lawyers. Though the Rules do not—and we believe should not—mandate lawyers to be vaccinated, certain lawyers should consider it a moral duty. In Part II, we examine the legal community's role in the antivaccination (antivax) movement and explore the concept of disinformation as professional misconduct, looking to recent post-election litigation as an analogy. Importantly, we distinguish disinformation (the deliberate spread of false information) from misinformation (the spread of false information in general). Rules requiring truthfulness and candor do prohibit lawyers from knowingly spreading antivax disinformation in certain contexts. Yet in practice, disciplinary authorities are unlikely to actually sanction lawyers for such behavior."

B. Gregory Bischoping, "Reconceiving Ethics for Judicial Law Clerks," 12 *St. Mary's Journal on Legal Ethics & Malpractice* 58 (2022), available at https://commons.stmarytx.edu/lmej/vol12/iss1/2.

This is an important and timely study of the ethical rules as they apply to law clerks and of the strengths and weaknesses of such rules. The following is a quote from the article's abstract:

> "Judicial law clerks hold a unique and critical position in our legal system. They play a central part in the functioning of the judiciary, oftentimes writing the first draft of their judge's opinions and serving as their trusted researcher and sounding board. Moreover, they are privy to the many highly confidential processes and private information behind the important work of the judiciary. It stands to reason the comprehensive set of ethical duties that bind the world of lawyers and judges should also provide guidance for judicial law clerks. The most important among those ethics rules is a duty of confidentiality. Without such a rule, after one's clerkship, nothing enforces the commonly known duty. It is difficult to study the extent to which chambers' confidences are breached in the practice of law, but books like The Brethren reveal the ways clerks have shared confidential judicial details with the public. Even the well-intentioned clerks, who make up the overwhelming majority, are given little to no guidance on the types of information they may ethically disclose. And there are other areas where guidance would be beneficial, such as post-clerkship recruiting and the limits on partisanship behavior during the clerkship."

BLAST FROM THE PAST

# Some Fees Charged by Abraham Lincoln in 1837

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|---|---|
| For "procuring pay for a lost horse" | $10 |
| For "procuring a divorce" [trial] | $15 |
| For "collecting a note" | $350 |
| For "collecting a note" | $20 |
| For trying a case of forcible detainer | $6 [paid "by board"] |

From the "fee books" of the firm of Stuart & Lincoln discussed in H. Pratt, *The Personal Finances of Abraham Lincoln* (Springfield, Ill., 1943), pp. 27-28.

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