

ATTORNEY FEE SHIFTING: A BIBLIOGRAPHY

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In the United States the client traditionally pays his or her own attorney; this practice is known as the American rule. "Attorney fee shifting" refers to situations in which the loser pays all or part of the winner's fee. In the United States fee shifting occurs under the application of a federal or state statute, a contract, or one of the several equitable exceptions to the American rule. The following bibliography gives citations for articles and books that discuss the theory of the American Rule versus the English, Continental, or European Rule, as it is variously called, by which the losing litigant pays, and the development and application of the equitable and statutory exceptions to the American rule. This is not a comprehensive bibliography on the subject of fee shifting, and the selections are for the most part more theory than practice oriented. The criteria for the bibliography arose from research done by Duke Professor Thomas D. Rowe, Jr.¹ and from the coverage of the conference that took place at Duke University on November 11-13, 1982.

Each issue of the ATTORNEY FEE AWARDS REPORTER, published bimonthly by Law & Business, Inc., has a current list of federal statutes authorizing attorney fees.

Avilla, *Shall Counsel Fees Be Allowed?*, CAL. ST. B.J., Mar. 1938, at 42.

Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

Best, *Reforming Interpleader: The Need for Consistency in Awarding Attorneys' Fees*, 34 BAYLOR L. REV. 541 (1982).

Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978).

Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

Comment, *Attorney Fee Awards to Nonprevailing Parties Under the Clean Air Act*, 51 U. CIN. L. REV. 635 (1982).

Comment, *Attorneys' Fee Awards to Complex Litigation Defendants: Striking a Balance*, 77 NW. U.L. REV. 818 (1983).

Comment, *Attorney's Fees and Civil Code 1717*, 13 PAC. L.J. 233 (1981).

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1. See Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651; Rowe, *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139.

- Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. CHI. L. REV. 332 (1980).
- Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 U.C.L.A.-ALASKA L. REV. 129 (1974).
- Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974).
- Comment, *Court-Awarded "Reasonable" Fees: Forcing a Segregated Public Interest Bar?*, 7 FORDHAM URB. L.J. 399 (1979).
- Comment, *The Discretionary Award of Attorney's Fees by the Federal Courts: Selective Deviation from the No-Fee Rule and the Regrettably Brief Life of the Private Attorney General Doctrine*, 36 OHIO ST. L.J. 588 (1975).
- Comment, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699 (1940).
- Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148 (1981).
- Comment, *Settlement Offers Conditioned upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. PA. L. REV. 793 (1983).
- COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE, FINAL REPORT, CMD. 4, No. 8878 (1953).
- Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIGATION, Summer 1976, at 27.
- Cruz, *Abuse of Rights in Title VII Cases: The Emerging Doctrine*, 67 A.B.A. J. 1472 (1981).
- Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).
- Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).
- Dayton, *Costs, Fees, and Expenses in Litigation*, 167 ANNALS 32 (1933).
- Derfner & Wolf, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).
- Deweese, Prichard & Trebilcock, *An Economic Analysis of Cost and Fee Rules for Class Actions*, 10 J. LEGAL STUD. 155 (1981).
- Diamond, *The Firestorm Over Attorney Fee Awards*, 69 A.B.A. J. 1420 (1983).
- Donin, *England Looks at a Hybrid Contingent Fee System*, 64 A.B.A. J. 773 (1978).
- Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).
- Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 3 CAL. ST. B.J. 107 (1951).
- Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. MAR. L. REV. 261 (1983).
- Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy*, 1962 A.B.A. SEC. INT'L & COMP. L. PROC. 134.
- Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 OTTAWA L. REV. 44 (1977).

- Goodhart, *Costs*, 38 YALE L.J. 849 (1929).
- Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207 (1984).
- Greenberger, *Appellate Review in England and the United States—Who Bears the Ultimate Burden?*, 1 DUQ. L. REV. 161 (1963).
- Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964).
- Griswold, *Two Branches of the Same Stream*, HARV. L. SCH. BULL., Feb. 1963, at 4.
- Halpern & Turnbull, *An Economic Analysis of Legal Fee Contracts*, in LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES (R. Evans & M. Tribilcock ed. 1982).
- Hermann & Hoffmann, *Financing Public Interest Litigation in State Court: A Proposal for Legislative Action*, 63 CORNELL L. REV. 173 (1978).
- Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567 (1980-81).
- Judicial Council of Massachusetts, *First Report*, 11 MASS. L. Q. 7 (1925).
- A. JUSTICE, CLAF: PROPOSALS FOR A CONTINGENCY LEGAL AID FUND: A REPORT (1978).
- A. JUSTICE, GOING TO LAW: A CRITIQUE OF ENGLISH CIVIL PROCEDURE (1974).
- Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963).
- E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981).
- Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981).
- Lynch, *The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy?* (pts. 1 & 2), 4 SETON HALL L. REV. 19, 421 (1972-1973).
- Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613 (1983).
- Mattis, *Attorneys' Fees as Costs in Illinois: 1607 and All That*, 1979 S. ILL. U. L.J. 249.
- Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 27 (1969).
- Mayer & Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426 (1975).
- McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931).
- McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972).
- Memorandum by the Council, *Indemnity Rule in Litigation*, LAW SOCIETY, ANNUAL REPORT OF THE COUNCIL AND ACCOUNTS 73 (1963-64).
- A. MILLER, ATTORNEY'S FEES IN CLASS ACTIONS: A REPORT TO THE FEDERAL JUDICIAL CENTER (1980).
- NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, REPORT TO THE CONGRESS: CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (1984).

- Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67 (1969).
- Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976).
- Note, *Attorney Fees for Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U.L. REV. 443 (1983).
- Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).
- Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319 (1977).
- Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 HOFSTRA L. REV. 307 (1982).
- Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 MICH. L. REV. 1111 (1982).
- Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677 (1983).
- Note, *Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68*, 16 GA. L. REV. 482 (1982).
- Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U.L.Q. 75 (1982).
- Note, *The Private Attorney General and the Public Advocate: Facilitating Public Interest Litigation*, 34 RUTGERS L. REV. 350 (1982).
- Note, *Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659 (1982).
- Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980).
- Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889.
- Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).
- Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973).
- O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333.
- Oesterle, *Proposed Rule 68 on Offers of Settlement*, CORNELL L.F., Feb. 1984, at 11.
- OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, *AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT* (1982).
- Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397 (1935).
- W. PFENNIGSTORF, *LEGAL EXPENSE INSURANCE: THE EUROPEAN EXPERIENCE IN FINANCING LEGAL SERVICES* (1975).
- R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).
- Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).
- Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163 (1982).

- Robertson & Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903 (1982).
- H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (2d ed. 1980).
- Rothschild, *A New Deal on Costs*, 39 COM. L.J. 43 (1934).
- Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651.
- ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, CMD. 5, Nos. 7648, 7648-1 (1979).
- Sands, *Attorneys' Fees as Recoverable Costs*, 63 A.B.A. J. 510 (1977).
- Satterthwaite, *Increasing Costs to be Paid by Losing Party*, 46 N.J. L.J. 133 (1923).
- Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970).
- Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).
- S. SPEISER, *ATTORNEYS' FEES* (1973).
- Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 CAL. ST. B.J. 874 (1966).
- Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).
- 2 W. NEW ENG. L. REV. 165 (1979) (Symposium on attorney fee shifting).
- Talmadge, *The Award of Attorneys' Fees in Civil Litigation in Washington*, 16 GONZ. L. REV. 57 (1980).
- Walker, *Court Awarded Attorney's Fees Under the Private Attorney General Concept: A Defense Perspective*, 23 U. KAN. L. REV. 653 (1975).
- Watson, *A Rationale of the Law of Costs*, 16 CENT. L.J. 306 (1883).
- Watson & Lantz, *Bringing Fairness to the Costs System—An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings*, 19 OSGOOD HALL L.J. 447 (1981).
- White, *Contingent Fees: A Supplement to Legal Aid?*, 41 MOD. L. REV. 286 (1978).
- Williams, *Fee Shifting and Public Interest Litigation*, 64 A.B.A. J. 859 (1978).
- Williston, *The Contingent Fee in Canada*, 6 ALBERTA L. REV. 184 (1968).
- Wills & Gold, *Attorneys' Fees in Litigation: Time to Discard the American Rule?*, LITIGATION, Spring 1978, at 31.
- Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 MOD. L. REV. 330 (1965).
- M. ZANDER, *LEGAL SERVICES FOR THE COMMUNITY* (1978).
- Zander, *Payment into Court*, 125 NEW L.J. 638 (1975).

