

## **A REPORT ON THE COST OF JUSTICE**

by Curtis E. Shirley

### **INTRODUCTION**

In *Washington Lawyer*, January 2008, Mr. Abe Krash, a retired partner of Arnold & Porter in Washington, D.C., wrote "*The Changing Legal Profession*." His discussion compares today's legal profession with the profession he first knew in the early 1950s.

He writes with nostalgia. His memories and comparisons are bittersweet. His concerns are tangible. His views about the current legal profession are alarming, and, in my opinion, they are correct. With trepidation, I offer a brief and topical summary of his thoughts, and I use this summary as an introduction to similar concerns that appear today throughout the United States. Mr. Krash says:

#### **Law Firm Size:**

**1.** He has reservations about various aspects of large firm practice. Between 1951 and 2000, there was an enormous increase in the total number of lawyers (1951: 221,605 and 2000: 1,056,328), together with the huge expansion in the size of many law firms.

**a.** In the late 1950s fewer than 40 law firms in the U.S. had 50 or more lawyers. In the 1960s there were only a dozen or so with 100 or more lawyers.

**b.** When he joined Arnold & Porter in 1953, it had 11 lawyers. Covington and Burling has about 70 lawyers and Hogan & Hartson about 25 lawyers. Today Arnold & Porter has more than 600 lawyers, Covington & Burling has more than 500 and Hogan & Hartson has more than 1,200 lawyers.

**c.** There are at least 13 firms in the U.S. with more than 1,000 lawyers.

**2.** The enormous growth in the size of law firms and in competition among firms has led to a fundamental change in the legal profession. It is a shift from the "partnership mode" to a "corporate mode."

#### **Law Firm Money:**

**1.** A "megalaw" firm is a major financial institution. The annual gross revenues of nearly a dozen firms exceed \$1 billion, and for more than 40 other firms they exceed \$500 million.

2. In New York, profits per partner at seven firms range from \$2.5 million to nearly \$4 million. There is a long list of firms in which the average annual compensation of partners exceeds \$1.5 million.

3. “To lawyers who began practice in the 1950s, the compensation now being enjoyed by associates at large firms is astonishing.” New York and Washington firms generally pay associates in their first year an annual salary of \$125,000 to \$160,000, plus a year-end bonus. Hiring bonuses in the range of up to \$250,000 are paid to former U. S. Supreme Court law clerks.

### **Professionalism:**

1. Mr. Krash suggests that to a great extent this is lost. It is replaced by commercialism. Even though the practice of law has had business aspects to it, in the 1950s lawyers thought of themselves as “professionals” and not businesspersons. Today the “professional” aspect has been overridden by financial considerations.

2. “Professionalism” is defined by the exercise of control over the manner in which the lawyer renders service. This is still present but it is invaded or perhaps replaced by law firm rules and procedures—there are thick books that detail these rules and procedures.

3. “Collegiality” has been damaged by replacing partner compensation systems based on seniority with systems based on generating business.

4. Rather than promoting cooperation and camaraderie, today’s compensation system may involve rivalry and rancor.

### **Other Effects:**

1. The lateral movement of partners from one firm to another was almost unthinkable in the 1950s. Today it is common.

2. “Excellent performance on a particular matter does not guarantee being retained in future matters.” Many senior lawyers today comment on the absence of client loyalty that existed in the 1950s.

3. Mr. Krash discusses the impact on marriage, young associate dissatisfaction, the hours of work that are demanded, specialization, the law firm branch offices in other cities or countries, the loss or diminution of young-lawyer training by older or senior partners, law firm solicitation departments and practices, and, among other things, the demographic changes in the presence of women and minorities.

### **WHY THESE CHANGES**

Mr. Krash adopts Judge Posner's thoughts in an essay which argued that the legal profession in the 1950s was essentially a cartel. It was formed without collusion among law firms, but the "profession was anticompetitive in a great many ways. . . . Posner analogized the profession at that time to a fictitious linen weavers guild in the 12<sup>th</sup> century France that was granted a monopoly charter" over making and selling linens. Mr. Krash further identifies the effect of Judge Posner's fictitious weavers' guild when he analogized the elements or characteristics of the legal profession then and now.

The Indianapolis Law Club received an update to Judge Posner's theory from Indiana University School of Law Dean Emeritus William F. Harvey, who explained that today admission to the profession is, clearly, a monopoly maintained through the offices of the A.B.A. and the U.S. Department of Education law school accrediting procedure.

One major difference between Judge Posner and Dean Harvey is that the Dean was using actual cases brought by the U.S. Department of Justice against the A.B.A. as the bases for his discussion. Perhaps it is appropriate to suggest that Judge Posner drop his theory about the 12<sup>th</sup> century guild in France, and explore the reality of the antitrust violations of the A.B.A. and the damage this has inflicted on legal education. In any event, the exclusionary guild in Judge Posner's discussion is more present today than it was in the 1950s. It is not maintained by French weavers from the 12<sup>th</sup> century, but by the A.B.A.—for at least the past 30 years and longer.

I hope to apply some of Mr. Krash's observations to conditions in many other States.

### **THE COST OF JUSTICE TO THE MIDDLE CLASS AND WORKING POOR**

Our justice system strives to enforce expectations, to respect the needs of the poor, the injured, and those who feel alone – orphans, the elderly. No matter the system, the wealthy will always have access. Those below the poverty level have resources available through legal aid grants, societies, and private efforts.

For the Middle Class and the Working Poor, however, when a complaint is filed, the scales of justice are not level. If you are a named defendant, you have already lost a great deal no matter the outcome of any lawsuit.

The federal district courts handle a small fraction of litigation in America. State Courts are overwhelmed. More actions are filed in each State's courts annually than in all federal district courts combined.

There are now 13 firms in America with more than 1,000 attorneys. To be included in a list of the nation's 250 largest law firms, in 2007 a firm had more than 172 lawyers. The National Law Journal reported that 11 law firms generated more than one billion dollars in revenue. At least one firm in 2007 generated more than two billion dollars in revenue. The average billing rate per attorney went from \$321 per hour in 2006 to \$348 in 2007. In the top 100 law firms, revenue ranged from \$500,000 to \$2,500,000 per lawyer. Partner compensation ranged from \$415,000 to \$4,000,000 per lawyer.

A survey of the nation's largest 250 law firms showed the lowest starting salary for an entry level associate was \$75,000; half started at \$160,000. The average yearend bonus for these first year associates was \$45,000. One question is whether any entry level associate can bring clients to the firm or produce enough quality work to earn this much. The second more serious problem is that 46% of these associates leave their firms within three years. 63% leave within four years. So law firms (and our clients) pay a fortune to educate and train associates, half of whom leave.

#### Related Conditions:

**1.** Large corporations suing each other. Rarely is such a case tried or settled without each side paying millions in attorney fees.

**2.** The Power of the State. The U.S. Department of Justice, and its United States attorneys' general offices, are in reality among the largest law firms in the world with unlimited resources. They can bankrupt the wealthiest of defendants. To this we might also add the power of the State of Indiana because it, too, can generate similar resources.

Today the power of the State is not unique, and this is shown by the effect of a "Billion Dollar Law Firm." In 2002 Enron collapsed. Its accountant, Arthur Anderson, imploded. On February 29, 2008 a federal district court in Houston hears whether to approve a \$6.6 billion dollar recovery offered up by the banks involved. The banks offered billions even though the Fifth Circuit and recently the United States Supreme Court held no theory made them liable. The plaintiff firm that led the effort spent \$112 million in expenses and wants \$688 million in attorney fees.

3. Alternative dispute resolution. The first words from the mediator is “settlement now on unfavorable terms is better than the expense of going forward” or something similar. There’s much truth to that. The transcript of a daylong deposition costs \$1,000. Experts cost \$5,000 just to open a file. Responding to summary judgment adds \$10,000 in legal fees. Appeals cost a minimum of \$10,000. When mediators talk about how the justice system will take years to resolve the case and cost too much – this is another way of saying our current system has failed.

### **THE AVAILABILITY OF ATTORNEYS TO MIDDLE CLASS CLIENTS**

As the cost of justice increases attorneys in private practice represent fewer Middle Class clients. Think of it this way - Many construction workers who build hospitals often cannot afford health insurance or medical care provided by that hospital. In the same way, many workers at law firms, including attorneys, cannot afford to hire the lawyers they serve.

Most clients pay us for our time. In a contingent case, attorneys receive a percentage of any recovery. If the plaintiff hires an attorney on contingency, the attorney has every reason to maximize recovery for the client in the shortest amount of time. Clients who pay an attorney by the hour also want to resolve cases in the shortest amount of time. I report here that the law going from a profession to a business has caused at least some, if not many, attorneys paid by the hour to manage a case in a more expensive way, with less regard to resolving a case quickly. When asked whether or not a case should be mediated or settled, attorneys by the hour sometimes say the “case is not ripe enough for settlement”.

How many attorneys are rewarded by how pleased the client is for an inexpensive and quick result? Or rather do attorneys receive reward and promotion for how much in fees they bring in? How many cases are settled along terms that were on the table years earlier?

Given today’s Rules of Court and the Administrative Rules of Court, rarely can attorneys predict the amount of time that will be involved and often we cannot predict the amount in controversy.

Until 1900 most States had less than a thousand pages of laws and the number of attorneys was quite small. Today States Codes, the United States Code, and International Codes contain laws too numerous to count. Even before attorneys agree to represent a client or accept any fee, much legal research may be required. Questions of exclusive jurisdiction, preemption, and binding arbitration cause a great deal of time and expense in deciding simply where to file. Attorneys have few options in how to reduce the cost of all this. Yet we can control expenses.

To the extent attorneys can lower expenses, the less clients must pay for our justice system to function. This is a typical list of expenses that might be shared:

- Office space (lease and furniture)
- Health, Disability, and Malpractice insurance
- Library
- Advertising
- Equipment: Computer, copier, fax machine, phones,
- Employee salaries

Cravath Swaine & Moore in New York City recently agreed to pay 900 million over 15 years for 600,000 square feet of office space. This is an annual cost of \$146,000 per lawyer per year. Skadden Arps in Chicago pays \$45,000 per lawyer. Paul Hastings in Los Angeles pays \$90,000 per lawyer. Venable in Baltimore pays \$22,000 per lawyer.

Today many seasoned attorneys work more hours and make less money. Some semi-retire and work from home without any support. The most experienced of attorneys do not have the time or the money to train future lawyers. Law-firm monitors and teachers is often written or spoken about, but it is almost gone. If the past continues without change, the Middle Class will continue to be priced out of the “lawyer market.”

There are millions of Middle Class and Working Poor families in America. Many cannot afford to hire an attorney because of the amount of retainers, potential fees, and potential expenses; but a more important concern is that they cannot get a trial in a reasonable time and the potential return on any investment of time and money is not worth the risks for the injured party or the attorney.

If the Middle Class and Working Poor could get results for a reasonable fee, I suggest that attorneys would be overwhelmed with business and profit. Perhaps the legal profession could change from being a business to a profession once again.

**ATTORNEYS CAN BE MORE AVAILABLE TO MIDDLE CLASS CLIENTS,  
BUT THERE ARE MAJOR OBSTRUCTIONS TO DELIVERY OF LEGAL  
SERVICES TO THOSE CLIENTS**

**1. WHAT HAS THE FEDERAL GOVERNMENT DONE?**

At issue is not the entire Federal Government, but the accreditation criteria established by the U.S. Department of Education. It has authorized the American Bar Association to govern the accreditation of law schools. That procedure and that power has inflicted a disaster on the American law school, it

has dramatically increased the cost of justice, and it has denied access to attorneys by the American Middle Class.

To sit for most bar examinations, students must graduate from a law school accredited by the A.B.A.. This appears to mean the A.B.A. has minimum standards which law schools must exceed to maintain accreditation. In reality, the A.B.A. requires law schools whose accreditation is up for examination to exceed standards far above other law schools. As Dean Emeritus William F. Harvey explained to the Indianapolis Law Club, the A.B.A. has violated many antitrust rules and federal court orders to advance an agenda in the name of accreditation. One result has been an astronomical increase in the cost of a law school education between 1973 and 2008, and yet a decrease in content.

The average cost of tuition and fees at a public law school surged by 140% during the past ten years. \$6,000 in 1996 to \$14,250 in 2006. Private schools increased by 70%. From \$17,800 in 1996 to \$30,500 in 2006. The political strength of the A.B.A. is seen when State Supreme Courts abolished programs that permitted people to “*read for the law*” for three years under a mentor and then sit for the bar. Moreover, the A.B.A. squeezed for-profit law schools out of existence. In doing this, the A.B.A. destroyed society’s free market system in legal education.

Many universities have endowments so large that all undergraduate and post graduate students (including law students) could study for free – forever. Pardon the sarcasm, but how many potential geniuses must schools saddle with debt or turn away so their supporting foundations can retain forty billion dollar endowments?

Law schools already pay faculty members far above what they might earn on the open market. Their buildings rival King Solomon’s Temple. The A.B.A. requires law schools to house enough books to fill a gymnasium, even though law firms use books for looks. We live in an age where a lap top computer has access to more information than the Library of Congress.

States compare elementary and high schools on the result of tests administered to students on how well they read, write, and count. Yet the federal government allows the A.B.A. to accredit or not accredit law schools without any criteria relating to what students should learn and more importantly, how well they learn it.

The U. S. Department of Education certifies the A.B.A. as its accrediting agency, but the government does not monitor what law students should be prepared to do after graduation. Sit for a bar examination, yes. But represent a client – let’s hope not. That new graduate today is a walking malpractice case.

No Founding Father graduated from an A.B.A. accredited law school. Attorneys who helped draft the United States Constitution, the Bill of Rights, or

the Indiana Constitution did not graduate from an A.B.A. accredited law school. No President graduated from an A.B.A. accredited law school. Neither did 99% of the 110 Justices of the United States Supreme Court.

## **2. WHAT REALITIES CAN LAW SCHOOLS CONSIDER?**

Not all law school graduates sit for the bar, and not all lawyers represent clients. But for those who do, law schools can require students to learn a bit more. An education at an A.B.A. accredited law school does not make a lawyer. Experience does. Attorneys cross the line between practicing law and mastering it the day before he or she retires.

We hope elementary and college students can read, write and count. What should law schools teach? Leaving our short past in the hands of the A.B.A. has proved utterly wasteful. Faculty members have rarely represented clients; few practiced law. Courses border on the obscure. Faculty members spend more time publishing law review articles than preparing for class. Law reviews that hardly any one reads, except those evaluating tenure.

Perhaps law school education and law reviews in particular can be guided by States' continuing legal education requirements. Seminars taught by experienced attorneys far exceed the quality and content of law reviews. Courts cite to articles and treatises written by experienced attorneys. If a brief cites to a law review article, this might be another way of saying your cause is lost, and your client hangs by a thread.

Most graduates do not know how to draft a complaint, file one within the limitations period, draft a Will, draft a deed, or draft a contract. What law schools fail to teach, law firms (our clients) pay the price for. A few law schools today might have varying degrees of success in teaching students how to provide legal representation. The practice of law requires so much more. Further, law schools have no proficiency in teaching entrepreneurial skills, how to procure new clients, or in general the business side of the law.

## **3. WHAT CAN STATE BAR ASSOCIATIONS DO?**

On December 27, 2007 the Wall Street Journal reported that surgeons in Brooklyn currently pay \$267,000 annually for malpractice insurance, general surgeons in Manhattan pay \$123,120, and obstetricians in Queens pay \$180,490. New York regulates the fees charged for medical malpractice insurance, and is pursuing the possibility of charging each physician an extra \$50,000 in 2008 to maintain sufficient reserves.

Whether we focus on health insurance, disability insurance, or malpractice insurance, the larger the group, the lower the premiums, and the more likely

those with problems can stay insured. The cost of insurance drives up the cost of everything, and our profession is no exception.

In 2000, solo practitioners paid an average annual cost of \$4,000 for family health insurance. In 2006 this had increased to approximately \$30,000. In 2007 using a health savings account could lower the cost for the year to approximately \$15,000. If these rates apply to healthy people, what are attorneys paying who have health problems? General inflation constitutes 18% and government regulations 15% of the factors driving rate increases. *Price WaterhouseCoopers, The Factors Fueling Rising Healthcare Costs, April 2002, p.3.*

Many large law firms self insure, paying premiums only on umbrella policies. Many lawyers obtain health insurance through non-lawyer spouses. What law firm can provide the same level of benefits and at similar cost as attorneys receive at any of the *Fortune 500* companies? What law firm can enjoy the cost of health insurance paid for attorneys in state or federal governments?

In 2000 attorneys could purchase \$2,000,000 of malpractice insurance for a premium of approximately \$3,000. By 2006 companies rarely sold more than \$1,000,000 of coverage for a premium of approximately \$5,000. If you can find an umbrella policy to increase coverage to \$2,000,000, expect to pay an additional premium of \$10,000. If these rates apply to attorneys with no malpractice history, what are attorneys paying who have been sued?

The suggestion follows that state bar associations could consider negotiating group plans or self insure for all health, disability, and malpractice insurance. This could include options among several companies and several plans. Neighboring states could even join for greater numbers. Requiring all attorneys to join such a system would reduce the cost and the time each firm spends on all this.

Envision holding a password for unlimited access to Westlaw and Lexis. Each would cost those of us in private practice approximately \$1,000 a month. How much lower might Westlaw and Lexis charge if the state bar associations negotiated the purchase of passwords for hundreds of thousands of attorneys?

#### **4. WHAT CAN THE SUPREME COURT RULES COMMITTEES DO?**

Trial rules are supposed to secure the just, speedy and inexpensive resolution of lawsuits. In 1970 and for several years afterward, they did this. Today the COURT Rules, to be distinguished from the TRIAL Rules, often cause the opposite. All States have their own peculiar problems here. But let's look at my home State of Indiana as an example.

### **a. Local Rules:**

Indiana has 84 trial rules printed on 76 pages. Indiana local rules are printed on 720 pages. The federal system has 86 trial rules printed on 57 pages. The local rules for the federal courts just in Indiana are printed on 232 pages. In addition to local rules adopted by courts, over a hundred judges require a slightly different case management plan. If time is money, local rules cost a fortune. Perhaps Courts do not wish for attorneys to practice in more than one county. For non-local attorneys, the system requires more research, and involves more risk, at the expense of clients.

Some local rules require responses to all motions within 7 days (or is that 15 days?) or you waive any objection to the proposed order. Some counties require a docket entry form or your entire envelope is returned (such as a response to summary judgment now 10 days late). Some local rules require the client, not the attorney, to sign motions and petitions; some require attorneys to serve file stamped copies. Both of these rules shorten time periods for non-resident attorneys. The Supreme Court of the United States, the Circuit Courts of Appeals, the federal district courts, State trial courts, and State appellate courts micromanage to the point of listing different font sizes for briefs.

One suggestion is to allow a local rule to remain effective for one year. If the Supreme Court Rules Committee sees that it is effective, perhaps it can become a trial rule for all; otherwise it should expire.

### **b. Automatic Change of Venue:**

Starting in 1972 Indiana allowed any party to the lawsuit to change the venue from the county and judge in any civil dispute. Counties with crowded dockets could be avoided. It was a rule most States admired. In 1992 the rule changed to prevent an automatic change of venue from the county because of concerns parties were trying to avoid the minority makeup of jury pools.

The change in Trial Rule 76 significantly changed the practice of law in smaller communities. With the automatic change of venue more attorneys lived and practiced in smaller counties. When not serving as local counsel on cases with significant amounts in controversy, these attorneys enjoyed a lower cost of living and helped a great many Middle Class clients. Not anymore.

Clients pay for justice with money and with their time. First choice trial settings can be years away. Nevertheless, courtrooms around Indiana sit idle. Dean Harvey argues that, over the years, the change in the automatic change of venue inflicted an economic disaster on Indiana's Middle Class that has cost millions. Further, it has created idle trial courts in our State. The Dean's point is that if justice delayed is justice denied then barring a civil litigant from an empty but open court room is both delay and denial.

**c. Filing and Service:**

If you want to file something with the Indiana Court of Appeals, you simply mail it and the clerk file stamps it the day you mailed it. For a trial court clerk to do the same requires certified or next day mail. This is a waste of money. If the mailbox rule is good enough for the Clerk of the Indiana Supreme Court it ought to be good enough for every other clerk. Each year the Middle Class in Indiana waste thousands on the cost of certified mail.

**d. Pro Hoc Vice:**

The cost of legal service in Indiana can be reduced by not allowing non-Indiana attorneys to appear in Indiana courts. Millions in attorney fees leave the State of Indiana and leave the pockets of Indiana citizens and persons. Our sister States extend such a courtesy in name only. On a related note, attorneys who never practice in Indiana advertise for cases here and then broker them for a fee to Indiana attorneys who do all of the work.

**e. Transcripts:**

In a recent tobacco trial, the parties paid for a private court reporter to provide real time transcription. At the end of the four week trial everyone had a transcript. Unfortunately, the appeals court had to wait nearly a year for the “official” court reporter to transcribe what had already been done, with the appellant paying another \$3.00 per page. Not a proud day for our profession.

Trial Courts have discretion to electronically record the proceedings as an official transcript, rather than requiring it in written form. An entire trial can be recorded onto a DVD or as a single wave file on any computer or flash drive. Computer media players can show who testifies when, and if an appeal turns on something said we can cite to the day, hour and second where that argument or testimony appears. If a party needs something transcribed, the Trial Court has discretion to appoint any person (not just the county’s court reporter).

What Trial Courts can do, however, does not follow in the appellate courts. An appellant who wants evidence reviewed must obtain a written transcript from the court reporter and pay all costs. No market forces at play here. No videos. Clients pay too much, and sometimes twice.

## **CONCLUSION**

Hopefully this Report on the Cost of Justice enlightens a few and motivates many. Each attorney is in a position to improve our justice system, and each of us should ask ourselves some rather basic questions:

1. How can attorneys reduce the cost of doing business so as to make ourselves more available to the Middle Class?
2. How can a person become an attorney without having to repay so much in student loans?
3. How can law schools better prepare students to help the Middle Class?
4. How can local rules and court rules be changed so as to reduce the cost of justice for everyone?
5. What suggestions do you have that might allow attorneys to represent more Middle Class and Working Poor clients?

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