

A Critique of Attorney Fees Regulation in Zimbabwe

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Abstract: *This paper examines whether fees charged by attorneys in Zimbabwe should be determined by the State through the instance of the Law Society, as is the current practice, or whether Zimbabwe should follow common international trends where the charging of fees is deregulated and controlled by market forces. If the latter course were to be adopted, what would be necessary measures to ensure the public is protected? What role will the Law Society play in such a new dispensation?*

Keywords: attorney, fees, market, regulation, deregulation, costs, law society, taxing officer, taxation, tariff.

Introduction

1. Generally speaking the justification behind the system of regulated fees is to protect the general public and ensure that there is uniformity in the service that the legal profession provides. However, many other jurisdictions have abandoned this system for a number of reasons; the principle reason for such abandonment is that it is extremely difficult to ensure compliance with a regulated system. As such, many first world countries such as the United States and the United Kingdom do not currently have any fee regulation, instead allowing the fees charged to be determined by market forces.
2. The United States experimented with fee regulation in the infancy of its legal system, while it was still under British Colonial rule. However, it appears that fee regulation was not really intended for the purpose of protecting the public; on the contrary, fee regulation was imposed by the British Government as a way of denying the American lawyers autonomy.¹ In any event, it appears that the fee regulatory system was hardly adhered to and famous American lawyers such as John Adams

managed to accumulate their fortunes despite the strictures of fee regulation.²

3. The English system was never burdened with any form of fee regulation. The charging of fees has always been regulated solely by market forces. However, it is interesting to note that, despite the lack of regulation, a common practice emerged among legal practitioners regarding the amounts to be charged for work. In fact that practice was so common that it was codified in 1812 by J. Palmer in *The Attorney and Agent's Table of Costs*³ a comprehensive, 600 hundred page volume setting out recommended fees to be charged by Solicitors.

Current regime in Zimbabwe

4. For our current purposes it is instructive to examine the current system that is employed by the Zimbabwean legal profession. There are four pieces of legislation which are of interest in this regard.
5. Firstly, attorneys in general practice are required to charge their clients fees in terms of the General Tariff of Fees published by the Law Society of Zimbabwe.⁴ The Law Society Tariff requires that attorneys charge fees on an hourly basis, though it is recommended that attorneys break down the hour into smaller units to ensure accurate billing. The rate charged per hour is dependent on the individual attorney's experience with an inexperienced attorney obviously charging considerably less than a senior attorney.
6. The tariff provides some measure of flexibility to the individual legal practitioner in that he is permitted to charge a premium where the matter is complex, involves specialized knowledge, the value of the property is particularly high or the matter is of particular importance to client. However, the premium to

¹ Leubsdorf, J. (n.d.). Toward a History of the American Rule on attorney Fee Recovery. *Law and Contemporary Problems*, 47(1), 9-36. Retrieved June 13, 2015, from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3748&context=lcp>

² Leubsdorf, J. (n.d.). Toward a History of the American Rule on attorney Fee Recovery *ibid*.

³ Palmer, J. (1812). *The attorney and Agent's Table of Costs*. London: Saunders and Benning.

⁴ General Tariff of Fees for Legal Practitioners with effect from February, 2011.

be charged is also regulated and dependent on each practitioner's experience.

7. It is significant to note that legal practitioners are legally obliged to charge fees that are fair and reasonable. The Law Society considers the charging of a fee higher than that set out in the Tariff to be excessive.⁵ As such, practically speaking, it is mandatory for legal practitioners to charge fees in terms of the Tariff or face the real risk of disciplinary action for charging unreasonable fees.
8. The second regulatory framework of relevance is Statutory Instrument 12 of 2011, the High Court (Fees and Allowances) (Amendment) Rules. This SI is employed where a party is recovering legal costs from another following the successful prosecution or defence of an action.⁶ The fees and allowances in terms of this framework are similarly time dependent, however the rates charged are much lower than those set out in the Law Society Tariff. In almost all cases fees leveled under this SI are taxed by the Courts to ensure their exactness. The Courts charge a taxation fee of 20% of the value taxed, and the impropriety of such an exorbitant fee will be dealt with in the latter parts of this paper.
9. The third fee regulatory framework which bears mention is SI 24 of 2013, the Law Society of Zimbabwe (Conveyancing Fees) By-laws. As the name suggests, this document sets out the fees to be charged for all conveyancing work including transfer of properties and the registration of mortgage bonds. The fees charged are a percentage of the overall value of the property concerned and are calculated on a sliding scale; that is, the percentage that one is allowed to charge decreases as the value of the property increases. The Conveyancing By-Laws are a comparatively recent addition to the profession.
10. An even more recent addition to the profession is the Legal Practitioners (Contingency Fee

Agreements) Regulations of 2014.⁷ This entitles a legal practitioner to levy his fee as a percentage of the amount recovered. The contingency fee arrangement is often colloquially referred to as the 'no win, no fee' style of billing. The system has not really taken root in Zimbabwe yet and the reason for this will be examined below.

Critique of the current regime

11. There are a number of problems with the current regime as will be examined below.
12. Specifically the General Tariff generates a number of problems which need to be addressed.
13. The first critique that can be made is the lack of enforceability of the regulations. While the tariff is theoretically mandatory, it is an impossible task for the Law Society of Zimbabwe to keep track of every legal practitioner and the amount of time that he spends on each case. Furthermore, it is difficult to readily ascertain the amount of time that a practitioner has spent in activities such as research, drafting, typing and attending to telephone calls. As such, while there is a tariff which guides the manner in which fees are charged, practically speaking, there is no way of ensuring compliance with that tariff. The tariff is therefore an ineffectual method of ensuring that the public is protected.
14. Secondly, the tariff system does not promote efficiency in the performance of a client's instructions. It is odd that, in terms of the tariff system, a legal practitioner who takes longer to perform a task can charge more than a legal practitioner who is efficient in the performance of his mandate. The system therefore rewards inefficiency. The current scheme also relies on the fallacy that something that takes longer to produce is necessarily better. There is no guarantee that Heads of Argument, for example, that are drafted in ten hours are any better than Heads of Argument drafted in two hours, yet the practitioner who takes longer can charge five times as much.

⁵ General Tariff of Fees *ibid.*, Note 3.

⁶ Similarly, Statutory Instrument 2 of 2011, the Magistrates Court (Civil) (Amendment) Rules performs the same function in Magistrate's Court matters; though the amount that is recoverable in the Magistrate's Court is significantly lower than that which is recoverable in High Court matters.

⁷ For ease of reference a copy of these Regulations can be downloaded from :
[http://www.veritaszim.net/sites/veritas_d/files/SI%202014-154%20Legal%20Practitioners%20\(Contingency%20Fee%20Agreements\)%20regulations,%202014.pdf](http://www.veritaszim.net/sites/veritas_d/files/SI%202014-154%20Legal%20Practitioners%20(Contingency%20Fee%20Agreements)%20regulations,%202014.pdf)

15. Further criticism of the current system may be leveled at the concept of uniform charge rates. For example the instruments apply on a national scale and do not take into account disparities of wealth in different parts of the country. For example, a legal practitioner in the city of Harare would most likely have wealthier clients than a practitioner from the cities of Mutare, Kadoma or Bulawayo which are small urban centers; however, under the current system it is mandatory for a lawyer in a small town to charge the same as a lawyer in a large city.
16. Similarly the system fails to take into account that different clients differ in their capacity to pay. A large multi-national corporation and a poor widow should not be required to pay the same for legal services. The legal practitioner should be able to tailor his charge out rate for each individual client on the basis of his estimation of their ability to pay.
17. Another factor which is not taken into account is the value of the work being done. In terms of the present system, a debt collection of USD1,000.00 might cost more than a debt collection of USD100,000.00 depending on the course that the trial takes. The value of the service to client is much greater in a large debt collection and the legal practitioner should be able to factor this into the calculation of his or her fees. This is further compounded by the fact that a legal practitioner takes on a greater responsibility when involved in a matter concerning a large sum of money.
18. The system also fails to take into account the specialist services of legal experts. Another modern trend in first world law systems is the move away from a situation where every lawyer is a general practitioner. The move towards specialization is an acknowledgment that codified law is so vast that a general practitioner can never expect to have anything more than a limited knowledge of every area of the law. By contrast, a specialist practitioner is able to have an in depth knowledge of one area of the law thereby improving the quality of his work in that field. A specialist practitioner should not be required to charge the same as a general practitioner as the specialist practitioner's services are, by their very definition, special.
19. Similarly, larger law firms tend to departmentalize their work. This is a move away from the system where each lawyer had his own clients and he alone performed their

legal work. In modern law firms it is common for a matter to be handled by a team of people. It becomes difficult to apply the current tariff where the work is not being done in a traditional manner.

Disparity between Attorney-Client fees and Party-Party Costs

20. The second critique that may be made of the current system is the huge disparity between fees charged by legal practitioners and the amount that litigants are able to recover from the other party. In fact, the current system is punitive of the successful litigant and in some instances the cost of litigation may outweigh the benefit to client.⁸
 21. The logical step would be to do away with the two separate scales and simply allow the successful litigant to recover his costs in full from the other side. If such a measure were to be adopted it would be necessary to educate taxing officers to ensure that there was no abuse of the process. Additionally, measures would need to be taken to ensure that the successful litigant was *only* recovering moneys that he had actually expended and not tacking on amounts which he had not paid.
- ### **Contingency fee arrangements**
22. As aforesaid, the Minister of Justice has recently caused to be published a new Statutory Instrument which provides for lawyers to enter into contingency fee arrangements with their clients. However, in terms of the Regulations, the procedure for entering into a contingency fee arrangement is somewhat laborious and perhaps this is why the system has not really taken root in Zimbabwe.
 23. For example, in terms of Section 5 of the Regulations, before a lawyer can enter into a contingency fee arrangement with his client he must provide the client with a summaries setting out the following information :
 - a. Alternative methods of financing litigation.
 - b. The customary procedure for determining costs payable to the legal practitioner.

⁸ This is even more prevalent in the Magistrate's Courts where the fees recoverable are so low that it in most cases it is not even worth taxing a Bill of Costs.

- c. The fact that the fee payable in terms of the contingency arrangement may end up being higher than the normal fee charged.
 - d. Any amounts that might be spent on expenses.
 - e. When such expenses will be due and payable.
 - f. The fact that the client may have to pay the other parties legal costs if they are unsuccessful in Court.
24. These written summaries must precede the written contract which is another requirement. The requirements for the contingency fee agreement are set out in Section 6 of the Regulations; the contents are too lengthy to replicate *in toto*.
25. However, one peculiarity of the Regulations is the provision of Section 7 (b) which provides that the legal practitioner cannot include a provision in his agreement which prevents the client from terminating the effect of the agreement or changing legal practitioners. Practically speaking this would allow a client to make use of a legal practitioner's services until nearly the end of the matter and then simply terminate the agreement and change legal practitioners, depriving the legal practitioner of his fee.
26. While it is clear that the intention of the contingency fee regulations is to protect the public, the provisions that have been imposed are too laborious and one-sided to make it commercially viable. In other words, the public is protected to such an extent that the legal practitioner is exposed.

Moving towards a Modern System

27. As aforesaid, the modern system has moved away from fee regulating structures and has allowed the market to drive the manner of fee charging and even the amounts of fees that are charged. The following is a table setting out the results of a survey on how fees are charged or regulated in first world countries. What is clear from that survey is that there is an international trend towards deregulation and, in some jurisdictions fee regulation even contravenes competition laws.

A survey of tariff regimes elsewhere

Country	Type of profession	Regulation of fees
German	No separation	There is an Act on remuneration

		of lawyers or payment is based on agreement between lawyer and client.
Netherlands		No guided fees. Only guide is "reasonable fees", for State funded legal aid there is a basic remuneration.
New Foundland and Labrador		No regulation of fees
Scotland	Divided profession	In not legal aid work fees are negotiated with Counsel's clerk. If no prior agreement then reasonable fees are charged. Same concept applies for solicitors.
Upper Canada	Not indicated	No regulation of fees. If the client questions the bill it is referred to the court which determines what is reasonable.
British Columbia	Fused	No settling of fees. Legal aid lawyers offer their services under a tariff
L.S Northern Territory Australia		Fee tariffs are illegal
Canada		No prescription of legal fees.
L.S Northern territory-		Each jurisdiction has its own schedule of fees. Solicitors may

		charge on the basis of 6 units based on hourly rate. There are also standard fees for matters in the federal court although private firms may charge on a commercial hourly rates.
Nova Scotia		Tariffs are illegal
East Africa		Gazetted tariffs /fees are standard
South Africa		Tariffs are illegal and anti-competitive

28. For the reasons set out below it would be preferable for Zimbabwe to adopt the modern system where fees are regulated by market factors. The advantages of such a system are self-evident and cure most of the problems highlighted above. While there is a fear that a market-driven system will lead to overcharging or undercutting, it appears that most jurisdictions who have adopted such a system have not experienced any drastic issues in this regard.

29. The system of market driven fees also has the advantage of encouraging excellence as an attorney is forced to rely on his own success rate and abilities to justify the fee he is charging. Such a system also decreases the number of frivolous cases and should increase the number of cases that are settled out of court.

30. Almost every other sector of society is governed by market forces. Nobody circumscribes what may be charged by a supermarket or a barber. Indeed, even professions such as accounting are deregulated. The position of a legal practitioner is one of great responsibility. If one can trust a legal practitioner to act in an ethical manner in his conduct in practice, surely the legal practitioner can also be trusted to maintain reasonable fees without regulation.

31. The modern international trend is a departure from the traditional approach where legal practitioners are forced to practice in partnership. There has been a move towards practice in unlimited liability companies. These companies carry all the characteristics of an ordinary company with the exception that the shareholders do not enjoy the protection of limited liability.

32. The advantage of the unlimited liability company system is that it enables legal practitioners to practice in a more business-like manner. For example, having a company means that practitioners are able to register assets in the name of the company, it is easier for them to take out insurance policies and the appointment of new partners (directors and shareholders) becomes less complex. The limited liability company also gives the practitioner the freedom to source outside investment for his practice if he so requires.

33. Another development of interest is that, in the United States, lawyers are now permitted to practice in Limited Liability Partnerships. This means that a partner is not personally liable for damages that may arise from the negligence of another partner; he is only personally liable for damages arising out of his own negligence. The advantage of this system is obvious in that a practitioner is then free to enter into partnership with any legal practitioner without the fear that he may be setting himself up for disaster.

34. While it is not suggested that such systems be adopted with immediate effect, it is still instructive to examine the systems that are in use in foreign jurisdictions to avoid stagnation and foster growth in the Zimbabwean legal sector. Perhaps the deregulation of the fee charge out system could be a step towards the modernization of the legal profession in Zimbabwe.

35. The deregulation of the fee charging system does not mean that there should suddenly be a free-for-all where lawyers can effectively take advantage of the general public. While the system is market-driven, not regulated, it is still necessary to have a legal framework to ensure that legal practitioners are not duping their clients. The Law Society will have an integral role within that legal framework and quite possibly will be even more effective in promoting reasonable fee charge out rates.

Recommendations

36. There would be no purpose in critiquing the current system without recommending a way forward. The following recommendations are simple proposals for the development of the legal practice in line with international trends :
- a. As aforesaid, the first step is to deregulate fee charging and allow it to be controlled by market trends.
 - b. The second important step is to create a legal framework within which a deregulated system can operate. For example, in the English system, all information about the cost of the lawyer's service must be given to the client in writing prior to commencement of the work. This is a legal requirement in terms of the Principles and Code of Conduct of the Solicitor's Regulation Authority, the English equivalent of the Law Society.
 - c. Additionally it may be necessary to revisit the current statutory rules which require practitioners to practice in unlimited liability partnerships. This system may have been effective where just a few attorneys came together to form firms. However, it is not unforeseeable that in the future there will be developments within the legal sector resulting in firms in Zimbabwe with hundreds of practitioners. It is necessary to revisit our current laws and create the enabling instrument to build appropriate vehicles for modern law firms.
 - d. The guidelines set out in the current Law Society Tariff must also be maintained to assist legal practitioners to determine their fees at a reasonable rate. The Law Society Tariff contains valuable advice in this regard such as a formula for the calculation of postage and petties, recommended fees to be charged for specific work and guidelines for charging of fees to foreign clients.
 - e. It is recommended that conveyancing tariff be retained. Conveyancing is easy to regulate and the current system is consistent with other stakeholders such as Estate Agents and government stamp duty which is similarly regulated. In conveyancing matters there is a real risk

of undercutting which would reduce the quality of the work being done.

- f. A principle which must be adopted is that lawyers should never charge more than the debt itself. It is fundamentally unethical for a lawyer to do a debt collection for a small amount while leveling a fee which far outweighs the benefit to client.
- g. One area of the law which requires the Law Society's urgent attention is the area of taxation. At present the court charges an outrageous 20% taxing fee on all bills, irrespective of value. A taxation process at the very longest might take the taxing officer one hour. As such, in a matter where a legal practitioner has done 100 hours' work, the court claims a taxing fee of the equivalent of 20 hours' work for a one hour job. Similarly the preparation of an appeal record is charged at a rate of USD1.00 per page. This is also excessively high when one considers that an Appeal record can easily be over 1000 pages.

The practical effect of such charges is to prevent litigants from recovering their legal costs or appealing against a decision. In short, high court charges are denying justice to the poorer sections of society.

Conclusion

37. In summary, the current fee regulatory structures are somewhat out of date. Additionally, the system seems to create more problems than it fixes. With increased globalization, the working world is becoming a smaller place; legal practitioners need to act for large international conglomerates and need the appropriate vehicles to deliver results of an international standard. It seems likely that large multinational law firms will soon commence practice within our jurisdiction; South Africa already has a huge number of such firms.
38. As such it is advisable; perhaps even necessary, to modernize the legal profession in Zimbabwe. The recommendations made above are simple proposals in this regard. It is clear that these issues will need to be discussed, debated and experimented with before a clear way forward is found. However, what remains

clear is that the Zimbabwean legal profession cannot be left in the dust; it must evolve to meet the challenges of the times.

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