

# The Hidden Costs of Lawyer Regulation

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New York law accredits 38 occupations as “professions”. Curiously, the practice of law is not among them, except by implication. And except for lawyers, all professions in the Empire State are regulated by the State Education Department. And in the case of all professions, the state’s system of regulation is financed by a biennial registration fee on the members of each profession.<sup>1</sup>

For most lawyers, it’s likely that the institutions which regulate the practice of law—from admission to registration to discipline—are simply “there” or “somewhere” in the labyrinth of state government. How those institutions got there, and the revenues that perpetuate them, matter little in the daily lives of most lawyers.

Indeed, until the mid-seventies the cost of enforcing the Lawyer’s Code of Professional Responsibility (actually New York court rules which have the force of law) was a charge on county and city governments, with the Appellate Divisions of the Supreme Court relying heavily on volunteer bar associations to investigate and prosecute acts of professional misconduct.

That regulatory scheme changed with a new system of centralized budgeting of lawyer discipline on the state level;<sup>2</sup> part

of a movement led by the American Bar Association to enhance lawyer regulation and discipline nationwide. In New York, it was centralized budgeting that enabled the Appellate Divisions to create the professionally staffed attorney grievance committees that now operate in all the state’s regional judicial districts.

These disciplinary functions cost significant dollars, and no prophet was needed to predict that budget makers in Albany would seek eventually to shift these costs from taxpayers to the members of the legal profession.

For most lawyers, the most tangible token of this restructuring arrives in the mail in the form of a \$300 bill from the Office of Court Administration every two years in the month of each lawyer’s birthday. Those billing statements have generated upwards of \$250 million in revenues for the state’s treasury since the registration fee’s inception in 1982.

For most of our history, lawyers paid no licensing fees. That exemption ended in 1963 when the Legislature imposed a one-time fee of \$15.<sup>3</sup> That fee was collected by the Clerk of the Court of Appeals for deposit into the so-called General Fund, which is the state government’s major operating



account and its source of funding for most day-to-day operations of state government.

Next came a biennial registration fee of \$40, which was also a revenue-raiser for the General Fund in the 1981-82 fiscal year.<sup>4</sup>

This proved to be a short-lived registration program. In a clumsy “grandfathering” scheme, the Legislature amended Governor Carey’s budget bill, and exempted all lawyers who were then admitted to practice. In the budget law that emerged, the obligation to register, and to pay a \$40 biennial fee, applied only to lawyers who were admitted after June 1, 1981, presumably the lawyers least able to afford the fee.

In short order, an embarrassed Legislature began negotiating with bar leaders to preserve the fee and registration program, but to eliminate the exemption it had created for many lawyer-legislators and their counsel.

The compromise that emerged was a broad-based registration program, with half of the fee earmarked for a public trust to reimburse the theft of law client money and property in the practice of law. With important allies in the court system, principally Chief Judge Lawrence H. Cooke of the Court of Appeals, the effort succeeded.

Within weeks, the Legislature repealed the \$40 registration scheme and replaced it with a program that exempted only lawyers who had retired from practice.<sup>5</sup> The biennial fee was fixed at \$50 and split in half: \$25 for the General Fund, and \$25 earmarked for a “Special Revenue Fund” in the state treasury to reimburse the theft of law client money and property in the practice of law.<sup>6</sup>

Thus was born the Clients’ Security Fund which was later renamed the New York Lawyers’ Fund for Client Protection. Since 1982, the Lawyers’ Fund has provided nearly \$70 million in reimbursement to eligible law clients and escrow beneficiaries.

The principal source for these awards is the biennial registration fee, augmented with interest, restitution and subrogation receipts and sanctions imposed on attorneys for frivolous conduct in litigation. The Lawyers’ Fund gets no revenues from the General Fund and, surprising for most lawyers, no revenues from the Interest on Lawyer Account (IOLA) program.

The \$50 biennial fee was increased to \$100 in 1986; again with a 50-50 split between the General Fund and the Lawyers’ Fund.<sup>7</sup> Then, four years later, the Legislature substantially overhauled the entire system of financing lawyer regulation. The biennial registration fee was trebled to its current level of \$300<sup>8</sup>, with 80 percent (\$240) for a new Special Revenue Fund which is named the Attorney Licensing Fund, and 20 percent (\$60) for the Lawyers’ Fund.

The Attorney Licensing Fund (ALF) has no statutory foundation or function, nor a board of trustees to administer it. It’s merely one of a myriad of financial accounts in the state’s accounting structure. ALF is important nonetheless because, in each state budget, the Legislature designates it as the source of funding for several programs administered by the judicial branch of government which were previously financed by General Fund revenues.

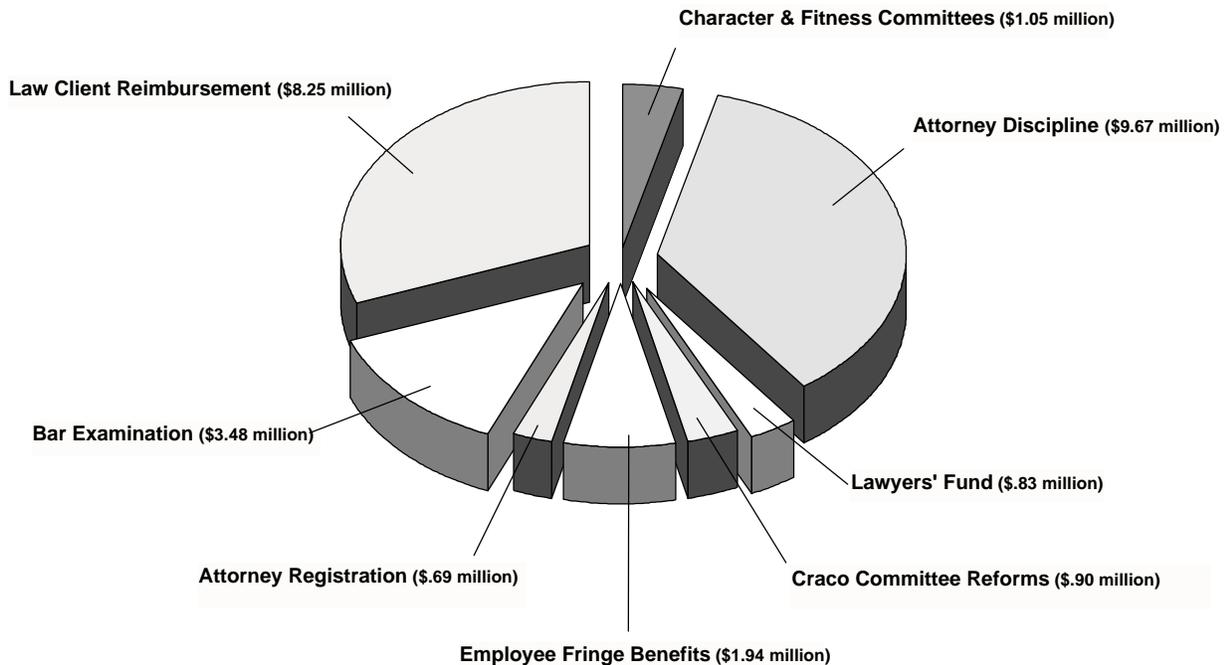
The budget for the state’s Unified Court System for the fiscal year that begins on April 1, 2000 proposes seven basic appropriations from the Attorney Licensing Fund for programs that directly affect the legal profession. The appropriations total \$27 million, roughly half of the registration fees that are raised in each biennial cycle from approximately 180,000 lawyers. The budget proposes no increase in the current \$300 fee.



- \$694,000 to underwrite attorney registration operations within the Office of Court Administration;
- \$903,000 to implement recommendations of the Chief Judge’s Committee on the Profession and the Courts (the “Craco Committee”);

- \$9.67 million to operate the Appellate Divisions’ attorney grievance and disciplinary committees;
- \$1.94 million to finance fringe benefits for the staffs of agencies funded by the Attorney Licensing Fund, including social security, health insurance and retirement system contributions;

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Source: NYS Judiciary Budget FY 2000-2001

- \$1.05 million to operate the Appellate Divisions’ Committees on Characters and Fitness which review the credentials of candidates seeking admission to the bar;
- \$3.48 million to operate the State Board of Law Examiners, the agency which administers the New York bar examination;

- \$8.25 million for awards of reimbursement from the Lawyers’ Fund for Client Protection, and \$834,500 for the fund’s overhead and administrative costs.

In the early years of the registration program, the biennial fee generated significant revenues beyond those needed for these lawyer regulation programs.



That surplus wound up in the General Fund. That's no longer the case, except for the unique financing arrangement that applies to the bar examination program. Under the current funding structure, the registration fee generates approximately \$3.5 million annually to operate the State Board of Law Examiners. But what of the \$3.4 million in bar examination fees that the Board collects each year? Those fees are paid into the General Fund, in effect a windfall of nearly \$7 million in each two-year registration cycle.<sup>9</sup>

New York's system of financing lawyer regulation cannot be grasped fully by reading the Judiciary Law. The actual work of getting and spending is accomplished within the budget process in Albany, and with annual legislative appropriations, not statutes. Digging for the actual numbers in a law firm library is a near-impossible task. Nonetheless, once the hard numbers are mined, it's clear that the legal profession enjoys no special privilege or exemption from registration fees.

New York's legal profession, whether in private practice or public service, contributes all revenues necessary for effective programs of bar admission, lawyer discipline and law client protection. That's one of the better kept secrets within the profession; but it's a secret better not kept. It deserves disclosure if only to promote professional self-respect and public trust.

What about the future? While there are no public proposals to increase the biennial fee above \$300, it's significant that nearly all of the \$54 million that the fee produces over its two-year cycle is now consumed by the existing lawyer regulation system. Revenues from the fee increase a modest \$1.35 million annually, which reflects a net increase in the bar's population, mainly by the admission of new lawyers.

In the "model" state lawyer regulation system, the components include bar admission, a lawyer discipline and disability system, a program to mediate lawyer-client disputes, a client protection fund, arbitration of fee disagreements, lawyer practice assistance programs, continuing legal education, and alcohol and substance abuse counseling.

The New York system has a way to go in this direction and, obviously, substantial improvements in the system would involve substantial costs. Therein lies the systemic rub, and the practical options for budget makers seem few: an increase in the attorney registration fee? new fees? an infusion of money from the state's general tax revenues? a reallocation of resources within the existing regulatory system? These are difficult choices but it's a good bet that lawyers will pay.

### Annotations

<sup>1</sup> New York Education Law, Title VIII.

<sup>2</sup> Laws of 1976, chapter 365 eliminated these charges on local government and shifted the source of funding to legislative appropriations in the state's judicial budget.

<sup>3</sup> Laws of 1963, chapter 204, §74, adding Judiciary Law §467-a.

<sup>4</sup> Laws of 1981, chapter 103, §138, adding Judiciary Law §468.

<sup>5</sup> Regulations of the Chief Administrator of the Courts also exempt from the fee full-time judges who are not permitted to practice law. They are deemed to be "retired" from the practice of law. 22 NYCRR 118.1(g).

<sup>6</sup> Laws of 1981, chapter 714, adding Judiciary Law §§468, 468-a.

<sup>7</sup> Laws of 1985, chapter 730.

<sup>8</sup> Laws of 1990, chapter 190, §255, amending Judiciary Law §468-a.

<sup>9</sup> Judiciary Law, §465(1), establishes a \$250 fee for each taking of the bar examination, and a \$400 credential-review fee from candidates seeking admission to the bar on motion.

