



By Fred Silberberg

Imagine you are not a lawyer, and you know your marriage is coming to an end. You need to consult an attorney to represent you, and you do not know what to expect.

You are feeling stress, and you are angry. You are worried about money, your home and your children.

Friends offer advice and tell you horror stories. The more they help, the angrier and more worried you become.

Eventually, you make it to a lawyer's office. You feel relieved, but you're still angry.

The lawyer tells you the things he or she will be able to do for you. He or she also tells you the things you need to do to protect yourself.

You want to get your spouse any way you can, and you want to protect yourself. When the lawyer quotes a retainer amount and tells you their hourly rate, you agree to pay them.

As the case unfolds, things are done by the lawyer that you do not question — or you question them and are told they are necessary. There are things you could have decided not to do, but you're angry and want vengeance, and you want to show your strength.

You don't understand some of the things clearly, but you rely on your lawyer and err on the side of doing more, rather than less.

Before you know it, you have incurred tens of thousands of dollars in legal fees.

You want your spouse to pay those fees. Your lawyer tells you he or she will ask the court to order that to happen.

Fee Conundrum

If you think that scenario is uncommon, think again.

The California Family Code allows such a request during the pendency of a divorce and at the conclusion of one. Cases interpreting the code state that the court is to consider various factors, including reasonableness.

To prevail on such a claim, in theory, a lawyer must explain the fee's reasonableness, and a judge must determine if the fee is reasonable.

The reasonableness of a legal fee depends on where it was incurred and the nature of proceedings undertaken. The intention behind the statute authorizing such fee requests is to provide a level playing field between parties.

Reasonableness of fees relates to that level playing field.

The law should not countenance the incurring of tens or hundreds of thousands of dollars in legal fees and an order for payment of those fees simply because one party authorized them, or because the lawyer for that party gambled and incurred them in hope that the other side would be ordered to pay them.

The problem is that, in a sense, the ability to seek fees in such a manner encourages them to escalate, and some lawyers make a career of pursuing outrageously high fee requests.

It is unfortunate, but not uncommon, that one side will take numerous steps they would not have taken if they did not have the ability to seek fees from their spouse.

Those steps increase fees on both sides. Had the spouse not opposed those actions, that party could have suffered otherwise-avoidable consequences.

But because that party took responsive actions, his or her fees also have escalated.

Now that argument is used to persuade the court that leveling the playing field means ordering payment of fees because the other side also has incurred them. The case has become significantly more costly for both sides because counsel for one side was willing to gamble with someone else's money.

While one needs competent representation, and there needs to be a means to accomplish that if someone is not in control of assets, existing procedures create fodder for some attorneys and wreak havoc with families' finances.

Our Legislature needs to address this problem and implement guidelines to remedy it. Courts need to scrutinize actual billing and not reward such conduct because a judge is concerned that the "out" spouse will be saddled with the unreasonable burden of having to pay fees. After all, the party paying child and spousal support often ends up paying a fee award, too.

The existing system does not foster client accountability. People make choices as consumers all the

time, but that does not give them the right to pass the buck for those choices.

In the family-law context, though, that is exactly what happens. If courts discouraged outrageous fee awards, they would send a message to lawyers and litigants. It would result in less litigation, lawyers being more accountable to their clients and the preservation of wealth for the benefit of the family.

While one needs competent representation in a divorce case, existing procedures create fodder for some attorneys and wreak havoc with families' finances.

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