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Phyllis Shapiro

Dana Underwood

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Recovering Expert-Witness Fees in Civil Rights Litigation: Fitting *Crawford Fitting* into the Picture

Phyllis Shapiro*

and Dana Underwood**

In the last year, much attention has been focused on the Supreme Court's recent, restrictive interpretations of federal civil rights legislation.1 These decisions will increase the difficulties women and minorities face in proving and remedying employment discrimination. No less significant, however, are those decisions minimizing the amount of fees attorneys can expect to recover should their clients eventually succeed in proving a civil rights violation.2 By diminishing the economic incentives for attorneys to take these cases, the Court has increased the chances that a civil rights plaintiff will not be able to obtain effective legal representation. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,3 the Court continued this trend, possibly dealing a "lethal blow" to many civil

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* B.A., Brooklyn College (1970); J.D., Washington University School of Law (1981); Supervisory Staff Attorney, Eighth Circuit Court of Appeals (1987 to present).

** A.B., The University of Michigan (1983); J.D., Case Western Reserve School of Law (1987); Staff Attorney, Eighth Circuit Court of Appeals (1987-89); Judicial Clerkship, United States District Court Judge William L. Hungate (1989-90).


The Court in *Crawford* limited a prevailing federal litigant's recovery of expert witness fees under 28 U.S.C. § 1920 to the $30-per-day cap set forth in 28 U.S.C. § 1821(b). This amount, of course, represents a small fraction of the actual cost of expert witnesses. One concurring and two dissenting Justices tried to minimize *Crawford*'s effect by specifically stating that the Court's opinion did not reach the question of whether a prevailing civil rights litigant could recover the full cost for expert witnesses under the fee-shifting provision of 42 U.S.C. § 1988.

This article reviews *Crawford* and canvasses the post-*Crawford* decisions addressing the question of recovery of witness fees under 42 U.S.C. § 1988. Several of these decisions conclude that, in light of *Crawford*, the $30-per-day cap applies to recovery of expert witness fees under Section 1988. Other courts have not read *Crawford* so literally. Rather, these courts rely on the significant adverse impact on civil rights litigation a $30-per-day cap causes. Reflecting the tension between these two approaches, one court of appeals which addressed the question en banc, split with a five-to-five vote. On February 26, 1990, the Supreme Court granted certiorari to resolve the split of authority among the circuits on this issue.

The article then examines the legislative history and policies underlying Section 1988. Although these policies justify full recovery of expert witness fees, given the Court's current approach to federal civil rights legislation, it is unlikely that a majority of the Court would uphold such a recovery absent further congressional directive. Finally, the article explores how a civil rights litigant

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6. Title 28 U.S.C. § 1821(b) (1982) provides that a witness shall be paid an attendance fee of $30 per day for each day's attendance and for the travel time going to and returning from the place of attendance. This does not apply to court-appointed experts.
7. 482 U.S. at 445 (Blackmun, J., concurring); id. at 446 n.1 (Marshall and Brennan, JJ., dissenting).
8. See infra note 47 and accompanying text.
9. See infra note 50 and accompanying text.
10. See infra text accompanying notes 51-57.
12. There has been no congressional action to amend § 1988 to provide explicitly for awarding expert witness fees to prevailing plaintiffs. New legislation introduced in Congress that has addressed the issue of shifting litigation costs in specific
might, pending congressional action, still recover some portion of the expenses of an expert witness in excess of the $30-per-day cap.

I. Crawford Fitting Co. v. J.T. Gibbons, Inc.

In Crawford, the Supreme Court considered consolidated appeals from two cases from the Court of Appeals for the Fifth Circuit. In J.T. Gibbons, Inc. v. Crawford Fitting Co., J.T. Gibbons brought an action against Crawford Fitting for alleged violations of the antitrust laws. After a directed verdict in favor of Crawford, Crawford sought reimbursement from Gibbons for litigation expenses which included substantial expert witness fees. The district court, finding that some of the expert testimony was "indispensable to the determination of [the] issues in [the] case," awarded $86,480.70 for expert witness fees under Federal Rule of Civil Procedure 54(d). The Fifth Circuit reversed, holding that the Section 1821 cap was dispositive.

In International Woodworkers of America, Local No. 5-376 v. Champion International Corp., IWA brought an action against Champion for alleged racial discrimination in violation of Title VII and 42 U.S.C. § 1981. After a successful defense, Champion sought reimbursement for, inter alia, $11,807 in expert witness fees. Although the district court found defendant's expert was "helpful and perhaps necessary to its case," it declined to award fees in excess of the $30-per-day cap. The Fifth Circuit af-
In each of these cases, the prevailing litigants argued that Federal Rule of Civil Procedure 54(d), which provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs," granted the court discretion to award expert witness fees as costs in excess of the Section 1821 cap.

Upon granting certiorari, the Supreme Court first reviewed the history of the 1853 Fee Act, the precursor to 28 U.S.C. § 1920, which gives federal courts authority to tax specified items. Before the 1853 Fee Act, taxable costs in most federal cases depended upon the practice of the state courts of the forum state. The Act was passed to eliminate the diversity of practice among the federal courts, and because "losing litigants were being unfairly saddled with exorbitant fees." The Act listed certain taxable costs, providing that "the following and no other compensation shall be taxed and allowed." The rate for witnesses was set at $1.50 per day.

The words "and no other" do not appear in Section 1920. The majority in Crawford, however, did not find this absence significant and concluded that Section 1920 sets forth the universe of costs a federal court could tax under Federal Rule of Civil Procedure 54(d).

The logical conclusion from the language and interrelation of [Section 1920, Section 1821, and Rule 54(d)] is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs.

The Court rejected the petitioners' argument that Rule 54(d) constituted a separate source of power to tax as costs expenses other than those enumerated in Section 1920, finding that this interpretation would make Section 1920 superfluous.

24. 790 F.2d 1174 (5th Cir. 1986) (en banc).
27. The 1853 Fee Act provided in relevant part, that "in lieu of the compensation now allowed by law to attorneys, solicitors, ... and ... witnesses ... in the several states, the following and no other compensation shall be taxed and allowed." Act of Feb. 26, 1853, 10 Stat. 161.
30. Id. at 440 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 251 (1975)).
31. 10 Stat. 161 (emphasis added).
32. Id. at 167.
33. Crawford, 482 U.S. at 441.
34. Id.
The Court held that it would "not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees." Later in the opinion, the Court again stated that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920."

The dissent, on the other hand, thought the majority's interpretation rendered Rule 54(d) superfluous and stressed the fact that Section 1920 "does not purport to be exclusive." In a footnote, Justice Marshall stated that, in his view, the majority did not decide the question whether a federal district court could award expert witness fees under 42 U.S.C. § 1988 in excess of the amount set forth in Section 1821. Crawford Fitting was an antitrust case not involving Section 1988. In International Woodworkers, which had been based in part on 42 U.S.C. § 1981, the prevailing defendant filed a motion for attorney's fees "and expenses" under Section 1821, and filed a bill of costs under Rule 54(d). The bill of costs included over $30,000 for "expert witness fees and expenses." The district court denied the motion for attorney's fees and expenses under Section 1988. This order was not appealed. Later, by separate order, the district court denied the application for expert witness fees under Rule 54(d); the appeal was only from this order. Thus, the issue of recovery under Section 1988 was not before the Court.

II. Post-Crawford Response

Lower courts have not agreed on Crawford's effect on awarding witness fees in Section 1988 cases. Before Crawford, courts routinely denied requests made pursuant to Section 1821(b) for expert witness fees in excess of the $30-per-day cap, but allowed recovery of full expert witness fees as expenses or attorney's fees.

35. Id. at 445.
36. Id.
37. Id. at 449.
38. Id. at 446 n.1 (Marshall, J., dissenting).
39. Id.
40. Id. (quoting the record).
41. Id. (quoting the record).
42. Id.
44. 482 U.S. at 446 n.1 (Marshall, J., dissenting).
under 42 U.S.C. § 1988 and other fee-shifting statutes.46 Since Crawford, however, several courts have found Section 1988 and similar civil rights statutes lacking in the explicitness required to shift the cost of expert witnesses.47 These courts have offered little analysis of the issue and support the holdings by focusing on Crawford’s requirement of “explicit statutory authority.”48 Indeed, under Crawford, the absence of any mention of expert witness fees in Section 1988 would seem to preclude a finding of statutory authority, especially when compared with the numerous fee-shifting provisions in other federal statutes specifically enumerating witness fees as a recoverable cost.49

Other courts have declined to read Crawford so literally. These courts have noted that Congress’s purpose in enacting Section 1988 was to provide equal access to the courts and to promote efficient enforcement of civil rights legislation and effective representation of persons seeking to vindicate violations of their civil rights.50 These courts have held that limiting recovery of expert

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603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); Goodwin Bros. Leasing, Inc. v. Citizens Bank, 587 F.2d 730 (5th Cir. 1979).

46. See, e.g., Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc), cert. denied, 453 U.S. 950 (1981).

47. See West Va. Univ. Hosps. v. Casey, 885 F.2d 11, 32-35 (3d Cir. 1989) (“we are constrained by the language of Crawford [requiring explicit statutory authority] ... to limit expert witness fees to thirty dollars a day”); Sevigny v. Dicksey, 846 F.2d 953, 959 (4th Cir. 1988) (Section 1988 does not authorize award of expert witness fees in excess of that set forth in § 1821); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987) (citing Crawford for proposition that prevailing civil rights party not entitled to tax expert fees as costs), cert. denied, 485 U.S. 991 (1988); Catlett v. Missouri Highway & Transp. Comm’n, 828 F.2d 1260, 1272 (8th Cir. 1987) (holding that in light of Crawford, defendant in § 1983/Title VII case could challenge assessment of class’s expert witness fees), cert. denied, 485 U.S. 1021 (1988); see also Denny v. Westfield State College, 880 F.2d 1465, 1471 (1st Cir. 1989) (reserving question of whether experts’ full fee can be shifted even when § 1888 is directly controlling); Glenn v. General Motors Corp., 841 F.2d 1567, 1573-76 (11th Cir.) (the Fair Labor Standards Act, 29 U.S.C. § 216(b), does not authorize award of expert witness fees in excess of amount permitted by § 1821), cert. denied, 109 S. Ct. 378 (1988); Leroy v. City of Houston, 831 F.2d 576, 584 (5th Cir. 1987) (Voting Rights Act does not allow recovery of witness fees), cert. denied, 486 U.S. 1008 (1988).


50. See Friedrich v. City of Chicago, 888 F.2d 511, 515 (7th Cir. 1989) (Crawford does not control because “literal interpretation of judicial language is no more defensible than the literal interpretation of statutory language”); Freeman v. Package Mach. Co., 865 F.2d 1331, 1347 (1st Cir. 1988) (Crawford may not directly control);
witness fees to $30 per day would frustrate these purposes.

Perhaps the clearest reflection of the split of opinion on this issue, as well as an indication of the stakes involved, is the evenly split vote of the Eighth Circuit sitting en banc in Gilbert v. City of Little Rock.51 The case represented the final chapter in nearly ten years of litigation concerning racial discrimination in the Little Rock, Arkansas, Police Department. The appellants were four police officers who eventually prevailed on their claim of discriminatory promotional policies brought under Title VII and 42 U.S.C. §§ 1981 and 1983.52 The district court calculated attorney's fees to be awarded the appellants, and awarded them full transcript and deposition costs and approximately $4,000 for out-of-pocket expenses.53 The appellants also sought $93,946.69 in expert witness fees and expenses.54 The district court noted that "[u]ntil recently, the Court would have been inclined to award [the appellants] the lion's share of the expert witness fees requested" but felt constrained by Crawford to limit the recovery of expert witness expenses to $30 per day.55 Accordingly, the district court limited its award of expert witness fees to $900.00.56 After oral argument in front of the en banc court, the award of $900.00 was summarily affirmed by the vote of an equally divided court.57

III. The American Rule and Section 1988's Fee-Shifting Provision

Under the "American Rule," the prevailing party generally may not recover expenses incurred to aid the party in preparing his or her case.58 This rule has been justified as a means of: (1)


51. 867 F.2d 1062 (8th Cir. 1989) (en banc).
52. Gilbert v. City of Little Rock, 799 F.2d 1210 (8th Cir. 1986).
54. Id.
55. Id.
56. Id.
57. 867 F.2d at 1062.
58. This is in contrast to the "English Rule" which awards the prevailing party
guarding against excessive litigation and unreasonable fees generated in the expectation that the cost will be borne by the losing party;\(^5\) (2) protecting those with monetarily small claims from being discouraged from instituting actions to vindicate their rights for fear they will be saddled with their opponents’ counsel’s fees;\(^6\) and (3) avoiding the substantial burden of judicial administration which would result from litigation fees.\(^6\)

In *Alyeska Pipeline Service Co. v. Wilderness Society*,\(^6\) the Supreme Court declined to carve a broad exception into the American Rule for attorney’s fees. Respondents in *Alyeska* had instituted federal litigation to prevent the issuance of government permits required for construction of a trans-Alaska oil pipeline.\(^6\) Although legislation eventually terminated the litigation and granted the permit,\(^6\) the Court of Appeals for the District of Columbia granted respondents’ request for attorney’s fees because they had acted “to vindicate important statutory rights of all citizens whose interests might be affected.”\(^6\)

In reversing, the Supreme Court noted that the “circumstances under which attorney’s fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”\(^6\) The Court reasoned that Congress’s intent, as evidenced in 28 U.S.C. §§ 1920 and 1923, was to preserve the American Rule.\(^6\) The Court further concluded that it would be inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation.\(^6\)

Congress responded swiftly and enacted the fee-shifting provisions of the Civil Rights Attorney’s Fee Awards Act of 1976,\(^6\) which later became 42 U.S.C. § 1988. The Act authorizes courts to award reasonable attorney’s fees to prevailing parties, unless spe-

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61. See Fleischmann, 386 U.S. at 718.
63. Id. at 242-43.
65. 495 F.2d 1026, 1032 (D.C. Cir. 1974) (en banc).
66. 421 U.S. at 262.
67. Id. at 255-60.
68. Id. at 263-69.
cial circumstances make such an award unjust.70 The legislative history indicates two justifications for fee-shifting. First, because civil rights litigants are often poor and judicial remedies are often non-monetary, shifting litigation costs from civil rights victim to civil rights violator gives victims effective access to the judicial process.71 Second, the Act encourages individuals to act as "private attorneys general," thereby playing a significant role in the enforcement of important congressional policies.72 In providing for the realization of these objectives, Congress recognized that competent counsel was an essential and critical ingredient.73

Both justifications indicate that all reasonable expenses, including the full expense of expert witnesses, should be recoverable under Section 1988. First, the increasingly complex fact patterns of civil rights litigation frequently require civil rights attorneys to make significant out-of-pocket expenditures for assistance from non-legal experts. If these expenses are not taxable as costs and the client cannot afford to pay them (as is often the case), they must be borne by counsel. For example, the successful plaintiffs in Gilbert incurred $93,946.69 in expert witness fees over an eight-year period, only $900.00 of which was awarded by the Eighth Circuit as costs.74 If counsel is forced to absorb these costs, generally billable in fee-paid cases, the effect will be to steer attorneys away from civil rights cases and toward more lucrative types of litiga-

70. Title 42 U.S.C. § 1988 states:

In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title], title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

71. See, e.g., S. Rep. No. 1011, 94th Cong. 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5909-10 (fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate their rights); H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1 (1976) (bill designed to give persons effective access to the judicial process); 122 Cong. Rec. 31, 471 (1976) (statement of Sen. Mathias) (goal of bill is to ensure high cost of litigation does not bar access to federal courts to citizens seeking to enforce their civil rights); 122 Cong. Rec. 31, 472 (statement of Sen. Kennedy) (bill addressed issue of citizen access to the courts, ensuring that beneficiaries of civil rights have means of enforcing them); see also 122 Cong. Rec. 31,832 (1976) (statement of Sen. Hathaway).


tion. Decreasing the availability of attorneys restricts a civil rights plaintiff’s effective access to the courts.

Second, although the “private attorney general” theory is usually discussed in terms of the parties to an action, the often complex nature of civil rights litigation makes the theory equally applicable to civil rights counsel. The valuable public service civil rights litigation performs could not be achieved without the services of counsel, who would be severely penalized if they could not recover the real costs of their services.

Thus, the congressional policies underlying Section 1988 support extending Section 1988’s fee-shifting provision to cover full expert witness fees. However, since neither Section 1988 itself nor its legislative history specifically mentions witness expenses, it does not seem to meet the “explicit statutory authority” requirement of Crawford.

The Seventh Circuit, in a recent decision, Friedrich v. City of Chicago,75 took an ironic approach to this problem by questioning whether Crawford’s own language76 was to be read literally. Writing for the court, Judge Posner stated:

Read literally this statement [in Crawford requiring explicit statutory authorization for the taxation of expert witness fees as costs] provides strong support for the defendants’ argument [that such fees were not taxable under section 1988], but the literal interpretation of judicial language is no more defensible than the literal interpretation of statutory language.77

Judge Posner went on to reason that, in any event, all Crawford requires is that Congress’s intent to shift full expert witness fees be clear. Crawford does not require that the statute in question explicitly contain the words “expert witness fees” or language which specifically repeals Sections 1920 and 1821.78 An examination of the purposes of Section 1988 and the circumstances surrounding its enactment convinced the Seventh Circuit that Congress clearly intended that full expert fees could be shifted.79

IV. A Loose Fit?

Even in those circuits where Crawford has already slammed the door on successful civil rights litigants attempting to recover full expert witness fees under 42 U.S.C. § 1988, Crawford’s holding may be significantly limited. Civil rights litigators should closely

75. 888 F.2d 511 (7th Cir. 1989) (Posner, J.)
76. See supra text accompanying notes 35-36.
77. Id. at 515.
78. Id. at 515-16.
79. Id. at 517-19.
examine these limits to see if their expert witness fees may qualify for full or partial reimbursement. Section 1821 specifies the amount an expert can be paid "for each day's attendance." Yet, in the course of preparing and presenting a case, an expert is likely to spend considerable time engaged in non-testimonial activity such as identification, collection, analysis, synthesis of data, and consultations with the attorney. In this capacity, the expert contributes to the attorney's understanding of the case.

In Missouri v. Jenkins, a post-Crawford Supreme Court decision interpreting "reasonable attorney's fees" under Section 1988, the Court stated that a reasonable attorney's fee should encompass the reasonable fee for the work product of an attorney, taking into account the work of paralegals, law clerks, others "whose labor contributes to the work product for which an attorney bills her client," and "other expenses and profit." Although Jenkins did not address expert services, the same rationale applies to that part of an expert's fees related to providing assistance in preparing the case, such as educating the attorney on statistical issues. Costs for expert advice and consultation certainly qualify as incidental and necessary expenses incurred in furnishing effective and competent representation.

Alternatively, a prevailing party may be able to recoup some costs of an expert's services under 28 U.S.C. § 1920(4) which allows reimbursement of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." A leading commentator has interpreted this section as covering the reasonable expenses of preparing demonstrative evidence such as models, graphs, charts, and photographs. Moreover, some courts have construed Section 1920(4) to permit awards of costs for statistical consulting and computer expenses. These cases, however, specifically differentiate between the expenses of an expert's research and analysis necessary for preparation of exhibits and surveys presented to the court (which are reimbursable under Section 1920(4)) and the expenses associated with the research and analysis necessary for prepara-

81. See, e.g., Expert Witnesses' Statements of Professional Services, Appellants' Addendum, at 29-32, Gilbert v. City of Little Rock, No. 87-2128 (8th Cir. filed Oct. 16, 1987) (expert was required to stay in Little Rock for 17 days during the trial to work on complex statistical analyses).
83. Id. at 2470.
84. See Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989).
86. 6 James Moore, Walter Taggart & Jeremy Wicker, Moore's Federal Practice ¶ 54.77(6), at 54-463-54-466 (2d ed. 1988).
tion of the case for trial (which are not reimbursable under Section 1920(4)).

It should be noted, however, that although prior court approval is not required for recovery under Section 1920 of justifiably incurred expenses, a party is less likely to recover these costs absent prior court approval. Nonetheless, counsel have occasionally convinced the court to tax these costs despite lack of prior court approval.

Finally, and probably most significantly, Crawford applies only to a litigant’s attempt to recover expert witness fees under federal law. At least one federal court has affirmed an award of expert witness fees in excess of the $30-per-day cap as authorized under a state cost-shifting statute. In Freeman v. Package Machinery Co., the plaintiff brought and recovered on parallel federal and state age discrimination claims. The First Circuit discussed the applicability of Crawford to claims brought under the Age Discrimination in Employment Act, but concluded that it did not have to reach the issue because Massachusetts had enacted its own cost-shifting statute. After analyzing the statute and case law, the First Circuit found no discernible cap to the plaintiff’s recovery under state law and upheld the amount of the award as wholly within the court’s discretion.

Although a few states specifically prohibit recovery of additional compensation for expert witnesses, twice as many states


88. See, e.g., Studiengesellschaft Kohle mbMH v. Eastman Kodak Co., 713 F.2d 128, 132-33 (5th Cir. 1983) (reversing award for charts, models, and photographs because no pretrial authorization); Shakey’s Inc. v. Covalt, 704 F.2d 426, 437 (9th Cir. 1983) (surveys not essential to defense).

89. See cases cited supra note 87.

90. 865 F.2d 1331 (1st Cir. 1988).


93. 865 F.2d at 1347-50.

specifically permit recovery of expert witness fees in an amount to be determined by the court. Moreover, some states permit a court to include an expert’s time spent in preparation for trial. A few states, however, restrict the number of experts whose fees can be taxed.

V. Conclusion

Although some federal courts have interpreted Crawford as foreclosing a successful civil rights litigant’s ability to recover full expert witness fees under the cost-shifting provisions of 42 U.S.C. § 1988, Crawford does not mandate such an interpretation. If


Crawford's requirement of "explicit statutory authority" is read to include authority as expressed in legislative history, then the justifications underlying Section 1988 indicate full expert witness fees should be recoverable thereunder. In any event, Crawford does not foreclose the possibility of recovering the costs of some of an expert's services under other federal statutes or full expert witness fees under some state cost-shifting statutes.