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Abstract: the fee award litigation involving a successful litigant, its high profile and
expensive attorney, and the factors necessarily considered in awarding
costs against the unsuccessful party in a US Constitutional case. Brief
biographical background to the participants including some parallels
between the high profile litigator and one time Supreme Court Justice
Lewis Powell.

Keywords: Laurence Tribe — Lewis Powell — litigation — costs — Supreme Court
— US Constitution — First Amendment — fee award — reasonable
expenses — counsel’s fees — attorney’s fees— Grendel’s Den, Inc v
Larkin — biography

[1] Bar News does not pander to the prurient curiosity of quidnunc readers. We are
confident that our readers are not such persons seeking a cheap frisson of excitement,
and it is on that basis we publish this discussion of a lawyer’s fee award case.¹

[2] So as not to ruffle the feathers of our fellow practitioners we have chosen the fee
award litigation involving the US constitutional lawyer Laurence Tribe.

GRENDEL’S CHAMPION

[3] Born in China, Tribe emigrated with his parents to California. He exhibited the
precociousness early of a child destined to go far. Entering Harvard University on a
scholarship, Tribe enrolled successively in medicine, mathematics, and then settled on
law. His maths background is demonstrated in his legal writings and choice of titles to
his published learned articles, e.g., “Trial by Mathematics: precision and ritual in the
legal process”, “Constitutional Calculus: equal justice or economic efficiency”, and
“The curvature of Constitutional Space: what lawyers can learn from modern
physics” wherein the author cites Kline, Hawking and Israel, Einstein, Davies,

¹ We note that the two co-defendants discharged in the long-running Elders
preliminary hearing were each seeking in excess of $1 million for legal costs: The Age,

² 84 Harv L Rev 1329 (1971).
⁵ Mathematics and the search for knowledge (1985) cited at 103 Harv L Rev 1 at 4,
footnote 7 (1989).
Gamow\textsuperscript{9}, and Hawking\textsuperscript{10}; and at page 17 makes reference to Heisenberg’s Uncertainty Principle.

[4] After a stint as law clerk to Supreme Court Justice Potter Stewart, Tribe was offered academic positions at both Harvard and Yale law schools. At Yale, his interviewing panel included Robert Bork. Tribe settled on Harvard and has taught there since the age of twenty-seven and holds the Tyler chair in Constitutional Law. He has been named as one of the US’s ten best law professors by Time magazine while the National Law Journal nominated him as one of America’s 100 most powerful lawyers in public or private life. His text American Constitutional Law received the Coif Award in 1980 for the most outstanding legal writing in the country and is generally accepted as the leading work on US Constitutional law.\textsuperscript{11} Tribe has written more than a dozen books and approximately 100 articles, he is a frequent witness before the US Congress and has appeared as counsel in many important Supreme Court cases. The National Law Journal said in 1984 that he had a better record in the Supreme Court “than any other attorney after the US Solicitor General”. According to the American Lawyer, many a “hopeless case” has ended up in Tribe’s “long string of successes” because he “probably knows the mind of the Court better than any other advocate now appearing before it”.\textsuperscript{12} He first argued before the US Supreme Court in 1980. Even his critics acknowledge his creativity as a constitutional scholar.

[5] He is described as “an all-purpose commentator on the Supreme Court”.\textsuperscript{13} Indeed, the day after the resignation of Justice Lewis Powell from the US Supreme Court was

\begin{itemize}
  \item \textsuperscript{6} Three hundred years of Gravitation (1989) cited at \textbf{103} Harv L Rev 1 at 4, footnote 7 (1989).
  \item \textsuperscript{7} The meaning of Relativity (5th ed., 1989) cited at \textbf{103} Harv L Rev 1 at 4, footnote 8 (1989).
  \item \textsuperscript{8} God and the new physics (1983) cited at \textbf{103} Harv L Rev 1 at 5, footnote 12 (1989).
  \item \textsuperscript{9} One, two, three, … infinity (1961) cited at \textbf{103} Harv L Rev 1 at 6, footnote 18 (1989).
  \item \textsuperscript{10} A brief history of time: from the big bang to black holes (1988) cited at \textbf{103} Harv L Rev 1 at 6, footnote 18 (1989).
  \item \textsuperscript{11} Tribe, God Save This Honorable Court: how the choice of Supreme Court Justices shapes our history, Biographical note (1985).
  \item \textsuperscript{12} Ibid.
  \item \textsuperscript{13} Savage, Turning Right: the making of the Rehnquist Court (1992) 385.
\end{itemize}
announced, Tribe was lecturing in West Germany and about to begin a month’s vacation in the south of France with his family. Notwithstanding the difficulty of geographic inaccessibility, the ABC TV network’s *This week with David Brinkley* had Tribe commenting on the import of Powell’s retirement and the implication of his replacement. Increasingly it seemed that no event of constitutional significance had really occurred until Tribe commented on it.\(^\text{14}\) He is not unaware of his place in American constitutional law, the joke among the Harvard law students being that Tribe can never be appointed to the Supreme Court because of the constitutionally mandated separation of church and state and Tribe’s belief that he is God.

[6] Like Robert Bork, Tribe was mentioned constantly as a likely nominee to the US Supreme Court. Tribe came out against the Bork nomination (by President Reagan in 1987). This was not surprising. Two years earlier he had described his view of such nominations. He sought balance.\(^\text{15}\) He had not publicly opposed the appointment of Sandra Day O’Connor or Antonin Scalia or the elevation of William Rehnquist to be Chief Justice\(^\text{16}\) although he did assist Senator Edward Kennedy in preparing the senator’s opposition during the Senate confirmation hearings.\(^\text{17}\) He did not initially publicly oppose Bork but merely advised those Senators opposed to the Bork appointment.\(^\text{18}\)

[7] His advice was born of his dismay at the imbalance on the Court and because of specific instances where Bork had made public utterances limiting individual liberty of the citizen. His role changed from that of behind-the-scene-advisor and tutor to public witness in the Senate confirmation hearing.\(^\text{19}\) This public and televised hearing greatly increased his fame and notoriety.\(^\text{20}\) As a consequence, the Right has vowed, after losing the Bork nomination battle, that a Tribe nomination to sit on the Supreme Court.

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\(^{15}\) *God Save This Honourable Court* (1985).

\(^{16}\) Bronner 297.


\(^{20}\) Bronner 297.
Court was the one event for which they would go to war. Not only because he is a feared liberal advocate but also because of his highlighted role in the defeat of the Bork nomination.\textsuperscript{21} Conservatives and Senate republicans would never forgive him.\textsuperscript{22} Tribe was exceptional\textsuperscript{23}, and an unusually successful litigator.\textsuperscript{24} Quick, attuned to questions from the bench and possessing an encyclopaedic knowledge of US constitutional law, he would use a justice’s question to advantage. He would furnish a tidbit of information in response and then use it to launch into a key point of his argument.\textsuperscript{25} Attorneys who consulted him were astonished at his high fees but waxed poetic about his nimble mind and his ability to grasp intricate legal arguments in minutes and to extend them beyond what they had imagined.\textsuperscript{26}

[8] As Bronner writes, as of 1987, of twelve cases Tribe had argued before the Supreme Court, he’d won nine … and he had done well financially from his litigation. Tribe’s assessment of his own worth and his mode of quantifying that worth are the point of this article.

[9] Of course, not everyone is so enthusiastic regarding Tribe. The unsuccessful nominee, perhaps not recognizing that his own unpreparedness born of confident presumption was as much responsible as was the opposition to his appointment of which Tribe was only a figurehead, had this to say:\textsuperscript{27}

> Laurence Tribe’s constitutional theory is difficult to describe, for it is protean and takes whatever form is necessary at the moment to reach a desired result. This characteristic, noted by many other commentators, would ordinarily disqualify him for serious consideration as a constitutional theorist. But Tribe’s extraordinarily prolific writings and the congeniality of his views to so many in the academic world and in the press have made him a force to be reckoned with in the world of constitutional adjudication.

[10] The real obstacle to Bork’s confirmation was that in a public career of nearly two decades he had left behind himself an easily discerned paper trail of his legal philosophy — a philosophy that the Senate refused to swallow. Those seeking public

\begin{flushright}
\textsuperscript{21} Ibid.
\textsuperscript{22} Savage 385.
\textsuperscript{23} Savage 385.
\textsuperscript{24} Bronner 129.
\textsuperscript{25} Savage 385.
\textsuperscript{26} Savage 385.
\textsuperscript{27} Bork, The Tempting of America: the political seduction of the law (1990) 199.
\end{flushright}
office are well advised to keep their thoughts to themselves as those who seek to appoint them (the US President) increasingly cast their net for the “stealth” nominee — such as President Bush’s nomination of David Souter to fill the vacancy when Justice Brennan announced his retirement in 1990. The nominee had spent so little time on the US Court of Appeals that he had published no legal opinions. Thus the pundits and second-guessers were forced to study the opinions of the New Hampshire Supreme Court where Souter has sat prior to his appointment to the Court of Appeals. Souter had not written any articles or made speeches on controversial topics, and his New Hampshire court opinions dealt mostly with dry issues of state law. “About the only thing you can tell by reading New Hampshire Supreme Court opinions,” one law professor observed, “is that you wouldn’t want to be a New Hampshire Supreme Court judge.”

[11] It seems that New Hampshire has had a bad press when it comes to things legal; Martin Mayer interviewed a New Hampshire attorney and wrote that “[Joseph] Millimer’s work is entirely in civil trials (‘There isn’t anything in New Hampshire worth stealing’)” and Philip Gove’s biographer describes Gove’s father’s career choice thus: “After graduation [John] entered [Boston University] law school, but after a year changed his mind and decided to enrol in the Boston Institute of Osteopathy. He wrote his fiancée, Florence Babcock, that prospects for osteopaths looked very much brighter than those for lawyers [in New Hampshire] ….”

[12] Discretion on the part of public office seekers may be well advised to prevent his nominator learning too much about the nominee — consider the experience of Solicitor General Charles Fried appointed by President Reagan.

The value of privacy that Fried favoured, as a law clerk to Justice Harlan and as a young scholar, was embraced by the Supreme Court in its landmark decision about abortion, *Roe v Wade*. Among his Harvard colleagues, Fried applauded this ruling and defended it from attack by others then on the faculty, including his colleague John Hart Ely. To Fried’s fortune, as a prospect for political appointment [as Solicitor General] in the Reagan Administration, he did not emphasise his support for *Roe v Wade* in print. One

28 Savage 355.
29 *The Lawyers* (1967) 32.
of his law school colleagues said, “Right before he went to Washington, we were together and someone asked him flat out: ‘Does the Administration know your position on abortion?’ He smiled and said, ‘Well, I’ve never written it down.’”

1977 AND ALL THAT

[13] One of the nine wins described by Bronner was the Grendel’s Den litigation. In 1977 Grendel’s Den purchased a liquor licence from Scorpio’s, Inc. and sought its transfer by applying to the Cambridge Licence Commission (CLC) and the Alcoholic Beverage Control Commission (ABCC). Pursuant to the then State law the licence application was disallowed upon the written objection of the Holy Cross Armenian Catholic Parish of Cambridge, Massachusetts because Grendel’s premises were within 500 feet of the Church. The Church’s objection was based on Grendel being the twenty-sixth application for a licence within the designated area and Grendel’s premises being only ten feet from the Church. The Church had not opposed all of the other twenty-five applications. Furthermore, the Church objected that it had already had “plenty of noise, dirt, and abuse from Grendel’s Den, Inc.” since it had been established as unlicensed premises in 1971. Grendel filed suit alleging violation of the First and Fourteenth Amendments to the US Constitution. Ultimately, in 1982, the US Supreme court upheld Grendel’s claim that the State law permitting the Church veto violated the First Amendment.

[14] In 1980 the District Court found in favour of Grendel. Several months later the US Court of Appeals (1st Circuit) reversed the District Court judgment, then, rehearing en banc was granted, the Court of Appeals reversed itself and restored the District Court decision. Consequently the CLC and the ABCC appealed to the Supreme Court which, in 1982, affirmed the Court of Appeals’s en banc decision and

33 Congress shall make no law respecting an establishment of religion ....
34 495 F Supp 761 (1980) per Tauro J.
that of the District Court.\textsuperscript{37} The dissenting judgment of Rehnquist J (as he then was) commenced\textsuperscript{38}:

Dissenting opinions in previous cases have commented that “great” cases, like “hard” cases, make bad law [citations omitted]. Today’s opinion suggests that a third class of cases — silly cases — also make bad law.

[15] Thereafter the CLC granted Grendel its licence over the Church’s opposition and on April Fools’ Day, 1983, Grendel began serving booze to its thirsty clientele. Shortly afterwards the Massachusetts State legislature amended its law to comply with the US Supreme Court decision.

[16] Having prevailed in its constitutional challenge, Grendel now sought attorney’s fees pursuant to the \textit{Fees Act}. Grendel sought US$345,290.91 being $17,348.73 for counsel’s fees and expenses for the fee award litigation and $327,942.18 in fees and expenses for the original litigation being made up of expenses of $7,489.68 and counsels’ fees of $176,137.50 (Professor Tribe), $21,750 (Professor David Rosenberg) and $15,747.50 for Mr Ira Karasick and a 50% “upward adjustment” of counsels’ fees ($106,817.50) to reflect the contingent nature of the fee, the long delay in payment and the significance of the results achieved\textsuperscript{39}. [We interpolate here to note that surely the contingent nature of the fee and the significance of the results achieved — a “success fee” — are but two ways of looking at the same thing. Isn’t this a case of the successful plaintiff “double dipping”?]

[17] Surprisingly, Professors Tribe and Rosenberg, given their intention from the outset to seek attorneys’ fees and expenses, if Grendel prevailed, did not keep time records\textsuperscript{40}.

[18] Initially, the District Court upheld the fees and expenses claimed although it did disallow the 50% “upward adjustment” and Mr Karasick’s fee of $15,747.50. The court disallowed Karasick’s fee on the basis that he served primarily as an intern and that his costs should be considered as part of the overhead of Professors Tribe and

\textsuperscript{37} \textit{Larkin v Grendel’s Den, Inc.} 459 US 116 (1982).
\textsuperscript{38} 459 US 116 at 127-8 (1982).
\textsuperscript{39} 749 F 2d 945 at 949 (1984).
\textsuperscript{40} \textit{Ibid.} at footnote 3.
Rosenberg. Regarding the 50% “upward adjustment”, the Court held that while it was merited, the failure to keep accurate time records precluded such an adjustment. Thus the District Court awarded $222,725.91 of the $345,290.91 sought. By disallowing Mr Karasick’s fee, the District Court neatly sidestepped prejudice to his future career as a lawyer as, at the relevant times, Karasick was a law student and legal assistant to Professor Rosenberg. The CLC’s opposition to Grendel’s fee award application included the objection that Mr Karasick’s services to the plaintiff amounted to the unauthorised practice of law.

[19] The CLC and the ABCC appealed to the Court of Appeals, First Circuit.

JUDGE BEOWULF

[20] On appeal to the US Court of Appeals, the fee litigation was heard by Senior Circuit Judge Cowen and Circuit Judges Coffin and Bownes. The opinion of the court was written by Circuit Judge Frank M Coffin.

[21] Ten years later Judge Coffin described his approach to and his disposition of the case:

One example was an attorney’s fee case at the end of an important litigation. The attorney was claiming a very large fee. I left to my clerk the statement of the factual and procedural background and the setting forth of the legal authorities relevant to the standard of review and factors to be considered in fee allowances. My job was to dig into the details of the time spent, the work done, and the amounts claimed for each segment. This was a case where I knew my clerk could find the appropriate law but felt I should develop my own “feel” for the work done by the lawyer.

[22] Two important cases referred to by Judge Coffin in his opinion were *Hensley v Eckerhart* and *Blum v Stenson*. These cases, presumably researched by Judge Coffin’s law clerk, concerned the approach of a court to fee litigation and awards. Both opinions were written for the US Supreme Court by Associate Justice Lewis Powell.

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41 582 F Supp 1220 (1984) *per* Tauro J.
After graduating in law from the Washington and Lee College (LL B, 1931) and Harvard (LL M, 1932), Lewis Powell joined the Virginia firm of Christian, Barton & Parker and two years later was enticed to join the biggest firm in town: Hunton, Williams, Anderson, Gay & Moore of Richmond, Virginia. There he met name partner Henry W Anderson. Anderson’s one-time fiancée, the Pulitzer Prize-winning novelist Ellen Glasgow, described Anderson thus:

Long before I knew him, he had reached the top of his ladder and the ground below was literally strewn — or so malice remarked — with the rungs he had kicked aside. If there was any social top in Richmond, he was standing upon it. People might laugh at him. … They might ridicule his English accent. … They might ridicule his slightly pompous manner and his too punctilious way of living. They might ridicule his English clothes, his valet, his footmen in plum-coloured livery; but it was his accurate boast that only death kept them away from his dinners.

Many thought Anderson a “pluperfect snob” and worse. Archibald Robinson was more tolerant: “If you like to put on dog, and got the money to put on dog, and know how to put on dog, I think you ought to be able to put on dog without being ridiculed.” A later name partner George Gibson first met Anderson when he initially interviewed for his first job. He was ushered into the august presence and asked whether he could “look up law”. “I think so,” said Gibson, “I can certainly try.” “Well, that is a good thing,” Anderson responded, “for to put me to that task would be like putting a thoroughbred to the plough.”

Although nominally working under another partner, the young Lewis Powell was seconded to Anderson who, at the time, was receiver of the Seaboard Air Line. The two of them commuted from Richmond to New York in a private railroad car and were met at Penn Central Station by a black limousine and taken to the Ritz-Carlton at 46th and Madison Avenue, where Anderson would go directly to his permanent suite. He never bothered to check in or pay a bill. After their first meal, Powell asked whether Anderson had forgotten to pay. “No,” said Anderson, “I don’t sign anything here.” Only later did Powell learn that the great man’s custom was to send at

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Christmas a freight car of hams and produce to be divided among the hotel employees.\textsuperscript{47}

**Learning the Ropes**

[26] When Powell proposed to bill the client for the firm’s services, he discovered that “Colonel” Anderson did not keep records of his time. “I’m not a plumber,” Anderson announced, “or a bricklayer. I don’t charge by the hour.” He simply assigned a figure to his services, which were rarely undervalued. “I can be of more help to a railroad client thinking about problems while I shave in the morning,” he told Powell, “than most of you could be in a month.” Unfortunately, it fell to Powell to give this explanation to the Interstate Commerce Commission when the firm applied for its fee, but the commissioners knew Colonel Anderson and accepted his valuation.\textsuperscript{48}

[27] Unfortunately for Professor Tribe, Judge Coffin was not so ready to accept such cavalier assertions fifty years (and several binding precedents — including two written by Powell) later.

[28] In World War II Powell enlisted in the Air force and worked in intelligence where, after a year in North Africa, he was returned to Washington and thence to England as US military liaison with the code-breakers at Bletchley Park. Despite the strictures of life in rationed England, Powell was able to occasionally enjoy the finer things in life staying in the flat of CBC radio correspondent Ed Murrow (a university friend from the early 1930s). At Bletchley Park he met the legendary Alan Turing,\textsuperscript{49} the mathematician \textit{wunderkind} behind the early primitive computers used to decode the Ultra and Enigma signals of the German and Japanese military communications. In view of his later assertion of innocence — I’ve never met a homosexual — his naivety was profound as the following incident described by his biographer illustrates:\textsuperscript{50}

Five years later, Lewis Powell III was born. Knowing it was her last pregnancy, Jo had hoped for twins. Powell was so ecstatic at the birth of a son

\textsuperscript{47} Jeffries 49-50.
\textsuperscript{48} Ibid. 50.
\textsuperscript{49} Jeffries 90.
\textsuperscript{50} Jeffries 120.
[after three daughters] that he could not quite believe his good fortune and asked the nurse if she was sure of the sex. “I have been looking at naked babies for twenty years,” she answered disdainfully, “and have not yet made a mistake.”

[29] Powell’s naivety was expressed during deliberations in *Bowers v Hardwick*[^51] — decided June 30, 1986, one year before his retirement. His plaintive assertion that he’d never met a homosexual[^52] was interpreted by his colleagues as his never recognising that he’d met homosexuals. This is born out as one of his law clerks at the time and Alan Turing were homosexual. His clerk deliberated whether to ‘fess up to his boss to allow him to see the “human face” of homosexuality. Ultimately the clerk decided not to and Turing and WW II were of a time when gays stayed inside the closet.

[30] *Bowers v Hardwick* was one of Tribe’s losing three out of 12 Supreme Court appearances and it was a narrow and, to Tribe, a disappointing loss. Deliberations were in Tribe’s favour five to four (with Powell in the majority). However, as he later confessed, Powell switched and formed a new majority in favour of upholding Virginia’s anti-gay laws. He later confessed, four years into his retirement, that he now believed that his change of mind was a mistake[^53] — small consolation to the disappointed Tribe.

[31] As has already been noted, it was Powell’s retirement in 1987 that brought on the confrontation between Robert Bork and Laurence Tribe.

[32] The links between Tribe and Powell are emphasised when one considers Tribe’s views on the application of the mathematical rules of probability theory to judicial

[^51]: 478 US 186
[^52]: Jeffries 521 and 528.
fact-finding. Alan Turing had devised a measure of weight for evidence of “decibans” which was later mathematically described by Claude Shannon.

**JUDGE BEOWULF’S DETERMINATION**

[33] The District Court award of $222,725.91 was challenged on two grounds: the time claimed and the hourly rate for such time.

[34] The overriding principle is to award fees “adequate to attract competent counsel but which do not produce windfalls”. Whereas the district court is usually thought to be best placed to determine a fair and reasonable award, this case involved absence of contemporary time records, extraordinarily high hourly rates ($275 for Tribe and $125 for Rosenberg) and claims for time spent in the most punctilious appellate research and preparation.

(I) **ABSENCE OF CONTEMPORANEOUS TIME RECORDS**

[35] Professor Tribe described his process of reconstructing his time records thus:

I surround myself with masses of paper, consisting of the briefs, of some notes in connection with the briefs.

I looked at the calendar to figure out when I had filed certain briefs, because in some cases I don’t think we actually had the date on it. When my calendar didn’t indicate when a brief was filed and when the brief didn’t indicate, I tried to find out from others — sometimes even calling the Attorney General’s Office — because my own records are just not that comprehensive. Then I tried to work backwards. For example, I know the practices that I go through in preparing for an oral argument. I lock myself in a room and think about it. I know roughly during which periods before an argument I would have done that. And I also know — I can remember vividly staying up all night on a number of nights before filing a petition for rehearing. And so I sat down and tried to figure it all out.

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57 *Grendel’s Den, Inc. v Larkin*, 749 F 2d 945 at 950.
58 749 F 2d 945 at 951.
Henceforth, the First Circuit announced59, “we serve notice the absence of
detailed contemporaneous time records, except in extraordinary circumstances, will
call for a substantial reduction in any award or, in egregious cases, disallowance. In
the instant case we feel it would be unfair to apply this standard, but subject the
retrospectively created record of time spent to a more exacting scrutiny ….”

(II) REASONABleness OF TIME SPENT

As he later described in his book Judge Coffin undertook to reconstruct the time
spent by Professors Tribe and Rosenberg by looking at the court documents to
determine a reasonable number of hours necessary to conduct the case.

As a first step Professor Rosenberg was docked 13 hours from his 174 claimed
hours because his reconstructed time records only added up to 161 hours. No other
penalty was exacted for shoddy arithmetic but we sure hope his legal research was of
a higher standard than his adding up.

Similarly, both professors claimed 19 hours each in oral argument. Professor
Rosenberg was lopped eight (back to 11), giving him the benefit of any doubt, in that
his presence was as support for Professor Tribe and not entirely necessary. Judge
Coffin noted that of the claimed eight hours oral argument before the Supreme Court,
only in the most extraordinary case does the Supreme Court permit a party more than
half an hour or one hour total oral argument for the whole case.

Professor Tribe was held to have spent an inordinate number of hours analysing
the opposing briefs, research and preparing foe oral argument. As evidence, 25 hours
to produce a compelling 40 page brief was used as a benchmark by Judge Coffin to
assess all Tribe’s other research.

Thereafter, the Court was convinced, “the early economy of effort and careful
focus upon only what was necessary was lost in the heat and excitement of litigating
an interesting First Amendment case.”

59 749 F 2d 945 at 952.
Thus, in the early stages of the litigation, Professor Tribe expended 10 hours to digest a 58 page brief filed by the ABCC and drafting a 37 page response in 16 hours. Thereafter, however, Professor Tribe was engaged five to seven hours each day for 11 days preparing for oral argument for the 1980 Court of Appeals argument (66 hours preparation for oral argument in a case in which the total argument of both sides occupy one hour at most).

Thus the court concluded: Grendel’s fee application assumed that “the service to be rendered and compensated is one of perfection, the best that illimitable expenditure of time can achieve.”

“But just as a criminal defendant is entitled to a fair trial and not a perfect one, a litigant is entitled to attorney’s fees for an effective and completely competitive representation but not one of supererogation.”

“It is simply not conceivable to us that the ablest of lawyers, having covered the same ground in arguments in the district court, would have required the equivalent of a full week and a half of billable hours to prepare for oral argument.”

Consequently the Court halved the 121 hours claimed for pre-argument preparation and post-argument petitioning to 60 hours.

SUPREME COURT PREPARATION AND ARGUMENT

This item, for which Grendel was seeking indemnity, amounted to 308 hours ($84,700). The Court noted that “most of what Grendel presented in oral and written argument had already been argued at earlier stages of the litigation”, and “Professor Tribe is an acknowledged authority in constitutional law and not a novice. … Professor Tribe’s efforts seemed to the Court to have been excessive.”

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60 749 F 2d 945 at 953.
61 749 F 2d 945 at 953-4.
62 749 F 2d 945 at 954.
63 749 F 2d 945 at 954.
A FROLIC OF HIS OWN

[48] Further, “Half of the 14 page Amendment portion of Grendel’s brief was devoted to a historical analysis, largely in four footnotes. While this analysis may be fresh and interesting, it was only briefly referred to in a footnote in the Supreme Court opinion … Professor Tribe spent 20 hours (billed at $5,500) producing an 18 line footnote on three ancient English statutes.” This comment by the Court led the author of a law review article to suggest that Tribe’s footnote was perhaps the most expensive in legal history. It would appear that neither Judge Coffin nor the anonymous law review author were aware of the great Dr Johnson’s dictum that what is written without effort is in general read without pleasure.

[49] Thus Tribe’s hours for the Supreme Court case were cut from 308 hours to 200 (his total hours for the whole litigation was cut from 640.5 to 468.5) and Professor Rosenberg’s cut from 174 to 150 hours.

(III) HOURLY RATE

[50] The Court accepted $125 per hour for Professor Rosenberg. However, notwithstanding Professor Tribe’s credentials, it held that $275 per hour for litigation in the late 1970s and early 1980s was a bit rich in that Tribe’s well-earned reputation was earned since the Grendel litigation.

[51] At page 956 the Court said “Professor Tribe was not a particularly experienced litigator during this period and the factual elements of the case were so simple that they only took three pages to summarize.” At the appellate levels, the legal problems ultimately reduced to a single, clearly understandable issue and as a consequence, the Court fixed an hourly rate of $175 as reasonable.

65 Also “easy reading, hard writing” (Sheridan); “I did not have the time to shorten my letter” (Pascal); “Of every four words I write, I strike out three” (Boileau); and “I have made this Letter longer than usual, only because I have not had the time to make it shorter” (Mark Twain quoted in Lasson, “Scholarship Amok: excess in the pursuit of truth and tenure”, 103 Harv L Rev 926 at 942 (1990)); qv Murray, Caught in the Web of Words: James A H Murray and the Oxford English Dictionary (1977) 208-9.
EXPENSES

[52] Courts of Appeal printing ($876.51) was disallowed in toto because Tribe had failed to make a timely application for such costs to be reimbursed by the Federal government despite being warned or advised to do so by the clerk. The Court held that Grendel’s neglect to seek reimbursement from the government did not permit it to now seek an order against the appellants. The printing costs associated with the Supreme Court appeal of $3,306.31 were disallowed because the Supreme Court Rules required each party to bear their own costs and Tribe’s accommodation claim of $917.24 was reduced to $400 (Tribe had actually incurred $1,543 but he conceded he had been accompanied by his family).

COSTS AWARDED FOR THE FEE LITIGATION

[53] Professors Tribe and Rosenberg had engaged attorney Jonathon Shapiro to represent them in the fee litigation. The court was of the view that “[t]he two professors failure to keep contemporaneous records had needlessly increased the difficulty of Shapiro in familiarizing himself with the case and fees could not be recovered for time spent on Mr Karasick’s unsuccessful application for fees.” Consequently the Court reduced 136.7 hours at $125 to 110.2 at $100 per hour.

[54] Thus the Court awarded Professor Tribe (and Professor Rosenberg) $113,640.95 out of a total $345,290.91 claimed and no order was made for costs and fees in respect of the appeal heard and determined by Judge Coffin and his colleagues.

[55] In a later edition of Bar News we will be bringing you the saga of the fee award of more than $1 million against the plaintiffs’ attorneys — Yes, the attorneys, not the plaintiffs.
