

## On the Transfer Payment of Lawyer's Fees

### -- Thoughts on the Mode of the Losing Party Bearing Lawyer's Fee

Zhuyi Liu

Zhongbei College of Nanjing Normal University, Danyang, 212300, China

#### Abstract

**In order to solve the concerns of the parties on the litigation cost, protect the legitimate rights and interests of the parties and punish the false litigation, a cost-bearing mechanism should be established for the losing party bearing the lawyer's fees according to the current national conditions of our country.**

#### Keywords

**Lawyer's fee; transfer payment of lawyer's fee; assumption mode.**

#### 1. Introduction

Due to the social and economic development of our country, people have better understanding of rule of law. When their rights and interests are violated, most of them will turn to law to protect themselves. As most people are not trained in law, they don't know how to protect their rights and interests through litigation, and it is necessary to entrust a professionally trained lawyer. If entrusting a lawyer to proceed with a lawsuit, the lawyer's fees paid by the client to the lawyer must be involved. Lawyer's fee mainly refers to all the relevant fees collected by the lawyer at the time when he is entrusted by the party to provide legal services, mainly including the remuneration of the lawyer and the relevant fees incurred in the process of handling the case. The lawyer's fee mainly refers to the remuneration. In China's civil litigation, the legal fees paid by the party to the lawyer for the agent's litigation are generally paid by the employing party in advance. In judicial practice, the losing party bears the legal fees which are mainly based on the judicial interpretation of the Supreme People's Court. Lawyer's cost bearing mechanism is a very economic way of dispute resolution. It paves the way for all parties to bear the economic cost of dispute resolution, which affects the expectations of the parties to the resolution and benefits [].The losing party bears the other party's lawyer's fees, which increases the cost of their breach of contract and tort, and reduces the cost of the victim to protect their legitimate rights and interests. This is not only conducive to curbing violations and breaches of contract, but also encouraging victims to take up legal weapons to safeguard their legitimate rights and interests in a timely manner.

#### 2. Types of Lawyer's Fee Bearing Modes in the World

##### 1. Each party bearing lawyer's fee mode

This mode mainly refers to that the litigants who pay their own legal fees for hiring lawyers for litigation. No matter what the outcome of the case is, the court will not ask the losing party to pay its legal fees to the winning party. This rule is mainly adopted by the United States and other countries. At present, this mode is adopted in our country. Each party respective bearing mode can enhance the responsibility of the parties and the awareness of litigation risk. The parties will carefully measure the risk of litigation, litigation cost and benefits before initiating the litigation.

##### 2. Losing party bearing lawyer's fee

Losing party bearing lawyer's fee mode mainly refers to that the losing party shall bear the lawyer's fee of the lawyer hired by the winning party according to the result of the litigation. This mode is mainly to classify attorney fees in the category of litigation costs, that the losing party shall bear the lawyer's fee of the lawyer hired by the winning party according to the result of the litigation. Losing party bearing lawyer's fee mode can enable the right holder to protect their rights without too much cost, and actively protect their own rights and interests through litigation when their rights are infringed.

### 3. Positive Significance of the Losing Party Bearing Lawyer's Fee

1. Better safeguard the legitimate rights and interests of the parties, safeguard social fairness and justice, and fully reflect the value of the law.

The losing party of breach of contract or tort bears the lawyer's fee of the other party, which is equivalent to that they increase the cost of infringement or breach of contract and reduce the cost of the victim to protect their own rights and interests. This is not only conducive to curb the infringement or breach of contract, but also conducive to encouraging the victim to take up the legal weapon to safeguard their legitimate rights and interests in time. The cost mechanism should not only consider the cost that the illegal act itself should bear, but also consider the legality and appropriateness of punishing the illegal act and resolving disputes. The lawyer's fee bearing mechanism should enable the parties to achieve maximization of effectiveness when choosing litigation. The bearing mechanism can also guide the choice of dispute resolution to a large extent, and then affect the relevant decision-making. In order to protect their legitimate rights and interests, one party will eventually solve the dispute through litigation, which is also the manifestation of a country's civilization and the rule of law. But the reality is that in order to start the litigation, the parties must have a lot of time, manpower, material resources and other costs to initiate litigation., and the lawyer's fees account for most of them. Most litigants do not have legal knowledge and judicial litigation skills, and they are afraid to bear the lawyer's fees, so they are unwilling to protect their own legitimate rights and interests through litigation. This will inevitably encourage the arrogance of those who violate the law and make the law-abiding people lose. The establishment of the losing party bearing the lawyer's fee system enables the parties to hire a lawyer to protect their legitimate rights and interests without worrying that they can not afford the lawyer's fee, which can relieve the parties' worries. The establishment of this system can fully protect the rights and interests of the parties, restore the rights of the parties to the state before the dispute, so as to ensure the realization of justice.

2. Guide the parties for reasonable and rational litigation and prevent false litigation and malicious litigation

In judicial practice, there are quite a number of litigations, such as irrational litigation, false litigation and malicious litigation and so on. In recent years, the false litigation cases in the field of civil and commercial trials occur frequently. The illegal and criminal acts of false litigation seriously infringe upon the legitimate rights and interests of others and damage the judicial authority and credibility of the judiciary. In order to punish such acts in accordance with the law, the Supreme People's Court and the Supreme People's Procuratorate issued the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of False Litigation. It is in line with the current value orientation of civil litigation that the losing party should bear the lawyer's fees, which can effectively prevent irrational litigation, combat false litigation and malicious litigation and guide parties to rational litigation. As the losing party bears the lawyer's fee, the parties will carefully evaluate the litigation risk, so that the parties can exercise the litigation right carefully. If the parties fail in the irrational litigation, false litigation and

malicious litigation, they will not only bear their own lawyer's fees, but also the other party's lawyer's fees. Therefore, the parties will weigh the pros and cons, which will greatly curb this act, and thus leading the parties to make the right decision. At the same time, the losing party bearing lawyer's fee will increase the illegal cost of the violator, and then play a role in punishing civil illegal acts.

### 3. It is conducive to the establishment of an honest and trustworthy society

The losing party bearing lawyer's fee can not only protect the lawful rights and interests of law-abiding parties, punish those who violate the law, but also facilitate to establish a honesty and trustworthy society. If the parties are dishonest in civil activities and cause disputes, when they lose the lawsuit, they should not only bear the corresponding civil liability, but also bear the other party's lawyer fees. This not only protects the trustworthy party and punishes the dishonest party, but also has an obvious guiding role. It will effectively curb the dishonest behavior of parties, greatly improve the social atmosphere and order, and thus promote social harmony.

### 4. It is conducive to the healthy and standardized development of the lawyer industry

With the establishment of the market economy system and the principle of governing the country according to law, the lawyer will play a more important role in the construction of national rule of law, and the lawyer industry will also usher in new challenges. At present, the lawyer industry has uneven business levels, work attitudes, professional ethics, and unfair competition among peers. The losing party bearing lawyer's fee can effectively enhance the lawyer's sense of responsibility and improve the lawyer's professional level, so that the lawyer can do his due diligence in the agency business and survive the fittest. At the same time, the reasonable fees of lawyers will also be reviewed by the judicial agency, and those expensive and unreasonable fees can be effectively contained. The establishment of this system can form a benign competition mechanism in the lawyer industry, so that the parties can obtain high-quality and efficient services under the condition of paying reasonable lawyer fees, thereby improving the overall level of lawyers.

## 4. Assumption on the System for the Losing Party Bearing the Lawyer's Fees

### 1. Establish the basic principle that the lawyers' fees should be borne by the losing party

Although our country does not provide for a compulsory representation system, as trained legal service personnel, lawyers are familiar with the law and various judicial procedures. Their main business is agency litigation, and they are the best people to win for the parties. However, due to economic factors, many parties are worried about losing money when they hire lawyers to defend their rights. At present, the court will only judge the lawyer fees in the case of intellectual property lawsuits and contracts that clearly stipulate the burden of lawyer fees. The author thinks that we can establish the basic principle of losing party bearing lawyer's fee in the litigation.

### 2. The court should review the rationality of lawyer fees and improve the lawyer fees system

At present, China's lawyer fees are mainly based on the "General Principles of Civil Law", "Contract Law", and "Management Measures for Charges of Lawyers", as well as the fees guided by the government and negotiated by the parties. Therefore, different cases in different regions and different lawyers' fees vary greatly. The court should have the right to review and discretion on the request of the losing party bearing the lawyer's fees, support the reasonable lawyer's fees, and reject unreasonable fees. This can prevent too high lawyer fees in the case, form the burden mechanism corresponding to the fault of the losing party, and promote the healthy development of lawyer fees. We can also determine the amount of lawyer's fees borne

by the losing party according to the case, and at the same time taking into consideration the degree of litigation success; the ratio of compensation to the amount of litigation claims, the actual workload of lawyers, the difficulty of the case, and the lawyer's fee standard determined by the judicial administrative department.

### 3. Establish an insurance system for losing party bearing lawyer's fee

The losing party bearing lawyer's fee system will inevitably have an important impact on whether the party hires a lawyer for litigation, especially for some cases that cannot predict the victory, the risk is particularly significant. There are risks in litigation. Many cases can not be judged at a glance from the beginning. Only after a series of investigation and evidence collection and court trial can we have a preliminary judgment. Therefore, we can set up a lawyer's fee insurance system, so that the losing party should bear the other party's lawyer's fee paid by the insurance company and transfer the litigation risk.

## 5. Although There is no Compulsory Representation in Civil Litigation in Our Country, The Parties can Decide Whether to Hire a Lawyer to Represent the Litigation According to Their Own Situation.

However, with the change of the court's authority, the judicial system is more professional and pays more attention on procedural justice, new laws emerge unstopably, the law has developed in a complex way. The parties' ability in litigation becomes more and more important, which will directly affect the success or failure of the case. In fact, it has become an indisputable fact or even necessary for the parties to hire lawyers for litigation. Lawyer's fee has a direct impact on whether the parties can obtain justice. Establishing losing party bearing lawyer's fee system can reduce the cost of safeguarding their rights, and actively protect their own legitimate rights and interests through litigation. At the same time, it can effectively curb unreasonable litigation, false litigation and malicious litigation, improve the overall service level of lawyers, and enhance the people's concept of the rule of law. Therefore, our country should establish a lawyer fee transfer payment system as soon as possible.

## Acknowledgements

Philosophy and Social Science Research Fund project for Universities in Jiangsu Province (2019SJA2075).

## References

- [1] Liu Donghua. [J]. Journal of the Graduate School of the Chinese Academy of Social Sciences, 2013, 3: 76-77(in chinese).
- [2] Zhang Geng, Wang Shujun. Limited Transfer of Lawyer's fees in Intellectual Property Litigation [J]. People's Justice, 2014, 9: 97-101(in chinese).