



September 15, 2006

Senator Arlen Specter
Attn: Barr Huefner
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Specter:

Please find enclosed answers to the questions submitted by committee members following our testimony on August 2, 2006 at the United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights, hearing entitled "Paying Your Own Way: Creating a Fair Standard for Attorneys' Fees Awards in Establishment Clause Cases."

We have accumulated the most accurate estimates and information possible in the time allotted and we remain available to answer any further questions committee members may have. As requested, an electronic copy has been sent to [Barr Huefner@judiciary.senate.gov](mailto:Barr_Huefner@judiciary.senate.gov). If you have any questions, please contact Erik Zimmerman at 757-226-2489 or ezimmerman@aclj.org.

Sincerely,

Colby May, Senior Counsel and
Director, Washington Office
Shannon Demos Woodruff, Senior
Research Counsel
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002

1. **Has the American Center for Law and Justice (ACLJ) represented plaintiffs in religious freedom cases? What percentage of your litigation in such cases is handled by staff lawyers and how much by affiliated attorneys?**

Yes, the ACLJ has represented plaintiffs in religious freedom cases. Approximately ninety-five (95) percent of our overall litigation in those cases is handled by ACLJ attorneys with non-ACLJ attorneys assisting with approximately five (5) percent.

2. **Please describe ACLJ's policies regarding seeking attorneys' fees in cases where it participates either directly or through the work of an affiliated attorney.**

The ACLJ seeks attorneys' fees in cases where authorized by law.

3. **Has ACLJ sought attorneys' fees under 42 U.S.C. § 1988 or the Equal Access to Justice Act when your client was the prevailing party in litigation?**

Yes.

4. **Has an attorney or law firm affiliated with or referred by ACLJ sought fees when its client was the prevailing party? Has ACLJ received any fees from such affiliated attorneys?**

The ACLJ has no independent knowledge as to whether and in which cases other attorneys or law firms have sought attorneys' fees. The ACLJ does not seek nor accept any fees or compensation for referrals.

5. **Please provide the subcommittee with a list of attorneys' fees awards ACLJ or an affiliated attorney has received under 42 U.S.C. §1988 or the Equal Access to Justice Act from January 1996 to the present. For each award of fees, provide a brief description of the case and the amount awarded. In cases where fees were awarded to affiliated attorneys, indicate what portion of the fees was ultimately provided to ACLJ.**

The following is the most accurate list that we could compile in the time allotted of cases where a court has awarded the ACLJ attorneys' fees under 42 U.S.C. § 1988 or the Equal Access to Justice Act. This list does not include cases that were resolved through a negotiated settlement where no court award of attorneys' fees occurred.

Church on the Rock v. City of Albuquerque, U.S. Dist. Ct. D.N.M., No. 94-cv-1101.

ACLJ represented plaintiffs in a challenge to the City's restrictions on showing a religious film and distributing Bibles at a senior center. The Church won the case and ACLJ was awarded \$90,397.90, which was split with affiliate counsel on a *quantum meruit* basis.

Springfield v. San Diego Unified Port Dist., U.S. Dist. Ct. S.D. Calif., No. 3:96-CV-01669.

ACLJ represented plaintiffs who weren't allowed to proselytize on airport property. Plaintiffs' motion for preliminary judgment was granted because plaintiffs showed a likelihood of success

on the merits. Attorneys' fees were awarded in the amount of \$32,470.75. Fees were divided between ACLJ, another nonprofit legal services organization, and affiliate counsel on a *quantum meruit* basis.

Gentala v. City of Tucson, U.S. Dist. Ct. D. Ariz., No. 97-CV-327.

ACLJ represented a couple whose group was prohibited from holding a National Day of Prayer event in the city park because the event would be from a religious viewpoint. The City's action was held unconstitutional and the ACLJ was awarded \$256,491.82 in attorneys' fees, which were shared with another non-profit legal services organization on a *quantum meruit* basis.

Phillips v. Missouri, U.S. Dist. Ct. W.D. Mo., No. 4:97-cv-00748.

ACLJ represented a state employee who claimed he was fired for requesting an accommodation of his religious beliefs in the workplace. The jury found in plaintiff's favor. Court awarded \$59,942.95 in attorneys' fees. All fees were retained by affiliate attorney.

Amandola v. Town of Babylon, U.S. Ct. App. 2nd Cir., No. 00-9006.

ACLJ represented a pastor and his congregation that were not allowed to use the Town Hall on an equal basis with other community groups. After the Second Circuit ruled in our favor, the ACLJ was awarded \$87,500.00 in attorneys' fees. Fees were divided between ACLJ and affiliate counsel on a *quantum meruit* basis.

Christian Coalition Int'l v. United States, U.S. Dist. Ct. E.D.Va., No. 2:00-CV-136.

ACLJ represented the Christian Coalition in challenging IRS's refusal to grant it tax-exempt status. CC won and was awarded attorneys' fees and costs. Fees were awarded in amount of \$58,940.96. Fees were retained by ACLJ.

Diaz v. Riverside County, U.S. Dist. Ct. C.D. Calif., No. 5:00-cv-00936.

ACLJ represented a nurse who was fired after refusing to agree to assist in abortion procedures. Jury found in plaintiff's favor. Court awarded \$64,875.70 in attorneys' fees. Fees were divided between ACLJ and affiliate counsel on a *quantum meruit* basis.

Schmidt v. Cline, U.S. Dist. Ct. D. Kan., No. 5:00-cv-04138.

ACLJ defended County Treasurer against suit by ACLU challenging treasurer's display of "In God We Trust" in county office. After dismissing ACLU's case as "frivolous," the District Court directed ACLJ to move for attorneys' fees. Court awarded \$8,130.00 in fees. Fees were retained by ACLJ.

Nichol v. Arin Intermediate Unit 28, U.S. Dist. Ct. W.D. Pa., No. 2:03-CV-646.

ACLJ represented an instructional assistant who was suspended by her employer for wearing a cross pendant on her necklace. The case settled after the court granted our motion for preliminary injunction, and the court approved an agreement whereby the ACLJ received \$24,000 in legal fees and our affiliate counsel received \$8,567.20.

6. **Please provide the subcommittee with copies of all letters dated January 1, 2001 to the present that were sent to a public authority by ACLJ or an affiliated attorney demanding a change in policy that discusses the possibility of litigation if the public authority refuses to change its policy.**

See Enclosures.

7. **Would you support legislation that would prohibit the awarding of attorneys' fees under 42 U.S.C. § 1988 and the Equal Access to Justice Act in both Establishment Clause and Free Exercise Clause cases?**

No. S. 3696 is both logical and reasonable to the extent that it distinguishes between Establishment Clause claims and the various civil rights protected by 42 U.S.C. §§ 1983 & 1988, including the right to Free Exercise of Religion. Establishment Clause claims differ both in application and definition. The civil rights identified under these sections deal largely with concrete, individualized harms, while the Establishment Clause is primarily “a specific prohibition on forms of state intervention in religious affairs.” *Lee v. Weisman*, 505 U.S. 577, 591 (1992). Free Exercise claims, for example, seek to remedy specific violations of individual rights, whereas Establishment Clause claims seek to define or clarify often abstract structural limitations on government. In this respect, the Establishment Clause is much more like the Commerce Clause and other generalized limitations on government power than it is like a specific protection of individual civil rights. The remedy of attorney’s fees is appropriate in civil rights actions because the vindication of one’s constitutional rights is vital to the public interest. The Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), recognized that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” By contrast, the injury in most Establishment Clause cases is abstract, consisting of mere “offense.” Just as the irreparable harm that accompanies a civil rights violation supports the notion of fee-shifting in those cases, the lack of such harm in Establishment Clause cases weighs against it. After all, there is no right not to be offended. S. 3696 is designed to address an unintended misuse of the attorney’s fees statute in Establishment Clause cases that is not present in cases involving the Free Exercise Clause and other civil rights provisions, recognizing that free exercise cases are not used to compel municipalities into flooding the public square with religion.