Excessive Attorney Fees and the Related Issues in the U.S. and Korea

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Abstract

Attorney fees should be set at a fair and reasonable level for both the attorneys and clients. As such, the attorneys must not enter into a retainer agreement with excessive attorney fees. However, the issue of excessive attorney fees has become one of the most controversial issues with respect to the attorney-client relationships not only in the U.S. but also in Korea. This paper first explains the possibilities of attorney fee structures being abused in the form of excessive and unreasonable fees in the U.S. as well as in Korea, while some aspects of abusive practice have relevance only in the U.S. Then, it discusses several methods to curb excessive attorney fees in the U.S. such as placing a limitation on hourly fee rates, requiring court approval for attorney fees, resolving fee disputes by an independent board, and utilizing disciplinary actions.

Also, this paper discusses the issue of "preferential treatment of former judges" as reflected in the excessive fee issues in Korea and proposes several ways to prevent such problem. The first is to use the judge recusal system in the strict way as intended by the relevant law provided. The second is to place some limitations on the legal practice of ex-judges upon their leaving the judiciary. The third is to utilize the jury trial system to the fullest extent possible by implementing some measures to avoid the logistical problems with it.

But more important than any proposal to deal with and prevent excessive attorney fee issues would be the mutual trust and respect between the attorneys and clients in terms of attorney fees. Without establishing trust and confidence built upon initially and throughout the legal representation would any attorney-client relationship be on a shaky ground. It is thus very important for the attorneys to candidly discuss the fee issue upfront with the client and to put that agreement and understanding in writing. Also, it is imperative to keep the communication line open and ongoing insofar as there is a possibility for any modification in their initial agreement. With such honest and continuous channel in place would it be difficult to expect the excessive attorney fee problems to persist continuously.

Key Words: Flat fee, Contingency fee, Disciplinary action, Judge recusal, Preferential treatment of former judges, Jury trial

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I. Introduction

The issue of excessive attorney fees is one of the most controversial issues with respect to the attorney-client relationships not only in the U.S. but also in Korea. Especially, this issue has recently become a socially controversial one in Korea causing public outcry and criticism with a news that an attorney who is a former judge was criminally charged and arrested for receiving almost $10 million from two clients who were charged for criminal activities.[1] The reason for such excessive attorney fees was that the attorney was allegedly trying to obtain favorable rulings such as bail or probation by lobbying the court and using her former position as a judge. It was reported that she allegedly had attempted to retain new clients whose trials were being presided over by the judges whom she had personal relationships as classmates at the Judicial Research and Training Institute or high school.[2] She was able to obtain reduced sentences or acquittal in six out of twelve cases that she represented under those circumstances.[3]

When a judge leaves the judiciary, he usually opens up his own legal practice or is hired by big law firms unless he completely retires from the legal profession. Unethical situations can arise when he tries to use his judicial connections and relationships in attempts to influence and obtain favorable rulings for his clients. Unfortunately, this kind of practice, known as "preferential treatment of former judges," has been implicitly understood as a 'customary matter' in Korean legal community although it is in violation of ethical rules and subject to public criticism at the same time. As often, the amount of fees charged by the attorneys with prior judicial positions is too excessive and unreasonable which is far beyond common sense, reasonableness, and the legal norm.

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1. Soo-Yong Chun, *Isum Sagi Sanyeonhyeong→Jipyu... '100 Eok Byeonhosa' Choiyoojeong lobiyeossna* [*Lee Sum Fraud 4-year Sentence→Probation... Was it a Lobby by '$10 Million Attorney' Yoo-Jung Choi?*], CHOSUN.COM (May 14, 2016, 3:00 AM), http://news.chosun.com/site/data/html_dir/2016/ 05/14/2016051400126.html.
2. Su-Ji Shin, *Choiyujeong, Yeonsuwon Dongki Pala Sageon Sseuleo Damassna* [*Did Yoo-Jung Choi Obtain Clients by Using the Judicial Research and Training Institute Connection?*], CHOSUN.COM (May 16, 2016, 3:00 AM), http://news.chosun.com/site/data/html_dir/2016/ 05/16/2016051600046.html (last modified May 16, 2016, 7:20 AM).
3. *Id.*

Attorney fees should be set at a fair and reasonable level for both attorneys and clients. As such, the attorneys must not enter into a retainer agreement with excessive attorney fees.[4] The mutual trust between the attorneys and clients can be established and continue only when they are in agreement and on the same page in terms of attorney fee structures, and consequently when there are no miscommunications and misunderstandings between them. Unless the clients can understand and agree with the basis and reasonableness of attorney fees, they may not be able to trust and rely on their attorneys and their representations. In the bigger perspectives, the establishment of fair and reasonable attorney fees can help restore public confidence which has been eroded over the years, also improving public image on legal profession at the same time.

This paper discusses and proposes several ways to deal with the excessive attorney fee issues. Part II of this paper will explain the various attorney fee structures in the U.S. with a focus on the current discussions as to the reasonableness of attorney fees. Part III will discuss several ways in which each fee structure can be abused in the form of excessive fees in the U.S. and Korea, while some aspects of abusive practice have relevance only in the U.S. In Part IV, the paper will propose several methods to deal with excessive fee issues in the U.S. Part V will explore some ways to deal with the excessive fee issues in Korea, especially with respect to the attorney fees charged by the attorneys who previously held judicial positions.

4. *See* Am. Bar Ass'n, ABA Model Code of Professional Responsibility § DR 2-106 (1983) ("Fees for Legal Services: (A) A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee. (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.") The majority of states have adopted the ABA Model Code of Professional Responsibility as state disciplinary rules. As an example of excessive attorney fees in the U.S., the Supreme Court of Indiana found an attorney fee of over $150,000 to be too excessive when the attorney work was mostly administrative in nature such as locating and collecting bank documents in connection with preparation of a will for several weeks. Matter of Gerard, 634 N.E.2d 51 (Ind. 1994).

II. Attorney Fee Structures

There are mainly three kinds of attorney fee structures. First, flat fee arrangement is the most basic and commonly used way to set attorney fees.[5] This fee arrangement is clear and simple because the specific and fixed amount of fee is discussed, negotiated and agreed upon by the attorneys and their clients in advance. The clients can expect what they need to pay for the legal services in advance so that they do not have to worry about the unexpected increase of attorney fees later on.[6] The attorneys would enter into this arrangement when they have a good idea as to the nature of the representation, the degree of legal skills, and the amount of time and energy that is necessary for a particular type of legal representation. This fee structure would be a preferred method with respect to straightforward, routine and run-of-the-mill legal services such as uncontested divorce matters and individual liquidation bankruptcy.

Secondly, under hourly fee agreements, the attorneys will charge fees based upon the number of hours that they spend; and they will send an invoice at particular intervals, usually at the end of each month, which provides the specific nature of works in detail and the number of hours spent on the works with the expectation that the clients will pay according to the invoice when it is due. The hourly rate of attorney fees to be charged will depend on the skills, experiences and reputation of the attorneys and other factors.[7] Hourly fee arrangement can be a useful fee structure when it is difficult to speculate, expect and thus set the specific amount of set fees. In some legal matters, it would be difficult to measure the amount of time and the level of skill that are required to perform certain kinds of legal works, making it difficult to employ a flat, fixed attorney fee arrangement. This structure is a preferred method when the

5. A flat fee is an advance fee payment intended to compensate a lawyer for all work to be done on a matter, regardless of the time required or the complexity of the legal work. *See* Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 113 (2009); *see also* In re Kendall, 804 N.E.2d 1152, 1157 (Ind. 2004) (quoting Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?*, 1 FLA. COASTAL L.J. 293, 299 (1999)).

6. The out-of-pocket costs and expenditures for preparing and handling the case would be included in the total fixed fee unless the client agrees to pay them outside of the fixed fee. In that case, the certainty and predictability of fixed fee structure may be lost.

7. Law firms tend to charge higher rate of attorney fees than solo practitioners or small and medium sized law firms based on their ability to provide diversified services and multi-task functions. *See* Debra Cassens Weiss, *Judge Approves Record $688M Attorney Fees in Enron Securities Case*, A.B.A. J. (Sept. 9, 2008, 12:25 PM), http://www.abajournal.com/news/article/judge_approves_record_688m_attorney_fees_in_enron_securities_case.

case is more complicated and technical rather than routine.

Third, contingency fee arrangement is usually used when a client cannot afford to pay the retainer fee up front to initiate a lawsuit.[8] Under contingency fee arrangements, the attorneys agree to be paid a percentage of recovery only when there is a recovery from the lawsuit.[9] Since the contingency fee does not require an initial down payment as a retainer fee, it will be advantageous to a client who would like to start a lawsuit without sufficient resources. Although there is a risk of no compensation for the attorneys when there is no recovery from the case, it will be a win-win situation when there is a substantial recovery in the case. This structure is often used in personal injury cases when the clients do not have enough funds to start a case and the attorneys believe that there are high or at least reasonable chances of winning the case. Contingency fee arrangements may be more appropriate when the case involves some degree of uncertainty and risk than an average run-of-the-mill kind of "minor" legal services.[10] The differences between contingency fee arrangement and the other two arrangements would be that the skill, experiences and reputation can play a more important role in setting attorney fees in flat fees as well as hourly fees than contingency fees. Also, unlike flat and hourly fee arrangements, contingency fee arrangements do not usually require retainer fees initially as the attorneys tend to forego them with the realization of the lack of sufficient funds on the part of their clients as well as the expectation of using that as an incentive to attract more clients. Because of the risk and uncertainty associated with contingency fees, the attorneys need to exercise more caution and due care in evaluating the merits of each case individually before entering into this fee arrangement.

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8. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998); *see also* Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG. Summer 1976, at 27, 28.
9. The contingency attorney fee is usually set at one-third (33%) of the total recovery. For cases involving legal transaction but not an actual lawsuit, the contingency fee percentage could be as low as 15% or as high as 33%. For cases that involve a lawsuit that is not an actual trial, the fee percentage can range from 20% to 43%. If the case is appealed, it can be increased to 40% or more of the recovery. For cases that go to actual trial, the percentage can range from 25% to 50%. Kritzer, *supra* note 8, at 286.
10. *See* Cassandra M. Neely, *Excessive Fees and Attorney Discipline: The Committee on Legal Ethics v. Tatterson*, 90 W. VA. L. REV. 562, 576 (1987/1988); ROBERT H. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 6 (1980).

III. Possibilities of Excessive Fees under Different Fee Structures

A. Flat Fees

The main advantage of a flat fee schedule is its transparency and predictability for the clients because the clients are assured that they need to be responsible for the fees which are certain and clear. However, the flat fees can be set too excessively which can sometimes be unjustifiable or unfair to the clients. Even if the attorney explained the reason for unreasonably high flat fees to the client at the time of retainment or at the beginning of the attorney-client relationship, the clients are not apt to make the informed decision as to the level of attorney fees.[11] The clients are usually laypersons who are not familiar with the delicacy and intricacy of legal matters and system, and thus are not equipped with the knowledge and information so as to make a fully informed decision about the attorney fees. The legal problems that they are facing may be the first one in their lives and possibly the last one. Due to their lack of experience and knowledge on law and legal problems, they may not even realize that the level of attorney fees proposed by their attorneys is too excessive or out of norm in the legal community. Even if they realized that the fee was set too excessively, they might be compelled to accept it because they did not have the equal bargaining power in terms of negotiating and setting attorney fees. Because of the disparity of the bargaining powers between the attorneys and clients, and because of the inequality of the level and quantity of knowledge and information available to them, it is possible that the attorneys abuse their negotiating power and superiority with informational knowledge with the end result of imposing excessively high fees unfavorable to the clients.

Flat fees can be set at a high level where some attorneys, because of their reputations and experiences, demand high retainer and attorney fees and try to justify their high fees for those reasons. They may be in great demand so that potential clients do not mind paying higher attorney fees than the amount within the range of norm in the same legal community. However, the fees demanded by these attorneys in the upper echelon can be too excessive and even abusive when they take advantage of their popularity and rarity in the legal market.

11. An ethical issue can arise when attorneys set the flat fee unreasonably high and excessive which can be in violation of the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY § DR 2-106.

Even under the assumption that some attorneys may be entitled to demand high fees based on their reputation and skills, the level of attorney fees cannot be justified if that is set too excessively and beyond the norm of the legal community.[12] It is not easy to set a certain demarcation line as to what should be an 'excessive' amount of fees; however, if it is set beyond the level of the comparable fees charged by other attorneys with similar skills and experiences, it could be considered as excessive.[13]

B. Contingency Fees

The proponents of contingency fee arrangements would defend the legitimacy of this schedule in that this arrangement in nature is fair and reasonable to both the attorneys and their clients. First, the clients, who cannot afford to pay high retainer fees up front, to pay any amount of flat fees, or to pay hourly fees on a continuous and regular basis, are able to retain attorneys and institute lawsuits because of the contingency fee arrangements. Also, the clients are fully informed by the attorneys about the fee schedules prior to the execution of a retainer agreement when they had no obligation to enter into the agreement.[14] If a client deems the rate of contingency fee as too excessive, he

12. Am. Bar Ass'n, Model Rules of Professional Conduct Rule 1.5(a), A.B.A., http://www.american bar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html (last visited Apr. 21, 2017) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Rule 1.5(a) lists eight factors to consider when weighing the reasonableness of a lawyer's fee (this list is called the Lodester method): (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.
13. One of the factors in determining the reasonableness of fee is the level of fee customarily charged in the locality for similar legal services. *Id.* (Rule 1.5(a)(3)).
14. However, an issue can arise when a client was lacking relevant information, thereby making his consent to the fee schedule as less than fully informed. The contingency fee arrangements in criminal cases are prohibited in Korea. Supreme Court [S. Ct.], 2015Da200111, July 23, 2015 (S. Kor.). Also, the contingency fees are prohibited in criminal cases in the U.S. AM. BAR ASS'N, *supra* note 4, § DR 2-106(C) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."). *See* People v. Gomberg, 342 N.E.2d 550 (N.Y. 1975) (the contingent fee arrangements in criminal cases amount to a denial of a defendant's right to effective assistance of counsel because of the perceived significance of the conflict). *See also* People v. Winkler, 523 N.E.2d 485 (N.Y. 1988) (contingency fee arrangements in criminal cases are against the public policy).

can demand the modification or refuse to enter into any professional relationship.[15] Secondly, there is no aspect of uncertainty in the fee which exists with hourly rate fees. Thirdly, the attorneys are taking the risk of no compensation for their legal services as well as litigation expenses in case they end up losing the lawsuit. Consequently, the attorneys and clients are on the same page in terms of their interests in a successful outcome of the case,[16] and more importantly, there are the risk factors of no recovery as well as of paying litigation expenses out of the attorney's own fund unless the clients agree to pay them regardless of the litigation outcome.

However, the mutual objective of achieving the successful outcome does not prevent the possibility of a conflict of interest between the attorneys and their clients in terms of attorney fees. For instance, an attorney may opt to accept a settlement offer which is lower than an amount of monetary remedies that could have been received if the case had gone to trial because the trial-related expenses would decrease the amount of their net recovery.[17] This would be against the best interest of the client whose profit margin was reduced because of the attorney's self-interest overriding that of the client. Along the same line, the attorneys would be less inclined to spend their time and exert their energy when the case with contingency fee appears to generate less revenue than other cases.[18]

Also, there is a high chance of overly excessive compensation in contingency fee arrangements in the U.S. when punitive damages are awarded. Since punitive damages are designed to punish the offender and to deter similar wrongdoing by the same and other possible offenders in the future, the amount of damages are usually set at high amounts, which leads to the high rate of contingency fees. In some cases, if the contingency fee is converted to an hourly rate, the rate would be many thousands of dollars per hour.[19]

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15. An argument was made that when the contingent fee reaches the 50% level, it cannot be considered as a due measure of legal compensation for attorneys as professionals because this arrangement makes them rather a partner or proprietor in the lawsuit. *See* Gair v Peck, 160 N.E.2d 43, 77, *amended by* 161 N.E.2d 736 (N.Y. 1959), *cert. denied & appeal dismissed*, 361 U.S. 374 (1960).
16. *See* Heather M. Williams, *Attorney Fees in Class Action Lawsuits: Implementing Change to Protect Plaintiffs from Unethical Attorney Behavior*, 7-SPG KAN. J.L. & PUB. POL'Y 68, 73 (1998); In re Oracle Sec. Litig., 131 F.R.D. 688, 694 (N.D. Cal. 1990).
17. See Williams, *supra* note 16.
18. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 17-18 (1991).
19. Ronald D. Rotunda, *Innovative Legal Billing, Alternatives to Billable Hours and Ethical Hurdles*, 2 J.

Also, the attorneys handling class actions were subject to the criticism for excessive fees, the degree of which is more magnified given the little amount of money for each one of their class action clients while receiving astronomical amount of attorney fees at the end of the litigation.[20]

To compensate for the risk of not winning a contingency case, the attorneys tend to diversify the portfolio of their contingency cases by taking up numerous cases on contingency basis. The attorneys may not take up frivolous cases because, first, the likelihood of success is small, and secondly, they may be subject to the sanctions under the Federal Rules of Civil Procedure Rule 11 for representing frivolous cases.[21]However, they may be willing to take on a risk of representing cases with non-frivolous nature but with small chance of winning, even with a slight chance, by demanding jury trials before sympathetic jurors.[22] Even if they lose a case without recovering any compensation, they may be able to make up that loss by winning some other cases out of their contingency case portfolio. There are two issues with this practice: the first is that the client whose case was won may feel that he is bearing the burden for other cases that were lost.[23] And the second has to do with whether the attorney

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INST. FOR STUDY LEGAL ETHICS 221 (1999); Pfeifer v. Sentry Ins., 745 F. Supp. 1434 (E.D. Wis. 1990); Metro Data Sys., Inc. v. Durango Sys., Inc., 597 F. Supp. 244 (D. Ariz. 1984).

20. The attorneys in a class action case agreed to accept $28 million as fees while their clients would receive $14 each. *See* Rotunda, *supra* note 19, at 221; Ralph T. King Jr., *Princely Fees, Paltry Damages Set Off Protest*, WALL ST. J. (Mar. 11, 1998, 11:59 PM), https://www.wsj. com/articles/SB8897470 67404702000; *Cf.* Matthew Scully, *Will Lawyers' Greed Sink Tobacco Settlement?*, WALL ST. J. (Feb. 10, 1998, 12:01 AM), https://www.wsj.com/articles/SB 887064289825734000.

21. *See* Fed. R. Civ. P. 11 ("(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."). Fed. R. Civ. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.").

22. *See* Rotunda, *supra* note 19, at 223; *see also* Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211 (1994).

23. Allan E. Korpela, *Amount of Attorneys' Fees in Tort Actions*, 57 A.L.R.3d 584 (1974).

could fulfill his obligation of adequate and zealous representation for a particular case due to his diversified practice. Representing many clients on various cases would require the resources and focuses of an attorney to be divided among his portfolio which will lead to the diminished quality of legal services provided unfairly to each client.

C. Hourly Rate Fees

The hourly rate arrangements seem to be fair and reasonable at the outset; however, the problematic aspect of this arrangement lies with the possibility of the abusive practice by the attorneys and the difficulties of the adequate attorney supervision by the courts. First, the attorneys have a lot of "incentives" in increasing the number of hours spent on the case by charging the same work in duplication or "padding" hours here and there.[24] Or they may refuse to extend settlement offers to the opponent at an opportune time or reject settlement offers from the opponent for the wrongful purpose of stretching and lengthening the case. Since there is no limitation on the number of hours that the attorneys can invest on a particular case, they are at liberty in terms of allocating their time. The attorneys will have strong incentives to charge as many hours as possible if the hourly rate for a particular case is set lower than other cases in order to incentivize the client to retain them initially.[25]

When providing an invoice for legal services, the attorneys need to provide the itemized explanation of their labor and services in detail on hourly basis which can be used by their clients to review and challenge their appropriateness if necessary. However, it would not be easy for the clients to question and challenge the appropriateness of legal fees for being afraid of offending their attorneys at first, and also for the possibility of having the legal representation being terminated by the attorneys for not paying the invoice as required under the attorney fee agreement. If a client files a complaint on fees to the state bar, it would be difficult to continue their attorney-client relationship regardless of the nature of the resolution of the complaint because attorneys whose integrity was officially challenged may not be inclined to continue to represent the same client. Also, the courts do not have the resources and time to evaluate the exact number of hours and minutes allegedly spent by the attorneys and their associates and staffs as well as the justification and necessity of those time and

24. *See* Williams, *supra* note 16, at 74.
25. *Id.*

services. It would be difficult to prove the existence of fee duplication or "padding" of hours except for the administrative mistakes in calculation, the obvious duplication of the same work, or egregiously outrageous amount of hours which is far beyond the reasonableness and norm under the circumstances. As a result, a lot of cases with unreasonably excessive attorney fees can go undetected by the courts.

IV. Methods to Curb Excessive Attorney Fees

A. Limit on Hourly Rate Fees

One of the ways to prevent excessive attorney fees would be to set a certain limit on hourly rate schedules.[26] For instance, the attorneys may agree not to charge more than the maximum number of hours, the limit of which can be agreed upon by the attorneys and clients and specified in the retainer agreement. In this way the clients would be able to expect the maximum amount of attorney fees and whether it reaches that level, and therefore not be taken by surprise later of its excessiveness.

The downside of this arrangement can be materialized when the attorneys underestimate or miscalculate the number of hours that is required to complete a particular case, and consequently the total number of hours for handling the case far exceeding the initial estimation. To avoid this downside, the attorneys and clients can agree that the cap can be exceeded later when the attorneys can prove the necessity for the increase and the client reviews and approves such increase. As to the appropriateness of the fee increase, the burden should lie on the attorneys to demonstrate that the circumstances requiring the increase are beyond the anticipation and control of the attorney and what exceeds the initial estimation is justified under the circumstances. However, a dispute may arise if a client disapproves such increase contesting the appropriateness and reasonableness of the increase. Unless an amicable resolution can be reached between them, a judicial involvement may be necessary to review the matter and decide its reasonableness.[27]

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26. *See* Rotunda, *supra* note 19, at 224.
27. The attorneys charging excessive fees can be subject to the state bar disciplinary action as discussed later.

Also, the attorneys may be able to get around the excessive fee issue by offering the clients with discounted hourly rates. Discounted hourly rates can translate into the reduction of total revenues for the attorneys or law firms; however, such problem can be minimized by offering such discounted rates only to particular clients who do business with the attorneys or law firms on a regular basis, or are likely to bring in more business down the road.[28]

B. Court Approval of Attorney Fees

In bankruptcy proceedings in the U.S., reorganization cases like Chapter 11 rehabilitation require attorneys to file a fee application to the bankruptcy courts before the bankruptcy trustees make distribution to the attorneys for their attorney fees.[29] The attorneys must itemize in detail the hours spent on each service and explain the nature of the legal services in order to be compensated for them. The bankruptcy judges have the authority to review the fee application, determine the reasonableness of the fees, and approve or deny the fee application before the trustees distribute the fees to the attorneys as administrative expenses.[30] Since the bankruptcy courts have the authority to review the fee application, the attorneys have the burden to prove the reasonableness and justification for the fees they claim.

By requiring the similar procedural steps in civil as well as criminal cases in which the attorneys file fee applications before the court, the issues of excessive attorney fees may be curtailed. Under this system, it would be difficult for attorneys to simply submit fee applications which include the itemization of legal representation with dubious nature, and even more difficult to submit the ones with duplicated hours. However, some difficulties exist before implementing this system due to logistical problems. The question remains as to whether the courts already burdened with the overload in their dockets would be able to handle the attorney fee applications in numerous cases. Due to the limited judicial resources and for the interest of the judicial efficiency would it be more advisable to devise adequate plans before implementing fee application

28. *Id.*
29. Fed. R. Bankr. P. 2016 ("An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.").
30. *Id.*

system.[31] For instance, if the courts can be relieved of their burden by utilizing the court magistrates for fee application process, it may be feasible to implement the systems for fee application review.

C. Independent Board Resolution of Attorney Fee Disputes

An independent board can be established in order to resolve any fee disputes between attorneys and their clients when the clients file a complaint contesting the appropriateness and reasonableness of the fees. Each state bar can set up an independent board which consists of retired judges, practicing attorneys and laypeople who are not related to the attorneys and clients and have no financial or personal interests in the case. By gathering necessary evidence and information, such board should be able to decide the fairness and reasonableness of the fees in a neutral and independent way. If necessary, a hearing can be held to hear the testimony of the clients, the attorneys and other witnesses to determine the excessiveness of attorney fees.

D. Disciplinary Actions

A state bar in the U.S. has the right to investigate and take disciplinary actions against attorneys for violating the state ethical rules and regulations, one of which is the violation of attorney's duty to the clients for not charging excessive or illegal fees.[32] Disciplinary actions are necessary not only to punish the individual attorney at fault but also to protect the integrity of the bar as well as to guard the public interest in the proper administration of justice.[33] Excessiveness of attorney fee alone may not be enough to initiate and take disciplinary action except for the most egregious kind. However, if there are

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31. The judicial augmentation in the number of judges would be the first step for the effective implementation of this system.
32. For state disciplinary rule, *see, e.g.*, ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS: ATTORNEY TORT STANDARDS, ATTORNEY ETHICS STANDARDS, JUDICIAL ETHICS STANDARDS, RECUSAL AND DISQUALIFICATION OF JUDGES § 6:4 (2016) (attorneys who violate the reasonable fee requirement could be brought before the state attorney discipline committee). The discipline can range from public censure to fines for the less serious violation to suspension of the license to practice law and to the disbarment for the most serious, egregious and repetitive violation.
33. *See* Neely, *supra* note 10, at 578; *See also* In re Daniel, 173 S.E.2d 153 (W. Va. 1970); Daily Gazette Co. v. Comm. on Legal Ethics, 326 S.E.2d 705 (W. Va. 1984); 7 AM. JUR. 2D *Attorneys at Law* §§ 18, 25 (2016).

other grounds for disciplinary action along with attorney fee abuse, or if there has been prior or pending action for attorney fee abuse against the same attorney, a disciplinary action against the particular attorney may be warranted.

The sanction for each offense related to excessive fee should be proportional to the degree and seriousness of each offense. If the offender's action was so serious and outrageous, coupled with the previous history of other offenses, more severe kind of sanctions may be necessary.

V. Measures to Curtail Attorney Fee Issues in Korea[34]

A. Judge Recusal

Despite the optimistic prospect for more attorney supplies in the legal market in Korea, thereby lessening the pressure for high attorney fees, the problem of excessive attorney fees still remains to be persistent in the area where the attorneys who were former judges are retained as counsels. The clients tend to retain such attorneys with the expectation of obtaining a favorable ruling because of the connection and relationship between the presiding judges and the attorneys who used to be the former superiors or colleagues of the presiding judges or are their classmates at the Judicial Research and Training Institute, high schools, universities or law schools. These kinds of practices known as 'preferential treatment of former judges' have been considered 'customary' in the legal community for too long.[35] Regardless of the eventual outcome of the case, such expectations make the attorneys less hesitant to demand the enormous amount of retainer fees and make the clients more inclined to pay

34. With the introduction of the law school system in Korea starting in 2009 and the admission of new attorneys under the law school system from 2012, the excessiveness of attorney fees seems to be in decline. This is mainly due to the competitive legal market in which attorneys attempt to build more clientele basis for their business by offering more reasonable and affordable attorney fee rates than the stiffer fee rates under the older bar admission system where the bar admission rate was so low causing the scarcity of attorneys in number. The provision of more affordable attorney fees for the general public was one of the major reasons for the introduction of the law school system in Korea as the main objectives of the new law school system is to allow more attorneys to be admitted to the bar and thus to make legal fees more affordable to the clients in the legal market and become more consumer-friendly. Moreover, it appears that the Korean legal market is on the right track to achieve that goal. It is optimistic to note that the number of attorneys in the legal market continues to go up steadily so that the public can rely on the sufficient resources in resolving their legal problems at a more affordable rate.

35. Young-Ho Kong, *Judge Recusal System in the U.S. and Korea – With a Discussion on How to Reduce Preferential Treatment of Former Judges*, 51 KYUNG HEE J. 483, 501 (2016).

them. An ethical issue from this arrangement exists because the amount of fees agreed between them are far too excessive and out of norm considering the amount of time and energy required to do the similar legal works as well as the level of skills required. More significant nature of ethical issue can arise from this fee arrangement because of the implicit and covert expectation and agreement between the attorneys and the clients that the attorneys intend to use a part of the fees for the purpose of 'lobbying' the presiding judges or prosecutors.

One of the most straightforward ways to prevent the above problem from taking place would be to use the judge recusal system in the strict way as intended by the relevant law provided.[36] Specifically, the relevant law provides that a judge should recuse *sua sponte* when there is a reason to suspect that he cannot conduct an impartial and fair trial.[37] *Sua sponte* recusal may be necessary when a party is represented by the attorneys who are the presiding judge's former colleagues, superiors or alums, thereby raising a concern for a possibility of the judge conducting a partial and unfair trial.

If the judge at issue fails or refuses to recuse *sua sponte* under those circumstances, a party or his attorney in civil case or the prosecutor in criminal case can file a motion to recuse.[38] In Korea, motions to recuse judges that are filed by the prosecutors might be on the rare side as non-customary practices; however, it is necessary to encourage this practice in order to achieve judicial impartiality and to protect judicial integrity. By the same token, the parties in civil actions should also be encouraged to file such motions, if necessary, by informing them of their rights.[39]

B. Limitation on Judges' Legal Practice

A legislative bill was proposed to prohibit high-ranking judges and

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36. *Id.*
37. A judge should recuse *sua sponte* when there is a reason for recusal or a reason to suspect that he cannot conduct an impartial and fair trial. Hyongsa sosong beob [Criminal Procedure Act] 24, Act No. 341, Sept. 23, 1954, *amended by* Act No. 14179, May 29, 2016 (S. Kor.); Minsa sosong beob [Civil Procedure Act] 49, Act No. 547, Apr. 4, 1069, *amended* by Act No. 13952, Feb. 3, 2016 (S. Kor.).
38. Kong, *supra* note 35; Criminal Procedure Act 18; Civil Procedure Act 43. The motions to recuse are to be decided by a three-judge panel from the same court system. The Korean Civil Procedure Rule 46 and Criminal Procedure Rule 21 provide that the recusal requests are to be decided by the panel of judges of the same court without the participation of the judge who is the subject of recusal request. Criminal Procedure Act 21; Civil Procedure Act 46. But that judge can submit his opinion on the recusal request, and the denial of recusal requests can be appealed to the appellate court.
39. Kong, *supra* note 35, at 503-04.

prosecutors from practicing as attorneys for three years after their retirements from the courts or prosecutors' offices.[40] This is designed to curtail the intermeddling of judicial administration by former high-ranking judges and prosecutors. At the same time, it can achieve the effect of preventing the practice of preferential treatment of former judges. In Hong Kong, the retirement age for judges is set at 70 years old, and judges are not allowed to practice as lawyers.[41] In the U.S. federal court systems, the term for federal judges is for life.[42] Although life term is designed to provide federal judges with independence in their judicial law-making power, it has an additional effect of discouraging ex-judges to go into legal practice after they leave the judiciary. In the similar vein, the state judges in the U.S. tend to remain in the judiciary for their entire career until their retirement although state judges' terms are not for life but have specific terms.[43] State judges are selected by partisan or nonpartisan elections, chosen through a merit selection process by a nominating commission, or appointed by the governors. Once the initial term is over, they are subject to the retention elections or the governor's nomination for retention.[44]

If the judges and prosecutors in Korea are prohibited from practicing upon leaving the judiciary or prosecutorial office, it would be the most certain and effective way to prevent ex-judges and ex-prosecutors from trying to influence the court decisions by using their former positions as judges or prosecutors from

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40. Currently under the Gongjikja yunli beob [Public Service Ethics Act] art. 17, Act No. 3520, Dec. 31, 1981, *amended by* Act No. 13796, Jan. 19, 2016 (S. Kor.), the high-ranking judges or prosecutors are prohibited from being hired by certain law firms (designated under the relevant law) for three years, but there is no restriction on opening up new law offices for them. The newly proposed legislation permits the bar association to refuse the bar registrations by the judges who are above the level of chief judge or high-ranking prosecutors. Gil-Ho Cha, *"Gowi Pangeomsa toejikhu 3nyeongan gaeeopgeumji" Deominju Bakyongjin 'Hongmanpyo Bangjibeob' Chujin* [*Prohibiting High-Ranking Judges and Prosecutors from Opening Law Office for Three Years after Retirement--Congressman Yong-Jin Park Pursuing 'Man-Pyo Hong Prevention Law'*], DONGA.COM (June 24, 2016, 3:00 AM), http://sports.donga.com/ISSUE/ Vote2016/ News?m=view&date=20160624&gid=78836012 (last modified at June 24, 2016, 3:00:40 AM).

41. *See* Seung-Yeol Kim, *Pansaeui Byeunhosa Gaeeop, Byeunhosa Sunggong Bosu Geumjihan Naraneun... Hong Kong Beobgwaneun 'Pyungseng Byupgwan.' Jungnyeun 70sae. "Byeunhosa Gaeeop An Hae"* [*A Nation Prohibiting Judges from Opening Law Office and Contingency Fees... Hong Kong's 'Life-Time' Judges. Retirement at 70. Not Opening Law Office*], CHOSUN.COM (June 23, 2016, 7:00 A.M.), http://pub.chosun.com/client/news/print.asp?cate= C03&mcate= m1003&nNewsNumb=20160620671.

42. *See* Office of the U.S. Attorneys, *Introduction to the Federal Court System*, U.S. DEP'T JUST., https://www. justice.gov/usao/justice-101/federal-courts (last visited April 25, 2017).

43. *See State-by-State Summary of Judicial Selection*, USLEGAL.COM, https://courts.uslegal.com/selection-of-judges/state-by-state-summary-of-judicial-selection (last visited April 25, 2017).

44. *Id*.

the outset, thereby nipping at the bud the possibility of excessive attorney fees stemming from such pre-arrangement. However, such a strong measure does not seem to be a viable option in Korea given the possibility that it be subject to the challenge on its unconstitutionality. Constitutionality of such provision can be challenged based on the fact that professionals including attorneys should be guaranteed of their constitutional right to choose their employments freely.

C. Jury Trials

Another possibility to curtail excessive attorney fees issues in Korea would be to utilize jury trial systems to the fullest extent as possible. When a criminal trial is conducted under jury trial instead of bench trial, it will be difficult for the judges to be swayed by the influence of their former colleagues or superiors and to rule in favor of them. Since the laypeople as jurors will participate in the fact finding and decision making processes along with the judges, judges will find it more difficult to rely on or exhibit their personal bias and prejudice in an open and public venue than a closed one without the presence of the watchful eyes of the jury.[45] As a way to make jury trial a more powerful safeguard against former judges' abusive practice, jury verdict can be made binding on the court.[46]

Along the same line, another possibility may be the introduction of jury trial system into the civil cases similar to the criminal trials.[47] The jury trial in civil cases would make it difficult for the judges to be swayed by the influence of their former colleagues and to exhibit bias or prejudice in one way or another. Like the criminal trials, it will be difficult for the judges to ignore the weight of evidence in an attempt to rule in favor of the parties who are represented by the judges' former colleagues or superiors.

But a logistical problem still remains in that one of the parties may refuse to do the trial by jury. To avoid such logistical problem, jury trial in civil case should be allowed with only one party's request in a similar way to the U.S.

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45. Young-Ho Kong, Kukminchamyeojaepaneui Heowa Sil [Truth and Falsity of Jury Trial System] 88 (2017).
46. Currently, the jury verdict in Korea is not legally binding on the courts but rather advisory, albeit its characteristics that the courts are strongly encouraged to honor the jury verdict. But the real issue with the criminal jury trial is that it would be unrealistic to expect that a criminal defendant requests a jury trial when he has an ulterior intention to manipulate the prior judgeship connection of his own attorney, making it unlikely to opt for a jury trial in such criminal case.
47. The Korean General Assembly passed a legislation in 2007 allowing jury trial system in criminal trial and the criminal jury trials have been conducted in Korea since 2008.

system. In the U.S., a party can demand a trial by jury since a litigant in a civil case has a constitutional right to request a jury trial in civil cases under the Seventh Amendment of the U.S. Constitution.[48]

VI. Conclusion

Attorney fee arrangement is to be made freely and voluntarily between attorneys and their clients. The attorneys should be able to make the attorney fee agreement under the right to exercise and enjoy the freedom of contract with the clients, and this right should be respected and honored. It is without a doubt that attorneys are entitled to and should be able to demand the compensation for what he has performed in a given case. However, there should be a limitation on such rights when a certain fee arrangement is out of norm and beyond reasonableness. Some attorney fees reach the level of unconscionability because it is so one-sided in favor of the attorneys and so unfair to the clients beyond the level of reasonableness and common sense. This is the reason why there has to be some measures in place to control and prevent such excessive fee arrangements. This paper discussed several different measures to achieve that purpose in both the U.S. and Korea.

But more important than any suggestion or proposal to deal with and prevent excessive attorney fee issues would be the mutual trust and respect between the attorneys and clients in terms of attorney fees. Without initially establishing trust and confidence as well as throughout the legal representation, any attorney-client relationship would be like a castle built on sand in the shore line. The initial and foremost responsibility lies with the attorneys whose knowledge and expertise should provide a guidance to the client who is without the same advantages. It is thus very important for the attorneys to discuss the fee issue upfront with the client candidly and to put that agreement and understanding in writing. Also, it is imperative to keep the communication line open and ongoing insofar as there is a possibility for any modification in their initial agreement. With such honest and continuous channel in place would it be difficult to expect the excessive attorney fee problems to persist.

48. U.S. Const. amend. XII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

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