

States that fought same-sex marriage owe millions in legal fees

Many states are now required to pay a 'reasonable' portion of fees for attorneys who represented same-sex couples

September 10, 2015 5:00AM ET

by **Steve Friess** @stevetriess

Two months after the U.S. Supreme Court ended the legal debate over same-sex marriage by declaring it a constitutionally protected civil right, attorneys general and governors who fought it are receiving unpleasant souvenirs of failure: Invoices from the attorneys who beat them.

States that defended same-sex marriage bans — most did, to some extent — are now being asked to pay the legal fees for those litigants under a 40-year-old federal law that says the court “in its discretion, may allow the prevailing party ... a reasonable attorney’s fee as part of the costs.”

Or as Michigan attorney Dana Nessel put it: “It’s the price governments pay for defending bigotry.”

Defeat won’t come cheap — or, in many cases, without further legal wrangling.

Michigan is weighing its response to a \$1.9 million demand from attorneys for April DeBoer and Jayne Rowse, plaintiffs in one of the four cases that went to the Supreme Court and was decided in June. In Kentucky, another state involved in the Supreme Court showdown, the bill for services rendered is \$2.1 million. South Carolina has been ordered to pay \$130,000, and Florida’s attorney general is fighting a tab of about \$700,000.

Several states have struck agreements already. Pennsylvania settled for \$1.5 million, Wisconsin for \$1.05 million, Virginia for \$580,000, Oregon for \$132,000, Colorado for \$90,000, Utah for \$95,000 and North Dakota for \$58,000. The varying prices reflect the length of the battles or their intensity.

“This is exactly what Congress created this law for,” said Stephen Rosenthal, a Miami-based attorney who fought Florida’s ban. “It’s a recognition that people need lawyers to fight the government, which has lots of lawyers, when they feel their civil rights are being violated. To encourage lawyers to take these cases, you need to provide the potential to get paid in the end.”

The attorneys general of Michigan, Florida, South Carolina and South Dakota did not respond to requests for comment.

Private attorneys who took these cases almost always did so pro bono, while national groups such as Lambda Legal and the ACLU paid their lawyers. Both can and have pursued reimbursements after the victories, but the matter is seen as more significant for private local attorneys who put practices on hold and turned down other cases. “That is part of what the court considered, that while we were doing this, we couldn’t be doing other work,” said M. Malissa Burnette, the lead attorney in the South Carolina challenge, who plans to donate her fees to the gay-rights group South Carolina Equality. “We took a risk that if we lost, we’d get nothing.”

In some cases, including in Florida and South Dakota, the government is trying to trim its costs by claiming it dropped its appeals after state or federal courts ruled definitively elsewhere. **Florida Attorney General Pam Bondi, for instance, filed a motion in mid-August that argued the opposing attorneys “are not entitled to appellate attorney’s fees.”**

That infuriated Rosenthal, who said there wouldn’t have been appellate costs if the state had given up when the case was clearly over. “There’s a difference between defending these laws and defending them tooth and nail,” he said. “They defended it tooth and nail. And once they lost, they tried to stay that decision all the way up to the Supreme Court. Now they don’t want us to be paid for defending against that very aggressive effort?”

Taxpayers, many of the litigants’ attorneys say, should be aware of how much money was lost by their officials — especially in the latter stages of the fight when appellate judges across the nation struck down same-sex marriage bans. “Some of the tactics the state used were unnecessarily dragging out the time spent and the cost of the litigation,” said Joshua Newville, a Minneapolis-based lawyer who handled marriage challenges for same-sex couples in South Dakota and North Dakota. “You have government officials who knew very well where this was headed and nonetheless defended these discriminatory laws.”

In Tulsa County, Oklahoma, the \$298,000 now owed to pro-gay lawyers is money not spent on “programs and services that need funding,” said John David Luton, an assistant district attorney in the Tulsa County District Attorney’s Office. Still, he understands that such liability is part of the process.

“If they get a result that’s favorable to them, attorney fees are typically a part of that,” he said. “They need to be reasonable, of course. There are times when fee schedules and work histories are more accurate than others. I’m not suggesting that lawyers that did the work shouldn’t be paid.”

The \$1.9 million Michigan bill is on the higher end in part because it was the only case in the final stretch of the gay marriage effort that involved a full court trial, with testimony by expert witnesses and cross-examinations, Nessel said. The attorneys’ total was based on logs of hours worked and expenses incurred throughout the case, which spanned nearly four years.

“If you looked at other cases around the country, I think we were incredibly conservative on our hours and our costs,” she said. “In Kentucky, they submitted bills for more than \$2 million, and they had no trial. For them to have billed more than we did — I think that says a lot about how conservative we were.”

In fact, Kentucky Gov. Steve Beshear is challenging the invoice he received. “The key word here is ‘reasonable,’” he said in an Aug. 24 statement. “We will be contesting those amounts as unreasonable. Until these issues are resolved, we will not know the overall cost.”

A similar argument was used in Tulsa, where attorneys objected to the original \$368,000 bill by complaining that the litigants “used a Howitzer to kill a gnat.” The judge was little moved, reducing the reimbursement slightly, to a total of \$298,000.

South Carolina also balked at paying, appealing to U.S. District Judge Richard Gergel that the \$135,000 requested was too high. He reduced the fees only slightly, to \$130,000, writing in his order that the state “cannot engage in a no holds [barred] defense and then complain the opposing counsel spent too much time responding.”

“The defense [of the state’s marriage ban] mounted was undertaken with as much skill and passion as was provided in any state, but the natural and predictable consequence of mounting such a vigorous defense was that it required opposing counsel to expend considerable time addressing the issues raised,” he wrote in his order.

These costs have prompted some intergovernmental feuds. Tulsa officials, for instance, have tried and failed to get the state to help pay.

“It’s unfair for Tulsa County to bear the brunt of the legal costs in this case just because Tulsa County was the place in which the action arose,” Luton said in an interview. “The other 76 counties in Oklahoma, by luck of the draw, are not going to assume any of that responsibility, nor is the state. Our court clerk swore an oath to uphold the laws of Oklahoma and was sued because of the will of the people of the state and what their definition of what marriage was. If our clerk had not done that, she could have been subjected to removal from office for not abiding by the laws.”

Disputing the bill could enlarge it for South Dakota, a state that continued to fight same-sex marriage even after the Supreme Court ruled in June. Newville said the tab is about \$300,000 — and the meter is still running.

“They’re doubling down to try to get out of paying the fees,” said Newville, who settled with North Dakota for far less because that case didn’t make it far in the courts before the matter was taken up by the Supreme Court. “That’s only going to add to the final cost.”