



The courthouse is closed (to you)

BY EJ HURST II, CONTRIBUTOR - 08/19/14 07:30 AM EDT

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American children are taught that everyone can have their day in court, and justice will prevail. The cold reality, though, is that an average American citizen often cannot afford to challenge other citizens — never mind corporations — in U.S. courts.

The first hurdle is the filing fee. In May 2013, another "administrative fee" of \$50 bumped the filing cost of a U.S. district court lawsuit to \$400. Appeals to a federal circuit court cost \$505 to file. But before one can file a complaint, someone has to draft it.

Citizens have the right to proceed *pro se*, of course, meaning that they act as their own attorneys. Even seasoned lawyers are often loath to represent themselves in court, though, lest they have that proverbial fool for a client. For an average citizen, the Rules of Court, the art of pleading and such a formal, high-stakes setting, against one or many more seasoned litigation attorneys, can be overwhelming.

Retaining a lawyer can instantly make the case unaffordable, though. Some lawyers, especially in established firms, will take cases on a contingency basis: No fee is owed unless the plaintiff recovers something. But a contingency fee is often one-third or more of any recovery, and it sometimes does not include the case's separate "costs." Unless the other side is ordered to pay costs and attorneys' fees, something neither guaranteed nor even permitted in certain cases, plaintiffs might see half or less of what the other side is ordered to pay. And if the case is dismissed, or lost at trial, the plaintiff might even be ordered to pay the other side's fees and costs.

Large and mid-sized firms are more likely to take contingency fee cases if they are substantial enough, but they also often charge more than smaller practices and are picky about which cases they take. On the other hand, many small firms and solo lawyers will not (cannot) take cases on a contingency basis. In that event, the plaintiff will need to pay something up front, often \$10,000 or more for federal cases.

These fees may seem, and in some cases might be, exorbitant. But they account for what can become a large number of hours sorting out complex facts and law, and preparing to argue against another (team of) lawyers who will do everything possible to kill the plaintiff's claim for procedural defects and, barring that, at trial.

After paying for lawyers and the filing fee, plaintiffs must next plan for the costs of litigation. Pages upon pages of documents will have to be traded with the other side, sometimes on paper and sometimes electronically. However the records are reproduced, production will cost not only the

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materials, but also the time it takes someone to find, organize and duplicate the records.

There will also be fact witnesses, which means pretrial depositions. That means lawyer time spent preparing the witnesses. That also means paying a court reporter to transcribe the questioning, then paying for a copy of the transcript. There is often a daily fee that must be paid to witnesses, and the costs to serve them with notice that they will be deposed (which can sometimes be handled by mail, but sometimes requires an officer to serve the notice in person). If either witness or plaintiff's counsel (or plaintiff) has to travel, there will be hotel and meal and transportation expenses.

Expert witnesses are also essential to many cases, particularly medical experts if some sort of personal injury is alleged. And medical experts can be particularly expensive. Under the cloak of "tort reform," many state laws — which can affect federal court requirements — demand that medical experts from the same field certify that their colleague's work fell below community standards. This requirement stands no matter how particular the defendant's specialty is. So in small communities, where there is only one such specialist (or even only one doctor), an out-of-town doctor will be needed.

Experts are not cheap, though. Doctors often charge \$500 an hour or more to review the case file, then might charge \$3,000 or more per day of testimony (both for pretrial depositions, and then again at trial). To bring a medical malpractice case against the U.S. government, for example, a plaintiff can easily have to pay \$10,000 just to the physician expert, or the other costs won't even matter.

Before ever getting a day in federal court, a plaintiff may need to come up with \$25,000 or much, much more. This is no problem for large corporations, whose team of white-shoe lawyers are a cost of doing business that can be written off the corporate tax return or passed on to consumers. But to Jane and Joe Average American, it can mean that the courthouse doors are closed to you.

Hurst is an attorney based in Durham, N.C. He practices in federal courts across the country, concentrating in criminal sentencing, appeals and habeas corpus matters.

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