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OF ETHICS AND ECONOMICS: CONTINGENT PERCENTAGE FEES FOR LEGAL SERVICES

I. INTRODUCTION

MEMBERS OF THE BAR,¹ the Bench,² Academia,³ and the public have been debating the ethical vices and virtues of the “contingent fee” for legal services continuously for the past several decades.⁴ Since 1970,⁵ economic analysis has proved to be a useful tool in further evaluating traits of the “contingent percentage fee.”⁶ This comment will analyze the arguments for and against the contingent percentage fee, explore alternatives to the present system, and suggest improvements on that system.

Under the contingent percentage fee arrangement, the attorney agrees to provide legal services to a client with either no outlay or a nominal outlay by the client. The attorney is entitled to an agreed upon percentage of the recovery if the client prevails. If the client does not prevail, the attorney receives no compensation.⁷

The contingent percentage fee “is the dominant system in the United States by which legal services are financed by those seeking to assert a claim.”⁸ The contingent fee is practically the exclusive method of compensating attorneys

¹Corby, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIGATION 27 (1976); Roy, *Contingent Fee Contract — Its Promises and Problems*, 26 LA. B.J. 209 (1979).

²Grady, *Some Ethical Questions about Percentage Fees*, LITIGATION 20 (1976).

³Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Kraut, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15 (1972); Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal — Injury Litigation*, 22 STAN. L. REV. 1125 (1970); Note, *The Contingent Fee: Disciplinary Rule, Ethical Consideration, or Free Competition?*, 1979 UTAH L. REV. 547.

⁴Older sources include Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587 (1940); Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability*, 47 IOWA L. REV. 942 (1962). See generally, F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964).

⁵Schwartz & Mitchell, *supra* note 3.

⁶This comment will refer to the “contingent percentage fee” to distinguish it from other types of contingent fees, such as the hourly contingent fee which will be discussed at a later point. One writer suggests that the “contingent fee” (as it is commonly called) is not really contingent at all and thus the fee is really a “percentage fee” disguised by a misnomer. Grady, *supra* note 2, at 24.

⁷See Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 8 n.41 (1961). See generally 7A C.J.S. *Attorney & Client* § 313 (1980).

⁸F. MACKINNON, *supra* note 4, at 4.

in personal injury cases.⁹ Contingent percentage fees are also frequently employed in antitrust litigation, class suits, minority stockholder suits, worker's compensation practice, tax practice, and will settlements.¹⁰ While the Ethical Considerations of the Code of Professional Responsibility authorize use of the contingent fee in most civil cases,¹¹ contingent fees are generally considered unethical when applied to criminal cases,¹² divorce cases,¹³ and arrangements for procuring or influencing legislative action.¹⁴ There remains questions as to the validity of defense contingent fee contracts.¹⁵ This comment will focus on contingent percentage fees for plaintiff's attorneys in personal injury litigation.

Although contingent fees are permitted in the United States, they are illegal in Great Britain and most other parts of the world.¹⁶ While British courts consider contingent fees champertous,¹⁷ most American courts distinguish use of the contingent fee from champerty.¹⁸

⁹According to a study of the New York City court system:

A spot check of experienced plaintiffs' attorneys disclosed that the contingent fee arrangement is almost universal in personal injury cases. Of the 29 attorneys questioned, 26 had not accepted any noncontingent fee retainers in personal injury cases in 1958, and the remaining three handled cases on this basis only rarely. Of the total retainers accepted by the 29 attorneys in personal injury cases in 1958, 98.5% were on a contingent fee basis.

Franklin, Chanin & Mark, *supra* note 7, at 22 n.103.

¹⁰F. MACKINNON, *supra* note 4, at 25-28.

¹¹MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20, 5-7 (1979). See also MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5 (Final Draft 1982).

¹²MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20; DR 2-106.

¹³MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979) provides: "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (Final Draft 1982)

¹⁴F. MACKINNON, *supra* note 4, at 49. Administrative agency advocacy is governed by the same consideration as in other civil cases. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979).

¹⁵The debate over the ethics of defense contingent fee contracts is beyond the scope of this comment. For a treatment of this topic see Comment, *Toward a Valid Defense Contingent Fee Contract: A Comparative Analysis*, 67 IOWA L. REV. 350 (1982).

¹⁶AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNEL BASIC PROTECTION PLAN & AUTO ACCIDENT REPAIRATIONS, at 4 (1968). Contingent fees are illegal in Great Britain, France, Belgium, Italy, Germany and Switzerland. See also J. SWARTZ, LAWYER CONTINGENT FEE AGREEMENTS IN CANADA (1976). Canada's provinces and territories are divided on the legality of contingent fees. Statutes of Alberta, British Columbia, Manitoba, New Brunswick and Quebec permit contingent fees subject to various forms of review. The Northwest territories follow the Alberta Rules. Saskatchewan does not have a statute, but in *Speers v. Hagemeister*, 52 D.L.R. 3d 109 (1975), the court said that contingent fees are permissible provided they are not champertous and will be upheld if they are fair and reasonable. Contingent fees are unlawful in Ontario, Nova Scotia, Prince Edward Island and Newfoundland, which consider the contingent fee champertous. Swartz, *supra*, at 2-4.

¹⁷F. MACKINNON, *supra* note 4, at 36-38. The Doctrine of Champerty prohibits the agreement to carry on a suit in exchange for a promise of a share in the recovery. *Id.*

¹⁸Kraut, *supra* note 3, at 19-21.

The liberal treatment of the contingent fee by the courts in the majority of the United States jurisdiction has, in effect, altered the definition of common law champerty . . . Only when the contingent fee contract includes a restraint on settlement or is unconscionable according to standard contract principles will the courts declare the agreement champertous and void . . . The only vestige of the common law prohibition against champerty which still exists is the distinction that the courts now make in allowing the use of the contingent fee, that the fee be measured by the amount of the recovery and not by a contract to pay over to the attorney a share of the actual proceeds

Supporters of the contingent fee justify it on three basic grounds. The first ground is that it allows clients who are unable to pay a fixed fee the opportunity to economically afford, finance and obtain the services of a competent lawyer to prosecute their claims.¹⁹ However, personal injury plaintiffs who could afford to pay an attorney retainer almost always enter into a contingent percentage fee contract with their attorney.²⁰ Thus, the contingent percentage fee is not justified entirely on the basis of efficiently providing legal services to the poor.²¹ A second major justification of the percentage contingent fee is that it permits clients to spread their risks, that is, to avoid the risks of losing a suit and having to pay the attorney also.²²

II. PROBLEMS WITH THE CONTINGENT PERCENTAGE FEE

A. *Ethical violations associated with the contingent percentage fee*

The third alleged attraction of the percentage contingent fee is its apparent provision of an incentive for attorney zeal, aligning the attorney's economic interests with those of the client, giving the attorney "a direct incentive to work in the client's interest."²³ However, Schwartz and Mitchell²⁴ have shown through economic analysis that the contingent fee does not necessarily align the attorney's interest with those of the client or lead him to put the amount of time in on a case that would maximize the client's net return.²⁵

Another way in which the attorney's interest in the litigation potentially hurts the client is that often the attorney will deprive the client of the right to make her own decisions involving the matter, such as when to settle a claim.²⁶ The situation is analogous to joint ownership of the claim, with the lawyer acting as managing partner.²⁷ This is a violation of the ABA Code of Professional Responsibility, which provides that such decisions should be made by

¹⁹MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979).

²⁰F. MACKINNON, *supra* note 4, at 205. See *supra* note 9. See also M. BLOOM, THE TROUBLE WITH LAWYERS, 140-41 (1968); Note, *supra* note 3, at 550. However, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979), counsels: "Although a lawyer generally should decline to accept employment on a contingent basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer . . . to enter into a contingent fee contract in a civil case with any client who after being fully informed of all relevant factors, desires that arrangement." See generally Comment, *Are Contingent Fees Ethical Where Client is Able to Pay a Retainer*, 20 OHIO ST. L.J. 329 (1959).

²¹Note, *supra* note 3, at 550.

²²*Id.* See also Schwartz & Mitchell, *supra* note 3, at 1147-54.

²³Schwartz & Mitchell, *supra* note 3, at 1125; See also Comment, *Right to Zealous Counsel*, 79 DUKE L.J. 1291, 1293.

²⁴*Id.*

²⁵*Id.* "The lawyer's and the client's economic interests come into stark conflict. The lawyer who truly serves his client must penalize himself; the self-interested lawyer underworks." Clermont & Currivan, *supra* note 3, at 546.

²⁶F. MACKINNON, *supra* note 4, at 196.

²⁷*Id.*

the client.²⁸ Often an attorney will want to settle a case quickly in order to obtain a large fee for relatively little effort on his part, while the client would have a larger expected recovery if the attorney were to postpone settling the case and instead pursue the litigation. The converse is also true. An attorney may want to delay settlement in hopes of obtaining a greater recovery, or for other reasons.²⁹ The client, on the other hand, may be anxious to settle if she needs the money.³⁰

“Ambulance chasing” by attorneys is another abuse frequently attributed, at least in part, to the quest by attorneys for personal injury cases that will reap them high rewards in the form of contingent percentage fees.³¹ However, this effect depends on the degree to which the net return on contingent percentage fee cases is greater than the net return on other cases.³² A related alleged abuse is that an attorney who is not competent to handle a case will refuse to refer a percentage contingent fee case to another attorney.³³

Another concern is that the percentage contingent fee induces attorneys to clog court dockets with spurious claims and nuisance suits.³⁴ Additionally, a defendant’s attorney may cause a defendant to make small payments to a plaintiff in weak cases in order to give plaintiff’s attorney, an acquaintance, a fee.³⁵

A major problem with the contingent percentage fee is public resentment of,³⁶ and more specifically, client dissatisfaction with,³⁷ the arrangement. Indeed, “the client who loses his case is delighted to avoid the need for paying counsel. The client who wins obviously feels that he is bearing the burden for others

²⁸MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1979). This provision provides:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer . . . *Id.*

²⁹M. BLOOM, *supra* note 20, at 140. “A settlement offer may to one seem reasonable — to the other unreasonable. One may need money more desperately than the other . . . lawyers have been known to refuse to discuss settlement of a case — ‘until next year because, for tax reasons, I can’t afford another large fee this year.’ ”

³⁰Franklin, Chanin & Mark, *supra* note 7, at 30; Clermont & Currivan, *supra* note 3, at 575.

³¹F. MACKINNON, *supra* note 4, at 203.

³²*Id.*

³³Clermont & Currivan, *supra* note 3, at 574. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-107 (1979).

³⁴Clermont & Currivan, *supra* note 3, at 574. “The contingent percentage fee could encourage nuisance suits if the percentage is fixed high enough to overcome the lawyer’s ethical and economic reluctance. However, that problem stems from the percentage nature of the fee, not from its contingency.” *Id.* at 573, n.138.

³⁵Franklin, Chanin & Mark, *supra* note 7, at 14. “Although we can cite no formal empiric evidence in support of this proposition, informal conversations with members of both the insurance industry and the bar have indicated this.” *Id.* at 14 n.70.

³⁶Clermont & Currivan, *supra* note 3, at 574.

³⁷Brown, *Some Observations on Legal Fees*, 24 Sw. L.J. 565, 568 (1970).

whose cases were lost. After the victory the client also becomes convinced that the risks of obtaining a verdict and collecting the judgment were in fact minimal."³⁸ The existence of the contingent percentage fee imposes a Hobson's choice upon personal injury plaintiffs who can either relinquish attorney representation (and thus a good chance of recovery)³⁹ or "merely" relinquish the attorney's one third percentage of whatever the client is able to recover.⁴⁰ Although the ABA Code of Professional Responsibility suggests that the client should be advised of other fee arrangement alternatives,⁴¹ this is rarely done in practice.⁴²

B. *Economics of the contingent percentage fee*

The most significant problem with the contingent percentage fee, and a factor contributing to the ethical problems associated with the fee, is that the fee bears no reasonable relation to the time and effort an attorney devotes to a client's case.⁴³ The contingent percentage fee must give the attorney a higher return on those cases he wins than he would get from his usual hourly rate fee, because the contingent percent fee must compensate the attorney for the risk he takes (that he will lose that client's case) as well as for the legal services he performs.⁴⁴ Posner also suggests that the contingent fee compensates the lawyer for the loan of his services in the form of an interest rate. According to him, this interest rate⁴⁵ must be high because the risk of default is high. In reality, however, the attorney handling a personal injury case incurs little risk of default. Furthermore, interest on the loan of the lawyer's services is a relatively insignificant portion of the attorney's contingent percentage fee and does not justify a large discrepancy between the contingent percentage fee and the attorney's usual hourly rate.

³⁸*Id.*

³⁹An accident victim's chances of recovering on a claim increase when he hires an attorney. See Franklin, Chanin & Mark, *supra* note 7, at 13. Also representation by an attorney positively correlates with larger recoveries. *Id.* at 16. Nevertheless, the increment to the victim who retains an attorney is large enough so that even after the attorney's contingent percentage fee is deducted, the victim will usually net more than if he had handled the case himself. *Id.* at 30.

⁴⁰J. AUERBACH, *UNEQUAL JUSTICE* 50 (1976).

⁴¹MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979), provides: "Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of the case, to enter into a contingent fee contract in a civil case with any client who, *after being fully informed of all relevant factors, desires the arrangement.*" (Emphasis added).

⁴²Grady, *supra* note 2, at 25.

Many personal injury plaintiffs who could afford to pay a reasonable non-percentage fee, and would be happy to do so if the advantages of that alternative were explained to them, are never given the opportunity to do so. They are simply told that it is customary to handle these cases on a "contingent fee" basis, with the usual explanation that the lawyer will receive nothing in the event there is no recovery. Emphasis is usually placed on this "contingent" aspect of the arrangement rather than on the large percentage of the recovery the client is committing himself to pay. *Id.*

⁴³Grady, *supra* note 2, at 21.

⁴⁴R. POSNER, *ECONOMIC ANALYSIS OF LAW* 448-49 (1976).

⁴⁵*Id.* at 449.

Take, for example, an attorney who spends thirty hours on each of two personal injury cases, and on each of these cases the attorney has about an equal chance of prevailing (i.e., the risk incurred on each is the same). Assume further that the attorney gets a verdict for the first plaintiff-client of \$13,500, and a verdict for the second plaintiff-client of \$45,000. If the attorney charges the same thirty-three and one-third percent contingent fee on both cases, he will get \$4,500 on the first case and \$15,000 on the second case. His return on the first case is \$150 per hour, and on the second case \$500 per hour.⁴⁶ Assume also that the attorney normally charges seventy-five dollars per hour for the cases he takes on a fixed hourly rate basis, so that the \$150 per hour return on the first case would adequately compensate him for the risk of default. This is also assuming that because of the risk involved the \$150 per hour fee must be discounted by fifty percent to get the expected net return per hour. This fifty percent discount rate is probably an overestimate, as will be demonstrated later in this comment.

The \$500 per hour fee in the second case is clearly excessive since the attorney has done no additional work in the second case to account for the \$10,500 difference in the attorney's net recovery. The attorney has obtained a windfall at the cost of his client or perhaps the defendant(s).⁴⁷ This can hardly be attributed to an "interest rate."

One might question how representative the figures used in the above example are of reality — the number of hours spent on the typical case, the inflexible standard percentage contingent fee rate, the fixed hourly fee rate, and the amount of risk involved in the typical case. In fact, the figures used here are at least as favorable to the percentage contingent fee as some other authors suggest.

One judge estimates that it should take no more than thirty hours for an attorney to prepare and try a case to jury verdict.⁴⁸ Usually, however, cases are settled before they even reach the trial stage.⁴⁹ Additionally, a lawyer may represent multiple plaintiffs and charge each of them a contingent percentage fee although much of the work done is common to all the cases.⁵⁰ Furthermore, one study has shown that as cases proceed without settlement, plaintiffs' expected recovery decreases.⁵¹ All of these suggests that in order for the attorney's fee to bear a reasonable relation to the work the attorney puts into

⁴⁶See Grady, *supra* note 2, at 21.

⁴⁷Despite the fact that jury awards are not supposed to include attorneys' fees, Grady, *supra* note 2, at 26, some suggest that common knowledge of contingent percentage fee practice may cause juries, unconsciously or otherwise, to increase the amount of an award so as to account for the attorney's fee. F. MACKINNON, *supra* note 4, at 145-46. See also AMERICAN INSURANCE ASSOCIATION, *supra* note 16, at 4.

⁴⁸Grady, *supra* note 2, at 21.

⁴⁹*Id.* at 24-25; Franklin, Chanin & Mark, *supra* note 7, at 32.

⁵⁰Grady, *supra* note 2, at 21-22.

⁵¹Franklin, Chanin & Mark, *supra* note 7, at 17-20.

a case, the contingent percentage rate should vary with each case;⁵² but it does not. Attorneys tend to charge about the same rate on every case,⁵³ and refuse to take cases that would not be profitable under such a rate.⁵⁴

Furthermore, a plaintiff has little risk of not recovering enough to pay a reasonable attorney fee in most personal injury cases. Plaintiffs settle some cases before suit is ever filed; about ninety-eight percent of cases are settled prior to trial,⁵⁵ and plaintiffs obtain jury verdicts in their favor in most of the cases that get that far.⁵⁶ In many cases, there is not even a question as to the defendant's liability, and the only disputed issue is the amount of damages.⁵⁷ Although it is possible that the attorney takes a chance that his client's recovery might not cover his reasonable fee, the risk is much less than advocates of the contingent percentage fee would lead one to believe.⁵⁸

The contingent percentage fee has the advantage of shifting a client's risk of a negative recovery⁵⁹ to the attorney, and insuring that if the client does prevail, either by settlement or verdict, the client will be able to net at least a portion of that recovery after paying litigation costs and the attorney's fees.⁶⁰ However, clients have different preferences for risk.⁶¹ Poor clients may be risk-averse, as a negative recovery could prove devastating to them. Wealthier clients, on the other hand, may prefer to take their chances. Where the plaintiff-client is virtually assured a recovery that would provide for a reasonable attorney fee and suit expenses and still leave a substantial amount left over for the client, any fully knowledgeable client would be likely to choose the fixed hourly rate. Furthermore, the client is often dependent upon the attorney to evaluate the merits of the case and the probabilities of recovery (i.e., the risk involved).⁶² Too often this information, and alternatives to the contingent percentage fee, are not presented to the client.⁶³

⁵²Grady, *supra* note 2, at 26.

⁵³*Id.* at 22; F. MACKINNON, *supra* note 4, at 21-22.

⁵⁴Note, *supra* note 3, at 553. "Many attorneys take a case only if it seems profitable under their pre-arranged fee schedule."

⁵⁵Franklin, Chanin & Mark, *supra* note 7, at 32; Grady, *supra* note 4, at 21.

⁵⁶In the New York study, plaintiffs who retained lawyers obtained some recovery in ninety percent of their cases. Franklin, Chanin & Mark, *supra* note 7, at 32.

⁵⁷Grady, *supra* note 2, at 24.

⁵⁸"The risk factor in the fee presents the possibility for the lawyer to overcharge his client by overestimating the risk involved in the case." Note, *supra* note 3, at 553.

⁵⁹"Negative recovery" refers to where the client must pay attorney fees even though he or she has not prevailed in his or her claim.

⁶⁰A percentage fee can not exceed recovery, although it is possible that a fixed hourly rate fee or a contingent hourly rate fee could exceed recovery and thus encompass any and all damages plaintiff may obtain by prevailing in a suit. *Cf.* Clermont & Curriuan, *supra* note 3, at 578-79.

⁶¹Schwartz & Mitchell, *supra* note 3, at 1149-52.

⁶²Note, *supra* note 3, at 553.

⁶³*See id.*

It is clear, then, that there are serious problems inherent in the contingent percentage fee arrangement as it is currently being practiced in the United States. There are merits to it too however, namely providing personal injury victims who could not afford to pay an attorney a fixed hourly rate the opportunity to be represented by counsel and providing other clients with a way of minimizing their risks. Proponents of the contingent percentage fee warn that the fee cannot be abolished or regulated without impairing the ability of personal injury plaintiffs to finance attorneys' fees and limit their risks of negative recovery.⁶⁴ This contention is unsound since a better, more efficient system is possible. Alternatives should be examined.

III. ALTERNATIVES TO THE PRESENT SYSTEM: IMPROVING ON THE CONTINGENT PERCENTAGE FEE

There are basically five ways of changing the present system of contingent percentage fees: (1) by abolishing contingent fees altogether and restructuring the system for alternative financing of attorneys' fees;⁶⁵ (2) by maintaining the contingent percentage fee as the primary method of financing attorneys' fees but imposing statutory controls on the percentage rate the attorney charges his client;⁶⁶ (3) by maintaining the contingent percentage fee system but having increased judicial supervision of the fee charged;⁶⁷ (4) by changing the structure of the fee itself from a contingent percentage fee to a contingent hourly fee⁶⁸ or to a contingent combination percentage/hourly fee;⁶⁹ (5) by improving the ethical behavior of the attorneys.⁷⁰

As mentioned before,⁷¹ contingent fees of any kind are banned in Great Britain. Instead, the British system provides for recoupment.⁷² That is, the British courts require the losing party to reimburse the winning party's attorney's (and witness) fees.⁷³ This system, however, has many inherent problems.⁷⁴ The main problem is that this indemnity discourages litigation because the plaintiff bears a risk that he will lose the suit and not only have to pay his own attorney's

⁶⁴Corby, *supra* note 1, at 29; Roy, *supra* note 1, at 213.

⁶⁵See, e.g., Corby, *supra* note 1, at 30-32; F. MACKINNON, *supra* note 4, at 141-52.

⁶⁶See, e.g., N.J. Ct. R. 1:21-27. This rule was upheld in *American Trial Lawyers Association v. New Jersey Supreme Court*, 66 N.J. 258, 330 A.2d 350 (1974).

⁶⁷Corby, *supra* note 1, at 36.

⁶⁸Schwartz & Mitchell, *supra* note 3, at 1154.

⁶⁹Clermont & Currihan, *supra* note 3. This article proposes a new type of contingent fee calculated by the formula: $w h + x (s - w h)$ where w = hourly wage, h = hours worked, x = some percentage (e.g., 10%), and s = the amount of settlement or award. *Id.* at 547.

⁷⁰Note, *supra* note 3, at 558-65.

⁷¹*Supra* note 16.

⁷²Corby, *supra* note 1, at 30-32.

⁷³R. POSNER, *supra* note 44, at 450.

⁷⁴Corby, *supra* note 1, at 30-32; R. POSNER, *supra* note 44, at 450-53.

fees but the attorney's fees of the defendant(s) as well.⁷⁵ This is why the United States system generally provides that each party pays his own attorney.⁷⁶ An alternative method of fee shifting is a "one way" shifting scheme which permits prevailing plaintiffs to recover counsel fees, but denies such recovery to successful defendants.⁷⁷ This type of scheme, however, might encourage an undesirable volume of litigation.⁷⁸

Socialized practice sponsored by public funds creates the possibility of "overutilization of the legal process," and, as it is a radical departure from the current system, it is likely to be met with much resistance.⁷⁹ Similar solutions such as private pre-paid insurance plans and group legal services are not only feasible but are currently in use and growing in acceptance.⁸⁰ Their major drawback is that they cannot accommodate all potential plaintiffs.⁸¹ Additionally, an attorney providing services under these arrangements may be motivated to settle a case prematurely or not spend adequate time on the case.

In response to concerns about the contingent percentage fee, some states⁸² have implemented maximum fee schedules. These schedules have many disadvantages, however, including the possibility that a low fee ceiling might discourage attorneys from handling small yet meritorious claims.⁸³ While they are intended to eliminate the disproportionate fee an attorney might take from large recoveries,⁸⁴ in practice they tend to provide a floor, as well as a ceiling, on the percentage rate charged.⁸⁵ Furthermore, as demonstrated earlier,⁸⁶ it is impossible to establish a percentage that will give the attorney a reasonable yet not excessive fee in all cases.⁸⁷

⁷⁵R. POSNER, *supra* note 44, at 452.

⁷⁶F. MACKINNON, *supra* note 4, at 144. "The dominant view in the United States is . . . a belief that it is not in the public interest to hinder an impecuniary plaintiff from bringing a valid but difficult claim by making him run the risk of having to pay the attorney's fee of his opponent." Moreover, litigation outcomes are probably more predictable in Great Britain than in the United States because of British judges' rigid adherence to *stare decisis* and less frequent use of the jury. R. POSNER, *supra* note 44, at 452-53.

⁷⁷Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 653 n.8 (1982). See Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

⁷⁸This is because "the plaintiff finds this system most attractive — he never bears legal costs greater than under the other systems and may bear a lesser cost." Shavell, *supra* note 77, at 61. Thus, the expected value of the plaintiff's suit is greater under this system than under either the American or British systems. See *id.* at 60.

⁷⁹See Corby, *supra* note 1, at 32-34.

⁸⁰F. MACKINNON, *supra* note 4, at 149-52; Brown, *supra* note 37, at 168-69.

⁸¹Corby, *supra* note 1, at 33.

⁸²Notably New York and New Jersey. See Note, *supra* note 3, at 556.

⁸³Franklin, Chanin & Mark, *supra* note 7, at 35.

⁸⁴F. MACKINNON, *supra* note 4, at 184.

⁸⁵Franklin, Chanin & Mark, *supra* note 7, at 37. This type of regulation "may encourage lawyers to charge more than a reasonable contingent fee, out of the belief that since the fee is not above the maximum allowable, no one will complain." Note, *supra* note 3, at 557.

⁸⁶See *supra* note 52 and accompanying text.

⁸⁷Grady, *supra* note 2, at 52.

Supporters of the contingent percentage fee sometimes suggest that the way of dealing with ethical abuses by attorneys in overcharging clients is simply to increase judicial scrutiny on a case by case basis.⁸⁸ But the ABA Code of Professional Responsibility already proscribes excessive fees,⁸⁹ and clients presently can take attorneys to court when they question a fee. In reality, this is not much of a remedy for the client, since the client must retain another attorney and expend additional resources to bring a claim against an attorney.⁹⁰ Furthermore, often a client is not aware of his or her right to judicial review of the fairness of the fee,⁹¹ although this could be easily remedied by requiring the attorney charging a contingent fee to give the client notice of this right.⁹²

Since the major problem with the contingent percentage fee is its lack of a reasonable relation to the services performed by the attorney,⁹³ the best way to improve the present system is to restructure the way the contingent fee is calculated so as to provide the benefits⁹⁴ of a contingency, while cutting down on the problems of the contingent percentage fee.⁹⁵ To this end, a contingent hourly fee⁹⁶ appears to have the most reasonable relationship to the work performed by the attorney.⁹⁷ This fee would be the attorney's normal hourly rate plus a risk premium.⁹⁸ The client would only pay the fee in the event she prevailed, and the fee would be limited to the amount of recovery should the fee exceed recovery.⁹⁹ Where this risk premium is set to compensate the attorney for her risk of loss, which will usually be minimal,¹⁰⁰ the contingent hourly fee's discounted value would equal the attorney's return on cases taken at a fixed hourly rate, and thus the attorney would be indifferent to the number of hours worked on contingent hourly fee cases as opposed to fixed hourly fee cases.¹⁰¹ The attorney would not have an economic incentive to work the number of

⁸⁸Corby, *supra* note 1, at 35.

⁸⁹MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1979).

⁹⁰M. BLOOM, *supra* note 20, at 139; Grady, *supra* note 2, at 26-27.

⁹¹See Note, *supra* note 3, at 555-56.

⁹²*Id.*

⁹³*Supra*, note 43 and accompanying text.

⁹⁴Such as providing clients with a way to finance their attorney's fees and allow clients to shift risk to the attorney.

⁹⁵The ethical problems such as conflict of interest between attorney and client and the sometimes excessive fees which bear no relation to services rendered are two examples.

⁹⁶Schwartz & Mitchell, *supra* note 3, at 1154. This is actually the same thing as allowing clients to borrow against their claims to finance the attorney's fees. The attorney is in the best position to make the loan since he can best evaluate prospects for the case. *Id.*

⁹⁷Note that the only variables here are the amount of the usually charged hourly fixed rate, the hours worked, and the risk premium. Honesty with the client and ability to accurately evaluate the risk involved produces the same effect as charging a fixed hourly rate when adjusted for risk. *See id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰See notes 55-57 and accompanying text.

¹⁰¹This is assuming that the attorney accurately calculates the risk factor, which might be impossible in reality. Clermont & Curriuan, *supra* note 3, at 596. However, there is always a problem setting a risk factor with any type of contingent fee. The best that can be done is to try to instill in attorneys an ethical obligation to predict the risk factor as accurately as possible when setting the fee.

hours that would maximize her client's recovery.¹⁰² This is ideal, since as long as there is no economic disincentive (as with the current contingent percentage fee¹⁰³) to further the client's best interests, the attorney would be encouraged by ethical and other considerations to further those interests. Absent incentives to the contrary, it would seem that attorneys would want to get the best possible recovery for their clients in order to feed their own egos and reputations for success. At the same time, the attorney has a smaller incentive¹⁰⁴ to act unethically in hopes of getting a higher recovery for a client and thus himself than he does with a contingent percentage fee.¹⁰⁵ The contingent hourly fee provides clients with a feasible alternative for financing attorneys' fees and shifting risk (since the fee is contingent), while minimizing problems associated with the contingent percentage fee. However, one drawback of this fee is that it could conceivably encompass the client's entire recovery,¹⁰⁶ although the client would not have to pay the attorney additional monies if the fee exceeded the recovery.¹⁰⁷ This has the effect of shifting some risk back to the client. Clients do have different preferences for risk;¹⁰⁸ therefore, the contingent percentage fee and other fee arrangements¹⁰⁹ could possibly be left to the option of a fully informed client.¹¹⁰

Clermont and Currivan¹¹¹ have proposed a new type of contingent fee which is based on hourly as well as percentage variables.¹¹² The major problem with this fee formula is that it is still, though to a lesser degree than the pure contingent percentage fee, tied to the amount the plaintiff recovers.¹¹³ As a result, the fee formula has the effect of granting the attorney a higher net yield in some cases than in those cases taken on the fixed hourly rate basis. Consequently, the fee formula encourages unethical practices such as ambulance chasing and failing to refer clients to other attorneys,¹¹⁴ more than the contingent hourly fee does. The fee formula's advantage over the contingent hourly fee is that it may provide a strong incentive for attorney zeal. The fee formula is preferable to the presently-used contingent percent age fee, and should not be discounted as an alternative.¹¹⁵

¹⁰²*Id.*

¹⁰³See *supra* note 25 and accompanying text.

¹⁰⁴Of course, the attorney still has an economic incentive to recover an amount which will enable the client to pay some or all of the attorney's fee.

¹⁰⁵See *supra* notes 31 and 35 and accompanying text.

¹⁰⁶Schwartz & Mitchell, *supra* note 3, at 1154.

¹⁰⁷*Id.*

¹⁰⁸See *id.* at 1151.

¹⁰⁹Clermont & Currivan, *supra* note 3.

¹¹⁰Schwartz & Mitchell, *supra* note 3, at 1155.

¹¹¹Clermont & Currivan, *supra* note 3.

¹¹²See *supra* note 69.

¹¹³*Id.*

¹¹⁴See *supra* notes 31-35 and accompanying text.

¹¹⁵The major purpose of this comment is to show that there are viable alternatives to the contingent percentage fee.

In addition to restructuring the contingent fee, tightening ethical controls on attorneys' behavior is imperative.¹¹⁶ To this end, several reasonable suggestions have been made. An obvious method of imposing ethical obligations upon attorneys is through self-regulation by the Bar itself,¹¹⁷ and, more specifically, through an ethical code.¹¹⁸ However, in practice the ABA Code of Professional Responsibility fails to impose enough duties on attorneys who charge contingent fees,¹¹⁹ and the duties it does impose have been generally ignored by the Bar.¹²⁰

Attorneys should only set a contingent fee after some investigation of a case,¹²¹ since this provides a basis for judging the amount of risk involved. If the attorney discovers that there is virtually no question of liability, but only a query of damages,¹²² the amount of which definitely would cover a reasonable attorney retainer,¹²³ and leave the client a sizable net recovery, the attorney should not charge a contingent fee.¹²⁴ Furthermore, an ethical code should provide that an attorney should:

(1) explain to the client that a contingent fee is computed in such a way as to give the lawyer not only a reasonable fee but a premium to cover the risk that the final recovery will not be large enough to cover the lawyer's expenses and investment of time; (2) explain to the client how the particular fee was arrived at in his case, specifying the amount of time he expects to put in on the case, the total recovery he expects to achieve, the minimum recovery, if any, he expects, and the degree of risk involved; (3) estimate a fixed fee for his services and compare it with the contingent fee that he proposes; and (4) inform the client of the nature of the fiduciary relationship that exists between lawyer and client and the rights that inure to the client because of the relationship.¹²⁵

The Proposed Model Rules of Professional Conduct¹²⁶ have greatly improved on the Code of Professional Responsibility by requiring not only that the attorney should present the client with alternatives, but also that the attorney should enter into a written contingent fee agreement¹²⁷ with the client explain-

¹¹⁶See Clermont & Currivan, *supra* note 3, at 593 n.218.

¹¹⁷See Note, *supra* note 3, at 558-60.

¹¹⁸*Id.*

¹¹⁹*Id.* Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19, 2-20; DR 2-106 (1979).

¹²⁰Grady, *supra* note 2, at 26. "Many lawyers who handle personal injury cases are unaware of these considerations and have never considered informing the client that there is an alternative to a percentage fee arrangement. It is time they started doing so." *Id.* The way to remedy this problem is through continuing legal education and publicity of the Code provisions in widely read bar publications.

¹²¹Grady, *supra* note 2, at 26. Ordinarily the fee is set at the time the lawyer is retained. *Id.*

¹²²*Id.*

¹²³Otherwise the attorney is taking some risk and would be justified in charging a risk premium.

¹²⁴See *id.*

¹²⁵Note, *supra* note 3, at 559.

¹²⁶MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5 (Final Draft 1982).

¹²⁷*Id.* According to the comment to this rule, this is to reduce the possibility of a misunderstanding. *Id.*¹²

ing the method by which the fee is to be computed.¹²⁸ Further, the Model Rules require the attorney at the conclusion of the matter to "provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."¹²⁹ This is obviously a step in the right direction.

Additionally, an ethical code should impose a duty on the attorney to readjust an unreasonable fee in the case of faulty estimation.¹³⁰ While some attorneys do this now, it is not common practice.¹³¹

IV. CONCLUSION

The contingent percentage fee for legal services is not the best method to attain the policy goals of providing potential plaintiffs in personal injury suits with feasible ways of financing attorneys' fees and reducing their own risks of litigation. The better way to further these goals is through a contingent hourly fee to be employed only where there are real risks inherent in the case. At the very least each client should be presented with alternative methods of computing the attorney's fee. Furthermore, ethical refinements through Bar self-regulation would greatly enhance performance of attorneys.

One commentator¹³² suggests that modifications such as these will evolve through increased price competition among attorneys.¹³³ While this may be true, we must not wait for this to occur. Rather, attorneys and bar associations should begin implementing fee reform now.

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¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰Note, *supra* note 3, at 559.

¹³¹*Id.*

¹³²Grady, *supra* note 2, at 52.

¹³³Increased price competition among attorneys will result from (1) a glut of lawyers; (2) the elimination of minimum fee schedules; and (3) easing of restrictions on lawyer advertising. *Id.*

