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The Tobacco Litigation and Attorney's Fees

Daniel J. Capra

Lester Brickman
Benjamin N. Cardozo School of Law, brickman@yu.edu

Michael Ciresi

Barbara S. Gillers

Robert Montgomery

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Daniel J. Capra, Lester Brickman, Michael Ciresi, Barbara S. Gillers, and Robert Montgomery

PROF. CAPRA:[1] Welcome to the Philip D. Reed Chair Panel Discussion on Tobacco Litigation and Attorney's Fees. I have the honor of holding the Philip Reed Chair, and part of that is a working chair to get stellar people like this up here to talk to you.

As you all know, the tobacco industry has entered into multibillion-dollar judgments with the states.[2] I would like to provide a short factual background and then stand out of the way.

The litigation on behalf of the states was brought by private lawyers, as I am sure you are aware, working under contracts with the states calling for them to get a certain percentage of any recovery. Four states settled individually with the tobacco industry: Mississippi, Texas, Florida, and Minnesota.[3]

The Minnesota litigation came closest to judgment. The settlement in Minnesota came on, I believe, the morning of the day on which Michael Ciresi, who is on the panel, was to make closing arguments to the jury charging the tobacco industry with decades of fraud, antitrust violations, illegal marketing of cigarettes to children, and the like. That litigation also forced the tobacco industry to turn over hundreds of incriminating documents. The settlement in Minnesota was for $6.6 billion.[4] After the Minnesota case was settled, Mr. Ciresi agreed to nullify his contingent fee contract, which would have netted his firm $1.5 billion in fees—that is the report. Instead, he settled for a lesser fee to be paid by the tobacco industry defendants. A suit by an activist lawyer and a legislator in Minnesota was dismissed challenging that arrangement.[5]

The settlements for the other three individual states were for more than $32 billion, although there is apparently some dispute because it

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1. Philip D. Reed Professor of Law, Fordham University School of Law.

2. *See* Milo Geyelin, *States Agree to $206 Billion Tobacco Deal*, Wall St. J., Nov. 23, 1998, at B13; *see also* Bob Van Voris, *Questioning That $206B Tobacco Deal*, Nat'l L.J., Dec. 14, 1998, at A8 (describing attempts by a prominent anti-tobacco activist to delay the approval of a multi-billion dollar deal between the tobacco industry and forty-six state attorneys general).

3. *See* Daniel Wise, *State May Share in Settlement of Tobacco Case*, N.Y. L.J., Dec. 24, 1998, at 1.

4. *See Lawyers First to Get Paid: In the Minnesota Tobacco Case, the State Must Wait*, Nat'l L.J., June 15, 1998, at A13.

5. *See* Bob Van Voris, *That $10 Billion Fee: The New Tobacco Deal Will Generate the Largest Fee Ever—and It May Grow*, Nat'l L.J., Nov. 30, 1998, at A1.

might go up, according to a most-favored-nation clause, because the Minnesota judgment was more favorable per citizen in the state.[6]

The tobacco settlements with these three states called for an arbitration panel to determine the amount of fees to be awarded.[7] In December, that panel awarded around two dozen plaintiffs' attorneys in those three states $8.2 billion for their work, and that was about a quarter of the total settlement.[8] More than $3 billion of that amount was awarded to the Florida attorneys, to be paid out over a fairly long period, a similar proportion going to the plaintiffs' lawyers in Texas. Actually, in Texas that award was more than they would have received pursuant to their contract with the state.

One member of the arbitration panel, former Federal Judge Charles Renfrew—who was chosen by the tobacco industry for the panel, I might add—dissented from the award, arguing that the attorneys were entitled to about eight percent of the settlement, or about $2.5 billion.[9]

Finally, there is a settlement negotiated by the remaining forty-six states in the amount of $206 billion.[10] Most of the lawyers' fees will be determined in that litigation by basically the same arbitration process as was awarded in Texas, Florida, and Mississippi. The agreement also provides that lawyers may negotiate directly with the tobacco industry as long as they agree to waive all their rights under the contracts that they entered into with the states.[11] These negotiated fees, if they decide to take this route, are to be paid out within five years, capped at $1.25 billion.

With arbitration, if they choose to go that way, the payouts are limited to $500 million per year, but there is no limit on the maximum amount that a lawyer can recover, and it can be greater than the actual contracted-for fee. If the lawyers go through arbitration and it is less than the actual fee, my understanding is that they can then go to the states for the differential.

There has been some fallout from all of this large money rolling around. In Texas, a new Attorney General has announced an investigation into the fee payments of certain lawyers challenging their fees.[12] In Florida, as we will speak about tonight, some of the trial attorneys for the state objected when the state sold them out and basi-

6. *See* Paul Elias, *Judge, Now Arbitrator, Is in Thick of Tobacco Case*, Nat'l L.J., Jan. 11, 1999, at A6.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See* Geyelin, *supra* note 2.

11. *See id.*

12. *See* Susan Borreson, *New AG Starts Tobacco Probe*, Nat'l L.J., Feb. 1, 1999, at A4.

cally reneged on the contract and they were forced to go through the arbitration process.[13]

A final cautionary factor is that the Senate, considering a failed $516 billion national-tobacco-settlement proposal last year, actually appeared to accept a proposal to cap attorney's fees in that bill, but it did not pass.[14]

In light of all this activity and all this money, it seemed appropriate to hold a panel discussion and debate on the policies and professional responsibility issues of the attorneys' fees in tobacco litigation, as well as contingent fees generally. We have the privilege of having an outstanding panel—I cannot believe they are all here—to discuss these matters. I will introduce them in the order in which they will make opening statements. After the opening statements, we will have a more free-flowing discussion and take questions from the audience.

First, Lester Brickman is a Professor of Law at Cardozo Law School, where he teaches legal ethics and contracts. He has written extensively on the subject of attorneys' fees, including co-authoring a major book, entitled Rethinking Contingent Fees.[15] He has been a leading advocate of congressional regulation of attorneys' fees in tobacco litigation, and was and is heavily involved in the drafting of legislation in Congress that would impose caps on attorneys' fees.

At the other end of the table we have Bob Montgomery, a principal in the law firm of Montgomery & Larmoyeux in West Palm Beach, Florida, where he is a noted and very well-respected plaintiff's lawyer. He was the lead counsel for the State of Florida in the suit against the tobacco companies, which eventually resulted in a settlement of more than $11 billion.[16]

Michael Ciresi is a partner at Robins, Kaplan, Miller & Ciresi in Minneapolis. As stated, he was the lead trial attorney in the action brought by the State of Minnesota against the tobacco companies. He was also heavily involved in major litigation involving Honeywell, Arco, Ford, and the Dalkon Shield, and he served as chief counsel to the Government of India in the actions arising out of the industrial accident at Bhopal.

Barbara Gillers is counsel to Fried Frank Harris Shriver & Jacobson, practicing in the area of the law governing lawyers, and advising lawyers on regulatory matters. Before joining the firm, she practiced for nine years as the first Deputy Chief Counsel to the First Judicial Department Disciplinary Committee, where she handled a lot of complex litigation and prosecutions. She is also, as I know from personal knowledge, a respected authority on lawyers' ethics at the City Bar.

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13. *See* Joel S. Perwin, *Don't End Contingency Fee System*, Nat'l L.J., Aug. 31, 1998, at A20.

14. *See* S. Res. 2264, 104th Cong. § 519 (1998).

15. Lester Brickman et al., Rethinking Contingency Fees (1994).

16. *See* Mark F. Bernstein, *A Big Fat Target*, Wall St. J., Aug. 28, 1997, at A14.

With that, I would like to open up with Lester and his views.

PROF. BRICKMAN: Thank you.

I guess it is pretty clear from Dan's remarks why we are here. It is because of the fees generated by the settlements, the magnitude of those fees, which is literally beyond capture by mere words, or certainly any words that I could think of.

As Dan indicated, the fees are mostly being set by arbitration, and I conclude that they will amount to at least $15 billion over the next twenty-five years and will continue to accrue at the rate of $500 million a year thereafter for probably at least a half-century or more. I have suggested elsewhere that fifty years from now, as mankind travels to the outer reaches of the solar system, lawyers will still be clipping their annual $500 million-a-year coupons.[17]

Calling the fee-setting process, the dominant one in this area, "arbitration" I suggest is a bit of a stretch. In most instances, two of the three arbitrators were effectively controlled by the lawyers. Indeed, the fee arbitration process itself was set up to divert public attention from the contingency fee agreements that turned out to be wildly excessive. Given the fact that the arbitration process is simply a fig leaf to hide the real fee-setting process from public view, it should come as no surprise that there is virtually no acknowledgement in the settlement agreements of the role of rules of legal ethics.

Senate Minority Leader Tom Daschle, in criticizing a Senate amendment, which Dan referred to, to limit tobacco fees to even $4000 a hour as too stingy, said: "A lawyer is a legal business person."[18]

With all due respect to the Minority Leader and his position that "a deal is a deal," lawyers are not simply businesspeople. They are fiduciaries, and doubly so when they are representing the people of a state. Under the rules of legal ethics, promulgated partly as a justification for the legal profession's self-governance, fees cannot be "clearly excessive."[19] Indeed, that standard has now been superseded in most states by an even more rigorous standard: fees have to be "reasonable."[20]

Are these fees, which in many cases amount to effective hourly rates of return of tens of thousands—and even hundreds of thousands—of dollars an hour, reasonable? I think to ask the question is to answer it.

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17. *See* Lester Brickman, *Will Legal Ethics Go Up in Smoke?*, Wall St. J., June 16, 1998, at A18.

18. *Id.* (quoting Sen. Tom Daschle).

19. Model Code of Professional Responsibility DR 2-106(A) (1983).

20. Model Rules of Professional Conduct Rule 1.5 (1998); *see also* Mich. Rules of Professional Conduct Rule 1.5 (1998) (adapting the standard set forth in the Model Rules of Professional Conduct); Wyo. Rules of Professional Conduct Rule 1.5 (1998) ("A lawyer's fee shall be reasonable.").

Even more disturbing is the fact that no one in this process is even raising the ethics issue—not the trial lawyers certainly; not the attorneys general with whom they are in partnership; not the tobacco companies; not legal ethicists, the folks that write the legal ethics case books or draft the American Law Institute's Restatement of the Law Governing Lawyers;[21] and not even John Q. Citizen, who is really precluded from doing so.

What other arguments are raised in this question of fees?

Well, the "Junior Sultan of Brunei Club" also argues that the fees are justified by the risks that they undertook. Now, there is certainly some substance to this argument for some of the attorneys, though far less than meets the eye. Some of you may recall that there was significant documentary evidence in some cases obtained from the files of tobacco-industry lawyers that was quite incriminating, and which surfaced before this round of lawsuits began.

The lawyers who spearheaded the tobacco litigation effort sought to sign up attorneys general and, therefore, were privy to the disclosures with regard to their own degree of success in enlisting the attorneys general to their cause. This was of critical importance with regard to the risk issue, because the strategy employed to beat the tobacco companies was not a matter of law, or at least less a matter of law, than one derived from the protocols of war: mass your troops and overwhelm the tobacco companies by allying with enough state attorneys general to raise the financial threat to intolerable levels. Success in this political endeavor dramatically reduced the risks involved.

There is much more to the risk calculus than I can present in the course of this evening. I do think one anecdote is worth telling, which concerns the twenty-five percent contingency fee contract in Florida. The lawyer who secured the Florida Legislature's unknowing passage of a law to allow suit by the state against tobacco companies, which not only stripped the companies of their defenses but virtually declared the outcome in the case, stated that enactment of that legislation made success in the state's suit "a virtual slam-dunk."[22] That's what he said. I suggest that a twenty-five percent contingency fee in a virtual slam-dunk case is prototypically an excessive and unreasonable fee.

Lawyers also argue, and I presume we will hear some of these arguments tonight, that since their centimillion- and billion-dollar fees are being paid directly by the tobacco companies on top of, instead of in most cases out of, states' recoveries, it is free money, it's nobody's business. I do not think these arguments are availing either.

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21. Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 2, 1998); Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, 1996).

22. *20/20* (ABC television broadcast, Mar. 16, 1998) (quoting Fred Levin, Esq.).

To the tobacco companies, dollars are dollars, whether paid to states or paid to lawyers. So the real amount on the bargaining table was not the $246 billion that the states settled for, but a larger sum, including the amount to be paid to the attorneys. Had the states' attorneys general instead bargained for and obtained $20 billion more, that might have left a mere $5 billion for the lawyers. Stated simply, because dollars are fungible, the fees are coming out of the settlements.

Finally, in addition to the ethical violations, the policy implications of the alliances formed between states' attorneys general and the contingency fee lawyers strike me as being of great concern, and I suggest it should be of great concern to you as well.

First, consider the use of the awesome power of a state against an unpopular defendant—who is more unpopular than big tobacco?—solicited by contingency fee lawyers motivated by finding the keys to Ali Baba's cave. Normally, as a matter of policy, we do not allow the use of the power of government for self-enrichment, since such a power inevitably is abused. We do not allow judges or prosecutors to take a percentage of the award because we know how that will impact on their behavior.

Moreover, consider what Mr. Montgomery might have said in his closing argument to the jury in Florida—and please excuse the lack of eloquence: "Ladies and gentlemen of the jury, friends, citizens, taxpayers: Do you want to pay taxes to the State of Florida out of your hard-earned dollars, or do you want these demon tobacco companies to pay a big chunk so that you will have to pay less? Think about it. The choice is yours."

Second, in our system of government, public policymaking is largely consigned to state legislatures, which are in turn responsible to the electorate. This is the core of our republican form of government. The tobacco settlements, I suggest, undermine the fundamental structure of that governmental form. The settlements, in reality, are public contracts between the states and the tobacco companies that effectuate certain public policies regarding the advertising and sale of tobacco products, in some cases determine how the tobacco payments are to be spent, and in all cases violate state laws that require appropriations of state funds to be approved by the legislature.

This is public policy writ large. Indeed, these alliances are nothing less than a new source for the creation of public policy.

What happens when legislatures are urged to, but fail to, ban or burden the sale of tobacco—or, for that matter, guns or butter or beer? We know that big tobacco, as well as the gun industry and manufacturers and sellers of artery-clogging, brominated polysaturated foods and alcoholic beverages, have a great deal of political muscle. Should the courts step in through the litigation process and do what the legislatures refused to do?

According to a *New York Times* editorial recently, such a resort to litigation is justified because the legislature has not acted, when of course it should have, and "so far nothing else has worked."[23]

When self-interested groups, however, fail to convince voters of the merits of their position, and instead resort to the courts and obtain through that litigation process equivalent policy outcomes that affect all of us, they deny the electorate the political accountability that our representative form of government is intended to bestow. Alliances directed against disfavored deep pockets that conjoin the power of the state with the enormous capital base of the contingency fee bar display awesome—and indeed, I think, frightening—power, power that is being exercised outside of the ordinary machinery of representative government.

It is not the people's representatives who are making the critical choices; it is contingency fee lawyers acting for heretofore unimagined profits, states' attorneys general who do not run for election on the basis of the policy choices that are at stake here, and unelected judges, or if they are elected, who do not run for office on the basis of whether tobacco or guns or butter or beer should be regulated, or even banned.

I do not know how this power will be curbed, but I think it must be. I do know that, having been so successful with the first of these alliances, the contingency fee bar is already planning the next alliance with government for private gain. For me, that is a chilling prospect.

Thank you.

PROF. CAPRA: I have the sense that a gauntlet has been thrown down. I would like to ask Bob Montgomery to respond.

MR. MONTGOMERY: Dan, thank you very much.

You are not going to be tested on this, so just relax and I'm going to tell you a story. I got a phone call from the Governor's office—this was February of 1995—and it came from Fred Levin, a lawyer in Pensacola who was very friendly with the Governor. I went to school with the late Governor Lawton Chiles. Fred said to me, "Look, we are putting together a trial team and we're going to take on tobacco." He said, "Are you familiar with the statute?"[24] I said I really hadn't read the statute. He said, "Well, it was passed."

I said, "Fred, wait a minute. You want me to be a member of a team? You know, there are 800 cases that have been tried against tobacco and none of them have ever been won. And you are asking me to risk whatever it takes—you tell me"—which in my mind per-

23. Editorial, *Lawsuits Against Handguns*, N.Y. Times, Nov. 14, 1998, at A12.

24. *See* Medicaid Third-Party Liability Act, Fla. Stat. Ann. § 409.910 (West 1998 & Supp.) (stripping defendants of all "affirmative defenses normally available," including "assumption of risk").

sonally was over $1 million or $2 million—"to take on an industry that has never been taken on before, and then we are going to have a trial team? Tobacco has never lost a case." I said, "Are you out of your mind to call me and ask me?"

He said, "We want to bring this case in Palm Beach, Florida, and we have this statute."

I said, "Let me talk about the statute just for a second. You've got a legislature up there in Tallahassee that is owned by tobacco. But they ought not to feel bad because the other forty-nine states are owned by tobacco also, and they ought not to feel bad because Congress is owned by tobacco. So you know what is going to happen to that damn statute? It is going to get repealed. So we are going to go on for about a year, a year and a half, spend all this money, the statute is going to be repealed, and consequently I don't think—the Governor may veto it, or he may trade it off for managed care or something." I said, "Fred, thank you, but I'm going to take a bye on this one."

They couldn't put a team together, folks.

He called me back in another week or ten days and he said, "Let me ask you something. I talked to Lawton the other day and he says he really wants you to be the trial lawyer and lead counsel and he wants to try this case in Palm Beach County because we have an excellent judiciary down there, we have a wonderful Fourth District Court of Appeals. Would you do us a favor?"

That is the reason I took this case. I spent $800,000 of my own money.

Let me tell you the responsibility that goes along with being a trial lawyer. I am an individual lawyer; I'm not a class action lawyer. I have never handled a class action case in my life, don't want to. I am a tragedy lawyer. I handle baby-brain-damage cases. I take on corporate America. And you talk about the man on the street. The man on the street doesn't have a damn chance in that courtroom because they will out-spend you.

RJR had a memorandum at a conference they had, and the lawyer—it was Shook Hardy, I think it was—was asked, "How in the world do you win these cases?" He said, "Let me tell you something. I take a page out of Patton's book. It's not that we spend all of our money; we make the other son-of-a-bitch spend all of theirs, and that's how we win the lawsuits."

And that is how corporate America—I do not know if you have ever been involved in heavy, heavy catastrophic litigation or know anything about it. They paper you to death. They are the best lawyers that money can buy.

The judges that have been appointed, especially in the federal court, by the Republican Administration are very, very narrow. It is tough.

I have a saying around my office: "If it was easy, everybody would be doing it."

But let me tell you something. I turned this case down, but then we got into it. The first thing that happened, of course, is we had ten appeals. Five-hundred-million pieces of paper that tobacco went through, because they went through every Medicaid file—they had legions of people in Tallahassee. They wanted to take a deposition of every Medicaid patient, on which we ultimately had a hearing before the Fourth District Court of Appeals. They then took it to the Supreme Court of the State of Florida. By a four-to-three vote, the statute was held constitutional.[25]

It went back to the Legislature. The first thing the Legislature did was vote to repeal the statute.[26] The statute was repealed. It went to the Governor. The Governor vetoed it.[27] They had two lobbyists for every legislator in the State of Florida, and it missed being repealed and the veto overturned by one vote.

In the meantime, ladies and gentlemen, there were nine Florida law firms and two out-of-state law firms that took on tobacco.

On July 21, 1997, I went up to Tallahassee to have a conference with the Governor in order to prepare for his deposition. At that particular time, there was $6 billion on the table. Tobacco wanted to settle for $6 billion. That is six thousand million dollars. A billion is a thousand million dollars. There were six thousand million dollars on the table.

I took the Governor in the back room and I said, "Governor, there is a time for everything." We are rocking and rolling because we went to focus groups down there. In our focus groups, Professor, we couldn't win a damn thing. Why? Tobacco was a legal product. What is the state doing trying to put a legal business out of business? Number two, what's going to happen to the money? They get paid more taxes than the Medicaid payments. The state is going to get the money. Look at the lottery. It's supposed to be education. What did they do? They fiddled it and fooled it away. We couldn't win anything.

I want to tell you a true story of a focus group, Professor, because you weren't there: Ladies and gentlemen, some of you don't like Medicaid reimbursement because you say people shouldn't smoke, and they know the dangers of it. Let me give you a hypothetical question. You know that a mother who smokes is probably going to have a baby whose weight is going to be underweight and is going to be sick, and maybe the father has been an executive and lost their insurance

25. *See* Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996), *cert. denied*, 520 U.S. 1115 (1997).

26. *See* Claudia MacLachlan, *Recent Tobacco Rulings Give Both Sides the Jitters*, Nat'l L.J., June 12, 1995, at B1.

27. *See id.*

and the baby doesn't have any insurance. Are you telling me that you believe that that child should not receive medical care? Yeah, mother shouldn't smoke. That is the kind of focus groups, Professor, that we had.

Oh, it was a slam-dunk, all right. The only time that we began to turn was when we began to get these deadly memorandums about bringing children in, how they are going to get new smokers to take the place of those that they kill, 400,000. I could go on and on and on, but I don't want to because I want to stop at this point.

Let me tell you something. How in the hell, without the contingency fee from all the persons that I have represented and been able to put the money aside where I could take on insurance companies that spend dollar-for-dollar—every damn dollar they spend, I spend two dollars.

I took on Delta Air Lines and Flight 191[28] and tragedies that I've been involved in. The contingency fee allows me to take them on, and I am delighted to do so. If you take away the contingency fee, you are falling right in the hands of corporate America, the insurance companies. They don't give a damn about you, my friend; they give a damn about the bottom line. And the only thing between catastrophe and being a ward of the state is contingency fees for persons like Mike Ciresi and all the nine trial lawyers that worked with me, and the two outside law firms. That is the buffer. That is the protection that the consumer has. I am proud of it. I am proud of that contingency fee. If you ever take it away from me, you better duck, because you don't have a chance.

Thank you.

PROF. CAPRA: The next speaker is Mike Ciresi.

MR. CIRESI: I find myself in an unusual position tonight, the voice of reason. I am standing—I often say when I started trying lawsuits, I was about 6'5", and it has been a long, long time.

Henry Simpson was a great patriot who served three of our presidents, both Roosevelts and Harry Truman. A long time ago he said this about the legal profession:

> I came to understand and learn the noble history of the profession of the law. I came to realize that without a bar trained in the conditions of courage and loyalty, our constitutional theories of individual liberty would cease to be a reality. I learned of the experience of many countries possessing constitutions and bills of rights similar to our own whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and inde-

28. Flight 191 was a Delta Airlines jet that crashed in Texas en route from Fort Lauderdale to Los Angeles. *See* Robert D. McFadden, *Jetliner With 161 Crashes in Texas; At Least 122 Dead*, N.Y. Times, Aug. 3, 1985, at 1.

> pendence to establish those rights by a grave assertion of available remedies. So I came to feel that the American lawyer should regard herself or himself as a potential officer of her government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed. [29]

I hear nothing in this debate about the fees of the defense bar. I do not believe that every corporation sets out to injure and kill people; 99.9% of them do not. I have represented some of the great corporations of this country, and I am proud to have done so. I have also represented injured victims.

I know in this case that this industry sold a product, which when used as intended, kills. They knew it, and they knew it was addictive, and they intentionally and deliberately went after children. In this great city, the greatest city of our country, they sit on boards, they go to their churches and synagogues, they are respected members of the community, and every day they go to work. And eighty-two percent of the people who start smoking are younger than the age of eighteen—they do not dispute that—and sixty-seven percent are below the age of sixteen. And every day they get them, and they knew by their own documents that they intentionally went after them.

So I wondered, and I looked, and I said: "Isn't this an injustice? Shouldn't we use available remedies and go after this industry?" We did in Minnesota, and we did use available remedies. And they had the most powerful law firms in the country representing them, good law firms, outstanding lawyers. In our case, thirty law firms, 600 lawyers, being paid every single day at $500 an hour, $550 an hour, $450 an hour, whatever. Every month their bills went out. They said in court under oath that they spent over $100 million just producing the privileged documents in our case. RJR said it spent over $95 million producing its document index. Who did that money go to? In defending their right—and they have a right to have that type of defense. That is our system, and to the fiber of my being I would fight for them to have that right. But how are you going to take them on? Who is going to take them on?

And so, fortunately, ladies and gentlemen, our liberties as a people are intact because of the vigilance of the members of our legal profession. To be sure, these liberties are under constant and increased attack by those who presume to possess ultimate truth and are intolerant of those who disagree or who are different.

I suggest to you that we, together with all members of our society, must join together, join arms, and restore, nurture, and enhance *in-*

29. Henry L. Stimson, *Introduction* to Henry L. Stimson & McGeorge Bundy, On Active Service in Peace and War at xi, xxii (1947).

formed public debate. I do not think it is necessary in this debate to talk about "Junior Sultans of Brunei," to talk about "free money," to talk about the "keys of Ali Baba's cave." What does that inform? How does that help the debate? I do not know.

I do know this: over 400,000 lives are lost a year as a result of smoking;[30] one-sixth of the deaths in our country are caused by smoking, greater than the combined deaths of alcohol, suicide, homicide, AIDS, motor vehicles, cocaine, and heroin; I know that $50 billion in health-care costs in this country are caused by smoking.

So we took them on and we looked at thirty-three million documents. The rest of the states asked for the Minnesota select documents. We had over 200 motions, seven appeals to the Minnesota Supreme Court, or writs, two to the United States Supreme Court. We fought for the privileged documents. We would not settle. We stopped, together with others, the legislation that other states wanted to pass in Congress because it emasculated the FDA, it gave immunity to this industry, it prohibited people from joining together and bringing suit. We are proud of that.

And we are proud of the fee. The Professor talks about $4000 an hour. We didn't get $4000 an hour. Bob Montgomery has a seven-person law firm. Fortunately, I am in a 220-person law firm. We did not spend $800,000. We spent millions of dollars, tens of millions of dollars, in time and out-of-pocket costs.

When we took on the case back in 1994, it was the subject of an editorial in the *Star Tribune* saying that the basis upon which we took the lawsuit was questionable.[31] It was the subject of an article in *The Wall Street Journal*.[32] I do not recall any articles of Professor Brickman—or for that matter, anyone else—saying, "Hey, wait a minute. These are slam-dunk lawsuits. These people shouldn't be on a contingency."[33]

I didn't hear any legislature—and we were the second case to file. Mississippi filed two months before us.[34] They had one count of eq-

30. The American Cancer Society has estimated that smoking causes 419,000 deaths each year in the United States. *See* June Fletcher, *Home Front: A Smoke-Filled Room of One's Own*, Wall St. J., Dec. 4, 1998, at W1.

31. *See* Editorial, *Tobacco Lies: Skip and the Blues Fight Fraud*, Star Trib. (Minneapolis), Aug. 20, 1994, at 14A [hereinafter *Tobacco Lies*].

32. *See* Junda Woo, *Cigarette Makers May Face Class Action on Addiction*, Wall St. J., Dec. 5, 1994, at B12.

33. Editor's note: Professor Brickman did author two articles in the *Wall Street Journal* criticizing the contingency fee plan, however these did not appear until long after 1994. *See* Lester Brickman, *Want to Be a Billionaire? Sue a Tobacco Company*, Wall St. J., Dec. 30, 1998, at A11 (contending that large attorneys' fees in tobacco litigation is in fact decreasing the payout for the individual states suing the tobacco companies); Brickman, *supra* note 18, at A18 (arguing that higher attorneys' fees lead to more tort litigation and higher costs imposed on society).

34. *See* Milo Geyelin, *Mississippi Becomes First State to Settle Suit Against Big Tobacco Companies*, Wall St. J., July 7, 1997, at B8.

uity. We had antitrust, consumer product, undertaking of a special responsibility; we had a number of counts. It was a much broader case.

I didn't see one legislature, though, over all those years, never ever, until they thought there was going to be a settlement. And most states, keep in mind, jumped in late in the game. But I never saw one legislature, except California, say, "Wait a minute. Let's appropriate money for these lawsuits. Let's spend money on this. This is such a good deal."

So I think we should discuss the fees. I have feelings about those fees. Some may surprise you. But I think we ought to do it in an informed way, because we can agree to disagree, but let's do it without calling names and talk about what the real issues were in these cases and truly how difficult they were.

Thank you very much.

PROF. CAPRA: Now I would like to turn to Barbara Gillers for a professional responsibility perspective.

MS. GILLERS: I want to talk to you a little bit about the standards that we apply in deciding whether fees are unethical, and then maybe we can have that reasoned debate about whether these fees were unethical.

There are essentially two rules that apply. One is New York Disciplinary Rule 2-106, which says that lawyer's fees shall not be "excessive."[35] The other is ABA Model Rule of Professional Conduct 1.5, which says that lawyer's fees shall be "reasonable."[36]

It is very hard to give concrete meaning to those terms in a unique circumstance, and I think, as you have heard tonight, this is a unique circumstance. But you can make a reasoned and informed judgment about what we mean by either "clearly excessive" or "reasonable" by looking at the factors that the courts and the rules have identified as bases on which to decide: (1) the novelty and difficulty of the issues as they are presented when that the lawsuit is brought; (2) the extent to which other work is preempted by the fact that the lawyers take on the case involved; and (3) for contingent fees, the chance of success.

Now, I am ticking off these standards for you, but they are hard standards to apply. I think we can all begin to see that you can have a real debate about how these factors would apply in these circumstances.

Also measured will be the time and labor involved in the case. You have heard a lot about that.

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35. *See* New York Code of Professional Responsibility DR 2-106 (1990).
36. *See* Model Rules of Professional Conduct Rule 1.5 (1998).

The courts apply these factors and find fees reasonable that on their face, when you look at the number, might not look reasonable. I will give you an example.

In the early 1970s, Telex Corporation won a large antitrust judgment in the trial court.[37] It was reversed by the Tenth Circuit,[38] but an adverse judgment was upheld, threatening Telex with bankruptcy. Telex, as I am sure you all know, is a major corporation and the lawsuit was against IBM. Telex searched the country for a lawyer who could handle this case and win it for them because that is what they wanted to do.

They settled on Lasky. They said, in essence: "Will you do it?" He said, "Sure I'll do it, but I will do it on a contingency because I don't know whether and how far this case is going to go." They negotiated an agreement that involved a contingency fee and a floor. Lasky said, "I get a percentage of whatever you get," and then Lasky filed a certiorari petition with the Supreme Court.[39]

After the certiorari petition was filed, IBM came in and offered a settlement, and the case was settled, I think, for what they called "a wash," and Mr. Lasky sent a bill to Telex. His bill was for $1 million. Telex said, "We're not paying $1 million. All you did was write a certiorari petition. That didn't take you very much time."

Well, there was a lawsuit, and the court held that this was not a clearly excessive or unreasonable fee, that it was negotiated between two sophisticated parties, and that it was enforceable.[40]

Well, how long does it take to file a certiorari petition? At 200 hours, the fee would have been $5000 per hour. It could have been $10,000 or $20,000 an hour, if you calculate it all out. This is in early 1970s dollars, so you fast-forward to today and you see what kind of money we are talking about. The court said that is not an unreasonable fee.[41]

I dwell on that case for a moment as one in which the court will look at the factors that I have articulated and some other factors and make a judgment, under the circumstances, whether the fee that is charged and being collected is actually unreasonable or clearly excessive within the meaning of the Lawyers' Code of Ethics.

I want to pause for one more minute and ask the question: Why do we allow contingency fee cases? Well, you have heard some of the reasons here, and they are substantiated throughout the profession. There are people who cannot afford to pay lawyers, there are indus-

37. *See* Telex Corp. v. IBM, 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir. 1975).

38. *See* Telex Corp. v. IBM, 510 F.2d 894, 894 (10th Cir. 1975).

39. *See* Telex Corp. v. IBM, 423 U.S. 802 (1975) (dismissal of certiorari).

40. *See* Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir. 1979).

41. *See id.*

tries that will not be taken on, there are cases that will not be brought, unless we allow contingency fees.

The contingency fees can be judged by the factors that I have given you. They are not measured by hourly rates, nor should they be. They are a variation of what has long been called "value billing"; that is, you get in a sense what you pay for, and a contingency is a variation of that. It does not correspond to any particular hourly rate.

There is one final point that I wanted to raise to give some additional background. A major New Jersey law firm that brought one of the tobacco cases, and in 1993–94 they moved in front of the Federal District Court in New Jersey and said, "Let us out of this case. We can't afford it any more." They went through some of the things that you have heard tonight about the number of depositions that were taken, the number of appeals that were taken, the amount of money that it cost this firm. The District Court in New Jersey would not let the law firm out of that case. Why wouldn't it let the law firm out of that case? Because no one else would do it and the plaintiff needed the lawyer to continue.

In these cases there were significant risks, there was a real down side to the lawyers, and there is a real history which shows that these cases were not always slam-dunks and that lawyers were not always beating down the door for them at the time.

Just one more thing I want to tell you. Under the ethics rules, contingency fee arrangements are judged at the time that they are made, not in hindsight. So if you can say that the agreement was reasonable under the factors that I have articulated at the time that it was made, it does not then become unreasonable at the end of the day when the fees are very high. We can all debate about whether fees ought to be the number that they are, whether the money ought to go somewhere else. There are lots of good policy arguments to be made. But in terms of the ethics rule, the agreement is looked at at the time that the agreement is made.

PROF. CAPRA: Thank you, Barbara.

I would like to ask Professor Brickman two questions. One question is on your public funding issue. How do you respond to the argument that there weren't any legislatures that were willing to fund the litigation against tobacco?

The second question is to ask, in light of whatever response you want to make, what about the idea that the contracts between the lawyers and the states, or the contracts between, as Barbara referred to, sophisticated business people who knew what they were doing, how can you at the end of the day call that excessive?

PROF. BRICKMAN: Let me take the second issue first. The suggestion that because a state attorney general or a governor or a gover-

nor's representative is a lawyer, and indeed a public official, they are also a sophisticated user of a contingency fee service, I think is really amiss. Most of the state attorneys general had never before negotiated contingency fee contracts. This was certainly *sui generis*. I suggested that there were issues regarding the risk that the attorneys general were simply unaware of. The lawyers who began this process knew a good deal more than the people with whom they were negotiating.

I also suggest that there is a fiduciary responsibility when you are representing a state that is in addition to the kinds of responsibilities when you take on an individual client.

With regard to the ultimate question, which I addressed and you now raise again, if the legislature will not do it and it's a good idea, why not let the litigation system run it? And, of course, what we mean by the litigation system, by and large, at that point is the contingency fee system.

Well, I am suggesting that—not because of any like for tobacco, but simply as a matter of whether the end justifies the means—I think that in a democracy, in a republican form of government, you simply have to do what it takes to get the legislature to go your way. I think that is not out of the question. I certainly concede—it is not even a concession, it's a reality—that big tobacco owned many of the legislatures. But, you know, in Florida in days gone by, the Legislature was owned by people in small counties where the cows exceeded the residents. There are changes that need to be made, but I do not think the way to do it is to subvert the form of government we have, which is what I think has occurred here.

MR. MONTGOMERY: You talked about the legislature. Our statute that was passed, that gave us the right to sue tobacco—which was not new, by the way—if a third party, if somebody runs a stop sign or hurts someone that goes into Medicaid, from dollar one you have to pay Medicaid back.[42] That statute said we were entitled to thirty percent, passed by the legislature.

How do you explain the Federal Employers' Liability Act,[43] which provides for contingency fees for lawyers?[44] How do you explain the Federal Tort Claims Act,[45] which provides that a maximum of twenty-five percent of recovery can be awarded as attorneys' fees?[46] Congress passed that law and it never has been fiddled with. When I sue

42. *See* Fla. Stat. Ann. § 16.53 (West 1998).

43. 45 U.S.C. §§ 51–60 (1994).

44. Editor's note: The Act does not explicitly provide for contingency fees for lawyers. However, such fee arrangements are generally used in cases brought under the Act. *See* Thomas E. Baker, *Why Congress Should Repeal the Federal Employer's Liability Act of 1908*, 29 Harv. J. on Legis. 79, 107 (1992).

45. 28 U.S.C. §§ 1346(b), 2671–2680 (1994).

46. *See id.* § 2678.

the government on a baby-brain-damage case, the attorneys' fee is approved just like that. How do you explain the twenty-five percent under those circumstances when lawyers when they are sworn in do not take a vow of poverty, Professor?

PROF. BRICKMAN: Because those statutory examples of contingency fee-setting by the legislature involve individual litigations, they involve representing a tort claim in a traditional manner. These are *sui generis* representations, and the experience within the tort system does not extend over to what is a wholly different kind of—we will call it litigation, because in some sense it was, but I am suggesting it was something other than litigation as well.

The rules of ethics themselves really do not have a purchase on these kinds of fee arrangements. This kind of an action was simply not contemplated by the drafters of the rules. This truly is *sui generis*.

MR. MONTGOMERY: Not so. Our statute in Florida itself passed to the extent that we could have market share, to the extent that the attorneys would be entitled to thirty percent.[47] Now, how do you explain that? How do you explain that this is unethical?

How do you explain that when you are dealing with a sophisticated chief legal officer of the state who runs an office with a hundred lawyers, the governor of the state, the attorneys general throughout the other states that made these? How do you explain that, Professor? That it's just not right? Is that what you are saying? That's no answer.

PROF. BRICKMAN: Well, you know the judge in Palm Beach County said it wasn't right.[48]

MR. MONTGOMERY: Yes, and he was reversed. The Fourth District Court of Appeals said he didn't know what he was talking about.[49] They had had no hearing whatsoever. So let's not mislead these folks here.

PROF. BRICKMAN: He was reversed on the grounds that that was not the issue before him, not on the basis of reasonableness. I will grant you I was not there. I was quoting Fred Levin, as you did, and he was there, and he was the one who said, "This is a slam-dunk."

MR. MONTGOMERY: Fred Levin had nothing to do with the trial in this case, and you know that as well as I do.

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47. *See* Fla. Stat. Ann. § 16.53.

48. *See* State v. American Tobacco Co., No. CL95-1466 (Fla. Cir. Ct. Nov. 21, 1997), *rev'd on other grounds sub. nom.* Kerrigan, Estess, Rankin & McLeod v. State, No. 97-4008, 1998 WL 246325 (Fla. Dist. Ct. App. May 18, 1998).

49. *See* Kerrigan, Estess, Rankin & McLeod v. State, No. 97-4008, 1998 WL 246325 (Fla. Dist. Ct. App. May 18, 1998).

PROF. CAPRA: Maybe Mike would like to comment.

MR. CIRESI: Let me address a couple of the points that were raised. I think Barbara has put the issue in context.

Let's deal first with an assertion you made that the chief legal officer of a state is an incompetent, essentially.

PROF. CAPRA: I am not sure he meant it exactly that way.

MR. CIRESI: But that is basically what he said, that they do not have any experience in these contingent fee contracts and they really did not know what they were doing.

Well, the chief legal officer of the State of Minnesota has a staff of 220 lawyers. The Attorney General's office had a history—not just with Attorney General Humphrey, but with both Republican and Democratic attorneys general previous to him—of entering into contingent fee contracts with lawyers. So they had experience in that. The case law in Minnesota provided for contingent fee contracts when a lawyer represented a government entity.

So I think it is a rather—and I don't mean to use this in the pejorative sense, but it sort of comes sometimes with academia—it is sort of an arrogant assumption to suggest that these attorneys general did not have the legal maturity or judgment to enter into these contracts.

In Minnesota, our contract was filed with the Secretary of State in 1994.[50] It was the subject, as I said, of an editorial in the *Star Tribune*, which laid it out.[51] Every legislator knew about it. In fact, what the legislators were saying then was, "I'm sure glad Humphrey took this one on contingency." So it wasn't as if people did not know what was going on.

You talk about whether the fees were unreasonable or not and boards of professional responsibility. I had, as a result of this suit, the first ethics complaint ever filed against me in my twenty-eight years as a lawyer. It was filed by two Republicans. They solicited a lawsuit on the floor of the Republican Convention in Minnesota, literally, and this was a party that had a platform against the institution of frivolous lawsuits. So they filed an ethics complaint against the firm.

The Board of Professional Responsibility in Minnesota said, "You can't file it against a firm, so we'll just name Ciresi." So they inserted my name in. They then dismissed it. I would suggest you read that, Professor, because they addressed some of the issues that you are raising. They dismissed it summarily. There was then an appeal from that to the Board as a whole, and that was also dismissed.

The lawsuit that was brought by those individuals—and they did this during the gubernatorial race—was dismissed by the judge, who

50. *See Tobacco Lies*, *supra* note 31.
51. *See id.*

said that it was frivolous, without merit under any theory of the law, and he awarded sanctions against them for bringing the lawsuit.

So I think you have to take a look at two issues here. One is, did the attorneys general have the authority in a given state to enter into these contracts? And then, in each individual state, take a look at the fees and what was done and say, "Are those reasonable or not?" rather than making blanket statements, such as you make, about the attorneys general of the United States.

PROF. CAPRA: Let me ask you this, Mike. In that respect, in your view of what has been going on, especially with what will still be going on, is there some unreasonableness out there? Are lawyers asking for too much?

MR. CIRESI: Well, of course some will ask for too much, and some did. I am not arguing that point.

PROF. BRICKMAN: They got it.

MR. CIRESI: Just a minute. What we did is we did a simple thing: we tore up our contract with the state and we negotiated with these lawyers for the industry. Now, you are wrong when you say it is all part of a pot—well, in a way you are wrong and in a way you are not. The fact is the State of Minnesota got much more than their damages, much more than we put into evidence. It was only after that that we negotiated attorneys' fees directly with the lawyers who were representing the industry. So that was an arm's-length transaction, okay? And these fees were known by everyone.

Now, we put in a tremendous amount of time. We were one firm. The only state in the Union that had one law firm representing it was Minnesota. We felt that we shouldn't get $1.5 billion. I will be glad to take it from the state if they want to give it to us, but we felt that was too much in light of the result and in light of everything else. Although we were entitled to it by contract, and we were, we decided not to do that.

What we said was, "You can judge what we have done. It is out there in the public record. Here are our fees. If somebody else did more than us, God bless them, they can get more; but if they did less, they ought to get less." Now, I think there are a lot of lawyers out there who did some very good work. There are some who didn't do squat, so they shouldn't get anything. But judge it on a state-by-state and case-by-case basis.

As a result of our settlement, which was two times per capita what they got in Texas or Florida, twenty percent more than they got in Mississippi, they put in most-favored-nation clauses, which gave us—

MR. MONTGOMERY: $1.7 billion because of the actions of Mike in Minnesota, under what I call the "mighty fine nation clause."

MR. CIRESI: You're right, the most-favored-nation clause. Florida got $1.7 billion, Texas got another $2.2 billion, and Mississippi got another $600 million.[52] I didn't ask for any attorneys' fees from those states, but if they want to give us some, that's fine. I don't suggest anybody is going to appropriate any in those legislatures.

But the fact is we must look, I think, at each and every individual state and say, "What was done by the lawyers?" Let them stand up and say what they did and let it be judged, rather than making blanket statements, such as you have been wont to make, Professor, both in your writings and in your statements here today. I think then, and only then, can you judge it against the criteria that Barbara has set forth, because those are the correct criteria to judge these issues.

MR. MONTGOMERY: Let me just make one other observation very quickly.

PROF. CAPRA: Very quickly, and then let's go to Barbara and let her respond.

MR. MONTGOMERY: Not one time during the whole course did tobacco nor the State of Florida ever come to me or any member of the team and say, "Let's negotiate this fee. This is twenty-five percent under your contract, a deal's a deal, blah, blah, but let's sit down as reasonable people and let's negotiate this fee." It never happened. Tobacco in its arrogance, and the state in its arrogance, said, "You shall go to arbitration. If you want any money, fine." The Supreme Court of the State of Florida said, "You have a tight contract, great contract. Sue the state, get a judgment, and go have the legislature appropriate the money," which would never, never happen.

So no negotiations whatsoever. They threw the gauntlet down and went to arbitration and got twenty-six percent, as opposed to twenty-five percent under that contract, and I am happy to take my share of it.

PROF. CAPRA: Barbara?

MS. GILLERS: I want to say two things in response to some of the things that have been said.

The first is I feel very close to academics, Professor Brickman, but I did want to put in an independent plug for government lawyers. Having served in the Justice Department and litigated both for and against

52. *See* Scott Gold, *State, Tobacco Negotiating $1.7 Billion Settlement Boost*, Sun Sentinel (Ft. Lauderdale), July 20, 1998, at 1B.

the government, I think that there are many very sophisticated lawyers in government who are as able as any general counsel or big-firm lawyer to negotiate a contract. So I disagree with you insofar as you say that the government lawyers were not in the position to negotiate these contracts.

Forgive me, but I want to make one other point, which is unrelated to that but arises out of some of the discussion, and that is that one of the impetuses for the contingency fee arrangements is that the lawyers were able to serve as private attorneys general and serve the public interest. And so, while I do not think that it is incumbent upon lawyers because of the ethics rules to do what I am going to suggest, I think that it is part of the lawyers' public purpose, a sort of moral calling for lawyers, or a professional calling, to give back something in appropriate cases if the fees are too high. I don't say they need to or they have to or that the ethics rules require it, but that is a matter of good judgment, that it may be that some lawyers want to.

I know, Mike, you have in fact given back some of these fees to charitable organizations, to health care for kids and to serve other kinds of public purposes.

PROF. CAPRA: Lester?

PROF. BRICKMAN: First, my comments regarding the degree of sophistication and judgment of states' attorneys general is based on having read most of the contingency fee contracts and other kinds of contracts that were entered into, and in many cases they were anything but sophisticated.

MR. CIRESI: Which ones did you read?

PROF. BRICKMAN: I read about thirty-five, as I recall. I read yours too, and your comment about the $4000 an hour thing is utterly wrong. I won't use other words. And I think the fee statement that was filed in Minnesota, with the add-ons, which were just a top-down kind of a public policy ploy, simply didn't become you. I don't see why you just didn't put the fee out there and say "that's the fee," instead of trying to justify it mathematically with numbers that were obviously concocted.

MR. CIRESI: What numbers were concocted? Why do you make these statements?

PROF. BRICKMAN: I read your—

MR. CIRESI: What number was concocted? Tell me what number was concocted. That is flat-out false.

PROF. BRICKMAN: The numbers were simply concocted as a way of getting to a certain number.

MR. CIRESI: No, they weren't.

PROF. BRICKMAN: Yes, they were, and it was reported in the press that way.[53]

MR. CIRESI: Who reported it in the press? Wait a minute. You made a statement. You said things were concocted and you said they were false and you have no basis for that.

PROF. BRICKMAN: Well, I read—-

MR. CIRESI: Just a minute. The industry negotiated that. Do you think they wanted those in there to use maybe as a standard against what others may get or may not get?

PROF. BRICKMAN: You negotiated a number and you concocted a formula to justify the number.

MR. CIRESI: That is flat-out false, sir. Were you there?

PROF. BRICKMAN: I was in Florida.

MR. CIRESI: So you were not there, correct?

PROF. BRICKMAN: I was not there.

MR. CIRESI: Did you talk to anyone who participated in those negotiations who told you that?

PROF. BRICKMAN: I read your—-

MR. CIRESI: Did you talk to anyone who participated in those negotiations who told you that?

PROF. BRICKMAN: Let me continue.

MR. CIRESI: You didn't, did you? So don't just make assertions, okay?

PROF. BRICKMAN: With regard to the states' attorneys general, given the amounts of money at stake, it was inevitable that in many of the states the selection process would be, let me call it, tainted by the volume of money that was going to be passing through. In Texas, for

53. *See* Pete Aronson, *Sealed Fee Pacts Raise Questions: Expert Calls Agreement in Minnesota Tobacco Case "Hocus Pocus"*, N.Y. L.J., Sept. 14, 1998, at A6.

example, one of the major attorneys in Texas who as not a part of the "Dream Team," stated publicly that the State Attorney General demanded a million dollars from him and from any attorney who would become the State's private attorney, and he refused.

Secrecy surrounded the hiring of the lawyers in most of the states by the attorneys general. In most states, the hiring was done on a pay-to-play basis.

MR. MONTGOMERY: Didn't you hear me say I turned this case down twice, Professor? Twice I had been begged by the Governor to take this case in the first place, and they had me up before—I went to Senator Criss up there in Tallahassee. The most damn foolish thing I ever heard in my life, talking about being tainted. Nobody wanted this case. Look at the people who turned it down, for God's sake.

PROF. BRICKMAN: Why did the Governor just absolutely rip up your contract?

MR. CIRESI: Professor, let's discuss the merits of this. You said "pay-to-play." What did you mean, and who are you asserting was a "pay-to-play?" I take that as an insult to all the lawyers who are out there. If you have specific facts relating to an individual, you ought to state that and not make blanket statements indicting all kinds of lawyers who did—

PROF. BRICKMAN: I am not.

MR. CIRESI: Well, you did, sir.

PROF. BRICKMAN: I am making blanket statements that many of the lawyers were selected on the basis of the campaign contributions that they made to the state attorneys general.

MR. CIRESI: Tell me who.

PROF. BRICKMAN: Give me the list of the lawyers that was published as part of the settlement agreement, the specific list that is listed in the agreement that says, "The following lawyers are going to receive moneys under this settlement."

MR. CIRESI: What are you talking about? Which settlement?

PROF. BRICKMAN: The $206 billion settlement with the states.[54]

PROF. CAPRA: That's the kind of assertion that I don't think we can litigate here, so I think we should probably move on.

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54. *See supra* note 2 and accompanying text.

MR. CIRESI: Right. And what we should talk about are the facts and any that the Professor has, because that is informed public debate. Let's talk about individual states where the Professor feels he has some information, other than now mentioning a $206 billion settlement. That was the forty-six states, I take it, you're talking about.

PROF. BRICKMAN: Yes.

MR. CIRESI: We had nothing to do with that.

MR. MONTGOMERY: When Lawton Chiles was running for Governor, $100 was the maximum you could give him. I don't know whether I even gave him $100 or not. I may have, though. So if $100 buys him, he sure was a cheap politician, I'll tell you that.

PROF. CAPRA: In light of that, I would like to open it up for audience comment.

MR. GEFFEN:[55] I have a question for the lawyers: when you are faced with settlement offers where you have these contingent fee arrangements, is there absolutely no force that kind of pulls you into accepting this offer of settlement, especially in light of all the effort you have put into it and the enormous figures, the multibillion-dollar figures? Can you tell me that there is absolutely no force that in some small matter pulls you a little bit more toward accepting the offer? What do you do to fight that? I mean, what is it that prepares you? How can you set your mind so that you kind of ignore that force?

MR. CIRESI: Number one, what guides you, what has to guide you under the Rules of Professional Responsibility and the honor of the profession, is your client's best interests. Now, some people snickered. I don't find that funny.

In June of 1997, all the states wanted to settle. Minnesota would have gotten $4.1 billion. We would have gotten a lot of money. This was in April, and I called Skip Humphrey out to Tyson's Corner where the discussions were going on. I said, "We're not going to do this." He said, "I agree, Mike," and he stood against all the attorneys general who he had worked with for over sixteen years, and he stood alone, because he always told me from the outset of that case, "This will be judged by its legal merits, not political considerations."

The settlement emasculated the FDA, it curtailed individual people's rights, it granted immunity to the industry, and the documents were not going to come out. And so, we went back and we said "no," and we went forward. For the first time, the Governor of Minnesota came out and said, "Take the $4.1 billion. These attorneys are going

55. William Geffen, J.D. Candidate, 2001, Fordham University School of Law.

to make billions." And Skip Humphrey said "no," and we said "no," and we tried our case, the only state that did try the case as long as we did. Bob's was the only other state where they even picked a jury.

And so we went through four months, and we fought for the privileged documents, which we finally received in April. It was on the day that I was going to give my closing argument when the case settled, and the client got $6.1 billion. That's over twenty-five years. It can be more. It can be less. But all the other factors—all the injunctive relief, all the non-economic relief—a settlement that Surgeon General Koop said was "one of the most significant health developments of the second half of the twentieth century." That's what he said about our settlement.

So what do you do? You act in the client's best interest. And if you lose your ass, that's the deal that you took at the beginning. If you can't do that as a lawyer, if you don't have the strength and the will and the courage to do that as a contingent fee lawyer, don't do it. Do lawyers abuse that? Yes, they do. And when they do—

MR. MONTGOMERY: Let me just comment on that. That is a super good question. All I can tell you is you have to do it by reputation. You know, sometimes you have to sit down with a client, and you have to sit down early in the game, and say, "Look, Ms. Jones, they are going to offer you as time goes by five or six million dollars, and I'm going to tell you now you and your husband think about that, because that's not enough money to take care of that child. Until such time as they get to seven-and-a-half, eight, nine million dollars—what I call the red zone—that's the time to talk." But I have to tell my clients to steel themselves from taking that.

And then, we have what we call a forty-thirty-twenty contingency fee contract approved by the Supreme Court. So you can see that the pressure gets really rough, because on the back end of it—forty percent of the first million, thirty percent of the second million, and twenty percent of everything thereafter, unless a larger fee is approved by the court. So, consequently, the attorneys' fees go down as you get more and more money.

But you have to do it by reputation. I think Mike put it correctly. You have to think about your client and you have to be true to yourself. Otherwise, you are a thief, and if you are going to be in the law for that purpose, then you are in the wrong business.

QUESTIONER: You said that in your case you acted admirably in that client's best interest. But I'm saying, as a general rule, how do lawyers as a profession stand up against that kind of thing?

MR. CIRESI: Very, very well, just as I believe that the profession as a whole on the defense side, which charges by the hour, 99.9% of the

lawyers are honorable. They don't over-bill, they don't pad their hours. Some will. Some will delay it, some will do unnecessary things. We are human beings, so you are going to have that. But the system works very well.

You know what the real key to that is? This American system of ours is the only system of jurisprudence like this in the world. I have spoken all over the world, and I see people from England, Australia, Korea, and Japan. They want to come here to get justice.

Now, the Professor will say that they want to come here to get the pot at the end of the rainbow. Not true. They can't even bring cases in other places. And now in England they are going toward a contingency fee system, and it is because the system does work.

Is it abused? Yes, there are occasions where it is, on both the plaintiff and defense side, and the full force of this profession ought to come down on either side when that happens.

MR. MONTGOMERY: A lot of people say that what we do is a lottery. Let me tell you something, folks. I've got some cases where you wouldn't want a ticket to that lottery. I can tell you that right now.

PROF. CAPRA: Professor Gillers.

PROF. GILLERS:[56] I'd like to ask the Professor a question because I know he thrives on adversity.

But first, up until the moment that this settled, how much lawyer time in dollars and firm-dollar disbursements had you invested in that case, roughly?

MR. CIRESI: Between $30 and $40 million. That's what I'll tell you.

PROF. GILLERS: Is that the gross number?

MR. CIRESI: Yes.

PROF. GILLERS: Okay.

MR. CIRESI: That's attorneys' time and out-of-pocket costs.

QUESTIONER: Okay. So, Lester, here is my question. I hear two issues being debated here. One is whether in a particular situation the amount of a fee is unreasonable, and that can be analyzed in various ways.

But the second issue is what I want to talk about, and that is whether the lawyers behaved unethically. We can all agree that a fee could turn out to be unreasonable although everybody acted properly.

56. Stephen M. Gillers, Professor of Law, New York University School of Law.

So my question is: If Mr. Ciresi's case had gone to the jury, and if the jury came in with a defense verdict and he was out $30 or $40 million, at that point would he have acted unethically, or did he act unethically only because his work produced the great success of the settlement he was able to achieve?

MR. CIRESI: That's a tough one, but thank you, Professor.

PROF. BRICKMAN: Let me respond to your first point. I will agree with you that the reasonableness of the fees is something that we have not addressed at all. Apart from my original remarks, those have not been addressed at all.

Second, with regard to whether the fee agreement was ethical at the time that it was entered into, you have a multiplicity of fee agreements. And so, I think, I can't answer that in a broad scope. I deal on a case-by-case basis.

Starting off with Mississippi, with Richard Scruggs, who began the ball rolling in terms of litigation, I think that was perhaps the most significant risk being taken of any of the lawyers because that was early on in the process.

MR. CIRESI: Because he was two months before us? If I had known that, I would have filed before him, and then you would have been agreeing with me.

PROF. BRICKMAN: I actually think that your fees, simply by a matter of measure, are some of the least unreasonable of the entire set of fees.

MR. CIRESI: That's called damning with faint praise.

PROF. BRICKMAN: What I was really going to do was apologize before for calling you a "Junior Sultan of Brunei." I'll take out the "junior."

PROF. CAPRA: Now, now. Why don't we answer Professor Gilder's question?

PROF. BRICKMAN: I think that in the cases even early on, where there were twenty-five percent contingency fees, they were probably unreasonable, given the fact that the lawyers did know so much more than the state attorneys general about what was going on, because this was not just a state-by-state effort. This was a coordinated effort; this was a political process that was going on, using the courts as a tool to compel the tobacco industry to settle, coupled with the fact that in the tobacco industry the CEOs had changed. The new CEOs who came on-board were people who had capital markets in mind, they were

looking at the stock price, and they realized that in order to get the shareholders' stock price up in the languishing tobacco stocks, they had to bring some kind of closure.

So the confluence, I think, created an enormous opportunity for the lawyers, and I think that certainly many of them, including Mr. Ciresi, deserve a substantial fee. The question is, what is that?

PROF. GILLERS: But you are not answering my question, Lester. The day that Mr. Ciresi signed his fee contract, which may have been before or after Mississippi lawyers did, on that day, given that contract which you have read, do you now have any reason—knowing that on that date he could not know whether he would lose or how much he might win, if anything—do you have any reason for saying that on that day that contract violated Mr. Ciresi's ethical obligations as a licensed lawyer of Minnesota?

PROF. BRICKMAN: I don't think so. I don't think so in Mr. Ciresi's case, although the fact that he traded in his twenty-five percent fee, which was payable to them over—what, twenty-five years—

MR. CIRESI: That's not true. And there's another problem here.

PROF. BRICKMAN: Let me just—

MR. CIRESI: Professor, please—

PROF. BRICKMAN: You traded in your contingency fee, which was payable over the period of time over which the income would be coming in from the tobacco companies—

MR. CIRESI: Well, that's another thing that is not true. You haven't answered the Professor's question.

PROF. BRICKMAN: —in exchange for a present value fee, I think, payable over two and a half years.

MR. CIRESI: What you have done is say "yes, but." Now let's talk—since we're on Minnesota, I know something about Minnesota, and I don't want to speak for other states unless I know something about them.

But you said there was a political process going on. How many suits were filed in 1994?

PROF. BRICKMAN: I believe one.

MR. CIRESI: One? You're wrong already.

How many were filed in 1995? How many states were in suit?

PROF. BRICKMAN: I can tell you by looking at the affidavit I filed in one of the state cases,[57] but I don't recall the numbers offhand.

MR. CIRESI: More than ten?

PROF. BRICKMAN: When?

MR. CIRESI: 1995.

PROF. BRICKMAN: No. I think less than ten.

MR. CIRESI: There were two in 1994.

PARTICIPANT: There were four.

MR. CIRESI: Just a minute. Mississippi and then Minnesota.

PARTICIPANT: West Virginia.

MR. CIRESI: West Virginia was filed in, I believe, early 1995, wasn't it?

PARTICIPANT: 1994.

MR. MONTGOMERY: Not suited.

MR. CIRESI: It was non-suited, okay.
How many states came in 1995? You don't know.

PROF. BRICKMAN: I don't recall. I do know, but I don't recall.

MR. CIRESI: How many in 1996? You said there was a political process.

PROF. BRICKMAN: The bulk of them came in—

MR. CIRESI: You see, that is the problem. You have made a statement here to these folks that at the time we filed suit—Mississippi, Minnesota—that there was a political process going on where all these state suits were being filed. It is not true.

PROF. BRICKMAN: There was a political process going on, in that the attorneys who were behind the litigation understood that the way to succeed was to get as many attorneys general as possible to bring cases.

MR. CIRESI: What attorneys? Who are you talking about?

57. *See* Texas v. American Tobacco Co., No. 5:96-CV-91 (E.D. Tex. May 11, 1998) (affidavit of Lester Brickman).

PROF. BRICKMAN: I am talking about Scruggs, Rice, Motley, and Umphrey. Those are the main ones.

PROF. CAPRA: Let's turn to any other questions from the audience.

Professor Zipursky?

PROF. ZIPURSKY:[58] I don't want to challenge the deservedness of the attorneys in the tobacco litigation, which was incredibly successful litigation that I think many people feel has great public benefits, and I don't want to challenge the quantity at all. All I want to ask is a general question—and it has only been mentioned once, I think—which is whether there is any reason to doubt that contingency fees generally—not in the tobacco litigation, but in the kind of litigation that we are now seeing in hand guns and tobacco—but contingency fees generally for what we might call public-health-tort litigation carry with them the sort of risks that, let's say, we see in criminal cases. I mean, there are categories of cases where we want the attorneys to have a special eye towards their responsibilities and the public good. The question is whether, in light of that, and in light of the fact that the state is not poor and could put up money up-front, we ought not have contingency fee arrangements for these kinds of cases?

PROF. CAPRA: Anyone want to take that?

MR. MONTGOMERY: It doesn't make any difference. I am sure Mike's answer would be the same. They couldn't get any money. The state in our contract set forth the fact that the state could not handle this litigation. The legislature would not appropriate any money. As I mentioned, the legislature, in Florida at least, is owned by the tobacco companies, the lobbyists are so powerful there. They aren't going to appropriate any money to sue.

The gun industry—as I say, I am not a class action lawyer—I have one case and that's it. I don't know what is going to happen there. I can't answer your question. I have no thoughts on that at all, one way or the other.

But I can tell you one thing so far as this tobacco litigation is concerned. The state could, number one, never have taken it on. The second thing is had they taken it on, then consequently the legislature would have put them out of business because they would not have appropriated any money. I will say this, insofar as what Professor Brickman said, they didn't have—I won't say talent—I'll say the background and the experience to handle a case of this magnitude. They just didn't have the personnel to handle that. Consequently, that is the best answer I can give.

58. Benjamin Zipursky, Associate Professor, Fordham University School of Law.

MR. CIRESI: Professor, you are talking about on a going-forward basis, as I understand your question. I'll tell you my bias, and that is that I would let the market work. These contracts, at least in our state, are public. The Attorney General is an elected official. I think if you are going to get the best lawyers to handle them, you'd better let the marketplace work. I don't know why you would want to fetter the state by restricting the availability of lawyers who they may be able to obtain to handle a very, very difficult case where the state doesn't have the resources.

Might there be abuses in that? If there are, I think in individual states you could handle it through the individual state process, as opposed to saying, "Let's have a legislation out there that says this." You are going to give a lot of people a blank check to do a lot of things.

PROF. BRICKMAN: Let me finish the response.

As you indicate, with the proliferation of suits now ongoing by states represented by contingency fee lawyers, or effectively the same kinds of suits as class actions, which are the precursors to state suits, as in the gun area, you have the policy issue I posed earlier, of whether conjoining the private-gain motive with public policymaking in this form is an acceptable process, if you think that the outcomes that you seek are only obtainable that way and cannot be obtained through the legislative process.

PROF. CAPRA: But is that any different from, for example, civil rights actions which have attorneys' fees awards? There is always going to be a profit motive for lawyers to do public policy.

PROF. BRICKMAN: Absolutely. But this is vastly different, I think, when you are talking about taking on an industry and in effect trying to outlaw it, not by the legislative route, but by litigation. I think that is a vastly different circumstance, and I think it raises the kind of public policy issues that deserve a great deal of airing. These are being sublimated in the face of billions of dollars, which just overwhelm the issue.

MR. CIRESI: I don't think the second part of your answer was accurate.

What is the public policy issue, assuming that you are enforcing the laws of the state? In other words, the law has already acted from a public policy statement and says that there is a viable cause of action here.

Now, if you are saying the public policy is whether the state can hire a private lawyer as an adjunct to the attorney general's staff, that is another issue of public policy. In Minnesota, the legislature has spoken on that issue: you can. I believe in the other states that there is

probably similar legislation. I don't know, but I can speak for Minnesota in that regard. So I'm not sure what your public policy issue is, Professor.

PROF. CAPRA: I think we have time for one more question.

MS. ETHAN: My name is Linda Ethan. In the interest of fairness on the question, I would like to tell you that I am the Deputy Attorney General for Litigation from Texas, and, as you know, we are investigating attorneys' fees.

The question I have is, would you comment on the ethics of the Texas lawyers who were awarded $3.3 billion in arbitration who are under the standstill agreement that was signed this last summer, standstill litigation with the Governor? In that litigation, they agreed that they would tell the State of Texas by early January whether or not they would take the arbitration fee or they would rely on the contingency contracts. The contingency fee contract would give them $2.3 billion, arbitration $3.3 billion, paid out at a different time, of course. They have refused to tell the state whether they are going to take arbitration or rely on the contingency fee contract, at least at this point. I would like comments on the ethics of not telling the client at this point what the lawyers want to do in that fee award.

MR. CIRESI: Assuming your stated facts to be true—and I know there are a lot of political shenanigans going on down in Texas in the new Attorney General's office, so I don't know about any of that—but just assuming the facts as you posited, they should tell them. I think they have a duty to tell the state. That is my feeling.

MR. MONTGOMERY: I agree. For example, when Florida settled, I was one of the lawyers as lead counsel that was dead set against settlement. We had been picking a jury for three weeks. As Shelly Schlesinger said, we were rocking and rolling. We told the Governor that.

But you have to follow the dictates of your client. We could never stand in the way of any settlement. But you have to make a full, fair disclosure to your client and always put—as Mike said previously, your client as number one. So I agree with you, based upon your hypothetical. If your hypothetical has basis in fact, then consequently of course they should tell them.

PROF. CAPRA: I'd like to thank you all for coming and thank our panelists. Thank you very much.