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## Attorney Fee Arrangements: The U.S. and Western Perspectives

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# Attorney Fee Arrangements: The U.S. and Western European Perspectives

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## I. INTRODUCTION

At the heart of the lawyerly function lies the fee. The fee fixes the economic relationship between the lawyer and the client, and it deeply influences the relationship between the lawyer and the justice system. The fee quite literally supports the lawyer in the professional role. The specific way in which the attorney fee is structured affects the attorney's obligations and decision-making at critical junctures in a legal representation. Thus the fee system by which attorneys are paid is an important and distinguishing feature of a legal system. Moreover, in the United States and in the western European countries, the fee system is almost invariably regulated by the state rather than simply left to the attorney and the client to contract. Thus it is possible to examine and compare the approaches that the U.S. and the western European legal systems take to the matter of attorney fees in private civil cases. Employing an analytical framework drawn from basic agency theory, we compare the likely effects of the dominant fee systems on the justice systems of the United States, the United Kingdom, and the civil law countries of western Europe. From this analysis, we argue that the various approaches to fee systems reflect specific differences among western legal cultures. In addition, we suggest the likely direction of changes in western fee systems.

The analysis should inform the on-going debates over attorney fee systems in the United States and in the United Kingdom.<sup>1</sup> Calls for reform

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<sup>1</sup> The United Kingdom has experienced the throes of civil justice reform throughout the 1990s, beginning with changes in fee structures, changes that will continue into the foreseeable future. See Part VII, Introduction; *Access to Justice with Conditional Fees: A Lord Chancellor's Department Consultative Paper* (Mar., 1998) <<http://www.open.gov.uk/lcd/consult/leg-aid/laconf.htm>> (visited on August 15, 1999) [hereinafter *Access to Justice*]

of the fee system,<sup>2</sup> and especially the contingency fee system,<sup>3</sup> are recurring features of tort reform proposals in the United States.<sup>4</sup> The United Kingdom is rapidly modifying its approach to paying civil attorneys,<sup>5</sup> and similar developments are likely to spread to the continent through competitive processes.<sup>6</sup> In this changing environment, it is important for policy makers to understand the advantages and disadvantages, as well as the intended and unintended consequences, of alternative arrangements. This analysis provides a basis for predicting these consequences.

Moreover, as the practice of law becomes increasingly global,<sup>7</sup> the fee arrangement will become not only an area that is less immediately tractable

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*With Conditional Fees*]; *KPMG Report to the Lord Chancellor on Conditional Fees*, (Apr., 1998) <<http://www.open.gov.uk/lcd/lcdseaftr.htm>> (visited on August 15, 1999) [hereinafter *KPMG Report*]; Neil Rose, *Council to Vote on Contingency Fees*, 95 LAW SOC'Y GAZETTE 16 (April 22, 1998); Lord Mackay, *Scheme Reducing Risks for Clients — The Introduction of the Conditional Fee in England and Wales Should Benefit Clients and Widen Access to Justice*, LAW SOC'Y GAZETTE, July 5, 1995, at 10. See generally, LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995); REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' (A.A.S. Zuckerman & Ross Cameron eds.) (1995) [hereinafter REFORM OF CIVIL PROCEDURE].

<sup>2</sup> See Henry J. Reske, *Tort Awards Increasing: Experts Peg Rise to Decreased Publicity About Tort Reform, Profit-Driven Corporate Decision-Making*, A.B.A. J., May 1996, at 26; Charles Silver, *Incoherence and Irrationality in the Law of Attorneys Fees*, 12 REV. LITIG. 301, 307-09 (1993); Gerald Walpin, *America's Failing Justice System: Can We Learn From Other Countries?* 41 N.Y.L. SCH. L. REV. 647, 648 (1997).

<sup>3</sup> See, e.g., Allison Aranson, *Contingent Fee Systems: Ridicule and Reform From an International Perspective*. 27 TEX. INT'L L.J. 755 (1992); Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173 (1995); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Practice*, 47 DEPAUL L. REV. 267 (1998); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?* 71 CHI-KENT L. REV. 625 (1995).

<sup>4</sup> PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991); *Hearings on H.R. 10 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary*, 104th Cong., 1st Sess. (1995); NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 145-47 (Ed Gillespie & Bob Schellhas eds. 1994) (concerning fee-shifting and damage caps).

<sup>5</sup> *Access to Justice with Conditional Fees*, *supra* note 1, at §§ 2.6-2.17; Rose, *supra* note 1, at 16.

<sup>6</sup> Marianne Korteweg & Matt Stearns, *No Cure, No Pay: On the Way*, INT'L HERALD TRIBUNE (THE NETHERLANDER), at 10 (October 18, 1997) ("Despite the criticism, the Dutch are about to introduce a variant of the controversial no cure, no pay legal system, also known in the United Kingdom as 'no win, no fee.'").

<sup>7</sup> Much of the movement toward globalization has been driven by accounting and consulting firms engaging in the practice of law. See John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42, 44 ("Today, all the major accounting firms have significant legal practices throughout Europe with hundreds of lawyers on board. Indeed, in some markets they are among the largest providers of legal services for businesses."). Globalization is also driven by GATT's allocation of jurisdiction over professions to the World Trade Organization. *Id.*; Philippe Fouchard, *The Judiciary in Contemporary Society: France*, 25 CASE W. RES. J.

to national regulation but also a distinctively competitive element of legal services. Although courtroom representation is inherently national, and therefore subject to the direct control of local government, many legal services, such as business planning and litigation support, can be rendered almost anywhere in the world. Thus, as a practical matter, many clients, and especially business clients, have choices of fee arrangements beyond those permitted in the countries in which they are located. This development will have far-reaching implications for the legal services industry and for international clients. Most likely, it will pressure the legal industry, and the governments that regulate the legal industry, to admit a wider range of fee systems.

Most analyses of fee systems focus on and criticize a particular fee system,<sup>8</sup> without attending fully to the reality that all fee systems, and certainly all fee systems in which the civil client contracts to pay the attorney, share an essential and characteristic flaw. This flaw flows from the nature of legal services and the attorney's concomitant duty to protect the interests of the client.<sup>9</sup> The financial interest of the attorney and the financial interest of the client necessarily conflict on the issue of fee setting.<sup>10</sup> If the client and the attorney negotiate a fee directly, the divergence of interest is obvi-

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INT'L L. 221, 246 (1993) (describing the tenuous relationship between the "Anglo-Saxon 'Big Six'" and the Paris Bar).

<sup>8</sup> See, e.g., LESTER BRICKMAN, MICHAEL HOROWITZ, JEFFREY O'CONNELL, *RETHINKING CONTINGENCY FEES* (1994); Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark?* 37 UCLA L. REV. 29 (1989); Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813 (1989); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

<sup>9</sup> In common law systems, the attorney-client relationship is a fiduciary relationship. This conclusion flows from agency law and from the traditional understanding of the legal profession. See Alison G. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 744 (1978); Brickman, *supra* note 8, at 32; Arthur Jacobson, *Capturing Fiduciary Obligation: Shepard's Law of Fiduciaries*, 3 CARDOZO L. REV. 519, 524 (1982); Arthur Jacobson, *The Private Use of Public Authority: Sovereignty and Association in the Common Law*, 29 BUFFALO L. REV. 600, 612 (1980). Many issues flow from the statement that one is a fiduciary. See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943) (Frankfurter, J.) ("[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?"); Maksym v. Loesch, 937 F. 2d 1239, 1241 (7th Cir. 1991) (describing the attorney as a fiduciary agent).

<sup>10</sup> This conflict has been widely observed. See GEOFFREY HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODERN RULES OF PROFESSIONAL CONDUCT* 70-71 (1985) ("[S]etting . . . fees for professional services inevitably creates a conflict between lawyer and client . . . . A potential conflict of interest attends the commencement of every client-lawyer relationship . . . ." (emphasis in original)); Herbert M. Kritzer, *Lawyers' fees and the Holy Grail: Where should clients search for value?*, 77 JUDICATURE 187, 188 (1994) ("The goal of law firms is to maximize profits, and the goals for corporations is to minimize costs. The dilemma is how to manage the inherent conflict.").

ous.<sup>11</sup> If the fee is regulated or fixed exogenously, as for example a jurisdiction where a fee scale is set by the Bar<sup>12</sup> or by statute and/or the government,<sup>13</sup> then the profession's fundamental conflict with its clients is resolved in the process of fixing the fee scale. In either event, the attorney's interest in establishing a right to be paid necessarily will collide with the attorney's duty to represent the interests of the client. This fundamental dynamic, which undergirds the attorney-client relationship, is unavoidable and is managed on a systematic basis by the legal system,<sup>14</sup> by the profession,<sup>15</sup> as well as on an individual basis by the attorney and, often, by the

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<sup>11</sup> In the United States it is the norm for the private civil client to assume responsibility for paying the attorney directly. However, under various statutory schemes, and usually in class action suits, the plaintiff's attorney fees are awarded directly by a court, to be paid by the other party, in a manner specified by statute or court rule. See Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2156 (1992). See, e.g., M. Wade Baughman, Note, *Reasonable Attorneys' Fees Under the Social Security Act: The Case for Contingency Agreements*, 97 U. ILL. L. REV. 253, 258 (1997). This structure further complicates the relationship between attorney and client with respect to fees. For simplicity's sake, in discussing U.S. law, we look primarily at fact situations in which the fee arrangement is made between the attorney and the client by contract. The matter is somewhat more complicated in the European legal systems because of the existence of public legal aid and private legal insurance. See *infra* Part IV; Neil Rickman & Alastair Gray, *The Role of Legal Expenses Insurance in Securing Access to the Market for Legal Services*, in REFORM OF CIVIL PROCEDURE, *supra* note 1, 305, 321-22.

<sup>12</sup> See *infra* Part VIII.B.3 (discussing the European experience); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 758-88 (1975) (explaining the U.S. experience with bar-set minimum fees).

<sup>13</sup> See *infra* Part VIII.B.2. The United Kingdom is likely to create fixed fees for small civil cases. LORD WOOLF, ACCESS TO JUSTICE FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 20-58 (1996).

<sup>14</sup> The judiciary has an inherent power to regulate counsel fees in matters before common law courts. See F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 43 (1964); Stephen F. Gladstone, *Judicial Power Over Contingent Fee Contracts: Reasonableness and Ethics*, 30 CASE W. RES. L. REV. 523, 541 (1980).

<sup>15</sup> Since 1908 the organized bar has promulgated rules of ethics at the national level. The most recent version of these rules was promulgated in 1983 as the Model Rules of Professional Conduct by the American Bar Association (ABA). These rules are adopted, sometimes with modifications, by state bars and the federal courts, which regulate the practice of law within their jurisdictions. Not surprisingly, the professional rules address issues associated with the fee arrangement. These issues include the reasonableness of the fee, communication with the client about the fee, contingency fees, and division of fees.

Rule 1.5 of the Model Rules deals with fee arrangements. Under Rule 1.5 the attorney has an overarching obligation to charge a reasonable fee. The rule states: "A lawyer's fee shall be reasonable." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983). Rule 1.5 then expresses the factors to be considered in determining the reasonableness of the fee. These include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

sophisticated client.<sup>16</sup> The dynamic is exacerbated or ameliorated, however, by the particular way in which the attorney is compensated, and thus by the latitude that the parties have in fixing that compensation. The fee arrangement is simply one aspect of the attorney-client relationship that requires management of a conflict of interest,<sup>17</sup> but it is critical and overarching.

This article develops an analytical framework for viewing the rules on attorney fee arrangements that have been adopted in the United States<sup>18</sup> and in major western European countries.<sup>19</sup> In section II the paper explains the choice of economic agency theory as a starting point for developing this

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- (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;
  - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5. These criteria provide factors for the lawyer to consider in formulating and defending a fee, but they provide little direct guidance.

Rule 1.5 contrasts sharply with the approach taken by the ABA's previous ethics code, the Code of Professional Conduct, which focused on the excessiveness of the fee. Disciplinary Rule 2-106(A) requires that the lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Model Code of Professional Responsibility EC 2-20. The drafters of the Model Rules considered this approach insufficiently protective of the client's interests. See REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT (1981). However, in considering what kind of fee would be excessive, the Rules provide that a fee is "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." the perspective of a client or of a member of the public, notably, is not used. The Model Code continues in use in some states.

<sup>16</sup> There are, indeed, highly sophisticated clients. See Cindy Collins, *The Price of Doing Business . . . Lawyers Praise and Pillory Insurance Giant AIG*, 16 NO. 22 OF COUNSEL 6 (December 1-15, 1997); Kritzer, *supra* note 10, at 187 n.5 (chronicling the development of corporate general counsels' efforts to monitor outside law firm services). See also Jonathan Foreman, *His Offer: Finish Faster, Earn More*, NAT'L L.J., May 11, 1998, at B1 (describing E.I. Du Pont de Nemours & Co as a sophisticated company); Jonathan Foreman, *Counsel Puts Her Stamp on Business*, NAT'L L.J., May 4, 1998, at B1 (describing Pitney Bowes, Inc. as a sophisticated client); Laurel-Ann Dooley, *There's No Dodging Crossfire in His Job*, NAT'L L.J., April 20, 1998, at B1 (describing Cable News Network Inc. as a sophisticated client); Jonathan Foreman, *Trading in Skadden for Corporate Life*, NAT'L L.J., April 13, 1998, at B1 (describing The Dun & Bradstreet Corp. as a sophisticated client); Geanne Rosenberg, *For Legal Matters, He's 'Eveready'*, NAT'L L. J., March 30, 1998, at B1 (describing Ralston Purina Co. as a sophisticated client); Laurel-Ann Dooley, *No Handyman, But He Nailed His Job*, NAT'L L.J., March 23, 1998, at B1 (describing The Home Depot Inc. as a sophisticated client).

<sup>17</sup> See Deborah Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 715 (1994) (calling for stronger fiduciary standards).

<sup>18</sup> See *infra* Part VI.

<sup>19</sup> See *infra* Parts VII & VIII.

framework. Within the meaning of economic agency, the attorney is a dual agent, with duties to both the client and the judicial system. In section III the paper identifies five interests that form the basis for evaluating fee systems. These interests are derived from applying basic agency theory to the duties of the attorney as an agent of both the client and the judicial system, and extracting the more specific aspects of both types of duties.

In sections IV and V the interest analysis is applied to three types of fee arrangements — the fixed fee, the hourly fee, and the contingency fee. We select these types of fee arrangements because they represent key distinct elements, one or more of which seems to be present in any of the fee systems used in the United States or in western Europe. The key distinct element of the fixed fee is that the attorney will be paid the amount agreed upon, without regard to effort or to risk. The key distinct element of the hourly fee is that the attorney will be compensated based on effort, as measured by time spent working, without regard to a fixed amount or to risk. The key distinct element of the contingency fee is that the attorney is compensated for assuming risk, without regard to an agreed upon amount or effort expended. By isolating the way these three distinct types of fee arrangements affect interests that are important in all of the western fee systems, we build a framework for evaluating the many fee arrangements that utilize and combine these key elements, such as the United Kingdom's new conditional fee system. This framework avoids the dominant tendency of the literature to focus on the flaws of a particular fee system in isolation from its alternatives.

In the remaining sections of the article we use the analytical framework to identify, and to contrast and compare, the probable impact of different types of fee arrangements on clients and on the justice systems. These sections examine the specific rules governing fee systems in the United States, the United Kingdom, and the continental civil law countries. They identify the implicit policy preferences and trade-offs in the different approaches legal systems take to regulating legal fees. These include, specifically, the new conditional fee system in the United Kingdom, the issue of anticompetitive fee structures in western Europe, and the pervasive problem of access to justice in the United States and in western Europe.

This task must be approached with caution because, of course, the attorney fee arrangement is only one aspect of a justice system. It would be an error to claim too much, or too little, about any legal system from an examination of fee arrangements alone. On the other hand, the fee arrangement lies at the heart of the industry of supplying legal services, and it is invariably subject to public policy intervention. Thus, systemic attitudes toward justice and toward legal services may be inferred from the manner in which fee arrangements are regulated.



## II. AGENCY AS A SOURCE OF FACTORS FOR COMPARING FEE SYSTEMS

The framework of analysis flows from a perspective grounded in basic economic agency theory. Attorney fees have been of keen interest to legal commentators.<sup>20</sup> The fee has generated a significant body of literature analyzing fee structures and criticizing specific fee arrangements. Different critiques reflect different assumptions about the material features of the attorney-client relationship. The traditional legal ethics literature,<sup>21</sup> for example, focuses on the public function of the legal profession, the expectation of the public for the profession, and the role of the profession in the administration of justice. The equity/fairness literature,<sup>22</sup> in contrast, attends to the perceived fairness of the fee arrangement, the relative power of the client and attorney in the relationship as it is reflected in the fee arrangement, and

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<sup>20</sup> See BRICKMAN ET AL., *supra* note 8; Clermont & Currivan, *supra* note 8; Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987); Robert L. Haig & Steven R. Caley, *What a Fair Fee for a Litigator?*, 20 LITIG. 37 (1993); Rhode, *supra* note 17, at 721; Douglas R. Richmond, *Professional Responsibility and the Bottom Line: The Ethics of Billing*, 20 S. ILL. U. L.J. 261 (1996); Note, *Settling for Less: Applying Law and Economics to Poor People*, 107 HARV. L. REV. 442, 445 (1993) [hereinafter *Settling for Less*]. For a history of U.S. legal fee arrangements, see John Leubsdorf, *Toward a History of the American Rules on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

<sup>21</sup> See Brickman, *supra* note 8, at 32 (advocating restrictions on the use of contingency fees); Ellman, *supra* note 20, at 718; Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990); Eric M. Rhein, *Judicial Regulation of Contingent Fee Contracts*, 48 J. AIR L. & COM. 151, 153 (1982) (seeking to restrict use of the contingent fee to circumstances in which the plaintiff cannot afford an hourly fee arrangement); Rhode, *supra* note 17, at 721; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 597 (1985); Richmond, *supra* note 20, at 261-62. The traditional legal ethics literature focuses on the public function of the legal profession, the expectations of the public for the profession, and the role of the profession in the administration of justice. In particular, the legal profession attributes deontological status to the fiduciary duty. See, e.g., Brickman, *supra* note 8, at 44 ("Fiduciary law is the starting point in any analysis of ethical considerations.") It is a defining reality of the legal profession that lawyers identify with and protect the interests of clients; it is a reality that creates economic value and reputation as well.

<sup>22</sup> E.g., Penelope Eileen Bryan, *Toward Deconstructing the Deconstruction of Lawyers*, 71 DENV. U.L. REV. 161 (1993); Haig & Caley, *supra* note 20; Lisa G. Lerman, *Gross Profits? Questions About Lawyer Billing Practices*, 22 HOFSTRA L. REV. 645 (1994) [hereinafter *Gross Profits*]; Lisa G. Lerman, *Contingent Fees: Do Lawyers Deserve Them When Cases Settle Quickly?*, A.B.A. J., July 1995, at 45 [hereinafter *Contingent Fees*]; Leubsdorf, *supra* note 20; Darlene Ricker, *Greed, Ignorance and Overbilling*, A.B.A. J., Aug. 1994, at 62; William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991); Carl M. Selinger, *Inventing Billable Hours: Contract v. Fairness in Charging Attorney's Fees*, 22 HOFSTRA L. REV. 671 (1994). While closely related to traditional concepts of lawyer ethics, the equity literature tends to focus on the broader role of the legal system in society rather than on the rules of professional conduct and the self-governing nature of the profession. See generally, Bryan, *supra*; John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981).

the social implications of that relationship.<sup>23</sup> The law and economics literature<sup>24</sup> includes analyses using theories of moral hazard,<sup>25</sup> of information asymmetry,<sup>26</sup> and of agency,<sup>27</sup> as well as combinations of these theories. We think that basic agency theory provides a useful and rich exposition of attorney fee arrangements, for several reasons.

First, agency theory attends to the way in which the fee structure aligns the interest of the client and the attorney. It treats the attorney-client relationship as a special case of the more generalized agency problem an eco-

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<sup>23</sup> The controversy over the role of attorney fees in recent U.S. tobacco litigation aptly illustrates the reality that the public interest is perceived to be at stake in the fee setting system. See, e.g., Matthew Scully, *Will Lawyers' Greed Sink the Tobacco Settlement?* WALL ST. J., February 10, 1998, at A18.

<sup>24</sup> See, e.g., Clermont & Currivan, *supra* note 8; Patricia M. Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213 (1983); Herbert Kritzer et al., *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 LAW & CONTEMP. PROBS. 125 (1984); Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381 (1991); Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343 (1993); Schwartz & Mitchell, *supra* note 8; *Settling for Less*, *supra* note 20.

<sup>25</sup> The moral hazard literature attends to the incentive structure each potential fee arrangement provides for attorney shirking, or otherwise failing to maximize the interest of the client. The contingent fee is thought to ameliorate, to some extent, the attorney moral hazard; the hourly fee and the fixed fee are thought (in the absence of effective monitoring) to be fraught with it. See generally, Clermont & Currivan, *supra* note 8, at 539; Danzon, *supra* note 24, at 216; D.J. Halpern & S.M. Turnbull, *Legal Fees Contracts and Alternative Cost Rules: An Economic Analysis*, 3 INT'L REV. L. ECON. 3, 6 (1983); Kritzer et al., *supra* note 24, at 128; Miceli & Segerson, *supra* note 24, at 385; Schwartz & Mitchell, *supra* note 8, at 1151.

<sup>26</sup> See James D. Dana & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349 (1993); Rubinfeld & Scotchmer, *supra* note 24, at 355 ("Contingency fees occur in equilibrium because there is asymmetric information between attorneys and clients, as well as because attorneys are subject to moral hazard."). The information asymmetry literature attends to the explanation information economics provides for the existence of a particular fee arrangement "in nature." See Michael A. Dover, *Contingent Percentage Fees: An Economic Analysis*, 51 J. AIR L. & COM. 531, 545 (1986) (arguing that high contingent fee arrangements reflect insufficient information in the relevant market).

<sup>27</sup> See MACKINNON, *supra* note 14, AT 195-206. See generally, Clermont & Currivan, *supra* note 8; John Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996) (providing a model for identifying the privately optimal contingency fee for a given case); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); Murray L. Schwartz & Daniel J.B. Mitchell, *Theoretical Implications of Contingency Legal Fees*, 12 Q. REV. ECON. & BUS. 69 (1972); Schwartz & Mitchell, *supra* note 8; Alison Watts, *Bargaining Through An Expert Witness*, 19 J.L. ECON. & ORG. 168 (1994).

conomic actor faces in conducting business through agents.<sup>28</sup> The attorney acts as an agent for the client-principal, obviously in the legal sense of the term "agency" but also in the economic sense. In the latter sense, the attorney values the engagement based on the expected return and the cost of obtaining the return. Agency theory assumes that the attorney accepts the engagement provided its expected return exceeds the return he can obtain from employing his efforts in his best alternative activity.<sup>29</sup> His interests lie in maximizing his return at the lowest cost to himself. The client, of course, usually maximizes his return if the attorney experiences high cost, by investing time, energy, and perhaps money. In this difference lies an inherent conflict of their interests. Agency theory invites one to identify predictable misalignments of interest and consider possible mechanisms for reducing the misalignment or ameliorating its effects.<sup>30</sup>

Consider, for example, the effect of introducing an attorney as an expert agent. Hiring an attorney both enhances and diffuses the capacity of the client to effectuate his interest through the legal system. While the attorney enhances that capacity (or else, one would presume, clients would not hire attorneys), the attorney also may diffuse or compromise the client's interest. This may happen in two ways. On the one hand, the attorney may perceive conflicts between the interests of the client and the interests of the justice system, and resolve those conflicts against the client. That is, the attorney may resolve conflicting interests of the client and the legal system by compromising the interest of the client. This probably is not troublesome from a

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<sup>28</sup> Agency is a common law concept. In recent years economists have explicated and modeled the complex cost and incentive issues associated with agency in contract. See Eugene Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Grossman J. Sanford & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983); Bengt Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979). Business management scholars have augmented the work of economists by applying agency principles to management studies. See, e.g., Stanley Baiman, *Agency Research in Managerial Accounting: A Second Look*, 15 ACCT. ORG. & SOC'Y. 341 (1990); Robert E. Hoskisson & Michael A. Hitt, *Antecedents and Performance Outcomes of Diversification: A Review and Critique of Theoretical Perspectives*, 16 J. MGMT. 461 (1990); R. Kosnik & K. Bettenhausen, *Agency Theory and the Motivational Effect of Management Compensation*, 17 GROUP & ORG. MGMT. 309 (1992); Henry L. Tosi et al., *Disaggregating the Agency Contract: The Effects of Monitoring, Incentive Alignment, and Term in Office on Agency Decision Making*, 40 ACAD. MGMT J. 584 (1997). Recently, legal commentators have investigated the impact of agency principles on the attorney-client relationship. See Hay, *supra* note 27; Miller, *supra* note 27.

<sup>29</sup> In agency theory this condition is known as "participant constraint." The agent (attorney) must obtain more from the proposed activity than from alternative options in order for the agent to participate. See, e.g., JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 36-37 (1988).

<sup>30</sup> Clermont & Currivan present a proposal for attorney compensation designed to harmonize the interest of lawyer and client and to reduce the conflict of interest inherent in the two major compensation plans, the hourly fee, and the contingent fee. Clermont & Currivan, *supra* note 8, at 533.

social welfare perspective; in fact, it is considered desirable, to varying extents, in almost any modern legal system. The client would have obligations to the justice system even in the absence of an attorney; requiring the attorney to see that the client meets these obligations simply assures that the introduction of a lawyer/agent does not diffuse the basic responsibilities of the client. For example, the attorney may prevent the client from telling lies on the witness stand, or he may comply more promptly and fully with a discovery request than the client would prefer.

On the other hand, there is the more ominous risk that the attorney might use the professional engagement to pursue his own personal interest rather than that of the client, and at the expense of the client. This is the classic concern of agency theory.<sup>31</sup> In that theory, the fee arrangement is one mechanism for managing the agency problem.<sup>32</sup> By aligning the attorney's financial interest with that of the client, the fee arrangement may reduce or increase the incentive for the attorney to sacrifice the client's interests. This includes important interests such as the financial costs of the engagement and the likelihood of obtaining or paying damages and related costs.

Secondly, agency theory accommodates the reality that the attorney's role is inconsistent with a complete alignment of the attorney and client interests. The attorney is a "dual agent,"<sup>33</sup> in the sense that the attorney has a duty to the justice system and to the larger society as well as to the client. Obviously, the client has duties to the justice system and to the larger society as well, but the attorney's duties are sharply and clearly defined; the attorney must explicitly assume these duties in order to practice law. Within

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<sup>31</sup> Agency theory identifies the conditions for which a rational agent satisfies his obligations to exert effort on behalf of his principle when that effort is costly to the agent. If the rational agent's actions are unobservable, then the agent is unlikely to exert sufficient effort without adequate incentives. See DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 578-82 (1990).

<sup>32</sup> See Fama, *supra* note 28; Grossman & Hart, *supra* note 28; Holmstrom, *supra* note 28; Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979).

<sup>33</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1983) (describing lawyers as "trusted agents of their clients, and as assistants to the court in search of a just solution" (quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961) (Brennan, J., dissenting)); *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973) (describing the "honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client"). Economists have examined the dual agency issue. They focus on the difficulty that principals can have in eliciting optimal effort from an agent when other principals are simultaneously competing for the agent's attention. See generally, B. Douglas Bernheim & Michael D. Whinston, *Common Agency*, 54 ECONOMETRICA 923 (1986); David E. M. Sappington, *Incentives in Principal-Agent Relationships*, 5 J. ECON. PERSP. 45 (1991). Thus, we can view litigation as a situation in which the client and judicial system vie for the attorney's sometimes conflicting allegiance. The fee arrangement is at the heart of their attempts to win and maintain this allegiance.

the meaning of economic and organizational agency theory, the attorney is an agent for the judicial and legal system. Thus, the manner in which the fee arrangement may affect the attorney's compliance with these duties must be considered in any analysis of attorney fee systems. With this in mind, our analysis considers the probable effect of a fee structure on the efficient working of the justice system, and the likelihood that the system will produce truthful results in an efficient manner that is respected as fair and just.

While this analysis focuses on the fee, other factors also influence the attorney's propensity to resolve conflicts that flow from the multiple duties of the attorney as dual agent. Legal ethics rules place almost deontological value on meeting duties to the client and to the justice system, and many attorneys will follow these rules because they believe that is their duty, even if it is not in the attorney's or the client's obvious and immediate interest.

In addition, the attorney's concern for reputation may reduce the incentive to sacrifice client or social interest to his own benefit, especially to the extent that his actions are observable. Moreover, attorneys serve as confidential advisors to clients, often in periods of the client's life characterized by stress and even despair. The demands of professional role responsibility may induce the attorney to champion the client's interest, even at the expense of his or her own interest. Thus, ethics rules, concern for reputation, and the value of faithfulness to duty — and the propensity to act on those values — may serve to ameliorate the agency problem as well. While these factors are quite real, and in fact influence attorney behavior, they are not explicitly included in the analysis in order to keep the analysis focused on the economic incentives generated by the fee structure and thereby manageable. Economic incentives are but one kind of influence on the attorney, but they are a keenly important influence.

### III. THE ANALYTICAL FACTORS

This analysis examines the range of possible fee arrangements from the standpoint of five factors. The first two flow from the attorney's relationship with the client and the remaining three flow from the attorney's relationship with the judicial system and the interests of justice.

The first factor is the extent to which the fee arrangement tends to align the interest of attorney and client in making decisions about the case. It is common in the literature, both domestic<sup>34</sup> and internationally comparative,<sup>35</sup>

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<sup>34</sup> See Kritzer, *supra* note 10, at 188; Clermont & Currihan, *supra* note 8, at 536 ("In sum, neither the certain hourly fee nor the contingent percentage fee can align fully the economic interests of lawyer and client.").

<sup>35</sup> See Loraine Minish, *The Contingent Fee A Re-Examinae*, 10 MANITOBA L. J. 65, 72 (1979) ("This conflict begins at the very outset, when the contract is being negotiated between lawyer and client. As a partner in this venture into justice the lawyer is subject to his own temptations to obtain the best deal for himself."); *Access to Justice with Conditional Fees*, *supra* note 1, at § 1.3 ("The current system does not encourage lawyers - who are paid

to find various fee arrangements criticized on the ground that the arrangement poses a conflict of interest for the attorney. It is more useful to recognize the natural and inherent conflict of interests that any fee arrangement poses, and then examine and compare fee arrangements from the standpoint of whether the conflict of interests is worsened or improved. Presumably, to the extent that the interests of attorney and client are aligned, the attorney has increased incentive to act in the interest of the client.

A second factor is the risk of financial loss or gain from the outcome of the case; these risks, and their associated costs, may fall on the client or the attorney, or be shared by them, depending on the fee structure. Both clients and attorneys vary in their propensity to accept or avoid risk, and different justice systems vary in their willingness to permit clients to shift risk to attorneys. Clients employ lawyers in order to avoid or reduce the risk of loss or the magnitude of loss if it occurs as a result of a legal conflict. To the extent that the fee arrangement tends to limit the client's costs and risk in the legal system, the client's basic interest in engaging an attorney is advanced. Cost shifting and risk shifting, of course, may impose other costs on the client, and our analysis seeks to identify these costs.

A third factor is access to the judicial system, an interest that the client undoubtedly regards as important, but which is also regarded as important or desirable, to varying extents, in western justice systems.<sup>36</sup> The client engages an attorney in order to gain access to the judicial system.<sup>37</sup> To the extent that a fee arrangement tends to improve the client's access to the judicial system, it promotes the client welfare and interest. It follows that a system that promotes one client's welfare also tends to promote the welfare of all other similarly situated potential clients.<sup>38</sup> Thus, improving or diminishing access to the judicial system presumably improves or diminishes social welfare as well.

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the same, win, lose or draw - to weed out weak cases. This means that too many people undergo the strain of lengthy legal disputes for nothing.”)

<sup>36</sup> See *Access to Justice with Conditional Fees*, *supra* note 1, at § 1.1 (“Justice should be there for all or us, when we need it. It should not be just for the wealthy or those on the very lowest incomes.”), § 1.9 (“Access to justice is...a fundamental part of our democracy.”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.”). However, this right to counsel has been extended only to a limited number of civil cases, primarily those involving the risk of government intrusion on family relationships. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996).

<sup>37</sup> See *Access to Justice with Conditional Fees*, *supra* note 1, at § 1.13 (“Our aim is a fair and open legal system, where everyone is able to rely on the impartial advice of their legal advisers throughout the legal process”).

<sup>38</sup> See, e.g., J.A. Jolowicz, *The Woolf Report and the Adversary System*, 15 CIV. JUST. Q. 198, 199 (1996) (quoting Lord Diplock on the need for the state to provide its citizens with “a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some citizen, the defendant.”)

A fourth factor is the extent to which different fee arrangements affect the operational efficiency<sup>39</sup> of the justice system. While the operational efficiency of the justice system is not the immediate and primary concern of any particular client, it is of keen concern to clients as a group and to the larger society.<sup>40</sup> This factor may be observed in the incentives to settle or to continue a case, and in the working out of conflicts between the attorney's interests and his duty to court or to client.<sup>41</sup> We also consider the possible impact of the fee arrangement on the revelation of truth and incentives that different fee structures may provide for the attorney to introduce error in judicial decision-making.

Finally, we consider the way in which the fee arrangement may affect the social perception of fairness in the justice system. We assume that if, for example, a plaintiff's return substantially exceeds the value of his injuries, or an attorney's return substantially exceeds the value of her effort, observers will perceive a windfall, an unjust enrichment,<sup>42</sup> and will resent it. This resentment, described by equity theory,<sup>43</sup> increases in the degree that the plaintiff's or attorney's gain is perceived to be unjust or unfair. This reduces social confidence in the judicial system.

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<sup>39</sup> We use the term "operational efficiency" broadly, to refer to the manner in which the justice system achieves its objectives of finding truth and doing justice. Attorney fee systems that provided incentives for introducing error into fact finding or that wasted judicial resources with delays and frivolous cases would, for example, affect the operational efficiency of the system.

<sup>40</sup> See GORDON TULLOCK, TRIALS ON TRIAL 5, 14-15 (1980) (arguing that society has a strong interest in minimizing all litigation costs and maximizing decision accuracy); Frank Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 353 (1981) (asserting that courts promote efficiency by accurately enforcing laws, contracts and socially determined rights and liabilities); Daniel L. Rubinfeld & David E. M. Sappington, *Efficient Awards and Standards of Proof in Judicial Proceedings*, 18 RAND J. ECON. 308, 308-09 (1987).

<sup>41</sup> See *infra* pp. 26-30 and text accompanying notes 47, 59.

<sup>42</sup> Avoidance of a "windfall" to an attorney often is mentioned in judicial discussions as an element of the "reasonableness" of attorney fees. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984). The contingent fee arrangement in particular is criticized for its unjust enrichment potential. See *Dover*, *supra* note 26, at 551. The lack of correlation between hours worked and fee paid creates much of the problem. See *Schwartz & Mitchell*, *supra* note 8, at 1126. The fact that a contingent fee attorney can receive a substantial fee for little apparent effort is frequently denounced, and courts have punished attorneys for accepting fee awards believed to be excessive. See, e.g., *In re Swartz*, 689 P.2d 1236 (Ariz. 1984) (suspending an attorney for receiving a \$50,000 fee after insurance company agreed to pay the full policy limit before the attorney filed a complaint); *People v. Nutt*, 696 P.2d 242 (Colo. 1984) (suspending an attorney for a contract that allowed payment of \$200,000 for services valued at less than \$19,000).

<sup>43</sup> See generally, ELAINE WALSTER ET AL., *EQUITY: THEORY AND RESEARCH* (1978).

#### IV. AN ANALYSIS OF FEE ARRANGEMENTS

This section considers three types of fee arrangements and examines the likely behavioral incentives under each arrangement, as they affect the five interests identified in the Section III. It considers the fixed fee arrangement, the hourly fee arrangement, and the contingency fee arrangement. Logically, there is a much wider variety of ways in which an attorney could be paid. Those found in the United States or in western Europe<sup>44</sup> involve one or more of the key distinct elements of each type of fee arrangement — the element of fixedness or predictability in the case of the fixed fee, the element of effort (as measured by time) in the case of the hourly fee, and the element of risk of loss in the case of the contingency fee. These elements represent the basic components of fee structures found in the U.S. and western European legal systems. We examine each type of fee arrangement from the standpoint of its effect on 1) alignment of the interests of client and attorney; 2) allocation of costs and the risk of loss; 3) access to justice; 4) the operational efficiency of the justice system; and 5) the social perception of fairness.

##### A. The Fixed Fee

In the fixed fee arrangement, the client and the attorney contract for a fixed payment for handling the engagement. The attorney earns no greater or lesser fee for handling the case slowly or expeditiously, skillfully or carelessly, or for winning or losing. This arrangement provides the client certain benefits, but it also poses problems for the client and for social welfare. For example, the fixed fee arrangement poorly aligns the interests of the attorney and the client. It allocates all risk of loss of the case to the client, and it discourages access to the justice system. On the positive side, however, it provides few incentives for the attorney to fail to meet his du-

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<sup>44</sup> Some commentators have considered the proprietary transfer, or the outright sale of the client's claim to the attorney. See Coffee, *supra* note 27, at 670; Danzon, *supra* note 24, at 223 (“[O]utright sale is unlikely to be optimal since the value of a personal injury claim depends not only on the attorney's effort but also on the behavior or the plaintiff.”); Kritzer, *supra* note 3, at 308 (suggesting that escrow of a fee would be necessary to secure the client's cooperation in pursuing the case); Miller, *supra* note 27, at 196 (dismissing further analysis because of the alignment of law and public policy against it, but observing that in an outright sale of a claim to a lawyer “agency problems would be largely absent”); Rubinfeld & Scotchmer, *supra* note 24, at 349 (identifying the “client moral hazard” problem associated with such a fee system); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 329-30 (1987) (arguing for permitting plaintiffs to sell tort claims to attorneys); Watts, *supra* note 27. While the western legal systems do not permit this structure explicitly, its key features can be seen in legal contexts such as debt collection and insurance subrogation, where the injured party is paid and the real party in interest is the collection agent or the insurance company. In addition, certain types of U.S. class actions simulate some key features of such an arrangement.



ties to the justice system, and his rewards are unlikely to be regarded as unfair or unjust.

The fixed fee arrangement misaligns the financial interest of the client and the attorney, and this may result in suboptimal representation from the client's vantagepoint. The attorney's return on the case actually decreases with the time he invests on behalf of his client, giving the attorney an incentive for minimizing actions that might actually increase the client's probability of winning the case. If the attorney is free to negotiate the fee, the attorney will demand a payment amount that reflects the uncertainty of the time commitment required by the engagement. If he errs in the estimate, he may adopt a cost-minimizing approach, or a quick settlement of the case, which could reduce the client's return or jeopardize the case altogether.<sup>45</sup> The attorney on the other side can exploit this incentive structure through a strategy that increases the fixed fee attorney's costs. By credibly threatening to impose costs, it can pressure the fixed fee attorney into recommending an unfavorable settlement. Defendants who litigate often may seek a reputation for over-investing in litigation, making it irrational for a plaintiff's attorney to accept the case under a fixed fee arrangement.

The misalignment of interests may be seen also in the fixed fee attorney's disincentive to invest more effort as the stakes in the case increase. The fixed fee attorney may even have an incentive to exert less effort in higher stakes cases than in lower stakes cases if he knows the defense attorney is paid on the basis of effort or outcome. Hence, the fixed fee attorney may have a stronger incentive to settle in order to avoid depleting his fee by trying to counter a strong defense in the high stakes case, whereas the potential loss is lower countering a less motivated defense in a lower stakes case. This perverse incentive structure is diametrically opposed to the client's interests. If the attorney charges more for a high stakes case, he has a greater loss reserve, but that still provides no incentive to spend more time on the case.

On the positive side, the fixed fee attorney has other incentives to perform well. Psychic benefits, the personal satisfaction of providing adequate representation, and reputation enhancement all provide such incentive. Apparent success in a highly visible, high stakes case can serve as a proxy for performance, spreading valuable information to potential clients and sources of referral. Just as marginal economic benefits rise with the case value for the defendant, marginal reputation benefits rise with stakes and visibility for the fixed fee attorney. Hence, the fixed fee attorney may willingly invest in high stakes cases to reap these benefits. Of course, it is in

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<sup>45</sup> See Sarah Evans Barker, *How the Shift From Hourly Rates Will Affect the Justice System*, 77 JUDICATURE 201, 202 (1994) ("When continued representation of a client has become economically untenable to the lawyer, or when the client has lost faith in the attorney before a balloon payment is to be paid to the lawyer, one could expect things to go haywire in major ways.").

just such cases that the defendant is also likely to invest heavily. If an investment race ensues, the fixed fee attorney has a high incentive to settle. In this event, too, the fixed fee structure fails to align the interest of attorney and client.

The fixed fee fixes the client's costs and, in many cases, his downside risk. The client knows the cost of the engagement with certainty. On the other hand, the attorney does not share downside risk with the client, and the attorney is paid regardless of the outcome. Thus, the fixed fee arrangement allocates all of the risk of loss of the case to the client and none to the attorney.<sup>46</sup>

The fixed fee arrangement also discourages access to the justice system. If the client cannot pay, he cannot obtain relief, regardless of the merits of the case. In high cost litigation, noncontingent payment of the attorney may not be practical for any but the wealthiest of potential clients. In relatively low cost cases, however, the client may obtain greater access, since costs can be ascertained and there is no risk of open-ended liability, as there might be if the attorney were paid by the hour.

The fixed fee arrangement provides the justice system mixed benefits. On the one hand, attorneys working under a fixed fee have few incentives to act unethically, because returns cannot be increased through unethical or disingenuous behavior. In fact, there is an incentive to be efficient and expeditious in reaching a resolution of the matter.<sup>47</sup> On the other hand, the fixed fee structure provides little incentive to avoid frivolous lawsuits. Provided the case fee exceeds the expected cost of representation, the fixed fee attorney has an incentive to take any case with a positive expected return regardless of the case's merits. However, the rational fixed fee attorney would be slow to take highly meritorious cases with significant precedent-setting value if expected litigation costs are too high. One would expect the mix of cases under a fixed fee structure to include an undesirable ratio of frivolous claims relative to potential precedent-setting cases.

Finally, since the fixed fee contract is deterministic, there are few risks to the public perception of fairness in the justice system. It is true that the fixed fee attorney may receive an apparent unearned bonus if he settles the case quickly or without investing significant effort or resources, especially

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<sup>46</sup> Of course, the attorney assumes the risk that the engagement consumes more time and expense than was estimated when he agreed upon the fee. Making such estimates, of course, is part of lawyering.

<sup>47</sup> Observing that "the core benefit of value billing arrangements is the institution of standardized, pre-packaged groupings of cases and controversies," Judge Barker suggests that fixed fee lawyers place an economic premium on "generic, patterned approaches." As a result, "[l]awyers who lack any real incentive to present their cases in an accurate, customized fashion, alert and faithful to the uniqueness of each set of facts and to the subtleties in the application of the law to those facts, will leave the 'heavy lifting' to the courts. And the courts are not equipped, from the standpoint of time or function, to assume that burden." Barker, *supra* note 45, at 202.

if settlement amount appears to be too low. Although the client may reap an apparent windfall from unexpectedly large damages, the fixed fee attorney does not share it. Because he does not share the windfall, he has little incentive to press for high damages, so one would expect fewer unexpectedly high damage awards when plaintiff's attorneys work under fixed fee arrangements. Hence, the deterministic nature of fixed fee arrangements and the disincentives against excessive case investments are likely to limit the negative social impact of perceived windfalls.

### B. The Hourly Fee

The hourly fee is the most universally accepted fee arrangement. While it has much to commend it, it too poses serious problems. In the usual situation, the attorney keeps track of hours worked and bills the client based on the amount of time expended on the client's behalf. The hourly fee avoids some of the problems of misaligned interests that the fixed fee posed, but it presents others. As in the fixed fee arrangement, the risk of losing the case is allocated to the client. Moreover, the client's risk of loss is exacerbated by the preference for risk that the fee arrangement engenders in the attorney. The hourly fee does little to increase access to justice, but it provides few incentives for the attorney to shirk his duties to the justice system. Moreover, since compensation varies directly with effort, the hourly fee system is likely to be regarded as highly fair.

The hourly fee arrangement avoids some of the problems of interest misalignment of the fixed fee; however, it does so at the financial risk of the client.<sup>48</sup> On the one hand, the attorney has no incentive to shirk. He can focus on preparing the highest quality case possible. At its extreme, he can "leave no stone unturned."<sup>49</sup> This incentive is conducive to high quality representation. There is evidence that, as compared with contingency fee attorneys, hourly fee attorneys appear to focus on the quality of representation, reputational issues, and providing a public service.<sup>50</sup>

On the other hand, the hourly fee arrangement may enhance the client's costs and risk of financial loss for three reasons. First, the hourly fee attorney and the client will have different attitudes toward costs, and this

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<sup>48</sup> See Kritzer, *supra* note 10, at 188 ("The goal of law firms is to maximize profits, and the goal of corporations is to minimize costs. The dilemma is how to manage the inherent conflict.").

<sup>49</sup> See Rhode, *supra* note 21, at 635 ("[M]ost lawyers will prefer to leave no stone unturned, provided, of course, they can charge by the stone.").

<sup>50</sup> See Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows*, 24 J. LEG. STUD. 87, 106 (1995) (asserting that hourly fee attorney cost indifference and the requirement for concurrent or advanced payment puts the hourly fee arrangement out of the reach of many litigants); Kritzer et al., *supra* note 24, at 265-66 (presenting data that suggests that hourly fee attorneys work diligently in their clients' interests but may be less attuned to costs than are their clients).

divergence will elevate the client's risks. The hourly fee attorney's fees are indeterminate, and he faces zero costs in deciding whether to make an additional investment. It follows that he will undertake any investment with a positive expected return, no matter how small.<sup>51</sup> Hence, there is endogenous pressure for the hourly fee attorney to over-prepare and overspend, at the expense of the client.<sup>52</sup> While the plaintiff can limit costs through diligent monitoring, the plaintiff is at a disadvantage due to the attorney's superior legal knowledge.<sup>53</sup> Thus, in an hourly fee case, the attorney has an incentive to over-prepare, and this is costly to the client.<sup>54</sup>

Second, the hourly fee attorney's attitude toward the risk of losing will diverge from that of the client. The attorney may expect strong reputational and psychic benefits from winning, but his downside risk is limited, since his income is independent of the case outcome. Thus the attorney is likely to prefer greater risk than the client would prefer. This difference in risk at-

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<sup>51</sup> The blatant practice of running up hours in a wasteful manner is anticipated and prohibited under U.S. rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) ("A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures."). See also Selinger, *supra* note 221, at 671-73; Lerman, *Gross Profits*, *supra* note 22, at 45 (recounting horror stories of hourly-overbilling practices in large law firms); Ricker, *supra* note 22, at 62 ("Sixty-hour days, documents that don't exist, clerical work that fetches \$300 an hour. It's not an Alice in Wonderland fantasy, but a peek through the looking glass into the kaleidoscope world of law firm overbilling.").

<sup>52</sup> See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978) (discussing how the adversarial nature of civil litigation and hourly fees provide attorneys with incentives to protract and complicate discovery); Rhode, *supra* note 17, at 711 ("In a time-based billing system, strategies that prolong proceedings almost always benefit the lawyer, only sometimes benefit the client, and even less frequently benefit the public."); *id.* at 710 ("Experts generally agree that the hourly [billing] minimums at many firms are unattainable without making 'very liberal allowances' for the way time is recorded. Similar allowances are often made in assessing clients' 'needs' and staffing their cases."); Ross, *supra* note 22; Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621 (1994).

<sup>53</sup> Outside auditors may be retained to examine billing records and evaluate charges. Of course, these monitors pose their own agency problems. See Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE, 191, 192-93 (1994) (discussing monitoring problems).

<sup>54</sup> Professor William Ross, for example, reports that in a survey of corporate and private counsel 12.3% of U.S. private practitioners and 15.2% of U.S. corporate counsel respondents believe that lawyers "frequently" pad their billable hours beyond the hours they work. Thirty-eight percent of private, and 40.7% of corporate counsel, believe that lawyers do so "occasionally." Forty-nine point seven percent of private and 44.1% of corporate say they believe such padding 'rarely' or 'never' happens. More than half of both groups knew personally of instances of padding. Ross found that, in addition to ethical restraints, reputation and trust in the client relationship were the major deterrents to padding. Ross, *supra* note 22, at 93-99.

titudes will translate into different attitudes toward settlement,<sup>55</sup> and it can cause substantial welfare losses for the plaintiff.<sup>56</sup>

Finally, the incremental payment characteristic of hourly fees obscures total costs. The plaintiff may be caught in a repeated cycle of escalating investments. The greater his litigation investment, the more the plaintiff loses by refusing to continue the case. Ultimately, his losses may substantially exceed the maximum that he would have risked prior to the start of litigation.

Hourly fee arrangements probably provide greater access to the judicial system than fixed fee arrangements, particularly if they do not require payment in advance. However, the expected cost of litigation is likely to be greater, for the reasons already discussed. Therefore, plaintiffs with limited resources may not regard the hourly fee arrangement as an option. Moreover, the hourly fee attorney may require advance payment of a retainer fee, eliminating this fee arrangement from the consideration of many potential plaintiffs. One would expect fewer claims brought if hourly fee arrangements were the only means of obtaining legal representation.

On the other hand, the hourly fee arrangement does little to filter meritorious claims from nuisance claims.<sup>57</sup> Therefore, if the plaintiff has strategic motives for bringing a lawsuit and can pay the fees, the hourly fee attorney has the incentive to take the case, regardless of its merit. Hence, hourly fee arrangements make it easier for well-funded plaintiffs to use the judicial system for purposes other than pursuing a valid legal claim, nega-

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<sup>55</sup> See William C. Cobb, *Competitive Pricing Along the Value Curve; or The Folly of Hourly Rate Pricing*, 14 LEGAL ECON., Sept. 1988, at 28; Miller, *supra* note 27 (exploring the agency problems of the hourly fee attorney in the settlement context and observing that a purely self-interested hourly fee attorney never would settle even when settling is in the client's best interest); Rhode, *supra* note 21, at 596.

<sup>56</sup> Consider, for example, two cases with identical expected values of \$1 million. In the first case, the plaintiff is awarded either \$900,000 or \$1,100,000, each with a probability of .5. In the second case, the plaintiff is awarded either zero or \$2 million, each again with a probability of .5. In the first case, neither plaintiff nor his hourly fee attorney will accept a settlement of less than \$900,000. In the second case, the plaintiff facing an even chance of walking away with zero may be willing to accept a settlement offer of much less than \$900,000, perhaps even \$500,000 or less. The attorney, however, may regard her efforts as inadequate if she settles so low, a signal of a poor effort, a concern that the client does not share. If the attorney persuades the client to hold out for a greater settlement, the results could be disastrous. Note that this example does not consider the effect of costs, which further exacerbate the divergence in risk attitude between the client and attorney in an hourly fee arrangement.

<sup>57</sup> Commentators have defined nuisance or frivolous lawsuits as being those in which plaintiffs have lower probabilities of prevailing than do legitimate plaintiffs in similar cases. A. Mitchell Polinsky & Daniel Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 404 (1993). The hourly fee attorney, who is paid regardless of who prevails or the probable outcome of litigation, has no incentive to distinguish between cases with low and high probabilities of success.

tively impacting the judicial system and public confidence in that system.<sup>58</sup> Under a "loser pays" rule of the European systems, the threat of a defendant pressing for full judgment instead of settling ought to ameliorate this effect to some extent. It would put even greater pressure on the client, who, if he loses, would have to pay not only the hourly fee that his own attorney has run up but also that of his adversary, to monitor costs and attend to settlement opportunities.<sup>59</sup>

With the downside risks bounded, the attorney has little incentive to violate his duties to the justice system. The attorney has a reduced incentive to engage in questionable behavior to enhance the probability of winning. He has little incentive to exaggerate the size of damages. This fee arrangement may even encourage attorneys to engage in behavior designed to enhance their reputation as principled and skilled attorneys, even at the expense of the client's interests. They may find that the benefit to "winning at all costs" is tempered by the drawbacks of a sullied reputation.

Finally, the hourly fee arrangement probably enjoys the greatest perception of fairness of the fee arrangements considered. The hourly fee attorney is paid only for services rendered, so that the fee reflects the major cost component — attorney effort — to a greater extent than the other fee arrangements. The attorney has a strong incentive to excel, to enhance his reputation to support higher hourly fee prices, and the least incentive to shirk. Moreover, since excess costs are not visible to the public,<sup>60</sup> highly compensated hourly fee attorneys do not appear to receive windfalls that highly compensated contingency fee attorneys receive.<sup>61</sup> Their excesses

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<sup>58</sup> Professor Rhode recounts the 12 year delay in the regulation of peanut butter content that Covington & Burling was able to effect for a client, and "Cravath, Swaine & Moore's 14 year defense of an antitrust case that, according to its chief litigator, involved thousands of exhibits, a 50,000-page record, and no real dispute about the facts." Rhode *supra* note 21, at 598. Presumably, both firms were working by the hour.

<sup>59</sup> *Cf.*, Kirchoff v. Flynn, 786 F. 2d 320, 325 (7th Cir. 1986) ("There is no wholly satisfactory way to employ hourly rates when the plaintiff can not or will not monitor his own attorney and the defendant has both incentive and ability to turn the request for fees into a second major litigation.").

<sup>60</sup> Hourly fee attorneys may, however, benefit unjustly from litigation due to their control over their compensation and the difficulty of monitoring. They may inflate their hours worked, billing the time spent flying, eating meals, and working on other cases. On occasion, attorneys have billed in excess of 24 hours in a single day. *See, e.g.*, Houghton v. Sipco, Inc., 828 F. Supp. 631, 638 (1993) (attorney billed 26.7 hours in a single 24 hour period); Claire P. Rattigan, *Bashing Lawyers: Massachusetts Attorneys Talk About Their Profession's Reputation and Wonder Whether They Can Do Anything To Help It*, MASS. LAW WKLY., April 3, 1995, at B1.

<sup>61</sup> *See* Brickman, *supra* note 8, at n.186 (citing the 1979 DC-10 crash in Chicago in which at least one contingency fee attorney received \$383,244 for 25-35 hours of work); BRICKMAN ET AL., *supra* note 8, at n.24 (citing a 1989 Texas school bus accident settlement for which contingency fee attorneys received more than \$40 million for 8 month's work).

probably do not have a strong detrimental impact on society's perception of the justice system.<sup>62</sup>

### C. The Contingency Fee

In the United States, where it enjoys the greatest popularity, the contingency fee takes many forms. For purpose of this section, however, we refer to a fee arrangement in which the attorney is not entitled to payment unless the client wins the case, and the amount of payment depends on the amount of damages awarded. The chief characteristic of this arrangement is that the attorney shares both the risks and the benefits of the case. Often this fee arrangement is called a proportional contingency fee. Although this fee arrangement has flaws, it has many benefits that accrue primarily to clients. In particular, the arrangement more closely aligns the financial interest of the client and the attorney than do the fixed and the hourly fee systems; nevertheless, the alignment is flawed in important respects. The arrangement allows the client to shift substantial risk of loss and costs to the attorney, and it permits financing that increases access to the justice system.<sup>63</sup>

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<sup>62</sup> Nevertheless, negative impact can be identified. See Ross, *supra* note 22, at 90 (“[E]xcessively clever strategies for accumulation of hours and the protection of litigation for the conscious or unconscious purpose of generating more billable hours have aggravated a widespread cynicism about the legal professional that ultimately calls into question the integrity of the judicial system and weakens public faith in the quality of the nation’s justice.”).

<sup>63</sup> The colorful history of the contingent fee contract in American law is chronicled in Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 248 (1998); BRICKMAN ET AL., *supra* note 8, at 35-39; Leubsdorf, *supra* note 22, at 10. The contingency fee’s disfavor has roots in both Roman law and English common law. See MACKINNON, *supra* note 14, at 9-10; BRICKMAN ET AL., *supra* note 8, at 35. In the English legal tradition, restrictions on contingent fees, and on attorney fees more generally, are rooted in the doctrines of maintenance, barratry, and champerty. Maintenance is defined as “[a]n officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute it or defend it.” BLACK’S LAW DICTIONARY 860 (5th ed. 1979). Barratry is “[t]he offense of frequenting, exciting, and stirring up quarrels and suits...” *Id.* at 137.

The acceptance of contingency fees in the United States was prompted in part by concern for the ability of economically disadvantaged person to gain access to the courts. See Leubsdorf, *supra* note 22, at 475-79. It was the result also of changes, beginning in the mid-nineteenth century, in social and judicial attitudes toward the legal profession. As the profession moved from a system of statutorily set fees to a contract model of compensation, the sharing of risk through contract became more acceptable. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876* 277 (1976); Brickman, *supra* note 8, at 35-37. As a growing body of impecunious industrial workers sought redress for industrial injuries, the contingency fee became a more common method of financing lawsuits. See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 422-23 (2nd ed. 1973); Comment, *Are Contingent Fees Ethical Where Client Is Able to Pay A Retainer?*, 20 OHIO ST. L.J. 329, 335 (1959). By the late nineteenth century the contingency fee was a common form of fee arrangement for many matters. By the mid-1960s all fifty American states recognized the validity of the con-

The contingency fee attorney may have incentives, however, to engage in behavior that has a negative impact on the justice system. And finally, the potential for windfall earnings by attorneys has a decidedly negative impact on the public perception of fairness in the justice system.

A casual examination of contingency fee arrangements suggests that the attorney and client interests are highly aligned. The attorney has an incentive to maximize the plaintiff's litigation return. He has little obvious incentive for shirking or settling too low. He apparently has an incentive to work hard to recover his costs and attain the expected return. Moreover, his risk attitude should be closer to the client's than the risk attitudes of attorney and client in the fixed fee or the hourly fee arrangement.<sup>64</sup> Hence, under this logic, a contingency fee attorney can be expected to be an aggressive, hard-working advocate, who is likely to seek a large return or seek a substantial settlement without exposing the plaintiff to the risk of receiving zero.<sup>65</sup>

Oddly, the most widely accepted view of the contingency fee arrangement is that it misaligns the interest of client and attorney.<sup>66</sup> This approach views the attorney as a wealth-maximizer who will exert less effort than a plaintiff would choose to have exerted on his behalf because the attorney, not the client, fronts the costs of such effort. Under this view, the contingency fee arrangement produces shirking and sub-optimal investment in the case. It is also thought to produce sub-optimal settlements because client and attorney face differing cost constraints when they assess the alternatives of settling or pursuing costly litigation.<sup>67</sup> Thus, there are competing views

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tingent fee. *See, e.g.*, ME. REV. STAT. ANN. Tit. 17-A, §516 (1983) (recognizing the contingent fee as legal in the state of Maine).

<sup>64</sup> *See* Danzon, *supra* note 24, at 223 ("[T]he contingent fee system induces the amount of attorney effort that would be chosen by a fully informed risk-neutral plaintiff who was paying an attorney by the hour.").

<sup>65</sup> *See* Miceli & Segerson, *supra* note 24, at 381-82.

<sup>66</sup> *See* Brickman, *supra* note 8, at 32; Clermont & Currivan, *supra* note 8, at 532; Schwartz & Mitchell, *supra* note 8, at 543-46; Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. LEGAL STUD. 187, 191-93 (1991); Watts, *supra* note 27, at 169; Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. L. REV. 469, 471 (1994).

<sup>67</sup> *See* Miller, *supra* note 27, at 190. The settlement decision is a joint decision between client and attorney. However, the attorney is likely to exert substantial influence due to his superior experience and legal expertise. Hence, the attorney may have the ability to gain a settlement in the attorney's favor – and not the plaintiff's – by persuading the plaintiff that the settlement is the best that the plaintiff can obtain. *See also* Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 U.C.L.A. L. REV. 949, 955 (1990); Schwartz & Mitchell, *supra* note 8, at 545; Thomason, *supra* note 66, at 221-22 ("[A] contingent-fee structure alters attorney incentives so as to create a conflict of interest between the attorney and his or her clients.").



of the effect of the contingency fee on the alignment of client and attorney interest.<sup>68</sup>

The contingency fee arrangement provides financing<sup>69</sup> and risk-shifting benefits<sup>70</sup> for the client. The contingency fee attorney fronts the litigation costs, which may or may not be payable solely out of the plaintiff's recovery. As a result, the plaintiff faces little or no risk of losing the case. His return is bounded from below by zero and the return is bounded from above only by the need to share the return with the attorney. Most of the risk of loss is shifted to the contingency fee attorney, in exchange for which she shares in the benefits.<sup>71</sup>

The contingency fee system clearly increases client access to the justice system, as compared with the fixed or hourly fee systems. By accepting

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<sup>68</sup> A competing approach views the contingent fee attorney as a competitive firm, a small business. See Danzon, *supra* note 24, at 215-16. While maximizing personal income may make sense for a single case, it is a poor long-term strategy for a successful law practice. An attorney must be known for investing effort and money in clients' cases in order to compete effectively for cases with high net expected returns and he must differentiate his representation from that of the selfish, utility maximizing attorney. Therefore, establishing a reputation as a provider of high quality legal representation is likely to be a more effective strategy for attracting plaintiffs with cases that have high expected returns. In a competitive market, the attorney establishes this reputation by investing effort and resources into cases so long as his profits are non-negative. Under these conditions, the contingency fee attorney's case investment equals that of the optimal hourly fee outlay. See Danzon, *supra* note 24, at 216 (identifying the mathematical conditions under which contingent fee attorney investment equals the optimal investment). However, reality is not perfectly competitive and there are informational imperfection that may discourage attorneys from adopting a competitive strategy. The contingency fee attorney may well have a strong incentive to perform as a personal utility-maximizer in low stakes, low visibility cases. Thus, it is likely that plaintiffs receive both strong and suboptimal representation in contingency fee arrangements depending on case visibility and amount at stake. See Kritzer et al., *supra* note 24, at 267 (reporting empirical evidence that contingent fee attorneys exert less effort than hourly fee attorneys in low stakes cases, but equal or even exceed hourly fee effort in high stakes cases).

<sup>69</sup> In addition to making a lawsuit possible for a person without the financial resources to pay a lawyer, see Ross, *supra* note 22, at 12, the contingent fee also functions as a financial hedge, whereby the exposure to loss is limited by the attorney's assumption of risk, and gain is similarly limited by the attorney's sharing in equity. See Brickman, *supra* note 8, at 43.

<sup>70</sup> Professor Kritzer observes that the attorney working on an hourly or fixed fee basis normally expects payment in advance, in addition to expenses, whereas the financing arrangement offered by the contingency fee attorney is a key feature of her service. Kritzer, *supra* note 3, at 270.

<sup>71</sup> See Miller, *supra* note 27, at 189 ("The attorney effectively purchases an equity interest in the litigation from the plaintiff, offering his or her future services in exchange for a percentage of the recovery."). This percentage is regulated in many states. See BRICKMAN ET AL., *supra* note 8, at 17 (stating that some states, including Florida, Illinois, Michigan, New Jersey, California, Connecticut, and New York, regulate the contingent fee by imposing a sliding scale). For a well reasoned argument that a contingent fee arrangement made in the absence of a real risk of loss should be struck down as a breach of fiduciary duty, see generally Brickman, *supra* note 8. In practice, courts routinely strike down contingent fees that are disproportionate to the risk involved in the litigation. *Id.* at 78-88.

the financial risk of loss, the contingency fee attorney provides any plaintiff with judicial access whose claim the attorney believes has a positive expected return.<sup>72</sup> In addition, this risk-shifting characteristic of contingency fee arrangements induces contingency fee attorneys to serve as society's judicial gatekeepers, so that unpromising cases are less likely to come to court than under an hourly fee system.<sup>73</sup>

On the other hand, the contingency fee does not provide complete access or ideal gatekeeping. Meritorious claims with important legal implications but limited pecuniary prospects will not be pursued under contingency fee arrangements, either.<sup>74</sup> In addition, the contingency fee attorney may take a case with limited merits if he believes that he can extract a significant settlement from the defendant. He may accept a "strike suit" with little financial risk, especially in the United States where the loser normally does not pay.<sup>75</sup> This is a low risk strategy, because the attorney can drop the case if the defendant refuses to settle. The association of strike suits with contingency fee arrangements has precipitated demands for reform in the United States<sup>76</sup> and has made other western nations leery of permitting contingency

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<sup>72</sup> See Kritzer, *supra* note 3, at 307 ("In a sense, clients pay a premium for eased access to the civil justice system.").

<sup>73</sup> Contingency fee attorneys typically engage in this filtering activity in deciding which cases to accept. See, e.g., Andrew Robert Schein, *Attorneys Fees for Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U.L. REV. 443, 455 (1983) (arguing that contingency fee attorneys are reluctant to take FOIA and Privacy Act cases due to the difficulty of evaluating the potential for success before accepting the case). This may result in fewer frivolous lawsuits. See Clermont & Currivan, *supra* note 8, at 586; Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 26 (1990).

<sup>74</sup> Lawsuits to clarify legal rules, obtain equitable relief, or identify individual rights, for example, usually are incompatible with a contingent fee arrangement.

<sup>75</sup> Frivolous lawsuits obtained the moniker "strike suit" because of the unexpected and explosive nature of the assault on companies whose stock drops unexpectedly. See Andrew E. Serwer, *What to do About Legal Blackmail*, FORTUNE, November 15, 1993, at 136. Such claims have been described as extortionate with widely volatile technology stocks seen as particularly vulnerable to such actions. See Dan Morain, *Anti-Litigation Initiative Drive Moves Forward*, L.A. TIMES, September 12, 1995, at A3. Corporate distress has encouraged a push for litigation reform to restrict the ability of attorneys to bring such actions. However, some commentators argue that such legislation is an over-reaction because there already exists effective means to deter the filing of frivolous claims. See, e.g., D. Brian Hufford, *Detering Fraud vs. Avoiding the "Strike Suit": Reaching an Appropriate Balance*, 61 BROOK. L. REV. 593, 594 (1995) (encouraging courts to use authority available under Fed. R. Civ. P. 9(b) to prevent frivolous lawsuits before resorting to extreme reform measures such as cost shifting).

<sup>76</sup> Some attorneys, for example, target certain industries whose stock is particularly volatile. For example, the regular wide swings in stock value of high technology companies make them obvious targets for such actions. See, e.g., Gina Smith, *In Silicon Valley, Nobody Wants a Piece of Lerach: High Tech Execs Hope Nemesis Has Had His Day in Court*, S.F. EXAMINER, October 22, 1995, at D-1 (describing litigation reform efforts to deter attorneys from bringing lawsuits against high technology companies); Nanette Byrnes, *Valley of the*

fee arrangements.<sup>77</sup> Hence, the access provided by the contingency fee arrangement is accompanied by potential, and sometimes real, abuses.

In fact, the contingency fee is a prime suspect in the body of literature that considers the wasteful effects of litigation driven by attorney interests on the economy.<sup>78</sup> The contingency fee arrangement is thought to impact the judicial system by producing more litigation,<sup>79</sup> higher damages awards,<sup>80</sup> and a greater expansion of legal doctrine by bringing novel theories of law to litigation.<sup>81</sup> We have considered that the contingency fee increases access to the justice system, increasing the number of conflicts litigated. It is also known that the vast majority of cases involving multi-

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*Pols: High Tech's Heavy Hitters Build a War Chest for Tort Reform*, BUS. WK., August 28, 1995, at 72.

<sup>77</sup> See I THE ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT 176-77 (1979) (observing that "[t]he fact that the lawyer has a direct personal interest in the outcome of the case may lead to undesirable practices, including the construction of evidence, the improper coaching of witnesses, the use of professional partisan expert witnesses . . . improper examination and cross-examination, groundless legal arguments designed to lead the courts into error and competitive touting").

<sup>78</sup> See Grant P. DuBois, *Modify the Contingent Fee System*, A.B.A. J., Dec. 1985, at 38; Jay, *supra* note 8, at 813; Kritzer, *supra* note 3, at 267-8 ("On the one hand, contingency fees represent the average person's "key to the courthouse. Individuals who would otherwise be left with no recourse can pursue the compensation to which they are entitled. At the other extreme, contingent fees are the source of all evil in the civil justice system: chasing ambulances for clients, creating expectations that every little injury deserves large payments of compensation, and filing inflated and fraudulent claims.") (footnotes omitted).

<sup>79</sup> See Walpin, *supra* note 2, at 654. The assumption that contingent fees promote litigation is well established in the common law doctrine of champerty, which forbade the attorney's participation in the result of litigation. While contingent fees became established in the United States by the mid to late nineteenth century, they continue to be prohibited in the United Kingdom and Ireland on the ground of champerty. See Matthew Scully, *Contingency Fees: Another Name for Champerty?*, WALL ST. J., Nov. 10, 1997, at A23 (discussing the case of *Buckle v. Fraser*, in which an agreement of an attorney to secure a lost inheritance for a client for a percentage of the amount recovered was struck by the Irish Supreme Court because it "savored of champerty" and "could compromise the proper administration of justice"). In *Buckle v. Fraser*, [1996] 2 I.L.R.M. 34, the Irish Supreme Court held the agreement was unethical because it "[had] an undue tendency to promote litigation for the benefit of the promoter rather than the litigant or involves an abuse of legal proceedings." Professor Miceli, however, concludes that the "results [of his economic model] do not generally support the conventional view that contingent fees promote excessive litigation" in the sense that contingent fees do not provide the attorney an incentive to engage excessively in litigation. Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211, 224 (1994). This does not consider the impact of increased access to litigation that the contingent fee permits for wealth-constrained plaintiffs. In short, it is probably the financing feature of the contingent fee that increases litigation, not the incentive that the contingent fee system provides to the attorney, as compared with hourly fee.

<sup>80</sup> See Dover, *supra* note 26, at 551.

<sup>81</sup> See J. Robert S. Prichard, *A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of Substantive Law*, 17 J. LEGAL STUD. 451, 452-53 (1988).

million-dollar awards and punitive damages involve contingency fee attorneys.<sup>82</sup> In fact, an overwhelming majority of plaintiff tort claims are handled on a contingency fee basis,<sup>83</sup> so an erroneous inference may be based on a coincidental relationship. Nevertheless, the contingency fee provides attorneys with incentives to aggressively pursue large court awards. The possibility of sharing in large awards, as well as the psychological pitfalls of escalation and entrapment,<sup>84</sup> provide the attorney incentives not only to win cases, but also to punish the other side and maximize the inflicted punishment. In addition, the actions of defense attorneys, who usually work on an hourly basis and have little incentive to settle and much incentive to delay and conduct a war of attrition,<sup>85</sup> undoubtedly fuels the contingency fee attorney's zeal and contributes to escalation of the conflict.

Finally, contingency fee arrangements hold the potential for apparent windfall earnings by attorneys,<sup>86</sup> and this negatively affects the public perception of fairness in the justice system.<sup>87</sup> The attorney may appear to, and

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<sup>82</sup> See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 526 (1986).

<sup>83</sup> See Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 *CARDOZO L. REV.* 1755, 1773-74 (1994) ("Virtually all personal injury litigation today is done on a contingent fee basis.").

<sup>84</sup> Escalation of commitment is a well-documented psychological phenomenon. See, e.g., Max H. Bazerman et al., *Escalation of Commitment in Individual and Group Decision Making*, 33 *ORG. BEHAV. & HUM. PERFORMANCE* 141 (1984); JOEL BROCKNER & JEFFREY Z. RUBIN, *ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS* (1985); ALLAN I. TEGER, *TOO MUCH INVESTED TO QUIT* (1980). In his seminal study of escalating conflict, Teger found that the longer the conflict remained unresolved, the more dominant psychological factors became in motivating involved parties. *Id.* at 24. Each side tends to vilify the other and the desire to defeat and humiliate the other side eventually become dominant objectives. See *id.*

<sup>85</sup> See Barker, *supra* note 45, at 201 ("Judges have experienced the frustrations of having settlement discussions bog down or fail completely when the lawyer's ability to be paid is tied to the amount of the final recovery to the client, and the lawyers have evaluated their investment in the case on the basis of hours spent.").

<sup>86</sup> Professor Brickman has illuminated this point in several articles. See BRICKMAN ET AL., *supra* note 8, at 15; Brickman, *supra* note 83, at 1773-74 nn.57-60 (citing hourly rates of return for contingent fee attorneys of \$30,000-50,000 per hour); Brickman, *supra* note 8, at 2-3 (observing that from the perspective of a plaintiff seeking to sell a claim on a contingent fee basis, "lawyers have been instrumental in creating a tort system which overcompensates lawyers, undercompensates many claimants, and creates barriers to nonlawyer competition in the claim-invoking process"). See also Gladstone, *supra* note 14, at 523 (observing the problematic aspects of a "reasonableness" standard in court supervision of fees).

<sup>87</sup> The sense of unfairness that the public may perceive has a psychological basis. According to equity theory, an individual's satisfaction with the results of a multi-person venture depends inversely on the difference between the partners' perceived respective returns and inputs. WALSTER ET AL., *supra* note 43, at 17.

Professor Kritzer's study to date of effective hourly rates of return for attorneys suggests thinking of the case mix as a portfolio in which fixed and hourly fee cases are low risk or fixed income items and contingent fee cases are higher risk/ higher yield investments. Krit-

indeed may actually, benefit disproportionately to the efforts and risk he invests.<sup>88</sup> State bar ethics committees,<sup>89</sup> judicial decisions on attorney ethics,<sup>90</sup> and many commentators,<sup>91</sup> regard the contingency fee as ethical only if it represents a shifting of a palpable risk from the client to the attorney. Where there is no real risk of nonrecovery, the contingency fee is considered unethical.<sup>92</sup>

Of course, in theory clients may negotiate with attorneys to avoid windfalls to the attorney; after all, in a perfectly competitive market for attorneys, expected attorney profits are zero. Except for large corporate clients, however, plaintiffs rarely negotiate alternative fee arrangements, suggesting that there are other dynamics at work, such as the client's diffi-

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zer, *supra* note 3, at 303 ("My analysis shows that lawyers who take a case on a contingency fee basis can expect to do somewhat better than they do on their hourly fee cases. . . . The occasional very good case will yield some significant profits over and above the balancing out of the typical better than average cases and the worse than average cases. Under certain circumstances, lawyers can do much better from contingency fee work than most lawyers do from hourly fee work."). Like investors, contingent fee attorneys may have different approaches to managing risk. *Id.* at 304.

<sup>88</sup> The apparent "windfall" fees of contingent fee attorneys in U.S. tobacco litigation provide an excellent example of this public perception. See Scully, *supra* note 23, at A18 (quoting Florida Circuit Court Judge Harold J. Cohen's declaration that \$2.8 billion in fees, amounting to 25% of Florida's \$11.3 billion settlement, or \$14,000 per hour per attorney for 42 months, "simply shocks the conscience of this court"); Bob Van Voris, 'Fees' is a *Four-Letter Word*, NAT'L L.J., July 7, 1997, at A6 (concerning the fees to be awarded to private attorneys in the multistate tobacco litigation settlement in 1997).

The potential for windfall profits, however, far transcends the tobacco litigation. See Richard B. Schmitt, *Courts Whittle Down Lawyers' Fat Contingent Fees*, WALL ST. J., Jan. 28, 1998, at B-1 (describing various instances of contingent fee claims grossly disproportionate to effort expended, and also observing the power of the common law court to modify and deny fee claims). See Andrea Gerlin, *Patent Lawyers Forego Sure Fees on a Bet*, WALL ST. J., June 24, 1994, at B-1 (patent attorney made \$150 million a year in contingent fee patent infringement cases).

<sup>89</sup> See, e.g., Virginia State Bar Ass'n, [1992 Transfer Binder] Nat'l Rep. Legal Ethics & Prof. Resp. (UPA) LEO 1461 (Va:Ops. Apr. 13, 1992).

<sup>90</sup> See e.g., Attorney Grievance Comm'n v. Kemp, 496 A.2d 672, 678-79 (Md. 1985) ("[W]here the risk of uncertainty of recovery is . . . low . . . it would be the rare case where an attorney could properly resort to a contingency fee. . . ."); In re Swartz, P.2d 1236, 1244 (Ariz. 1984) (holding that an attorney who did not reduce his contingency fee upon finding that there was no risk was in breach of an ethical duty); Cazares v. Saenz, 208 Cal. App. 3d 279, 288, 256 Cal. Rptr. 209, 214 (1989) ("[T]he raison d'etre for the contingent fee . . . [is] the contingency.").

<sup>91</sup> See BRICKMAN ET AL., *supra* note 8, at 8, 10; Brickman, *supra* note 8, at 125-26; John F. Grady, *Some Ethical Questions About Percentage Fees*, LITIG., Summer 1976, at 20, 24; Horowitz, *supra* 3, at 177; Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1643 (1996).

<sup>92</sup> See WOLFRAM, *supra* 82, at 526.

culty in prospectively distinguishing high quality legal representation<sup>93</sup> from among the many competitors for contingency fee representation. The complexity of the factors that affect the client's return probably inhibits knowledgeable negotiation. There are many possible outcomes of a lawsuit, and the particular characteristics of the attorney chosen can dramatically influence the size of the plaintiff's return. Choosing an expensive expert attorney in a case that the plaintiff is certain to win is rational. In particular, retaining a high priced and distinguished attorney can have value if the attorney's reputation induces the defendant to settle quickly. Thus, a quick settlement for a large amount is not proof that the attorney did not provide substantial value to the plaintiff. Nevertheless, this argument probably is not well appreciated in the public eye.<sup>94</sup> Thus, the three types of fee arrangements, based around the central elements of predictable fixed fees, fees based on hours expended, and fees based on a sharing of risk of loss and benefits, affect interests of the client and of the justice system in different ways. If one thinks of these interests as a continuum of the duties an attorney owes to his client and to the judicial system, then it is clear that fee systems emphasizing one element over others will encourage attorneys to strike a balance of duties at different points on the continuum. The social choice of fee systems, then, reflects a social preference for emphasis on different duties.

In the following section, we compare the effects of these types of fee arrangements on each of the five interests we have identified. This comparison identifies more precisely the way in which each interest is advanced or hindered by different fee structures.

## V. COMPARING THE FEE ARRANGEMENTS

Each fee arrangement has both positive and negative aspects. Fee arrangements sometimes vary in the same direction on similar dimensions, and sometimes they diverge substantially. Fee arrangements diverge noticeably, for example, in aligning attorneys and client interests. The fixed fee arrangement particularly misaligns interests in that it provides strong disincentives to working in clients' interests. Hourly and contingency fee arrangements are far better at aligning attorney and client interests, but they are not perfect.<sup>95</sup> The hourly fee arrangement would be the fee arrangement of choice for deep-pocketed plaintiffs in high stakes litigation. However, for

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<sup>93</sup> It is widely recognized that contingency fee attorneys who successfully differentiate their services can obtain above average fees for their services. See DEREK BOK, *THE COST OF TALENT* 139-140 (1993) (decrying the phenomenon).

<sup>94</sup> Professor Brickman has been a vocal critic of alleged attorney windfalls. Ignoring the potential for attorneys to provide value in a case that settles quickly, or in which the risk of no recovery is low, Professor Brickman asserts that such contingency in such cases are ethically valid. Brickman, *supra* note 8, at 32.

<sup>95</sup> See *supra* text accompanying notes 46-48, 61-65.

other plaintiffs and cases the hourly fee attorney's insensitivity to costs and risk makes the fee arrangement problematic; the attorney can spend more than plaintiff receives in a winning effort unless the client monitors with a high degree of insight, skill, and perspicacity. Contingency fee attorneys also provide good representation in high stakes cases and do so with more sensitivity to cost efficiency and risk.<sup>96</sup> In low stakes cases the contingency fee attorney is more likely to shirk.<sup>97</sup> Hence, unless the case has a high expected return, the moderate income plaintiff is not well served by either fee arrangement.

The fee arrangements also diverge dramatically with respect to client risk of loss and costs. Both the fixed fee and the hourly fee arrangements allocate substantial risk to the plaintiff, although the risk is more deterministic with the fixed fee.<sup>98</sup> The contingency fee arrangement shifts substantial risk of costs and loss to the attorney but permits the plaintiff to share in gains, including unexpectedly high gains.<sup>99</sup> The contingency fee plaintiff's downside risk, however, is zero — so long as there is no fee shifting to the loser.<sup>100</sup>

The plaintiff's yield, or expected return net of attorney fees and costs, provides a measure of the price of the reduction in risk. For high stakes cases, contingency fee cases probably produce the lowest yields, because of the high risk that attorneys bear and the financing costs. Yields under the more risky fixed and hourly fee arrangements should be greater for high stakes cases because fees depend on attorney costs rather than stakes. Although costs and fees under these fee arrangements increase with costs, they do not increase at the same rate as the attorney's share under the contingency fee arrangement. In lower stakes cases yields may be lower under fixed and hourly fee arrangements than under the less risky contingency fee arrangement. This difference is due to the fact that fixed and hourly fee arrangements are not as sensitive to stakes. Work done under a contingency fee, being proportional to the stakes, can be scaled downward accordingly. Therefore, the relative yield is likely to be greater when this fee arrangement is used in low stakes cases.

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<sup>96</sup> A seminal study in the 1980s of hourly and contingency fee attorneys generally supports this assertion. See Kritzer et al., *supra* note 24, at 272-73 (“[O]ur analysis suggests that even if contingency fee lawyers and hourly fee lawyers spend similar amounts of time on cases, the factors that affect the allocation differ. Thus, contingency fee lawyers seem to be more sensitive to the productivity of their time and are less influenced by purely craft-oriented considerations. As the amount of money at stake in a case goes up, the contingency fee lawyer seems to be willing to invest relatively more time in cases.”).

<sup>97</sup> *Id.* at 267 (discussing data that suggests contingency fee attorneys spend less on cases worth \$6000 or less than do hourly fee attorneys).

<sup>98</sup> See *supra* text accompanying notes 46, 48-54.

<sup>99</sup> See *supra* text accompanying notes 69-71.

<sup>100</sup> For a discussion of the implications of fee shifting, see *infra* text accompanying notes 132-138.

Although the contingency fee arrangement would appear to provide the greatest access to justice, this may not be the case where the stakes are low. Low stakes cases, with low expected returns, may not entice the contingency fee attorney to take cases, especially if he adopts a utility-maximization strategy rather than a competitive strategy. Moreover, the quality of contingency fee representation may be the lowest in low stakes cases.

The fixed and hourly fee arrangements provide access to anyone willing to pay the attorney's requested fee, and thus may provide superior access to those who can pay the fee. Nevertheless, for a plaintiff who cannot pay the fixed or hourly fee, even a claim with a million dollar expected return may go unrepresented. On the other hand, a marginal or malicious lawsuit — cases likely to be rejected by contingency fee attorneys — can be represented if the plaintiff is willing and able to pay. Thus, all fee arrangements limit access in some dimensions. The contingency fee arrangement is likely to provide the greatest access but at the cost of quality representation for marginal cases. Contingency fee arrangements discriminate based on the case quality whereas the fixed and hourly fee arrangements discriminate based on the plaintiff's ability to pay. The impact of each fee arrangement on the justice system is not entirely clear. It seems reasonable to suggest that whether his compensation depends on winning can influence the attorney's ability to resist attempting to introduce error into the court's decision. Fixed and hourly fee arrangements introduce no such incentive because the attorney's payoff is independent of the court decision or settlement. However, contingency fee attorneys are susceptible to this pressure.

The perception of fairness in the justice system probably is affected significantly by the fee arrangement. The hourly fee arrangement is most likely to be perceived as fair because the fee is related to effort. The fixed fee arrangement may be seen as fair because it is agreed to; shirking probably is not visible or well understood by the public. The contingency fee, however, holds the possibility of multi-million dollar returns for seemingly little work.

In short, the public policy of fee arrangements is a problem of judgment and optimization. Ideally, a variety of attorney fee arrangements would be available and clients and attorneys would match an optimal fee arrangement with attorney-client characteristics and the nature of the case. Such a system probably would result in fee arrangements biased toward protecting the interests of the client and the attorney rather than those of the justice system. At best, a fee arrangement might be optimal from the client's point of view and not offensive to important interests of the justice system. Protection of the interests of the justice system requires some regulatory assertion of those interests in the decision process.

In the next three sections, we examine the dominant institutional fee structures of the United States, the United Kingdom, and the western civil law countries. In this examination, we apply the principles developed above



and use them to draw inferences and suggest the likely direction of public policy in the area of attorney fee structures in these countries.

## VI. THE U.S. APPROACH TO THE ATTORNEY FEE

In the United States, most civil cases in which money damages are sought are undertaken through a contract with a private attorney or firm; little legal aid is available for this type of legal proceeding.<sup>101</sup> In such cases, attorneys and clients may contract within a range of possible fee arrange-

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<sup>101</sup> Most legal aid for civil actions in the United States is restricted to the poor. Funding for legal aid is provided primarily through the Legal Services Corporation ("LSC"), which was created pursuant to the Legal Services Corporation Act of 1974. Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (1983)). Local government entities generally match these funds on less than a one-to-one basis. Private donations supplement this public funding. See Robert J. Cohen & James Meeker, *Don't Cut the Poor's Legal Lifeline; Slashing Legal Services Corp. Would Deny Representation to 9,000 Residents*, L.A. TIMES, April 5, 1995, at B9.

The work of the LSC has received tepid support and, most recently, hostile treatment from the U.S. government. The U.S. Supreme Court has consistently held that there is no constitutional right to legal representation in most civil cases. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 118 (1996); *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *Murray v. Giarratano*, 492 U.S. 1, 7 (1989). In the absence of a constitutional mandate favoring representation, members of Congress have threatened the existence of the LSC and substantially reduced its funding. See Ragan Powers, *Legal Services: Providing Access to Justice for All*, SEATTLE TIMES, October 2, 1997, at B5. In part due to these cutbacks and the general lack of support for publicly funded legal aid, a substantial majority of low and moderate income individuals who can benefit from legal services do not receive it. See INSTITUTE FOR SURVEY RESEARCH AT TEMPLE UNIV., AMERICAN BAR ASS'N CONSORTIUM ON LEGAL SERVICES & THE PUBLIC FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 20 (1994) (estimating that 61 percent of moderate-income people and 71 percent of low-income people who can benefit from legal services do not consider using a lawyer).

ments,<sup>102</sup> including the fixed fee, the hourly fee, and the contingency fee, as well as creative combinations of these fee arrangements.<sup>103</sup>

The fixed fee is a common fee arrangement in many kinds of legal matters.<sup>104</sup> In the fixed fee arrangement, the attorney takes no proprietary or equity interest in the client's case. The attorney receives a fixed dollar return regardless of the outcome of the case. Traditionally, the fixed fee was used to engage an attorney for a specific and limited representation. It is becoming more common, however, for law firms to enter into relational contracts with a client rather than separate contracts for each transaction. Some firms, for example, undertake a broad range of services for a client for a flat annual fee.<sup>105</sup>

The hourly fee, however, is the traditional method by which attorneys in the United States are compensated.<sup>106</sup> The attorney keeps a log of hours worked on a transaction for a client and periodically presents a bill for the

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<sup>102</sup> In the United States, bar rules emphasize communication about the fee arrangement with the client. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (stating that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 cmt. 1 (providing that it is sufficient "to state that the basic rate as an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 cmt. 3 (providing that "[w]hen there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications" and a simple memorandum or a copy of the attorney's fee schedule may provide sufficient communication with the client). In addition, Model Rule 1.4(b) requires the attorney to explain matters to the client sufficiently well that the client can make an informed decision regarding the representation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b). The ABA also takes the position that a lawyer entering into a contingent fee agreement should advise the client of "the availability of alternative fee arrangement." ABA Comm. On Ethics and Professional Responsibility, Formal Op. 389 (1994) (discussing contingent fees).

<sup>103</sup> Recent innovations include the blended hourly rate, the combination of a lower hourly fee and a contingent interest in outcome, the defense contingent fee, the fixed unit charge, positive premium billing, incentive billing, negative premium billing, the retrospective fee, and the dedicated attorney (whereby the client purchases the services of an attorney for a fixed period of time). For discussion of these innovations, see generally Zoe Baird, *A Client's Experience With Implementing Value Billing*, 77(4) JUDICATURE 198 (1994); Haig & Caley, *supra* note 20; Kritzer, *supra* note 10, at 189 (reporting the increasing acceptance of alternative and value-billing among inside and outside counsel in the United States); Menkel-Meadow, *supra* note 52, at 655 n.163 (explaining blended value billing and the "reverse contingent fee"); Marilyn V. Yarbrough, *Is Value Billing the Answer?: A Response to The Individual Practitioner and Commercialism in the Profession*, 45 S.C. L. REV. 991 (1994).

<sup>104</sup> *See* Baird, *supra* note 103. However, at some point the complexity and uncertainty of a matter make the fixed fee unfeasible. *See* Litan & Salop, *supra* note 53, at 194-95.

<sup>105</sup> *See* Kritzer, *supra* note 10, at 189.

<sup>106</sup> For a history of the gradual establishment of the hourly fee in American legal practice, see Ross, *supra* note 22, at 6-12.

hours. Sometimes this fee is taken out of a pre-paid retainer account after the client approves the periodic bill.<sup>107</sup> Different hourly fees are charged for attorneys of different levels of experience and expertise, as well as for paralegals and similar services.<sup>108</sup> It is common for both the billing attorney and the paying client to scrutinize the hourly statements for accuracy and value.

Finally, the contingency fee is widely used in the United States, particularly on the plaintiff's side in litigation.<sup>109</sup> Under a contingency fee the client's obligation to pay the attorney depends upon the outcome of the engagement. Normally, the fee will be paid out of an expected monetary award, and typically the attorney takes between 20% and 50% of the court award.<sup>110</sup> If the client loses the case, however, no fee is payable.<sup>111</sup> Within

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<sup>107</sup> The fixed fee is different from the retainer fee, with which it is sometimes confused. Special retainers simply represent advanced payment for a service. The funds are held by the attorney in escrow and drawn on as they are earned; this sort of retainer could be used in conjunction with almost any fee arrangement. The general retainer, however, is a fee paid to a lawyer, often annually, simply to secure the lawyer's availability. A hybrid form of agreement may provide for advance payment of an annual retainer that is applied to the bill as the attorney earns it (presumably on a fixed fee basis for sequential transactions, or on an hourly fee basis), the remainder being retained by the attorney for her availability. See Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993); Alexander K. McKinnon, *Analytical Approaches to the Nonrefundable Retainer*, 9 GEO. J. LEGAL ETHICS 583, 584 (1996).

<sup>108</sup> See *Leblanc v. Secretary of Health and Human Servs.*, No. 90-1607V (Fed. Cl., filed November 8, 1995) (holding that certain routine tasks must be billed at lower paralegal's hourly rate rather than higher hourly rate for attorneys); J. E. M., *How Profitable are Associates?*, AM. LAW., Dec. 1995, at 8.

<sup>109</sup> Increasingly, however, contingent fees are employed in tort defense. Margaret Cronin Fisk, *Corporate Firms Try Contingency*, NAT'L L.J., Oct. 27, 1997, at A1 (quoting Louis Briskman, general counsel of Westinghouse Electric, "[o]ur general focus is to move away from the hourly billing cycle. We're looking for a relationship that aligns our interests with the law firm's"). Contingency fees are employed at times in a broad variety of types of representation, including shareholder derivative suits, patent cases, mergers and acquisitions, securities cases, and lobbying. See Painter, *supra* note 3, at 626.

<sup>110</sup> See FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-1.5(B)(I) (setting maximum contingency fees between 15% and 40%, depending on the stage of litigation). The contingency fee is commonly used in U.S. personal injury litigation. See JAMES S. KAKLIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 37 (1986) (about 95% of U.S. personal injury cases are taken on contingency); WOLFRAM, *supra* note 82, at 526; *Settling for Less*, *supra* note 20, at 445. In addition to regulation by lawyers' ethics codes, see *supra* note 15, the contingent fee is regulated piecemeal by statute. For example, claims against the federal government are subject to limits on the proportion of recovery awardable as a contingent fee. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 2678 (1998) (20% of settlements, 25% of judgments); False Claims Act, 31 U.S.C. § 3730(d)(1) (1998) (15%/25%); 38 U.S.C. § 5904(d)(1) (1998) (veterans' benefits, 20%); 42 U.S.C. § 406(a)(2)(A)(i)(I)&(II) (1998) (Social Security benefits, the lesser of 25% or \$4000); 20 C.F.R. § 404.1730 (1999) (Social Security disability, 25% cap).

<sup>111</sup> The attorney fee may be based on net receipts, effectively shifting costs to the client. In addition, the client may agree to be obligated to pay expenses if there is no recovery, but

the constraints of state and federal law and bar rules, a variety of contingency fee arrangements may be constructed.<sup>112</sup> Under American Bar Association Model Rules, it cannot be used in most family law matters and in criminal cases.<sup>113</sup> In addition, the contingency fee attorney must communicate with the client in an explicit and detailed manner about the details of the fee arrangement.<sup>114</sup>

In short, the states of the United States regulate attorney fees, but they permit a broad range of choice in fee arrangements, particularly where civil plaintiffs engage private attorneys for representation. Until 1975, the mini-

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in practice that does not appear to happen. See Clermont & Currivan, *supra* note 8, at 532 n.3.

<sup>112</sup> The judge in a U.S. court has the power to rule on the propriety and reasonableness of the fees of attorneys in a matter before the court. See MACKINNON, *supra* note 14, at 23-24. In addition, legislatures have asserted an interest in supervising the contingent fee arrangement. See REPORT OF THE ABA COMM. ON EVALUATION OF PROFESSIONAL CONDUCT (1981), Legal Background Notes. A variety of hybrids of contingent fee arrangements have been crafted by both regulators and scholars, basically with the goal of approximating either a privately or socially optimal fee arrangements to account for incentives and risk. See Brickman, *supra* note 8, at 36; Clermont & Currivan, *supra* note 8, at 532 (combining contingent hourly fees with bonuses based on percentage of recovery); Miller, *supra* note 27, at 201 (describing fee arrangements in which percentage varies with the stage of litigation); Leubsdorf, *supra* note 22, at 475. See also Kirchoff v. Flynn, 786 F.2d 320 (7th Cir. 1986) (Easterbrook, J.) (analyzing the appropriate use of an hourly fee or a contingent measure of attorney fee under 42 U.S.C. § 1988).

<sup>113</sup> Both the Model Rules and the Model Code prohibit, or severely limit, the use of a contingent fee in domestic relations matters. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1) (prohibiting contingent fees in divorce, alimony and support cases); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 ("Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified."). See also MACKINNON, *supra* note 14, at 45-53; Karsten, *supra* note 63, at 248 (discussing the public policy constraints on the use of contingent fees in family matters that were in place by the end of the 19th century, even as the contingency fee itself became well-established); Comment, *Professional Responsibility – Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar*, 62 N.C. L. REV. 381, 382 (1984); Comment, *Contingent Fee Contracts: Contract Related to Divorce Action Upheld*, 56 MINN. L. REV. 979, 980 (1972). In addition, the Model Rules and the Model Code prohibit the use of a contingent fee for representing a defendant in a criminal case. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (c). See generally, Karsten, *supra* at 64 (discussing the public policy constraints on the use of contingent fees in family matters that were in place by the end of the 19th century, even as the contingency fee itself became well-established.); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 499 (1991).

<sup>114</sup> For example, the contingency fee arrangement must be in writing. It must state how the fee is to be determined, including how the fee varies if the case is settled, goes to trial, or goes to appeal. In addition, the writing must explain whether and how such expenses of the case are to be calculated. When the matter is concluded, the attorney must write the client a statement describing the outcome of the matter and, if there was a recovery, explaining the remittance to the client and how it was determined. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c).

mum fee schedule, which amounts to minimum price fixing, was common in the United States for the straightforward transactions for which a fixed fee is practical, such as real estate transaction, wills, divorces, simple contracts, and trusts. These minimum fee schedules were struck down on anti-trust grounds in U.S. federal courts.<sup>115</sup> Since then, the amount of attorney's fees in private cases is relatively unregulated, although several states have set maximum percentages for contingency fee cases to avoid overreaching by attorneys.<sup>116</sup> If the attorney and client are relatively free to establish the fee structure, one would expect them to select — depending on characteristics of the case and the attorney and client — one that emphasizes the alignment of their interests, the sharing of risk and costs, and client access to the judicial system. One would not expect them to select a fee arrangement with an eye toward the operational efficiency of the justice system or the social perception of justice because neither client nor attorney has an immediate interest in these latter concerns.

Most European countries limit more closely the ability of attorney and client to negotiate a fee arrangement, and this is an important dimension in which the U.S. and the western European legal systems and legal professions are different.<sup>117</sup> The following section examines the innovative approaches that the United Kingdom is pioneering.

## VII. THE UNITED KINGDOM AND THE CONDITIONAL FEE

British solicitors traditionally have been limited to a choice of either the fixed fee<sup>118</sup> or the hourly fee.<sup>119</sup> Through a series of reforms in the early

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<sup>115</sup> In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), the U.S. Supreme Court struck down the publication of mandatory minimum fee schedules by a county bar association that were enforced by a state bar association as horizontal price-fixing violative of U.S. federal antitrust law.

<sup>116</sup> See CONN. GEN. STAT. § 52-251(c) (1997) (sliding scale for personal injury, wrongful death, and property damage actions); MICH. M.C.R. 8.121 (1997) (maximum one-third limit for personal injury or wrongful death actions); N.J. COURT RULES 169 R. 1:21-7 (1997) (sliding scale for tort suits); NY CLS SUP. CT. §§ 603.7(e), 691.20(e)(1998) (providing choice between sliding scale and fixed rate for personal injury or wrongful death suits). Other states have enacted limits on contingent fee payments associated with medical malpractice cases. These statutes take the form of a declining graduated payment scheme. See, e.g. 735 ILL. COMP. STAT. 5/2-1114 (1997); ME. REV. STAT. ANN. tit. 24, § 2691 (1996); MASS. GEN. LAWS ANN. ch. 231, § 60I (1997); WIS. STAT. § 655.013 (1995-1996).

<sup>117</sup> See generally James Donovan and Gerard Britton, *USA v. The Rest of the World – Product Liability Law*, LLOYDS PRODUCT LIABILITY INT'L, Dec. 31, 1994, at (commenting on such difference as the absence of punitive damage awards, contingent fees and jury trials, the prevalence of an appointed professional judiciary, and the existence of caps on damages).

<sup>118</sup> The fixed fee normally is negotiated with the client, or in the case of legal aid, with the legal aid board. New proposals would identify cases involving less than £10,000 as suitable for a "fast track" procedure. Such cases would be undertaken on a standard fixed fee basis and would be subject to careful case management by the court. See LORD WOOLF, ACCESS TO JUSTICE FINAL REPORT, *supra* note 13, 20-58. See also Note, 'Access to Justice':

1990s,<sup>120</sup> however, Parliament has permitted the use of a conditional fee for personal injury cases, insolvency proceedings, and proceedings before the European Commission of Human Rights and the European Court of Human Rights.<sup>121</sup> The conditional fee is available to solicitors,<sup>122</sup> and presumably to barristers as well,<sup>123</sup> at least with respect to the uplift portion of the fee.<sup>124</sup> It cannot be used if the case is funded through legal aid.

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*Lord Woolf's Interim Report*, 14 CIV. JUST. Q. 231, 233 (1996); I.R. Scott, 'Access to Justice': *Lord Woolf's Final Report*, 15 CIV. JUST. Q. 273, 375-76 (1995).

<sup>119</sup> Prior to the conditional fee, fee arrangements have been struck as unenforceable if the solicitor agreed not to collect a fee if the case were lost. *British Waterways Bd. v. Norman*, 26 H.L.R. 232 (Q.B. 1993) (inferring that the fee must have been conditional on winning because the plaintiff prevailed against the Board, but was on income support and not legally aided).

<sup>120</sup> Section 58 of the Courts and Legal Services Act of 1990 [hereinafter "Act"] gave the Lord Chancellor the authority to create regulations whereby conditional fees would be available for certain types of cases. Courts and Legal Services Act, 1990, ch. 41 § 58 (Eng.). The Act defines a conditional fee agreement as "an agreement in writing between a person providing advocacy or litigation services and his client which . . . (b) provides for that person's fees and expenses, or any part of them, to be payable only in specified circumstances." *Id.* at § 58(1). Section 58 provides further that "[w]here a conditional fee agreement provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not a conditional fee agreement, it shall specify the percentage by which that amount is to be increased." *Id.* at § 58(2).

<sup>121</sup> See Courts and Legal Services Act 1990, ch. 41 § 58(1) (Eng.) (excluding family proceedings); The Conditional Fee Agreements Order 1995 (S.I. 1995, No. 1674) and Conditional Fee Agreements Regulations 1995 (S.I. 1995, No. 1675) (including only proceedings for personal injuries, insolvency, and actions before the European Courts). The conditional fee system was proposed originally in the 1989 Green Papers under the Thatcher Government. The WORK AND ORGANISATION OF THE LEGAL PROFESSION (1989) and CONTINGENCY FEES (1989) both attempt to alter the structure of the legal professions and their fee systems. See generally Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always be an England?*, 9 CONN. J. INT'L L. 185, 220 (1994); Michael Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?* 24 INT'L LAW. 753, 755 (1990).

<sup>122</sup> Despite reforms of the early 1990s, the British legal profession remains essentially a two-tiered system in which solicitors and barristers divide responsibilities of legal representation. Solicitors deal directly with clients and conduct research, handle routine business planning and filings, and handle litigation in the lower courts, including the magistrates' and county courts. Barristers are engaged to litigate and to handle courtroom representation in the courts of general jurisdiction and the appellate courts. See Schwarzschild, *supra* note 120. See generally, RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988); PATRICK ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

<sup>123</sup> In theory, at least, barristers have no contractual right to payment of a fee in any event. See Schwarzschild, *supra* note 121, at 203.

<sup>124</sup> See STELLA YARROW, *THE PRICE OF SUCCESS: LAWYERS, CLIENTS AND CONDITIONAL FEES* 76-77 (1997).

### A. The Conditional Fee

The conditional fee is, in effect, an hourly fee that may include a premium for success. The solicitor charges the firm's normal hourly fee, which need not be paid if the client loses the case. If the client wins the case, however, the solicitor may charge an "uplift" — sometimes called a "success fee" — of up to 100% of the hourly fee.<sup>125</sup> The client and the attorney agree in advance on the percentage of uplift, and presumably the extent of the uplift is inversely proportional to the likelihood of winning the case. While the "uplift" cannot be tied to the damage award directly,<sup>126</sup> the Law Society recommends that it be no more than 25% of the damage award received by the client.<sup>127</sup>

The U.K. conditional fee is a variation on the long-standing "Scottish rule" which permits a fee on a "no win, no pay" basis.<sup>128</sup> The British arrangement rewards success, but bases the reward on the effort expended rather than on the amount in controversy. Prior to the passage of this rule in 1995 British courts were quick to strike down fee arrangements that provided a differential payment based on outcome as contrary to public policy.<sup>129</sup> Public policy still prohibits proportional contingency fees or a

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<sup>125</sup> See *supra* note 111.

<sup>126</sup> See Solicitors Act 1974, § 59(2) (Eng.) (reinforcing the traditional prohibition of a contingent fee). A fee is considered "contingent," as opposed to "conditional" if it gives the attorney a percentage return of the money damages or in other ways compensates the attorney based on the amount received by the party by virtue of litigation. In addition, Rule 8 of the Solicitors' Practice Rules of 1996 states that: "A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingent fee in respect of that proceeding." The Law Society proposes to modify Rule 8 to permit an agreement by an attorney to waive the fee (whether hourly or fixed) if the case is lost. See *Rose, supra* note 1, at 16. In that sort of arrangement, an uplift would not be available and the ordinary fee would be contingent; it would not be a *percentage* contingency fee. *Id.* The Law Society's action follows a decision of the Court of Appeal in *Thai Trading Co. v. Taylor*, in which Lord Justice Millett said: "In my judgment, there is nothing unlawful in a solicitor acting for a party to litigation to agree to forego all or part of his fee if he loses, provided that he does not seek to recover more than his ordinary profit costs and disbursements if he wins." Peter Hurst, *The Indemnity Principle Following Thai Trading Company v. Taylor*, 148 *NEW L.J.* 405, 405 (1998).

<sup>127</sup> The Law Society, which regulates solicitors, has promulgated a model fee agreement according to which the uplift cannot exceed 25% of the damages. See *YARROW, supra* note 124, at 73. In a study of conditional fee cases, the Law Society's agreement was found to have been used almost exclusively, either in its original copyrighted form or in a slightly modified form. *Id.* at 72. In addition, the solicitor is obligated to explain to the client all payment obligations that the client might incur, and to obtain the client's agreement to the arrangement, and this occurs in 94% of conditional fee cases. *Id.* at 81.

<sup>128</sup> See Law Reform (Miscellaneous Provisions) Act 1990, ch. 40, § 36 (Scot.). See also MICHAEL NAPIER & FIONA BOWDEN, *CONDITIONAL FEES: A SURVIVAL GUIDE 2* (1996).

<sup>129</sup> *Arata Potato Co. Ltd. v. Taylor Joynson Garrett*, 4 All E.R. 695 (Q.B. 1995) (finding the agreement of a solicitor to reduce a fee by 20% if the case were lost to be a contingency fee contrary to public policy, and therefore unenforceable). Prior to 1967 contingent agreements for attorney fees were considered to constitute the crimes of champerty and mainte-

*pactum de quota litis* in other matters.<sup>130</sup> The barrister, who is expected to present all issues to the court in an impartial manner, and whose payment would come from the solicitor in any event, may not enter into any but a fixed fee arrangement.<sup>131</sup>

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nance. The Criminal Law Act of 1967 abolished the criminal aspect of these ancient prohibitions, leaving them merely contrary to public policy: "The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal." Criminal Law Act, 1967, § 14(2) (Eng.).

For a discussion of contemporary concepts of champerty, see generally Adrian Walters, *A Modern Doctrine of Champerty?*, 112 LAW. Q. REV. 560 (1996). While neither a crime nor a civil offense, champerty can be used to undermine litigation funded by a stranger. See *Grovewood Holding Plc. v. James Capel & Co., Ltd.* [1995]; *Re Oasis Merchandising Services Ltd.* [1995] 2 B.C.L.C. 493; *Re Ayala Holdings Ltd.* [1996] 1 B.C.L.C. 469. Champerty has roots in the thirteenth century, to prevent "support for disputants given by powerful patrons" from spilling over "into private wars between feudal retainers." Walters, at 561.

The animus of champerty is complex and historic. See *Giles v. Thompson*, 3 All E.R. 321, at 350-51 (C.A. 1993) (Lord Mustill) (describing the history of champerty and maintenance). Modern objections appear to include the need "to preserve the honour and honesty of the profession" and to avoid conflicts of interest. *Wallerstein v. Moir* (No.2) 1 All E.R. 849, 860-61 & 872 (C.A. 1975) (Lord Buckley). In *Wallerstein*, Lord Buckley specifically considered the public policy against contingent fees, stating:

It can, I think, be summarized in two statements. First, in litigation as professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations.

*Id.* at 872. Professor Painter observes, poignantly, that the permissibility of the contingent fee in the United States provides the American bar market power in the market for champerty, inviting such competitive strategies as tying and price discrimination. Painter, *supra* note 3.

<sup>130</sup> This state of affairs is changing rapidly, however. See Lord Irvine of Lairg, *Speech to the Annual Conference of the Association of Personal Injury Lawyers* (May 7, 1998) <<http://www.open.gov.uk/lcd/speeches/1998/1998fr.htm>> (visited on August 15, 1999) (stating, "[t]he majority of the British people are unable to uphold their rights and defend their interests. The majority of the British people are effectively excluded from access to justice," and arguing for expansion of the conditional fee system to include all private civil matters except family law). The *pactum de quota litis* is a European civil law term that includes the concept of contingent payment. See *infra* p. 47.

<sup>131</sup> Under the new conditional fee arrangement, however, barristers may be under pressure to make their fee arrangements with solicitors conditional as well. The acceptability of such an arrangement is uncertain; barristers, for example, may have less control over the various elements of the case that affect its success, and may therefore be reluctant to take a case on contingency in any event. See YARROW, *supra* note 124, at 76-77; *Conning the IADC Newsletters*, 64 DEF. COUNS. J. 463, 468 (1997). Under the Law Society model agreement, the uplift of solicitor and barrister cannot exceed the cap of 25% of damages. See YARROW, *supra* note 124, at 76.



It is important to observe the impact of the "loser pays" rule, which is part of the European tradition,<sup>132</sup> on the conditional fee. Customarily, courts allocate the costs of litigation, including attorney fees, to the losing party.<sup>133</sup> A solicitor winning a case under a conditional fee would be able to recover his basic fee directly from the losing party, and that would not come out of the damages paid to the client.<sup>134</sup> Under the new conditional fee scheme, the client would be responsible for the uplift. If the solicitor lost, he would not receive a basic fee or a success fee. Normally, the client would be responsible for the other side's attorney fee.<sup>135</sup> If the client were impecunious, and the case simply taken on a conditional fee basis because the client could not obtain support for it under legal aid, one of two things might happen: The court might not shift costs to the impecunious losing client, as is common in the case of legal aid cases.<sup>136</sup> Alternatively, the client may have purchased insurance to cover the possibility of fee-shifting. The attorney would not be liable for the winning side's cost either,<sup>137</sup> because in most cases either the

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<sup>132</sup> Insurance is available to cover fee shifting expenses related to personal injury litigation, *see infra* note 135.

<sup>133</sup> Section 51(1) of the Supreme Court Act 1981 gives most English courts discretion to allocate the costs of proceedings, and § 51(3) gives the court the "full power to determine by whom and to what extent costs are to be paid." Supreme Court Act, 1981, ch. 54, § 51(1), § 51(3) (Eng.). Under Order 62, Rule 3(3) of the Rules of the Supreme Court, a court that makes orders as to costs shall order that the costs "follow the event," so that the "loser" must indemnify the "winner" for his costs in bringing an action or defending one. If there are several losing parties, they are jointly and severally liable for the winner's costs, unless the court allocates otherwise. *See* I.R. Scott, *Towards Understanding the Maintainer's Liability for Costs*, 14 CIV. JUST. Q. 271, 272 n.3 (1995). Note the U.S. law proceeds from the same first premise, that a court has the inherent power to determine the propriety of the attorney fees in a case before it. MACKINNON, *supra* note 14, at 43 ("the general view in all jurisdictions seems to be that this right to make fee contracts is limited by the basic power of the courts to prevent unprofessional conduct by its officers").

<sup>134</sup> *See Conning the IADC Newsletters*, *supra* note 131, at 466.

<sup>135</sup> Insurance schemes provide coverage for liability for the opposing party's costs. The Law Society has worked with insurance companies to develop "Accident Line Protect" insurance for many types of cases, usually not including medical negligence and pharmaceutical and tobacco cases. *See* JOANNA SHAPLAND ET AL., *AFFORDING CIVIL JUSTICE* 47-50, Law Society Research and Policy Planning Unit Research Study No. 20 (1998) [hereinafter *AFFORDING CIVIL JUSTICE*]; *Conning the IADC Newsletters*, *supra* note 131, at 468. This form of insurance is used in about 99% of conditional fee cases. *See* YARROW, *supra* note 124, at 78. Under the Law Society's procedures, a plaintiff's lawyer who is eligible to use the Accident Line policy must do so in every personal injury case, the majority of which are won or settled on favorable terms. *Id.* at 78-80. This holds the premiums to about £85 per case. *Id.* *See also* Fiona Bawden, *Improving Conditions*, 94 LAW SOC'Y GUARDIAN GAZETTE, Nov. 27, 1996, at 23; John C. Evans, *England's New Conditional Fee Agreements: How Will They Change Litigation?*, 63 DEF. COUNS. J. 376, 381 (1996); Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, LAW & CONTEMP. PROBS. 37, Winter 1994, at 37.

<sup>136</sup> *See* SHAPLAND ET AL., *supra* note 135, at 46.

<sup>137</sup> The issue has been raised whether a solicitor on a conditional fee basis has sufficient pecuniary interest in the case to become a real party in interest who might be liable for win-

client or the attorney, or both, will have purchased legal cost insurance. Insurance against fee shifting has become critically important to plaintiffs as the conditional fee replaces legal aid cases.<sup>138</sup>

It is also important to understand the relationship between the conditional fee and the United Kingdom's relatively extensive provision of legal representation through legal aid.<sup>139</sup> At one time legal aid paid the attorney fees for almost half of the serious civil litigation in England; this has been scaled back significantly<sup>140</sup> with reduced state funding as the income level for eligibility is lowered.<sup>141</sup> Under this system, the client and attorney apply to legal aid for fees to pay the attorney. The case is examined on its merits, based on a cost/benefit analysis, prior to coverage by legal aid. The legal aid system usually pays solicitors a negotiated hourly fee that is usually lower than the going rate.<sup>142</sup> Costs normally are not allocated against a losing party whose representation is supported through legal aid.<sup>143</sup> Thus, neither attorney nor client bears risk in prosecuting a case; the attorney is paid without regard to the outcome of the case, and the client is not subject to the

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ners' costs. In a recent Court of Appeals case, the court indicated that the conditional fee attorney has no greater exposure to fee shifting than a solicitor working under other fee systems. See Frances Gibb, *Case Against Tobacco Firms May Fall Over Costs Ruling*, TIMES (London), Oct. 16, 1997, at 8 (reporting on *Hodgson v. Imperial Tobacco Ltd.*, in which counsel for 47 lung cancer victims sought an order to debar the tobacco companies from seeking recovery of their costs from the law firm in the event of a loss).

<sup>138</sup> See Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990) (suggesting that without fee shifting to the attorney, the English rule results in fee shifting only for the victorious but impecunious party, but not for the victorious but solvent party, when they are in opposition); Marc S. Stein, *The English Rule With Client-To-Lawyer Risk Shifting: A Speculative Appraisal*, 71 CHI.-KENT L. REV. 603, 603-02 (1995); Marc S. Stein, *Is One-Way Fee Shifting Fairer than Two-way Fee Shifting?* 141 F.R.D. 351, 352 (1992). See generally Herbert M. Kritzer, *The English Rule: Searching for Winners in a Loser Pays System*, A.B.A. J., Nov. 1992, at 54; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139; Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56 (1982).

<sup>139</sup> See AFFORDING CIVIL JUSTICE *supra* note 135, at 45-46 (explaining how the legal aid system works); *Conning the IADC Newsletters*, *supra* note 131, at 466.

<sup>140</sup> See Tamara Goriely, *The Government's Legal Aid Reforms in REFORM OF CIVIL PROCEDURE*, *supra* note 1, at 347-369.

<sup>141</sup> In 1998 the maximum household income level for eligibility, adjusted for family size and similar factors, was £7777 for most cases, and £8571 for personal injury cases. See *Press Release #57, Lord Chancellor's Department*, (March 4, 1998) <<http://www.open.gov.uk/lcd>> (visited on August 15, 1999). In 1993, approximately 12-14 million people were cut from the national legal aid program; the escalating costs of the legal aid budget were described by one barrister as "a ghastly black hole." See Lisa Stansky, *Changing of the Guard*, A.B.A. J., June 1996, at 72-73.

<sup>142</sup> See AFFORDING CIVIL JUSTICE, *supra* note 135, at 45-46.

<sup>143</sup> See *Conning the IADC Newsletters*, *supra* note 131, at 467.

“loser pays” rule. Under the conditional fee statutes, cases involving legal aid representation are excluded from conditional fee arrangements.

Not surprisingly, legal aid is viewed increasingly as unnecessary in those types of cases where a solicitor might take the case on a conditional basis.<sup>144</sup> In fact, the Lord Chancellor has proposed scrapping the legal aid scheme for most civil disputes<sup>145</sup> and embracing the conditional fee system for all civil claims for money or damages.<sup>146</sup>

## B. How the Conditional Fee Affects the Five Factors

The United Kingdom’s conditional fee system represents a distinct hybrid of the three fee systems and requires a separate analysis. In particular, we think it should be understood against the backdrop of the legal aid system it is likely to substantially, if not completely, replace. In that context, we think the conditional fee is likely to better align client and attorney interests; that the nature of the client’s risk is basically unchanged; that access to justice should increase in cases not previously covered by legal aid; and that operational justice probably is not much affected; and that the social perception of the justice system could be affected negatively.

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<sup>144</sup> A recent study funded by The Law Society to examine the Lord Chancellor’s proposals to substitute conditional fees for legal aid does not, however, concur, especially in the case of personal injury litigation:

The Consultation Paper suggests that publicly funded support on legal services should be concentrated towards helping people secure their basic rights. Is not being able to cope with the effects of injury a basic right? . . . ‘Personal injury’ or ‘tort’ is labeled as a different branch of law in the textbooks and in law firms from ‘welfare law’ or ‘crime’ or ‘family.’ It is still part of needed welfare provision. . . .

AFFORDING CIVIL JUSTICE, *supra* note 135, at 86.

<sup>145</sup> See *Access to Justice with Conditional Fees*, *supra* note 1, at 3. See generally Dan Bindman, *Deep Concern Over Threat to Legal Aid*, 94/38 LAW SOC’Y GUARDIAN GAZETTE 1 (1997) (estimating a savings of about £800 million annually).

<sup>146</sup> See Robert O’Connor, *Blimey, What’s Legal Aid Coming To?*, A.B.A. J., Feb. 1998, at 22 (describing the proposal by the Lord Chancellor, Lord Irvine of Lairg, to extend the conditional fee system to all civil proceedings except family matters and to bar the use of legal aid to fund claims for money damages). In addition, the Lord Chancellor’s proposal would increase the merits threshold for funding a civil case through legal aid. See Frances Gibb and Nicholas Wood, *Justice for the Middle Class in Law Reform*, TIMES (London), October 4, 1997, at 1. This system would be used in conjunction with fixed fees rather than variable or conditional fees. It is unclear whether the “loser pays” rule would be scrapped or, if not, whether the solicitor or the client would be responsible for the winner’s costs. The changes have been opposed by the Bar Council, the Law Society, and groups such as the National Consumer Council on the ground that a rigid merit test, combined with the prospect of paying the winning parties costs if the case is lost, will effectively deny access to justice to many people. See O’Connor, *supra*, at 22. See also Frances Gibb, *No Win, No Fee Justice Will Be a Rip-Off, Says Bar Chairman*, TIMES (London), October 16, 1997, at 8 (quoting Robert Owen, QC, Chairman of the Bar, “There is a very real danger of abuse. There is a conflict of interest at the very heart of these conditional fee agreements which could lead to the public being ripped off.”).

### 1. *Alignment of Interests*

Under legal aid, the attorney receives his fee without regard to success or to the amount of damages awarded. For that reason alone the conditional fee should provide somewhat better alignment of attorney and client interests. In addition, under legal aid the losing plaintiff's attorney's fee are put to the taxing master and paid by the state; usually the amount is not contested by the winning party and the attorney gets what he asks. If the attorney wins, however, his fees are shifted to the losing party, who has a strong incentive to contest them. Thus, an attorney might well be better off losing than winning a legal aid case, a state of affairs damaging to any desired alignment of attorney and client interests.<sup>147</sup>

The conditional fee provides the incentive for the attorney to win the case. Unless an uplift is negotiated, however, the incentive is blunted by a "toggle-switch" effect: the attorney has an economic incentive only to win, not to obtain damages for his client. Even if an uplift is negotiated, the attorney is provided an incentive to obtain damages sufficient only to cover his uplift, and not to obtain full satisfaction for the client.<sup>148</sup> This feature is not entirely undesirable. The solicitor has no incentive to push for large damage awards — awards that may exceed the client's full satisfaction — that tend to raise the social cost of litigation. Obviously, the Law Society's cap is absolutely essential; without it, the attorney's uplift can exceed his client's award, a result that would severely damage the perception of fairness of the conditional fee.

### 2. *Risk of Losses and Costs*

Under legal aid, the client, not the attorney, bears the very real risk of not being compensated for a loss, but does not have to pay the costs of his attorney or the winning side; the state bears that risk. The attorney bears no risk of loss, since he is paid in any event. Under the conditional fee system, the client's risk does not change, the attorney's risk increases,<sup>149</sup> and the state's costs are eliminated. In many cases, the client will have to pay the premium for insurance, but that must be paid whether the case is won or lost. Thus, the move from legal aid to the conditional fee has minimal effect on client risk of losing.

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<sup>147</sup> A practicing solicitor attending a seminar at the Institute for Advanced Legal Studies, London, May 20, 1998, afforded us this insight.

<sup>148</sup> We can hear the "solicitor's client's nightmare" conversation: "Congratulations Mr. Smith-Jones. You have won your case. And, better still, the damages will just cover my fee. You don't have to pay a farthing."

<sup>149</sup> Not surprisingly, attorneys in the United Kingdom are keenly interested in understanding and managing this risk. See Jenny Levin, *Solicitors Acting Speculatively and Pro Bono*, 15 CIV. JUST. Q. 44, 45-46 (1996).

### 3. Access to Justice

At first blush, the effect on access to justice of moving from legal aid to a conditional fee is positive. This is primarily true, however, for the client whose case was not taken by legal aid, either because of budgetary constraints or because he was ineligible for legal aid. The capacity to shift the funding mechanism to the lawyer through a conditional fee should provide greater access for this group, for much the same reasons that shifting the funding mechanism to the attorney through the contingency fee increases access.<sup>150</sup> It does not appear to much affect clients whose cases would have been funded by legal aid.

On closer analysis, however, one can see possible negative effects on access for this group. First, the conditional fee attorney, rather than a legal aid board, determines which cases are brought. The legal aid board can choose to fund high risk cases with high social merit that a lawyer would not fund. Thus, a client with a high risk, high social merit case may experience a reduction in access unless some other fund for public interest litigation is created.<sup>151</sup> In fact, it is unlikely that a private solicitor will choose to fund any truly high risk cases, regardless of their social merit, since he does not share proportionately in the gain from taking the risk, as a percentage contingency fee attorney would. His compensation is tied to hours put into the case (with or without the uplift), and not to result. In the absence of reward, high risk is not economically justifiable and cases will not be taken that might have been taken under legal aid or under a contingency fee system.

### 4. Operational Efficiency of the Justice System

The effect of the conditional fee on operational justice is complex, but is not of great magnitude. The fact that the attorney has an incentive to win the case probably increases the likelihood that truth will be found and justice will prevail. In addition, the attorney under a conditional fee should be reluctant to wastefully run up hours due to the risk from losing at trial, as he might under legal aid, unless, of course, the case involves remarkably little risk. In that event, the attorney should wish to prolong the proceedings as long as possible, and then settle at an amount that covers his fee and uplift, without running the risk of losing at trial. This negatively affects the operational efficiency of the justice system as well as the interests of the client.

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<sup>150</sup> See *supra* text accompanying notes 72-74.

<sup>151</sup> For this reason, the Lord Chancellor proposes a transition fee to fund cases that test a novel legal argument, or that involve small sums but hold benefit for large numbers of similarly situated plaintiff, or that involve nonmonetary judicial awards or redress injuries against the environment or the public health. See *Access to Justice with Conditional Fees*, *supra* note 1, at § 3.30-3.31; Scott, *supra* note 118, at 275.

### 5. *Social Perception of Justice*

Finally, we suspect that the effect of the change from legal aid to the conditional fee on the social perception of justice will be neutral in most cases. The attorney's fee is not likely to be perceived as a windfall; because it is based on an hourly fee, it is earned, and the amount of the uplift has been agreed upon in advance by the client, who must, in any event, pay it. This system may be regarded as more fair than a public subsidy of a losing attorney.

One possible and serious problem lies in the nature of the hourly fee as a basis for compensation. First, the client's obligation to the uplift is unknown; the legal aid client did not have to contend with this uncertainty. Second, the attorney in this fee system has the potential for yields that may be regarded as unfair. One can picture a case in which the conditional hourly fee attorney, knowing that his basic fee falls upon the losing party, accumulates a bill — with or without an uplift — that exceeds 100% of the client's judgment in the case. Such a result does not occur even in the contingency fee arrangement, which is thought to provide the lowest yield for plaintiffs. Yields of this nature are likely to be perceived not only as excessive but also as highly wasteful.

#### C. Conclusions on the Conditional Fee

Although the movement to the conditional fee in the United Kingdom is explained as a measure to increase access to justice, its strongest effects probably lie elsewhere. The new fee system shifts access from public to private funding, with little effect on the clients whose cases might have been funded by legal aid but more significant effects on non-legal aid clients. The stronger effect of the change from legal aid and from the pure hourly fee lies in improved alignment of attorney and client interests. That alignment, however, is marred by the incentives provided to the attorney to overinvest in time. We see some potential for damage to the public perception of justice in this model, but we think that potential is ameliorated to some extent by the cap. Moreover, because there is no strong incentive for the attorney to push for excessive damages, the conditional fee system is unlikely to garner the criticism that the contingency fee suffers.

## VIII. THE EUROPEAN UNION CIVIL LAW SYSTEMS

The western European civil law systems differ from the common law systems in many important respects, and especially with respect to the role of the judge and the attorney.<sup>152</sup> The continental judge tends to play a more

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<sup>152</sup> See Werner Pfenningstorf & Donald G. Gifford, *THE LITIGATION PROCESS, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES* 81 (1991) (noting "great difference in the way the Bar is structured, in the way lawyers operate, in the way their fees are determined, and in the level of the fees

activist, “inquisitorial” role; there is less pre-trial discovery, especially as compared with the U.S. system. Normally, juries are not used in civil cases, and punitive damages are uncommon. The legal culture is more conservative, at least as compared with that of the United States.<sup>153</sup> Moreover, many of the western European countries have a variety of occupations that require legal training, and that confer different privileges and functions, rather than the unified bar of the U.S. model or the tiered system of the United Kingdom.<sup>154</sup> Like the common law lawyer, however, civil law attorneys represent the interests of the client, have obligations to the system of justice, and they must manage to get paid for their services.<sup>155</sup> Thus, there is a basis for comparing fee arrangements, all the while recalling that there are important differences.

#### A. The Council of the Bars and Law Societies of the European Community: The Code of Conduct for Lawyers

Beginning in the late 1970s, the European Community (EC) commenced harmonizing rules of conduct for lawyers and cross-border legal practice.<sup>156</sup> The Council of Europe has been slow to issue extensive direc-

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. . . . [T]he differences reflect different philosophies of civil procedure and of the relative role of court and counsel.”); Jolowicz, *supra* note 38, at 198-210 (comparing the adversarial, inquisitorial, and accusatorial approaches to court procedure and the role of the judge).

<sup>153</sup> See *supra* Pfenningstorf & Gifford, *supra* note 152, at 81-82 (discussing the limited role of juries in the civil law system); NIGEL G. FOSTER, *GERMAN LEGAL SYSTEM & LAWS* 98 (1996) (comparing the culture of the German litigator with that of the common-law countries); RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA*. 108-10 (1996) (discussing the anomalous “entrepreneurial, lottery-style character of American litigation”).

<sup>154</sup> See Philippe Fouchard, *The Judiciary in Contemporary Society: France*, 25 *CASE W. RES. J. INT’L L.* 221, 232-37 (1993) (explaining the roles of the *avocat*, the *notaire*, and other officers of the court in France); Javier Sans Roig, *Spain*, in *LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW* 126, 126 (Edwin Godfrey ed., 1995) [hereinafter *LAW WITHOUT FRONTIERS*]; Madja Barazuitti, *Italy*, in *LAW WITHOUT FRONTIERS* 94, 94 (explaining the roles of *notaries*, *avvocati*, and *procuratori* in Italy).

<sup>155</sup> The Code of Conduct for Lawyers in the European Community § 1.1 (Preamble) (1988) [hereinafter *CCBE Code*] recognizes this common function of lawyers, stating:

A lawyer’s function . . . lays on him a variety of legal and moral obligations . . . towards:

- the client;
- the courts and other authorities before whom the lawyer pleads his client’s cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in the face of the power of the state and other interests in society.

CCBE § 1.1 (Preamble).

<sup>156</sup> See Edwin Godfrey, *The European Union*, in *LAW WITHOUT FRONTIERS* *supra* note 154 at 12, 14-17 (chronicling the 1974 decision of the European Court of Justice on the right

tives on the legal ethics, however, preferring to look for consensus in the Council of the Bars and Law Societies of the European Community (also known as the *Comite Consultatif des Barreaux Europeens*, or CCBE). The CCBE is the community-wide association of the bars and the law societies of the EC member states. In 1988 the bars of twelve EC member states of adopted a Common Code of Conduct for lawyers.<sup>157</sup> An Explanatory Memorandum and Commentary followed the Code in 1989.<sup>158</sup> The Code has been adopted into the national professional rules of the CCBE members and also those of six European countries that were not then members of the EC: Austria, Cyprus, Finland, Norway, Sweden, and Switzerland.<sup>159</sup> The Code is intended to apply to the cross-border practice of law, but inevitably it will have the effect of increased harmonization of legal ethics within the EU. The Code's scope of applicability is quite broad, covering not only the ethical conduct of a lawyer practicing in another jurisdiction, but also that of a lawyer advising another lawyer on matters within the home jurisdiction.<sup>160</sup> In fact, apparently the drafters envisioned a legal ethics code that would warrant worldwide adoption.<sup>161</sup>

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of establishment of lawyers, the Council Directive of 1977 on identification of legal rules of practices, and the Council Directive of 1988 on educational qualifications); Roger J. Goebel, *Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice*, in RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 239 (Mary C. Daly & Roger J. Goebel, eds., 1995).

<sup>157</sup> CCBE Code (1988). See generally, Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556 (1991-92) (describing various effects and consequences of the Common Code of Conduct); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993); John Toulmin, *A Worldwide Common Code of Professional Ethics?* 15 FORDHAM INT'L L. J. 673 (1991-92). The CCBE is not an institution of the European Community, but rather an official liaison to Community institutions, a role somewhat analogous to the ABA.

<sup>158</sup> Explanatory Memorandum and Commentary on the CCBE Code of Conduct for Lawyers in the European Community. *Id.*

<sup>159</sup> See Terry, *supra* note 157, at nn.42-44; Godfrey, *supra* note 156, at 22; John Toulmin, *A Worldwide Common Code of Professional Ethics?*, in RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 207, 208-210 (Mary C. Daly & Roger J. Goebel, eds., 1994).

<sup>160</sup> See Godfrey, *supra* note 156, at 22-23.

<sup>161</sup> See Toulmin, *supra* note 159, at 208-210 ("The hope is to build on what has been done and to develop a code of professional conduct that will apply to the cross-border activities of lawyers from all countries which are signatories to the General Agreement on Tariffs and Trade (GATT)... [T]he CCBE seeks with others to develop a uniform code of conduct that could be adopted worldwide."). But see Godfrey, *supra* note 156, at 22 ("[I]t is however perhaps somewhat optimistic to believe that these rules without amendment would be acceptable in their entirety to the professions of countries with widely differing systems, such as the USA.").



Article 3.3 of the CCBE Code prohibits entering into a *pactum de quota litis*,<sup>162</sup> which is defined as

[A]n agreement between a lawyer and his client entered into prior to the final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.<sup>163</sup>

Under the Code, an attorney may, however, enter into an agreement where the fee is in proportion to the value of the matter, so long as the state or the bar under a fee schedule regulates the fee.<sup>164</sup> In addition, the fee must be fair and reasonable.<sup>165</sup> Thus, the code leaves room for a member nation to establish a fee arrangement that carries some of the risk-shifting and gain-sharing features of a contingency fee. Presumably, the conditional fee arrangement in English law falls within this interpretation.

## B. The Fee Systems of the Continental Civil Law Countries

The permissible fee arrangements of the continental CCBE members' legal systems are quite diverse, but they can be grouped into the hourly fee system and the fixed fee system, with high variability as to contractual freedom to establish the fee.

### 1. The Hourly Fee Arrangement

The hourly fee arrangement is the dominant fee system among the continental systems. Sometimes the hourly fee is referenced to a fee schedule,<sup>166</sup> but more commonly the lawyer is governed by a code that enumerates the factors to be considered in establishing an hourly fee and that subjects the lawyer to some test of reasonability. This is the usual practice for the French *avocat*,<sup>167</sup> the Belgian *avocat* or *advocaat*,<sup>168</sup> the Swedish

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<sup>162</sup> CCBE § 3.3.1 states: "A lawyer shall not be entitled to make a *pactum de quota litis*." See SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* (trans.), COMMISSION OF THE EUROPEAN COMMUNITIES (1988) Chap. 4-43, Jan. 1991 [hereinafter *CROSS BORDER PRACTICE COMPENDIUM*] (suggesting that the reasoning behind this CCBE provision is the belief that an unregulated contingent fee agreement would likely be abused, resulting in an increase in nonmeritorious claims and lawsuits).

<sup>163</sup> CCBE § 3.3.2 (1989).

<sup>164</sup> CCBE § 3.3.3 (1989), states, "The *pactum de quota litis* does not include an agreement that fees be charged in proportion to the value of a matter handled by a lawyer if this is in accordance with an officially approved fee scale or under the control of the competent authority having jurisdiction over the lawyer."

<sup>165</sup> *Id.*

<sup>166</sup> SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* 159-67 (1988).

<sup>167</sup> Jacques Buhart, *France*, in *LAW WITHOUT FRONTIERS*, *supra* note 154, at 75.

<sup>168</sup> Roel Nieuwdorp, *Belgium*, in *LAW WITHOUT FRONTIERS*, *supra* note 154, at 32.

*Advokat*,<sup>169</sup> the Danish *advocat* (for nonscheduled services),<sup>170</sup> the Irish solicitor,<sup>171</sup> the Italian *avvocati* (for out of court services),<sup>172</sup> the Luxembourgian *avocat*,<sup>173</sup> the Portuguese *advogado*,<sup>174</sup> the Scottish solicitor,<sup>175</sup> and the German *Rechtsanwalt* (for out-of-court work).<sup>176</sup>

## 2. Contingent Elements of the Fee Arrangement

The percentage contingency fee is not permitted in most of the continental legal systems,<sup>177</sup> although this prohibition is overlooked in some circumstances.<sup>178</sup> In addition, the French *avocat* may agree that, at the end of the representation, an *honoraire* will be payable if the result is successful; the *honoraire* is a premium for success.<sup>179</sup> Similarly, the Italian *avvocati*

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<sup>169</sup> Per-Reik Hasselberg & Per Nyberg, *Sweden*, in *LAW WITHOUT FRONTIERS*, *supra* note 154, at 143.

<sup>170</sup> MAURICE SHERIDAN & JAMES CAMERON, *EC LEGAL SYSTEM: AN INTRODUCTORY GUIDE* 10 (1992).

<sup>171</sup> *Id.* at 11.

<sup>172</sup> *Id.* at 19 (noting that hourly fee arrangements are more likely to be made in "international" law firms).

<sup>173</sup> *Id.* at 12.

<sup>174</sup> *Id.* at 13.

<sup>175</sup> *Id.* at 11.

<sup>176</sup> NIGEL G. FOSTER, *GERMAN LEGAL SYSTEM & LAWS* 98 (1996); Lawrence W. Schonbrun, *Attorney Billing Practices in Germany: An American Perspective*, 4 *INT'L LEGAL PRAC.* 120, 121 (1994) ("Apart from the limited area of fees in litigation, it appears that BRAGO has simply been abandoned by most firms in favour of the hourly rate method which allows the attorney to charge what one German practitioner described as 'Whatever you can get the client to agree to.'").

<sup>177</sup> See Pfennigstorf, *supra* note 135, at 59 and sources cited at 59 n.153. Some representative statutes prohibiting the *pacta de quota litis* include: Decret 27.11.1991, Articles 174 et seq. and 245 (France); Secs. 7, 12, 17, 31 et seq. BRAGO (Germany); Estatuto da Ordem dos Advogados, approved by the Decreto-Lei No. 84, 16th March 1984, Art. 66 (Portugal); General Statute for the Legal Profession Art. 56 (Spain); BOARD OF THE BAR ASSOCIATION, *GUIDELINES ON CONDUCT OF ADVOCATES* 25-31 §§ (Sweden).

Italy and the Netherlands appear to permit the use of contingency in fee setting to the extent it is in accordance with the CCBE Code of Conduct, *see supra* notes 101-110. The Civil Code 1942, Article 2223 (Italy); THE NETHERLANDS ORDER OF ADVOCATES, *GUIDE TO CALCULATION OF THE ADVOCATE'S CHARGES* (The Netherlands).

Greece and Finland permit contingent fees under some conditions. Legislative Decree No. 3026/1954, Sections 91-192 (Greece) (permitting pactum de quota litis under certain restrictions); FINNISH BAR ASSOCIATION, *GUIDELINES ON FEE CHARGING* (Finland) (*pacta de quota litis* are permitted if agreed to in advance with the client).

The contingent fee sometimes has been an issue in the international enforcement of U.S. money judgments. See Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 *COLUM. J. TRANSNAT'L L.* 641, 672 n.57 and accompanying text (1992) (Germany).

<sup>178</sup> Javier Sans Roig, *Spain*, in *LAW WITHOUT FRONTIERS*, *supra* note 154, at 131 (discussing Spanish labor cases which do not prohibit contingency fees).

<sup>179</sup> Sheridan & Cameron, *supra* note 170, at 20.

can agree to receive an additional fee, or *palmario* if a representation is successful. These practices appear to be similar to the “uplift” under English and Welsh law. Like the “uplift”, the *honoraire* and the *palmario* are not directly proportionate to the monetary value of the result. There is some evidence that the contingent element of the “no win, no fee” system of English and Welsh law is receiving favorable attention on the continent.<sup>180</sup>

### 3. *The Fixed Fee Set by Statute or by the Bar*

Many of the continental legal systems prescribe a schedule of fees that attorneys are bound, to varying extents, to charge for their services. At the extreme, fees are set statutorily. For representing a client in civil matters, for example, the German lawyer operates under the *Bundesgebührenordnung für Rechtsanwälte* of 26 July 1957 (BRAGO, or Federal Ordinance on Fees for Lawyers).<sup>181</sup> The BRAGO sets forth detailed rules and schedules of fees based upon the stages of representation completed and the amount in controversy.<sup>182</sup> In civil litigation, the BRAGO is followed strictly by the courts. At the conclusion of litigation the court allocates the statutory fee, as well as statutory court costs that are both substantial and based upon the amount in controversy.<sup>183</sup> An agreement to charge less than the BRAGO scheduled value of the service is illegal and void.<sup>184</sup> Attorneys may agree with the client to charge more than the BRAGO scheduled value, and that agreement, which must be in writing, may consider the time spent by the lawyer. Such a fee agreement requires substantial disclosure and justification.<sup>185</sup> In effect, the German lawyer represents clients at court under a fixed fee arrangement and does not assume court costs or shifted fees.

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<sup>180</sup> Korteweg & Stearns, *supra* note 6, at 10.

<sup>181</sup> See CROSS BORDER PRACTICE COMPENDIUM, *supra* note 162; Carsten Eggert, *Germany*, in LAW WITHOUT FRONTIERS, *supra* note 154, at 85-86; Gerfried Fischer, *Recognition and Enforcement of American Tort Judgments in Germany*, 68 ST. JOHN'S L. REV. 199, 201 (1994).

<sup>182</sup> See Dieter Leipold, *Limiting Costs for Better Access to Justice: The German Approach in REFORM OF CIVIL PROCEDURE*, *supra* note 1, at 265, 271-73; Volker G. Heinz, *Germany*, in EC LEGAL SYSTEMS, *supra* note 170, at 16. The amounts are calculated regressively with greater amounts in controversy. See FOSTER, *supra* note 176, AT 99.

<sup>183</sup> The BRAGO value is a form of social engineering designed to overcompensate attorneys dealing with higher stakes cases, and undercompensate them for lower stakes cases, the assumption being that the more well-off members of society would thereby subsidize legal services to the less well-off. See Schonbrun, *supra* note 176, at 121 (“[T]his governmental regulation of prices has not withstood the forces of modern market economics where price mechanisms for good as well as services are often indistinguishable.”)

<sup>184</sup> Sec. 177 II BRAGO [Federal Ordinance Pertaining to Lawyers]. See FOSTER, *supra* note 176, at 98.

<sup>185</sup> See Lawrence W. Newman & Michael Burrows, ‘Loser Pays’ – Attorneys Fees in England, *Germany*, N.Y.L. J., October 15, 1992, at 3 (negotiating lower fee is considered unethical); CROSS BORDER PRACTICE COMPENDIUM *supra* note 162, at 27 Germany.

The more common approach, among systems that set fees, is a minimum fee schedule for services set by the bar. Spanish attorneys, for example, are expected to adhere to minimum fixed fee schedules established by local bar associations for each area of legal practice.<sup>186</sup> These bar schedules vary somewhat in the factors that may be taken into consideration to increase the fee from the fee schedule.<sup>187</sup> Similarly, the Italian bar association, the *Consiglio Nazionale Forenze*, sets the *tariffa forense*, a complex minimum and maximum allowable fee set for in-court and out-of-court work in different areas of law by *avvocati* and *procuratore*.<sup>188</sup> Within these ranges the client may negotiate a fee based on enumerated factors, such as the nature and value of the case, the complexity and importance of the issues, the result of the representation, and the benefits to the client. *Avvocati* may charge fees above the allowable maximum if consent of the *Ordine degli Avvocati e Procuratori* is obtained.<sup>189</sup> The bar establishes fee schedules also in Belgium,<sup>190</sup> the Netherlands,<sup>191</sup> Denmark,<sup>192</sup> Greece,<sup>193</sup> and Portugal,<sup>194</sup> although the schedules do not appear to be binding.

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<sup>186</sup> See Roig, *supra* note 178, at 130.

<sup>187</sup> Ramon Mullerat, *Spain*, in EC LEGAL SYSTEMS, *supra* note 170, at 21.

<sup>188</sup> The Italian bar is divided into two categories: the *procuratore*, who provide technical assistance in the courts, and *avvocati*, who advise clients on legal matters. Majda Barazzutti, *Italy*, in LAW WITHOUT FRONTIERS, *supra* note 154, at 94, 94-97.

<sup>189</sup> *Id.*

<sup>190</sup> See Nieuwdorp, *supra* note 168, at 32. Members of the Belgian national bar are required to charge clients a fee appropriate to the "dignity of the profession." See Carl Bevernage, *Belgium*, in EC LEGAL SYSTEMS, *supra* note 170, at 21, citing Judicial Code 1967 (art. 459). Cf. CROSS BORDER PRACTICE COMPENDIUM, *supra* note 162, at 27-28 Belgium.

<sup>191</sup> The Dutch *advocaat* charges private clients by the hour, based on a standard hourly fee set periodically by the Netherlands Bar Association. The resulting amount can be increased or decreased based on the experience of the lawyer or other circumstances, but other forms of fee arrangements are discouraged and are subject to a rule of reasonability. In the event of a dispute over the fee, courts apply the bar calculation schedule. See Justus Voute, *The Netherlands*, in LAW WITHOUT FRONTIERS, *supra* note 154, at 107; Willem A. Hoyng & Francine M. Schlingmann, *The Netherlands*, in EC LEGAL SYSTEMS, *supra* note 170, at 11-12. See generally, CROSS BORDER PRACTICE COMPENDIUM, *supra* note 162, at 26-27 Netherlands; THE NETHERLANDS ORDER OF ADVOCATES, GUIDE TO THE CALCULATION OF THE ADVOCATE'S CHARGES.

<sup>192</sup> The Danish Bar Association publishes fee schedules for specific legal services, and the attorney must justify deviation from them. See Christian Emmeluth & Michael Rekling, *Denmark*, in EC LEGAL SYSTEMS, *supra* note 170, at 10, citing Code of Legal Procedure, § 126.2; CROSS BORDER PRACTICE COMPENDIUM, *supra* note 162, at 21-22 Denmark; GUIDELINES ON FEE CALCULATION ADOPTED BY THE DANISH LAW SOCIETY 1987.

<sup>193</sup> The schedule of fees is advisory. See Yanos Gramatidis, *Greece*, in EC LEGAL SYSTEMS, *supra* note 170, at 10; CROSS BORDER PRACTICE COMPENDIUM, *supra* note 162, 25-26 Greece; Legislative Decree No. 3026/1954, secs. 91-192.

<sup>194</sup> See Statuto da Ordem dos Advogados approved by the Decreto-Lei, No. 84, 16th March, 1984, Art. 65. The fee schedule established by the local district bar is intended to represent an average fee for the legal service. See generally, Jose Manuel Coelho Ribeiro,

Attorneys in most continental legal systems are permitted to set a fee for a service, subject to tests of reasonability and sometimes with enumerated factors to consider.<sup>195</sup> The setting of a fixed fee for handling all of the litigation of a large client for a year is becoming more common,<sup>196</sup> a development that parallels events in the United States.<sup>197</sup>

### C. The Future of the Minimum Fixed Fee

To the U.S. attorney, the use of minimum fee schedules promulgated by the state or by the bar is an unusual feature of European legal systems. Since the minimum fee schedule was struck down as an unreasonable restraint on competition under the federal antitrust laws,<sup>198</sup> the amount of a fixed fee in the United States has been essentially unregulated and subject to price competition. One can infer from the continued use of minimum fee schedules in western Europe<sup>199</sup> that the EC nations exhibit less concern than the United States for anticompetitiveness in the legal profession, including the use of state machinery to support prices. This is consistent with observations about twentieth century European attitudes toward cartels<sup>200</sup> and the role of the state in protecting the economic status of certain sectors of the economy.<sup>201</sup> To the European, this may be considered the price one must pay for a bar that is not dominated by the interests of clients, but that con-

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*Portugal*, in EC LEGAL SYSTEMS, *supra* note 170, at 13; CROSS BORDER PRACTICE COMPENDIUM, *supra* note 162, at 31-32.

<sup>195</sup> The Law Bar of Barcelona, for example, enumerates the factors as relevant to the setting of a fee: 1) Time employed; 2) Economic interest of the matter; 3) Relevance of the issue for the client; 4) Time limits imposed on the lawyer due to the case; 5) The case's particular degree of difficulty, taking into account the facts, people and documentation that were available and its legal complexity. *See* Roig, *supra* note 178, at 130.

<sup>196</sup> Nieuwdorp, *supra* note 168, at 32.

<sup>197</sup> *See supra* text accompanying note 104-105

<sup>198</sup> *See supra* text accompanying note 115.

<sup>199</sup> *See supra* text accompanying notes 181-194. In fact, the CCBE expressly permits minimum price fixing of attorney fees. CCBE CODE RULE 3.4.

<sup>200</sup> *See* DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHIUS 178-79 (1998) (describing the post World War II preference for economic concentration, government controls on the economy, and macro-economic planning and stating that "[i]n this intellectual atmosphere it is not surprising that economists seldom focused on the need to protect the process of competition").

<sup>201</sup> Professor Gerber grounds the twentieth century European attitude in turn of the century Austrian thought:

The competition law ideas developed in Austria at the turn of the twentieth century provided the seeds for the development of the European competition law tradition. . . . Economic competition was valued, but subject to considerations of community welfare; administrative decision-makers were considered competent to deal with the conflicts arising from competing private and public goals; and the respect for law and its mechanisms was sufficiently broad and deep to create confidence that neither businesses nor bureaucrats would lightly flout community norms. European competition laws continue to be based on this constellation of insights and values.

GERBER, *supra* note 200, at 67-68.

siders the interests of society.<sup>202</sup> There is evidence, however, that European legal systems continue to alter their attitudes on competition law toward freer markets, as antitrust concepts permeate the business regulatory environment,<sup>203</sup> and this may impact the legal profession as well.

We predict that use of a fixed fee reduces access to the judicial system and increases client risk of loss. The misalignment of interests inherent in the fixed fee arrangement will result in suboptimal representation and encourage quick low settlements. In addition, attorneys on a fixed fee will tend to skimp on efforts, except in high stakes, high visibility cases where such behavior, if detected, would be costly to reputation. A minimum fixed fee schedule exacerbates the problems of access and risk, while a maximum fixed fee would exacerbate the problem of shirking. A more competitive legal environment almost certainly would increase access to justice, manage client risk, and reduce shirking.

From a different perspective, however, the tolerance of minimum fee schedules may also reflect a different way of balancing the lawyer's duty to the justice system and the lawyer's duty to the client. Attitudes may vary among legal systems about the extent to which interests of the client and the attorney should be aligned. Agency theory suggests that it is efficient for these interests to align; however, in the presence of dual agency relationships, the question becomes more complex. The European systems reflect an implicit underlying skepticism about the desirability of too close an alignment of attorney and client interests, too much zealous representation, and too much identification of the attorney with the cause and interest of the client.<sup>204</sup>

Indeed, in all legal systems the attorney has duties to the justice system as well as to the client. Too close an alignment with the client may compromise the attorney's sense of obligation to the justice system. Unbridled competition and strong incentives to win are likely to have this effect.

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<sup>202</sup> See Pfennigstorf, *supra* note 135, at 78 (describing the "uneasy balance between freedom (reflecting the attorney's professional independence) and regulation (reflecting the monopoly of representation granted them by law").

<sup>203</sup> Professor Gerber describes the renewed European interest in competition law in the 1990s, observing

a growing recognition throughout Europe of the importance of competition. The market was becoming more fashionable, and this both justified and encouraged measures to protect it. To some extent this represented an ideological shift, particularly after 1989. It also reflected, however, a growing awareness that the European economies needed reinvigoration and that increased competition was the most likely means of increasing economic vigor. This provided a direct impetus for strengthening competition law systems. . . .

GERBER, *supra* note 200, at 402, 417-36.

<sup>204</sup> See Terry, *supra* note 157, at 48 (suggesting that the identity of the attorney as an independent and objective professional may be more important in the European legal systems than in the United States and stating that "[a]ccording to this perspective, the lawyer, even when acting in a representative capacity, remains an independent being, whose identity is not collapsed into the identity of the client").

Americans have become inured to a legal culture in which lawyers are expected to be zealous advocates of the interests of clients. The U.S. system apparently trusts an aggressively adversarial system to sort truth and do justice, and therefore attends to the alignment of attorney and client interests. The European attitude is less tolerant of such a process; it strikes a different balance point between the attorney's duty to society and the system of justice and his alignment of interests with the client.<sup>205</sup> It prefers the attorney as a gatekeeper, as a moderator and presenter of the client's cause, rather than an advocate whose interests are highly aligned with those of the client, even if this is costly in terms of client access, client risk, and efficient pricing of legal services.

#### D. Legal Aid and the Problem of Access to Justice

Legal aid is an important factor in the continental civil systems as well as the common law system. The systems vary widely in the extent and nature of legal aid, the manner in which it is structured and administered, and the propensity of lawyers to participate. In the postwar period the "northern" countries, especially the United Kingdom, Sweden, and the Netherlands, and to a lesser extent France, Germany, and Belgium, established significant programs of legal aid as a means of providing access to justice, while in the southern countries, such as Italy, Spain, and Portugal, legal aid was scarce. In the 1990s the "northern" countries have tended to reduce expenditures on legal aid as part of overall government cost containment.<sup>206</sup> Nonetheless, the process of access to justice remains a strong and important consideration in public policy toward justice.

In the European literature on the contingency fee and especially the percentage contingency fee, one is struck by the criticism that this fee ar-

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<sup>205</sup> Professor Terry has drawn a similar inference from a broader comparison of the U.S. model codes and the CCBE, concluding that

in the United States society thinks about the lawyer primarily as an agent of the client, on who acts because of, and at the direction of, the client. In other words, the lawyer is a derivative person, whose duties flow from the client. In contrast the CCBE Code suggests a perspective in which lawyers sometimes can be viewed as acting for themselves, as opposed to acting as the agents of, and at the direction of, clients. According to this perspective, the lawyer is sometimes perceived as an independent being who has rights and duties which do not necessarily derive from the client.

Terry, *supra* note 157, at 51-52. See preamble to CCBE Code, *supra* note 155.

<sup>206</sup> Erhard Blankenburg, *Access to Justice and Alternatives to Courts: European Procedural Justice Compared*, 14 CIV. JUST. Q. 176, 176-77 (1995). See Fouchard, *supra* note 7, at 244-45 (describing a 1991 French government study of legal aid, *Conseil D'Etat, L'Aide Juridique - Pour un Meilleur Acces au Droit et a la Justice*, and observing that "[p]ublic funds earmarked for legal aid in France are very meager: less than 400 million francs in 1989, corresponding to a contribution of seven francs per head yearly, as opposed to thirty francs in Germany, thirty-four francs in the United States, and ninety-eight francs in England").

rangement promotes excessive litigation<sup>207</sup> and reduces the attorney's independence and judgment.<sup>208</sup> Rarely, however, is a direct comparison made with other methods of payment, which may also promote or limit litigation and which may skew the manner in which the attorney exercises her independence and judgment.

Forbidding the contingency fee reduces access to the legal system and prevents the attorney from absorbing more of the risk of loss than other systems would admit. But for its tradition of legal aid, one might infer that access to the legal system is of less significance to Europeans than to Americans. In fact, the continental systems vary significantly in the level of legal aid they provide,<sup>209</sup> and in the levels of litigation in the judicial system, with little obvious correlation.<sup>210</sup> They vary as well in the extent to which legal expenses insurance is commonly purchased.<sup>211</sup>

Clearly, the United Kingdom's experiment with the conditional fee is motivated by a concern for access.<sup>212</sup> Indeed, it may be assumed that most

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<sup>207</sup> For example, in the Lord Chancellor's 1998 consultative paper on conditional fees, *Access to Justice with Conditional Fees*, *supra* note 1, Lord Irvine emphasizes at several points an aversion to excessive litigation, all the while recognizing the fine line between an undesirable level of litigation and a desirable level of rights protection. *Id.* § 1.1 ("We do not want to create a litigious society but one in which people respect one another's rights."); § 1.12 ("We do not want to import "ambulance chasing," or to encourage litigiousness.").

<sup>208</sup> See *UK: No win, No Fee, But it Won't Be a Free Ride*, THE OBSERVER, Aug. 15, 1993 (Reuters) (quoting a well-known English libel solicitor who says that "[i]t's wrong for a lawyer to have a proprietary interest in the outcome of a case. His first duty is to give his client objective advice. There's a danger that he will look at the matter subjectively"); 1 ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, *supra* note 77.

<sup>209</sup> The Dutch *Buros voor rechtshulp*, for example, are an extensive network of walk-in centers to provide first-line legal advice and make referrals. For an insightful study of these centers, see Tamara Goriely, *Legal Aid in the Netherlands: A View from England*, 55 MOD. L. REV. 803 (1992).

<sup>210</sup> See Blankenburg, *supra* note 206, at 177 (analyzing modes of state-provided access to justice, and observing, for example, "the Dutch pattern of court avoiding is even more amazing in the light of its general legal aid infrastructure which grants every second private household an entitlement to legal aid subsidies, provided by a combination of public legal aid offices and a judicare system for lawyer services").

<sup>211</sup> See Rickman & Gray, *supra* note 11, at 320 (noting that approximately fifty percent of German households and eight percent of Swedish households have legal expenses insurance). Legal expenses insurance is the term used to describe the type of legal insurance one might purchase as part of a general household and personal liability insurance plan, or that might be included in one union benefits. It is different from the accident line protect insurance that the English Law Society has developed for conditional fee cases in that the latter is purchased after the legal conflict has arisen. See *id.*

<sup>212</sup> See LORD WOOLF, *supra* note 1. In addition to altering the fee structure, the English justice system is undergoing many changes designed to improve efficiency and reduce delay through case management. See Note, 'Access to Justice', *supra* note 109, at ; *Practice and Procedure*, 15 CIV. JUST. Q. 272 (1996); Michael Zander, *The Woolf Report: Forwards or Backwards for the New Lord Chancellor*, 16 CIV. JUST. Q. 208, 209 (1997); Dick Greenslade, *Objections to Woolf*, NEW L. J., Sept. 6, 1996, at 1293; Dick Greenslade, *Objections to*



European countries are wrestling in various ways with the issue of whether access and justice for ordinary citizens should be a good provided at public expense or one provided privately by permitting greater risk and rewards for attorneys.<sup>213</sup>

“Access” should not be regarded as though it were another term for “more litigation” or at least more formal dispute resolution. We note as well that issues of access may be addressed other than by manipulating the incentives of attorneys to take cases in the formal legal system. Legal aid is only one alternative that has been used in most western legal systems. In addition, state provision of informal dispute resolution mechanisms, sometimes without lawyers, results in more access and more disputes subject to the state justice system.<sup>214</sup> In both of these examples, the state subsidizes access to justice, whether it is through the courts or through alternate dispute resolution mechanisms.<sup>215</sup>

The contingency fee arrangement represents, in effect, a public decision to subsidize access by shifting risk and rewards to private attorneys. The different attitudes of Americans and Europeans toward the contingency fee arrangement may reflect the American penchant for utilizing the private sector to secure public goods, and the traditional European preference for public sector solutions. In fact, there is evidence that the introduction of the conditional fee system is challenging traditional understandings of the economy of lawyering in the United Kingdom.<sup>216</sup> The movement from legal aid to the conditional fee shifts the risk position of the lawyer from no risk to substantial risk.<sup>217</sup>

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*Woolf*, NEW L.J. Aug. 16, 1996, at 1252; Dick Greenslade, *Objections to Woolf*, NEW L.J. Aug. 9, 1996, at 1215.

<sup>213</sup> See, e.g., Miguel Martin Casals, *Spanish Product Liability – The Likely Impact of the New Act*, LLOYDS PRODUCT LIABILITY INT’L (Feb 27, 1995) (Reuters) (suggesting that in the absence of punitive damages, contingent fees should not produce windfall profits and would effectively improve access to justice by inured persons); Lord Mackay, *supra* note 1, at 10.

<sup>214</sup> See Note, ‘Access to Justice’, *supra* note 118, at 231 (the United Kingdom, on the other hand, has been slow to adopt court-annexed forms of alternate dispute resolution, preferring to monitor the experience of the United States and the Commonwealth countries).

<sup>215</sup> Blankenburg, *supra* note 206, at 188-89 (suggesting that assessing court fees that accurately reflect costs, especially against business and government agencies, will more effectively promote ADR use, reduce overall costs, and improve access).

<sup>216</sup> See KPMG Report, *supra* note 1.

<sup>217</sup> See Iain Goldrein, *Conditional Fees: The Litigator’s High Wire Act*, NEW L.J., Oct. 11, 1996, at 1456 (“The conditional fee agreement brings out the lawyer in each of us. Those litigators who are able to make that analysis will be the winners in the new environment. Those who are not sufficiently disciplined in that risk analysis will be those who fail to make a profit.”); Catherine J.B. Leech, *Towards a US System for Personal Injury Cases?*, NEW L.J., Dec. 6, 1996, at 1774 (stating that in the absence of jury awarded damages “[t]here may not be the incentive for lawyers in this jurisdiction to take the large risks that US attorneys take”).

## IX. CONCLUSIONS

We began with the premise that a careful analysis of fee systems from a framework that examined the lawyer's dual agency relationship to the client and to the system of justice would yield insight into differences in both practice and experience between the U.S. and western European legal systems. The analysis does, indeed, suggest several such insights that may hold value as both the United States and western Europe consider possible changes in their fee systems.

We have examined attorney fees from the standpoint of the dual sets of duties that attorneys owe to clients and to society. The particular fee arrangements permitted by society and used by clients will ameliorate or exacerbate the tendency of the relevant interests to diverge at key decision points. Any fee system will affect interests of the client in obtaining access to justice, in trusting the attorney to protect client interests, and in allocating the costs and risk of loss. It will affect the interests of the society in access to the justice system, in the operational efficiency of the legal system and in the extent to which the public views the justice system as fair and just in its operation.

We have examined the predictable economic and behavioral effects of different systems of compensating attorneys and used this analysis to draw inferences about underlying differences between the U.S. and western European legal systems. These differences are more than simply differences of tradition and procedure. They reflect different assumptions about the desirable level of access, the desirable balance of the attorney's duties to client and to the justice system, and a preference for allocating the provision of public goods to the public or the private sector.

The analysis suggests that the most striking differences are the United States' strong preference for private provision of legal services and the willingness to accept a close alignment between attorney and client interests. European countries are far more open to publicly providing some baseline of legal services to its citizenry. Movements to more private means of providing legal services, at least in the United Kingdom, appear to be driven by efforts to address inefficiencies in public provision of legal services rather than a change in preference in favor of private provision of legal services.

Even with increasing privatization, there is still much concern about how the balance between the attorney's allegiance to his client and to the justice system is struck. In the United Kingdom a major concern is whether allowing fee arrangements that closely align attorney and client interests will induce attorneys to neglect their duty to the justice system. In Europe the contingency fee is generally viewed as striking the balance too much in favor of the client at the expense of the justice system. Hence, although different attorney compensation schemes are certain to become available in Europe, it is very unlikely that the contingency fee will be considered an option in countries that do not already allow it.

The increasing globalization of legal practice will affect current reform efforts.<sup>218</sup> As the provision of legal service becomes truly international, governments will experience considerable pressure to adopt codes and regulations that facilitate global commerce. One likely manifestation of this globalization will be pressure to adopt common procedural rules in order to facilitate the ability of attorneys to counsel clients in different countries. Restrictions on fee arrangements that are inefficient or noncompetitive are unlikely to last. Although it is true that each country determines who can engage in trial practice within its borders, the emergence of alternatives to formal trial practice will increasingly nullify the importance of such jurisdictional restrictions. Many disputes now are and increasingly will be addressed through arbitration, mediation, negotiation, and private trials. Parties to disputes in countries that maintain overly restrictive controls over fee arrangements increasingly will avail themselves of such alternatives, rendering superfluous attempts by government to control trial practice.

The trend towards globalized legal practice also will pressure legal systems that impede competition. It is unlikely that Germany's fee schedules, Spain's minimum fee schedules, or similar regulations that restrict the ability of attorneys to compete will survive. At the same time, common interests in seeing that attorneys and clients meet their duties to justice, honesty, fairness, and other values essential to the integrity of the judicial system will remain prominent factors in determining allowable fee arrangements. Without the integrity provided by such interests, judicial systems and the legal profession lack the legitimacy needed to maintain an efficient market economy.

Hence, contingency fees are unlikely to become universally accepted, nor will any fee arrangement that is perceived to align the interests of attorney and client too closely. The movement to more competitive and private means of funding litigation will invite fee arrangements, such as the United Kingdom's conditional fee, that more closely align the interests of attorney and client than do the fixed and hourly fees, without too closely aligning such interests. This preference for maintaining some distance between attorney and client interests to avoid unacceptable conflicts with the attorney's duty to the justice system will counter pressures to allow all conceivable fee arrangements. Thus, while the landscape of available attorney fee arrangements in Europe is almost certain to become less restrictive, the benefits to legal systems of limiting attorneys' allegiance to clients' interests will prevent European countries from loosening their regulatory hold on attorneys to the extent allowed in the United States.

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<sup>218</sup> See *supra* note 7 and accompanying text.