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PROTECTING THE POOR: THE DANGERS OF ALTERING THE CONTINGENCY FEE SYSTEM

I. INTRODUCTION

The contingency fee system developed from a once illegal practice to an essential element of the American legal system that allows people who could not otherwise afford an attorney to gain access to the courts.¹ For example, a woman referred to as Judy White (not her real name) had a nine year old, blind son who was sexually assaulted while attending a state school for the deaf and blind.² Mrs. White could not have brought suit if she could not find an attorney to take the case on a contingency fee basis because of her husband's disability and poor economic status.³ This is a fundamental example of how undermining the contingency fee system may "price the average American citizen - especially one who has been catastrophically injured by an unsafe product or a doctor's carelessness, and who isn't working as a result - right out of the justice system."⁴

Without the contingency fee system, many attorneys representing plaintiffs like Mrs. White will only work for the clients who can afford their hourly rates.⁵ The contingency fee system, however, is not perfect. It is possible for attorneys to abuse the system, often resulting in exceedingly large fees.⁶ Many contingent fee cases are settled relatively

¹ See *McInerney v. Massasoit Greyhound Ass'n, Inc.*, 359 Mass. 339, 349, 269 N.E.2d 211, 217 (1971) (overruling doctrine of champerty and finding contingency fees socially useful).

² See Lawrence Messina, *Contingency-Fee System Balances Out, Lawyers Say*, SUNDAY GAZETTE MAIL, February 8, 1998 at 1A (discussing situation of family who required contingency fee to proceed with case).

³ See *id.* (discussing family's inability to sue without contingency fee).

⁴ Joel S. Perwin, *Don't End Contingency Fee System*, 21 NAT'L L.J. 1, Aug. 31, 1998 at A20.

⁵ See *id.* (noting disturbance of contingency fee system would shift balance in litigation toward wealthy).

⁶ See Athima Chansanchai, *Lawsuit or Lotto?*, THE VILLAGE VOICE (New York), April 21, 1998 at 27 (discussing certain groups fighting for reform of tort system). Two groups, the New Yorkers for Civil Justice Reform and the National Federation of Independent Businesses, are campaigning for a \$250,000 limit on punitive damages, a ten

easily.⁷ A fee of one third of the settlement, or more, may not accurately represent the effort put forth by the attorney.⁸ Additionally, some attorneys may mentally devalue settlement offers when they have an interest in the outcome of the case.⁹ The contingency fee system needs modification, but in such a way that will not reduce plaintiffs' access to the courts.

This Note recognizes the inherent problems that exist with the contingency fee system.¹⁰ Part II of this Note discusses the history of the contingency fee system.¹¹ Part III discusses how this system currently works.¹² Part IV analyzes and critiques possible changes to the system such as a complete ban, a sliding scale or bonus system based on outcome, and a penalty system.¹³ This article concludes that most of the proposed changes to the system would create as many, if not more, problems than they claim to solve.

II. HISTORY

Contingency fees grew out of the English doctrine of champerty.¹⁴ Champerty is "a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving

year statute of limitations for product and building designs, and reduction of contingency fee rates. *Id.*

⁷ See Perwin, *supra* note 4, at A20 (noting opponents of contingency fees claim lawyers do very little to collect large fees).

⁸ See *id.* at A20 (alleging one or two phone calls may settle certain cases).

⁹ See David Wagner, *Lawyers Will Win States' Tort Lotto*, INSIGHT MAGAZINE, March 16, 1998 at 12 (discussing attorneys' likelihood of refusing settlements other than cash in even if in client's interest).

¹⁰ See *supra* notes 6-9 and accompanying text (noting reasons for proposed changes).

¹¹ See *infra* notes 14-43 and accompanying text (discussing development of contingency fees from English doctrine of champerty).

¹² See *infra* notes 44-117 and accompanying text (discussing how contingency fees presently work).

¹³ See *infra* notes 117-155 and accompanying text (reviewing proposed alterations of present system).

¹⁴ See *Saladini v. Righellis*, 426 Mass. 231, 233, 687 N.E.2d 1224, 1225 (1997) (observing England's feudal system as origin of champerty). The *Saladini* court defined champerty "as the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation." *Id.*

part of any judgment proceeds; it is one type of 'maintenance', the more general term which refers to maintaining, supporting, or promoting another person's litigation."¹⁵ Champerty has existed since thirteenth century England when it was illegal for a person to provide the financial means for litigation or to pursue the claim of another person with the expectation of receiving compensation from the proceeds.¹⁶ An example of champerty occurred when persons with money and power attempted to increase their position by pursuing property claims of the less fortunate in order to receive part of the property recovered.¹⁷

Though English courts during the eighteenth and nineteenth century prohibited all contingency fee contracts, not all persons agreed with this idea.¹⁸ One English jurist, Lord Abinger, suggested it is not a disservice to society to assist a person who has no means of obtaining relief on his or her own.¹⁹ Approximately ten years after Lord Abinger expressed this idea, a British coal mine inspector stated that the system unfairly treated the families of coal miners killed during work because they often could not find a solicitor who would pursue their claims.²⁰ Furthermore, in many cases the losing party had to pay the winning party's attorney's fees, which often exceeded any amount awarded as damages and served as an additional impediment to lower class plaintiffs.²¹

The use of contingency fees in America developed slowly.²² During the 1800's, many contingency fee agreements developed out of land disputes in the recently settled colonies.²³ Many people who settled

¹⁵ BLACK'S LAW DICTIONARY 157 (6th ed. 1991).

¹⁶ See Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 262 (1998) (discussing English legal system).

¹⁷ See *id.* at 263 (explaining reasons for use of contingent fees).

¹⁸ See 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, 233 (1998) (noting objections to rule barring contingency fees began in early 1840s).

¹⁹ See *id.* at 233 (expressing Abinger's discontent with system that did not allow one to help another obtain relief).

²⁰ See *id.* at 233 (understanding difficult position of families of disabled miners).

²¹ See Landsman, *supra* note 16, at 263 (illustrating risk of accepting contingent fee case).

²² See Karsten, *supra* note 18, at 234 (observing increase in poor parties paying attorneys out of recovery).

²³ See generally PATRICIA WATLINGTON, *THE PARTISAN SPIRIT: KENTUCKY POLITICS, 1779-1792*, 16-17 (1978) (observing extent of land disputes); ALAN TAYLOR, *LIBERTY MEN AND GREAT PROPRIETORS: THE REVOLUTIONARY SPIRIT ON THE MAINE FRONTIER, 1760-1820*, 21 (1990) (discussing expensive and time consuming nature of

on land believing they had good title were later removed from the land by the true landowners and could only afford to defend themselves if they entered contingency fee agreements.²⁴ Courts usually allowed these fee agreements.²⁵ The court would void the fee contract as contrary to public policy, however, if an attorney inserted a clause that prevented the client from settling the matter without the attorney's consent.²⁶

Though contingency fees were recognized, the American courts did not universally accept them.²⁷ For example, a New York attorney familiar with a particular case paid plaintiffs \$351.31 for their right to sue on a promissory note.²⁸ The attorney recovered \$5,987.00 after pursuing the original claim.²⁹ The Chancellor found the attorney concealed his reasons for believing he could prevail in this litigation, and the agreement was precisely the type English courts tried to prevent.³⁰

Contingency fees became more common by the late nineteenth century.³¹ They were not allowed, however, when an attorney would be taking a portion of an alimony award, initiating divorce proceedings, prosecuting or defending a criminal matter, or obtaining a discharge from the military for a draftee.³² In 1915, Congress attempted to limit contingency fees to twenty percent for attorneys representing Southern clients

land disputes); PAUL GATES, *LANDLORDS AND TENANTS ON THE PRAIRIE FRONTIER; STUDIES IN AMERICAN LAND POLICY*, 16 (1973) (commenting on costs of litigating over title).

²⁴ See Taylor, *supra* note 23 and accompanying text (discussing problems associated with land disputes).

²⁵ See Karsten, *supra* note 18, at 237 (discussing case which found settlement restrictions void because public policy encourages settlement of lawsuits).

²⁶ See *id.* at 235 (prohibiting attorneys from preventing client settlements).

²⁷ See *id.* at 234 (observing many members of bar still considered contingency fees champertous and illegal).

²⁸ See *id.* at 235 (discussing attorney's right to pursue another's cause of action).

²⁹ See *id.* at 235 (noting judgment recovery far in excess of amount paid for right to sue).

³⁰ See Karsten, *supra* note 18, at 235 (disapproving of attorney's actions as champertous).

³¹ See *id.* at 239 (noting many colonies lifted ban on contingency fees). By 1898 state courts in Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Iowa, Louisiana, Michigan, Missouri, New Jersey, New York, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Wisconsin all allowed and enforced contingency fees. *Id.* See also Powell v. Alabama, 287 U.S. 45, 61-65 (1932) (noting twelve of thirteen colonies abandoned English rule and affirmed clients' right to representation).

³² See Karsten, *supra* note 18, at 249 (noting refusal to allow contingency fee contracts when contrary to public policy).

who alleged damages from government takings or theft suffered during the Civil War.³³ While Arkansas upheld the act, the United States Supreme Court and the supreme courts of Kentucky, Mississippi, and Tennessee found the act unconstitutional by ruling attorneys should have the freedom to set the terms of their own contracts.³⁴

More recently, American courts have invalidated the doctrine of champerty, labeling it as "a tool ill fitted to curb the evils attendant upon contingent fees."³⁵ Now when an attorney contracts for a fixed percentage of the recovery, the agreement is considered a valid contingency agreement and not void under the doctrine of champerty.³⁶ The Massachusetts Supreme Judicial Court (SJC) and other state courts have since enacted rules to replace the doctrine of champerty.³⁷

American courts have found certain fee agreements to be excessive and, therefore, unenforceable.³⁸ Courts may require an attorney to provide detailed justification for his or her fee; otherwise, the court may reduce the fee in proportion to the amount it determines the attorney has proven reasonable.³⁹ For example, in *In re Cohen*,⁴⁰ an attorney's wrong-

³³ See *id.* at 250 (seeking to restrict fees in certain circumstances).

³⁴ See *id.* (noting where litigation arose, most courts disapproved act).

³⁵ *McInerney v. Massasoit Greyhound Ass'n, Inc.*, 359 Mass. 339, 349, 269 N.E.2d 211, 217 (1971). See also *Sullivan v. Goulette*, 344 Mass. 307, 312, 182 N.E.2d 519, 523 (1962) (suggesting court rules should not deal with doctrine of champerty).

³⁶ See *McInerney*, 359 Mass. at 349-50, 269 N.E.2d at 218 (finding fee agreement not champertous but unenforceable for other reasons). See *infra*, note 30-31 and accompanying text (discussing rejection of doctrine of champerty).

³⁷ See *id.* at 349, 269 N.E.2d at 2187 (noting Rule 14 of General Rules deemed contingent fee agreements not champertous). The present rule is S.J.C. Rule 3:14. *Id.* at 350 n.8, 269 N.E.2d at 217 n.8.

³⁸ See *Trustees of Tufts College v. Ramsdell*, 28 Mass. App. Ct. 584, 585, 554 N.E.2d 34, 35 (1990) (finding one-third of recovery unreasonable fee for collection of defaulted loan); *McInerney*, at 354, 269 N.E.2d 211, 220 (declaring agreement void and requiring attorney to return money and stock received); *In re Cohen*, 155 N.Y.S. 517, 520, 169 A.D. 544, 547 (1915) (finding fees charged by attorney unreasonable in light of services rendered).

³⁹ See *In re Nelson*, 206 B.R. 869, 883 (Bankr. N.D. Ohio 1997) (reducing attorney's fees to account for insufficient documentation of fees); *In re Albert*, 206 B.R. 636, 641 (Bankr. D. Mass. 1997) (finding time spent on case and hourly rate insufficient to ascertain reasonableness of fee); *Schlesinger v. Teitelbaum*, 475 F.2d 137, 139 (3d Cir. 1973) (invalidating agreement exceeding set schedule where attorney could not document basis of increased fee).

⁴⁰ 155 N.Y.S. 517, 520, 169 A.D. 544, 547 (1915).

ful actions concerning his fee ultimately resulted in his disbarment.⁴¹ The attorney retained a fee of \$17,619.59, of which \$14,169.74 was found to be unreasonable.⁴² The court would have found a less severe penalty if the attorney had not fled the jurisdiction when ordered to return the unreasonable portion of the fee.⁴³

III. MODERN APPLICATION OF CONTINGENCY FEES

The Model Rules of Professional Conduct limit the types of cases an attorney can accept on a contingency basis.⁴⁴ Attorneys may not use a contingency fee agreement in domestic relations cases or in criminal matters.⁴⁵ Additionally, some jurisdictions have further restrictions, such as requiring pretrial court approval for a contingency fee agreement in cases for personal injuries of minors.⁴⁶

In *In re Settlement of Betts*,⁴⁷ a drunk driver hit and seriously injured two minor children.⁴⁸ The parents signed a contingency fee contract that entitled the attorneys to forty percent of the recovery.⁴⁹ The court determined no binding contingency fee contract existed and reduced the attorneys' fees to thirty-three and one third percent.⁵⁰ The

⁴¹ See *id.* at 521, 169 A.D. at 548 (finding attorney ineligible to continue as member of bar).

⁴² See *id.* at 519, 169 A.D. at 546 (detailing portions of attorney's fee proven reasonable).

⁴³ See *id.* at 520, 169 A.D. at 548 (stating reason for extreme disciplinary measure).

⁴⁴ See Model Rules of Professional Conduct Rule 1.5. Model Rule 1.5 provides, in pertinent part:

(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.

Id.

⁴⁵ See *id.* (setting out prohibited areas for contingency fees).

⁴⁶ See *In re Settlements of Betts*, 62 Ohio Misc. 2d 30, 37, 587 N.E.2d 997, 1002 (1991) (reducing attorneys' fees because contingency fee agreement not previously approved by court).

⁴⁷ 62 Ohio Misc. 2d 30, 587 N.E.2d 997 (1991).

⁴⁸ See *id.* at 32, 587 N.E.2d at 998 (discussing accident involving minors).

⁴⁹ See *id.* at 37, 587 N.E.2d at 1002 (describing terms of contract).

⁵⁰ See *id.* at 42, 587 N.E.2d at 1005 (noting court's objection to fee).

court refused to enforce the original contract because the attorneys failed to have the contingency fee pre-approved by the court, the issues were not unusual or particularly difficult, and the attorneys kept no time records.⁵¹ The court calculated a reasonable fee and reduced it by the interest that the client should have earned on the advanced settlement.⁵²

Courts also restrict fee agreements when the client is not capable of negotiating a fair contract.⁵³ For example, when a minor hires a lawyer, "[c]ontingent fee contracts have been especially subject to restriction . . . largely because of the obvious possibilities of unfair advantage."⁵⁴ Likewise, the United States Court of Appeals found seamen, as wards of admiralty, similarly situated and set their attorney's fees according to a predetermined schedule regardless of any contracts signed by the clients.⁵⁵

All courts have discretion to determine the reasonableness of attorneys' fees.⁵⁶ Courts routinely examine both contingency fees and fees calculated on an hourly rate.⁵⁷ Generally, a client and attorney enter into a fee agreement and the attorney may not bill in excess of the agreement

⁵¹ See *id.* at 39, 587 N.E.2d at 1003 (detailing court's reasons for reducing fee).

⁵² See *Betts*, at 42, 587 N.E.2d at 1005 (explaining how court reduced fee).

⁵³ See *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir. 1973) (reflecting courts' special concern in reviewing contingent fee contracts because of fiduciary nature of relationship).

⁵⁴ *Id.* at 140.

⁵⁵ See *id.* at 138 (comparing seamen to minors).

⁵⁶ See, e.g. *Saladini v. Righellis*, 426 Mass. 231, 236, 687 N.E.2d 1224, 1227 (1997) (stating judges have fundamental power to disapprove unreasonable fees); *Gagnon v. Shoblom*, 409 Mass. 63, 67, 565 N.E.2d 775, 777 (1991) (noting judges' power to act when party objects to fee agreement); *Snow v. Mikenas*, 373 Mass. 809, 812, 370 N.E.2d 1001, 1003 (1977) (holding trial judge has authority to require justification of fees).

⁵⁷ See *Buckman v. Montana Deaconess Hospital*, 238 Mont. 516, 519, 776 P.2d 1210, 1211 (1989) (decreasing hourly fee from \$225 per hour to \$80 per hour in workers' compensation case). The *Buckman* court reduced the hourly rate of an attorney who had normally worked on a contingent fee basis. *Id.* The judge considered evidence other than the testimony of the attorney as to what would be a reasonable rate. *Id.* See also *Baeta v. Don Tripp Trucking*, 254 Mont. 487, 490, 839 P.2d 566, 568 (1992) (reducing fee from \$20,566 to \$12,500 and costs reduced from \$4,033.23 to \$3,805.59). But see *Gullett v. Stanley Structures*, 222 Mont. 365, 367-68, 722 P.2d 619, 621 (1986) (finding attorney entitled to rate normally charged, not merely average attorneys rate).

unless there are extenuating circumstances.⁵⁸ Ultimately, the courts have the final determination of the reasonableness of the fee.⁵⁹

In considering a fee agreement, the court construes any obscurities in the contract against the attorney, who has an "obligation of seeing that all its parts were completed with clarity."⁶⁰ In *Grace and Nino, Inc. v. Orlando*,⁶¹ the Massachusetts Appeals Court ordered the return of a portion of the retained fee because of an ambiguity in the written agreement caused by the attorney.⁶² The fee agreement provided that the attorneys would receive \$10,000.00 if they settled the case within thirty days of signing the agreement and before filing suit.⁶³ If the attorney filed suit, recovery would be sixteen and two-thirds percent of the first \$300,000.00 and forty percent of any amount over \$300,000.00.⁶⁴ The agreement did not specify what fee the client should pay if the attorney settled the matter more than thirty days after signing the contract, but prior to filing suit, and therefore, the agreement must be construed in favor of the client.⁶⁵

Massachusetts, as well as other jurisdictions, has certain requirements and restrictions regarding contingency fee contracts.⁶⁶ One such

⁵⁸ See *Winterbotham v. Winterbotham*, 500 So. 2d 723, 724 (Fla. App.1987) (holding court award of attorney's fees above contracted amount improper).

⁵⁹ See *Elser v. Law Offices of James M. Russ*, 679 So. 2d 309, 313 (Fla. App. 1996) (reminding attorneys of their ethical obligation to charge reasonable fees).

⁶⁰ In the Matter of *Kerlinsky*, 406 Mass. 67, 72, 546 N.E.2d 150, 153 (1989). See also *Grace and Nino, Inc. v. Orlando*, 41 Mass. App. Ct. 111, 114, 668 N.E.2d 864, 866 (1996) (reading fee agreement in light most favorable to client). The court interpreted the fee agreement in the client's favor and determined that a contingency fee only applied if the attorney actually filed suit. *Id.*

⁶¹ 41 Mass. App. Ct. 111, 668 N.E.2d 864 (1996).

⁶² See *id.* at 114, 668 N.E.2d at 866 (reducing fee because of lack of clarity).

⁶³ See *id.* at 112 n.2, 668 N.E.2d at 865 n.2 (describing terms of contract).

⁶⁴ See *id.* at 112 n.2, 668 N.E.2d at 865 n.2 (further detailing terms of contract).

⁶⁵ See *id.* (interpreting contract against attorney).

⁶⁶ See MASS. RULES OF THE SUP. JUD. CT. Rule 3:07 (West 1998). Rule 3:07 provides, in pertinent part:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state:

(1) the name and address of each client;

requirement dictates that a contingency fee agreement must be in writing to be enforceable.⁶⁷ If a written fee agreement exists, courts need not consider extrinsic evidence to determine if the parties modified it orally.⁶⁸ Additionally, Massachusetts requires that if lawyers from multiple firms bill a client, they must inform the client in advance and receive consent for the division of fees.⁶⁹ Unlike the American Bar Association Model Rules (ABA Model Rules), the Massachusetts rule does not require a division of fees based on the percentage of work completed by each attorney.⁷⁰

Some attorneys attempt to avert these rules through the creation of jurisdictional loopholes.⁷¹ By signing a contingency fee contract with an out-of-state client and hiring local counsel in the client's state to work on an hourly basis, the attorney attempts to have the contingency fee

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- (2) the name and address of the lawyer or lawyers to be retained;
 - (3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
 - (4) the contingency upon which compensation to be paid, and whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer;
 - (5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out amounts collected; and
 - (6) the method by which litigation and other expenses are to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Id. Accord ALA. RULES ANN. Rule 1.5 (Michie 1995); CAL. BUS. & PROF. CODE § 6147 (West 1998); FLA. STATE. ANN. ch. 4-1.5 (West 1998); NEVADA SUPREME COURT RULE 155(3).

⁶⁷ *See id.* (detailing content requirements of contingency fee contract).

⁶⁸ *See* Foodtown, Inc. of Jacksonville v. Argonaut Ins. Co., 102 F.3d 483, 484 (11th Cir. 1996) (upholding decision not to hear parol evidence). The appellate court upheld the findings of the magistrate judge that an oral agreement should not be considered if there is a clear written agreement settling the question. *Id.*

⁶⁹ *See* MASS. RULES OF THE SUP. JUD. CT. Rule 3:07 (West 1998) (requiring client knowledge of division of fees).

⁷⁰ *See id.* (detailing differences between Massachusetts and ABA Model Rules).

⁷¹ *See* Anderson v. Conley, 206 N.J. Super. 132, 138, 501 A.2d 1057, 1060 (1985) (holding contract signed out of state insufficient to avoid New Jersey jurisdiction). The New York firm viewed their contract with the New Jersey firm as a New York contract not subject to the jurisdiction of the New Jersey courts or rules. *Id.*

contract subject only to the jurisdiction of his or her own state.⁷² Courts have ruled, however, that a firm acquiesces to the court's jurisdiction when its agent, the local counsel, appears in the court.⁷³ When attorneys violate these rules, they will be subject to various sanctions from the courts, ranging from monetary penalties to disbarment.⁷⁴

Some states have imposed sanctions on attorneys who violate advertising rules pertaining to contingency fees.⁷⁵ In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,⁷⁶ Philip Zauderer violated several Disciplinary Rules with two advertisements.⁷⁷ The Supreme Court of Ohio publicly reprimanded him for advertising that he would represent clients in criminal cases involving drunk driving on a contingency fee basis.⁷⁸ The court also reprimanded Zauderer for another advertisement in which he failed to include the distinction between costs and fees and whether percentages for fees were calculated before or after deduction of costs.⁷⁹ Similarly, in *Office of Disciplinary Counsel v. Shane*,⁸⁰ the court publicly reprimanded attorneys Barry Shane and Louis Henderson for improper television advertisements.⁸¹ In addition to other violations, the attorneys failed to disclose that clients were responsible for paying costs and expenses regardless of outcome.⁸² Rulings such as

⁷² See *id.* (outlining how New York firm attempted to avoid New Jersey jurisdiction through use of contracts).

⁷³ See *id.* at 140, 501 A.2d at 1061 (though not admitted pro hac vice, firm appeared through use of local counsel).

⁷⁴ See *Guenard v. Burke*, 387 Mass 802, 803, 443 N.E.2d 892, 893 (1982) (holding client may receive multiple damages if attorney failed to turn over funds from judgment); *In re Cohen*, 155 N.Y.S. 517, 521, 169 A.D. 544, 548 (1915) (disbarring attorney who failed to pay money due client and fled jurisdiction to avoid court's power).

⁷⁵ See *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 655 (1985) (disciplining attorney for improper advertisements). The Supreme Court of Ohio publicly reprimanded the attorney for violating Ohio Disciplinary Rules that prohibit the use of pictures in advertisements, or offers to take criminal cases on a contingent fee basis. *Id.* See also *Office of Disciplinary Counsel v. Shane*, 81 Ohio St. 3d 494, 498, 692 N.E.2d 571, 574 (1998) (imposing sanctions on attorney for violating duty not to mislead).

⁷⁶ 471 U.S. 626, 655 (1985).

⁷⁷ See *Zauderer*, 471 U.S. at 631 (discussing charges against attorney).

⁷⁸ See *id.* at 655 (indicating content of advertisements).

⁷⁹ See *id.* (detailing advertisements in violation of state rules).

⁸⁰ 81 Ohio St. 3d 494, 498, 692 N.E.2d 571, 574 (1998).

⁸¹ See *id.* at 498, 692 N.E.2d at 574 (discussing charges against attorneys).

⁸² See *id.* at 497, 692 N.E. 2d at 573 (explaining further violations of advertisements).

this show that attorneys have a right to make their services known to the public through advertising, but the advertisements must fairly represent the deals they would make with clients.⁸³

In determining the fairness of a fee agreement, courts consider many factors beyond the actual fees paid.⁸⁴ The SJC has detailed a number of factors to be weighed when determining if fees are reasonable.⁸⁵ These factors 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; (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.⁸⁶

Many state legislatures have given statutory guidance to the judiciary regarding factors the courts should consider when determining fee suitability.⁸⁷ Legislators have also suggested courts should consider a need for special skills, the requirement of a devotion of a large amount of time, or the involvement of particularly intricate issues when deciding to

⁸³ See *id.* at 497, 692 N.E.2d at 574 (clarifying what is allowable in advertisements).

⁸⁴ See *Salvini v. Flushing Supplies Corp.*, 137 F.R.D. 190, 194 (D. Mass. 1991) (considering many factors including ability, reputation, demand for services, and fees charged by others in area); *Salem Realty Co. v. Matera*, 10 Mass. App. Ct. 571, 576, 410 N.E.2d 716, 719 (1980) (evaluating several elements in determining fee). The court lists "the special skills which may have been brought to bear, the complexity of the case, the size of the case in terms of dollars, the caliber of the services, the fees usually charged for work of the kind involved, the time spent, and the success achieved" as factors that should be taken into account when determining fees. *Id.* at 576, 410 N.E.2d at 719.

⁸⁵ See MASS. RULES OF THE SUP. JUD. CT. Rule 3:07 (West 1998) (indicating how fees are to be assessed).

⁸⁶ *Id.*

⁸⁷ See *id.* (proposing factors for courts to discuss). Accord ALA. RULES ANN. Rule 1.5 (Michie 1995) (providing similar factors as Massachusetts statute); FLA. STAT. ANN. ch. 4-1.5 (West 1998) (supplying substantially same factors as Massachusetts).

allow higher fees.⁸⁸ Though most states allow contingency fees, the courts must review agreements carefully to weigh the fairness to both attorney and client.⁸⁹

In most instances, courts look at contingency fees to determine if they are fair to the client, however, in cases where the attorney is discharged prior to a final outcome, courts determine the fair compensation due to the attorney.⁹⁰ In such an instance, determining a fair fee is not an objective process but rather requires the judge to evaluate several subjective factors.⁹¹ Courts must consider the amount of attorney responsibility involved, the effect of any results already achieved, the handling of specialized issues, advancement of a specific theory, the usefulness of an attorney's work to the replacement attorney, the client's displeasure with the attorney's services, and other testimony regarding the attorney's services.⁹² The court weighs all these factors to assign a reasonable value to the attorney's services.⁹³

In general, courts will award fees on a quantum meruit basis for an attorney who has been dismissed prior to a final judgment or settle-

⁸⁸See FLA. STAT. ANN. ch. 4-1.5(c) (West 1998). The statute provides:

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors."

Id. See also 735 ILL. COMP. STAT. ANN. 5/2-1114 (West 1998). The Illinois statute provides: "(c) The court may review contingent fee agreements for fairness. In special circumstances, where an attorney performs extraordinary services involving more than usual participation in time and effort the attorney may apply to the court for approval of additional compensation." *Id.*

⁸⁹ See *Modery v. Liberty Mutual Ins. Co.*, 228 N.J. Super. 306, 310, 549 A.2d 867, 869 (1988) (overruling trial court's reduction of fees). The court found that the attempt of the trial court to enlarge the amount recovered by the plaintiff was commendable but "it should not have done so at the expense of the attorney." *Id.*

⁹⁰ See *e.g.* *Salvini v. Flushing Supplies Corp.*, 137 F.R.D. 190, 191 (D. Mass 1991) (compensating attorney for initial involvement in case); *Opert v. Mellios*, 415 Mass. 634, 636, 614 N.E.2d 996, 997 (1993) (determining method of compensation for discharged attorney); *Salem Realty Co. v. Matera*, 10 Mass. App. Ct. at 576, 410 N.E.2d at 719 (calculating value of services rendered and contribution to ultimate outcome).

⁹¹ See *Salem Realty Co. v. Matera*, 10 Mass. App. Ct. 571, 576, 410 N.E.2d 716 720 (1980)(looking at subjective factors in determining attorney's fees).

⁹² See *id.* at 576-77, 410 N.E.2d at 720 (considering extent of attorney's involvement and multifaceted nature of case).

⁹³ See *id.* at 577, 410 N.E.2d at 720 (finding \$47,500 fair value of services given involvement in case).

ment in a suit.⁹⁴ Though this is common practice, the Massachusetts courts have "not formulate[d] a rule . . . which would bar recovery on a contingent fee agreement in all cases by an attorney who has rendered substantial performance."⁹⁵ To date, however, the SJC has not enforced a contingency fee agreement for a discharged attorney, rather choosing to only to consider the contingency fee agreement when determining reasonable compensation.⁹⁶ For example, in *Salvini v. Flushing Supplies Corp.*,⁹⁷ the court determined the appropriate amount of legal fees awarded to attorneys discharged from a case.⁹⁸ The court awarded the fee on a quantum meruit basis due to the attorneys' preliminary involvement in the case and the lack of special skill required for that work.⁹⁹ Although the court did not find it appropriate in this case, it did note that if greater expertise had been required, or if the attorney's work had been

⁹⁴ See *Salvini*, 137 F.R.D. at 191 (compensating attorney on quantum meruit basis).

⁹⁶ *Opert*, 415 Mass. at 637, 614 N.E.2d at 997 (quoting *Salem Realty Co. v. Matera*, 384 Mass. at 804, 426 N.E.2d at 1160). See *Sae Hwan Kim v. M & Y Gourmet Grocers, Inc.*, 657 N.Y.S.2d 167, 168 (1997) (compensating attorney for fair value of work done). The court held that an attorney should be paid for the "reasonable value of the services rendered whether that be more or less than the amount provided in a retainer agreement" if the attorney is released without cause. *Id.*

⁹⁶ See *Opert*, 415 Mass. at 637, 614 N.E.2d at 997 (finding possible recovery in quantum meruit if attorney handled claim properly and agreement was fair); *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 208, 496 N.W.2d 57, 63, (1993) (looking at contract as evidence of reasonable fee when assessing attorney's fees against municipality).

⁹⁷ 137 F.R.D. 190 (D. Mass. 1991).

⁹⁸ See *id.* at 193 (evaluating legal services). The factors the court considered were: "1) ability and reputation, 2) demand for services, 3) importance and difficulty of matter, 4) time spent, 5) prices charged for similar services in the area, and 6) amount involved and value of property affected by controversy and result secured." *Id.* at 194. Under the first factor, the court considered that the attorneys were recently admitted to the bar, had no extraordinary skills or prominence, and continued working on this case even after they were discharged and asked to turn over the file. *Id.* The court weighed this against the second and fourth factors, which indicated that the attorneys did spend a great deal of time on the case and could have spent that time on other clients. *Id.* In considering factors three and six, the court found the case was very important to the client and there was a great deal at stake. *Id.* at 194. The court also found the work the attorneys had done was during the developmental stage of the case, did not substantially contribute to the client's award, and it was not very complicated. *Id.* The court considered both hourly rates and contingent fees for comparable services. *Id.* Realizing the method they decided to use would not be the normal method of compensation, the court set the fee by multiplying their normal hourly rate by the reasonable number of hours worked. *Id.* at 195.

⁹⁹ See *id.* (discussing attorneys involvement in case).

a material factor in the outcome, a share of the contingency fee may have been an appropriate method of compensation.¹⁰⁰

Courts have an obligation to make certain that an attorney's fees are fair and reasonable, but a party must challenge the validity of a fee agreement before a judge can inquire into the reasonableness.¹⁰¹ Many attorneys support this judicial limitation because average people could not afford attorney services without a contingency fee system.¹⁰² In Massachusetts, it is improper for a judge to deny approval of a fee agreement when there is no evidence that the fee is unreasonable.¹⁰³

Some states have questioned the validity of the contingency fee arrangements that private attorneys have signed with states' attorney generals for prosecuting the large tobacco cases.¹⁰⁴ Although the fee percentage in these cases is lower than the average contingency fee, the total payment to attorneys is extremely large.¹⁰⁵ In Texas, there were estimates that attorneys would receive approximately \$92,000 per hour for the time they spent on such a case.¹⁰⁶ Some theorists believe the courts should reduce the fees because the states had no idea of the potential

¹⁰⁰ See *id.* (recognizing greater expertise dictates allowance for increased amount of contingency fee).

¹⁰¹ See *Gagnon v. Shoblom*, 409 Mass. 63, 65, 565 N.E.2d 775, 776, (1991) (determining lower court erred in rejecting fee agreement when client had no objection). *But see* *Snow v. Mikenas*, 373 Mass. 809, 812, 370 N.E.2d 1001, 1003, (1977) (finding judge may question fees when attorney will collect from funds distributed by court order).

¹⁰² See John H. Kennedy, *Reduction in Lawyer's \$975,000 Fee is Unanimously Reversed by SJC*, THE BOSTON GLOBE, January 11, 1991, at 42 (noting trial lawyers' objection to court decision).

¹⁰³ See *Gagnon*, 409 Mass. at 65, 565 N.E.2d at 776 (overruling Superior Court judge's reduction of fees). The client testified he was pleased with the attorney's service and signed the agreement willingly. *Id.* at 64, 565 N.E.2d at 776. An attorney specializing in personal injury cases testified the fee was reasonable. *Id.* Opposing counsel from the underlying action testified he was impressed by the attorney's work. *Id.* There was no contradictory evidence. *Id.*

¹⁰⁴ See Stuart Taylor Jr., *Is \$2,000 an Hour Too Much?*, 219 N.Y.L.J. 103, 115 (1998) (discussing decision to disapprove settlement agreement in tobacco case and possible result of further action).

¹⁰⁵ See *id.* (discussing states' reactions to fees due attorneys in tobacco litigation). In Texas, the prosecuting attorneys would receive a total of \$2.3 billion, based on a fifteen percent contingency fee. *Id.* Florida attorneys would receive \$2.8 billion, based on a twenty five percent fee. *Id.*

¹⁰⁶ See David E. Rosenbaum, *Senate Fails Again to Curb Lawsuit Fees*, THE NEW YORK TIMES, June 12, 1998 at 17 (discussing Texas expert's approximation of hourly rate).

enormity of the awards when they signed contracts with these lawyers.¹⁰⁷ The irony of this argument is that uncertainty is the reason for the contingency fee system.¹⁰⁸

Additionally, some commentators question whether it is proper to use private lawyers in a prosecutorial role because prosecutors "are supposed to balance the needs of the legal system against zeal for courtroom victory."¹⁰⁹ If a prosecutor is given a financial stake in the outcome of the case, it is argued he or she may focus more on winning than on serving justice.¹¹⁰ Although there may be a risk of impropriety, it is far outweighed by the states' need for additional resources.¹¹¹

Using contingency fee agreements to hire private attorneys to prosecute the tobacco companies allows states to pursue these claims without putting their own limited resources on the line.¹¹² The contingency fee system may be the key to winning cases against the large tobacco companies.¹¹³ These companies have resources to pay top attorneys to defend their lawsuits.¹¹⁴ A state, however, often has the limited resources of a comparatively small staff and restricted budget.¹¹⁵ When private attorneys take on these cases for the state, they have much greater resources available.¹¹⁶ The contingency fee is necessary to give private attorneys incentive to assist the states in these risky lawsuits.¹¹⁷

¹⁰⁷ See *id.* (noting states' uncertainty of outcome when signing contracts).

¹⁰⁸ See Taylor, *supra* note 104 (discussing support for fee agreements because attorneys bore great risk in pursuing cases).

¹⁰⁹ See Wagner, *supra* note 9, at 12 (quoting Robert Levy, senior fellow in constitutional law at Cato Institute in Washington).

¹¹⁰ See *id.* (detailing Levy's objections to use of private attorneys as prosecutors).

¹¹¹ See *id.* (outlining reasons why states need to use private attorneys on contingency fee basis).

¹¹² See *id.* (noting risks to states in pursuing tobacco litigation).

¹¹³ See *id.* (analyzing benefits of private attorneys prosecuting tobacco litigation).

¹¹⁴ See Wagner, *supra* note 9, at 12 (assessing advantage to defendants under present system).

¹¹⁵ See *id.* (determining drawbacks faced by states when prosecuting these cases).

¹¹⁶ See Rosenbaum *supra*, note 106 at 17 (stating one Mississippi attorney used five million dollars of own money in tobacco litigation).

¹¹⁷ See Michele Jacklin, *Friends in High Places May Reap Tobacco Lawsuit Windfall*, THE HARTFORD COURANT, June 26, 1998 at A17 (noting minimal response to proposal to represent states because they risk recovering nothing).

IV. POSSIBLE CHANGES AND THEIR EFFECTS

One suggested change is to reduce the amount of contingency fees attorneys can collect "to 10 percent of the first \$100,000 received in a settlement, plus 15 percent of any amount received greater than \$100,000."¹¹⁸ Many theorists believe it is unfair to regulate the fees received by attorneys as no other profession has limits imposed on what can be collected as payment.¹¹⁹ If it is absolutely necessary to implement some type of legislation to guide contingency fees, it should not be a rate as low as the proposed ten to fifteen percent.¹²⁰ Such a drastic reduction in percentages may discourage attorneys from accepting cases on a contingency fee basis.¹²¹

A more moderate reduction would be to use a scale similar to that for medical malpractice in Massachusetts.¹²² This type of scale constitutes, "(1) Forty percent of the first one hundred and fifty thousand dollars recovered; (2) Thirty-three and one-third percent of the next one hundred and fifty thousand dollars recovered; (3) Thirty percent of the next two hundred thousand dollars recovered; (4) Twenty-five percent of any amount by which the recovery exceeds five hundred thousand dollars."¹²³ Illinois has adopted a similar statute and found this type of restriction does not limit litigants' access to courts because attorneys are still willing to take risky cases.¹²⁴ There should also be a provision that would allow attorneys to petition the court to increase their fees in cer-

¹¹⁸ See Scott Lehigh, *Weld Preparing a Major Overhaul of Legal System*, THE BOSTON GLOBE, April 10, 1995, at 1 (discussing Governor Weld's plan to revise state's legal system).

¹¹⁹ See Stuart Taylor Jr., *Tobacco Fees: The Rewards of Winning*, NATIONAL JOURNAL, May 30, 1998 (recognizing "corporate fat cats, actors or star athletes" have no limits imposed on salary).

¹²⁰ See Lehigh, *supra* note 118 (reviewing Governor Weld's proposals for reforming legal system).

¹²¹ See Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 410 (1998) (analyzing deterrent effects of placing caps on contingency fees).

¹²² See MASS. GEN. LAWS ch. 231, § 60I (1986) (setting statutory limits on contingency fees in medical malpractice cases).

¹²³ *Id.* Accord CAL. BUS. & PROF. CODE § 6146 (West 1993); FLA. STAT. ANN. § 4-1.5(f)(4) (West 1998); 735 ILL. COMP. STAT. ANN. 5/2-1114 (West 1998); N.Y.R. OF CT. § 691.20(e) (McKinney 1997).

¹²⁴ See *Bernier v. Burris*, 113 Ill. 2d 219, 229, 497 N.E.2d 763, 768 (1986) (observing statute's negligible effect on plaintiffs pursuing claims).

tain circumstances.¹²⁵ In New Jersey, the courts consider whether the attorney has "demonstrate[d] that (1) the fee allowed under the rule is not reasonable compensation for the services actually rendered, and (2) the case presented problems which required exceptional skills beyond that normally encountered in such cases or the case was unusually time consuming."¹²⁶ If attorneys are assured that they can rely on their contracts, and there is not a drastic reduction from the fees they are accustomed to, then this will not be as likely to have a negative effect on plaintiffs.¹²⁷

Another possible modification of the contingency fee system is to allow partial contingencies; a client pays an hourly rate and pays a bonus if the attorney wins the case.¹²⁸ If the hourly fees were nominal and the bonuses were extremely high, then this would not be a substantial change from contingency fees where payment is entirely dependent on outcome.¹²⁹ A more substantial change to the present system would be to require more effective disclosure of the chances of success and the time and money it will likely take to achieve this outcome.¹³⁰ Disclosure of the likelihood of success and associated costs, however, is difficult because at the time the client signs the fee agreement, the lawyer is not necessarily familiar with the specifics of a case.¹³¹ Enforcement would be problematic because third parties could not know whether the attorneys have accurately conveyed their true estimates.¹³² Furthermore, the ABA Committee on Ethics and Professional Responsibility has previously stated that attorneys should explain these types of probabilities to their clients.¹³³

Another proposed option is to require attorneys to seek early settlement offers to assist clients in determining the reasonableness of con-

¹²⁵ See *American Home Assur. Co. v. Golomb*, 239 Ill. App. 3d 37, 43, 606 N.E.2d 793, 797 (1992) (finding attorneys may petition court for additional compensation).

¹²⁶ *Anderson v. Conley*, 206 N.J. Super. 132, 147, 501 A.2d 1057, 1066 (1985).

¹²⁷ See *Bernier*, 113 Ill. 2d at 229, 497 N.E.2d at 768 (finding reliance on contracts provides attorney stability).

¹²⁸ See Samuel R. Gross, *We Could Pass a Law...What Might Happen If Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 322 (1998) (discussing possibility of partial contingency fees).

¹²⁹ See *id.* (noting similarity to present system).

¹³⁰ See Schneyer, *supra* note 121 at 403-04 (discussing Professor Lester Brickman's proposal of mandatory contingent fee retainer form disclosing estimates).

¹³¹ See *id.* (considering difficulties faced by replacement attorneys).

¹³² See *id.* (observing obstacles of enforcement).

¹³³ See *id.* (describing guidelines for attorneys when estimating fees for clients).

tingency fee contracts before they sign them.¹³⁴ This would not require the attorneys to accept these offers, but simply to convey them to the clients to help clients estimate the likely minimum recovery and therefore estimate the risk involved.¹³⁵ One problem with this requirement is once a settlement offer is rejected or withdrawn, there is no guarantee of recovering that amount and the client's estimates would not be enforceable.¹³⁶ Further, early settlement offers are rarely a realistic reflection of the other side's expectations.¹³⁷ Attorneys are not likely to spend time negotiating before their fee has been established because the attorneys may lose the opportunity to influence the bargaining process.¹³⁸ The negative effect this may have on future negotiations may harm clients rather than provide them with accurate estimates of the value of their case.¹³⁹

A more extreme alternative may be to mandate a complete ban on contingency fees.¹⁴⁰ Clients would be responsible for their legal fees regardless of whether or not their case was successful.¹⁴¹ Plaintiffs could not pursue claims without the risk of monetary loss.¹⁴² The difficulty with this prohibition would come in the enforcement.¹⁴³ If both the attorney and client were content with the outcome of an illegal contingency fee agreement, it would be difficult to identify these violations.¹⁴⁴ They would only become known when clients are dissatisfied with the result.¹⁴⁵ To avoid this result, attorneys could set an hourly rate and sim-

¹³⁴ See *id.* (discussing Professor Brickman's proposition requiring early settlement solicitations).

¹³⁵ See Schneyer, *supra* note 121, at 405 (outlining benefits to clients of early settlement offers).

¹³⁶ See *id.* at 406 (considering consequences of early settlement requirements).

¹³⁷ See ROGER FISHER ET AL., *GETTING TO YES* 139 (2d ed. 1991) (discussing negotiators' responses to extreme demands).

¹³⁸ See *id.* (analyzing methods of influencing negotiations).

¹³⁹ See Schneyer, *supra* note 121, at 406 (explaining possible harm to subsequent negotiations).

¹⁴⁰ See generally Gross, *supra* note 128 (discussing possible outcome if contingency fee system were abolished).

¹⁴¹ See *id.* at 322 (detailing effects of prohibiting contingency fees).

¹⁴² See *id.* at 322 (noting significant difference from present system).

¹⁴³ See *id.* at 323 (noting likely response to ban on contingency fees could be illegal contracts).

¹⁴⁴ See *id.* (discussing difficulty of enforcement of suggested changes).

¹⁴⁵ See Gross, *supra* note 119, at 324 (finding opportunity for detecting violation of rule).

ply choose not to collect if they are unsuccessful.¹⁴⁶ This would be nearly impossible to detect because it would only have a positive effect on clients; however, attorneys may not adopt this method because they have no reward for taking on the extra risk.¹⁴⁷

Rather than enacting a complete ban, states may choose to establish a restricted ban.¹⁴⁸ Placing a ban on "an objectively defined category of cases that pose no genuine risk of non-recovery when the fee is set" would prevent excessive fees where the attorney, but not necessarily the client, knows there is little to no risk of non-recovery.¹⁴⁹ This would primarily cover insurance claims or other similar cases but would have no practical value for most personal injury cases.¹⁵⁰ A limitation on fees, either by a flat rate or by a sliding scale, would have much greater force in personal injury matters where attorneys most frequently use contingency fees.¹⁵¹

Another possible change, reverse-cost-shifting, would have the losing party pay a fine to the court that is equal to a percentage of their own fees.¹⁵² This proposal would have the parties who are using the legal system paying for its maintenance.¹⁵³ The proposal also discourages parties from litigating unsound cases.¹⁵⁴ This penalty system would only be enforceable in cases where monetary compensation is the objective.¹⁵⁵

Two problems with reverse cost have not been addressed. First, a penalty may discourage plaintiffs from pursuing invalid claims, or encourage defendants to settle when their defense is weak, but it does not take into account the plaintiff with a very strong case who refuses to accept settlement offers. It would not be proper to penalize a defendant who has attempted to settle but the plaintiff has refused. If the courts make exceptions for these defendants, they will have to look at each set-

¹⁴⁶ See *id.* (noting possibility of averting detection of misbehavior).

¹⁴⁷ See *id.* (arguing likelihood of attorney participation is minimal).

¹⁴⁸ See Schneyer, *supra* note 121, at 407 (discussing possible bans on certain cases).

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 408 (assessing scope of proposed change).

¹⁵¹ See Taylor, *supra* note 119 (noting effects on personal injury cases).

¹⁵² See Ephraim Fischbach and William McLauchlan, *Reverse-Cost Shifting: A New Proposal for Allocating Legal Expenses*, 32 J. MARSHALL L. REV. 35 (1998) (discussing reasoning behind and impact of reverse cost shifting).

¹⁵³ See *id.* at 43 (considering impact on parties involved in suits).

¹⁵⁴ See *id.* at 39 (predicting effect on prospective plaintiffs and defendants).

¹⁵⁵ See *id.* at 42-44 (discussing exceptions to proposal).

tlement offer to determine if it was a valid offer made in good faith. The second problem arises from attorney error. If a client loses the case because his or her attorney did not adhere to time limitations, rules of the court, or other administrative processes, it hardly seems just that the client would have to pay a penalty. A response may be for the client then to sue the former attorney for damages. This would just create more lawsuits with more penalties to be paid. This proposal, on the surface may appear to be a good idea, but would end up creating more litigation to remedy its faults.

V. CONCLUSION

It is unfair to regulate the fees received by attorneys as no other profession has limits on what can be collected as payment. The dangers of disturbing the contingency fee system outweigh the benefits. Plaintiffs are presently able to litigate suits that they may not be able to litigate if the system is upset. If lawyers believe they are only allowed to enforce contingency fee agreements in the context of long and drawn out cases that cost large amounts of money to litigate, then there is a smaller probability these cases ever being litigated. Cases that an attorney can settle with little effort, but still return a decent fee, often provide financing for other ongoing cases that can be very expensive. If attorneys cannot support themselves working on contingency fees, they will choose to work only for the clients that can afford hourly rates. This could seriously upset the balance in favor of affluent defendants or plaintiffs. Plaintiffs that cannot find qualified attorneys to represent them may end up not getting the compensation they need and deserve. Most proposals to alter the contingency fee system create as many problems as they solve. When considering possible changes to the present system, it is most important for legislatures to remember the legal system serves several purposes: it is a source of compensation and redress for injured plaintiffs, a tool for administering justice, a possible source of prevention of future wrongs through deterrence, and it is also the livelihood of attorneys. Any rules passed need to keep all these objectives in mind.

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