Journal of Air Law and Commerce

Volume 48 | Issue 1 Article 7

1983

Judicial Regulation of Contingent Fee Contracts

Eric M. Rhein

JUDICIAL REGULATION OF CONTINGENT FEE CONTRACTS

ERIC M. RHEIN

CONTINGENT FEE CONTRACTS for legal services [1] are of special concern to the law.[2] This concern arises from the judicial and American Bar Association recognition that many clients have little experience negotiating fees with lawyers,[3] the public resentment of the occasionally exorbitant contingent fee recoveries by attorneys,[4] and public distrust of the legal profession.[5] One consequence of this special concern

---

[1] A contingent fee contract for legal services is a contract under which the amount or the payment of the attorney's fee is dependent upon the outcome of the litigation or matter. Annot., 9 A.L.R.4th 191, 193 (1981). A contingent fee for a plaintiff's lawyer is based upon an agreement between the lawyer and client under which the lawyer agrees to prosecute the client's claim in exchange for a specified portion of the amount recovered. BLACK'S LAW DICTIONARY 553 (5th ed. 1979). A contingent fee for a defendant's lawyer may be dependent upon a specified percentage of an amount of money saved the client by his lawyer's efforts. *See* Annot., 9 A.L.R.4th 191 (1981).

[2] *See, e.g.*, Dunn v. H.K. Porter Co., Inc., 602 F.2d 1105 (3rd Cir. 1979) (holding that a district court has authority to set aside contingent fee agreements when it finds that fee agreements would result in unreasonable fees); Peyton v. Margiotti, 398 Pa. 86, 156 A.2d 865 (1959) (voiding a contingent fee contract under which an attorney was to receive a fee upon procuring a pardon for a prisoner).

[3] F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 22 (1964) [hereinafter cited as F. MACKINNON].

[4] *See* Clermont & Currivan, *Improving the Contingent Fee*, 63 CORNELL L. REV. 529, 598-99 (1978) [hereinafter cited as Clermont & Currivan].

[5] *See* McKay, *Legal Education: Law, Lawyers, and Ethics*, 23 DE PAUL L. REV. 641, 644 (1974). Lawyers ranked ninth place, above law enforcement officials, television news reporters and plumbers, in a poll measuring public perception of professional credibility. *Id.* An American Bar Association poll showed in 1974 that most people polled believed that attorneys charge too much for legal services, and that many types of legal matters could be more efficiently handled by accountants, bank officers, and insurance agents. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 231-34 (1977). Chief Justice Warren Burger has noted that even though public perception of the extent of unethical practices in the legal profession is unfounded, the bar should

is that courts have frequently stepped into the attorney-client relationship to review the propriety of contingent fee contracts.[6]

Courts have balanced the need to protect the lawyer's right to contract freely with clients[7] with the need to protect unwary clients from attorney overreaching[8] so that the integrity of the bar can be maintained.[9] This comment will focus on the historical and doctrinal framework of the theory underlying the use of contingent fees, the social utility of contingent fee arrangements, and the possibility for abuse inherent in contingent fee arrangements. Case law illustrating judicial control of contingent fee contracts will then be discusssed in terms of the fiduciary, ethical, and reasonableness standards of review to show that judicial scrutiny of contingent fee contracts, along with enforcement of the legal profession's ethical rules, can ensure that contingent fee arrangements are fairly negotiated and that lawyers utilizing contingent fee arrangements are well compensated.[10]

I. HISTORICAL BACKGROUND AND SOCIAL UTILITY OF CONTINGENT FEE CONTRACTS

---

take action to curb public resentment of lawyers. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 379-80 (1980) [hereinafter cited as Burger].

[6] *See, e.g.*, Hoffert v. General Motors Corp., 656 F.2d 161 (5th Cir. 1981) (holding that the district court validly exercised its authority to supervise the amount of attorneys' contingent fee in wrongful death suit).

[7] *See* Dunn v. H.K. Porter Co., Inc., 602 F.2d 1105, 1111-12 (3d Cir. 1979).

[8] *See* Matter of Reisdorf, 80 N.J. 319, 403 A.2d 873 (1979) (finding that an attorney had charged an excessive contingent fee).

[9] *See generally* Locklin v. Day-Glo Color Corp., 378 F. Supp. 423, 426 (N.D. Ill. 1974) (holding that court-awarded statutory attorneys' fees in antitrust suits must not be overgenerous, in order to maintain public respect for and confidence in the bar).

[10] Any discussion about the advantages and problems of contingent fee arrangements is likely to stir strong feelings. This comment, however, will examine all views on each aspect of judicial regulation of contingent fees. It is important to keep in mind Professor Radin's early caveat that "[c]ontingent fees are neither good nor bad. They are good when they assist an otherwise helpless litigant to secure his right against a powerful antagonist. They are bad when they deprive this litigant of a substantial part of the compensation for his injury." Radin, *Maintenance By Champerty*, 24 CALIF. L. REV. 48, 75 (1935).

A. *English Law*

English common law advocates could not lawfully enter into contingent fee contracts.[11] The amount of the advocates' fee was to be set - even though payment of it could not be enforced[12] - without regard to the possible outcome of the litigation.[13] An agreement to litigate in exchange for a promise of a share in a party's recovery was defined as champertous[14] and therefore illegal.[15] The English believed that if advocates were permitted to contract with parties for contingent fees a greater number of frivolous cases would be brought, because parties would be free of the monetary risks and costs of unfounded litigation.[16]

The early English doctrines of maintenance[17] and barratry[18] also reflected the English policy against allowing non-party participation in lawsuits.[19] Champerty, maintenance, and barratry, however, were not originally aimed at preventing lawyers from having monetary interests in litigation, but were intended to prevent the powerful feudal lords from controlling litigation to which they were not parties.[20] Contingent fees were thus unlawful because they were perceived as promoting

---

[11] R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 76 (1980) [hereinafter cited as R. ARONSON]. The Federal Judicial Center commissioned Professor Aronson's study. *Id.* at 1.

[12] J. COHEN, THE LAW: BUSINESS OR PROFESSION? 234 (1916). Even today it is illegal in England for barristers to sue clients for recovery of fees. L. DRINKER, LEGAL ETHICS 170 (1953). Instead, since solicitors make fee arrangements with clients for barristers, English law permits solicitors to enforce payment of the barristers fees by suing clients. F. MACKINNON, *supra* note 3, at 11-12.

[13] F. MACKINNON, *supra* note 3, at 10.

[14] R. ARONSON, *supra* note 11, at 76.

[15] 1 S. SPEISER, ATTORNEYS' FEES 82 (1973) [hereinafter cited as S. SPEISER].

[16] J. LIEBERMAN, CRISIS AT THE BAR 130 (1978).

[17] Maintenance is "[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 or defend it." BLACK'S LAW DICTIONARY 860 (5th ed. 1979).

[18] Barratry is "[t]he offense of frequently exciting and stirring up quarrels and suits. . . ." *Id.* at 137.

[19] F. MACKINNON, *supra* note 3, at 35-38. At English common law, non-parties who participated in litigation in which they had financial interests could be criminally prosecuted. *See generally* Schnabel v. Taft Broadcasting Co., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975).

[20] F. MACKINNON, *supra* note 3, at 36.

unfounded litigation purely for private profit.[21]

In addition to refusing to permit the use of contingent fees, early English courts controlled the activities of the members of the bar in other ways. The power of courts to regulate lawyers' activities initially was asserted in 1292 when King Edward I appointed the Lord Chief Justice and Associate Justices of the Court of Common Pleas, and gave them the power to appoint attorneys.[22] This act of the king was the basis for direct judicial control of the legal profession.[23] In fact, the barristers' conduct was regulated with such particularity as to include personal matters such as the length of their beards and the cut of their dress.[24] Thus, regulation of lawyers by judges was a clearly established practice in early English common law courts.

B. *United States Law*

Initially, many courts in the United States followed the traditional English common law rule and condemned contingent fee contracts as being champertous.[25] Eventually American courts accepted contingency fee contracts,[26] finding that the evils so feared in England did not exist in American lawyers' contingent fee arrangements.[27] In *Bentinck v. Franklin*,[28] for example, the Texas Supreme Court, in approving the use of a contingent fee contract by a plaintiff's lawyer in a suit for the recovery of land, stated that:

> [I]f a lawyer helps his client to recover lands from the posses-

---

[21] J. COHEN, THE LAW: BUSINESS OR PROFESSION? 234 (1916).

[22] INSTITUTE OF JUDICIAL ADMINISTRATION, CONTINGENT FEES IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS IN THE UNITED STATES 6 (1957).

[23] II HOLDSWORTH, HISTORY OF ENGLISH LAW 490 (1872).

[24] INSTITUTE OF JUDICIAL ADMINISTRATION, CONTINGENT FEES IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS IN THE UNITED STATES 6 (1957) (citing II HOLDSWORTH, HISTORY OF ENGLISH LAW 264 (1872)).

[25] *See, e.g.* Lafferty v. Jelly, 22 Ind. 471 (1864); Roberts v. Yancey, 94 Ky. 243, 21 S.W. 1047 (1893); Hinckley v. Giberson, 129 Me. 308, 151 A. 542 (1930); Butler v. Legro, 62 N.H. 350 (1882); Orr v. Tanner, 12 R.I. 94 (1878).

[26] T. FINMAN, CIVIL LITIGATION AND PROFESSIONAL RESPONSIBILITY 99 (1966).

[27] *See* Combs, *The Contingent Fee Contract*, 28 TEX. B.J. 949 (1965) [hereinafter cited as Combs].

[28] 38 Tex. 458 (1873).

> sion of another, and even takes a part of the land for his fee, if the right of his client is clear to the land, we are unable to see any immorality or breach of professional ethics in the transaction.[29]

There were three reasons for the legalization of contingent fee contracts in the United States. First, Americans generally regarded the concept of "profession" as being aristocratic and anti-democratic.[30] Americans did not share the English disdain for "trade"[31] and instead chose to allow ordinary principles of supply and demand to govern the attorney-client fee relationship.[32] Second, unlike the the English view of litigation, Americans did not regard lawsuits as social evils,[33] and contingent fees were viewed as a desirable means of providing access to the courts for those who otherwise could not afford to hire counsel.[34] Finally, the use of contingent fees tended to mitigate the harsh effect on the indigent litigant of the "American Rule" of attorneys' fees,[35] which held that the winning party in a lawsuit could not recover money to pay his attorney from the losing party.[36] Contingent fee contracts therefore made it possible for the poor litigant to obtain access to the justice system in civil cases, for the reason that if he recovered no monetary judgment, he owed his attorney no

---

[29] *Id.* at 462. The United States Supreme Court first recognized contingent fee contracts in Wylie v. Coxe, 56 U.S. 415 (1853) (permitting plaintiff's attorney to recover a contingent fee of five percent on the amount recovered on the client's claim against a foreign government). *See also* Taylor v. Bemiss, 110 U.S. 42, 46 (1884) (holding that a contingent fee that constitutes fifty percent of a client's recovery is not extortionate); Stanton v. Embrey, 93 U.S. 548, 557 (1876) (approving the use of contingent fee in claim against the United States).

[30] Comment, *The Contingent Fee: Disciplinary Rule, Ethical Consideration, or Free Competition?*, 1979 UTAH L. REV. 547 [hereinafter cited as Comment, *The Contingent Fee*].

[31] At that time the English believed that "gentlemen" should not indulge in "trading class" speculation as to fee compensation. Combs, *supra* note 27, at 950.

[32] Comment, *The Contingent Fee*, *supra* note 30, at 547.

[33] F. MACKINNON, *supra* note 3, at 41.

[34] M. GISNET, A LAWYER TELLS THE TRUTH 73 (1931). *See infra* notes 38 - 44 and accompanying text.

[35] *See* Combs, *supra* note 27, at 950.

[36] Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND L. REV. 1216, 1226 (1967).

fee.[37]

The rise of the contingent fee contract for legal services in the United States has been attributed to the industrial and transportation boom of the late eighteenth and early nineteenth centuries, which brought about previously unknown incidence of industrial death and injury among members of the working class,[38] many of whom lacked the funds to hire counsel.[39] Without an attorney willing to take such cases with the accompanying risk of not being paid, those persons injured during these economic boom periods would not have been able to sue to recover damages for their work-related injuries.[40] Thus, because many personal injury claimants lacked the funds to pay retainer fees,[41] the contingent fee provided the only means by which some persons could obtain judicial determination of their rights.[42] This rationale for the contingent fee still carries great weight today,[43] considering that many personal injury claimants often cannot afford to pay hourly-

---

[37] Comment, *The Contingent Fee*, *supra* note 30, at 547.

[38] Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIGATION, Summer 1976, at 27, 30. [hereinafter cited as Corboy]; Combs, *supra* note 27, at 999.

[39] J. AUERBACH, UNEQUAL JUSTICE 44 (1976). "An alarming proliferation of work and transportation accidents, most often borne by those least able to afford lawyers' fees, generated human tragedies which a profit economy and its legal doctrines exacerbated. Accident victims—and the surviving members of their families—were compelled to bear the full burden for the risks inherent in dangerous work. Corporate profit was the primary social value." *Id.*

[40] R. ARONSON, *supra* note 11, at 77.

[41] S. SPEISER, *supra* note 15, at 84. Many personal injury plaintiffs, faced with lost wages, mounting medical bills, and uncertain futures, are not able to finance preparation and investigation of a lawsuit, and are seldom able to pay retainer fees. *Id.*

[42] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980) (contingent fees often "provide the only practical means by which one having a claim against another can economically afford . . . the services of a competent lawyer to prosecute his claim. . . ."); Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097, 1105 (4th Cir. 1977) (holding that "sound public policy favor[s] the contingent fee as a method for those less financially advantaged to vindicate their substantive rights"); Kreindler, *The Contingent Fee: Whose Interests Are Actually Being Served*, 14 FORUM 406 (1979)[hereinafter cited as Kreindler] ("[t]he contingent fee makes it possible for anyone in our society to get the best lawyer. The client need not be a rich man. He need only have a good case."); Kuhn, Collins & Rush v. Reynolds, 614 S.W.2d 854, 857 (Tex. Civ. App.-Texarkana 1981, writ ref'd n.r.e) (contingent fees "provide the only practical means by which" poor claimants can hire attorneys to prosecute claims).

[43] Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977).

based attorneys' fees.[44]

In contingent fee arrangements, the attorney serves as an insurer by bearing the risk of loss (i.e., nonpayment) in exchange for the possibility of receiving a portion of the client's recovery.[45] The attorney can better bear this risk of loss by spreading it over a large number of contingent fee cases.[46] Viewed in this light, a single large contingent fee recovery by a plaintiff's lawyer looks less exorbitant, considering that the lawyer may not recover much, if any, money in other cases.[47]

The use of the contingent fee in the United States has been widespread.[48] Traditionally, plaintiffs' attorneys have contracted for contingent fees in personal injury suits,[49] collection suits,[50] workmen's compensation cases,[51] stockholder derivative suits,[52] antitrust civil suits for damages,[53] tax cases,[54] and

---

[44] *See supra* note 42.

[45] R. ARONSON, *supra* note 11, at 49.

[46] *See* M. Schwartz & D. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1147-54 (1970). For instance, suppose a lawyer represents ten personal injury claimants, under contingent fee contracts, and spends an average of forty hours on each suit. Assume for the purpose of this example that the attorney bills other clients by the hour at one hundred dollars an hour. In order to make the attorney's time profitable, it would be necessary for the attorney to recover more than $8,000 in each of five out of ten cases, so that the attorney can "cover" for the time spent on the five cases in which no money is recovered. One commentator, however, has argued that because most personal injury cases are settled before trial, there is little doubt that the contingent fee lawyer will earn some fee; the only contingency has to do with the amount of the fee. Grady, *Some Ethical Questions About Percentage Fees*, LITIGATION Summer 1976, at 20,23 [hereinafter cited as Grady].

[47] *See* Brown, *Some Observations on Legal Fees*, 24 Sw. L.J. 565 (1970). Often a contingent fee lawyer may recover a large fee in one case, and will use that recovery to finance the cost of his "losing" cases. This situation raises an ethical question of whether it is fair to require, in essence, one client to finance an attorney's other cases. *See* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 27-31 (Supp. 1978).

[48] F. MACKINNON, *supra* note 3, at 29.

[49] *See, e.g.*, Bounougias v. Peters, 49 Ill. App. 2d 138, 198 N.E.2d 142 (1964).

[50] *See* F. MACKINNON, *supra* note 3, at 25.

[51] *See, e.g.*, Thatcher v. Industrial Commission, 115 Utah 568, 207 P.2d 178 (1949).

[52] *See, e.g.*, Marine Midland Trust Co. v. Forty Wall Street Corp., 13 A.D.2d 118, 213 N.Y.S.2d 689 (1961).

[53] *See, e.g.*, International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980).

[54] *See* F. MACKINNON, *supra* note 3, at 27.

will contests.[55] More recently, attorneys have contracted for contingent fees in defending tort claims,[56] lien foreclosures,[57] tax cases,[58] will contests,[59] and ejectment suits.[60]

The contingent fee mechanism, by providing access to the legal system to a significant number of people, has played an indispensable role in recent progressive changes in the law.[61] For example, plaintiff's personal injury lawyers' efforts have been the impetus for many developments in tort law,[62] such as the abolition of governmental immunity in some states,[63] abrogation of intra-family immunity,[64] the creation of a wife's right to recover for negligent impairment of her husband's consortium,[65] the creation of the tort of negligent infliction of emotional distress,[66] and creation of the right of parents to recover for the wrongful death of an unborn child.[67] Often the only way to finance these suits has been by the use of the contingent fee, because many such claimants otherwise could not have afforded to pay fixed or hourly fees.[68]

II. Possible Abuse of the Contingent Fee

Despite no hard empirical data evidencing widespread

---

[55] *See* Annot., 40 A.L.R.2d 1407, 1438 (1955).

[56] *See* Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W. 2d 331 (Iowa 1980) (striking down defendant lawyer's contingent fee which was based upon difference between amount in plaintiff's prayer and jury verdict).

[57] *See, e.g.*, Walls v. Russell, 519 P.2d 936 (Okla. 1974).

[58] *See, e.g.*, Board of Education v. Thurman, 121 Okla. 108, 247 P. 996 (1926).

[59] *See, e.g.*, Jones v. Jones, 333 Mo. 478, 63 S.W.2d 146 (1933).

[60] *See, e.g.*, Moss v. Richie, 50 Mo. App. 75 (1892).

[61] *See* Corboy, *supra* note 38, at 28.

[62] *See* Lambert, *The Trial Lawyers and the Changing Law*, TRIAL, July-Aug. 1971, at 2.

[63] *See, e.g.*, Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971).

[64] *See, e.g.*, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (abrogation of parent-child immunity).

[65] *See, e.g.*, Gates v. Foley, 247 So. 2d 40 (Fl. 1971).

[66] *See, e.g.*, Dillon v. Legg, 68. Cal 2d 728, 441 P.2d 912, 68 Cal. Rptr. 72 (1968) (holding that a mother may recover for illness and shock resulting from seeing defendant negligently cause her child's death).

[67] *See, e.g.*, Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971).

[68] *See* Lambert, *The Trial Lawyers and the Changing Law*, TRIAL, July-Aug. 1971, at 2.

abuse of the contingency fee,[69] there is a general feeling on the part of the public that lawyers charge too much[70] and that many contingent fee lawyers engage in unethical activities.[71] The area of fee disputes is perhaps the most serious problem to be considered in the relationship between the public and the bar.[72] Even though the public's negative perception of the legal profession may be unfounded,[73] the practice and appearance of contingent fee abuse should be eliminated to the greatest extent possible.[74]

One aspect of the contingent fee arrangement that is sometimes subject to abuse concerns the size of the percentage of the client's recovery a lawyer retains under a contingent fee contract. Sometimes that percentage may bear no relationship to the time and effort invested by the attorney.[75] For example, in *Ransom v. Ransom*,[76] a will contest, the plaintiff's attorney contracted with his client for a twenty-five percent contingent

---

[69] C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1803 at 245 (Supp. 1981).

[70] Comment, *The Contingent Fee*, *supra* note 30, at 551.

[71] J. AUERBACH, UNEQUAL JUSTICE 44-48 (1976).

[72] R. ARONSON, *supra* note 11, at 5.

[73] *See* Burger, *supra* note 5, at 379-80.

[74] *Id.* at 380. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980), which states that "[a] lawyer should avoid even the appearance of professional impropriety."

[75] *See, e.g., Suggested Changes in the Contingent Fee System*, 19 FED'N INS. COUN. Q. 76, 82 (1968) ("[t]he Federation [of Insurance Counsel] objects . . . to abuses of the contingent fee whereby lawyers obtain excessive fees completely out of relationship to the value of [their] services either in time, effort or talent. . . ."); Grady, *supra* note 46, at 21 ("there is little, if any, relationship between the efforts of the [contingent fee] lawyer and the size of the verdict, once we assume a verdict in favor of the plaintiff. . . ."). In Mills v. Elta Corp., No. 80-2270 (7th Cir. 1981), a plaintiffs' lawyer asked the Seventh Circuit Court of Appeals to award him $500,000 for 186 hours of work in a class action suit in which his clients did not recover any monetary damages. The attorney justified the fee to the court, on oral argument, on the ground that his telephone call to his "personal friend" Justice Thurgood Marshall extended the period for filing a petition for certiorari with the Supreme Court; the attorney also had worked on the plaintiffs' Supreme Court Brief. The plaintiffs won in the Supreme Court, but, upon remand, did not win at trial. Nat'l. L. J., Oct. 5, 1981, at 2, col. 3. *See also* Dallas Times Herald, Aug. 1, 1982, at 10A, col. 1, where it was reported that an attorney who won a $12.5 million medical malpractice suit requested that the trial court award him $6 million in fees, an amount the defense attorney stated would be equivalent to $10,000 per hour for a forty hour work week.

[76] 70 Misc. 30, 127 N.Y.S. 1027 (N.Y. Sup. Ct. 1910).

fee.[77] The attorney did not inform the client, during the fee negotiations, of a previous decision rendered by an appellate court in the client's favor in the course of the litigation.[78] The trial court later reduced the attorney's contingent fee, upon the motion of the client's new attorney, from twenty-five to seven and one half percent.[79]

In response to the criticism of the contingent fee that sometimes the amount of the fee bears no relationship to the attorney's efforts, it has been argued that (1) the average personal injury lawyer's income is less than that of the average member of the bar;[80] (2) contingent fee lawyers work the particular number of hours required to maximize the client's recovery,[81] instead of performing unnecessary work for a client and billing by the hour;[82] and (3) since juries today have been awarding plaintiffs larger awards to account for inflation,[83] there is a tendency among some contingent fee lawyers to lower the percentage of a client's award from which their fees are derived.[84]

---

[77] 127 N.Y.S. at 1029-30.

[78] *Id.* at 1035-36.

[79] *Id.* at 1037.

[80] F. MACKINNON, *supra* note 3, at 182.

[81] Kreindler, *supra* note 42 at 406.

[82] *See* Clermont & Currivan, *supra* note 4, at 567-69, where the authors note that because the hourly paid the attorney has no direct economic reason to work the number of hours demanded by the client's best interests, it is quite possible that disproportionately high hourly fees are charged. Overbilling by the hour attracted attention recently in the *Fine Paper Antitrust Litigation*, No. MDL 323 (E.D. Pa. 1981), where plaintiffs' lawyers have accused each other of charging excessive hourly fees. Legal Times of Washington, June 15, 1981, at 1, col. 1. It has been alleged that pretrial conferences were attended by one or more attorneys from seven to seventeen firms, where two or three attorneys would have sufficed, and that several firms representing the same client would attend a single conference. At one such conference, three out of four firms allegedly appeared on one client's behalf, billing a total of fifty and one-half hours. One affiant stated that "[t]he requested fee . . . probably exceeds [the lawyers'] clients' recovery." *Id.* at 32, col. 3. In total, the attorneys' fees requested in the case amount to forty percent of the amount paid in settlement. *Id.*

[83] *See generally*, W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1192-97 (1976), in which the authors point out that often juries' awards overcompensate plaintiffs, because jurors believe that doing so is necessary to ensure that plaintiffs have enough money to properly redress their injuries after their expenses and attorneys' fees are deducted. *Id.*

[84] *See* Nat'l. L.J., June 22, 1981, at 1, col. 1, & 27, col. 3. Noted tort lawyer Melvin Belli reports that he has lowered the amount of his contingent fee from one-third to one-fourth of a client's recovery. *Id.* at 27, col. 2.

Critics of the contingent fee have also argued that the contingent fee mechanism encourages lawyers to file groundless suits.[85] Proponents of contingent fees, however, contend that it is of no use for a contingent fee lawyer to bring a "losing" case[86] because unlike the hourly-fee lawyer, a contingent fee lawyer receives no compensation when his client does not recover a money judgment.[87] Therefore, it is against a contingent fee lawyer's economic interest to waste his time on groundless suits.

Moreover, in *Roadway Express, Inc. v. Piper*,[88] the United States Supreme Court held that the federal district courts possess inherent power to assess attorneys' fees against lawyers who willfully abuse the judicial process.[89] This decision could be instrumental in discouraging the filing of groundless suits. In *Roadway Express*, counsel for the plaintiffs in a civil rights class action suit refused to comply with the district court's discovery and briefing orders.[90] The defendant then moved to dismiss the suit, and requested the district court to award it attorneys' fees under Federal Rule of Civil Procedure 37.[91] The district court dismissed the plaintiff's suit[92] and ordered the plaintiff's attorneys to pay the defendant's attorneys' fees,[93] citing the civil rights statute[94] that allows the pre-

---

[85] K. Clermont & J. Currivan, *supra* note 4, at 571.

[86] *See* Kreindler, *supra* note 42, at 407.

[87] *See* Pocius v. Halvorsen, 30 Ill.2d 73, 195 N.E.2d 137 (1963).

[88] 447 U.S. 752 (1980). The case is reviewed at Note, 60 B.U.L. REV. 950 (1980).

[89] 447 U.S. at 766.

[90] *Id.* at 755.

[91] *Id.* FED. R. CIV. P. 37(b)(2) provides in part that:

> If a party . . . or an . . . agent of a party . . . fails to obey an order to provide or permit discovery . . . the court . . . may make such orders in regard to the failure as are just, and among others the following:
>
> (B) An order . . . dismissing the action . . . or rendering a judgement by default against the disobedient party.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorneys advising him or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the court finds the failure was substantially justified.

[92] 447 U.S. at 755.

[93] *Id.* at 756.

[94] 42 U.S.C. § 2000 (e)-(5)(k) (1976) provides that "[i]n any action . . . under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasona-

vailing party in civil rights litigation to recover attorneys' fees as costs, and the federal statute that permits district courts to assess costs against attorneys who multiply proceedings so as to unreasonably increase costs.[95] The Court of Appeals reversed the district court's decision,[96] but the Supreme Court affirmed and remanded,[97] holding that the federal district courts have the inherent power to "assess attorneys fees for the 'willful disobedience of a court order . . .' or when the losing party has acted in bad faith."[98]

Contingent fee lawyers are also accused of using improper litigation tactics, such as permitting clients to lie on the witness stand.[99] Recently, an investigative reporter went to thirteen personal injury lawyers in a large city, posed as an accident victim, and offered to testify in court to an undetectable lie which would have the effect of producing a large award.[100] Several of the lawyers offered their services to the reporter.[101] Certainly, though, it is arguable that since all lawyers want to win,[102] such fraudulent tactics are not exclusively used by contingent fee lawyers. Moreover, stricter enforcement of the *Model Code of Professional Responsibility (Code)* would be a more effective way to curb abuses than eliminating contingent fees altogether.[103]

Critics also allege that contingent fee lawyers are more

---

ble attorney's fee as part of costs. . . ."

[95] 28 U.S.C. § 1927 (1976) provides that "[a]ny attorney . . . in any court of the United States . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

[96] Monk v. Roadway Express, Inc., 559 F.2d 1378 (5th Cir. 1979) *aff'd and remanded*, 447 U.S. 752 (1980).

[97] Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

[98] *Id.* at 766. The court did not, however, allow the fees to be assessed against counsel under 42 U.S.C. § 2000(e)-(5)(k) (1976) or 42 U.S.C. § 1927 (1976), for the reason that the statues make no mention of possible attorney liability for costs and fees, and that legislative history evidencing such a Congressional intention was lacking. 447 U.S. at 762-63.

[99] *See* Lehman v. Cameron, 207 Misc. 919, 139 N.Y.S.2d 812 (N.Y. Sup. Ct. 1955).

[100] Berentson, *Integrity Test*, AM. LAW., May 1980, at 15-18, (cited in Burger, *supra* note 5, at 383).

[101] Berentson, *Integrity Test*, AM. LAW., May 1980, at 15-18.

[102] K. Clermont & J. Currivan, *supra* note 4, at 570.

[103] J. LIEBERMAN, CRISIS AT THE BAR 129-30 (1978).

likely to solicit clients than hour-billing attorneys.[104] The Supreme Court's decision in *Ohralik v. Ohio State Bar Association*[105] that state or local bar associations constitutionally may discipline attorneys for soliciting clients in person[106] reaffirms the legal profession's power to effectively deal with the problem of solicitation. In *Ohralik*, an attorney had heard that two young women had been injured in an automobile accident.[107] He visited both women personally,[108] and both women agreed to hire him on a contingent fee basis to represent them in their claims against an insurance company.[109] Both clients later discharged the attorney, and filed bar association grievances against him.[110] The disciplinary board found[111] that the attorney had violated Disciplinary Rules 2-103(A)[112] and 2-104(A).[113] The Ohio Supreme Court adopted the board's findings,[114] and the United States Supreme Court affirmed,[115] pointing out that solicitation may cause the individual solicited distress and may invade an individual's privacy.[116]

Finally, contingent fee lawyers are criticized for sometimes

---

[104] *See* Wasservogel, *Report in the Judicial Investigation of "Ambulance Chasing" in New York*, 14 MASS. L.Q. 1, 21 (1928); *See also* Appleson, *Solicitation Charges Follow Hyatt Disaster*, 67 A.B.A. J. 1442 (1981), where it is reported that the Missouri Bar Association is investigating charges of solicitation in the wake of the Kansas City Hyatt Regency Hotel disaster of July 17, 1981. One victim, injured when two skybridges collapsed, received telephone calls from seven Kansas City lawyers the day she returned home from the hospital. Other victims allegedly received similar communications from out-of-state law firms. *Id.*

[105] 436 U.S. 447 (1978).

[106] *Id.* at 449.

[107] *Id.*

[108] *Id.* at 449-50.

[109] *Id.* at 450-51.

[110] *Id.* at 452.

[111] *Id.* at 453.

[112] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(a) (1980) provides that "[a] lawyer shall not recommend employment, as a private practitioner . . . of himself . . . to a non-lawyer who has not sought his advice regarding employment of a lawyer."

[113] *Id.* DR 2-104(a) provides that "[a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice," with specified exceptions.

[114] Ohio State Bar Ass'n v. Ohralik, 48 Ohio St.2d 217, 357 N.E.2d 1097 (1976), *aff'd*, 436 U.S. 447 (1978).

[115] Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978).

[116] *Id.* at 465.

breaching the fiduciary duty of trust inherent in the attorney-client relationship. For example, in *Bounougias v. Peters*[117] an attorney and a client entered into a contingent fee contract under which the attorney was to receive one-third of the client's recovery in a personal injury suit.[118] The lawyer recovered a verdict for the client of $105,000,[119] and the attorney successfully defended the verdict in the court of appeals.[120] The opposing party indicated to the plaintiff's lawyer that it might seek review in the United State Supreme Court,[121] and the plaintiff's lawyer wrote his client, requesting that the client come to his office alone.[122] At the meeting, the client signed a letter, written by the attorney, which stated that the attorney's contingent fee would be increased to fifty percent of the client's recovery.[123] In fact, the defendants did not seek review in the Supreme Court, the defendants paid the judgment and the plaintiff's lawyer kept one-half of that amount.[124] The client then sued the attorney, alleging that the second fee contract was void, since it was obtained by unconscionable overreaching on the attorney's part.[125] The appellate court reversed the trial court's entry of summary judgment for the attorney, holding that material issues of fact existed as to whether the second fee arrangement was fairly negotiated.[126] The court first observed the general rule that attorney-client fee contracts made during the existence of the fiduciary attorney-client relationship are presumptively fraudulent.[127] The court, in examining the circumstances of the instant case, found that the evidence of the attorney's conduct created a material issue of fact.[128] The court held that issues of fact ex-

---

[117] 49 Ill. App.2d 138, 198 N.E.2d 142 (1964).
[118] 198 N.E.2d at 143.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 143-44.
[123] *Id.* at 144.
[124] *Id.* at 144-45
[125] *Id.* at 145.
[126] *Id.* at 149.
[127] *Id.* at 148.
[128] *Id.* at 149.

isted as to whether the fee contract was procured by unconscionable overreaching because (1) the client could not read English;[129] (2) although the client was usually accompanied by a member of his family on his visits to the attorney's office, the attorney indicated in his letter to the client that the client was to come to the attorney's office alone;[130] (3) the attorney rejected the client's request for time to discuss the second contract with his family;[131] and (4) the attorney failed to disclose to the client the client's legal position under the first fee contract.[132]

Another dimension of the fiduciary duties owed by attorneys to clients is that attorneys have a duty to fully inform clients of alternative means of fee financing.[133] Many personal injury clients have no previous experience with legal matters, and negotiate with lawyers on unfamiliar territory.[134] Many clients may lack the sophistication and education necessary to understand fee arrangements and to deal with their lawyers at arms' length.[135] Even though the Supreme Court approved of limited lawyer advertising in *Bates v. State Bar of Arizona*,[136] lawyer advertisements inherently lack the capacity to convey information as to the quality of a lawyer's services, and, for that reason, may not help close the information gap.

In *Matter of Reisdorf*,[137] an attorney was held to have violated the Code's prohibition against charging a clearly exces-

---

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1980), which states that lawyers should explain fully to clients "the reasons for the particular fee arrangement" he proposes.

[134] *Id.* EC 2-19 cautions lawyers that clients "may have had little or experience with fee charges of lawyers . . . ."

[135] *See* Kiser v. Miller, 364 F. Supp. 1311, 1319 (D.D.C. 1973), *modifed sub nom*, Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974). *See also* Pete v. United Mine Workers of American Welfare & Retirement Fund of 1950, 517 F.2d 1275 (D.C. Cir. 1975), where, in a class suit for coal miners retirement benefits, the Court of Appeals upheld the district court's refusal to give effect to contingent fee agreements solicted without court approval and after entry of summary judgement for the plaintiff class.

[136] 433 U.S. 350 (1977).

[137] 80 N.J. 319, 403 A.2d 873 (1979).

sive fee.[138] In that case, the attorney failed to inform his client prior to execution of a contingent fee contract for a will contest that his fee could be paid by an award of the court out of the decedent's estate.[139] One alternative available to the client was a state statute which permitted widows to apply to the courts to receive money for will contest expenses upon a showing of need.[140] Another alternative, unknown to the client, was a statute under which state probate courts had the authority to order payment of a will proponent's litigation expenses out of the decendent's estate.[141] The court held that the attorney's contingent fee was clearly excessive in light of his failure to disclose the important fee information to his client.[142]

III. JUDICIAL CONTROL OF CONTINGENT FEE CONTRACTS

A. *The Freedom of Contract Approach*

Many courts hesitate to void or modify contingent fee agreements between attorneys and clients because of the strong feeling that, absent evidence of fraud or overreaching,[143] the private contractual attorney-client relationship should not be intruded upon.[144] In *Shannon v. Cross*,[145] the Michigan Supreme Court struck down a circuit court's rule which absolutely prohibited the use of contingent fees, for the reason that the circuit court's rule attempted to interfere with an attorney's substantive right to contract freely with clients.[146] The difficulty with the freedom of contract rationale,

---

[138] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980) provides that "[a] lawyer should not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." *See infra* notes 153-165 and accompanying text for a further discussion of the Rule.

[139] 403 A.2d at 877.

[140] N.J. STAT. ANN. 3(A):3-24 (West 1978).

[141] N.J. CT. R. 4:42-9(a)(3) (1978).

[142] 403 A.2d at 877.

[143] *See* Smith v. Kingsport Press, Inc., 263 F. Sup. 771, 773 (E.D. Tenn. 1966), where the court stated that contingent fees must not be obtained by "fraud, mistake, or undue influence, and must not be oppressive or extortionate."

[144] *See* Dunn v. H.K. Porter Co. Inc., 602 F.2d 1105, 1111-12 (3d Cir. 1979).

[145] 245 Mich. 220, 222 N.W. 168 (1928).

[146] *Id.*

which fosters a "hands off" policy toward contingent fee agreements, is that it assumes that the attorney and client have agreed on the amount of the contingent percentage after negotiation.[147] Usually, though, there is little negotiation over the terms of the fee contract.[148] The other flaw in the freedom of contract approach is that it ignores the fact that lawyers' activities historically have been subject to heavy regulation by the courts.[149] The recent trend in the case law has been to abandon the freedom of contract approach and examine the propriety of fee arrangements in other ways.[150]

B. *The Ethical Approach*

A number of courts have passed upon the validity of contingent fee contracts by determining the ethical propriety of the particular fee.[151] These courts determine ethical propriety by inquiring whether the attorney has acted within the confines of the *Model Code of Professional Responsibility*.[152] Attorneys have an ethical duty to assure that the fees they charge are fair,[153] given the lawyer's societal role as practically the only means of access to the legal system.[154] The most important ethical rule concerning fees is *Code* DR 2-106,[155] which

---

[147] R. ARONSON, *supra* note 11, at 18.

[148] F. MACKINNON, *supra* note 3, at 22.

[149] *See supra* notes 22-24 and accompanying text.

[150] *See, e.g.*, Krause v. Rhodes, 640 F.2d 214 (6th Cir. 1981) (reasonableness approach); Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331 (Iowa 1980) (ethical approach); Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 (1959), *cert. denied*, 361 U.S. 374 (1960)(court rule appraoch).

[151] *See* Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973) *modified sub nom*, Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974). *See also* Comment, *Judicial Power Over Contingent Fee Contracts: Reasonableness and Ethics*, 30 CASE W. RES. 523, 530-31 (1980).

[152] The CODE, however, is not binding on a court, but may be a guide for professional conduct to which a court can look in evaluting an attorney's conduct. *In re* Kutner, 78 Ill.2d 157, 399 N.E.2d 963 (1979) (criminal lawyer charged client an unconscionable fee of $5,000 for defending client in simple battery prosecution).

[153] See F. MACKINNON, *supra* note 3, at 9, where it is stated that "[b]y definition, the [legal] profession holds the public interest to be superior to the self-interest of its members; therefore, one of the historic conerns of all professions is to insure that the economic advantages sought by individual members do not impair the ability of the profession to carry out its functions." *Id.*

[154] *Id.*

[155] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980). *See supra* note

prohibits lawyers from charging "illegal or clearly excessive" fees.[156] The *Code* provides that a fee is clearly excessive "when a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[157]

Few courts have had the opportunity to interpret Rule 2-106,[158] but the cases arising under this Rule usually involve the question of whether a specified percentage of a client's recovery is "clearly excessive" *per se.* In *Bennett v. Home Insurance Co.*,[159] for example, the court invalidated a contingent fee contract which provided that the attorney was to receive fifty percent of the client's recovery.[160] The court held that one-third of the client's recovery is the maximum percentage to which the plaintiff's attorney was entitled, and that the fifty percent fee arrangement was !q'ethically improper and legally invalid."[161] Authority to the contrary is not recent,[162] although one court recently upheld a contingent fee contract under which an attorney was to receive, for assisting his clients' collection efforts, one hundred percent of the first $50,000 collected, fifty percent of the next $100,000 and twenty percent of any amount above $250,000, because the cli-

---

138.

[156] *Id.* DR 2-106(A).

[157] *Id.* DR 2-106(B). The Rule provides:

> Factors to be considered . . . in determining . . . reasonableness of a fee 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 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. (8) Whether the fee is fixed or contingent.

[158] *See* Altman, *Lawyer, Defend Thy Fee!*, 59 A.B.A. J. 79 (1973).

[159] 347 F. Supp. 451 (S.D. Fla. 1972).

[160] *Id.*

[161] *Id.* at 452.

[162] *See* Taylor v. Bemiss, 110 U.S. 42, 45 (1884) (upholding a contingent fee of fifty percent of the client's recovery); Pagano v. Aetna Cas. & Surety Co., 137 F. Supp. 295 (N.D. Ill. 1955) (upholding a contingent fee of fifty percent of the client's recovery).

ents insisted upon the arrangement and there was no evidence of attorney impropriety.[163]

A few attorneys have been disbarred upon the finding of a disciplinary board that they charge excessive contingent fees. Those cases involved situations where the attorney made no investigation of the facts of his client's case,[164] where the attorney retained more of a client's recovery than was permitted by statute,[165] where the attorney failed to appear at the disciplinary hearing,[166] or where the attorney unilaterally attempted to change the terms of the fee agreement.[167]

Most courts, however, will not strike down an attorney's contingent fee recovery just because the fee paid turns out to be greater than the value of the services rendered[168] or on the ground that the proportion of the claim to be retained by the attorney happens to be large.[169] Generally, though, contingent fee contracts that provide for an exorbitant percentage of a client's proceeds have been held to be void and subject to modification by the courts.[170]

C. *The Reasonableness Approach*

Another standard against which contingent fees are judged is whether the fees are reasonable.[171] In *Wiener v. United Air*

---

[163] Foshee v. Lloyds, 643 F.2d 1162 (5th Cir. 1981).

[164] *In re* Gillard 271 N.W.2d 785 (Minn. 1978).

[165] State *ex rel.* Oklahoma Bar Assoc. v. Hatcher, 452 P.2d 150 (Okla. 1969).

[166] *In re* Hartzog, 257 S.C. 84, 184 S.E.2d 116 (1971).

[167] *In re* Hamm, 79 Wis.2d 1, 255 N.W.2d 308 (1977).

[168] *See, e.g.*, Jones v. Jones, 333 Mo. 478, 63 S.W.2d 146 (1933) (approving a contingent fee contract which provided for conveyance of land to attorney in will contest defense matter); Domroe v. Kessler, 16 App. Div. 2d 791, 228 N.Y.S.2d 246 (1962) (enforcing a one-third contingent fee in life insurance proceeds suit); Adams v. Dodson, 106 A.2d 501 (D.C. 1954) (allowing attorney recovery of contingent fee for filing client's claim for army retirement pay).

[169] High Point Casket Co. v. Wheeler, 182 N.C. 459, 109 S.E. 378 (1921) (holding that the defendant had no standing to complain that one-third of plaintiff's award went to plaintiffs' lawyers); Moyers v. City of Memphis, 135 Tenn. 263, 186 S.W. 105 (1916) (upholding a contingent fee of fifty percent of clients' recovery).

[170] *See* United States v. 115.128 Acres of Land, More or less in Newark, New Jersey, 101 F. Supp. 796, 799 (D.N.J. 1951).

[171] *See* Allen v. United States, 606 F.2d 432 (9th Cir. 1979); Anderson v. Kenelly, 37 Colo. App. 217, 547 P.2d 260 (1976); *In re* Estate of Thompson, 426, Pa. 270, 232 A.2d 625 (1967); Gruskay v. Simenauskas, 107 Conn. 380, 140 A. 724 (1928); *See also*

Lines,[172] the court allowed the attorney to enforce his one-third contingent fee contract as to the adult claimants in a wrongful death suit, but limited the attorney's fee with respect to the minor claimants' awards to twenty-two percent, applying a reasonableness standard.[173] In *Hoffert v. General Motors Corp.*,[174] the Fifth Circuit Court of Appeals affirmed a district court's decision to limit the plaintiffs' law firm's contingent fee recovery to one-fifth of a $2,500,000 judgment, rather than enforce the fee contract's "one-third" provision.[175] The Court of Appeals held that the district court did not abuse its discretion in denying the plaintiff's recovery on the contract because the district court had made sufficient factual findings to support its conclusion that one-fifth of the plaintiffs' clients' recovery was a reasonable fee.[176] The district court grounded its power to set a reasonable attorney's fee on its equitable jurisdiction to resolve any questions it had concerning the settlement of the case, because the plaintiffs' attorneys had invoked the court's equitable jurisdicition by asking it to approve the settlement agreement.[177]

In *Anderson v. Kennelly*,[178] the Colorado Supreme Court looked to whether a reasonable relationship existed between the attorney's contingent fee and the attorney's efforts.[179] In holding that no such relationship existed,[180] the court set aside the plaintiff attorney's one-third contingent fee.[181] In *Anderson*, the plaintiff's husband had been killed in an automobile accident.[182] The plaintiff hired an attorney to aid in the collection of her husband's life insurance policy, which

---

Annot., 13 A.L.R.3d 701 (1967).

[172] 237 F. Supp. 90 (S.D. Cal. 1964).

[173] *Id.* at 96. *See also* Cappel v. Adams, 434 F. 2d 1278 (5th Cir. 1970) (upholding a one third contingent fee as to the adult claimants; reducing the amount of contingent fee from one third to one fifth as to the minor children claimants).

[174] 656 F.2d 161 (5th Cir. 1981).

[175] *Id.* at 166.

[176] *Id.*

[177] *Id.* at 165.

[178] 37 Colo. App. 217, 547 P.2d 260 (1976).

[179] 547 P.2d at 261.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 260.

provided that life insurance coverage would continue thirty-one days after enlistment in the military.[183] On June 22, 1971, the plaintiff's husband enlisted in the service,[184] and on July 22, 1971, he was killed in an auto accident.[185] The widow erroneously believed that her husband had enlisted on June 20, 1971.[186] The widow went to the judge advocate's office and was advised to retain a private attorney.[187] The widow talked with an attorney and agreed to hire him on a one-third contingent fee basis.[188] The attorney, in negotiating with the insurance company, discovered the plaintiff's husband's correct enlistment date, and, within a few days, the insurance company paid the amount due under the deceased's life insurance policy.[189] In both the trial and appellate courts, the widow was successful in her action to set aside the fee, because "little skill or effort" on the attorney's part was required to perform the service for which the attorney was hired.[190]

In *Krause v. Rhodes*,[191] the Sixth Circuit Court of Appeals upheld a district court's approval of a settlement arrangement under which a private contingency fee contract between the plaintiffs and an attorney was disregarded.[192] In *Krause*, the original counsel for twelve of the fourteen plaintiffs in the 1970 Kent State cases[193] appealed from the district court's orders which limited his fee to $33,740 out of a settlement fund totalling $675,000.[194] The attorney argued on appeal that the district court did not have power to invalidate the contingent

---

[183] *Id.* at 260-61.
[184] *Id.* at 260.
[185] *Id.*
[186] *Id.* at 260-61.
[187] *Id.* at 261.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] 640 F.2d 214 (6th Cir. 1981).
[192] *Id.* at 218.
[193] The suits stemmed out of the May 4, 1970 incident on the campus of Kent State University in which nine persons were injured and four others killed by members of the Ohio National Guard. The plaintiffs based their damage claims on 42 U.S.C. § 1983 (1976). 640 F.2d at 215 n.1.
[194] *Id.* at 215-16.

fee contract.[195] The district court had based its decision to limit the attorney's fee upon the traditional power of a trial court to adjudicate fee disputes between litigants and their lawyers.[196] The chief justification for the district court's decision was the nature of the settlement agreement itself: the State of Ohio, though not a party to the litigation, offered to pay the plaintiffs $675,000 in full settlement, provided that only $50,000 of the fund would be paid in attorneys' fees, and $25,000 would be paid as out-of-pocket expenses.[197] Thus, in light of the length of the litigation[198] and the fact that the attorney seeking additional compensation played no part in creating the settlement fund[199] because he had only represented his clients in the first of two trials, the court of appeals held that the district court's order awarding the attorney a reasonable fee was not an abuse of discretion.[200]

Despite its appeal, the reasonableness standard has been criticized on two grounds. First, it is argued that use of a reasonableness standard of reviewing contingent fees may discriminate against personal injury lawyers, because the fees of lawyers who bill on an hourly basis are rarely subject to judicial scrutiny.[201] It is argued that clients who enjoy long-standing relationships with their lawyers do not often complain about hourly fees that may actually be excessive, because the professional relationship will be ruined by the client suing his lawyer over a fee.[202] The fee-challenging client would thus

---

[195] *Id.* at 216-17.

[196] *Id.* at 217.

[197] *Id.* at 216.

[198] The plaintiffs' complaints, filed in 1970, were originally dismissed. *Id.* The Sixth Circuit affirmed the dismissal in Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972), but the United States Supreme Court reversed, holding that the eleventh amendment did not bar the actions. Scheurer v. Rhodes, 416 U.S. 232 (1974).

The first trial resulted in verdict for the defendants. Krause v. Rhodes, 640 F.2d 214, 216 (6th Cir. 1981). Later, American Civil Liberties Union counsel took over the plaintiffs' case, and prosecuted a successful appeal. Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978). The parties were in the midst of their second trial when a settlement accord was reached. Krause v. Rhodes, 640 F.2d 214, 216 (6th Cir. 1981).

[199] *Id.* at 218.

[200] *Id.*

[201] R. ARONSON, *supra* note 11, at 13.

[202] *Id.*

face more attorneys' fees as well as the task of breaking in a new lawyer.[203] Often the business client may find it easier to pay the fee and pass on the extra cost to consumers.[204]

Second, it has been suggested that the reasonableness approach of reviewing contingent fee contracts has no justifiable basis for the reason that it has no application in cases other than those in which the court alone has the statutory authority to set attorneys' fees.[205] In *International Travel Arrangers, Inc. v. Western Airlines, Inc.*,[206] the Eighth Circuit recognized the distinction between a reasonableness approach and a more lax "outer limits of reasonableness" standard and awarded the plaintiff's attorneys statutory attorneys' fees.[207] The court, however, disregarded a thirty-nine percent contingent fee contract agreed to by the plaintiff and its lawyers.[208]

D. *Court Promulgated Fee Regulations*

Some courts have abandoned the *ad hoc* approach to reviewing contingent fee contracts and have adopted formalized contingent fee schedules and rules.[209] They justify the promulgation of these schedules on their inherent power to prescribe rules of practice[210] and procedure in order to properly

---

[203] *Id.*

[204] *Id.*

[205] *See* Comment, *Judicial Power Over Contingent Fee Contracts: Reasonableness and Ethics*, 30 CASE W. RES. 523, 529-30 (1980). For an extensive citation of statutory authorization of federal court power to set attorneys' fees, see S. SPEISER, *supra* note 15, at 95-97.

[206] 623 F.2d 1255 (8th Cir. 1980) (contingent fee in antitrust suit).

[207] 15 U.S.C. § 15 (1976).

[208] 623 F.2d at 1277.

[209] *See, e.g.*, N.D. ILL. CT. R. 39 (1981) *reprinted in* ILL. PRAC. ACT. RULES 281-83 (West 1981); MICH. GEN. CT. R. 928 (1981), *reprinted in* MICH. CT. R. (West 1981); CODE OF RULES FOR THE DISTRICT COURTS 1 (Minn. 1981); *reprinted in* MINN. RULES OF COURT 331 (West 1981); N.J. CT. R. 1:21-7 (1974) (upheld in American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974)); N.Y. CT. R. § 603.7(a)(3) (upheld in Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *cert. denied*, 361 U.S. 374 (1960)); OKLA. STAT. ANN. tit. 5, § 7 (West 1981), *reprinted in* WEST'S OKLAHOMA COURT RULES & PROCEDURE 726 (1980-81). See also the fee schedule applicable to federal seamen's personal injury cases, upheld in Schlesinger v. Teitelbaum, 475 F.2d 137 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973).

[210] Some courts have pointed out that judicial power to regulate the professional activities of attorneys that practice before them rests on the foundation that lawyers are "officers of the court." *See In re* Patterson, 176 F.2d 966 (9th Cir. 1949); *In re*

administer justice.[211] These fee rules usually limit the amount of contingent fees to specified percentages of a client's recovery, i.e., one-fourth of the amount recovered if the case is settled before trial, one-third if the case is tried and the client receives a monetary award, and one-half of the client's award if the case is successfully appealed.[212] The advantage to this approach is that lawyers are provided with certainty as to the amounts they may charge clients as contingent fees.[213] Judicially-developed fee schedules have been criticized, however, on the ground that the schedules deprive poor claimants of important rights by making it unprofitable for lawyers to charge contingent fees.[214] Also, two appellate courts have invalidated lower courts' efforts to uniformly regulate contingent fee contracts.[215] The modern trend, though, is to uphold court-made fee schedules.[216]

In the case *In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979* (the DC-10 crash case),[217] federal judges in the Northern District of Illinois have been utilizing their rulemaking and equitable powers to help ensure that contingency fees received by plaintiffs' lawyers are not excessive.[218] Local court rules require attorneys to file their contingency fee contracts with the court, and to file closing statements

---

McBride, 164 Ohio St. 419, 132 N.E.2d 113, *cert. denied*, 351 U.S. 965 (1956); *In re* Schofield, 362 Pa. 201, 66 A.2d 675 (1949).

[211] See, e.g. Fall v. Eastin, 215 U.S. 1 (1909) for such a justification.

[212] *See, e.g.*, MICH. GEN. CT. R. 928 (1981).

[213] *See Suggested Changes in the Contingent Fee System* 19 FED'N INS. COUNS. Q. 76, 82 (1968-69). "[J]udicial review [of contingent fee contracts] . . . would preserve for claimants' lawyers and claimants the adequacy of the fee and award to the claimant . . . ." *Id.*

[214] See H. Gair, *Contingency Fees! Bane or Boon?*, 25 INS. COUNS. J. 453, 457 (1958) "iot]he power to regulate the [contingency fee] in advance by fiat is the power to destory the cause of action by making it unprofitable for lawyers to engage in that practice.").

[215] *See* Shannon v. Cross, 245 Mich. 220, 222 N.W. 168 (1928) (overruled by a later court rule); Thatcher v. Industrial Commission, 115 Utah 568, 207 P.2d 178 (1949). *See also supra* note 219 and accompanying text.

[216] *See supra* note 207.

[217] 644 F.2d 594 (7th Cir. 1981) (holding that where there is a true conflict between the laws of states having equal interests, the law of the place of the injury is to be used).

[218] *See* Warden, *Should a Lawyer Make $10,000 an Hour?*, STUDENT LAW., April 1981, at 20, [hereinafter cited as Warden].

itemizing the amount of the fee, the method by which the fee is determined, and any expenses deducted from the client's recovery.[219]

Court records show that a few attorneys representing decedents' estates in the DC-10 crash litigation have received contingent fees amounting to one-third of decedents' estates' recoveries for expending minimal amounts of time.[220] For example, one law firm, representing the family of a physician who was killed in the airplane crash, negotiated a settlement agreement with the defendants under which the decedent's family was to recover $1,150,000.[221] Prior to the settlement, the firm filed probate papers but took no depositions (since no lawsuit was filed).[222] It was estimated that the firm invested twenty-five to thirty-five hours on the case.[223] The firm received one-third of the $1,150,000 settlement, in accordance with its contingent fee contract with the decedent's family.[224]

Because liability is not always contested by the defendants in air crash suits,[225] perhaps a more reasonable fee arrangement in cases where fault is not at issue may be a contingency-hourly combination fee. Under this type of arrangement, the client would pay the attorney a retainer, and the lawyer would receive, for example, ten percent of the client's

---

[219] N.D. ILL. CT. R. 39 (1981), *reprinted in* ILL. PRAC. ACT. & RULES 281-83 (West 1981). One of the federal judges presiding over the litigation said that:

> you have to get a little worried when you see some of these percentage fees in relatively early settlements in these cases in which there is no contested liability, and the amounts are substancial . . . . I do not think judges can stand by and watch lawyers gouge clients and do nothing about it.

Transcript of Hearing, Nov. 6, 1980, *In re* Air Crash Disaster Near Chicago, Illinois, on May 25, 1979. For a complete discussion of the DC-10 crash case contingent fee issues, *See* Craft, *Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation*, 46 J. AIR L. & COM. 895, 919-26 (1981).

[220] *See* Warden, *supra* note 218, at 21-23.

[221] *Id.* at 20-22.

[222] *Id.* at 21.

[223] *Id.*

[224] *Id.* When one lawyer of the firm was asked by an investigative reporter to justify the fee, he stated "we don't have to justify what we charge to anyone." *Id.* at 21-22.

[225] Liability was not contested by the defendants in the DC-10 crash case. *Id.* at 21.

recovery.[226] Because there is no doubt that the client will recover some amount of money from the defendant, and because the lawyer should only earn fair compensation for his efforts,[227] the lawyer should not be permitted to receive a windfall amounting to one-third of the client's recovery.[228]

IV. CONCLUSION

To curb abuses of a fee arrangement[229] that has generally served both the legal profession and public well,[230] courts have imposed restrictions on the ability of lawyers to contract for contingent fees.[231] These limitations do not interfere with the lawyers' right to freely contract with clients, because the restrictions are applications of the inherent power of the judicary to oversee the activities of lawyers as officers of the court[232] and to ensure that fiduciary[233] and ethical[234] standards are not breached. The ethical approach[235] of reviewing contingent fees will be merged with the reasonableness approach[236] if the proposed *Model Rules of Professional Conduct* (*Model Rules*) are adopted.[237] The proposed *Model Rules* would eliminate the distinctions among Disciplinary Rules, Ethical Considerations, and Canons in the present *Code*.[238] The provision in the *Model Rules* relating to fees would require that contingent fee contracts be in writing[239]

---

[226] Clermont & Currivan, *supra* note 4, at 530, 581.
[227] Grady, *supra* note 46, at 21.
[228] Clermont & Currivan, *supra* note 4, at 581.
[229] *See supra* note 69-142 and accompanying text.
[230] *See supra* notes 48-68 and accompanying text.
[231] *See supra* note 143-219 and accompanying text.
[232] *See supra* note 210.
[233] *See supra* notes 117-142 and accompanying text.
[234] *See supra* notes 151-170 and accompanying text.
[235] *Id.*
[236] *See supra* notes 171-208 and accompanying text.
[237] The American Bar Association, at its August, 1982 Annual Meeting, postponed deciding whether to adopt the Model Rules. Dallas Times Herald, Aug. 18, 1982, at 27, col. 1.
[238] *See* Moser, *The Model Rules: Is one Format Better than the Other?*, 67 A.B.A. J. 1624, 1625 (1981).
[239] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (Final Draft 1981), *reprinted in* A.B.A. J. 1300-1331) (pullout supp. 1981). The proposed Rule 1.5(b) provides that:

and would require attorneys to furnish clients with fee statements reflecting the outcome of the case and showing the remittance to the client.[240] Additionally, the proposed *Model Rules* provide simply that "[a] lawyer's fee shall be reasonable,"[241] instead of requiring, as does the current *Code*, that a lawyer's fee cannot be "clearly excessive."[242] The new *Model Rules*, by their simplicity, may help lawyers determine whether they may be engaged in questionable conduct,[243] but do not go far enough. The *Model Rules* should include a requirement that lawyers apprise clients of alternative methods of financing legal services (i.e., an hourly fee), and should prohibit the use of a contingent fee where a client can afford to pay an hourly fee,[244] for the reason that use of the contingent fee has no legal basis if a client can pay a fixed or hourly fee.[245] It must be remembered that the contingent fee was originally developed to provide access to the legal system for those who could not afford to hire counsel.[246] Enforcement of new ethical standards may deter abuse of the contingent fee

---

> [t]he basis or rate of a lawyer's fee shall be communicated to the client in writing before the lawyer renders substanial services in a matter except when: (1) an agreement as to the fee is implied by the fact that the lawyer's services are of the same general kind as previously rendered to and paid for by the client; or (2) the services are rendered in an emergency or where a writing is otherwise impractical.

Proposed Rule 1.5(c) provides that:

> 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 law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, expenses to be deducted from the recovery, and whether expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, 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.

[240] *Id.* Rule 1.5(c).

[241] *Id.* Rule 1.5(a).

[242] *See supra* note 156 and accompanying text.

[243] *See* Moser, *The Model Rules: Is One Format Better Than the Other?*, 67 A.B.A. J. 1624 (1981).

[244] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980).

[245] *See* Grady, *supra* note 46, at 21.

[246] *See* Corboy, *supra* note 38, at 37.

and therefore may be a step toward gaining the public confidence and trust which the bar requires.[247]

[247] *See* Burger, *supra* note 5, at 387.

> Less money is still being spent nationally on professional discipline than may accrue to lawyers in one big case . . . . If we are to maintain public confidence in [the legal] profession, it is imperative that courts and local and state bar associations take positive action to deal with every manifestation of professional misconduct. This must be done fearlessly and with fairness to the public, the profession, and the individuals involved.

Id.