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Let's Put the Contingency Back in the Contingency Fee

Angela Wennihan

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LET'S PUT THE CONTINGENCY BACK IN THE CONTINGENCY FEE

Angela Wennihan*

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I. INTRODUCTION

The conduct of each attorney in our country contributes to the societal perception of our legal system. In light of the recent public spotlight on our country’s criminal justice system in the O.J. Simpson case, attorneys and law students should be increasingly wary of how their actions are being perceived. Not surprisingly, recent polls tend to indicate a decline in the trust and confidence that citizens place in attorneys. In fact, it was recently reported that a stunning 31% of all Americans regard lawyers as less honest than the average citizen. Furthermore, 56% of Americans believe that lawyers use the system to protect the powerful and enrich themselves. Recently in a Senate debate, Senator Mitch McConnell described our civil justice system as “broken.” Finally, the American tort system was recently described as “standing shoulder to shoulder with our welfare system as a leading social pathology.” These figures and statements are upsetting to those who believe that, for the most part, our system is a fair and efficient one, or at least that our system is as good as the next alternative.

The most common complaint among lay persons about attorneys is that

2. Id. This is not hard to imagine given some legal handbooks have been said to “do everything but condone outright lying.” Stephen Budiansky et al., HOW LAWYERS ABUSE THE LAW, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 5053, 5056. A mere 11% of the public has a great deal of “confidence” in law firms. BRICKMAN ET AL., supra note 1, at 7.
3. Budiansky et al., supra note 2, at 5056.
4. McConnell is a republican Senator from Kentucky.
they charge too much.\(^7\) Among those who had used an attorney, less than half the people surveyed believed they were charged a reasonable fee.\(^8\) With this in mind, attorneys should be particularly mindful of societal disapproval and distaste when setting fees.

Furthermore, because of the attorney's personal stake in the litigation, contingency fees are especially susceptible to abuse and therefore appropriately scrutinized by the Bar. In a recent survey, it was discovered that 48% of people believed that the only way average people who are injured can afford a lawyer is on a contingency fee basis. Further, 44% of people believed that contingency fee contracts encourage too many lawsuits.\(^9\) The charging of excessive fees in general, but particularly of abusive contingency fees, is a subject about which many Americans are deeply concerned. Attorneys should be mindful of this concern over excessive fees because it directly affects society's perception of the Bar.

Contingency fees are one of the two dominant means of attorney compensation in the United States.\(^10\) Although heralded by some as a citizen's "key to the courthouse,"\(^11\) in modern times, the contingency fee has undergone critical economic and ethical evaluation by legal scholars.\(^12\)

This Comment will initially give an expansive overview of the scope, history, traditionally prohibited uses, and the advantages and disadvantages of the contingency fee. Part III will explore and critique possible alternatives to the current system, the most notable being the Manhattan Proposal, a plan authored by three leading scholars on contingency fees. The final part of this Comment will give an overview of the legislation which was recently debated in Congress and explain California's Proposition 202, which was placed on the March 1996 state ballot and only narrowly defeated.

Although many journalists have attempted to persuade the public to the contrary,\(^13\) personal injury attorneys, operating under the contingency fee system, are not what is wrong with our system. There may be inadequacies in the current contingency fee system, but the hourly fee system is not without fault. The problem of excessive and unreasonable fees exists for plaintiffs and defendants alike. The real problem lies not inherently

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7. As one columnist joked, "Nothing is as close to a lawyer's heart as a fat fee, especially a contingency fee." Brent Larkin, Reformers Target Lawyer's Fees, THE PLAIN DEALER, Feb. 27, 1994, at 1C. Furthermore, the National Law Journal reported that since its 1986 poll the number of people that believe lawyers overcharge increased from 23% to 43%. Id.
8. Brickman et al., supra note 1, at 7.
9. Budiosky et al., supra note 2, at 5056.
within either system. Rather, the problem of excessive fees stems from unscrupulous attorneys on both sides of the Bar who act in their own self interests when setting and collecting fees. Just as some plaintiffs' attorneys over-estimate the risk involved in a case when setting a contingency fee, some defense counsel are guilty of padding client bills by logging excessive hours.

This Comment urges that we begin to examine all of the methods that attorneys have employed to price their services and do so at a careful pace, without destroying the aspects of our system that have served the country well over the past several decades. Furthermore, although radical change will not be productive, it is time to start critiquing those aspects of our civil justice system with which the public has long been dissatisfied. Action needs to be taken soon, before attorneys lose this ability to self regulate. As the late Justice Frederick Van Pelt Bryan noted:

When I sit in a settlement part of our court, disposing of large volumes of negligence litigation including personal injury and death cases, FELA cases, automobile accident cases, all kinds of cases, and we get them by the thousands, there are an awful lot of unhappy clients, bitter clients, clients who leave the court in a state of mind which is not healthy and which does not presage well for the future of the Bar. And I tell you that as a fact, that if the Bar does not police itself very thoroughly, and keep on policing itself very thoroughly, somebody other than the Bar is going to police it, somebody other than the Bench is going to police it. And if that occurs, it will be a sad day.14

Unfortunately, the days of self-regulation may soon be over. Recently, Congress passed amendments to a bill which if passed would have changed the contingency fee system as we know it if the bill had not been vetoed by President Clinton.15 Furthermore, in March 1996, California voters only narrowly rejected a proposal which would have limited contingency fee recovery in their state.16

II. OVERVIEW OF THE CONTINGENCY FEE

A. The Basics of the Current Contingency Fee System

A contingency fee is

[A] fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the law-

The contingency fee is thus predicated on an element of risk, and payment will only accrue on the "happening of a future event whose occurrence is not readily predictable." The contingency fee has also been described as "an arrangement between attorney and client whereby the attorney agrees to represent the client with compensation to be a percentage of the amount recovered." The typical contingent fee paid by a client ranges from 25% to 50%, depending on the stage of the case at the time of resolution. A limit of 25% generally exists for cases settled before trial. A fee of one-third or 30% of a judgment is standard for cases tried. A 40% to 50% fee could be paid to an attorney if she was required to appeal or undertake other proceedings following judgment.

However, evidence exists which suggests that many attorneys obtain standard fees of 40% and 50% in cases that are settled before trial. In these situations "when payments of fees and expenses are taken into account, many clients receive less than 50% of their recoveries even if no appeals of their judgments are necessary." Several studies have shown that over half of each dollar expended in litigation is paid in attorney's fees. When different categories of cases are compared, there are variations in the average amount of fees collected, which hopefully reflects different degrees of risk and effort.

Although the most common type of contingency fee is one which is based on a percentage of the plaintiff's recovery, there are several other types of contingency fees. A contingency fee can also be figured by the hour, meaning that the attorney bills the client for the total hours spent on the case.

23. Note, however, that in the absence of an express provision concerning the appellate process, the courts have held that a contract for legal services implicitly includes work done on appeals, and that the attorney is not entitled to additional compensation for such work. See Aronson, supra note 21, at *30.
24. Id. at *2.
25. Brickman et al., supra note 1, at 14.
27. Stewart Jay, The Dilemmas of Attorney Contingent Fees, 2 Geo. J. Legal Ethics 813 (1989). For example, "asbestos cases closed between 1980 and 1982 had average fees and costs of 39%; major aviation accident death cases were below 30% (data from ongoing research in 1986); automobile accident cases (1978 data) were 31%; medical malpractice came to 36% (data from early 1970s)." Id. at 830.
28. Id. at 814. But cf. id. at 821 (few if any personal injury attorneys offer any of the other types of contingency agreements as options for fee payment).
on the case only if the representation has been successful. Another alternative is to compensate the attorney hourly and with a bonus, both based upon the outcome of the litigation. A lawyer could also specify a flat fee for services, which would be payable contingent on a positive outcome. Finally, an attorney could be compensated at a flat hourly rate with a bonus granted in the event of a positive outcome. These various alternatives to the percentage contingency fee have advantages and disadvantages; unfortunately, none have been adequately explored because the percentage contingency fee is the dominant method of financing litigation in certain areas of the law.

B. History of the Contingency Fee

The United States has fully embraced the contingent fee system as an acceptable and, for the most part, desirable way of contracting for legal services. Every state in the country has accepted the contingency fee as a practical and perfectly legal way for an attorney to provide legal services. However, Maine had maintained its traditional ban on the use of the contingency fee until 1965.

Although now viewed in the United States as commonplace, the contingency fee is used in only two other countries: Spain and parts of Canada. Contingent fee systems are prohibited in Great Britain and English Commonwealth nations. While this prohibition has been maintained for a variety of reasons, the original rationale behind its proscription centered around the medieval doctrines of maintenance, champerty, and barratry. The Doctrine of Champerty prohibits the agreement on "a suit in exchange for the promise of a share in the recovery." Contingent percentage fees violate the doctrines of maintenance and champerty because the attorney is maintaining the client until an award is received.

In addition to these medieval doctrines, England has, unlike the United

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29. Id. at 814. See also Alfred D. Youngwood, The Contingent Fee-A Reasonable Alternative, 28 MOD. L. REV. 330, 333 (1965).
31. Id.
32. Id.
33. Id.
34. See Wylie v. Coxe, 56 U.S. 415 (1853) (Supreme Court first recognized contingent fee contracts by permitting plaintiff's attorney to recover a contingent fee of 5% on the amount recovered on the client's claim against a foreign government); Taylor v. Bemiss, 110 U.S. 42 (1884) (Supreme Court held that a contingent fee that constitutes 50% of a client's recovery is not extortionate); Stanton v. Embrey, 93 U.S. 548, 557 (1876) (Court approved the use of a contingent fee in a claim against the United States).
35. Jay, supra note 27, at 813.
36. Wolfram, supra note 18, at 527.
40. Radin, supra note 38, at 70.
States, traditionally viewed litigation as undesirable. Courts lumped the contingent fee in with other champertous practices that were thought to stir up unwanted litigation and involve unscrupulous lawyers in the nefarious business of brokering lawsuits.

Finally, another probable reason contingent fees have not been adopted in Great Britain involves the widespread availability of publicly financed legal aid. The Legal Aid Scheme in England is administered by the Law Society and is underwritten by the government. The English Legal Aid Committee screens clients to ensure that the client has a reasonable claim and his financial resources are indeed limited. If the client meets these requirements, the solicitor is given authorization to take the case and the Legal Aid Scheme agrees to pay a percentage of the client's costs; the percentage will depend on the client's particular financial status. However, Legal Aid will not assist in claims involving defamation, seduction, breach of promise to marry, or enticement.

It is interesting to note that although generally adverse to the use of the contingency fee, modern England has considered reversing the prohibition for the disadvantaged. Furthermore, amidst the controversy in the United States, the Canadian province of Ontario very recently decided to end its long-standing prohibition against the use of the contingency fee. Interestingly enough, Ontario's Attorney General, Charles Harnick, explained the primary motivation behind the change as a need to provide indigent clients access to the legal system. This is exactly the reason why many Americans are hesitant about radically changing our own contingency fee system.

The American practice of using contingency fees originated in the industrial age when large numbers of industrial and transportation accident

41. Corboy, supra note 11, at 30-31. Corboy notes four differences between the American and English system:

[A]lthough its participants are entitled to do things in their own way, 1) Their adversary system is far less "adverse" than ours and depends heavily on shared values and contentment with the status quo in English society; 2) their courts have not become the means to social justice as they have become in large measure here and that the isolation of the [B]ar is a cause of that situation; 3) their lawyers exercise too little independence in their practice; and 4) their litigants receive too little of the protection we have come to expect from representation by legal counsel.

Id.

42. Wolfram, supra note 18, at 527.
43. Youngwood, supra note 29, at 334.
44. Id.
45. Id.
46. Id. at 335.
50. Stacey Ruckle, 'Average Guy' Doesn't Want Reform, Lawyer Says, CHARLESTON DAILY MAIL, Feb. 8, 1996, at 01A.
victims could not afford legal representation to pursue their personal injury claims.\(^{51}\) Without an attorney willing to take on such risky cases, many of those persons injured during this economic boom period would not have been able to sue to recover damages for their work-related injuries.\(^{52}\) The principal use of contingency fees has continued to be in the personal injury arena.\(^{53}\) The contingency fee has proven particularly well-suited to the situation where an individual has been injured and desires to sue on the basis of the injury, but is unable to afford representation precisely because of the injury.\(^{54}\)

In addition to personal injury cases, the contingency fee has been employed in class actions, collection matters, antitrust actions, shareholder derivative suits, corporate reorganizations, tax proceedings, condemnation actions, will contest litigation, debt collections, environmental actions, civil rights claims (including employment discrimination), and stockholders' suits.\(^{55}\) Further innovative use of the contingency fee has included use in defending tort claims, lien foreclosures, and ejectment suits.\(^{56}\) Also, combinations of hourly, fixed, and contingent fees have recently become popular in business and law firms as part of the move toward "value billing."\(^{57}\)

C. TRADITIONAL AREAS OF CONTINGENCY FEE PROHIBITION

Despite its general acceptance, American courts have proscribed the use of the contingent fee in certain situations on public policy grounds. These areas include domestic relations,\(^{58}\) criminal defense,\(^{59}\) and legislative litigation.\(^{60}\)

\(^{51}\) Jay, supra note 27, at 815.

\(^{52}\) Corboy, supra note 11, at 29. See also Clermont & Currivan, supra note 10, at 531; Murray T. Bloom, The Trouble with Lawyers 140-41 (1968) (describing contingent fees as almost the exclusive method of financing personal injury litigation).

\(^{53}\) Corboy, supra note 11, at 28. See also Clermont & Currivan, supra note 10, at 531; Bloom, supra note 52.

\(^{54}\) Corboy, supra note 11, at 28. "The contingent fee did not blossom forth into anything approaching its present use until the industrial revolution with its concomitant of industrial accidents and poor plaintiffs." Youngwood, supra note 29, at 332.

\(^{55}\) Corboy, supra note 11, at 29.


\(^{57}\) Drummonds, supra note 22, at 900 n.22.

\(^{58}\) However, the prohibition against contingent fee systems in this area has been relaxed somewhat in recent years. See Kathleen P. Southern, Comment, Professional Responsibility-Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar, 62 N.C. L. Rev. 381 (1984); see Note, Contingent Fee Contracts: Contract Related to Divorce Action Upheld, 56 Minn. L. Rev. 979 (1972).


\(^{60}\) Some courts have also proscribed the use of contingent fees for purposes of influencing legislative or administrative action. See Weehawken Realty Co. v. Hass, 177 A. 434 (N.J. 1935).
1. Domestic Relations

The predominant rationale cited for the prohibition of the contingent fee in the domestic relations context is the state’s interest in maintaining the marriage relationship. The idea is that contingent fee arrangements might tend to encourage the lawyer to discourage reconciliation of the parties. For this reason, the American Bar Association has stated that “contingent fee arrangements in domestic relations cases are rarely justified.” However, in some states this limitation does not apply to post-divorce actions. In these states, contingent fee contracts to collect child support funds from a divorced spouse are permitted.

2. Criminal Defense

The use of the criminal contingency fee has also been historically viewed as against public policy. This result is largely due to the early comments of the most influential author on contingency fees, F.B. MacKinnon. MacKinnon cited three cases and a “consensus” among unidentified commentators as standing for the proposition that the practice of using contingency fees in criminal cases was against public policy. This limitation on contingency fees being employed in criminal cases has survived. Today, practically every jurisdiction has outlawed the use of contingency fees in such cases, and both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility prohibit their use. An attorney’s breach of this obligation can lead to professional discipline and contractual liability.

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61. Professional Responsibility-Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar, supra note 58, at 383.
62. See Contingent Fee Contracts: Contract Related to Divorce Action Upheld, supra note 58, at 980.
63. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980).
64. Guenard v. Burke, 443 N.E.2d 892, 895 (1982) (prohibiting any contingent fee agreement in a domestic relations case entered into prior to entry of a final divorce decree).
67. MACKINNON, supra note 17, at 52.
68. Weber v. Shay, 46 N.E. 377 (Ohio 1897); Peyton v. Margiotti, 156 A.2d 865 (Pa. 1959); Bac v. Padilla, 190 P. 730 (N.M. 1920).
69. Lushing, supra note 66, at 503-07.
70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (Discussion Draft 1983).
71. Id. The evolution of our criminal justice system adds another dimension to MacKinnon’s early analysis, whose comments about the subject basically dictated the then-existing state of the law. Perhaps, MacKinnon would not necessarily be adverse to the use of the contingency fee system in a modern world where a system of community funding has sometimes failed to provide equal justice. MacKinnon states,

Current developments in the use of public defenders, court appointed and compensated counsel, and legal aid for criminal defendants indicate that economic pressures currently point toward a fee arrangement borne by the community and not by the individual client.

MACKINNON, supra note 17, at 55.
Given the changes that have occurred in our legal system, it might be time to reexamine the cursory treatment that the idea of criminal defense contingency fee contracts received by MacKinnon. However, there are still four main justifications for the modern prohibition of contingency fee contracts in criminal law. Prominent concerns have included: (1) the nature of fee collection for criminal defense attorneys; (2) attorney/client conflicts of interest; (3) lack of a monetary recovery; and (4) immorality of the Bar.

3. **Lobbying**

Finally, lawyers traditionally have been unable to contract with clients on a contingency basis to perform activities such as passage of legislation or the awarding of a government contract. Recently, a bill was introduced in Congress that would put teeth into this common law prohibition by making contingent fee contracts to influence government actions a crime under Federal law. The penalty for this crime would be a fine of $100,000 or up to five years imprisonment, or both. In addition, the law would authorize the Attorney General to bring a civil suit against the attorney and recover an amount equal to twice the proceeds that the contingency fee generated.

**D.Advantages of the Contingency Fee**

There are many advantages to the contingent fee system, and before demonstrating the weaknesses in the system, I will highlight these positive aspects. First, the role that contingency fees play in providing indigent clients access to the legal system cannot be ignored. Next, it is important to recognize that the contingent fee represents the essence of freedom to contract. In effect, what the client is able to do, via the contingency fee, is contract away part of his legal claim. In addition, one of the earliest recognized benefits of the contingent fee was its inherent linking of the attorney’s interests with those of the client. Finally, the contingency fee has produced safer products by giving the poorest of clients the ability to haul even the largest of companies into court for producing a defective product.

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74. *Id.*
75. *Id.*
76. Corboy, *supra* note 11, at 32.
I. Provides Access to the Legal System for the Disadvantaged

The most common justification for the use of the contingent fee system is that the system provides counsel for many who would not be able to pay a fixed fee for a competent lawyer. As one commentator noted long ago, “[D]espite its widespread use in the United States the contingent fee is, nevertheless, viewed in many if not most American quarters as a necessary evil.” As discussed earlier, the contingent fee gained tremendous popularity during the industrial revolution. Cases during that era often involved a poor factory worker suing a large company. Without a contingency fee system, the resources and power of a large corporate defendant would likely frighten most potential plaintiffs away from investing large sums of money in litigation. As stated by Max Radin in his 1935 essay, “If in medieval England, powerful men oppressed their weaker fellow subjects by maintaining suits against them, in modern society powerful people are more likely to achieve their ends by daring their victims to maintain suits.” Now, by simply being able to hire an attorney, the client is likely to receive a higher offer from the defendant if the case settles and better representation if the case goes to trial.

In effect, what the contingency fee attorney does is lend the plaintiff the funds to enable her to pursue a claim. To the extent that it is financially necessary for a potential plaintiff to obtain such a loan to proceed in a lawsuit, there is probably no other available method within our society for financing the claim. It is not likely that institutional lenders would be interested in using a legal claim as collateral, given the inherent risks associated with litigation.

Most people believe that, to the extent contingent fees give the poor and middle class greater access to the courts, contingency fees are a use-

80. Id. at 32; Jay, supra note 27, at 813. See also Barry J. Nace, The ‘Legal Scholars’ Speak on Contingency Fees, 1994 TRIAL 7.
81. Youngwood, supra note 29, at 333. He continues, “[P]ractically all American lawyers would agree . . . contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel.” Id. at 334.
82. Although the ABA Model Code of Professional Responsibility prohibits such practice, some believe that to give an indigent true access to the courts he should be able to contract on a contingent basis with expert witnesses. Reed E. Schaper, The Contingent Compensation of Expert Witnesses in Civil Litigation, 52 IND. L.J. 671 (1977); Note, Contingent Fees for Expert Witnesses in Civil Litigation, 86 YALE L.J. 1680 (1977); but cf. Model Code of Professional Responsibility DR 7-109 (1980) (prohibiting lawyer from paying a witness a fee that is contingent upon the content of his testimony or the outcome of the case).
83. Radin, supra note 38, at 77-78.
85. Id.
86. See Jay, supra note 27, at 814.
87. Id.
88. Id. “Banks, lacking assignable security, thus cannot justify lending funds for legal fees on the unsecured hope that a statistical likelihood of recovering will pay off the loan.” WOLFRAM, supra note 18, at 528.
ful part of our legal system. The problem many have with contingency fees is, instead, that lawyers are making excessive amounts of money in the name of serving the poor. As stated in a recent Senate debate, “the lawyers are using this process not so much to . . . protect the little guy—the little guy is the person who is actually hurt—but rather to earn a living which is far beyond what is necessary to protect the public.”

2. Supports Policy of Allowing Citizens Freedom to Contract

In a competitive market, an efficient allocation of resources will be achieved when individuals are permitted to reach mutually acceptable agreements. Thus, the argument follows that if attorney and client are both comfortable with a contingent fee arrangement, restrictions on the ability to so contract should not be imposed. Interfering with the contingency fee contract will disrupt the efficient allocation of resources throughout society. Many courts have endorsed this position, feeling that, absent evidence of fraud or overreaching, the attorney-client contract for legal services should not be intruded upon by the State.

There are three problems with the freedom of contract argument. First, the argument assumes that the attorney and client have agreed on the amount of the contingent percentage after negotiation. Typically, however, there is little if any negotiation between the attorney and the client concerning an appropriate percentage amount for a contingency fee. Instead, the client is told that the “standard” or normal way the attorney bills is by a one-third contingency fee, and the client merely accepts this. Second, the argument ignores the fact that the attorney-client relationship has traditionally been subject to heavy regulation by the courts and various professional associations. Finally, the freedom of contract argument is also problematic because it assumes that the client has access to enough information to make an intelligent decision. In reality, most clients have very little knowledge about how the legal market operates and have had little contact with the legal system.

89. See generally Ruckle, supra note 50, at 01A (arguing that efforts to modify the contingency fee ignores the basic role contingency fees play in providing access to the courts to low and middle income persons).
91. Id.
92. Contingent Fee Contracts: Validity, Controls, and Enforceability, supra note 77, at 943.
93. Rhein, supra note 56, at 166.
94. Id. at 167.
95. Id.
96. See id.
97. Id.
3. **Alignment of Attorney/Client Interests**

Often contingency fees are justified on the ground that by making the recovery of a large judgment a win-win situation, the attorney's and client's interests become aligned.99

The problem with this argument is that it is too general. An attorney's interests are generally aligned with the client's because the common goal is to extract a large settlement or verdict from the defendant. The interests diverge, however, because the attorney maximizes her net profit by working as few hours as possible to reach this large result, whereas the client wants the attorney to work as many hours as necessary to attain this goal.100

4. **Promotes Progressive Litigation**

Besides the access to the judicial process that the contingent fee provides for certain individuals, commentators have also pointed to the wealth of progressive consumer litigation that has occurred during recent years as a byproduct of the contingency fee.101 As one scholar noted, "During the past several decades, cases brought only because the mechanism of the contingent fee was available have succeeded in overturning a considerable body of backward-looking law."102 In fact, it has been estimated that 90% to 95% of the progressive decisions made during recent years have been the result of contingent fee litigation.103 Examples of progressive changes made in the law credited to the use of the contingency fee include:

[A]bolition of governmental immunity in some states, abrogation of intra-family immunity, the creation of a wife's right to recover for negligent impairment of her husband's consortium, the creation of the tort of negligent infliction of emotional distress, and the right of parents to recover for the wrongful death of an unborn child.104

Florida Bar President, John A. Devault III explains, "People are no longer being maimed by flammable children's pajamas, Dalkon shields, asbestos-laden new homes and cars that explode on impact because clients asked lawyers to advocate for them."105

An abolition of the contingency fee system would certainly have serious long-term consequences for human rights, values, and safety.106 Because litigation appears so risky to potential plaintiffs, "particular areas of

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100. See infra notes 133-38 and accompanying text.
102. Id.
the law might develop far less vigorously, especially areas in nascent stages.”

Furthermore, the mere threat of a lawsuit provides some assurance that companies will be mindful of health and safety when designing and producing their products.

Although it is true that high profile cases in modern times have helped to keep some harmful, dangerous products out of the market, there is a flip side to this benefit. There are also many products, perhaps safer and more effective products, that have not reached store shelves because manufacturers are afraid of the inevitable lawsuit. In fact, it is estimated that this fear of liability prompted 47% of businesses to withdraw products from the marketplace, 25% to discontinue some forms of research, and 8% to lay off employees. In his address to the Senate, Senator Spencer Abraham also noted the number of small businesses, one out of five, that decide not to introduce a new product because of a fear of litigation. He also discussed the increasingly common problem of pharmaceutical companies discontinuing helpful, but litigation susceptible, drugs.

A recent Wall Street Journal article also highlighted the problem when it noted that a liability premium of $100 has been added to the cost of making a modern football. Furthermore, although America once had twenty major vaccine producers, only four remain because of excessive litigation. The author explained, “Fear of suits has reduced our access to all kinds of good things: small airplanes, public swimming pools, [and] honest job references.”

E. Problems & Criticisms of the Current Contingency Fee System

As discussed, many people, both lawyers and non-lawyers, are finding fault with the legal system lately. In this rush to “fix” the system, contingency fees have become an easy reform target. But, aside from political agendas, it cannot be denied that there are serious problems with the way that the contingent fee operates in modern America. First, although the contingency fee would work in a perfect economic world, in the real world the client does not have access to enough information about attorney’s fees. The effect of this lack of information is that many clients have not freely decided that the contingent fee is the best payment ar-

107. Jay, supra note 27, at 815 (securities law is used as an example of one area of law that has developed largely due to contingency fees).
108. See Ruckle, supra note 50, at 01A.
111. Abraham is a republican Senator from Michigan.
113. Id.
114. Stossel, supra note 13, at 8.
115. Id.
116. Id.
117. Shuck, supra note 98, at 568.
rangement for them, but instead have been told that the agreement is the standard way in which such cases are handled.\footnote{Rhein, supra note 56, at 167.} Next, although at a superficial level the contingent fee aligns the attorney's financial interests with those of the client's, more careful examination has shown that the contingent fee attorney actually has an incentive to generate the highest return possible while expending the least amount of effort necessary.\footnote{Clermont & Currivan, supra note 10, at 534.} In other words, the attorney is interested in the highest net return. The client, on the other hand, wants the attorney to put in as much effort as necessary to produce the highest return possible. In addition, many attorneys receive excessive contingent fees in comparison with the amount of work or effort required to produce the outcome.\footnote{John F. Grady, Some Ethical Questions About Percentage Fees, 1976 Ltr Ac. 20, 24.} It has also been argued that the contingent fee encourages frivolous lawsuits because an attorney will subsidize high risk, frivolous suits with funds from low risk, big settlement cases.\footnote{Aranson, supra note 20, at 762.}

Another concern with the operation of the contingency fee in modern society is that attorneys are not varying the percentage rate charged in accordance with the amount of risk a particular case presents. Finally, opponents criticize contingency fee attorneys for their blanket approach to client financing needs. It is argued that the rationale of providing access to the legal system does not support allowing wealthy clients to use the contingency fee.

1. Freedom to Contract Argument Assumes Client Has Access to Market Information About Legal Fees

As one commentator noted, "The great majority of consumers of legal services who agree to contingent fee arrangements lack the ability to gauge accurately whether a projected recovery will exceed litigation expenses."\footnote{Jay, supra note 27, at 815.} Although a pure economic model suggests that constructing barriers for attorneys and clients who want to use a contingency fee payment arrangement is economically dangerous, this economic model assumes that consumers and clients have adequate information concerning the legal market. However, when surveyed by the American Bar Foundation, 80% of persons said they did not go to lawyers "because they cannot identify which particular lawyer is competent to handle their particular problem."\footnote{Shuck, supra note 98, at 568.} Furthermore, the American Bar Foundation study found that "75% of the persons polled overestimated the cost of a 1/2-hour consultation, and that 40% overestimated the cost by as much as 300%."\footnote{Id.} Thus, the general public is generally unable to accurately evaluate a legal claim and therefore, must rely on the lawyer's assessment of the case.
This lack of information places the consumer in a vulnerable position with regard to the attorney because she is not in a position to bargain effectively to determine an appropriate fee arrangement. As noted by one legal commentator, "The potential for abuse is of particular concern in those relationships that are not expected to be ongoing, which is usually the situation when a person brings a personal injury claim to a lawyer who specializes in such cases."\(^\text{125}\)

The client suffers from lack of information because the attorney censors the information he provides to the client about her claim based on what the attorney believes is important for the client to know.\(^\text{126}\) This is problematic for two reasons. First, this is troublesome because a large part of the decision to contract for legal services by method of contingency fee should ideally involve a client's preferences for risk.\(^\text{127}\) If the lawyer attempts to substitute his judgment on the amount of risk that is acceptable, the client has been denied his ability to voluntarily decline the contingent fee contract.\(^\text{128}\) Second, the lawyer, as discussed above, is not a neutral advisor, and therefore is not an appropriate figure to determine what information a client does and does not need to have.\(^\text{129}\) One commentator explains, "Attorneys are free to exaggerate the complexity of the case."\(^\text{130}\)

One commentator suggests that consumers could become more informed about the legal market if attorneys increased their advertising and Bar associations provided public information about attorneys' fees and quality of work.\(^\text{131}\) However, another commentator questions the practicality of this alternative and suggests that legal problems are inherently too unique to provide a standard consumer rate and quality analysis.\(^\text{132}\)

2. **Contingency Fee Does Not Align Attorney/Client Interests**

At first glance, the contingency fee seems to align the attorney's interests with that of the client. And to some extent, that is clearly true. Obviously, both the client and the contingent fee attorney have the same general interest in the outcome in the case.\(^\text{133}\) However, the contingent fee does not necessarily lead an attorney to devote the amount of time and effort to a case that would maximize the client's net return.\(^\text{134}\)

If a particular number of hours of work would result in the largest net recovery for the client, the client desires the attorney to work that

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\(^{125}\) Jay, supra note 27, at 818.


\(^{127}\) Jay, supra note 27, at 821.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Burrell, supra note 126.


\(^{132}\) Drummonds, supra note 22, at 868.

\(^{133}\) Clermont & Currivan, supra note 10, at 536.

\(^{134}\) Schwartz & Mitchell, supra note 78, at 1144-145.
amount of hours. However, the lawyer has no direct economic incentive to work that particular number of hours because her goal is to get the largest amount of recovery in the shortest amount of time.135 “Lawyers on contingent fee are said to have an incentive to make a 'quick kill' before too many additional hours are spent at possibly only a marginal increase in the lawyer's fee.”136 Thus, the contingent fee system can create an incentive for an attorney to deprive the client of the right to make her own decisions in litigation, such as when to settle a claim.137 The lawyer and the client have the same interests only when the case goes to the jury; before that time the attorney actually has a strong incentive to settle the case, which could be in conflict with the plaintiff's best interests.138

3. Excessive Fees Bear No Relation to Work Performed

Because the attorney and the client enjoy a fiduciary relationship, there are special problems inherent in the calculation of legal fees. As one legal scholar commented, “Unlike the seller of goods or other kinds of services, a lawyer is prohibited by the canons of his profession from making an excessive charge.”139

Although attorneys are prohibited from charging these judicially determined “clearly excessive fees,” oftentimes the fees that attorneys working on a contingency fee basis collect seem to shock the conscience of the general public and the rest of the legal community.140 As Professor Lester Brickman points out, “the contingency fee is the key to the courthouse for injured plaintiffs, but it also has become the key to untold riches for lawyers.” In fact, it is estimated that the contingency fee system generates around $15 billion a year for lawyers.142 Furthermore, it is estimated by Professor Brickman that many trial attorneys earn $1000 to $25,000 per hour.143

135. Clermont & Currivan, supra note 10, at 534; Aranson, supra note 20, at 755.
136. WOLFRAM, supra note 18, at 529.
137. Id. at 536. See also Schwartz & Mitchell, supra note 78, at 1133-135 (discussing how contingency system rewards fast, cheap settlements). The effect is for the lawyer to treat the client as his or her own “key to the courthouse door.” Theresa A. Gabaldon, Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability, 73 MINN. L. REV. 425, 466 (1988).
138. Aranson, supra note 20, at 764. In addition, there is also a case management rationale for the lawyer desiring to settle. Id. The attorney can handle a large number of contingent fee cases and maximize his returns by settling many of them, versus spending much of their time going to court for one case, which may or may not produce income. Id.
139. Grady, supra note 120, at 20.
140. Id. at 24-25.
141. Brickman, supra note 6, at 11A.
142. Place Some Limits on Contingency Fees, HARTFORD COURANT, Mar. 8, 1994, at B10. In addition, asbestos litigation is estimated to generate more than $1 billion a year. Budiansky et al., supra note 2, at 5056.
The Model Code of Professional Responsibility provides eight factors which should be considered in determining whether a legal fee is reasonable:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer or lawyers performing the services.
- Whether the fee is fixed or contingent.

Critics of contingency fees complain that although these factors might be examined in determining whether to bill the client on an hourly or contingent basis, there is no relation between the ultimate fee and the degree of diligence exercised by an attorney. In fact, one study indicates that a lawyer working on a contingent fee basis works, on average, seven hours less on a case than a lawyer hired on an hourly basis.

Although there are admitted differences in the level of skills from attorney to attorney, such differences rarely create differences in the size of a plaintiff's verdict. The differential in verdicts is more likely created by the nature and extent of a plaintiff's injuries. Whether an attorney should receive higher compensation because her client has worse injuries than another attorney's client is questionable, provided no more than average work is involved.

However, it is important to point out that not all studies indicate that contingent fee attorneys recover excessive fees; in fact, one study showed that lawyers on average actually earn about as much from contingency fee cases as they do when they are paid by the hour.

Furthermore, plaintiff's attorney's often rebut the argument that they receive excessive fees by pointing to the contingent nature of a contingent

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145. This is actually sharply disputed.
147. Grady, supra note 120, at 21.
148. Id. “Juries award money to compensate for injuries, and as a general rule, the worse the injury the larger the verdict.” Id.
149. Id. Grady also questions the multiple plaintiff situation. In this case the attorney represents many people injured in the same accident and receives a portion of each settlement or judgment even though the work done was essentially that for one case. Id.
150. Burrell, supra note 126.
fee to explain the fees they collect. Judge Richard Posner describes the contingent fee as a type of interest rate. His explanation for the large contingent fees is that "this interest rate must be high because the risk of default is high."

Theoretically, an attorney working under a contingent fee system could spend many hours on a case only to lose at trial and recover nothing. However, because most cases settle before trial, the modern contingency fee generally does not reflect the actual risk of non-recovery that the attorney incurs. "In reality, however, the attorney handling a personal injury case incurs little risk of default."

One judge estimated that an attorney should easily be able to prepare for and present a case within thirty hours. Furthermore, Professor Brickman indicates that in 25% to 35% of cases "lawyers get a contingency even though there's no 'contingency' in their work." Finally, there are also situations where an attorney represents multiple plaintiffs and, although doing work that is common to all of their claims, she charges each a contingent fee.

However much greater the chances of settlement are in modern times, the efforts of plaintiffs' attorneys should not be discounted. "Tort litigation, including preparation and negotiations in advance of litigation, typically involves substantial uncertainties in the theory and proof of liability, defenses, damages, and potential collectibility."

Another argument that plaintiffs' attorneys typically make is that, although the case at hand might not be very risky, it is necessary to make a profit on these low-risk cases in order to be able to fund high-risk litigation. Justice Scalia recently acknowledged this practice when writing, "An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not." In his treatise on legal ethics, one legal commentator used the ability to cross-subsidize risk as a benefit of the contingency fee system. He explained, "With a portfolio of clients whose claims bear varying degrees of risk, a lawyer can use a high-percentage recovery in one case to support work on other cases, including those that will turn out to be losers."

153. Laufer, supra note 12, at 751.
154. Aranson, supra note 20, at 764.
155. Laufer, supra note 12, at 751.
156. Grady, supra note 120, at 21.
158. Grady, supra note 120, at 21-22.
159. Drummonds, supra note 22, at 863-64.
161. WOLFRAM, supra note 18, at 528.
162. Id.
But the ethics of this “pooling” approach are open to debate. A lawyer owes a fiduciary duty to a client to zealously represent her interests. To the extent that a particular attorney is motivated to benefit people other than the client during representation, the attorney has breached the fiduciary duty. Sharply disputing the ethics of the “pooling” approach, one legal scholar comments,

A license to practice law does not justify, in effect, taking more of a client’s recovery than the particular case justifies and diverting that money to the cases of other clients whose claims are less worthy. The reasonableness of a contingent fee should instead be measured by the risks, effort, and results in each client’s particular case.\(^{163}\)

However, financing legal services for the indigent in this manner is perhaps preferable to the next best alternative. Professor Wolfram notes, “It seems defensible, in the absence of a better method of cost spreading, to distribute the cost of supplying that legal service among the class of clients who otherwise would find it difficult or impossible to finance legal services on a non-contingent basis.”\(^{164}\)

4. Contingency Fees Increase Frivolous Litigation

Frivolous claims involve “unmeritorious cases brought with the intention of securing settlement from the defendant since the defendant’s unrecoverable lawyer fees could run higher than the amount the plaintiff will accept to settle the case.”\(^{165}\) Some commentators argue that, under a contingent fee system, lawyers can use the proceeds from large recoveries to take a gamble on a greater number of such frivolous cases,\(^{166}\) which all have a chance of being profitable.\(^{167}\) The reason these cases have a chance to be successful is the pressure that the plaintiff’s attorney puts on the defendant to settle.\(^{168}\) As indicated by one commentator, “the percentage contingent fee system offers lawyers the most tempting incentive to initiate cases for their settlement value, clogging the legal system with litigation and resulting in costly delays for society.”\(^{169}\) Furthermore, if defendant companies are being forced to settle these unmeritorious claims, the longterm result is increased consumer costs\(^{170}\) which affect the

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163. Drummonds, supra note 22, at 874.
164. WOLFRAM, supra note 18, at 528.
165. Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS. 139, 150 (1984).
166. The ethics of this practice are sharply disputed. Seemingly this kind of conduct violates the attorney’s fiduciary duty to the client to zealously represent that client’s interest.
167. Aranson, supra note 20, at 761-62. Aranson used an Agent Orange case as an illustration of this problem. Id. at 763. Although the judge found “no factual connection . . . between the disease and the alleged cause,” the defendants settled for $180 million which amounted to a fee of $26 million. Id.
168. Id.
169. Id. at 762.
170. New York City paid an estimated $270 million in liability judgments and settlements in 1993, and nationwide cities and counties collectively spent nearly $9 billion on litigation costs. Budianski et al., supra note 2, at 5053, 5056.
impoverished the most. This is ironic, given that the rationale many cite for the use of the contingency fee is the benefit to the poor.

There is some empirical support for the allegation that contingency fees increase the number of frivolous claims filed. One study found that more than 80% of malpractice claims filed in New York against doctors are without merit.171 Commentators also point to the fact that although automobile safety has increased, bodily injury claims resulting from car accidents have continued to rise.172

Plaintiffs’ attorneys, however, argue that this is a gross exaggeration because lawyers are rational people who will not spend their time on cases that will obviously generate no revenue or have just a slight chance of producing a return.173 One personal injury attorney insisted that “[l]awyers will not invest hundreds of hours and thousands of dollars in cost unless they are convinced that a client’s case has merit.”174

In fact, Corboy argues that there is actually less of a chance of frivolous suits being filed under a contingent fee system.175 In his view, the lawyer acts as a buffer between the plaintiff and defendant by not accepting baseless claims because it is not in her own economic best interest to do so.176 Corboy notes,

[T]he purpose of the contingent fee is . . . to make the parties equal to the extent possible, for the limited purpose of judging the case. If the defendant decides that the economics of the situation favor settlement, his action should be recognized as the business decision, unaffected by moral considerations.177

Corboy also points out that public policy encourages settlement, and thus, if the contingent fee does in fact encourage settlement of disputes, this should be viewed as a positive aspect of the system.178

Finally, it is important to keep in mind that, although frivolous lawsuits may be a problem, the scope and acceleration of the problem may well be exaggerated in the rush to “fix” the system. The number of personal injury suits filed in the United States actually remained constant from 1975 to 1990, and it has fallen since 1990.179 The National Center for State Courts says that “tort filings are only 10% of all civil suits.”180 The average award in these personal injury suits is not “megabucks,” but actually around $48,000.181

171. Id.
172. Id.
173. Corboy, supra note 11, at 27, 32. Lawyers are not “apt to encourage litigation which has no merit, particularly where the customary fee arrangement is a contingent one.” Id. at 320. See, e.g., Baits v. Baits, 142 N.W.2d 66, 73 (Minn. 1966).
174. Mediation Alternative to Court, supra note 105, at 4G.
175. Corboy, supra note 11, at 27, 32.
176. Id. at 29.
177. Id. at 30.
178. Id.
179. Budiansky et al., supra note 2, at 5056.
180. Id.
181. Id.
5. **Contingency Fee Rates Often Do Not Correlate With Risk of Case**

The one-third contingency fee has became the standard rate for personal injury attorneys in our country. This is often without any consideration as to whether there is a risk of non-recovery for the attorney.\(^{182}\) This is a problem because the contingency fee is not appropriate for every personal injury case and client. There must be an element of risk to justify use of a contingency fee.

Over 90% of contingency fee cases settle before trial and 50% of those that do go to trial result in a verdict for the plaintiff.\(^{183}\) The exorbitant compensation a contingency fee attorney sometimes collects can hardly be said to reflect the amount of risk involved in a claim.\(^{184}\) This type of behavior is both unethical and illegal. As stated by a prominent scholar on contingency fees,

> [C]harging a contingent fee percentage in a case involving little or no risk, which is designed to effectively yield double or triple the lawyer's opportunity cost . . . is almost certainly unethical and illegal. It is just as unethical and illegal as a lawyer billing a client for fifty hours when he has only worked ten hours. Charging for a risk that is not being assumed and charging for work not done are both fraudulent acts.\(^{185}\)

Absence of risk in many types of claims where contingency fees are collected was the topic explored and recently reported on by three prominent legal scholars, Lester Brickman, Michael J. Horowitz, and Jeffrey O'Connell, who formulated a proposal designed to eliminate excessive fees in situations where little or no risk of recovery exists.\(^{186}\) The authors do not advocate an abolition of the contingency fee\(^ {187}\) or a system of individualized judicial review\(^ {188}\) of attorney's fees. Instead, their proposal centers around the existence or nonexistence of a defendant's offer at an early stage in the case.\(^ {189}\) This proposal will be examined at length later in this Comment.

6. **Contingency Fees Do Not Account for a Client's Ability to Pay an Hourly Fee**

As one prominent legal scholar noted, "it must be recognized that in a sizable percentage of contingent fee cases today the plaintiffs could probably afford to finance the litigation on an hourly basis."\(^ {190}\) In fact, 97% of United States lawyers accept personal injury cases without regard to the

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183. *Id.* at 23-24.
186. BRICKMAN ET AL., *supra* note 1, at 24 [hereinafter the Manhattan Proposal].
187. *Id.* at 13.
188. *Id.* at 25.
189. *Id.* at 26.
client's ability to pay an hourly rate. Without any real contingent element to recovery of their fees, attorneys should not be able to recover excessive fees. The conclusion is not that wealthy plaintiffs should be denied access to the contingency system, but rather that wealthy plaintiffs should be informed of the fact that they may be compensating an attorney for incurring a risk of non-payment that does not exist in their situation. As explained by Judge Grady:

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

The American Bar Association Committee on Contingent Fees addressed the question of whether it is ethical for a lawyer to charge a contingent fee to a client who can afford to pay for the services at an hourly rate. The committee found no basis in the Model Rules of Professional Conduct for limiting the availability of the contingent fee to clients who otherwise could not afford litigation. Members noted that such an approach ignores the high cost of present day litigation and the difficulty of determining a cost estimate relative to the time which will be spent by an attorney at the time a fee agreement is formed. They concluded that, “[b]arring contingent fees for other than the impecunious would deny important benefits to which the ‘well-to-do’ as well as the poor client are clearly entitled.”

Although the option of employing a contingent fee should not be removed from wealthy clients as a method of financing litigation, it is necessary to demonstrate that the committee's argument is flawed in two respects. First, the high cost of modern day litigation is not being ignored. If a client is a billionaire, but the litigation would likely cost trillions, the contingent fee might still be appropriate. The point is that the contingent fee option should be examined on a case-by-case basis with regard to the particular claim the individual wants to pursue. Second, although it might be difficult to estimate the amount of time likely to be spent on a particular claim, estimation is possible. Defendants, as well as plaintiffs, are concerned about legal costs, and thus require information

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193. Grady, supra note 120, at 25.
195. Id.
196. Id.
197. Id.
about the likely costs of defending a suit. Defense counsel is generally able to provide these estimations. The extra calculation time is necessary for the client to make an informed choice about her billing options. As stated by Professor Wolfram, "If a client, fully advised about the matter by a lawyer, prefers to have the lawyer share some of the risk of loss in return for a higher fee payment, which will be the usual tradeoff, it is difficult to see why the rich should not have what the poor are forced by circumstances to accept."\(^\text{198}\)

## III. SOLUTIONS PROPOSED

### A. PROVIDING THE CLIENT WITH MORE INFORMATION ABOUT FEE PAYMENT OPTIONS

Many problems with the contingency fee could be alleviated if the plaintiff's attorney made an individual evaluation of the strengths and weaknesses of each case and every plaintiff's financial situation. After this evaluation, the lawyer, acting under a fiduciary duty, should inform the client of which type of fee system would be most suitable for her personal situation. As stated by one legal commentator,

A lawyer must always counsel the client as to the fee arrangement that is most suitable to the client, even if such an agreement would not maximize the attorney's economic position. An attorney must present the client with sufficient information and advice to exercise an informed choice about the fee agreement.\(^\text{199}\)

As discussed above, the market does not operate efficiently because consumers do not have enough information about the pricing of legal services.\(^\text{200}\) William Fry, executive director of Helping to Abolish Legal Tyranny (HALT) explains,

Often the experienced lawyer has a good idea what the case is worth and how much time it will take. But this information is not shared with clients. . . . If plaintiffs had this information they could compute how the fee compares with the lawyer's hourly charges and bargain or seek another lawyer.\(^\text{201}\)

In order to combat this problem, some Canadian provinces require attorneys to reduce the contingent fee contract to writing for the client, give the client notice of their right to judicial review of the fairness of the fee, and file the contract with the court.\(^\text{202}\) The *Model Code of Professional Responsibility* requires that an attorney being compensated on the basis of a contingent fee provide the client with a written contract explaining the method by which the fee is calculated, which stages of litigation the specified percentage of recovery incorporates, and whether expenses are

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\(^{198}\) Wolfram, *supra* note 18, at 530 (emphasis added).

\(^{199}\) Jay, *supra* note 27, at 819.

\(^{200}\) See generally Shuck, *supra* note 98, at 568.

\(^{201}\) Burrell, *supra* note 126.

\(^{202}\) The Contingent Fee: Disciplinary Rule, Ethical Consideration, or Free Competition?, *supra* note 99, at 555.
to be deducted before or after calculation of the fee. However, supplying the client with information about judicial review and providing the court with the basics of the attorney/client contract will produce a more informed court and client. There has been discussion by Congress and commentators to adopt enhanced client education standards in the United States.

In the recent article *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, legal scholar Lester Brickman suggests the adoption of a standardized form procedure in which attorneys file certain information with the court. This suggestion, if adopted, would require every attorney to generate a form that stated the lawyer's normal hourly rate and the lawyer's estimation of what the case is worth. This would involve estimating the likelihood of success and the amount of recovery anticipated if a successful verdict was achieved. The form would be filed with the court and given to the client and reviewed before and after resolution of the case to ensure that excessive fees were not being charged. Brickman has seemingly abandoned this idea for a more expansive system of fee regulation that will be addressed at length later in this Comment.

It is not clear why Brickman changed this approach, for there are three key advantages to such a proposal. This standardized form would help to educate unwary clients and enable an officer of the court to effectively supervise contingency fees. Another advantage is that it forces current contingency fee attorneys to establish an hourly fee and to collect and record the amount of hours worked on each client's case.

Finally, this alternative has the advantage of not being a radical overhaul of our current system. As noted, contingent fee attorneys are currently required, under the *Model Rules*, to disclose the following to their clients in writing: (1) the rate of the fee; (2) the method by which the fee is to be determined; (3) what stages of litigation the fee covers; and (4) }

203. The *Model Rules of Professional Conduct* Rule 1.5(c) (Discussion Draft 1983).
206. *Id.*
207. *Id.*
208. *Id.*
209. See discussion *infra* part C.
211. This, however, is not regarded as a positive feature of any system of reform by some attorneys. In a recent Senate debate Senator Ernest Hollings explained, I really object to bringing it back to billable hours because we have to work and represent clients. I am not in Michigan in one of these large law firms. We are in a relatively small town. . . Here we have regulatory reform. Now they have regulations here about actual fee per hour charged. We will have to hire someone to keep track of this thing because I have work to do. . . . I would rather just put it on a contingent basis trying my best to get it to trial and get it to a conclusion, and not be into the proposition of the actual fee per hour charged and trying to compute it.
whether expenses will be deducted before or after calculation of the contingent fee.\footnote{212}{The Model Rules of Professional Conduct Rule 1.5(c) (Discussion Draft 1983).} Under the Canadian plan, all that would be required of an attorney in excess of the existing ABA requirements would be to file the contract with the court and to give the client notice of her right to appeal its calculation.\footnote{213}{The Contingent Fee: Disciplinary Rule, Ethical Consideration, or Free Competition?, supra note 99.} The Brickman proposal would, however, require attorneys to calculate their hourly fees and give the client some estimation of the likelihood of success and amount of recovery.\footnote{214}{Brickman, supra note 192, at 120.} Of course most contingent fee attorneys would object to having to keep such records\footnote{215}{See, e.g., 141 Cong. Rec. S5638-03, S5655 (daily ed. Apr. 25, 1995) (statement of Sen. Hollings).} and give such estimations, but these requirements do not radically change the current contingency fee system. Given that the contingency fee has operated in this country for over fifty years with few consumer complaints, we should take small steps to improve the status quo.\footnote{216}{Radical changes, such as the Manhattan Proposal,\footnote{217}{See discussion infra part C.} should be examined with caution while measures such as providing the client and court with more information about legal fees should be embraced.\footnote{218}{See generally Ruckle, supra note 50, at 01A.}} Radical changes, such as the Manhattan Proposal,\footnote{219}{Richard Vuernick, Congressional Testimony before Senate Judiciary Committee on Contingency Fee Agreements (Nov. 7, 1995).} should be examined with caution while measures such as providing the client and court with more information about legal fees should be embraced.\footnote{220}{Hollings is a democratic Senator from South Carolina.} 

Furthermore, providing the client with more information about the fee system is not nearly as controversial as placing caps on contingency fees. As one consumer rights group representative stated, “We are in favor of empowering the consumer with better disclosure of fees and the fee structure and sanctioning attorneys who do not act in the best interest of their clients. We are also in favor of better explanation of bills and their contents.”\footnote{221}{Letter from Douglas K. deVries, President, California Trial Lawyers Association, SACRAMENTO BEE, Mar. 27, 1994, at F05.} In a recent Senate debate, Senator Ernest “Fritz” Hollings,\footnote{222}{141 Cong. Rec. S5638-03, S5655 (daily ed. Apr. 25, 1995) (statement of Sen. Hollings).} a long time plaintiffs' attorney, also expressed his support for providing clients with more information about fee payment when he stated, “There is nothing wrong with disclosure. Like I say, I disclose. I want a clear understanding. I cannot represent a client fully fairly unless there is absolute trust.”\footnote{223}{Hollings is a democratic Senator from South Carolina.} Senator Hollings’ statement was made during a Senate debate over an amendment which would require attorneys to disclose in writing to the client both the actual services provided and the hours spent to perform
the task. This amendment eventually passed in the Senate and will be discussed at length later in this Comment.223

B. JUDICIAL INTERVENTION

It has generally been recognized that it is within the judiciary’s power to discipline attorneys who charge excessive fees in the form of contingency fees and to create rules regarding the use of the contingency fee.224 As noted by a legal scholar, “Courts in most jurisdictions have held that there is an inherent equitable power vested in a trial court to pass upon the propriety of counsel fees in connection with any matter before it.”225

The trend has not been, however, to abolish the use of the contingency fee, but simply to create limitations on the amount an attorney can charge.226 In fact, one appellate court went as far as to announce that when the state public policy reflected support for the use of the contingency fee, a local court could not abolish the use of them.227 In fact, judges have been hesitant to interfere significantly with the calculation of legal fees. Some believe that this deference highlights the importance that judges, and in effect members of society, place on our freedom to contract. Others believe that it stems from judicial respect for other members of the Bar.

Regardless of judicial hesitance, case-by-case examination of contingency fees does not seem to be a desirable alternative given the overcrowded dockets of our courts. Professor Horowitz notes:

[C]ourts neither can nor should engage in fact finding reviews of all contingency fee contracts to determine the nature and degree of the risks of nonrecovery which existed when the retainer agreements were entered into; such encompassing fact-findings would constitute gross and promiscuous abuses of scarce judicial resources. They would also be generally one-sided, given attorneys’ highly superior ability to know (and build records regarding) the risks of nonrecovery.228

Although Horowitz has many good points, it is important to note that selective, versus automatic, judicial review has many advantages. First, as noted above, it is respectful of the rights of the parties to contract as they wish. Second, it does not involve a large degree of administrative ef-

224. Aronson, supra note 21, at 29.
226. Aronson, supra note 21, at 29.
227. Id.
fort because the judge selectively reviews cases that she feels merit inspection based on the degree of the plaintiff’s injury or the amount of the settlement. Of course, the obvious problem with this suggestion is that there is a lack of uniformity between jurisdictions. Like many issues, a judge would have discretion to police contingency fees with as much vigor as she feels necessary, which is bound to create inequities.

C. The Manhattan Proposal

As mentioned earlier, three scholars addressed the problem of contingency fees in an official proposal. The authors, a group of reformers from the Manhattan Institute of Washington, D.C., presented the Manhattan Proposal to the American Bar Association, its state affiliates, and state supreme courts. They urged each group to change their ethics rules accordingly.

Although the Manhattan Proposal has many defense attorney supporters, plaintiffs’ attorneys have also begun to jump on the bandwagon, perhaps if for no other reason than the declining perception of the Bar. One prominent personal injury attorney, during an annual meeting of the American Bar Association Tort and Insurance Practice Section, openly supported the proposal. Steven Susman stated,

I do a lot of contingent fee work for large corporate plaintiffs and during our fee negotiations, little is left on the table. Often my clients insist on a fee structure not so different from that being proposed (the Manhattan Proposal). So what’s so awful with a rule that assures clients without clout of the same protections against a lawyer windfall?

The Manhattan Proposal has also had the effect of putting the issue of excessive contingent fees in the legislative limelight. There have been numerous amendments attached to tort reform legislation in Congress that would make variations of the Manhattan Proposal federal law. Additionally, with backing from the Alliance to Revitalize California, a contingency fee capping system was placed on the March 1996 California ballot.

229. The next alternative discussed, the Manhattan Proposal, would likely require a significant degree of supervision from some sort of regulatory commission or the courts.

230. As discussed above, one of the most common complaints about the current system is that an especially injured plaintiff will receive a large award and her attorney will recover a larger fee, which is not based on the amount or quality of the attorney’s work. With this in mind, judges should look more closely at the seriously injured plaintiffs to make sure that the attorney is not capitalizing on their misfortune.

231. Brickman et al., supra note 1, at 24-28.

232. Place Some Limits on Contingency Fees, supra note 142, at B10.

233. Steven D. Susman, A Case for a Cease Fire, Address to the Annual Meeting of the Tort and Practice Section of the ABA (Apr. 15, 1994).

234. See infra part IV.

235. Robert S. England, Ambulance Chaser Alert: Next March California Voters Hope to Kick Off a Nationwide Movement to Rein in Lawyer’s Fees, FIN. WORLD, Oct. 10, 1995, at 28. Excepting that the California bill limits the amount an attorney can collect to 15%
I. The Basics of the Manhattan Proposal

Under the proposed system, defendants would be given an opportunity to make settlement offers within a sixty-day window after the request is received from plaintiff's counsel. First, if the defendant chose not to make an offer within the sixty-day period, contingency fee contracts would not be affected by this proposal. However, if the defendant submits an offer of settlement and the offer is accepted by the plaintiff, "counsel fees would be limited to hourly charges and are capped at 10% of the first $100,000 of the offer and 5% of any greater amounts." If the plaintiff chose to reject defendants' early offer(s), contingency fees would be limited to the amount in excess of the early offer(s). The proposal also provides for both parties to disclose "routinely discoverable information" in order for both parties to more effectively evaluate their claims.

2. Advantages

The Manhattan Proposal is widely praised. The measure is being pitched mostly for its ability to significantly reduce contingency fees. However, the proposal also attempts to inject a degree of efficiency into the civil justice system.

a. Reduction of Contingency Fees

The authors of the Manhattan Proposal claim that, if enacted, the proposal will reduce contingency fee payments to attorneys by thirteen to fifteen billion dollars annually. Professor Brickman explains, "In limiting windfall fees, the proposal would facilitate early settlements and redistribute to victims and consumers large amounts of tort payments that now go to lawyers." For low or middle income of an early settlement offer instead of linking the amount due to hours worked before the settlement, the bill appears to be a replica of the Manhattan Proposal. [Id.]

236. Brickman et al., supra note 1, at 27.
237. Id. at 28.
238. Id. at 27.
239. Id. at 28.
240. Id. at 27-28.
241. Id. at 40. They also predict that annual defense costs from such cases will be reduced by around sixteen billion dollars annually. [Id.]
242. Brickman, supra note 6, at 11A.
243. However, Richard Vuernick of Citizen Action notes that this doesn't necessarily mean that the Manhattan Proposal would reduce health care or product liability costs significantly because the negligent defendant would still have to pay the same award. See Richard Vuernick, Congressional Testimony before Senate Judiciary Committee on Contingency Fee Agreements (Nov. 7, 1995).
come personal injury claimants, the Manhattan Proposal provides an appealing alternative to the current clogged courts, which may not produce a verdict for several years.\textsuperscript{244}

The proposal's focus on early settlement also results in earlier discovery. This has the advantage of allowing parties to more accurately analyze settlement offers.\textsuperscript{245}

3. Criticisms

The proposal has been heavily criticized by many for a variety of reasons. First, the proposal has been criticized for being a one-sided attack on the problems of legal fees. Second, the proposal is being widely attacked as an effort by big business to sell their own agenda as a pro-consumer measure. Finally, although the capping plan may ultimately increase the amount of a plaintiff's recovery, the proposal ignores the disincentive it creates for attorneys to take lower dollar value cases. This inhibits the ability of a low or middle class plaintiff to obtain effective counsel.

a. Proposal Ignores Abusive Fee Tactics of Defense Bar

The first criticism explored is that the proposal ignores ethical violations in hourly fee schedules. Chief Justice Feldman of the Supreme Court of Arizona summed up this argument when he stated that the proposal failed to recognize that "fee abuse is not the exclusive province of plaintiff's lawyers."\textsuperscript{246}

Justice Feldman's point is well taken. In a recent study, more than 60% of lawyers who billed on an hourly basis said they had personal knowledge of bill padding.\textsuperscript{247} Furthermore, auditors reviewing legal bills found abhorrent tactics such as a lawyer who billed a client for sixty-two hours in a single day and another who charged the client three thousand times for the same twelve minutes of his time.\textsuperscript{248} Incredibly, one auditor stated that he finds over-billing in 90% of the cases that he is hired to examine.\textsuperscript{249}

Brickman does not argue with the Chief Justice's estimation of the problems of the defense bar, but instead he notes that the defense bar has also criticized the proposal for its incentive to provide quick, and therefore less costly, settlements. Thus, the effect of the proposal on the defense bar is also to cut costs because the current system rewards defense attorneys who engage in long, dragged out, paper shuffling battles.

\textsuperscript{244} Brickman et al., \textit{supra} note 1, at 36-37.
\textsuperscript{245} Id. at 38.
\textsuperscript{247} Budiansky et al., \textit{supra} note 2, at 5056.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
b. Questionable Motives Behind Creation

The second major complaint about the Manhattan Proposal is that the authors and supporters are insurance companies or manufacturers who have self-servingly designed a plan that will reduce their own litigation costs. Barry Nace, President of the Association of Trial Attorneys (ATLA) calls the Manhattan Proposal "a new line of attack with the same goal: to prevent consumers who have been negligently injured from going to court." He notes that this attack is from the usual cast of big defense firms, the Manhattan Institute, "a conservative think tank," and the J.M. Olin Foundation, who have had no personal connection with tort victims. One personal injury attorney, writing to The Sacramento Bee after the newspaper published a favorable article about the Manhattan Proposal, asked,

Who will benefit most if [the contingent fee] is legislated out of existence? The obvious beneficiaries are the insurance companies and the manufacturers. It is they who are most hostile to the contingency fee because suits brought under such agreements are the most effective curbs to the abuses they have wrought against the consumer.

In fact, leading financial supporters of the failed California Proposition 202, a plan that was very similar to the Manhattan Proposal, include: Intel Corporation, who donated $400,000; Seagate Technology, contributing $136,000; Symantec Corporation, providing $200,000; Cypress Semiconductor, donating $100,000; and Adaptec Incorporated, pledging $50,000.

c. Limits Client’s Ability to Obtain Counsel

Another criticism of the Manhattan Proposal is that it is merely an attempt by big companies to reduce the indigent's ability to obtain counsel. In testimony before the Senate Judiciary Committee on Contingency Fee Agreements, Richard Vuernick, Legal Policy Director, explained,

[The Contingency fee] provides access to our nation's court system and [has] allowed ordinary Americans—regardless of their wealth or social standing to hold even the most powerful wrongdoer accountable for harm caused by defective products, negligent doctors, and environmentally-unfriendly corporations. Our civil justice system, the envy of the world, puts consumer health and safety in the hands of the people, not the government or powerful corporations. Unless we want to institute widespread government paid-legal aid programs, the contingency fee arrangement is necessary. Simply stated, the contingency fee agreement is the poor and middle income person's ticket.

250. Nace, supra note 80, at 7.
251. Id.
252. The Olin Foundation, according to Nace, produces lawyers and judges who "champion the notion that property rights should receive the same constitutional protection as other rights." Id.
253. Id.
Representing Citizen Action, Mr. Vuernick explained that, although the Manhattan Proposal seems intuitively pro-consumer, in fact, it is not. By decreasing the incentive of counsel to take complicated cases or claims that require a financial investment by plaintiff's counsel, the Manhattan Proposal limits the plaintiff's ability to obtain counsel. Mr. Vuernick further explains, proposals to limit contingency fee agreements are unfair because they only affect consumers and their attorneys. Limiting contingency fee agreements without limiting the amount of money that corporations can spend on their defense is one-sided. Businesses will still be able to hire the best legal defense that their money can buy, but if limits are placed on contingency fee agreements, consumers may be limited in their choice of counsel. Proposals which limit contingency fees affect only one set of players in the civil justice system—consumers. Businesses sued by consumers would not be affected nor would businesses which sue other businesses be affected because they rarely rely on contingency fee agreements.

4. The Future of the Manhattan Proposal

Whether the Manhattan Proposal is workable remains to be seen. Because it is such a radical departure from the status quo, there are bound to be implementation and enforcement problems. What is clear, though, is that the Manhattan Proposal has put the issue of excessive attorney fees on center stage. It is time to scrutinize the inequities of the current billing practices of both sides of the Bar. The Manhattan Proposal, at the very least, provides a forum for such discussion.

IV. LEGISLATIVE REFORM

A. THE SENATE

Senators Spencer Abraham and Mitch McConnell introduced an amendment to the Commonsense Product Liability and Legal Reform Act that involved contingent fees. The amendment required an attorney to provide a written statement within thirty days that discloses certain information.

The attorney would have been required to provide the following: (1) the estimated number of hours the attorney will spend either settling or attempting to settle the client's case and the number of hours the attorney expects to spend if the claim should proceed to litigation; (2) the

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256. Richard Vuernick, Congressional Testimony before Senate Judiciary committee on Contingency Fee Agreements (Nov. 7, 1995) (emphasis added).
257. Id.
258. Id.
259. Id.
261. Id.
basis of the attorney's fee for services (contingent, hourly, or flat fee); and (3) the amount of the fee the attorney will charge (percentage of recovery expected, hourly rate, or retainer amount required). Furthermore, under the amendment, within thirty days after the claim has been settled or adjudicated, the attorney shall provide the client with a written notice of: the actual number of hours the attorney worked on the client's case, the total amount of the fee for the attorney's services, and the actual fee per hour (determined by dividing the total amount of the fee by the actual number of hours the attorney worked on claim). Finally, if the attorney failed to disclose this information to the client, the client can withhold up to 10% of the fee charged and can file a civil action for any damages she incurred as a result of the failure to disclose.

As discussed above, there are many approaches to addressing concerns about the contingency fee. This amendment focused less on reforming the terms of the contingent fee itself, and instead merely provided safeguards to be employed when using the current contingency fee. The goal of this amendment was to provide the client with more information so that she may effectively bargain for a percentage fee that is appropriate, given the amount of risk associated with her claim. Senator Abraham stressed that the consumer seeking legal services is especially in need of adequate information about fees, given that most clients have not dealt with the legal services market before. He noted, "This lack of client experience establishes a significant information and expertise imbalance, one that can lead to a client's receiving less favorable treatment than he or she might obtain with better information." This problem is exacerbated by the nature of the relationship between the typical contingency fee client and the lawyer. Often the relationship is not ongoing, but rather deals with a single piece of litigation, and therefore, the attorney has less of an incentive to keep the client satisfied and informed.

It should be noted at the outset that most of the information that the amendment required the attorney to provide must already be disclosed under the ABA Model Rules of Professional Responsibility. Therefore, besides the penalties for non-disclosure, the most notable addition of the amendment was the required estimation of the hours necessary and the subsequent tabulation of hours to resolve the client's debate. Senator

262. Id.
263. Id.
264. Id.
266. Id. at S5654.
267. Id.
268. An attorney contracting under a contingency fee must provide the client a written explanation of the method used to calculate the fee, which stages of litigation would be included within the original fee, and whether expenses are to be deducted before or after the calculation of the contingent fee. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (Discussion Draft 1983). Furthermore, after the matter has been disposed of the lawyer is obligated to provide the client with a written statement of the outcome of the matter and, if he prevailed, the amount and calculation of the remittance. Id.
Hollings strongly opposed requiring attorneys to make such a prediction at the outset of a case and being burdened with tracking the amount of hours worked on a client's case. Senator Hollings felt that this attempt to "bureaucratize the law practice" was intrusive and unwarranted.

In the end, this amendment was passed. Shortly after its adoption, the House sent a message to the Senate indicating the members' discontent with the amendment. A conference between the House and the Senate to work out differences was requested by the House and agreed to by the Senate.

B. THE HOUSE OF REPRESENTATIVES

Perhaps the reason that the House of Representatives sent a message to the Senate regarding the amendment they passed involves the legislation that the House itself had passed. The legislation passed in the House was modeled after the Manhattan Proposal. Under this amendment, if a plaintiff's attorney received written notification of an offer of settlement within 180 days after the defendant received initial notice of the claim, the plaintiff's attorney was limited to receiving an hourly rate for his services. Furthermore, even if no qualifying settlement offer was accepted by the plaintiff, a contingent fee could not exceed 33% minus the amount of the settlement offer, a reasonable hourly rate, and actual expenses of the attorney. Finally, if the defendant notified the plaintiff within 180 days that he no longer contested liability, the plaintiff's attorney would be limited to hourly fees.

As noted above, the two houses had a joint conference. An amendment was agreed upon. However, President Clinton vetoed the entire bill on May 2, 1996.

C. CALIFORNIA

In March 1996, three anti-lawyer initiatives were placed on the ballot. Nicknamed the "terrible 200s," they were sponsored by Alliance to Revitalize California. All three measures failed. If they had passed,

269. 141 CONG. REC. S5638-03, S5655 (daily ed. Apr. 25, 1995) (statement of Sen. Hollings) "I could comply with two and three. But I have no idea about the estimated hours of settling or attempting to settle the claim and estimated hours of handling the claim throughout trial. Of course, it says nothing here about the appeal." Id.
270. Id.
271. Id.
274. Id.
275. Id.
276. See No to the Terrible 200s, SAN FRANCISCO EXAMINER, Mar. 28, 1996, at A18.
278. No to the Terrible 200's, supra note 276.
they would have drastically altered the state's civil justice system. One of the proposed measures, Proposition 202, would have capped a lawyer's fee at 15% in suits that are settled within sixty days. Under the measure, if the settlement offer was rejected and a final judgment was received, the lawyer would have still been limited to a mere 15% of the amount of the initial settlement offer, plus a percentage of the excess over the settlement amount. The measure lost by a mere 51% margin.

California trial attorneys strongly opposed Proposition 202 mainly because they felt that it was designed to limit the ability of consumers to sue businesses and drive plaintiffs' attorneys out of business. As Ralph Nader indicated, "Make no mistake.... It's a very serious destruction of people's fundamental rights to have their day in court." Wayne McClean, president of Consumer Attorneys of California, added, "[T]he contingency fee measure would discourage many personal-injury lawyers from taking cases because the fifteen percent cap could apply to all or at least part of the final judgment in lengthy cases.... It's a built in provision to drive us out of business."

Members of Consumer Attorneys of California were so angered by Proposition 202 that they are currently trying to get three initiatives of their own placed on the November ballot. One of these proposals would repeal any caps placed on contingency fees during the March election and stop the legislature from passing any future limits. Another initiative would institute stronger disciplinary proceedings for counsel who file frivolous lawsuits. A third proposal would increase the number of parties that the defrauded elderly could sue. One commentator indicates that the proposal to protect contingency fees would "even foil judges who have been trying to control outrageous attorney fees in class

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279. Id.
280. Oliver, supra note 277. The second proposal would set up a no-fault insurance system in which victims would collect compensation for medical expenses and lost wages from their own insurance company regardless of fault. Id. The only people that could be sued under the measure are those who cause an accident because of drunk driving or while committing a crime. Id. The third proposal would require the losing party in a class action shareholder or derivative suit to pay the winner's attorney's fees. Id. Furthermore, to even bring a class action suit, plaintiffs would have to post a bond in the amount of the firm's estimated legal expenses; this bond is estimated to average at least $2 million. Id.
281. Id.
282. E. Scott Reckard, Assessing the Vote, Orange County Register, Mar. 28, 1996, at A04.
285. Id.
286. Jacobs, supra note 283, at B3.
287. Bernstein, supra note 284, at A3. The other proposal would also repeal any loser-pays legislation that might be passed in the March election, and expands pension fund investors ability to file and to win securities suits. Id.
288. Id.
action suits.\textsuperscript{289} In response, the Alliance to Revitalize California is placing yet another proposal on the November ballot to initiate contingency fee reform.\textsuperscript{290}

Although the proposal lost, it will probably be telling of what will occur at the national level: a hard fought, expensive battle, with serious consequences for the losers. It has been estimated that both sides in the California debate spent between $12 to $14 million each.\textsuperscript{291}

V. CONCLUSION

There are justifiably serious concerns about the operation of the percentage contingency fees in the United States today. Although there are massive numbers of people injured each year in accidents that require personal injury litigation and who cannot afford hourly fee counsel, the situation for these plaintiffs is different than that of the plaintiffs of the past. Tort laws have changed significantly, making it easier to establish liability; furthermore, the average amount of damages awarded to a plaintiff has drastically increased. It is necessary that fees for legal services reflect the relatively lower amount of risk involved in today's personal injury claims. However, in the process of this reform it should not be forgotten that, for many people, the contingency fee is the only real way to gain access to the legal system.

Given the decreasing amount of risk present in personal injury claims, it is incomprehensible that the average percentage contingency fee has risen, rather than declined, in the past decades. The percentage contingency fee should reflect risk of non-payment to the attorney, either because of the nature of the claim or the financial situation of the plaintiff. Without risk, there is no contingency, and thus no basis for a contingency fee. Over the years there have been many suggestions for improving the contingency fee, and many others have suggested alternatives to its use. I have outlined what I believe to be the most workable modern responses to the contingency fee crisis. These alternatives include: giving the client and the court more information about the fee arrangement at all stages of the litigation, increasing judicial regulation of attorney's fees, or adopting the Manhattan Proposal or one of its legislatively created hybrids.

As noted, enacting legislation that improves attorney/client communication has many advantages. It actually enhances the contractual relationship because it enables the plaintiff, as a contracting party, to be better informed of her fee payment options. If the information is shared with the court it also provides a method for the judge to more effectively identify abuses within the system. It also forces contingency fee attorneys

\textsuperscript{290} Dan Bernstein, More Legal Reform Votes?, SACRAMENTO BEE, Mar. 28, 1996, at A16.
to establish fees and track their hours. The problem is that this might not be enough of a change to satisfy the growing number of lawyers, scholars, and recently, legislators, who have determined our system to be "broken" and in need of an overhaul.

The second alternative discussed is that of enhanced judicial review of attorney fee arrangements. As discussed, although a case-by-case analysis of fees by the judge may not be an appropriate nor accomplishable alternative, there are definite advantages to the practice. This approach would allow the judicial system to continue to regulate itself, and would avoid a radical departure from the current system, which has many ardent supporters. Again, this may not be a strong enough solution for the many people who want our system "fixed."

Finally, the Manhattan Proposal has many advantages. In theory it will severely restrict an attorney's ability to receive "windfall" fees when little effort is expended. It also ties the attorney's fees more closely to the effort expended and the risk present in a particular case, without removing the indigent's option of hiring an attorney on a contingency fee. The problem with the proposal is that it is a radical departure from the current system. It is unclear what perverse incentives it might actually create in practice. Any radical effects of the proposal would likely come at the expense of the indigent.

The best alternative to the problem of abusive contingency fees is likely a combination of the three discussed alternatives. First, there should be a concerted effort to educate clients about fee payment options. Second, although burdensome for the average plaintiff's attorney, records should be kept which log the amount of hours that an attorney has worked on a case. At the end of the case, in light of the hours the attorney has worked on the case, the attorney, the client, and the judge should all review the proposed fee to determine if it is excessive. Finally, a cap on contingency fees might be appropriate in limited situations. For example, settlements entered into within thirty days after the attorney filed the claim should be limited. A cap of 10% to 15% might be appropriate in this situation because the attorney has not likely invested a lot of time, resources, or risk in the case.

Whatever combination of judicial review, information providing, and fee capping the legislature chooses to implement, one can be sure that it is necessary. As recently stated by Michael Horowitz while testifying before the House, "The 104th Congress' ability to significantly reform our civil justice system may in large measure determine America's continuing faith and belief in the rule of law itself."292

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