Contingency Fees

If It's Not Broken, Why Fix It?

BY LARRY E. COBEN

In the June 2004 edition of ARIZONA ATTORNEY, an article challenged the propriety of lawyer–client contingency fee agreements. It asserted that when a case is resolved with very little effort on the part of the lawyer, and in a very prompt fashion, it is unethical to charge a client the "standard fee" of 30 percent.

This article is written in response to the claimed deficiencies in the contractual relationship between attorneys and tort victims who become our clients. In truth, the time-tested methods available to consumers, lawyers and the court system to judge any questionable contingency fee contract have provided adequate ways to minimize the hypothetical abuse raised in the earlier article.[1]

A Nationwide Nonissue

The article represented—without any citation—that "the contingency fee system is under scrutiny in a number of states." This overarching argument requires its own scrutiny.

In fact, what the author should have disclosed is that he merely provided a slightly different version of the business- and industry-sponsored arguments of the national movement being spearheaded by an organization known as "Common Good." The Common Good proposal was developed and has been made the centerpiece of "tort reform" in several venues.

And that proposal has an even more interesting history. It comes in response to the rejection of a similar proposal studied by the American Bar Association. In the ABA's Ethics 2000–February 2002 Report,[2] the Association adopted a revision to its rule on contingency fee agreements by deleting (what is contained in one of the Comments to Arizona Rule E.R. 1.5) a sentence that required attorneys to discuss and/or offer clients alternative ways to calculate a fee when a contingency fee may not be consistent with the client's interests.

Are several states now reviewing the propriety of a contingency fee in cases that settle early? Because the article provided no citations, it's hard to know. However, we think it is important to note what happened just two years ago in New Jersey. There, the state supreme court decided that its fee limitations—particularly regarding the percentage of fee an attorney may charge in cases that resolve for sums under $500,000—had performed a disservice to the public. The court then made significant changes.[3]

The Mission of "Tort Reform"

Over the past two decades, many different interest groups have pursued an attack on the contingency fee used by most attorneys representing injured victims. In fact, this is another form of "tort reform." And, as the New Jersey experience reveals, one very real negative effect of having an inflexible fee schedule is that it makes our court system less available to poor and middle-class people who would otherwise have a legitimate basis for pursuing their legal remedies for harm caused by others.

The so-called contingency fee "reform" proposal focuses on plaintiff attorneys and ignores the defendants' counsel. It allows defendants the freedom to pay their hired counsel whatever they want to get the best chance of winning. Such an arrangement would surely guarantee that in the majority of claims brought by injured consumers, the defendants could use their economic advantage to crush the injured victim's pursuit of just compensation, regardless of the merits of the case or the extensive nature of the harm caused.

The fact is that those interested in adding more regulation and control over the contingency fee contractual relationship between attorney and client are really intent on affecting the number of consumers who seek counsel and bring claims. Undoubtedly, if attorneys were not permitted to receive fair compensation for the work they do to recover monies for their clients—even in cases having a relatively small monetary value—why would lawyers handle these cases?

Good Lawyering in an Injury Case

It was argued in the June article that in injury cases involving settlements without a lawsuit, it is unethical for an attorney (1) to not disclose that employment can be contracted on either an hourly basis or contingency fee basis, and (2) to charge a typical contingency fee on a simple case.[4] Instead, the author wrote that if he were to settle his hypothetical case—without filing a lawsuit—for $50,000, it would be appropriate to receive a fee of $10,000 for five hours of work.

Frankly, we find that proposal improper. No attorney is worth $2,000 per hour! This alternative conclusion demonstrates the invalidity of the argument.[5]

There is a more reasonable way to study the value of contingency fees.

Should counsel across the state be compelled to adopt a rigid schedule for compensation predicated upon whether the claim is settled without a lawsuit? Look at the rationale for the current practice and the effect on injured consumers if some more restrictive scheme were adopted.

What is important here is to consider the nature of the practice of law in cases where a contingency fee is the normal method of compensation. Changes that fail to recognize the daily reality of the practice of tort law are likely to affect the system in ways that deny redress to those harmed.

In what we consider to be the "modest" injury cases—defined as those with clear liability and injuries that fortunately have resolved without causing any permanent lifetime functional problems—it seems logical that if a client were paying on an hourly fee basis he or she would make different choices than would the client paying on a percentage basis.

- The hourly fee client will want to limit the time the lawyer puts into the case and probably would accept a lower settlement because the client will obtain a higher net recovery.
- The contingency fee client really has no concern about what it costs in terms of lawyer-hours to obtain a result, but is interested in maximizing her recovery.

All attorneys who regularly handle personal injury claims realize that insurance companies and defense attorneys are less inclined to make top-dollar settlement offers to a lawyer who, by reputation or practice, attempts to settle cases early and without a lawsuit. Likewise, it seems apparent that if a modest personal injury case was processed on an hourly fee basis and it has been suggested that it only takes about five hours of a lawyer's time to do so, then it is clear that the client will not receive the zealous representation that he or she deserves.

The Reality of Injury Practice

Let's assume counsel would bill at an hourly rate of $150 in a case valued at $50,000. If in fact it were true that this is the type of case that resolves after only five hours of work on the case, the attorney will earn less than $1,000. Why would any attorney handle such a case? And if an injured consumer could find a lawyer willing to process the case in that fashion, what are the chances that the consumer will get anything of value from his counsel?

This sort of proposal reflects either a lack of understanding of what representation of injured parties entails, or is designed to indirectly but effectively eliminate an entire class of tort victims—because an attorney cannot maintain a business practice under these financial restrictions.

It also must be realized that lawyers who handle these modest cases cannot possibly resolve them with the minimal work suggested. The ordinary practice requires that before a lawyer can obtain a fair and prompt settlement in a routine or modest case, she needs to confirm that it is an easily resolvable case. That means the accident facts have to be investigated, often witness interviews are required, photographs taken, records obtained and the client's course of treatment must be monitored to assure counsel that the injury has resolved. The latter conclusion often requires consultation with a physician. Furthermore, counsel must obtain employment records and substantiate the wage loss information. By the time the case may be ripe for settlement, the lawyer will have put in a considerable period of time.

In personal injury tort cases, any analysis of the propriety of charging a contingency fee agreement has to account for more than whether there will be a recovery. The other contingencies faced in these cases include uncertainty about the amount that will be recovered, the expense of litigating any particular case, and the amount of time it will take to reach the point in the development of the

case that a fair and reasonable settlement can be obtained.

Limiting a consumer's attorney to an hourly fee mistakenly assumes that he or she has shouldered no risk in an early settlement offer case. By their very nature, any case in which a lawyer invests time without guaranteed payment involves some risk of non-recovery. In addition, even under circumstances where an injured client's claim is uncontested, and one could argue there is no risk of non-recovery, a contingency fee agreement is still in the client's best interest because it will give his attorney an additional incentive to fight for as large a recovery for his client as possible.[6]

Facts Prove the System Works

Fortunately for consumers and our legal system, many legitimate studies have been conducted to judge whether in reality attorneys abuse the contingency fee agreement and whether tort victims have suffered from this traditional contractual relationship. Therefore, we are not relegated to merely providing hypothetical examples of improprieties and hypothetical solutions.

Studies over the past 30 years reveal that there is no legitimate evidence that contingency fees on the whole are unsupportable or harmful to the public.

Beginning in 1973, the federal government found that because medical malpractice cases are taken on a contingency, it lessens the number of nuisance cases. In 1980, the RAND Corporation concluded that the notion that contingent fees increase the number of non-meritorious cases "has no basis in logic." In 1985, a task force of the American Medical Association concluded that regulating contingent fees "may not reduce the number or severity of suits." In 1997, the Chair of the ABA's Standing Committee on Ethics and Professional Responsibility testified before Congress that "contingency fees are essential to this country's system of justice" and that proposals to cap contingency fees or limit their use in tort cases could effectively abolish these necessary agreements. This would deny access to the court system to the majority of Americans.

Reduce—Don't Compound—Suffering

Study after study has shown that without contingent fees, injured Americans would not obtain fair compensation for their needless injuries, and some industrial developments would have been delayed or never materialized. Thus, without fair access to our judicial system, it is likely we would not have seen changes in defectively designed vehicles, heart valves, flammable children's clothes, dangerous toys—the list goes on and on.[7] Gas tanks would still be exploding; untested drugs would still be causing birth defects. Think of the cases that have improved our health and safety. And, yes, virtually every one of these cases was brought by an attorney who represented his or her client on a contingency fee basis.

If it were not for the legal and ethical rules permitting contingency fees, suffering for many Americans would not end with the physical injury at the hands of tortfeasors. The harm would be compounded as the consumer is compelled to rely on the "good intentions" of the tortfeasor or his insurance carrier to promptly and fairly compensate the victims. Any society—and especially a democratic one—worthy of respect in the spectrum of civilization should never tolerate such a victimization of the weak by the mighty.[8] AZ

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endnotes

1. I want to thank Richard Plattner, Esq., for letting me use portions of a published article he penned. Furthermore, the reader should appreciate that I have penned this article in my capacity as a trial lawyer and a proud member of the Arizona Trial Lawyers Association. As your readers know, most members of AzTLA have spent their professional lives representing the victims of personal and corporate neglect on a contingency fee basis. The members of the Arizona Trial Lawyers Association stand together in the belief that the contingency fee basis for attorney compensation is the only fair method because it allows the ordinary consumer relatively equal access to our judicial system.
2. It can be found online: www.abanet.org/cpr/e2k-redline.html
3. N.J. RULES OF GENERAL APPLICATION, R. 1:21-7(c) (amended July 12, 2002).
4. Arizona Rule 1.5 does not mandate that an attorney provide written alternative methods of calculating a fee payment. However, the Official Comments provide that when there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.
5. We found it odd that the author wrote that the "standard" fee is 30 percent, because that is not the standard contingency fee in Arizona. Even more troubling was the fact that in the author's hypothetical solution he ignored the necessity to deduct case expenses and the reimbursement of any lienholder from the amount he claimed he should receive as an ethical practitioner.
6. *See* ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 94-389.
7. *See* H. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739 (Fall 2002).
8. *Richette v. Soloman*, 187 A.2d 910, 919-920 (Pa. 1963) (rejected the argument that contingent fee agreements are illegal, and discussed the societal importance of these contracts).