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DePaul Law Review

Winter, 1998

47 DePaul L. Rev. 457

ANYONE CAN FALL DOWN A MANHOLE: THE CONTINGENCY FEE AND ITS
DISCONTENTS

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Introduction

The contingency fee was an established feature of the American legal scene by the mid-nineteenth century. n1 In his study of personal injury litigation in New York City, Randolph Bergstrom found the contingency fee little used in 1870, but much in use by 1890, and pervasive by 1910. n2 From its inception, the contingency fee has been accompanied by accusations of illegitimacy. Attacks on the contingency fee have recurred with regularity, often in conjunction with campaigns against plaintiffs' lawyers for degrading professional standards by fomenting meritless litigation, ambulance chasing, and accident faking. n3

Denigration of the contingency fee has figured prominently in the contemporary assault on the civil justice system that started in the late 1970s. Critics who behold a litigation explosion, excessive litigiousness, runaway juries, too many lawyers and other evils, identify the contingency fee as an important ingredient of the mess. The Wall Street Journal urges us that the contingency fee is "the engine driving much of the liability explosion of recent decades." n4 Earlier opposition [*458] to the contingency fee emphasized incentives to overzealous representation and violation of the dignity and restraint proper to professionals. n5 The primary thrust of contemporary criticism is on windfalls to lawyers and promotion of excessive claiming, especially frivolous and nuisance claims which burden the economy. n6 But some critics maintain the classic objection that the contingency fee induces overzealous representation though excessive identification with client interests. n7

The first part of this Article will analyze public perceptions of the contingency fee, as manifested in public opinion surveys, referenda, and jokes about lawyers' fees. After a brief analysis of some current proposals to "reform" the contingency fee, I relate the contemporary operation of the contingency fee to the structure of plaintiffs' firms (Part II). In Part III, I assess the contribution

of the contingency fee to the maintenance of an accessible and proficient plaintiffs' bar and suggest that it needs to be supplemented by other devices in order to ensure effective representation of individuals in a legal world increasingly dominated by corporate entities.

I. Public Support for the Contingency Fee

In spite of the intense criticism of the contingency fee, there has hardly been a mention of abolishing it and curtailment has played a very modest role in proposed "reforms" of civil justice. The contingency fee occupies a rather special place in the discourse on civil justice. Unlike joint and several liability or punitive damages, the contingency fee is widely viewed as an essential requisite for the availability of civil remedies. In this Part, I review several different kinds of evidence about popular perceptions of the contingency fee.

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A. Public Opinion Surveys

People do not think they get good value from lawyers. A 1984 survey found that sixty-one percent of a national sample disagreed with the statement that lawyers' fees were "quite reasonable in light of the services they provide clients." n8 Only twenty-nine percent agreed. n9 In a 1990 survey, a national sample of adults was asked to rate "the value you get for your money" for lawyers' fees: only five percent thought they got good value; forty-one percent thought they received average value; and fifty-five percent thought they got poor value for their money. n10 Resentment of lawyers' fees seems to be rising. In 1986 and 1993 National Law Journal surveys asked respondents who had hired a lawyer whether they were charged a fair fee or overcharged. From 1986 to 1993, those who thought the fee fair decreased from sixty-six percent to forty-seven percent, while those who said their lawyer charged too much rose from twenty-eight percent to forty-three percent. n11

A 1982 poll conducted by The Gallup Organization for the Insurance Information Institute asked what was the fairest way for a plaintiff to pay his or her lawyer. n12 Among the general public there was a three-way split among the contingency fee (thirty-two percent), hourly fee (thirty-one percent) and a fixed fee (thirty-one percent). n13 Business people were less favorable to the contingency fee: only eight percent of senior executives thought it was the fairest method of payment, along with fifteen percent of risk managers and twenty-three percent of entrepreneurs. n14

A Roper poll conducted for the American Council for Life Insurance in June 1985 examined in detail perceptions of the incentives [*460] generated by the contingency fee. n15 Seventy-six percent of respondents thought it encouraged lawyers to take a lot of cases, n16 eighty-one percent thought it encouraged people to sue for inflated amounts, n17 and seventy-nine percent thought that it encouraged people to file lawsuits even if they did not have a strong case. n18 However, seventy-three percent n19 recognized that the contingency fee discouraged lawyers from accepting weak cases. Seventy-seven percent agreed that "this method of paying the lawyer gives everyone, even poor people, access to the courts because they don't have to pay the lawyer anything in advance, or anything at all if they lose the lawsuit." n20 Only nine percent disagreed with this viewpoint. n21 Forty-five percent of the respondents thought the contingency fee in personal injury cases was "a good thing," while only eighteen percent thought it was a "bad thing" and fourteen percent said it "didn't matter." n22

In a survey conducted by Louis Harris for Aetna Life Insurance in late 1986 at the height of the furor about the liability crisis, n23 respondents were critical of excessive litigation and agreed with a rash of drastic curtailments of plaintiffs' rights under the tort system. But, seventy-three percent of the public believed that it is very important (forty-one percent) or somewhat important (thirty-two percent) to retain the contingency fee system. n24 Table 1, reproduced from that Harris survey, suggests that attachment to the contingency fee is inversely related to income and education. n25

The most prosperous and educated people, as well as those in top jobs, have little attachment to the contingency fee. n26 Generally, the respondents thought that more lawsuits are brought than should be (sixty-eight percent) n27 and the costs of lawsuits are too high (seventy- [*461]

[SEE TABLE IN ORIGINAL] [*462] one percent) n28 Again, higher percentages of the prosperous, educated and well-positioned hold these views. n29 Sixty-four percent of all respondents attribute some responsibility for the excessive cost of lawsuits to the contingency fee. n30

This same ambivalence appeared in a survey conducted in early 1995 for US News & World Report. n31 The emphasis was not on the litigation explosion, but on the unpopularity of lawyers. n32 Respondents were asked which of two statements about lawyers, attributed to "some people in your part of the country," was "closest to your view." n33

Allowing lawyers to take a case in return for a share of any money won in the case encourages too many lawsuits44%. [sp.8]

Allowing lawyers to take such cases is the only way that average people who are injured can afford a lawyer48%. n34

Again, we see a divided verdict: the contingency fee is blamed for encouraging undesirable litigation while it is simultaneously credited with enabling ordinary people to bring justified claims.

B. Referenda

The contingency fee is one civil justice issue on which there has been direct expression of opinion through electoral activity. California voters were given three chances in the past decade to attack contingency fees. In 1988, Proposition 101, which coupled reduction of auto insurance rates with caps on damages and limitations on contingency fees, was defeated eighty-six percent to thirteen percent. n35 At the same time, Proposition 106, which would have limited contingency fees in all tort cases to twenty-five percent of the first \$ 50,000 awarded, fifteen percent of the next fifty dollars, and ten percent of any amount beyond \$ 100,000, was defeated fifty-seven percent to forty-three percent. n36 In 1996, Proposition 202, limiting fees by plaintiffs attorneys to fifteen percent of any early settlement offer, whether [*463] or not that settlement was accepted, lost fifty-one percent to forty- nine percent. n37

C. Popular Culture: Jokes About the Contingency Fee

I want to adduce some evidence about popular views regarding contingency fees from another source - the body of jokes about lawyers. Lawyer jokes, much in evidence in recent years, provide a different reading of public views than do opinion surveys or referenda. Do these jokes give us a

reliable reading of what Americans think about lawyers and legal institutions? Obviously, jokes are only one source among many and this is a source that may have its own biases. Jethro Lieberman and Tom Goldstein observe that the image of lawyers in books, dramas and daily reports is systematically biased toward critique rather than appreciation. n38 This is particularly so of the joke corpus, since jokes by their nature focus on flaws, weaknesses and pretensions.

Other aspects of jokes make them good indicators of patterns of sentiment, although there remains some fuzziness about just what that sentiment is. First, since jokes may carry messages that are not fully apparent to teller and listener, they may evade the censorship that would screen out open expression of scandalous and reprehensible views. Second, the sentiments jokes express have to be shared rather than idiosyncratic; they represent not transient and individual perceptions of lawyers, but shared perceptions that have been ratified and confirmed by successive tellings. The persistence of jokes is a useful indicator of enduring patterns of sentiment because jokes are labile social productions, re-made at each telling and neither controlled nor supported by organizational sanctions or authoritative text. Thus, jokes represent a shared and enduring collective representation, even if that may be subject to different readings.

Finally, jokes remain the possession and voice of individuals. While the production of music and even fairy tales are now managed by formal organizations, there is no Time Warner or Disney of jokes. The small scale and cheapness that makes them unattractive as profit centers leaves jokes as one of the redoubts of individual expression. For this reason, the perspective on lawyers in jokes differs from that in medias which are more subject to corporate packaging and corporate [*464] control. Jokes do tap a vein of genuine shared sentiment even though some themes that are important in other manifestations of public opinion may be poorly represented in the joke corpus.

Jokes do not have a single fixed meaning. They can be told with very different intonations. The setting may convey hostility or self-mockery. And there is great variance in what people make of them: lawyers and non-lawyers, men and women, educated and uneducated, and rich and poor encounter very different bundles of jokes and may hear very different messages in a given joke.

For the most part, jokes about lawyers are generic: they are about lawyers per se and do not turn on differences among various kinds of specialists (as do many jokes about doctors). But there are a few jokes that are clearly about plaintiffs' lawyers. n39 One set of these is jokes about ambulances (e.g., the lawyer who chases an ambulance and finds another lawyer in it or the lawyer who is injured chasing a parked ambulance).

A small set of jokes focus directly on the contingency fee relationship. Here is an 1883 version:

A New Yorker asked Wm. M. Evarts what he would charge for managing a certain law case.

"Well," said Mr. Evarts, "I will take your case on a contingent fee."

"And what is a contingent fee?"

"My dear sir," said Mr. Evarts, mellifluously, "I will tell you what a contingent fee to a lawyer means. If I don't win your suit I get nothing. If I do win it you get nothing. See?" n40

A century later the same story is still current:

"I'll take this case on contingency."

"What's contingency?"

"If I lose, I get nothing."

"And if you win?"

"You get nothing." n41

Other stories express the resentment of the size of the lawyer's share of the recovery: [*465]

An Englishman while passing along the main street in a small town in Maine stepped in a hole in the sidewalk and, falling, broke his leg. He brought suit against the city for one thousand dollars, and engaged Hannibal Hamlin for counsel. Hamlin won his case, but the city appealed to the supreme court. Here also the decision was for Hamlin's client. After settling up the claim, Hamlin sent for his client and handed him one dollar.

"What's this?" asked the Englishman.

"That's your damages, after taking out my fee, the cost of appeal, and several other expenses," said Hamlin.

The Englishman looked at the dollar and then at Hamlin. "What's the matter with this?" he asked; "is it bad?" n42

When this version of the story was published early in this century, Hamlin was long departed from the practice of law. But the story has survived into the digital age:

A man walking along a city street fell through an open sewer hole and broke his leg. He engaged a famous attorney, brought suit against the city for twenty thousand dollars and won the case. The city appealed the case to the Supreme Court, but again the lawyer won the decision. After the claim was settled the lawyer sent for his client and handed him a dollar bill. "What's this?" asked the man, looking at the dollar. "That's your damages, after deducting my fee, the cost of the appeal and other expenses," replied the attorney. The man looked at the dollar again, turned it over and carefully scanned the other side. He then looked up at the lawyer and said, "What's the matter with this dollar? Is it counterfeit?" n43

As if in response to the critique implicit in these stories, another nineteenth century joke provides a different assessment of the relative contributions of lawyer and client:

Litigant - "You take nine-tenths of the judgement? Outrageous!"

Lawyer - "I furnish all the skill and eloquence and legal learning for your cause."

Litigant - "But I furnish the cause."

Lawyer - "Oh, anybody could do that." n44

Again, the essentials have been preserved intact for a century:

The man looked at the check he received after winning his suit against the city. "Wait a minute!" he said to his attorney. "This is only a third of the full amount!"

That's right," said the attorney. "I took the rest."

"You!" screamed the man. "I was the one who was hurt!"

[*466] "You forget. I provided the intelligence required to build the case, the expertise to find precedents, and the oratory to convince the jury. Any asshole could fall down a manhole." n45

These stories date from the late nineteenth century, when the contingency fee was becoming institutionalized in personal injury cases, and have remained in circulation almost unchanged for over a century. Beyond these few, the joke corpus has nothing further to say about the contingency fee. These jokes form only a tiny fraction of the great number of jokes about the economic exactions of lawyers. Compared to the proliferation of jokes about lawyers' overcharging, relentless billing, and predatory practices, the contingency fee jokes are relatively mild and infrequent. n46 The resentment of lawyers' fees is not particularly focused on the contingency fee: individual clients are far more exercised about hourly, retainer and percentage fees in divorce, property transactions and probate, while corporate clients complain about superfluous billing at excessive hourly rates. One of the most widespread contemporary jokes about lawyers focuses on hourly fees:

A prominent lawyer died in an accident. When he got to the pearly gates, he complained to St. Peter that he didn't deserve to die so soon. That it was so unfair. That he was only 48 years old. That there most certainly must be some mistake.

"There's no mistake," said St. Peter. "We checked, and according to your very own records of hourly billings, you're a hundred and ten." n47

This is a rather recent addition to the corpus of lawyer jokes. It is not surprising since the phenomenon to which it refers, the hourly fee, became widespread in the world of law firms in the 1960s and 1970s. Since its appearance in the early 1980s, this single story about abuse of hourly fees has appeared in the print and electronic media far more often than all the various contingency fee jokes combined.

But if the contingency fee is accepted as an institution, this does not mean that the public feels that the price is fair. The public regards lawyers' charges generally as excessive. I have been able to find very little on public response to contingency fee rates. In a 1954 Gallup survey, a national sample of adults was asked how much a lawyer should get for "making the railroad pay damages of \$ 10,000 ... with [*467] out going to court" to your friend badly hurt in a railroad accident. n48 Of the eighty-seven percent who had an opinion, thirty percent chose \$ 1,000 - i.e., ten percent (the median response), thirty-four percent thought the appropriate fee higher, and twenty-one percent thought it lower. n49

A 1993 National Law Journal survey asked a national sample "how much would be fair to give the attorney winning" a typical accident case in which "a victim might get an award of \$ 1 million. n50 Responses were open-ended. As in the 1954 survey, the modal response was ten percent; the median was in the lower part of the twelve to twenty percent range. A quarter of all respondents (and one-third of those who responded to this item) would give the attorney between twenty-five

percent and fifty percent of the award. The level is somewhat higher than in the 1954 survey, but the questions are not entirely comparable, for the 1993 question mentions "an award" which suggests a full trial rather than early settlement. n51

The pattern of lawyer jokes provides indirect but telling confirmation of the survey and referendum data showing public acceptance of the contingency fee as an institution. Although there is resentment of the lawyer's cut, there is an acceptance of its necessity and appreciation of the benefits of the arrangement. n52 Enemies of the contingency fee are not those who avail themselves of it or feel they might have to use it. Rather, Peter Karsten observes that in the late nineteenth century critics included "railroad attorneys, physicians facing malpractice suits, treatise writers, law journal editors and jurists" n53 A century later, the contingency fee is assailed by a comparable alliance of adverse economic interests and professional notables.

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II. The Manhattan Solution and Its Real World Setting

Like the civil jury, the contingency fee is firmly ensconced in public regard. As with the civil jury, contingency fee reform proposals (which I refer to as the "Manhattan solution" in tribute to their Manhattan Institute provenances) eschew direct abolition, but advocate limiting regulation. n54 Unlike most of the "tort reform" agenda, proposals to change the contingency fee regime are not aimed explicitly at limiting access or recoveries. n55 Unlike proposals that address imaginary problems like excessive claiming, capricious juries, and monstrously large awards, the contingency fee reformers do address, though obliquely, a real problem: the high transaction costs that accompany the tort system (and other parts of the civil justice system). n56 Rhetorically, contingency fee reforms are not couched as attacks on claimants. They profess concern to protect claimants from rapacious lawyers, rather than to protect defendants from rapacious claimants. n57 Of course, when this concern surfaces among eager supporters of restrictions on access and remedies, it invites strict scrutiny. n58

One notable feature of these proposals is that they propose price fixing only on the claimants' side and to leave the defense side unregulated. n59 That is entirely understandable, for it is only on the plaintiff side where there are typically unsophisticated consumers with no incentive to invest in resources adequate to bargaining with their lawyers. n60 In contrast: "Most tort defendants are sophisticated, repeat performers, and are hard-nosed in pressing their lawyers to hold down fees and costs. There is simply no market failure, and thus no need for a regulatory solution, on the defense side." n61 Defendants typically have suitable incentives and opportunities to invest in knowing about lawyers and lawyers have incentives to please these parties, who are potential repeat customers and can have significant effects on lawyer reputations.

If the problem is one of protecting clients against their lawyers, the asymmetry of the proposal makes sense. But, of course, claimants are **[*469]** not only in potential conflict with their lawyer but they are in actual conflict with the defendants. Although claimants and defendants share an interest in resolution, they have adverse interests in the amount and timing of compensation and in the scope of attendant publicity. Some measures to protect claimants against their lawyers' misbehavior may impair their ability to contend with the defendants. Reducing the incentives for plaintiffs' lawyers may reduce investments in lawyering for plaintiffs and thus increase the disparities in lawyering and further skew the distributive outcomes. This is compounded by the

proposal for one-way offers of settlement, which provide asymmetrical opportunities for defendants to affect the amount and timing of lawyering for the claimants. Could this be remedied by restrictions on what the defense could spend at various stages of the lawsuit? This is complicated by the fact that payments to the defendants' lawyers may only be part of the benefit conferred by defendants who can be the source of profitable work in the future.

The operation of the contingency fee today should be placed in the context of the general upgrading of the plaintiffs' bar since World War II. n62 A system in which compensation was meager and uncertain and where seeking it was an arduous struggle with predatory lawyers, obdurate antagonists, unresponsive law and callous lawmakers n63 gave way to a new legal world with a doctrine that is more favorable to claimants, where judges and juries are inclined to award more ample recoveries, and where the plaintiffs' bar is more skilled and sophisticated. n64 A veteran of this transition observed that: "Before 1950 ... most tort lawyers took fifty percent fees, had no money to spend on preparing cases for trials, and were so weak that they accomplished little or nothing for their clients." n65

These developments appear to have been accompanied by a decrease in the size of contingency fees. Bergstrom reports that, in New York City, fifty percent was the typical contingency fee percentage at the turn of the century. n66 Fifty percent was the rate in the 1930s [*470] Hawks Nest Tunnel disaster, America's worst industrial disaster. n67 Speiser claims that fifty percent was the typical rate before 1950. n68 A study of retainer agreements in New York City in 1954-1955 showed that sixty percent of retainer agreements were for a fifty percent fee, although it is not clear that that percentage was ultimately charged. n69 A few years later, a survey of recoveries in New York City found the average fee collected was thirty-six percent. n70 A decline in percentage rates is what we might expect with the increase in the supply of lawyers serving individual clients, the increased competition ushered in by the demise of fee schedules, the appearance of advertising, and a gradual increase in the sophistication of clients.

Yet there is surprisingly little evidence of overt price competition. Nor has there been any significant development in the use of intermediaries who help clients pick lawyers and negotiate rates for them. To some extent, this selection is done by "forwarding" lawyers who refer cases (almost never negotiating fees), and who typically receive referral fees of thirty to fifty percent. This suggests that there is scope for development of more sophisticated arrangements for lawyer selection and fee negotiation.

The increased proficiency of the plaintiffs' bar has not been accompanied by noticeable growth in the size of plaintiffs' firms corresponding to the development of firms that serve organizations. Plaintiffs' firms have remained small. Stuart Speiser refers to "the rule of thumb that the optimum practical size of a plaintiff's tort firm was five to eight lawyers" n71 The best data I could locate on firm size is a 1995 survey that asked a random sample of The Association of Trial Lawyers of America ("ATLA") members about the number of lawyers in their firms. n72 Twenty-seven percent were sole practitioners and [*471] forty percent were in firms with two to five lawyers. Thus, two-thirds of the offices were comprised of five or fewer lawyers. Of those who were in firms, only eleven percent were in firms larger than twenty- one lawyers, including four percent in firms with over fifty-one lawyers. This was in sharp contrast to the profession as a whole: in 1991, forty-seven percent of all firm lawyers were in firms of twenty-one or more, including thirty-three percent in firms of fifty-one or more lawyers. n73

If one puts any stock in Ronald Gilson and Robert Mnookin's theory that firm formation is driven by risk-sharing, it would seem that plaintiffs' personal injury work, and contingency fee work generally, should give rise to intense firm development. n74 Yet, growth in firm size tends to top out early and the few large firms that emerge tend to be unstable. n75 With a few notable exceptions, larger units tend to break up after a while; they do not display the pattern of regular exponential growth that is normally observed among firms in the corporate sector. n76 Clearly something discourages or inhibits plaintiffs' firms from growing in the fashion of business firms. Possible explanations include the inability to borrow, n77 the difficulty of combining contingency with other fees, n78 and the "alpha male" characteristics of many of the most successful plaintiffs' lawyers. n79 There is probably some merit in each of these suggestions.

I would add to this list an argument from the nature of the human capital involved in plaintiffs' work. n80 Apart from reputation, the distinctive human capital of successful plaintiffs' lawyers is a capacity to select, assemble or construct cases, and especially to present them to decisionmakers (typically, to juries). n81 Unlike the human capital assets of business lawyers, these assets can be shared only to a limited extent. Their application can be extended by delegation and management, but they cannot be lent to other lawyers to be "worked" in the [*472] way that the trust of a major client can be shared by associates of the successful business lawyer. Many characteristics of the typical plaintiffs' firm flow from the inability to share the distinctive human capital of the successful plaintiffs' personal injury lawyer. Decisionmaking and partnership shares are closely held. There is a structure of permanent non-partners, or nominal partners, and paralegals that are involved in screening and preparing cases. There is no regular passage of junior lawyers to partner status. Often there is something like the older-style apprenticeship system that once prevailed: young lawyers spend some years doing grunt work for their seniors and learning the trade; some go off and set up practices of their own; others remain as permanent subordinates.

Where receipts come from the contingency fee, the effort is to secure the fee with a minimum investment of resources. Unlike the business firm which wants to increase billable hours - at least to a point short of where it offends the client - the plaintiffs' firm seeks early resolution, minimum investment of time, and use of the lowest cost workers. n82 Because it is costly rather than profitable to develop information from scratch, plaintiffs' firms have strong incentives to utilize whatever can be gained from networking and sharing, rather than to duplicate efforts, and to reciprocate by sharing information and documents. n83

Thus, the contingency fee is intimately tied to the structure of plaintiff practices: it is set up to minimize internal costs and maximize use of external aids. n84 What happens to this plaintiffs' firm, with its incentives to lean expenditures, from a shift to the kind of billing regime envisioned in the Manhattan proposals? n85 The plaintiffs' lawyer faced with a settlement offer would certainly have an incentive to log sufficient hours to justify the ten percent ceiling fee and to make money on expenses in the way that corporate firms do. n86 Perhaps the new re [*473] gime would stimulate a push toward larger firms oriented to high volume processing of settlement offers.

Would the Manhattan regime affect how good for plaintiffs these settlement offers would be? If we assume that the size of a settlement depends on whether the plaintiff can credibly threaten to take the case to trial, we might imagine that reducing the lawyer's perceived incentive for early disposition would lead to more trials and higher settlements? On the other hand, we might imagine that lawyers, deprived of high returns on cases that settle early, will be less likely to expose

themselves to risky trials. n87 Like the sponsors of these proposals, we just do not know how they will work out in the real world setting.

III. Where Do We Go From Here?

The work presented at this Symposium represents a genuine advance in our knowledge of the contingency fee and of plaintiffs' lawyering, topics that have suffered from little investment in research. n88 We now know immensely more about the crucial process of case selection. Our discussions point us to much more that we would like to know about lawyering on behalf of plaintiffs: investments in case preparation; n89 size, organization and financing of plaintiffs' firms; n90 and inter-firm relations of referral, information sharing, and strategic coordination. n91

It is also important to note the changing role of the contingency fee in our civil justice system. We know that there is a general unhappiness about contingency fees. Other fee systems, especially the hourly fee, are also under attack. We hear about an increase in the use of the [*474] contingency fee in lawyering for businesses. n92 Yet there are some hints that use of the contingency fee may be declining. The share of all legal services that is consumed by individual clients is shrinking. In 1967, individuals consumed fifty-five percent of the services provided by lawyers in private practice; in 1992, they consumed only forty percent of a much larger total. n93 More and more of that individual consumption of legal services is in the family/domestic area where the contingency fee is prohibited. n94 In many employment, consumer and health care settings, there is the prospect for increased contracting out of the public judicial system into private Alternative Dispute Resolution ("ADR") forums, with as yet unknown effects on the amount of legal representation and on fee arrangements. Finally, we see more big time plaintiffs' work shifting to the class action format, in which fees are awarded or approved by the court. n95 All of these may portend a smaller role for the contingency fee in the representation of individuals even while it flourishes in business litigation.

We have seen that the widespread appreciation of the contingency fee as giving ordinary people the "key to the courthouse" has been countered by a longstanding line of criticism that it overperforms by encouraging frivolous cases and permitting exploitative windfall returns to lawyers. Observation and research suggest that these criticisms are exaggerated. But reflection on the increasing domination of the legal arena by large organizations and large law firms suggests that the "key to the courthouse" characterization is too glib. There is a serious case to be made that the contingency fee underperforms in [*475] marshaling the cases of one-shot individual litigants contending with repeat-playing corporate antagonists.

The contingency fee lawyer is not only the client's advocate but the banker who finances his case. Since many clients are unable to pay expenses as they go, the lawyer not only provides his own services on credit, but advances the out-of-pocket expenses of investigators, expert witnesses, transcripts, and so forth. n96 Two recent and well-documented case studies suggest that in complex litigation against determined opponents, the exigencies of financing impose severe constraints on what lawyers can do for their clients. n97 Peter Schuck's incisive account of the Agent Orange litigation n98 is relevant even though that case was a class action and technically the fee was not a contingency fee, but was to be awarded or approved by the judge. Schuck reported that the consortium of twelve lawyers (and their firms) that launched the case n99 found their resources woefully insufficient:

[They would have to] put together a highly specialized trial team, constantly litigate discovery motions, examine and digest millions of documents in the government's and defendants' files throughout the country, organize and computerize their document base, identify and interview expert witnesses, and prepare their own witnesses for pretrial depositions ... conduct and digest hundreds of depositions of their own and their adversaries' witnesses, undertake large-scale legal research on many novel issues, keep hundreds of local counsel throughout the country (and in Australia and New Zealand) informed of litigation developments, prepare and file numerous pleadings, and devise and coordinate a trial strategy. These activities would demand enormous financial resources, management capability, specialized professional talent, secretarial and logistical support, and a deep reservoir of goodwill among the lawyers. n100

The initial consortium of attorneys found it necessary to bring in a succession of other lawyers who supplied additional financial backing in return for control over and a promise of payment "off the top" of any recovery. n101 These arrangements led to domination of settlement negotiations by the late-coming, eager-to-settle financiers. n102 It also resulted in a distribution of fees more advantageous to the financiers [*476] than to the lawyers who had invested the most effort in the case. n103 Schuck concluded that "in mass tort litigation ... power tends to flow from the lawyers with individual clients to the lawyers with the financial, legal and administrative resources to underwrite and manage the protracted, expensive venture." n104

The Agent Orange example suggests the limitations of the ad hoc law firm as a response to the problem of scale. A one-time collaboration among discrete firms to prosecute a single case may succeed in providing financial capital, but it could not make up for the lack of needed social capital of institutionalized relationships of trust and coordinated effort. One observer reported to Schuck that the members of the Plaintiffs' Management Committee were "egocentric aggressive kingpins who are essentially strangers to one another ... [and] had not developed a rapport through years of partnership" n105

The small size and low capital resources of plaintiffs' firms limits their capacity to accept risks as well as their organizational and administrative resources to manage massive litigation. n106 Outside investment is limited by the ban on non-lawyers investing in law firms or lawsuits. n107 Apart from bank credit, on which plaintiffs' firms are typically dependent, the only source of outside funds is bringing in other lawyers, which may involve relinquishing control as we saw in Agent Orange. The constriction of capacity to mount and sustain major litigation is vividly portrayed in a second example, A Civil Action, n108 Jonathan Harr's justly renowned account of an environmental tort case against two major corporations. Harr shows that even with extraordinary skill and dedication, the exigencies of financing this protracted and complex case (dependence on its banker, n109 an unhappy deal with a public interest group, n110 reliance on funding from other settlements, n111 and so forth n112) led to an escalating financial crisis that [*477] narrowed the plaintiffs' lawyers' options and shaped the eventual outcome. n113

In sum, while contingency fee financing of litigation can be credited with providing access in a host of cases, it may also limit access in certain important respects. It seems to impede the development on the plaintiffs' side of sizable and stable firms with their greater capacity for coordination, risk spreading and more ample financing. Until the contingency fee is combined with an enhanced capacity to marshal resources, spread risk and achieve strategic coordination, the

plaintiffs' bar will be less than optimally effective in representing individuals in a legal world increasingly dominated by corporate entities.

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FOOTNOTES:

n1. Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940, *47 DePaul L. Rev.* 231, 231 (1998). Much earlier, a Massachusetts polemicist against lawyer misdeeds spoke in 1786 of the "pernicious practice ... [of] making bargains upon the event of the cause Are the 'people' of this Commonwealth reduced to so dreadful a state, as to give one quarter part of their property to secure the remainder, when they appeal to the laws of their country?" Honestus [pseud. of Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston, 1819), reprinted in *13 Am. J. Legal Hist.* 241, 256 (1969).

n2. Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870-1910*, at 89 (1992).

n3. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 44-50 (1976); Bergstrom, *supra* note 2, at 91; Ken Dornstein, *Accidentally on Purpose: The Making of a Personal Injury Underworld in America* 238-40 (1996); Karsten, *supra* note 1, at 251-59.

n4. Editorial, *ABA v. Business*, *Wall St. J.*, Feb. 27, 1997, at A16.

n5. See *supra* note 3.

n6. See *infra* note 54.

n7. The real problem with the contingency fee derives not so much from the conflicts it creates between the interests of lawyer and client as from the even more dangerous identity it creates between their interests as against everyone else's....

... The case against the contingency fee has always rested on the danger it poses not to the one who pays it but to the opponent and more widely to justice itself.... There are things lawyers will do when a fortune for themselves is on the line that they won't do when it's just a fortune for a client.

Walter K. Olson, *The Litigation Explosion* 44-45 (1991). The hourly (or retainer) fee presents a similar temptation to counsel representing a repeat-player defendant because every performance carries with it the possibility of gaining or losing a whole stream of business. If we really think that the overzealous pursuit of the client's goals is a big problem, the cure might require something like a "cab rank" system in which all personal injury claimants and defendants would draw lawyers at random out of a pool of practitioners. Otherwise, lawyers would be concerned either with the payoff in the present case or the bonus of future work.

n8. Roper Center, *The Fees that Lawyers Charge are Quite Reasonable in Light of the Services They Provide Clients*, available in LEXIS, News Library, RPoll File.

n9. *Id.*

n10. National Family Opinion Research, How Do You Rate the Value You Get for Your Money When You Purchase Each of the Following Items? ... Lawyers' Fees, 1990, available in WESTLAW, Poll Database.

n11. Randall Samborn, Anti-Lawyer Attitude Up, Nat'l L.J., Aug. 9, 1993, at 1. This National Law Journal/West Publishing Co. poll was conducted in July 1993 by Penn & Schoen Associates, Inc.

n12. Gallup Organization, Attitudes Toward the Liability and Litigation System: A Survey of the General Public and Business Executives Go 81168 138, 38 (1982). Among the general public, preference for the contingency fee decreased as income and education increased. Id. at 139- 40.

n13. Id.

n14. Id. at 138.

n15. Roper Center, Do You Think the Present Method of Paying Lawyers in Personal Injury Cases is a Good Thing, or a Bad Thing, or Doesn't it Matter?, 1985, available in WESTLAW, Poll Database.

n16. Id.

n17. Id.

n18. Id.

n19. Id.

n20. Id.

n21. Id.

n22. Id.

n23. Louis Harris & Associates, Public Attitudes Toward the Civil Justice System and Tort Law Reform, 36 (1987); Robert Hayden, The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986, 11 Stud. in L. Pol. & Soc'y 95, 98 (1991).

n24. Harris & Associates, *supra* note 23, at 36.

n25. Id.; see *infra*, Table 1.

n26. Harris & Associates, *supra* note 23, at 36.

n27. Id. at 11, table 1-2.

n28. Id. at 16, table 1-5.

n29. Id.

n30. Id. at 17, table 1-6.

n31. Stephen Budiansky et al., How Lawyers Abuse the Law, U.S. News & World Rep., Jan. 30, 1995, at 52.

n32. Id.

n33. Id.

n34. Id.

n35. Kenneth Reich, *It Was Mismanagement, Not a Plot*, L.A. Times, Aug. 30, 1989, 1, at 3.

n36. *State Election Returns: Statewide Propositions*, L.A. Times, Nov. 10, 1988, 1, at 26.

n37. Bill Ainsworth, *Lack of Attention May Be Prop 207's Ticket to Success*, The Recorder, Oct. 28, 1996, News, at 1.

n38. Jethro K. Lieberman & Tom Goldstein, *The Popular Image of Lawyers in America* (May 31, 1990) (unpublished paper presented to the Annual Meeting of the Law and Society Association, Berkeley, Cal., on file with the DePaul Law Review).

n39. Id. at 8.

n40. Melville Landon (under pseud. Eli Perkins), *Wit and Humor of the Age: Comprising Wit, Humor, Pathos, Ridicule, Satires, Dialects, Puns, Conundrums, Riddles, Charades, Jokes and Magic* by Mark Twain, Josh Billings ... Eli Perkins 386-87 (Chicago Star Publishing Co. 1892) (1893). William Maxwell Evarts (1818-1901) was a prominent lawyer who served as Attorney General of the United States (1868-69), Secretary of State (1877- 81) and a member of the United States Senate (1885-91).

n41. Milton Berle, *More of the Best of Milton Berle's Private Joke File 324* (1993) (emphasis in original). This story also appears more recently in *The Lawyer Joke-A-Day Calendar: 1996* (Mar. 13) and on the Internet, *Canonical List of Lawyer Humor (Court Jester): No.29*(last modified Mar. 2, 1995) <http://www.personal.usyd.edu.au/atan/jokes/canonical_lawyer.html#lawyer>.

n42. Henry Frederic Reddall, *Wit and Humor of the American Bar 190-91* (1905) Hannibal Hamlin (1809-91) was a well-known lawyer and politician, who served as Governor of Maine, a United States Senator and Vice President of the United States during Lincoln's first term (1861-65). He practiced law in Maine until 1848.

n43. *Lowdown on Doctors, Lawyers and Politicians, Wisdom of the Ages* <http://www.quotations.com/c_sugj_d.htm>.

n44. William C. Sprague, *Flashes of Wit From Bench and Bar* 116 (n.p. 1897).

n45. Jeff Rovin, *500 Great Lawyer Jokes* 40 (1992) (emphasis in original).

n46. This and other assertions here are based on analysis of an archive of jokes about lawyers compiled by the author, based principally on some 600 joke books of anecdotes for speakers published over the last century and a half, as well as other media (disk, CD-rom, and on-line sources) for the most recent period.

n47. Harry T. Shafer & Angie Papadakis, *The Howls of Justice: Comedy's Day in Court* 38 (1988).

n48. Gallup Organization, *If a Friend of Yours Got Badly Hurt in a Railroad Accident, and a Lawyer--Without Going to Court--Made the Railroad Pay Damages of \$ 10,000, How Much Do You Think the Lawyer Should Get for His Fee (Payment)?*, 1954, available in WESTLAW, Poll Database. The ambiguous stipulation "without going to court," which may mean without trial or without filing, makes it difficult to interpret these responses. Nor do we know what the respondents would think is deserved by the lawyer in a case that proceeded to formal contest.

n49. Id.

n50. See supra note 11.

n51. Unfortunately, the wording of the item ("in a typical accident case, a victim might get an award of \$ 1 million. How much would it be fair to give the attorney winning the case?") leaves room for doubt whether the respondents thought the award was fair after trial.

n52. Those who have actually made a claim are more favorable to the contingency fee: those with trial experience were even more favorable. Gallup Organization, supra note 11, at 138. In the Louis Harris 1986 survey, those who had a claim consider it more indispensable. Harris & Associates, supra note 23, at 36.

n53. Karsten, supra note 1, at 254.

n54. Lester Brickman, Curb Legal Feeding Frenzy: California Measures Reward Victim, Not Lawyers, USA Today, Jan. 10, 1996, at 11A. These proposals are elaborated in Lester Brickman et al., Rethinking Contingency Fees (1994).

n55. Id.

n56. Id.

n57. Id.

n58. Id. For example, Lester Brickman, one of the architects of the contemporary drive to limit contingency fees, regards the tort system as "a leading social pathology." Id.

n59. Stuart Taylor Jr., The Right Way to Curb Fees, Legal Times, Mar. 4, 1996, at 21.

n60. Id.

n61. Id.

n62. Marc Galanter, Bhopals Past and Present: The Changing Legal Response to Mass Disaster, 10 Windsor Y.B. of Access to Just. 151, 163 (1990); see Lawrence M. Friedman & Thomas D. Russell, More Civil Wrongs: Personal Injury Litigation, 1901-1910, 34 *Am. J. Legal Hist.* 295, 310-13 (1990).

n63. Lawrence M. Friedman, Civil Wrongs: Personal Injury Law in the Late 19th Century, 12 *Am. B. Found. Res. J.* 351, 373 (1987); Friedman & Russell, supranote 62, at 310-13; Galanter, supra note 62, at 163.

n64. Galanter, supra note 62, at 164.

n65. Stuart M. Speiser, Lawsuit 571 (1980).

n66. Bergstrom, supra note 2, at 89.

n67. Galanter, supra note 62, at 158 n.25. For a discussion of Hawks' Nest, see generally Martin Cherniack, The Hawk's Nest Incident: America's Worst Industrial Disaster(1986).

n68. Speiser, supra note 65, at 571.

n69. Wasservogel, Report, Findings and Recommendations in the Matter of the Hearing Ordered by the Appellate Division of the Supreme Court in and for the First and Second Judicial Departments Regarding a Proposed Rule to Limit Compensation of Plaintiffs' Attorneys in Personal

Injury and Wrongful Death Actions 38, cited in F.B. Mackinnon, *Contingent Fees for Legal Services* 139 n.16 (1964).

n70. Marc A. Franklin et al., *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, in *Dollars, Delay and the Accident Victim* 53 (1968).

n71. Speiser, *supra* note 65, at 298. Speiser notes that in 1951 an eight lawyer firm was one of the largest plaintiffs' firms in New York City. *Id.* at 186.

n72. Association of Trial Lawyers of America, *Member Satisfaction/Expectation Survey 5* (1995). The ATLA study used a sample size of 403. Query: how representative is ATLA of plaintiff's bar as a whole?

n73. Barbara A. Curran & Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990's*, at 8 (1994).

n74. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *Stan. L. Rev.* 313, 313-20 (1985).

n75. Galanter, *supra* note 62, at 89. Speiser describes the formation and breakup (after seventeen years) of a twenty lawyer plaintiff's firm in Florida. Speiser, *supra* note 65, at 272, 293-99.

n76. Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* 109 (1991).

n77. Speiser, *supra* note 65, at 568.

n78. *Id.* at 569.

n79. *Id.* at 297.

n80. Galanter & Palay, *supra* note 76, at 109-10.

n81. *Id.* at 109.

n82. Herbert M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation* 157 (1990).

n83. See Paul D. Rheingold, *The Development of Litigation Groups*, 6 *Am. J. Trial Advoc.* 1, 5-12 (1982) (discussing the various tasks assigned to "litigation groups" by plaintiffs' attorneys, and how the assignment of such tasks allow for the more efficient financing of litigation); Paul D. Rheingold, *The MER/29 Story - An Instance of Successful Mass Litigation*, 56 *Cal. L. Rev.* 116, 122-24 (1968) (discussing the organized "litigation groups" among plaintiffs' attorneys which dates from the MER 29 litigation in 1963).

n84. See Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stan. L. Rev.* 497, 537 (1991) ("In theory, contingent fee arrangements minimize agency costs").

n85. See *supra* notes 54-61 and accompanying text.

n86. Cf. Kritzer, *supra* note 82, at 89 (discussing that hours spent on a case are affected by firm size).

n87. See, e.g., Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 *Mich. L. Rev.* 319, 380-82 (1991) (suggesting

that the contingency fee deal puts the power to insist on trial beyond the control of the lawyer, by freeing clients to press on to trial because costs fall on the lawyer). Would plaintiffs' lawyers be willing to expose themselves to such risks (which simultaneously enhance their bargaining power vis a vis defendants) in the new regime?

n88. Along with the contributions to this Symposium and work cited elsewhere in this Article, important contributions to the literature on plaintiffs' lawyering include: Jerome E. Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (Austin & Winfield Publishers, Inc. 1994) (1962); F. B. MacKinnon, *Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities* (1964); Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (1996); Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (1997).

n89. See supra note 80-86 and accompanying text.

n90. See supra notes 71-86 and accompanying text.

n91. See supra note 80-86 and accompanying text.

n92. See Margaret Cronin Fisk, *Corporate Firms Try Contingency*, Nat'l. L.J., Oct. 27, 1997, at 1.

n93. See Bureau of the Census, U.S. Dep't of Commerce, *Census of Service Industries: Sources of Receipts or Revenue 4-443 to 4-465*, tbl. 49 (1992). With each subsequent five year period the "business sector consumes a larger percentage of an increasing amount of legal services." See id. (50.90% of \$ 101.1 billion in receipts in 1992); Bureau of the Census, U.S. Dep't of Commerce, *1987 Census of Service Industries: Miscellaneous Subjects 4- 225 to 4-228*, tbl. 42 (1987) (50.90% of \$ 66.997 billion in receipts in 1987); Bureau of the Census, U.S. Dep't of Commerce, *1982 Census Service of Industries: Miscellaneous Subjects 5-108 to 5-109*, tbl. 30 (1982) (48.56% of \$ 34.325 billion in receipts in 1982); Bureau of the Census, U.S. Dep't of Commerce, *1977 Census of Service Industries: Subject Statistics 5-52*, tbl. 9 (1977) (44.46% of \$ 17.147 billion in receipts in 1977); Bureau of the Census, U.S. Dep't of Commerce, *1972 Census of Service Industries: Summary and Subject Statistics 4-36*, tbl. 4 (1972) (42.03% of \$ 9.724 billion in receipts in 1972); see also Richard H. Sander & E. Douglass Williams, *Why are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & Soc. Inquiry 431, 441 (1989) (showing percentages of consumption of legal services between various classes of clients).

n94. Model Code of Professional Responsibility EC 2-20 (1979).

n95. See *Amchen Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (marking the recoil against use of class action in mass torts).

n96. See Jonathan Harr, *A Civil Action* 201, 203, 209-10, 263 (documenting the out-of-pocket expenses paid for by plaintiffs' attorney during the course of litigation in a toxic tort suit).

n97. See id. (documenting the difficulties facing plaintiffs' attorneys in preparing for and financing litigation); see also Peter H. Schuck, *Agent Orange at Trial* 51 (1986) (detailing the financing of complex litigation).

n98. Schuck, *supra* note 97.

n99. Id. at 51.

n100. Id. at 84.

n101. Id. at 95, 121.

n102. Id. at 121, 202.

n103. Id.

n104. Id. at 265.

n105. Id. at 123.

n106. See supra notes 80-86 and accompanying text.

n107. See Elizabeth K. Thorpe & Kimberly A. Weber, Recent Opinions from the American Bar Association Standing Committee on Ethics and Professional Responsibility, *9 Geo. J. Legal Ethics* 1009, 1014-17 (1996) (discussing the prohibitions against non-lawyer investments in law firms).

n108. Harr, supra note 96.

n109. Id. at 212-15, 348-51.

n110. Id. at 76-77.

n111. Id. at 322-24.

n112. Id. at 346-48.

n113. Id. at 263, 434-77, 454-56.