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Cover Page Footnote

Professor of Law, Benjamin N. Cardozo School of Law. This Article and the alternative ethics opinion that is appended builds upon earlier collaborative scholarship with Professor Jeffrey O'Connell and Michael Horowitz. I have extensively used a memorandum principally drafted by Mr. Horowitz, dated February 10, 1995, addressed to "Persons Interested in Contingency Fee Reform Proposal of February 11, 1994."

ABA REGULATION OF CONTINGENCY FEES: MONEY TALKS, ETHICS WALKS

Lester Brickman*



*"I'm certain I speak for the entire legal profession when
I say that the fee is reasonable and just."*

Drawing by Leo Cullum; © 1995
The New Yorker Magazine, Inc.

[This illustration is intended to be read in conjunction with footnote 161.]

INTRODUCTION

THE bar's answer to the question of who should regulate lawyers is, of course, the bar. This Article is a case study of self-regulation in a specific context: contingency fees. The opportunity for close examination is afforded by a recent ethics opinion (the "Opinion," "For-

* Professor of Law, Benjamin N. Cardozo School of Law. This Article and the alternative ethics opinion that is appended builds upon earlier collaborative scholarship with Professor Jeffrey O'Connell and Michael Horowitz. I have extensively used a memorandum principally drafted by Mr. Horowitz, dated February 10, 1995, addressed to "Persons Interested in the Contingency Fee Reform Proposal of February 11, 1994."

mal Opinion 94-389," or "Opinion 94-389") of the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "Committee").¹ The Opinion purported to respond to a letter written by a group of lawyers (the "Letter") requesting ethical guidance² relating to charging *standard* contingency fees—usually thirty-three percent to forty percent of gross recoveries—in the absence of assumption of any realistic fee risk by the lawyer. The Committee responded by ignoring the questions posed regarding *standard* contingency fees and instead answered questions of its own devising with regard to charging contingency fees.³ The omission of the word "standard" from the Committee's response was both critical and disingenuous. There is, of course, a world of difference between charging a *standard* contingency fee of thirty-three percent to forty percent of any recovery in every personal injury matter, regardless of the underlying facts and issues of liability, and charging, for example, a five percent contingency fee. Deleting the word "standard" from the question posed enabled the Committee to ignore the central thrust of the ethics inquiry: whether it is ethical to charge standard contingency fees in all cases, including those in which the lawyer bears no meaningful fee risk. By restating the question, the Committee avoided confronting the ethical implications of charging a five percent contingency fee, because of little risk and high reward, versus a forty percent *standard* contingency fee in a hypothetically identical matter; this avoidance facilitated the Committee's conclusion that contingency fees are ethical in almost any circumstance.⁴ Indeed, the Committee identified no circumstance in which charging *standard* contingency fees in personal injury actions would be per se unethical.⁵ The Committee justified its Opinion by asserting—in full agreement with the plaintiff bar—that lawyers undertake considerable risk in every case in which they charge contingency fees, even when there is no issue of liability and a high likelihood that an early and substantial settlement offer will be made before the lawyer has rendered any substantial effort.

1. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994) [hereinafter Formal Op. 94-389].

2. Letter to the ABA Standing Comm. on Ethics and Professional Responsibility (Feb. 10, 1994), *infra* app. A, at 299 [hereinafter Letter] (request for ethical guidance, principally drafted by Michael Horowitz and signed by Morris Abram, William Barr, Ronald Beard, Robert Bork, Lester Brickman, Samuel Butler, Edward Costikyan, Roger Cramton, Norman Dorsen, Tyron Fahner, Thomas Gee, Walter Gellhorn, Mary Ann Glendon, Erwin Griswold, Charles Horsky, Michael Horowitz, Rex Lee, Thomas Morgan, Jeffrey O'Connell, Theodore Olson, Robert O'Neil, Shirley Peterson, Robert Pitofsky, George Priest, Leon Silverman, and Harry Wellington).

3. *See infra* part IV.

4. *See infra* part IV.

5. *See infra* text accompanying notes 159-60.

In this Article, I critique that Opinion,⁶ finding it wrong as a matter of ethics law, malevolent as a matter of public policy, disingenuous in its presentation, unfounded in the critical assumptions upon which the Opinion is based, illegitimate in its rejection of ethical considerations in favor of political partisanship, and blatantly self-interested in elevating lawyers' financial interests above their traditional fiduciary obligations to clients. I argue that the Opinion is so unbalanced that any claim to respect from courts⁷ and state bar association ethics committees is, or at least should be, foreclosed. Had the Opinion been written by the American Trial Lawyers Association ("ATLA"), the trade association of contingency fee lawyers, few would be surprised by the kind of partisan analyses contained in the Opinion. Even ATLA, however, has acknowledged—in contradistinction to the Committee—that there are circumstances in which charging standard contingency fees is inappropriate.⁸

To create a framework for the analysis and critique of the Opinion, I contextualize the Committee's decision process and explain how the process of rendering advisory ethics opinions can be, and often is, influenced by self-interest and political considerations.

Finally, in Appendix B to this Article, I present an alternative to the Committee's Opinion—one that might have been drafted had the objectives been consonant with ethics rules, fiduciary concerns, and furtherance of the "public interest . . . [rather than the] parochial or self-interested concerns of the bar."⁹

6. This Article may be seen as a response to the "call to arms" issued by Professors Ted Finman and Ted Schneyer inviting legal scholars to critique ABA opinions. See Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. Rev. 67, 150 (1981) (noting that the opinions of the Committee on Ethics and Professional Responsibility [CEPR] are "very rarely" criticized in the professional literature, and that "no one writes law review 'casenotes' on new CEPR opinions . . . even though . . . formal opinions can be as important as many of the appellate cases that are noted," and opining that "this lack of professional criticism is most regrettable, especially since other accountability measures offer no great prospect for improving CEPR's work"). Professor Schneyer was the organizer of the January 1996 Association of American Law Schools Professional Responsibility Section meeting on regulating lawyers, and selected the authors and articles for presentation at the meeting and, thus, for inclusion in this Symposium.

7. Although the Committee has no authority to bind courts, Committee opinions are often influential as a source of law. See *id.* at 84-86 (indicating the many contexts in which Committee opinions are cited). In this Article, I urge courts, for the reasons stated, to reject Formal Opinion 94-389 as a source of law.

8. In a recent publication, ATLA "publicly urge[d] its members to 'exercise sound judgment in using a percentage in the contingent fee contract that is commensurate with the risk, cost, and effort required.'" American Trial Lawyers Association, *Keys to the Courthouse: Quick Facts on the Contingent Fee System* 4 (1994); see Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 Emory L.J. 173, 178 n.17 (1995).

9. Model Rules of Professional Conduct Preamble (1994) [hereinafter Model Rules]; see *infra* text accompanying note 16.

I. THE ROLE OF THE BAR ASSOCIATION IN ADVANCING LAWYERS' SELF-INTEREST

Professional organizations exist to advance the interests of their members.¹⁰ Those interests are furthered by efforts to attain and maintain self-regulatory status.¹¹ Self-regulation enables members of a profession to extract higher rewards for their services and avoid sanctions that would be part of societally-imposed regulatory schemes.¹² The principal means of effectuating self-regulation is the promulgation of professional codes.¹³ While such codes explicitly and

10. On the whole, occupations all too commonly invoke the word "profession" for such self-serving purposes as advancing their social status, shielding themselves from moral accountability, minimizing public scrutiny, or justifying restrictive practices. Richard Abel, *Taking Professionalism Seriously*, 1989 Ann. Surv. Am. L. 41, 41.

11. This is especially germane in the legal profession where ethical codes are drafted, approved, and adopted as law in a process that does not allow for public participation. See Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 Ann. Surv. Am. L. 7, 14-15. As Professor Rhode states:

Unlike governance structures in other nations and professions, regulation of the American bar has remained under almost exclusive control of the group to be regulated. Courts in this country have asserted inherent authority to oversee the practice of law, and generally have permitted legislative initiatives only if consistent with judicial standards. The Committee that drafted the Code of Professional Responsibility included no lay members; the 13-member Model Rules Commission had only one. Nor were any lay perspectives included on the bodies adopting those codes—the American Bar Association's House of Delegates and state supreme courts.

Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 687 (1994) [hereinafter Rhode, *Institutionalizing Ethics*] (footnotes omitted); see also Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689, 690 (1981) [hereinafter Rhode, *Why the ABA Bothers*] ("[The] imbalance between professional and public representation in the drafting phase is exacerbated by a ratification process in which only the views of professionals are systematically solicited, and in which they alone cast the decisive vote."). Thus, "the legal profession has achieved a degree of self-regulation far beyond either the reality or even the expectations of any other professional group." Moore, *supra*, at 15.

12. The advantages of self-regulation are manifold: "[C]odes . . . are a primary instrument for attaining . . . objective achievement and recognition . . . [and] generat[ing] monetary and psychic benefits by enhancing occupational status and self-image; constraining competition; preserving autonomy; and reconciling client, colleague, and institutional interests." Rhode, *Why the ABA Bothers*, *supra* note 11, at 689-90; see also Richard L. Abel, *American Lawyers* 142 (1989) [hereinafter Abel, *American Lawyers*] (stating that, in the past, the legal profession has employed the privilege of self-regulation to restrict competition).

13. A profession differs from other occupations in that it is autonomous, a status that is singularly perpetuated by the establishment of a professional code. Rhode, *Why the ABA Bothers*, *supra* note 11, at 714. Professor Rhode observes that "[a]s both the history and content of ABA codifications make plain, the bar bothers because its interests so dictate. Like any other occupational group [with an ethics code], the ABA formulates and fulminates for its health, collectively speaking." *Id.* at 689. With reference to the debate in the ABA over adoption of provisions in the Model Rules dealing with disclosure of client fraud, Professor Rhode has further observed that "[n]otably absent . . . was any justification for provisions allowing disclosures to protect lawyers' own financial interests but not to preserve other individuals' health, safety, or economic security. Such provisions highlight more general problems with a

implicitly further self-interest,¹⁴ the professional group always justifies them as conceived in the public interest.¹⁵ Thus, the most recent ethical code promulgated by the American Bar Association ("ABA") states: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest

regulatory process under exclusive control of the group to be regulated." Rhode, *Institutionalizing Ethics*, *supra* note 11, at 675-76 (citation omitted).

14. In an effort to sustain the monetary benefits of a competitive market, the codes themselves propagate a supply and price monopoly over the profession:

Perhaps the clearest example of a Code standard which operates primarily for the benefit of lawyers is the prohibition of the "unauthorized practice of law" reinforced by Disciplinary Rule (DR) 3-101(A), . . . [which has] historically been used to suppress competition by lay persons seeking to perform services at less cost than those provided by members of the Bar.

Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702, 707 (1977); see also Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 544 (1994) ("Both conservative economists and Marxist analysts view much of the profession's regulation of itself . . . as designed to enhance the incomes and status of lawyers."). While the codes succeed in their goal of maximizing lawyers' interests, they fail, perhaps intentionally, in their goal of creating a self-sufficient profession despite the codified mechanisms for self-regulation. Indeed, the code provisions are sufficiently loose and lax to have facilitated the collapse of the system into one of non-regulation, save for the most egregious of behaviors such as theft from clients, although in recent years the bar has made attempts at improving the disciplinary process. See generally ABA Center for Professional Responsibility, *Lawyer Regulations for a New Century: Report of the Committee on Evaluation of Disciplinary Enforcement* (1992) (providing 21 recommendations for improving the disciplinary enforcement process). As Professor Abel has observed:

[S]tudy after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.

Richard Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639, 648-9 (1981) [hereinafter Abel, *Why Does the ABA Promulgate Ethical Rules?*] (citations omitted). Professor Abel further notes that "[t]he suspicion that professional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation is strengthened by the inadequacy of enforcement mechanisms." Abel, *American Lawyers*, *supra* note 12, at 143.

15. Professor Rhode writes:

Lawyers no less than grocers are animated by parochial concerns. What distinguishes professionals is their relative success in packaging occupational interests as societal imperatives. In that regard, codes of ethics have proved highly useful. Seldom, of course, are such documents baldly self-serving; it is not to a profession's long-term advantage that it appear insensitive to the common good. But neither are any profession's own encyclicals likely to incorporate public policies that might significantly compromise members' status, monopoly, working relationships, or autonomy.

Rhode, *Why the ABA Bothers*, *supra* note 11, at 720.

and not in furtherance of parochial or self-interested concerns of the bar."¹⁶

Despite these declarations of dedication to the public interest, many provisions of lawyers' codes seek to further the bar's self-interest.¹⁷ Provisions requiring adherence to minimum fee schedules or restricting advertising by lawyers—since struck down by courts—exemplify attempts by the bar to preclude price competition.¹⁸ Numerous provi-

16. Model Rules, *supra* note 1, Preamble; *see also* Model Code of Professional Responsibility Preamble (1981) [hereinafter Model Code] (“[I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.”).

17. “The purpose of such rules [of legal ethics] is not to describe reality or even to prescribe right behavior, but rather to create a myth about what lawyers might be in order to disguise what they are.” Abel, *Why Does the ABA Promulgate Ethical Rules?*, *supra* note 14, at 668. The Model Code is not always as oblique as Professor Abel suggests as, for example, when it specifically prohibits the aiding of the unauthorized practice of law. *See* Morgan, *supra* note 14, at 707 (“Perhaps the clearest example of a Code standard which operates primarily for the benefit of lawyers is the prohibition of the ‘unauthorized practice of law’ reinforced by Disciplinary Rule (DR) 3-101(A) . . . by lay persons seeking to perform services a less cost than those provided by members of the Bar.”). *See generally* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *Hastings L.J.* 577, 583-90 (1989) (reviewing history of the ABA’s efforts to police unauthorized practice of law).

Other examples of Model Code efforts to restrict the practice of law so as to benefit lawyers include Disciplinary Rule (“DR”) 3-103(A), which states that “[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law”; DR 3-102(A), which states that “[a] lawyer or law firm shall not share legal fees with a non-lawyer”; and DR 3-101(A), which states that “[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law.” *See* Model Code, *supra* note 1, DR 3-101(A) & 3-102(A) & 3-103(A). These provisions essentially suppress lower priced competition in the practice of law by laypersons so as to secure a price monopoly for licensed attorneys. *See* Morgan, *supra* note 14, at 707 (“[T]he unauthorized practice rules have historically been used to suppress competition by lay persons.”).

18. *See* Kenneth L. Penegar, *The Professional Project: A Response to Terrell and Wildman*, 41 *Emory L.J.* 473, 477 (1992) (stating that the bar’s traditional anti-competitive practices included minimum fee schedules and prohibitions on advertising); *see also* *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (holding that a rule prohibiting lawyers from advertising violates the First Amendment); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 (1975) (ruling that minimum fee schedules violate antitrust laws). *See generally* Gregory H. Bowers & Otis H. Stephens, Jr., *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 *Mem. St. U. L. Rev.* 221 (1987) (discussing the Constitutional protection afforded to attorney advertising before and after *Bates*).

Minimum fee schedules and restrictions on advertising are classic examples of the bar’s anti-competitive practices. Other examples include entry restrictions and market-division strategies designed to limit competition within the profession. Cramton, *supra* note 14, at 551-52 (footnotes omitted). These restrictions are a direct result of the bar’s attempts to serve its own interests: “A principal force animating any occupation’s efforts at self-regulation is a desire to minimize competition from both internal and outside sources.” Rhode, *Why the ABA Bothers*, *supra* note 11, at 702.

sions in the codes, such as those regulating group legal services¹⁹ and prohibiting the aiding of the unauthorized practice of law²⁰ and fee splitting,²¹ seek to preserve lawyers' monopolistic control over the dispensation of certain services and, as well, to maintain lawyers' primacy over other professional groups. Careful craftsmanship of code sections often allows the bar to claim that its self-interest is sublimated to the public interest, but closer observation reveals that the ostensible public interest simply masks the profession's self-interest.²² For example, when called upon in the proposed draft of the Model Rules of Professional Conduct to declare that lawyer cooperation with those committing fraud—often fee-motivated—should be minimized by at least authorizing lawyers to disclose client fraud perpetrated with the assistance of lawyers' work product,²³ the ABA House of Delegates rejected the proposed rule, claiming that "maintaining confidentiality" was a higher-order policy goal.²⁴ Instead, the House of Delegates enacted a rule eliminating all lawyer discretion, including the more limited form granted in the Model Code of Professional Responsibility, to disclose fraud and in particular barring lawyer disclosure of ongoing client fraud perpetrated with the assistance of lawyers' services, except that fraud perpetrated against a tribunal.²⁵ This provision pur-

19. See Model Code, *supra* note 1, DR 2-103(D)(4); Model Rules, *supra* note 1, Rules 5.4 & 7.2(c) & 7.3.

20. See Model Code, *supra* note 1, DR 3-101; Model Rules, *supra* note 1, Rule 5.5(b).

21. See Model Code, *supra* note 1, DR 3-102; Model Rules, *supra* note 1, Rule 5.4(a).

22. See Rhode, *Institutionalizing Ethics*, *supra* note 11, at 688 ("[L]awyers' ethical codes have generally resolved conflicts between professional and societal objectives in favor of those doing the resolving.").

23. Attorneys' failure to disclose client fraud, and especially fraud that could only have been accomplished by use of lawyers' work product, has resulted in substantial losses to investors and to the government. See *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990); Susan Schmidt, *Panel: 'Where Were the Lawyers During the S&L Crisis?'*, *Wash. Post*, Mar. 23, 1991, at B1.

24. See Model Rules, *supra* note 1, Rule 1.6 (Proposed Final Draft 1981); *id.* (Final Draft 1983).

25. Prior to the enactment of Model Rule 1.6, the state of the ABA Model Code of Professional Responsibility was one of perpetual confusion over the dimension of an attorney's responsibility to blow the whistle on a client who was perpetrating a fraud in light of the attorney's conflicting obligation to preserve client confidences and secrets. Model Code DR 4-101(B)(1) prohibited a lawyer from revealing confidences or secrets, but DR 4-101(C)(3) allowed a lawyer to breach confidentiality if his client intended to commit a crime by disclosing the information necessary to prevent the crime. DR 7-102(B)(1) required a lawyer to disclose that a client had, in the course of representation, perpetrated a fraud against a person or tribunal provided that the lawyer learned of the fraud from other than confidential information—an exception that, of course, consumed the rule. The Code's ambivalence was highlighted during the course of the *OPM* matter when lawyers prepared documents that were used by their client in committing massive fraud—and continued to do so after learning of their client's fraudulent use—yet were found not to have violated ethical requirements. See Stuart Taylor, Jr., *Of Lawyers, Ethics and Business*, N.Y. Times, Feb. 6, 1983, § 3, at 4 (discussing the *O.P.M. Leasing Services, Inc.* case).

ported to preserve client confidentiality but in reality maximized the price that lawyers could charge clients who intended to use the lawyers' services to commit fraud.²⁶

Self-interested behavior may also be found in the processes used for interpreting the ethical codes.²⁷ Both the ABA and most state bar associations have established committees to render advisory opinions on the meaning of code sections and the proscription of certain proposed actions.²⁸ The ABA committee that currently renders such

Thus, in an attempt to clarify and reformulate the existing law, when the Model Rules were drafted, Model Rule 1.6 was proposed. The original draft of Model Rule 1.6 delineated several exceptions to the general rule that lawyers have a duty to keep client communications confidential. The language of that draft said that a lawyer "may" disclose otherwise secret information, if necessary:

- (1) [T]o prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
- (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or
- (4) to comply with other law.

Model Rules of Professional Conduct Rule 1.6(b) (Revised Final Draft 1982), reprinted in Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Or. L. Rev. 455, 471 (1984).

Subsection (2) was subsequently rejected by the ABA House of Delegates, much to the consternation of the public and press, effectively barring an attorney from revealing client fraud even where the attorney's work product was an essential feature of the fraudulent scheme. See Model Rules, *supra* note 1, Rule 1.6 (Final Draft 1983). Some states have rejected the ABA Model Rule provision by calling on lawyers to rectify frauds perpetrated during the course of representation or to disclose life-threatening conduct. See ABA/BNA Lawyers' Manual on Professional Conduct 01:11-01:46 (1994) (listing each state's version of the clause).

26. Under an ethics regime where lawyers are prohibited from disclosing that their work product is being used by their clients to perpetrate fraud, lawyers' services command a higher value than under an ethics regime where lawyers must disclose the ongoing fraud. See Lester Brickman, *Keeping Quiet in the Face of Fraud*, L.A. Times (Wash., D.C.), Mar. 12, 1992, at A11; see also Rhode, *Institutionalizing Ethics*, *supra* note 11, at 675 (commenting on the lack of dialogue during discussion of the proposed Model Rules regarding the justification for permitting disclosure of confidential client information to protect lawyers' financial interests but not to protect other persons' economic security, health, or safety); Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 Pepp. L. Rev. 1467, 1468-72 (1995) (discussing various states' ethical rules regarding disclosure of confidential client information in order to prevent bodily harm, death, fraud, or ruin of professional reputation).

27. Lawyer self-governance is furthered not only by the promulgation of a professional code, but also by judicial and administrative proceedings which enforce the code and advisory opinions of bar association ethics committees which interpret the code. See Finman & Schneyer, *supra* note 6, at 68-69.

28. See Rhode, *Institutionalizing Ethics*, *supra* note 11, at 687 (1994) ("Interpretation and enforcement of professional rules similarly remain under professional con-

opinions is the Standing Committee on Ethics and Professional Responsibility.²⁹ The Committee has often been responsive to the finan-

trol.”). For a brief history and description of the use of bar committees to render advice on legal ethics, see Finman & Schneyer, *supra* note 6, at 69 n.4 and sources cited therein. See also Whitney A. McCaslin, *Empowering Ethics Committees*, 9 Geo. J. Legal Ethics 959, 964-66 (1996) (discussing the history of the ABA Canons of Professional Ethics from their adoption in 1908).

29. The following provides a brief history of the Standing Committee on Ethics and Professional Responsibility.

The Standing Committee on Professional Ethics of the American Bar Association was created in 1913 to:

[C]ommunicate to the Association such information as it may collect respecting the activity of state and local bar associations in respect to the ethics of the legal profession, and it may from time to time make recommendations on the subject to the Association.

In 1919 the name of the Committee was changed to the Committee on Professional Ethics and Grievances and “grievances against members of the Bar” were added to the category of information to be collected and communicated to the Association.

In 1922 the purpose of the Committee on Professional Ethics and Grievances was amended to authorize the Committee to “express its opinion concerning professional conduct, and particularly concerning the application of the tenets of ethics thereto” The Committee was also authorized to hear charges of professional misconduct against members of the Association. In 1931 the Committee’s authorization was extended to include expression of its opinion concerning proper judicial conduct and the investigation of charges of judicial misconduct against Association members.

A Judges Advisory Committee of the American Bar Association was established in 1946 “to consult with the Committee on Professional Ethics and Grievances on all questions involving the Canons of Judicial Ethics.”

In 1958 the Committee on Professional Ethics and Grievances was separated into two committees: a Committee on Professional Ethics and a Committee on Professional Grievances. The Committee on Professional Ethics retained the authority to express its opinion concerning proper professional and judicial conduct. The 1958 by-law relating to the Committee on Professional Ethics described the jurisdiction of the Committee as follows:

1. Formulate and recommend standards of ethics and conduct in the practice of law as a profession; consider the Canons of Ethics of the legal profession and of judicial officers; and make recommendations for amendments to or clarifications of the Canons of Ethics when they may appear to be advisable.
2. Upon request, advise or assist state and local bar associations in their activities in respect to the interpretation of the Canons of Ethics; and furnish information and make recommendations thereon to the House of Delegates or the Board of Governors.
3. Be authorized, when consulted by any member of the bar or by any officer or committee of a state or local bar association, to express its opinion concerning proper professional or judicial conduct, but these opinions shall not deal with questions of judicial decision or judicial discretion, and shall not be given until submitted to the members of the Committee and approved by a majority thereof.
4. Be authorized to adopt such rules as it may deem desirable concerning the methods and procedure to be used in expressing opinions; such rules not to become effective until approved by the Board of Governors. The rules may be altered or abrogated by the House of Delegates.

cial interests of lawyers when those interests have been threatened by ethical concerns.³⁰ Opinion 94-389 is a case in point.

In 1969, the American Bar Association adopted the Model Code of Professional Responsibility to replace the Canons of Professional Ethics. In 1972 the Code of Judicial Conduct superseded the Canons of Judicial Ethics. The Committee was renamed the Standing Committee on Ethics and Professional Responsibility in 1971. Although the jurisdictional statement of the Committee [was] changed in July, 1985 to reflect the adoption of the Model Rules of Professional Conduct in August, 1983, its jurisdictional statement [prior to July, 1985] read []:

The Standing Committee on Ethics and Professional Responsibility, which consists of eight members, shall:

1. [B]y the concurrence of a majority of its members, express its opinion on proper professional or judicial conduct, either on its own initiative or when requested to do so by a member of the bar or by an officer or a committee of a state or local bar association, except that an opinion may not be issued on a question that is pending before a court;
2. periodically publish its issued opinions to the legal profession in summary or complete form and, on request, provide copies of opinions to members of the bar;
3. on request, advise or otherwise help state or local bar associations in their activities relating to the interpretation of the Model Code of Professional Responsibility and the Code of Judicial Conduct;
4. recommend appropriate amendments to or clarifications of the Model Code of Professional Conduct or the Code of Judicial Conduct, if it considers them advisable; and
5. adopt such rules as it considers appropriate relating to the procedures to be used in expressing opinions, effective when approved by the Board of Governors.

ABA Comm. on Ethics and Professional Responsibility, Formal and Informal Ops. 1-3 (1985) [hereinafter History of Standing Committee].

30. The ABA amended the Model Code in 1974 to explicitly state that if a lawyer in a firm was disqualified, then so was the lawyer's firm. DR 5-105(D) provided that "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." Model Code of Professional Responsibility DR 5-105(D) (1974). This amendment created a problem for law firms that practiced before government agencies. Since DR 9-101(B) provided that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee," Model Code of Professional Responsibility DR 9-101(B) (1970), the amended provision threatened the revolving door that enabled lawyers to move temporarily from private practice to a government agency and then return to their law firms to practice law in the area which was regulated by that government agency. To accommodate the interests of lawyers in preserving the revolving door, the Committee issued Formal Opinion 75-342, effectively amending DR 5-105(D) and creating a special exception for former government lawyers. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) ("Formal Opinion 75-342"). "The committee noted that enforcement of DR 5-105(D) would expose firms that hire government attorneys to the risk of losing clients and revenues because of firm disqualification and ultimately might hamper government recruitment of attorneys and limit the career mobility of those in government." G. Paul Bollwerk, III, *Conflicts of Interest and the Former Government Attorney*, 65 Geo. L.J. 1025, 1046 (1977) (citing Formal Opinion 75-342). This justification illustrates the masking of self-interest in the garb of public interest. *But cf.* Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-firm Conflicts of Interest*, 73 Yale L.J. 1058 (1964) (discussing the existing disparity between the firm disqualification rule and its disregard in practice).

II. THE FINANCIAL INTERESTS OF LAWYERS AS FURTHERED BY OPINION 94-389

At first blush, one would not expect the interests of the ABA and those of contingency-fee plaintiff lawyers as represented by their trade association—ATLA—to converge. Lawyers representing defendants in tort litigation join the ABA, not ATLA. Plaintiff lawyers seek to enlarge the scope of liability imposed under the tort system because the contingent fee financing system handsomely and even lavishly rewards such effort. Despite conventional wisdom, it is erroneous to assume that these self-interested efforts by plaintiff attorneys are countered by equal and opposite efforts of the defense bar. The financial benefits flowing from expansion of the tort system do not redound exclusively to the benefit of plaintiff attorneys—they also benefit defendant attorneys. Expanded liability under the tort system increases the demand for defendant lawyers' services and results not only in higher utilization of defendant attorneys but also in higher earnings. As plaintiff lawyers' effective hourly rates of return increase, defendants seeking to retain comparable quality levels of counsel must thus raise the rates they pay to counsel. Accordingly, opinions such as 94-

The duty of client loyalty—the ostensible public interest so ubiquitously cited by the bar in support of its positions on keeping lawyer-assisted fraud confidential—can apparently be jettisoned when it impinges upon lawyers' self-interest. In a recent example, the Committee gave its approbation to the practice of representing a client in suing a subsidiary of another company for damages while at the same time representing the parent corporation—an obvious conflict of interest. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 390 (1995). Writing in dissent, Lawrence Fox (the primary author of Opinion 94-389) noted that the ABA's authorization of this practice enables “the lawyer who is suing the subsidiary of [the] parent client . . . literally [to] put [] her hand in her client's pocketbook.” *Id.* This opinion contorted a rule “designed to protect clients into one that can be used to permit lawyers [acting in their financial self-interest] freely, and without consultation, to take positions which destroy traditional notions of client loyalty and client concern.” *Id.*

For an example of an advisory opinion by a state bar association ethics committee that is blatantly and expressly self-interested, see N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 570 (1985) (“Opinion 570”). Opinion 570 was intended to allow lawyers to circumvent the protection afforded clients by DR 9-102(A) by allowing lawyers to deposit advance fee payments into their general accounts rather than their trust accounts. Under DR 9-102(A), if there is a fee dispute as to funds on deposit in a trust account, the lawyer may not withdraw the funds until the dispute is resolved. Under Opinion 570, the lawyer can choose to place the funds beyond the reach of DR 9-102(A). In Lester Brickman, *The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account?*, 10 *Cardozo L. Rev.* 647 (1989), Opinion 570 is described as “indefensible . . . [because it] is inconsistent with the text of the Code of Professional Responsibility and the Rules of Professional Conduct . . . [and because] it seeks to replace fiduciary law with commercial law to govern the attorney-client relationship.” *Id.* at 675; see also Brief of Amicus Curiae in Opposition to Respondent-Appellant's Appeal at 19 n.3, *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (describing Opinion 570 as taking a “professionally parochial position”), reprinted in Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 *U. Cin. L. Rev.* 11, 65 n.3 (1995) [hereinafter Brickman & Cunningham, *A Response*].

389, which ratify substantial increases in contingency fee incomes by insulating these fees from ethical restraints, do in fact favor the financial interests of both plaintiff and defense lawyers.³¹ Opinion 94-389

31. See Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AEA Papers and Proceedings 311, 313 (1988) (stating that "[o]bviously, the plaintiff's bar has a vital interest in preserving that system of laws which maximizes its own welfare" and that "[l]ess obviously, perhaps, the defendant's bar has closely parallel interests"); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 Cardozo L. Rev. 2193, 2219 (1989) (arguing that the defense bar's interest in not limiting liability is as strong as the plaintiff bar's interest because if whole classes of claims imposing retroactive liability were removed, the business of defending clients on the merits of individual cases would no longer be of any consequence); see also Amy Stevens, *Corporate Clients, Some Lawyers Differ on Litigation Reform*, Wall St. J., Mar. 17, 1995, at B6 (stating that defense lawyers oppose tort reform because "legislative change could deliver a big blow to the bottom line").

The consonance of interests of plaintiff and defendant tort lawyers is nowhere better illustrated than in a recent letter from the presidents-elect of the California and Los Angeles trial lawyers associations to California business lawyers soliciting funds for a campaign to oppose two initiatives which appeared on the March 1996 California ballot. Letter from Mary E. Alexander, President-Elect, Consumer Attorneys of California & Bruce M. Brusavich, President-Elect, Consumer Attorneys Ass'n of Los Angeles, to Fellow Attorneys [hereinafter Letter from Alexander & Brusavich] (on file with the *Fordham Law Review*). One of the initiatives would have created a true no-fault system for automobile injury compensation and the other would have limited contingency fees when there are early settlement offers. See, e.g., Robert Stowe England, *Ambulance Chaser Alert: Next March, California Voters Hope to Kick Off a Nationwide Movement to Rein in Lawyers' Fees*, Fin. World, Oct. 10, 1995, at 28 (discussing the no-fault and contingency fee initiatives); Christopher J. Farley, *Fed Up with Lawyers*, Time, Jan. 8, 1996, at 36, 36 (discussing both initiatives as measures to control automobile accident litigation); Tim W. Ferguson, *Tort Retort*, Forbes, Feb. 12, 1996, at 47, 47 (discussing three tort reform initiatives that were to appear on California's presidential primary ballot); Margaret A. Jacobs, *Business Groups, Lawyers Face Off over California Litigation Reform*, Wall St. J., Jan. 15, 1996, at B3 (describing the competing interests of businesses and plaintiff lawyers); Stuart Taylor, Jr., *Tort Lawyers vs. Consumers*, Legal Times, Jan. 29, 1996, at 23 (arguing in support of the propositions). With regard to the no-fault initiative, the fund-raising letter stated that "[N]o one will be handling automobile cases if this passes!" Letter from Alexander & Brusavich, *supra*. The letter also stated that the contingency fee limitation will "drastically reduc[e] the number of [tort] filings. This will effect [sic] everyone in the tort system!" *Id.*; see also Dan Morain, *Lawyers' Campaign for Funds Draws Fire*, L.A. Times, Dec. 1, 1995, at A3 (describing the letter as a statewide fund-raising appeal to raise \$10 million to fight three "anti-lawyer" initiatives on the March ballot). The letter then went on to indicate several ways in which contributions by business lawyers could be laundered to avoid both California campaign contribution disclosure laws and disclosure to their clients. Letter from Alexander & Brusavich, *supra*. The letter pointed out that non-"public record" contributions made directly to the trial lawyers association will also be helpful and that while the trial lawyers may not use that money "directly to fight the initiative . . . it can be used for [so-called] general expenses," and "may [also] be tax deductible." *Id.* In addition to being opposed by plaintiff lawyers, the California initiatives were also opposed by lawyers for insurance companies because they "are equally concerned about . . . [taking] thousands of cases out of court." Mark Thompson, *Opponents Unite over Tort Reform*, L.A. Daily J., Jan. 29, 1996, at 3. The fund raising efforts among the defense bar raised at least \$600,000. Dan Morain, *Businesses Duel with Lawyers on Three Measures*, L.A. Times, Mar. 24, 1996, at B1, B2. The consonance of interests of plaintiff and defendant tort lawyers in preserving and extending the quantum of tort litigation is further illustrated by an-

also states a more explicit financial self-interest: the increasing use of contingency fees in "a wide variety of situations . . . [not] limited to personal injury cases . . . [or] suits involving tortious conduct . . . [including] collections, civil rights, securities and anti-trust class actions, real estate tax appeals and even patent litigation."³² Moreover, the Opinion notes that contingency fees are being employed in mergers and acquisitions, in public offerings, in loan transactions, and by corporate defendants.³³ The obvious message here is circle the wagons: we are all contingency fee lawyers.³⁴

other fund raising letter sent out by the trial lawyers in their effort to defeat the California initiatives. A similar letter from Deborah Wolfe, President of the Consumer Attorneys of San Diego, was sent to "dozens of firms that provide services to lawyers [including] court reporters, expert witnesses, and those who copy and deliver documents and summonses." Ed Mendel, *Trial Lawyers Summon Help to Defeat 'These Horrible Initiatives'*, San Diego Union-Trib., Mar. 18, 1996, at A3. The letter promised:

Vendors will be listed in order of category of contribution, and members of [the trial bar] as well as members of the defense bar will be encouraged to patronize those vendors who came to our aid. Likewise, attorneys will be urged not to patronize those vendors who did not assist us to the level of their ability during this precarious fight.

Id. (quoting Wolfe letter). The letter went on to say that "[m]any of you will see your litigation-related business dry up if these horrible initiatives pass in March." *Id.*

The efforts of the plaintiff bar, as augmented by the defense bar and support industries, were successful. Proposition 200, dealing with auto no-fault was defeated by 65% to 35%; Proposition 202, dealing with limiting contingency fees in cases of early settlement offers, was defeated by 51% to 49%. Dan Bernstein, *More Legal Reform Votes*, Sacramento Bee, Mar. 28, 1996, at A16.

Apart from the consonance of interests of plaintiff and defense lawyers in maximizing litigation, defense lawyer financial interests are furthered by protracting litigation and engaging in other practices that fall under the general rubric of agency costs. See Horowitz, *supra* note 8, at 184.

32. Formal Op. 94-389, *supra* note 1.

33. *Id.*

34. As the principal author of the Opinion elsewhere noted: "This is no time to undermine the use of contingent fees . . ." Lawrence J. Fox, *Yes: Lawyers Should Have the Benefit of the Bargain*, A.B.A. J., July 1995, at 44, 44. The blatancy of the statement of self-interest at the beginning of Formal Opinion 94-389 is confirmed by a similarly explicit appeal to self-interest. As a member of the Bar Association of the City of New York Committee on Professional and Judicial Ethics, I drafted a proposed ethics opinion regarding the use of contingency fees similar to the one set forth herein as Appendix B. The opposing argument by one of the two Committee members who were contingency fee lawyers began by noting—as stated in Formal Opinion 94-389—that contingency fees are not limited to use by personal injury plaintiff lawyers but instead are increasingly utilized by other lawyers as well. The speaker then went on to state that any (Committee) advisory opinion that adversely affected contingency fee lawyers would similarly disadvantage other lawyers, including Committee members. This appeal to self-interest did not fall on deaf ears. Not a single Committee member, other than myself as the proponent, argued that there was any need for applying ethical constraints to contingency fees.

III. THE ABA AS A POLITICAL ENTITY—THE POLITICS OF CONTINGENCY FEES

The ABA purports to be non-partisan but has increasingly taken positions on political issues, often assuming postures which mirror the financial interests of lawyers.³⁵ Occasionally, the bar's financial interests are furthered by not taking a position. For example, while the ABA has passed resolutions on scores of issues ranging from abortion to importation of chromium from Rhodesia,³⁶ it has not in the past twenty-five years taken a position on automobile litigation and limitations on such litigation by the adoption of no-fault laws, even though these suits account for a majority of tort litigation. In 1972, the ABA House of Delegates adopted a resolution mandating that states require motorists to purchase automobile insurance.³⁷ In 1993, the ABA debated the question of whether to revisit its 1972 resolution. Urging the Committee to study the matter and offer a recommendation for a new ABA policy, a past chairman of the ABA Committee on Tort and Insurance Practice stated:

35. See W. John Moore, *Identity Crisis*, Nat'l J., July 1, 1995, available in LEXIS, Nexis Library, NTLJNL File. The ABA has increasingly injected itself into political issues. At its 1995 mid-year meeting, the House of Delegates adopted positions on school prayer, welfare benefits, and securities litigation, leading some to conclude "that the ABA operates just like any other trade association on Capitol Hill, taking positions that reflect its members' financial interests. The ABA . . . opposes an overhaul of the civil justice system for purely pecuniary reasons . . . [because] 'too many lawyers are making too much money from it.'" *Id.* (quoting Theodore B. Olson, a lawyer in Gibson, Dunn & Crutcher's Washington office); see Judge John M. Walker, *The Politicization of Bar Associations*, Speech Delivered to New York City Chapter of the Federalist Society (May 16, 1990), reprinted in *The ABA in Law and Social Policy: What Role?* 115 (1994); see also William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 Alb. L. Rev. 993, 1025-26 (1994) (discussing the ABA's controversial role as a special interest group).

36. As the late Chief Justice Warren Burger noted:

In recent years, the ABA has adopted formal policy positions on abortion, affirmative action, AIDS, funding for the arts, gun control, homelessness, nuclear proliferation, parental leave, sexual orientation, health care and a wide variety of other social issues. At the same time, the ABA has done little or nothing to attack the root causes of the public's loss of confidence in the legal profession and the judicial system.

Warren E. Burger, *The ABA Has Fallen Down on the Job*, Wall St. J., Aug. 10, 1994, at A9.

37. The resolution favored requiring mandatory motor vehicle bodily injury and property damage coverage, mandatory uninsured motorist coverage, and mandatory first party medical and economic loss coverage. See Memorandum from Leo J. Jordan to Peter B. Prestley, Chair of the ABA Section of Tort and Insurance Practice 1-2 (Jan. 29, 1993) (on file with the *Fordham Law Review*). Prestley, the current chairman of the ABA Section of Torts and Insurance Practice ("TIPS"), had asked Jordan, a prior chairman of TIPS, to review a proposal to give motorists the choice of whether to purchase first party personal injury protection as an alternative to current insurance practice (which bundles together economic loss coverage with pain and suffering coverage).

Today there is a great cry that auto insurance is not affordable. Moreover, a significant number of first-line insurers have left or are leaving the auto insurance market because it is not an attractive enterprise. As a public policy issue, the affordability of auto insurance ranks among the public's important concerns. . . . Nowhere in the current ABA policy is there an expression of concern for the cost of insurance coverage mandated by the ABA resolution. . . . [I]t would appear in the public interest to review what has occurred since [1972].³⁸

In response, the Committee commissioned a report from a consultant, and on the basis of that report decided to maintain the policy position adopted in 1972.³⁹ The commissioned report included a truly remarkable statement: "Even if the [no-fault] choice plan [that was presented for consideration] resulted in substantial savings in [auto insurance] premiums, the question remains whether there are offsetting negative consequences. From an economic perspective, lowering the cost of driving is not necessarily socially desirable."⁴⁰

To comprehend properly the enormity of the ABA's rejection of even reconsidering its 1972 policy requires a modest understanding of the costs of the current automobile insurance system as compared to pure first-party, no-fault insurance and the consequences of denying motorists the choice of purchasing the latter. It is beyond dispute that adoption of a pure first-party, no-fault auto insurance system would produce substantial rate reductions in insurance premiums. A recent study⁴¹ found that under a plan that allowed drivers to choose between tort and absolute no-fault auto insurance,⁴² drivers who selected absolute no-fault would reduce their premiums for personal injury coverage about sixty percent in most states.⁴³ Total premium payments would be reduced by about thirty percent nationwide,⁴⁴ and

38. *Id.* at 4.

39. See ABA TIPS Spring Meeting Council Minutes, April 16-17, 1994, at 14 (on file with the *Fordham Law Review*).

40. Trevor Armbrister, *This Could Slash Your Car Insurance Bill*, Reader's Dig., Feb. 1995, at 181, 183-84 (quoting the report commissioned by the Committee).

41. Jeffrey O'Connell et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 Md. L. Rev. 160 (1996) [hereinafter O'Connell, *Consumer Choice*]. The study is based on 1987 and 1992 auto accident data collected by the Insurance Research Council. *Id.* at 171 n.61.

42. See *supra* note 31.

43. O'Connell, *Consumer Choice*, *supra* note 41, at 182 tbl.2 (finding a 58.6% savings for drivers who switch to no-fault if 100% of drivers switch, and a 63.4% savings if 50% of drivers switch); see also Allan F. Abrahamse & Stephen J. Carroll, *The Effects of a Choice Auto Insurance Plan on Insurance Costs* (RAND Inst. for Civ. Just., Santa Monica, Cal.), Mar. 1995, at xiv (finding that adoption of a choice plan rather than a tort system would save drivers 40% of the cost of personal injury coverage). For example, California drivers who switched to no-fault would save 62.4% on their personal injury premiums if all drivers switched, or save 65.4% if half of all drivers switched. O'Connell, *Consumer Choice*, *supra* note 41, at 182 tbl.2.

44. O'Connell, *Consumer Choice*, *supra* note 41, at 172 tbl.1 (finding a 31.4% premium savings for drivers who switched to no-fault, assuming 50% of all drivers

savings would amount to no less than \$26.1 billion per year.⁴⁵ The latter estimate ignores as much as \$13 to \$18 billion⁴⁶ in potential premium savings that the RAND Institute for Civil Justice estimates is the cost generated from claimed automobile accident medical costs which are fraudulent—the result of contingency-fee induced claim build-up.⁴⁷ There is no data on how much additional fee income is generated for contingency fee lawyers by medical cost build-up and fraudulent claiming practices, but it is reasonably clear that it amounts to at least several billion dollars from automobile claims alone.⁴⁸ Additionally, increased claiming induced by the availability of increased contingency fee income yields increased demand for defendant lawyer services generating higher defense fees.⁴⁹

switched); see also Abrahamse & Carroll, *supra* note 43, at xiv (stating that because personal injury coverage accounts for nearly half of total auto insurance compensation costs, “a 60-percent reduction in the costs of personal injury coverage should translate into a roughly 30-percent reduction in a driver’s total auto insurance premium”).

Under a pure no-fault insurance system the average California driver’s insurance premium would be reduced about 34% if the mandatory personal injury protection (PIP) coverage were \$50,000, or about 25% if the mandatory PIP coverage were \$1 million. See Stephen Carroll & Allan Abrahamse, *The Effects of a Proposed No-Fault Plan on the Costs of Auto Insurance in California*, Issue Paper (RAND Inst. for Civ. Just., Santa Monica, Cal.), Mar. 1995, at 3 [hereinafter Carroll & Abrahamse, Issue Paper]; see also O’Connell, *Consumer Choice*, *supra* note 41, at 172 tbl.1 (finding a 34.5% reduction, assuming 50% of all drivers switched to no-fault).

45. O’Connell, *Consumer Choice*, *supra* note 41, at 172 tbl.1. California drivers who switched to no-fault would save about \$3.6 billion if 100% of all drivers switched, *id.*, or save about \$3.8 billion if 50% of all drivers switched (based on calculations using the data provided in the Consumer Choice study). *Id.* at 182 tbl.2; see also Carroll & Abrahamse, Issue Paper, *supra* note 44, at 3 nn.6-7 (finding a savings of about \$3.3 billion under a mandatory \$50,000 PIP coverage option, and a savings of about \$2.4 billion under a mandatory \$1 million PIP coverage option).

46. As a consequence of excess medical claims, about \$4 billion in health care costs were incurred in 1993 at a cost of \$9 to \$13 billion to insurers in compensation for noneconomic loss and other costs. If insurers passed these costs onto insurance premiums, then excess medical claims cost insurance purchasers \$13 to \$18 billion in 1993. Stephen Carroll et al., *The Costs of Excess Medical Claims for Automobile Personal Injuries*, Documented Briefing (RAND Inst. for Civ. Just., Santa Monica, Cal.), 1995, at 3, 23.

47. RAND estimates that 35% to 42% of claimed medical costs in automobile accident claims generated in 1993 were excessive. *Id.* Excess medical claiming includes claims “based on staged or nonexistent activities, claims for nonexistent injuries when the accidents were real, and buildup of claims for real injuries to leverage a settlement from the insurance company.” *Id.* at 4.

48. The conclusion that attorneys are substantially and even wholly responsible for these increases in medical costs seems inescapable. Consider the following example. After Massachusetts amended its no-fault law in 1988 to raise the threshold level of economic damages for bringing a lawsuit from \$500 to \$2000, the median number of claims-related medical treatment visits per claimant rose immediately from 13 to 30. See Sarah S. Marter & Herbert I. Weisberg, *Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Liability Claims*, 10 J. Ins. Reg. 462, 463, 488-89 tbl.13 (1992).

49. That is why the California plaintiff bar found the defense bar a kindred spirit in opposing a no-fault auto choice plan. See *supra* note 31.

Apparently, the principal reason why the ABA rejected even reconsideration of its 1972 position on automobile insurance is that its alternatives were plans to give consumers the choice whether to purchase first-party auto insurance with or without pain and suffering coverage, leading to substantial reductions in lawyer fees. Thus, although the alternative plans would have substantially decreased insurance costs to consumers, leading to a decrease in the number of uninsured drivers,⁵⁰ they would have also diminished litigation to the detriment of lawyers' incomes, a result not considered "socially desirable" by the ABA.⁵¹

The political dimension of contingency fees is thus manifest.⁵² Indeed, at the outset of its Opinion, the Committee acknowledged that there was an intense political dimension but promised to steer clear of

50. Consider, for example, that 37.11% of Los Angeles County drivers are uninsured. See California Dep't of Insurance Statistical Analysis Bureau, Commissioner's Report on Underserved Communities LA-7 (1995).

51. See Armbrister, *supra* note 40, at 183-84.

52. See Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 Cornell L. Rev. 1303, 1311 (1994) ("The plaintiffs' personal injury bar has certainly long shown great political strength and sophistication in protecting its interest, especially in developing powerful ties with the Democratic Party." (footnotes omitted)). Professor O'Connell sets forth the following anecdote:

A Washington lawyer-lobbyist, formerly a power in his home state's Democratic party, went to one of his state's Democratic senators for whom he had raised substantial amounts of campaign money. The lobbyist wanted the Senator to include an amendment to a federal product liability bill favorable to a manufacturer in their home state. The Senator replied that he couldn't touch anything that curbs tort law. He explained that although he gets a lot of money from business interests, those interests would desert him in a moment, and give three or four times what they give him, to a really promising Republican challenger. On the other hand, the plaintiffs' bar, he said, is with him first, last and always. And their only price is no interference with personal injury law. So, he said, much as he'd like to help, he'd have to pass.

Id. at 1312 n.33 (citation omitted).

The political dimension of efforts to curb contingency fee abuses is even more manifest. One such effort that has elicited a striking political response is a proposal to require plaintiff lawyers to determine whether an alleged responsible party will offer to settle a tort claim. If such an early settlement offer is forthcoming, then under the proposal the lawyer is precluded from charging a standard contingency fee and is instead limited to a negotiated hourly rate for the time spent in compiling the facts needed to set forth the demand. The attorney may charge any contracted-for contingency fee as to any recovery obtained in excess of the early offer. This "early offer" proposal was set forth in a monograph included with the Letter sent to the Committee. See *infra* note 60. When the proposal, which was structured to be adopted by state supreme courts as amendments to ethics rules regulating lawyers, had garnered considerable public attention and support, see Horowitz, *supra* note 8, at 173 & n.3, ATLA took close notice. ATLA attempted to obtain the enactment of federal legislation banning states from adopting the proposal. This "head them off at the pass attempt" culminated in the health care bill introduced by Majority Leader George Mitchell in the waning days of the health care debate. See S. 2357, 103d Cong., 2d Sess. (1994) ("A Bill To Achieve Universal Health Insurance Coverage"). In a section dealing with medical malpractice claims, the bill, using indirect and obscure language, effectively precluded states from adopting the early offer mechanism that was the core of the contingency fee reform proposal. See *id.* at § 5402. This provision was

it: "This Committee does not propose in this opinion to take a role in this often intense public policy debate, which has been and will continue to be played out in Congress, state legislatures and other places in the political arena and within the profession."⁵³ This assertion is belied by many features of the Opinion, beginning with the news release accompanying the Opinion which provides insight into the Committee's political compass.⁵⁴

In that news release, the Committee erroneously attributed the request for ethical guidance to the Manhattan Institute⁵⁵ when in fact it came from twenty-six lawyers and legal educators, including former attorneys general, solicitors general, deans of Harvard, Yale, and Cornell law schools, federal agency heads, and a president of the American Civil Liberties Union, among others.⁵⁶ Indeed, had this request

inserted into the Mitchell bill by ATLA's chief lobbyist, Thomas Boggs. Conversation between Jeffrey O'Connell and Thomas Boggs (Oct. 25, 1994).

53. Formal Op. 94-389, *supra* note 1.

54. This assertion is further belied by the Committee's boarding-house reach to criticize and reject a proposed amendment of ethics and court rules regulating contingency fees even though the proposed amendment was not before the Committee. See *infra* notes 60-65 and accompanying text.

55. The Manhattan Institute is a New York-based public policy group, of the type popularly described today as a "think tank." The Institute describes itself as a nonpartisan, independent research and educational organization supported by tax-deductible gifts from individuals, foundations and corporations. The Institute's goal is to develop and encourage public policies at all levels of government which will allow individuals the greatest scope for achieving their potential, both as participants in a productive economy and as members of a functioning society.

Manhattan Inst., Review of Programs 1 (1996) [hereinafter Review of Programs]. Though not as well known as other think tanks such as the American Enterprise Institute, Brookings Foundations, Heritage Foundation, or the RAND Institute, the Manhattan Institute has had a significant impact on public policy debate in the areas of welfare, education, and civil justice. More than 40 books have been commissioned and funded by the Institute since 1979, including: Thomas Sowell, *Markets and Minorities* (1981); Roberta S. Karmel, *Regulation by Prosecution: The Securities and Exchange Commission vs. Corporate America* (1982); Charles Murray, *Losing Ground: American Social Policy 1950-1980* (1984); Charles Murray, *In Pursuit of Happiness and Good Government* (1988); Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (1988); Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* (1991); Walter K. Olson, *The Litigation Explosion* (1991); and Seymour Fliegel with James Macguire, *Miracle in East Harlem: The Fight for Choice in Public Education* (1993). See Review of Programs, *supra*, at 1-2. Among the innovative ideas that its fellows have spawned, some of the most notable include exposure of the dependency-producing effects of the welfare system, school vouchers and other educational choice programs that empower parents and shift authority from centralized school bureaucracies, and the concept of "junk science." See *id.* at 1. Though the Institute is generally associated with conservative policies, it has received favorable reviews from both conservative and liberal journals. See, e.g., James Traub, *Intellectual Stock Picking*, *The New Yorker*, Feb. 7, 1994, at 36, 39 (stating that the Institute has gained respect from a city usually thought of as liberal).

56. See *supra* note 2 (listing names of the twenty-six Letter signatories).

In attempting to justify labeling the request as coming from the Manhattan Institute, some in the ABA have pointed out that the return address on the letterhead was

come from any public policy group like the Manhattan Institute, it would have been outside of the Committee's purview, which is limited to matters brought before it "either on its own initiative or when requested to do so by a member of the bar or by an officer or a committee of a state or local bar association."⁵⁷

The misattribution of the request's origin appears to have been an attempt to imply that the Letter's request was political in nature, thereby justifying a political response, though one garbed in ethical rhetoric.⁵⁸ By stating that the request had come from an entity with a conservative public policy agenda rather than from a group of distinguished lawyers and educators, the Committee sought to divert attention from the ethics issues posed in the request and to focus instead on the politics of the source of the request. This strategy is all the more interesting and revealing because it is identical to the strategy used by trial lawyers in California in opposing contingency fee reform.⁵⁹

the same as a Washington, D.C. branch office of the Manhattan-based Manhattan Institute. The argument is without merit.

Because the Letter was to be mailed, it had to contain a return address. Michael Horowitz, the principal drafter and a signatory of the Letter, was in February 1994 a senior fellow with the Manhattan Institute in a Washington, D.C. office. Horowitz had the Letter typed on his office stationary, which listed his office address. The words "Manhattan Institute" simply did not appear. Even had the letterhead stated "Manhattan Institute," the ABA's labeling of the request for ethical guidance would still have been transparently political. *See infra* text accompanying note 58. Consider if the Letter with its 26 signatories had been sent on my letterhead and included my affiliation. It would not then have been properly identified, and no one would have identified it, as coming from the Cardozo Law School any more than if other letterheads had been used, it would have been identified as coming from the Virginia Law School or from Cravath, Swaine & Moore, or from any of the 22 other affiliations of the signatories.

57. *See* History of Standing Committee, *supra* note 29, at 3.

58. In addition to political considerations, the role of personal pique in the drafting of Formal Opinion 94-389 cannot be dismissed. At the time the Letter requesting ethical guidance was sent to the Committee, a story appeared on the front page of the New York Times commenting on the Letter and a separate proposed change in the ethics rules. *See* Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. Times, Feb. 11, 1994, at A1, B18. That story quoted an unnamed source: "'It's no stretch to go from the current ethics code to more precise limits on contingency fees,' said one lawyer who follows the work of the ethics committee closely and knows the current members well. 'There's a good chance they'll accept the idea.'" *Id.* In a private conversation between the author and Lawrence Fox, a principal author of Formal Opinion 94-389, Fox expressed outrage about the news article and especially the quoted statement. He indicated that it reflected badly on the Committee's image by at least implying that the Committee was a dupe of the proponents of tort reform. Conversation with Lawrence Fox, at 20th Nat'l Conf. on Professional Responsibility, Naples, Fla. (May 27, 1994).

59. In responding to an initiative sponsored by the Alliance to Revitalize California to reform contingency fees, *see supra* note 31, the trial lawyer group similarly sought to divert attention from the merits of the initiative by seeking to instead focus attention on the role of the Manhattan Institute, a group it implied had some hidden nefarious political agenda. Wayne McClean, president of the California trial lawyer group, referring to the contingency fee initiative, stated: "This prime example [the initiative] . . . is the brainchild of Reagan/Bush pointman Lester Brinkman [sic] of the

The Committee provided additional insight into its own political agenda by conflating, for purposes of its response, two separate documents: (1) the Letter sent to the Committee requesting ethical guidance; and (2) a monograph which discussed contingency fees and included a proposed amendment to ethics codes and state supreme court rules.⁶⁰ The Letter referred to the monograph and stated that it

Manhattan Institute, a right-wing think tank based in New York." Wayne McClean, *Stepping Up to the Plate*, Forum, July-Aug. 1995, at 4, 4. With the exception of the location of the Manhattan Institute, each and every "factual" assertion in the quoted sentence is false.

ATLA President Barry Nace attempted to discredit the Letter on the basis that a number of the signatories "received their law degrees from the University of Chicago . . . [which] has received millions of dollars from the Olin Foundation in the past few years to develop a law and economics program." Barry J. Nace, *President's Page: The "Legal Scholars" Speak on Contingency Fees*, Trial, Apr. 1994, at 7, 7. This criticism is ludicrous. See, e.g., Horowitz, *supra* note 8, at 183 (describing Nace's attempt to discredit the signatories as "near-hysterical"). This is one criticism that the ABA has not joined.

Another tactic of the trial bar is to couple the claim that contingency fee reform is an evil to be avoided because it is on the Manhattan Institute's agenda with the erroneous claim that the Institute is in reality a "front" organization for insurance companies. For example, during audience participation following a recent presentation I made critiquing Opinion 94-389 and advocating an ethics regime of the type set forth in the alternative ethics opinion included as Appendix B to this Article, someone from the audience, identifying herself as a member of the California Bar, asked whether or not it was true that I was simply advocating the position of the Manhattan Institute and was not the Institute merely a front for the insurance industry. 21st Nat'l Conf. on Professional Responsibility in San Diego, Cal., A.B.A. Plenary Session (June 2, 1995). Virtually all of the attendees at the conference were either bar counsel, law school teachers and lawyers representing lawyers in disciplinary proceedings. The speaker from the audience was none of these. It seemed apparent that her sole purpose in attending was to state—in leading question form—what is reported above.

The strategy of claiming that insurance companies are behind all tort reform efforts permeates the political discourse of tort reform. It is instructive to note, however, that just as plaintiff and defense lawyer financial interests converge on maintaining a maximum amount of litigation, *see supra* note 31, liability insurance company interests are basically similar. Insurance companies earn money by investing premiums charged for assuming risk. The quantum of risk imposed under the tort system creates the demand for risk insurance. The greater the quantum of risk, the greater the premiums that may be charged. Conversely, a lowered quantum of risk results in reduction of insurance company premiums. Thus, a leading liability insurer, the Aetna Company, has come out in opposition to the "early offer" contingency fee reform proposal. See Judyth Pendell, *Fees in the Marketplace*, N.Y. Times, Mar. 11, 1994, at A30 (Letter to the Editor). The "early offer" proposal is described in note 52, *supra*, and note 60, *infra*. Moreover, insurance companies opposed the California tort reform initiatives described above. See Thompson, *supra* note 31, at 3.

60. See Letter, *infra* app. A, at 299; Lester Brickman et al., Rethinking Contingency Fees 13-83 (1994) [hereinafter Brickman et al., Rethinking Contingency Fees]. The proposal would require tort attorneys to determine whether allegedly responsible parties were willing to offer to settle before any significant value-adding work had been done by the attorney and prohibiting the attorney in such cases from charging a standard contingency fee against any such early settlement offer. Lester Brickman et al., Rethinking Contingency Fees, *supra*, at 27-28; see also *supra* note 52 (describing proposal which requires attorneys to charge an hourly rate instead of a contingency fee when an early settlement offer is forthcoming).

was enclosed because of its extensive discussion of contingency fees. The Letter further noted, however, that the proposal set forth in the monograph was beyond the reach of the Committee because it sought a change in ethics codes and court rules which was not "possible or proper for the committee to adopt."⁶¹ Nonetheless, in its eagerness to give a blanket validation to all contingency fees, the Committee chose to treat the Letter request and the monograph proposal as fungible.⁶² It then went on to reject the proposal which it had erroneously incorporated into the Letter.⁶³

Not content simply to reject the ethics proposition that some meaningful risk is required to justify charging a substantial and standard risk premium, the Committee went ahead to denounce the proposed rule change set forth in the monograph proposal,⁶⁴ belying its earlier position that it did "not propose in this opinion to take a role in this often intense public policy debate, which has been and will continue to be played out in . . . the profession."⁶⁵

IV. THE QUESTIONS POSED AND THE QUESTIONS ANSWERED: A STUDY IN DISSIMILATION

One of the Committee's most blatant offense against ethical propriety was its refusal to respond to, let alone acknowledge, the central and critical ethical guidance question posed and to instead respond to a different set of questions of its own devising. The Letter posed two questions. Question I asked: "Is it ethical for an attorney to charge a standard contingency fee on the entire recovery if the attorney knows or has reason to know that a significant settlement offer is likely to be

The proposal discusses myriad aspects of the nature and purpose of contingency fees, such as: the regulation of contingency fees, including the ethical bases for such fees; the essentiality of the assumption of the risk; the lack of enforcement of ethical rules applicable to contingency fees and the practice of charging standard contingency fees even in cases without meaningful risk; the difficulty of assessing risk *ex post* to determine the degree of *ex ante* risk; the need for an alternative enforcement mechanism—an objective, routinely applicable test to determine the legitimacy of a contingency fee; the construction of such a test which uses a defendant's willingness to make an early settlement offer before the expenditure of any significant value-adding effort by an attorney as an indicator of the absence of risk as to that offer; a plan incorporating that test that would require plaintiff attorneys in tort cases to determine at the outset of the representation whether parties alleged to be responsible for an injury are willing to make an early settlement offer and, if so, to limit their fees in such cases to negotiated hourly rates and allow contingency fees to apply to the amount of settlement offer or award in excess of any early settlement offer; and the effects of such a proposal, including higher net payments to claimants, lower health care utilization costs, earlier settlements, faster payments, and projected savings. See Brickman et al., *Rethinking Contingency Fees*, *supra*.

61. Letter, *infra* app. A, at 310.

62. Formal Op. 94-389, *supra* note 1.

63. *Id.*

64. *Id.* (criticizing the proposal and referring to it as "any proposed rule").

65. *Id.*

made without the need for significant effort on her part?"⁶⁶ Question II asked, in part: "[I]s it ethical to charge the standard, or any, contingency fee against . . . early offers?"⁶⁷ The term "standard contingency fee" was defined as a fixed contingency fee percentage charged without regard to the facts underlying a claim, most particularly, those facts delineating the degree of risk present.⁶⁸ The Letter noted that "[s]tandard contingency fees are typically at least one-third, forty and even fifty percent in cases settled before trial and often more than fifty percent [of the net recovery] in cases which go to trial."⁶⁹ Instead of responding to the posited questions, the Committee constructed a different and presumably more palatable inquiry: "[T]he Committee has been asked if it is an ethical violation for a lawyer to charge a contingent fee a) to a client who can otherwise afford to pay on a non-contingent basis or b) in a matter where liability is clear and some recovery is likely."⁷⁰ Not surprisingly, the Committee went on to opine that charging a contingency fee in circumstance (b) was ethical.⁷¹

Compare the questions posed and the questions answered in the context of the following hypothetical. Joanne Smith was driving to work and, while stopped at a stoplight, was "rear-ended." Ms. Smith suffered a broken pelvis, a hip fracture and a severely broken leg. Her medical bills were \$65,000 and her lost wages were \$16,000. Michael Baker, the driver of the vehicle that hit her from behind, operates a home cleaning business, has \$100,000 in auto insurance coverage, and rents a home out of which he conducts his business. Mr. Baker's assets are otherwise unknown. Ms. Smith goes to three different lawyers with her medical file and states that she wants to be paid "what the case is worth." In addition to asking about the value of her claim, she wants to know what each lawyer will charge her.

Lawyer *A* responds that he charges the standard amount that all tort lawyers in the jurisdiction charge. He then proffers his retainer agreement, which sets forth a thirty-three percent (or forty percent) contingency fee percentage applied to the gross recovery, and states that before he can go forward, she will have to sign the agreement.

Lawyer *B* responds that if he can settle the claim by making a few phone calls and writing a demand letter, he will charge her a contingency fee of ten percent of the first \$100,000 and five percent of any amount above that. If he cannot settle the claim, he will charge the standard contingency fee.

66. Letter, *infra* app. A, at 305 (footnote omitted).

67. *Id.* at 307.

68. See Derek Bok, *The Cost of Talent* 140 (1993) ("[T]he contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.").

69. Letter, *infra* app. A, at 300-01 n.6.

70. Formal Op. 94-389, *supra* note 1.

71. *Id.*

Lawyer C responds that, based upon the facts Ms. Smith has alleged, there is no issue of liability and the case is worth between \$400,000 and \$500,000, but the recovery may be considerably less depending upon the amount of insurance coverage. He also indicates that before setting a fee, he will determine the amount of coverage and whether the insurance company will offer to settle for policy limits. Upon determining that coverage is \$100,000 and that the insurance company will tender policy limits, Lawyer C indicates to Ms. Smith that he will charge her a contingency fee of five percent (he estimates that the \$5000 fee will yield him \$800 to \$1000 an hour).

Several observations may be offered. First, Lawyers B and C are figments of a fertile imagination—they do not exist. Second, there is a world of difference between the contingency fee charged by Lawyer A and those charged by Lawyers B and C. These differences were at the heart of the request for ethical guidance set forth in the Letter. Third, and most significantly, the Committee staunchly maintains that none of the fee structures of the type discussed above affect ethical concerns; because all involve charging contingency fees in cases in which there is no absolute certainty of outcome, all such charges are ethical.⁷²

The most the Committee could muster by way of expressing an ethical concern in response to a fact situation of the type set forth above is that “a lawyer who always charges the same percentage of recovery regardless of the particulars of a case should consider whether he is charging a fee that is, in an ethical context, a *reasonable* one.”⁷³

Even that modest admonition was apparently too great a concession, for in the very next sentence the Committee states: “One standard fee for all cases may have the effect, given the difference among cases, of both over- and under-compensating the lawyer.”⁷⁴ No doubt there are instances where contingency fee lawyers have been undercompensated relative to their opportunity cost. But these instances dissolve into insignificance when compared to the windfall fees that contingency fee lawyers obtain in cases devoid of meaningful risks—fees which translate into effective hourly rates of thousands and even tens of thousands of dollars an hour.⁷⁵ Moreover, contin-

72. *See id.*

73. *Id.*

74. *Id.*

75. *See* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 76 n.186 (1989) [hereinafter Brickman, *Without Contingencies*]; Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 Cardozo L. Rev. 1755, 1773 (1994) [hereinafter Brickman, *Lawyers' Rates of Return*]. Illustrative examples of ethically impermissible rates of returns abound. *See, e.g.*, Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. Times, Mar. 24, 1995, at B6 [hereinafter Passell, *Challenge*] (quoting Professor Brickman stating that settlements resulting from the Phillips Petroleum case yielded a law firm a “\$65 million fee [which] translates into almost

gency fee lawyers carefully select their cases, limiting their exposure to undercompensation and maximizing their overcompensation. As more fully discussed in part VII, careful case selection techniques enable contingency fee lawyers to attain success ratios that exceed seventy percent.⁷⁶ Furthermore, these screening processes continue to be applied to post-case acceptance procedures, resulting in greater amounts of profit than that indicated by a seventy percent or more success ratio.⁷⁷

V. THE ROLE OF RISK IN DETERMINING THE ETHICAL VALIDITY OF CONTINGENCY FEES

Contingency fees are vital to the vindication of important legal rights in that they enable accident victims and other injured persons to have access to both counsel and the courts which would not be otherwise feasible. Under the contingency fee system, clients who cannot afford the risk of liability for attorney's fees if they fail to recover damages can proceed fully with their cases; their attorneys can be paid only from money that the clients actually recover. There is, of course, a quid pro quo for the agreement to represent clients on a contingent fee basis. As Justice Blackmun stated: "[L]awyers charge a premium when their entire fee is contingent on winning. . . . The premium added for contingency compensates for the *risk* of nonpayment if the suit does not succeed."⁷⁸ This assessment of the contingency fee system is rooted in existing ethics standards. The legal community widely recognizes the essentiality of the risk requirement in determining the legitimacy of contingency fees. Another commentator noted that where "[t]he risk of uncertainty of recovery is . . . low . . . it would be the rare case where an attorney could properly resort to a contingency fee."⁷⁹ Thus, as Professor Charles Wolfram stated: "Courts in general

\$20,000 an hour, a windfall in a case where tens of millions in compensation was a foregone conclusion"); James Pinkerton & Glen Golightly, *The Spoils of Tragedy: Profiting on Disaster*, Houston Chron., Aug. 2, 1992, at A1 (stating that a Texas school bus disaster settlement yielded contingent fee lawyers a fee conservatively estimated to be \$25,000 to \$35,000 per hour despite the notable fact that most of the attorneys who reaped these riches did not participate in the settlement process, nor did they engage in significant preparatory work for trial, because the issue of liability was clear-cut and the likelihood of a very substantial settlement was overwhelming); Dee Ralles, *\$84.5 Million Offered in Tainted-Water Case*, Ariz. Republic, Feb. 26, 1991, at A1 (stating that settlement yielded \$33.8 million in attorneys fees [most likely producing rates of return in excess of \$30,000 per hour]).

76. See *infra* text accompanying notes 111-13.

77. See *id.*

78. *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting).

79. *Attorney Grievance Comm'n v. Kemp*, 496 A.2d 672, 679 (Md. 1985); see also Virginia State Bar Ass'n, LEO 1461 (Apr. 13, 1992), reprinted in Nat'l Rep. on Legal Ethics and Professional Responsibility, Va. Ops. 21 (1992) ("One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. Conversely, matters which carry no such risk to

have insisted that a contingent fee be truly contingent. The typically elevated fee reflecting the risk to the lawyer of receiving no fee will be permitted only if the representation indeed involves a significant degree of risk."⁸⁰

Both the Model Code and the Model Rules recognize the validity of contingency fees.⁸¹ The ethical justification for these approvals necessarily lies in the assumption that the lawyer's risk of receiving no fee, or a fee that effectively will be well below her normal hourly rate or opportunity cost, merits compensation in and of itself: Bearing the risk entitles the lawyer to a commensurate risk premium. Conversely, a lawyer not bearing risk cannot charge a risk premium. Therefore, a lawyer who charges a substantial risk premium in the form of a standard contingency fee in a case without meaningful fee risk is charging both an illegal and an unethical fee.

This fee is illegal because it violates the lawyer's fiduciary duty to deal fairly with clients.⁸² A lawyer who charges for a service—assumption of a substantial fee risk—that is not provided is at least breaching the fiduciary duty of fair dealing.⁸³ Because such conduct violates fiduciary law, it is illegal; because it is illegal, it is therefore unethical.⁸⁴ Such conduct is also unethical because charging a contin-

the lawyer are not usually matters in which a contingent fee arrangement is appropriate.”).

80. Charles W. Wolfram, *Modern Legal Ethics* 532 (1986).

81. Model Code, *supra* note 1, DR 5-103(A)(2); Model Rules, *supra* note 1, Rule 1.5(c).

82. *See* Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 113 (W. Va. 1986) (“If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is ‘clearly excessive’ . . . even though the client has consented to such fee.”).

83. *See* Brickman, *Without Contingencies*, *supra* note 30, at 44-47.

84. *Id.* at 44 n.65; *see also* Model Code, *supra* note 1, DR 2-106(A) (“A lawyer shall not enter into an agreement for, charge, or collect an illegal . . . fee.”) & DR 1-102(A)(1) (“A lawyer shall not: Violate a Disciplinary Rule.”). It is also unethical because by charging for a service—assumption of a substantial fee risk—that was not provided, the lawyer would be “[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation,” *id.* DR 1-102(A)(4), and therefore would be violating a Disciplinary Rule. *Id.* DR 1-102(A)(1). This violation would be accentuated if the lawyer additionally misled the client regarding the risk that the lawyer was bearing by failing to disclose—if it were true—that the case would likely be resolved by a settlement without significant effort on the lawyer's part. *See* Tatterson, 352 S.E.2d at 114 (holding that misrepresenting the difficulty of collection to justify an excessive fee violates Model Code DR 1-102(a)(4)).

A lawyer charging for a risk that is not assumed is the functional equivalent of a lawyer charging for hours of work that were not performed. *See In re Mercer*, 614 P.2d 816, 819 (Ariz. 1980) (en banc) (holding that including workers compensation payment in a contingent fee bill is a charge for which no services were performed and therefore is clearly excessive in violation of DR 2-106); *see also In re Weinberg*, 511 N.Y.S.2d 293 (App. Div. 1987) (accepting a lawyer's resignation from the bar during investigation by the disciplinary committee into allegations that he attributed personal credit card charges to client expenses); *cf. Goeldner v. Mississippi State Bar Ass'n*, 525 So. 2d 403, 406-07 (Miss. 1988) (implying that charging for hours not worked violates DR 1-102(A)).

gent fee grossly disproportionate to any realistic risk of nonrecovery amounts to charging a "clearly excessive" fee.⁸⁵

Whether a given contingency fee is unreasonable or clearly excessive is primarily a function of the degree of risk borne by the attorney. This requirement of risk is embodied in both ethics codes. Model Rule 1.5(a) prohibits a lawyer from charging unreasonable fees⁸⁶ and Disciplinary Rule ("DR") 2-106(A) provides that a lawyer shall not charge a "clearly excessive fee"⁸⁷ which the Model Code defines in DR 2-106(B) as that which "is in excess of a reasonable fee."⁸⁸ Model Rule 1.5(a)(8) and DR 2-106(B)(8) both provide that whether the fee is contingent or fixed is one of eight factors to be considered as a guide in determining a fee's reasonableness.

The only sensible interpretation of this factor is that for a contingent fee to be reasonable and therefore not "clearly excessive," the lawyer must bear some risk of nonrecovery.⁸⁹ Any other interpretation results in an absurdity. If a lawyer could ethically charge a contingent fee absent any realistic risk of nonrecovery, then the mere fact that he called his fee a contingent fee and thereby raised his fee be-

85. Model Code, *supra* note 1, DR 2-106(A) (1982); see *In re Kennedy*, 472 A.2d 1317, 1322-23 (Del.) (holding that a 50% contingency fee was "clearly excessive" in a case where client had "clear entitlement" to temporary total disability payments under Workman's Compensation statute), *cert. denied*, 467 U.S. 1205 (1984); *Florida Bar v. Moriber*, 314 So. 2d 145, 146-48 (Fla. 1975) (holding that a 33.3% contingency fee was "manifestly improper" in a case where the major asset of an estate passed to the client/beneficiary by operation of the law; "[the case] frankly could have easily been performed by a layman"); *In re Gerard*, 548 N.E.2d 1051, 1057 (Ill. 1989) (finding that a 33.3% contingency fee was "excessive" in a case where an elderly client mistakenly believed that her certificates of deposit had been stolen, and the lawyer 'recovered' them by telephoning the client's banks); *In re Teichner*, 470 N.E.2d 972, 976-78 (Ill. 1984) (holding that charging a 25% contingency fee for collection of an "unquestioned, routine payment" under a group life insurance policy was "not only in excess of a reasonable fee, but was unconscionable"), *cert. denied*, 470 U.S. 1053 (1985); *Tatterson*, 352 S.E.2d at 114 ("In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of Disciplinary Rule 2-106(A)."); 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct 74-75* (Supp. 1987) (stating that contingent fees are unreasonable where risk of nonrecovery under given facts is negligible); 1 Stuart M. Speiser, *Attorneys' Fees* § 2:10, at 94 (1973), *cited with approval in* *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984) (en banc) (holding that a contingent fee should not be fixed so high that it ceases to measure due compensation for professional services and makes lawyer "a partner or proprietor in the lawsuit").

86. Model Rules, *supra* note 1, Rule 1.5(a).

87. Model Code, *supra* note 1, DR 2-106(A).

88. *Id.* DR 2-106(B).

89. The requirement of risk was even more explicit in the ABA Canons of Ethics Canon 13 (1908) (amended 1933), which provided that "[a] contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness." A.B.A. Rep. 700 (1933) (emphasis added).

yond what a fixed fee would have yielded⁹⁰ would be considered a factor attesting to the reasonableness of the higher fee.⁹¹ In other words, if DR 2-106(B)(8) and Model Rule 1.5(a)(8) are not interpreted as mandating real risk when a contingent fee is charged, then a lawyer could justify charging a higher fee simply by denominating it as a contingent fee rather than a fixed fee—an absurd result.⁹²

Consequently, ethics committees and the courts have purported flatly to bar the use of contingent fees in classes of cases where the risks of client non-recovery are minimal. Thus, contingency fees have been deemed unethical both in insurance collection cases when there is no evidence that insurers will contest the claims and in automobile accident cases in which clients seek payment under “no-fault” or “basic payment” statutes.⁹³ The Virginia State Bar Association, in barring the use of contingency fees in claims against “basic payment” automobile insurance contracts, reaffirmed the ethical requirement of

90. Contingent fees usually produce a higher fee than a fixed or hourly fee would for the same service. See West Va. State Bar Op. 83, Legal Ethics Case 149 (July 8, 1961), cited in Olavi Maru & Roger L. Clough, Digest of Bar Ass'n Ethics Ops., No. 4711, at 516 (1970) (“Where no agreement exists with regard to a fee, it is proper to charge only a reasonable fee, which will ordinarily be less than a fee fixed on a contingent basis.”).

91. As one court noted in reasoning consistent with the text: “If . . . there is little hazard involved in the litigation, the fact that a retainer is on a contingent fee basis may be entitled to little weight.” *City of Moraine v. Baker*, 297 N.E.2d 122, 127 (Ohio Ct. C.P. 1971).

92. See *In re Reisdorf*, 403 A.2d 873, 878 (N.J. 1979). The reasonableness of agreeing on the higher anticipated return must be based on differences between the intrinsic nature of an hourly or fixed fee and a contingent fee. That difference is the contingency, or risk, in properly accepting contingent fee cases.

93. See State Bar of Ga., Advisory Op. 37 (Jan. 20, 1984), reprinted in Nat'l Rep. on Legal Ethics and Professional Responsibility, Ga. Ops. 5 (1984) (stating that “[t]he basis on which attorneys are allowed to take contingency fees is that the claim . . . is itself contingent” and that “the taking of a contingency fee for the filling out of routine, undisputed [no-fault] claim forms is unreasonable and a violation of DR 2-106(B)(1) and Standard 31(b),” although “[a]n attorney may charge a reasonable fee for the attorney's time spent in processing a [no-fault] claim”); Oregon State Bar, *Desk Book for Lawyers*, Op. 282 (Feb. 15, 1975), cited in Olavi Maru, Digest of Bar Ass'n Ethics Ops., No. 9843, at 459 (Supp. 1977) (finding a contingency fee in a no-fault claim proper only “when the companies in fact oppose the claims for benefits and when the services of a lawyer are required to obtain payment of these benefits”); Professional Guidance Comm. of Pa., Inquiry 88-4 (Mar. 21, 1988), reprinted in Nat'l Rep. on Legal Ethics and Professional Responsibility, Pa. Ops. 61 (1989) (finding that a “uniform or systematic practice” of charging a fee of “40% or 50% of any recovery, depending upon at what stage a recovery is made” would in many circumstances be “unreasonable” and would violate Rule 1.5 of the Model Rules of Professional Conduct); S.C. Ethics Advisory Comm., Op. 83-03 (1983), reprinted in Nat'l Rep. on Legal Ethics and Professional Responsibility, S.C. Ops. 17 (1983) (“Only . . . [when] there is a true question concerning the availability of [no-fault] coverage should a contingent fee be charged and then, only after the client has been fully informed of all relevant factors.”); State Bar of Wis. Ethics Comm. Op. E-82-5 (Jan. 1982), reprinted in *Lawyers' Manual on Professional Conduct* 801:9106 (A.B.A./B.N.A. 1982). For judicial opinions establishing the above standard, see Brickman et al., *Rethinking Contingency Fees*, *supra* note 60, at 54 n.16.

risk in a 1992 ethics opinion: "One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. Conversely, matters which carry no such risk to the lawyer are not usually matters in which a contingent fee arrangement is appropriate."⁹⁴

Despite the ethical requirement that risk be assumed when charging a substantial risk premium, lawyers routinely violate this requirement by charging standard and substantial risk premiums in cases without meaningful risk.⁹⁵ Lawyers not only routinely violate this ethical standard but relish the opportunity to do so for the "easy money" thus obtained.⁹⁶ What is clear to contingency fee lawyers is also clear to judges and commentators: "[T]here is very little that is contingent about the contingent fee. Recoveries are obtained, mostly through the medium of settlements, in over 90 per cent. [sic] of the claims handled by lawyers, so that the dread contingency of no recovery and therefore no fee is pretty remote."⁹⁷ Former Harvard president and law school dean Derek Bok has similarly stated:

94. Virginia State Bar Ass'n, LEO 1461 (Apr. 13, 1992), *reprinted in* Nat'l Rep. on Legal Ethics and Professional Responsibility, Va. Ops. 21 (1992).

95. "The contingency risk of loss that justified a one-third to 40 percent share of a plaintiff's verdict for a trial attorney in the 1950s and 1960s no longer exists. Negligence trials today focus primarily on apportionment of damages, not on whether there is liability." Grant P. DuBois, *Modify the Contingent Fee System*, A.B.A. J., Dec. 1985, at 38, 38; *see also* Patricia M. Danzon, *Medical Malpractice: Theory, Evidence, and Public Policy* 58 (1985) ("[T]he payoff to suit has increased as a result of pro-plaintiff trends in common law doctrine, which have raised compensable damages, eroded traditional defenses and extended the scope of liability, and reduced the plaintiff's costs of proving negligence."). A federal district court judge, who was a practicing lawyer for 22 years before his appointment to the Northern District of Illinois, observed that "not all personal injury cases [routinely accepted on a contingent fee basis] are contingent." John F. Grady, *Some Ethical Questions About Percentage Fees*, *Litig.*, Summer 1976, at 20, 24. The federal judge presiding over the litigation resulting from the crash of a DC-10 in Chicago on May 25, 1979, stated: "[Y]ou have to get a little worried when you see some of these percentage fees in relatively early settlements in these cases in which there is no contested liability, and the amounts are substantial [sic] . . ." Transcript of Nov. 6, 1980 Hearing, *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979* (MDL No. 391), *quoted in* Eric M. Rhein, Note, *Judicial Regulation of Contingent Fee Contracts*, 48 *J. Air L. & Com.* 151, 175 n.219 (1982). The risk factor has been whittled away and the "contingent fee" has become a misnomer; it would be more accurate to rename it a "percentage fee." Grady, *supra*, at 24. "[The] lawyer does know in most cases that there will be some payment made by the defendant or his insurance company." *Id.*

96. "[T]here are the good [personal injury] cases—with clear liability and high return . . . [generating] 'quick and easy money' . . ." Andrew Blum, *Big Bucks, But . . .*, *Nat'l L.J.*, Apr. 3, 1989, at 1, 47 [hereinafter Blum, *Big Bucks*].

97. Presiding Justice Bernard Botein, Address at the New York State Ass'n of Plaintiffs' Trial Lawyers Annual Luncheon (Sept. 16, 1961), *printed in* Bernard Botein, *Co-operation of Bench and Bar in the Regulation of Negligence Litigation*, *N.Y. L.J.*, Sept. 21, 1961, at 4 [hereinafter Remarks of Judge Botein]; *see also* Jeffrey O'Connell, *The Injury Industry and the Remedy of No-Fault Insurance* 49 (1971) (arguing that lawyers rarely accept cases on a contingent fee basis that do not result in recovery); Randal R. Craft, Jr., *Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation*, 46 *J. Air L. & Com.* 895, 918-20 (1981)

The lure of obtaining a fraction of [a sizable damages award] has caused most trial lawyers to insist on contingent fee arrangements, even if their clients can afford to pay the normal hourly rate. . . . There is little bargaining over the terms of the contingent fee. Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.⁹⁸

These routine violations of ethical standards generated the request to the Committee for ethical guidance. The Letter's authors hoped that the Committee would take the opportunity to resuscitate moribund ethics rules. Instead, the Committee used the opportunity to give its imprimatur to these routine violations of ethics rules and further sought to declare the rules officially dead. It remains to be seen whether that further objective will have been realized.

VI. THE REQUIREMENT OF RISK AS INTERPRETED BY THE COMMITTEE

The Committee dealt with the requirement of risk in two initially divergent but ultimately convergent ways. It sought both to eliminate the risk requirement and as well to restate it so as to render it meaningless. Apparently recognizing that the phrase "whether the fee is fixed or contingent" appearing in Model Rule 1.5(a)(8) and DR 2-106(B)(8) could only properly be interpreted to mean that risk is required to validate contingency fees ethically, the Committee simply eliminated Model Rule 1.5(a)(8) and DR 2-106(B)(8).⁹⁹ In the Com-

(discussing the conscionability of charging high contingency fees in cases where claimants' recoveries are not truly contingent); DuBois, *supra* note 95, at 38 ("The fact is that the risk of loss to the personal injury plaintiff has faded away . . .").

98. Bok, *supra* note 29, at 139-40.

99. The omission is not without precedent and was perhaps presaged in ABA Informal Opinion 86-1521, which also dealt with contingency fees. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986) [hereinafter Informal Op. 86-1521]. There, an earlier Committee opined that contingency fee lawyers must extend to clients the option of paying an hourly rate. In that opinion, the Committee quoted and discussed Ethical Consideration 2-20, which deals with the need to disclose to the client all relevant factors regarding entering into a contingency fee arrangement. However, the Committee did not cite or discuss—that is, it essentially deleted from the Model Code—Ethical Consideration 5-7, which states:

Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. *But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.*

Model Code, *supra* note 1, EC 5-7 (emphasis added). That omission enabled the Committee in Informal Op. 86-1521 to avoid considering whether the codes had thus

mittee's version of the Model Rules, only seven factors bear upon a contingency fee's reasonableness.¹⁰⁰

The Committee additionally dealt with the risk requirement by determining that risk was ubiquitous. As stated by the Committee:

All contingent fee agreements carry certain risks: the risk that the case will require substantially more work than the lawyer anticipated; the risk that there will be no judgment, or only an unenforceable one; the risk of changes in the law; the risk that the client will dismiss the lawyer; and the risk that the client will require the lawyer to reject what the lawyer considers a good settlement or otherwise to continue the proceedings much further than in the lawyer's judgment they should be pursued.¹⁰¹

Thus, because all contingency fees always carry risk, the risk requirement is always satisfied. In the following sections, these purported risks will be analyzed.

VII. THE RISK ELEMENT IN CONTINGENCY FEE CASES AND THE RELATIONSHIP BETWEEN RISK AND REWARD

When plaintiff lawyers respond to criticisms of contingency fee abuses, they invariably claim that there is a high degree of risk inherent in their work and that even "sure winners" often turn out to be losers.¹⁰² It is instructive therefore to examine the available data on the degree of risk borne by contingency fee lawyers.

Much literature has noted that tort plaintiffs' success in jury trials has declined in recent years;¹⁰³ while jury trial success ratio does bear some relationship to what occurs in tort practice, only a small percentage of tort claims go to trial, and the largest percentage of these cases, about ninety-five percent, are settled.¹⁰⁴ And although jury verdicts do impact settlement values, the data on jury verdicts is misleading in

codified the objective fiduciary standard of fair dealing with a client. See Brickman, *Without Contingencies*, *supra* note 30, at 51 n.88.

100. Formal Op. 94-389, *supra* note 1.

101. *Id.*

102. *Id.*

103. See James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. Rev. 479, 523 (1990) (reporting that an empirical study, in part, of plaintiffs' success rates in product liability cases shows that in 1979, plaintiffs prevailed 40.5% of the time, but by 1987, plaintiffs' victories dropped to 32.5%); see also Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 Yale J. on Reg. 435 (1995) (discussing tort reform proposals based on an economic model); Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, Wall St. J., Mar. 21, 1994, at B1 (stating that jurors believe jury awards are too large); Linda Himmelstein & Neil Gross, *Should Business Be Afraid of Juries?*, Bus. Wk., Nov. 8, 1993, at 100, 100 (noting that recent studies have shown a decline in the number of plaintiffs' victories in product liability cases and in the resultant amount of awards).

104. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 89 (1983) (stating that less than eight percent of the civil cases studied eventually went to trial); P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-Ameri-*

that it fails to reflect two of the most significant tort developments of the past several decades: the mass tort claim and the extension of the realm and dimension of punitive damages. By amassing thousands, tens of thousands, and even hundreds of thousands of claims in class actions, plaintiff lawyers have so changed the dynamics of tort litigation as to be able to extract multi-million-dollar and billion-dollar settlements which often bear little relationship either to causation or injury.¹⁰⁵ The billions of settlement dollars and hundred of millions of contingency fee income dollars generated by mass tort claims are not captured in assessments of the state of risk in the tort system based upon jury verdicts.¹⁰⁶ Nor are these massive wealth transfers captured in such basic statistical measures of litigation as the number of tort filings. Class action settlements involving tens of thousands and even hundreds of thousands of claimants are often counted as a single

can Comparisons, 1987 Duke L.J. 1002, 1009 (stating that most tort lawsuits never reach the trial phase).

105. See Lester Brickman, *Class Action Reform: Beyond Rhone-Poulenc Rorer*, Research Memorandum, Manhattan Inst. for Pol'y Res. (Oct. 1995); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); Brickman, *Lawyers' Rates of Return*, *supra* note 75, at 1780-85. Breast implant litigation and the spin-off litigation involving the contraceptive Norplant amply illustrate the ability of plaintiff lawyers to extract multi-billion dollar settlements despite overwhelming scientific evidence of lack of causation. See Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. Times, May 28, 1995, § 3, at 1, 5 (describing the parallels between the Norplant litigation and the breast implant litigation and discussing the financial interests of lawyers and doctors; for example, when one woman was told by her attorney to remove her Norplant device in order to preserve her claim for damages even though she was very happy with Norplant, she reportedly asked: "Once I get my money, can I get a second Norplant put in?"); Gina Kolata & Barry Meier, *Implant Lawsuits Create a Medical Rush to Cash In*, N.Y. Times, Sept. 18, 1995, at A1 (describing how women could qualify to receive \$200,000 or more from a settlement fund for complaints of non-verifiable injuries such as aches and fatigue; one doctor admitted that "one of the categories was so broad that you or I would have fit into it"); Anne E. Tergesen, *Norplant Under Siege, Device Spawning a Spate of Lawsuits*, *The Rec.*, Aug. 27, 1995, at B1 (discussing reports which show that most Norplant users who have suffered at least one side effect are satisfied with Norplant and stating that some complaints filed by lawyers have been "carbon copies of one another, right down to typographical errors").

106. These fees are also often unrelated to the risk borne by the attorney or the amount of work actually performed. For example, in an order disallowing unreasonable attorneys' fees, Judge Robert Merhige, presiding over the Dalkon Shield Claimants Trust litigation, stated:

It is to be borne in mind that counsel has already received, in the vast majority of instances, fees of at least one-third of the *gross* settlement amount, plus costs. These fees, in many instances, exceed \$100,000.00 per claim, and the aggregate fees received by some counsel, especially those with hundreds of cases, runs as high as several million dollars per attorney or law firm. Generally, the sole efforts related to such compensation consist of garnering medical records and advising a client whether to accept a non-negotiable settlement offer.

Memorandum to Accompany Order Disallowing Unreasonable Attorneys' Fees at 18 n.10, *In re A.H. Robins Co., Inc.*, Ch. 11 Case No. 85-01307-R (Bankr. E.D. Va. Mar. 1, 1995).

filing.¹⁰⁷ Reliance on the recent decline in plaintiffs' jury trial success ratio as a measure of litigation risk is also misleading because it fails to capture either the enormous expansion in the use of punitive damages¹⁰⁸ or the effect of punitive damage awards on settlement values.¹⁰⁹ Moreover, just as in mass tort litiga-

107. For annual compilations of federal litigation filings, see the Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* (1993) (including statistical compilation of tort actions commenced in U.S. District Courts, but not describing the methodology for counting case filings). For annual compilations of state litigation filings, see National Center for State Courts, *State Court Caseload Statistics* (1988) (including statistical compilations of tort filings in trial and appellate courts). Of the 36 states providing civil disposition data in 1988, 23 states counted a case as one filing if the jury or first witness were sworn, whereas 13 states required a verdict or decision. *Id.* at 52.

Because class actions are typically counted as a single filing, the resultant undercounts of litigation activity are dramatic. Conversations between author and a Senior Management Analyst at the Administrative Office of the United States Courts (July 20, 1995 & July 26, 1995) (the views stated by the analyst are not necessarily representative of the views of the Administrative Office). The analyst stated that "[d]epending on how a federal judge certifies under Rule 23, class actions are granted as either: (1) One class action covering multiple plaintiffs (most cost-effective because of single filing fee) or (2) Plaintiffs being counted individually as part of one class action." *Id.* (July 20, 1995 conversation). He also stated that the number of filing fees paid determines the number of filings that are registered for statistical purposes, which is the reason why most class actions are counted as one filing. *Id.* For example, as many as six million homeowners may be eligible to collect from a \$950 million settlement of a class-action suit against the makers of allegedly defective plastic pipes used in home plumbing systems. Bill Rumbler, *Judge Gives Homeowners \$950 Million for Bad Pipes*, Chi. Sun-Times, Nov. 10, 1995, at 28. About 4.2 million claimants received \$408 million in discount coupons from airline companies accused of price fixing. See *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993). A class action suit against the manufacturer of Norplant has been certified in a state court in Cook County, Ill., which may adjudicate the claims of about one million Norplant users. *Jane Doe v. Wyeth-Ayerst Labs. & Am. Home Prods. Corp.*, No. 93 L 11096 (Cook Cty. Cir. Ct. filed Sept. 13, 1993); see also Laura Duncan, *Norplant: The Next Mass Tort*, A.B.A. J., Nov. 1995, at 16, 16-17 (discussing the details of the suit and the appropriateness of filing for class action status). At least 400,000 women with silicone gel breast implants registered to participate in a \$4.225 billion settlement with manufacturers. See Kolata & Meier, *supra* note 105, at A8. As many as 700,000 homeowners may be eligible to participate in a \$375 million settlement of class-action suits against a manufacturer of defective siding. See Bill Richards, *Louisiana-Pacific Agrees to Settlement of Class Action Suits Linked to Product*, Wall St. J., Oct. 18, 1995, at A8.

108. In addition to increased awards of punitive damages in tort cases, see Stephen M. Turner et al., *Punitive Damages Explosion: Fact or Fiction?*, Washington Legal Foundation, *Critical Legal Issues* (Nov. 1992), punitive damages are being used increasingly in contracts cases, see *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1374 (7th Cir. 1990); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 Wis. L. Rev. 1, 8, and in other contingency fee driven claims where there is no allegation of physical injury. See Janet Novack, *Torture by Tort*, *Forbes*, Nov. 6, 1995, at 138, 138.

109. Punitive damage claims drive up compensatory settlement costs. See Paul B. Taylor, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis when Punitive Damages Are Sought*, 16 Harv. J.L. & Pub. Pol'y 769, 793 n.90 (1993) ("One sample in the study . . . indicates that settlements in claims where plaintiffs sought punitive damages were nearly 150 percent higher than in those where

tion, statistical measures of punitive damages are grossly inaccurate.¹¹⁰

The ratio of plaintiff to defense verdicts in tort cases conveys little information about the success ratios of plaintiff attorneys. We know relatively little about these success ratios; what we do know indicates that plaintiff attorneys prevail, that is, obtain more than merely nominal settlements and awards, in at least seventy percent and perhaps in as many as ninety percent of the claims they accept.¹¹¹ These high success ratios reflect the very careful selection processes that contin-

plaintiffs did not seek punitive damages, and in another [sample] the settlements were 60 percent higher"); see also Novack, *supra* note 108, at 140 (quoting the general counsel of a large bank who acknowledges that the threat of punitive damages results in higher settlements). A recent survey of large American corporations confirms this effect. In February and March of 1995, approximately 70 chief executive officers of large American corporations were asked to provide the number of tort claims their companies had settled in the previous five years and the aggregate amounts of those settlements, where the settlements were driven primarily by the threat of punitive damages. The CEOs were asked to call a telephone number where their responses were anonymously recorded. Of 68 responses, 43 provided detailed settlement amounts. Insufficient data was obtained on the number of cases settled, but the aggregate dollar value of the punitive damages driven settlements was \$4.4 billion. See Richard J. Mahoney, *Punitive Damages—Once Is Enough*, Contemporary Issues Series 72 (Center for the Study of Am. Bus., St. Louis, Mo.), May 1995, at 6, 20 n.16.

110. Consider that in just one case, *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), *appeal docketed sub nom. Cimino v. Pittsburgh Corning*, No. 93-4452 (5th Cir. May 3, 1993), the number of punitive damage settlements paid and judgements awarded exceeded by a large measure the total of *all* punitive damage awards counted in Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 39 & n.193 (1992), as having occurred in the 1965-1990 period. Rustad cautions his readers in a footnote that "[t]he number of cases was computed by verdict and not the number of plaintiffs. In asbestos cases, this method understates the number of punitive damage awards." *Id.* The use of the term "understates" vastly understates the Rustad data's unreliability.

111. One noted jurist stated more than 30 years ago—before the massive increase in the scope of liability imposed under the tort system—that lawyers receive payment in over 90% of the claims they represent. See Remarks of Judge Botein, *supra* note 97; see also *Boccardo v. United States*, 12 Cl. Ct. 184, 186 (1987) (discussing cases in which tort lawyers recovered approximately 90% of their litigation expenses), *rev'd on other grounds sub nom. Boccardo v. Commissioner*, 56 F.3d 1016 (9th Cir. 1995).

Litigation over the tax treatment of contingency fee lawyers advances, for the expenses and the costs of litigation, is instructive. Despite the apparent contingent nature of the repayment, the Internal Revenue Service formerly treated these as nondeductible loans which the lawyer could deduct as bad debts if not repaid, rather than as ordinary and necessary business expenses which would be deductible in the year the money was advanced. The IRS position was based upon data it assembled from lawyers' records indicating that between 80% and 90% of the amount of the advances is eventually repaid through settlements and judgments. See *Boccardo*, 12 Cl. Ct. at 186; *Burnett v. Commissioner*, 42 T.C. 9, 12 (1964), *remanded*, 356 F.2d 755 (5th Cir.), *cert. denied*, 385 U.S. 832 (1966). The IRS concluded and courts concurred that although reimbursement was tied to the recovery of a client's claim, in reality, the risk of nonrecovery was very low because lawyers exercised such great care in agreeing to represent only those whose claims would in all likelihood be successfully concluded. See *Boccardo*, 12 Cl. Ct. at 185. It is also interesting to note that most of the data used by the IRS was from the 1950s and 1960s—before the major expansion of

gency fee lawyers employ.¹¹² Furthermore, firms' screening processes continue even after careful case selection to ensure further a high probability of overall recovery—a process that continues throughout the duration of the claim process. Thus, firms constantly reassess their claim portfolio and change resource allocation in order to devote more time, and advance more funds, to stronger cases rather than to weaker ones.¹¹³

High success ratios in represented cases coupled with substantial expansion in the scope of tort liability in recent decades¹¹⁴ have resulted in significant increases in the effective hourly rates of many contingency fee lawyers. Although here, too, information is scarce, the available information is startling. While risk of nonrecovery has declined when measured over the past three decades,¹¹⁵ rates of return have increased prodigiously. In the past twenty-five years, the likelihood of a personal injury plaintiff's prevailing at trial has

tort liability, and the dramatic decrease in the risk of nonrecovery. There is a strong likelihood that the correct figure today is at least 90%.

At the time of the Court of Claims' decision, the law firm in which Boccardo was a partner used a retainer agreement in which advances for costs were taken out of the client's share of the recovery and the client was obligated to repay the advances if the recovery was insufficient. *See id.* The firm then changed to a "gross fee" retainer in which advances were no longer the obligation of the client but simply an investment by the firm in a product—the lawsuit. *See Boccardo v. Commissioner*, 56 F.3d 1016, 1017 (9th Cir. 1995). Under that retainer agreement, because the advanced costs were not loans and there was no contractual right to recover from the client in the event the recovery was insufficient, the advanced costs were "ordinary and necessary" business expenses deductible in the year advanced. *Id.* at 1019-20.

112. Kenneth R. Shaw, *The Right Kind of Case*, N.Y. Times, Feb. 25, 1994, at A28 (Letter to the Editor) ("[A] lawyer who takes contingent fee cases where liability is in doubt will soon go bankrupt. An astute lawyer will take only one type of case on contingency: where liability is nearly certain and the amount of damage depends on the amount of money available for trial."). This view has been echoed by another contingency fee attorney who stated that "[t]he success of a firm depends not so much on the cases taken but upon the cases turned down." Blum, *Big Bucks*, *supra* note 96, at 46. Stephen Z. Meyers, co-founder of the law firm Jacoby & Meyers—which has "all but abandoned" a practice oriented towards middle-class needs in favor of a "more lucrative" contingency fee practice—stated that their storefront offices reject more than 80% of personal injury claims and other types of contingency fee cases. Randy Kennedy, *Groundbreaking Law Firm Shifts Focus to Personal-Injury Cases*, N.Y. Times, May 12, 1995, at A29; *see also* Maurice Rosenberg et al., *Elements of Civil Procedure* 64-65 (4th ed. 1985) ("[Contingency fees are] likely to be acceptable to a lawyer only when there appears to be a reasonably good prospect of recovery."); Wolfram, *supra* note 80, at 528 n.19 ("[E]xperienced lawyers can make a prediction about the success of a representation and can refuse to accept cases that are too risky or settle them quickly at any available figure and thus avoid risking much lawyer capital.").

113. *See Boccardo v. United States*, 12 Cl. Ct. 184, 185 (1987), *rev'd on other grounds sub nom. Boccardo v. Commissioner*, 56 F.3d 1016 (9th Cir. 1995).

114. *See Brickman, Lawyer's Rates of Return*, *supra* note 75, at 1773.

115. This is so despite the recent decline in plaintiffs' success rates. *See supra* note 103 and accompanying text.

doubled.¹¹⁶ At the same time, the average judgment, adjusted for inflation, has risen five-fold.¹¹⁷ Despite the resulting dramatic decrease in the risk of nonrecovery, the standard contingent fee has actually increased.¹¹⁸ The standard contingent fee today yields five to eight

116. See Brickman, *Without Contingencies*, *supra* note 30, at 89. While it is conceivable that the plaintiffs' increased trial success is due to plaintiff lawyers taking less risky cases to trial, that is implausible in light of expansion of the scope of tort liability in that time period. Moreover, since most claims are settled without litigation and most filed claims are settled without trial, the more significant issue is what has been the impact of greater success at trial on settlements. See Sean F. Mooney, 'Facts' Don't Speak for Themselves in Tort Reform Battle, Nat'l Underwriter, Feb. 27, 1995, at 47 (stating that lawsuits are filed in only one-third of liability claims, and only 2% of liability claims are resolved by verdict); Jeffrey O'Connell, *The Lawsuit Lottery* 84 (1979) [hereinafter O'Connell, *Lawsuit Lottery*] (discussing the outcome of personal injury cases at jury trials).

Some indication of this impact may be gleaned from the discussion of commercial general liability insurance payments. A recent study revealed that in inflation-adjusted dollars, paid claims tripled between 1978 and 1990, at a rate well in excess of the average annual rate of inflation; between 1978 and 1985, they increased at an average annual rate of 21.1%, and between 1986 and 1990, they increased at an annual rate of 7.8%. Sean F. Mooney, *Crisis and Recovery: A Review of Business Liability Insurance in the 1980's* 1 (1992).

The impact of greater trial success on settlements is also reflected in decisions on mass consolidation. See *In re Repetitive Stress Injury Litig.*, Nos. 92-7732, 92-7962, 92-9006, 92-9014, 92-9016, 92-9018, 1993 U.S. App. LEXIS 32085, at *9-10 (2d Cir. 1993) ("Defendants assert that consolidation unnecessarily increases their expenses by forcing them to participate in discovery and other proceedings irrelevant to their particular actions. These costs, they say, will force them to settle what they regard as baseless claims."); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 *Cardozo L. Rev.* 1819, 1873-81 (1992) (arguing that the actual purpose of mass consolidation increasingly is to compel defendants to enter settlements on favorable terms with hundreds and thousands of unimpaired claimants as a way of clearing courts' dockets).

The success rate for medical malpractice litigation is approximately 30% to 33% (versus the 50% rate that is common for most tort litigation). See Randall R. Bobbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 *Law & Contemp. Probs.* 5, 22 (Winter/Spring 1991) (stating that the win rate for medical malpractice trials was about 33%, which is substantially lower than those for automobile cases (64%), suits against the government (48%), and products liability cases (44%)); see also Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 *Cornell L. Rev.* 1124, 1137 (1992) (noting 30% win rate for medical malpractice cases in jury trials); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is Compensation Fair?*, 24 *Law & Soc'y Rev.* 997, 1007 (1990) (stating that a Florida sample showed a success rate of 22% and a Kansas City sample showed a success rate of 34%).

117. Brickman, *Without Contingencies*, *supra* note 30, at 100 n.281.

118. See O'Connell, *Lawsuit Lottery*, *supra* note 116, at 142 (quoting and citing sources stating that 50% contingent fees are common, including a former local bar president and prominent personal injury lawyer stating that "I agree that there has been an increase in the percentage of contingent fees"); see also *Mississippi State Bar v. Blackmon*, 600 So. 2d 166, 176 (Miss. 1992) (Banks, J., dissenting) (judicially noting "a once prevailing standard contract of one-third, if the claim is settled without suit, forty percent where suit is filed and fifty percent where the case actually goes to trial . . . more typically stated now as forty percent through trial and fifty percent, if an appeal is taken"); Brickman et al., *Rethinking Contingency Fees*, *supra* note 60, at 50 n.5 (1994). The standard rate has also increased because lawyers increasingly apply

times more contingent-fee income, in inflation-adjusted dollars, than it did twenty-five years ago.¹¹⁹ "This enormous increase in contingent-fee income has paralleled the enormous expansion in the scope of liability imposed on personal injury defendants."¹²⁰

The receipt of windfall fees, which cannot be gainsaid, is often justified with the argument that the fees subsidize other contingency fee litigation and thus enable more litigants to gain representation.¹²¹ The argument fails for two reasons. First, even if the rob-Peter, pay-Paul rationale¹²² was a valid depiction of a lawyer's practices, it is inconsistent with a lawyer's fiduciary and ethical obligation to deal fairly with each client and charge each a reasonable and not excessive fee.¹²³ Robbing Peter is no more justifiable than a lawyer overstating the number of hours worked in a bill for services in order to generate funds to compensate the lawyer for representing an impecunious client.

Second, while taking from Peter to pay Paul always meets with the approval of Paul,¹²⁴ it is instructive to consider, in the contingency fee context, the true identities of Peter and Paul. Peter is the client paying a windfall fee to the lawyer in a case without meaningful risk. Paul, at first blush, is a subsequent client who gains representation at the expense of Peter. It is the attorney, however, who is the repeat beneficiary of increased contingency fee litigation. When Paul is unmasked, he is properly identified as the attorney who not only charged Peter a windfall fee but, whenever possible, subsequent clients as well.

their contingent fee percentages to the gross award thereby shifting litigation costs entirely to their clients. *See id.* at 50 n.4; O'Connell, *Lawsuit Lottery*, *supra* note 116, at 142 (quoting an attorney who stated that "[a] 50% fee will always net the client less than half the total recovery mainly because the lawyer takes his expenses out first," and quoting from a report of an ambulance-chasing investigation in Philadelphia that "in many cases 'the attorneys managed to get more out of the settlement than the clients'").

119. Brickman, *Without Contingencies*, *supra* note 30, at 89-90, 100-01.

120. Brickman, *Lawyers' Rates of Return*, *supra* note 75, at 1773.

121. The Committee implicitly adopted the cross-subsidy justification when it stated: "The contingent fee system essentially shifts the risk of litigation or other legal endeavor from a risk averse client to the lawyer who may be more risk neutral because of his ability to recoup his losses through his handling of other legal matters on a contingent basis." Formal Op. 94-389, *supra* note 1.

122. This rationale is simply the tactical idea to charge some clients excessive fees in order to "finance the claims of hypothetical, future clients whose claims bear greater risks of nonpayment." *See* Brickman et al., *Rethinking Contingency Fees*, *supra* note 60, at 23; *see also* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1, 36 n.133 (1993) (criticizing approval of the overcompensation argument in a once widely-cited book on contingency fees); Horowitz, *supra* note 8, at 182 (discussing the ethical breach involved in the attorney practice of cross-subsidization).

123. Model Code, *supra* note 1, DR 2-106(A); Model Rule, *supra* note 1, Rule 1.5(a).

124. *See Thoughts on the Business of Life*, *Forbes*, Apr. 23, 1984, at 176, 176 (quoting George Bernard Shaw).

There is simply no empirical evidence to support the proposition that lawyers use their windfall fees to subsidize other clients. To the contrary, there is overwhelming evidence that contingency fee lawyers only accept cases in which there is at least a good prospect for recovery.¹²⁵ Indeed, contingency fee lawyers often defend their role in the litigation system. In response to counter arguments that they bring too many frivolous lawsuits, contingency fee lawyers claim that they have a financial incentive not to bring frivolous suits.¹²⁶ They are correct. Contingency fee lawyers generally do not accept high-risk cases where the likelihood of prevailing is small, i.e., frivolous cases. Instead, they use careful case-selection processes to screen out high-risk cases and continue such rigorous screening procedures even after case selection is made, adding to the high probability of overall recovery.¹²⁷ The cross-subsidization argument thus fails as a matter of both ethics and empirical validity.

VIII. THE RISK THAT THE CLIENT WILL REFUSE A SETTLEMENT OFFER

One of the ubiquitous risks identified by the Committee as justifying the charging of contingency fees in all tort cases is that the client will reject a settlement offer acceptable to the attorney and instead force the attorney to litigate the case.¹²⁸ If in fact the attorney accepted the case believing that an adequate settlement would be proffered, thereby eliminating the need to go to trial, a belief that ethical rules would have required the attorney to disclose in the course of fee negotiations with his client,¹²⁹ then client rejection of such an offer does indeed expose the attorney to an increased risk. The Committee recognizes this as a risk but wrongly suggests that the risk justifies a substantial risk premium.¹³⁰ How often does a client reject a settlement offer that the attorney wants the client to accept? The Committee's Opinion implicitly assumed that it is a common occurrence. As proof of the empirical validity of this proposition, the Committee cited the Model Rules provision that all major decisions, including the acceptance or rejection of settlement offers, are solely those of the cli-

125. *See supra* text accompanying notes 111-13.

126. Consider, for example, the following remark of Todd Twyman, a personal injury lawyer from Charleston: "[E]ven client-starved attorneys do not want to waste their time and money on frivolous cases they will not win. With contingency agreements, the lawyer receives a portion of the money collected for the client, so there is a built-in component which serves to protect against lawyers filing frivolous lawsuits." Todd A. Twyman, 'We All Lose'—Courtroom's Equalizer Under Attack Again, *Charleston Gazette*, Oct. 23, 1995, at P5A.

127. *See supra* text accompanying notes 111-13.

128. Formal Op. 94-389, *supra* note 1.

129. *See* Brickman, *Without Contingencies*, *supra* note 30, at 49-70.

130. *Id.*

ent.¹³¹ "It is [therefore] the lawyer who is bound by the client's decision, not the other way around."¹³² But simply stating the ethics rule as if it were self-effectuating does not validate the proposition that the client controls the settlement process any more than citing the rule that lawyer fees may not be excessive or unreasonable means that actual contingency fees are reasonable. It may be that the Committee was simply uninformed about the nature of contingency fee practice.¹³³

As a matter of reality, it is the attorney who controls the settlement process—not the client.¹³⁴ In 1989, the RAND Corporation's Institute for Civil Justice conducted an empirical study of routine litigation to define the "legal reality" governing lawyer-client relations and litigant control.¹³⁵ The results of the study "ha[ve] tended to disprove the myth, implicit in traditional tort approaches, that individual litigants exercise control over their own cases and that intimate contact and consultation between lawyers and clients forces lawyers to respond faithfully to their clients' wishes."¹³⁶ Fifty-six percent of the polled litigants felt that they had little or not much control over how their cases were handled.¹³⁷

This client perspective is substantiated by both logic and reality. The contingency fee lawyer has a substantial financial interest in the claim; unlike an attorney working for a flat rate, the contingency fee

131. Model Rules, *supra* note 1, Rule 1.2.

132. Formal Op. 94-389, *supra* note 1.

133. There is evidence for this in a contemporaneous work by the principal author of Formal Opinion 94-389, Lawrence Fox. See Lawrence J. Fox, *Legal Tender: A Lawyer's Guide to Handling Professional Dilemmas* (1995). In *Legal Tender*, Mr. Fox continues his war on the application of ethical constraints to contingency fees. *Id.* at 239-51. He gives an example of a lawyer beset by a client rejecting an early and serendipitous settlement offer and thereafter having to invest an additional \$30,000 in outlays to take the case to trial, all the while watching his projected hourly rate of return plummet and his risk increase. *Id.* But unbeknownst to Mr. Fox, contingency fee lawyers do not obligate themselves to advance expert witness fees and other costs. When they do advance such expenses, it is because they expect to make a substantial profit on their investment—not because they are obligated to advance such expenses. Mr. Fox's hapless lawyer need only have informed his client that the client would have to come up with the \$30,000 to induce the required client consent.

134. See Frederick B. MacKinnon, *Contingent Fees for Legal Services* 196 (1964) ("Although theoretically the client has the control over such decisions, as a practical matter it is usually handled by the attorney.").

135. Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 92-97.

136. *Id.* According to the RAND study, it is more often the lawyer rather than the litigant who elects to file suit rather than settle without filing: 38% of litigants reported that it was solely or mainly the litigant's decision, compared with 52% who reported that it was solely or mainly the lawyer's decision. *Id.* at 94.

137. *Id.* at 95-97; see also Herbert M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation* 60-67 (1990) (analyzing empirical data from a survey of 1,382 lawyers on their perspective of the distribution of control in the lawyer-client relationship).

lawyer only recovers if the outcome favors his client.¹³⁸ Thus, the issue of control assumes that greater significance in a contingency fee situation.¹³⁹ To be sure, the traditional notion of the lawyer-client relationship assumes the lawyer acts as the agent of the client-principal.¹⁴⁰ But in reality, and in particular when the attorney has a substantial financial stake in the claim, this traditional perspective is anachronistic because the attorney assumes the role of the principal.¹⁴¹

The lawyer is able to gain control over a case, some postulate, by employing manipulative tactics during the negotiation of the lawyer-client relationship. Based on an empirical study, Douglas Rosenthal concluded that:

When faced with an economic interest that competes with the client's, most attorneys employ the device of preparing the client to accept less than he anticipates and persuading him that it is in his best interest to do so—"cooling the client out." . . . In a few instances, cooling out the client is a breach of legal ethics. One specific limitation on a lawyer . . . is the principle that a case may not be settled without the client's informed consent. . . . Nevertheless, a few attorneys have conceded that they regularly make unethical misrepresentations to discourage a client's inclination to feel that his lawyer didn't get enough money for him.¹⁴²

138. See MacKinnon, *supra* note 134, at 196.

139. A contingency fee lawyer arguing against California Proposition 202, which advocates contingency fee limits when early offers are made, see Bernstein, *supra* note 31, at A16, stated: "[M]y clients—and most clients—are ultimately going to do what I (or their own lawyers) recommend. So the client will choose perspective is a little deceiving. It's usually the lawyer choosing for the client . . ." Richard Zitrin, LEXIS Counsel Connect (Feb. 12, 1996, at 15:45:35) (on file with the *Fordham Law Review*) (responding to Triple Threat Discussion; thread begun by Stephen Gillers).

140. Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189, 213-14 (1987).

141. "The lawyer's financial interest [sometimes] lies in quick settlement. . . . The client's financial interest lies in going to trial. . . . A lawyer who literally made his client's interests his own . . . would quickly be out of business." Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 99 (1974) [hereinafter Rosenthal, *Lawyer and Client*]. In a similar vein, the lawyer-client relationship is sometimes viewed as a partnership, again, with the lawyer maintaining the ultimate control. "It would seem, in spite of the general protestations of courts to the contrary, that there is a joint ownership of the claim, with the lawyer acting as managing partner." MacKinnon, *supra* note 134, at 196. MacKinnon adds that in some cases, not only is the client not in control, but she or he is also uninformed as to the status of the case: "Occasionally, the client may not know of the exact terms of the settlement, being given a share of the recovery after the lawyer has completed the settlement and deducted his fees, hospital liens, and costs." *Id.*

142. Rosenthal, *Lawyer and Client*, *supra* note 141, at 110-11. In fact, one attorney admitted that although it is unethical not to report accurately settlement negotiations to the client, no lawyer follows this. Lawyers understate the amount of the proposed settlement to the client so that when the client finally learns of the correct amount, he is satisfied. "If it is necessary to lie and cheat him to get him to accept what's good for him, you do it." *Id.* at 111.

Another view asserts that lawyers and clients do not negotiate their relationship at all, but rather engage in a power struggle which the lawyer invariably wins.¹⁴³ More specifically, the lawyer engages her clients in "law talk" which consists of conversations "about the legal system, legal process, rules, hearings, trials, judges, other lawyers and the other lawyer in the case."¹⁴⁴ This tactic plays on the uneven distribution of power between the attorney and the client, and enables the lawyer to "persuade [her] client to adopt a particular definition of reality."¹⁴⁵

Only the most basic understanding of the lawyer-client relationship in the context of tort claims is needed to comprehend how lawyers "persuade" their clients to accept settlement offers deemed desirable by the lawyer. By simply indicating doubts that a better offer will be forthcoming and that the risk of loss at trial is greater than initially thought, the lawyer puts enormous pressure on the client since the client is wholly dependent on the lawyer's efforts. By making his own position clear even as he states that acceptance of the offer is up to the client, the lawyer undermines the client's confidence in the intensity of the lawyer's future efforts. Refusing to advance expert witness fees and instead requiring the client to pay the fees when contracted for is another weapon in the lawyer's arsenal.¹⁴⁶ In addition to these subtle but effective tactics, lawyers have used blunt force to coerce clients to accept settlements.¹⁴⁷

143. "[A] review of the empirical literature on the lawyer-client relationship hardly suggests that lawyers and clients negotiate relationships The literature portrays professional practice as dominated by the lawyer or the client, depending on who has superior status or resources" William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 *Cornell L. Rev.* 1447, 1449 (1992) (emphasis added).

144. *Id.* at 1463.

145. *Id.* at 1462. The prevailing view of the lawyer-client relationship is one of the lawyer, the professional, as dominant, and the client, the layman, as passive and relatively uninvolved. *Id.* at 1451.

146. *See supra* note 133.

147. In a malpractice case now before the Texas courts, there is compelling evidence that some of the leading tort firms in Texas, representing workers injured in a plant explosion, coerced their clients into accepting settlements. To present the terms of the settlement, the attorneys scheduled meetings with scores of clients, at 15 and 20 minute intervals, at which they presented the amount that they had allocated to that client and demanded immediate acceptance. In many instances, this was the first and only time that the client had met with the lawyer. In other instances, a paralegal was the only contact with the client and apparently did most of the computations. Clients who did not wish to accept the settlement amounts allotted to them were told that their lawyers had agreed with the defendant that as part of the settlement, the lawyers would not represent anyone who rejected the settlement and wished to proceed to suit. Furthermore, clients were told that if they did reject the settlement and retain other counsel, they would have to pay their original lawyers one third of any recovery plus whatever amount they agreed to pay to new counsel. Reluctant clients were further "convinced" by the presiding judge who had formerly been a partner of the lead plaintiffs' lawyer, was receiving payments from that lawyer while she was presiding in this matter, and was thereafter elevated to a higher court due primarily to the

A client's right to refuse to accept a settlement offer and force the attorney to go to trial when he does not wish to do so is a theoretical risk which does not rise to a level of significance in the totality of contingency fee practice;¹⁴⁸ so too is the risk that the client will want to accept a settlement offer which the attorney wishes to reject. Interestingly, the Committee did not invoke this theoretical risk as well in support of using standard contingency fees in all tort representations. This latter risk would have focused too much attention on lawyers' self-interest. The Committee has not made the case that either risk is remotely commensurate with the rewards obtained by charging standard contingency fees. In further derogation of the Committee's argument is its failure to note in its discussion of risk that lawyers often build a specific risk premium into their contingency fees to compensate themselves for the risk that the client may refuse to accept a settlement offer.¹⁴⁹ In many cases, contingency fee agreements provide for percentages that increase as the time and effort spent on the case also increase. A fairly typical fee structure is described as follows:

We might judicially note a once prevailing standard contract of one-third, if the claim is settled without suit, forty percent where suit is filed and fifty percent where the case actually goes to trial. It is more typically stated now as forty percent through trial and fifty percent, if an appeal is taken.¹⁵⁰

The Committee argues not only that the risk that the client will refuse a settlement offer justifies charging a standard and substantial contingency fee on the whole recovery if the early settlement offer is re-

efforts of one of the plaintiffs' lawyers. Despite the clear violation of numerous ethics rules, neither the Texas disciplinary system nor the judicial system has found fault with the practices used. While the author ascertained a large part of the foregoing information in the course of personal investigation, see also Passell, *Challenge*, *supra* note 75, at B6 (describing the lawsuit and the various ethical violations).

148. For an example of a case where the client refused to accept a settlement offer despite being urged to do so by the lawyer, see *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658 (5th Cir. 1996).

149. The Committee does permit charging higher contingency fee percentages as stages in the claims process advance. Formal Op. 94-389, *supra* note 1. It never perceives, however, that charging higher risk premiums also compensates the lawyer for the risk that the client will refuse a settlement offer and force the attorney to proceed to a more advanced stage such as initiating discovery or going to trial. In some cases, the graduated fee structure is intended to dissuade the client from refusing to accept a settlement offer which the lawyer believes ought to be accepted. See Letter from Thomas M. Gibson to Steven Krane, Ethics Comm., Ass'n of the Bar of New York City 1 (Dec. 1, 1995) (seeking ethical guidance regarding a proposed contingency fee in a patent infringement case) (on file with the *Fordham Law Review*). In one situation, the proposed fee structure was "25% of the recovery resulting from a settlement before the pre-trial stipulation is filed" with "50% of the recovery" taken "[a]fter the pre-trial stipulation is filed." *Id.* The attorney stated: "The reason for the conditions is that I do not want my client to demand that I try the case if settlement is more sensible." *Id.*

150. *Mississippi State Bar v. Blackmon*, 600 So. 2d 166, 176 (Miss. 1992) (Banks, J., dissenting).

jected, but also that the risk that the client will refuse a settlement offer—already typically compensated for by the increasing percentage fee—also justifies charging a windfall fee in the case where an early settlement offer is made and accepted.¹⁵¹ Even if the Committee's naivete about who controls the settlement process can be ignored, its reasoning cannot withstand analysis. If the attorney can charge a higher percentage fee as compensation for the risk that the case will not settle early, and also charge a substantial and standard risk premium to compensate for the risk that the client will reject an early offer, then the attorney can also charge a standard and substantial risk premium to compensate for the risk that the client will want to accept an early settlement offer against the lawyer's wishes. With every conceivable twist and turn of possible client action constituting additional grounds for charging a standard and substantial risk premium in the absence of assumption of meaningful risk, the Committee has reduced the ethical prohibition against charging unreasonable and clearly excessive fees to an evanescent chimera.

IX. THE RISK THAT THE CLIENT WILL TERMINATE THE LAWYER'S REPRESENTATION, THEREBY DEPRIVING THE LAWYER OF HER ANTICIPATED REWARD

From an assertion of risk emanating from the right to reject settlement offers—which is at best unrealistic—the Committee moves to an assertion of risk that is just plain wrong as a matter of law. The latter assertion posits that, because the client has the right to terminate the lawyer at any time,¹⁵² a contingency fee lawyer can be deprived of the benefit of the bargain, i.e., of the anticipated reward of a standard percentage of any recovery.¹⁵³ This assertion fails for three reasons. First, as a matter of law, a client who terminates a contingency fee lawyer "on the courthouse steps" after an acceptable settlement offer has been received but before it has been accepted must nonetheless pay the lawyer the agreed-upon percentage.¹⁵⁴ Second, as a general

151. At first blush, it appears that the Committee distinguished—for ethical purposes—the charging of standard contingency fees in cases where early settlement offers were made and accepted from those where the offer was rejected. Thus, Opinion 94-389 provides that "to pass ethical muster a contingent fee agreement [need not] . . . limit the percentage recovery on the amount originally offered . . . if the client rejects the early offer." Formal Op. 94-389, *supra* note 1. This suggests that if the early offer is accepted, then a standard contingency fee would not pass ethical muster. In a turn of phrase that may properly be deemed "slippery," however, the Committee then went on to reject any limitation on the use of standard contingency fees where the early offer was accepted. Thus, Opinion 94-389 adds that there is no basis in the ethics codes for "limiting contingent fees on the amount of an early offer." *Id.*

152. See Model Rules, *supra* note 1, Rule 1.16(a)(3); Model Code, *supra* note 1, DR 2-110(B)(4).

153. Formal Op. 94-389, *supra* note 1.

154. See *Kaushiva v. Hutter*, 454 A.2d 1373 (D.C.), *cert. denied*, 464 U.S. 820 (1983).

rule, a discharged contingency fee lawyer is entitled to collect in quantum meruit from the former client.¹⁵⁵ Third, in a number of jurisdictions, the discharged lawyer can collect in quantum meruit even if the client hires a second lawyer and ends up with a zero recovery.¹⁵⁶ In such a case, the client must pay the fee out-of-pocket. Because in virtually all jurisdictions a terminated contingency fee lawyer is entitled to compensation, the risk of such termination—fully compensated for by quantum meruit—does not appear to justify a standard contingency fee charge as additional compensation.¹⁵⁷

155. See Lester Brickman, *Setting the Fee when the Client Discharges a Contingent Fee Attorney*, 41 Emory L.J. 367, 380 (1992).

156. *Id.* at 386. Thus, in jurisdictions such as Illinois, Minnesota, New York, Washington, Hawaii, and Massachusetts, a lawyer who discovers—after agreeing to represent the client—that the case is a loser can nonetheless obtain a fee by inducing the client to terminate the lawyer. *Id.* at 382-83. To be sure, if the termination is for cause, then the lawyer is not entitled to a fee. *Id.* at 393. What constitutes “cause,” however, is an elusive concept. Lawyers can induce discharge by being unavailable to their clients and by otherwise causing the client to lose confidence in the lawyer. It is very difficult in such circumstances for clients to prove that the discharge was “for cause.” Clients generally are unaware of the need for and the means of creating a paper trail to document grounds for discharge. *Id.* at 395-97. In such circumstances, lawyers can shift the risk of loss, which they initially share, entirely to the client.

157. Counting the risk of termination as a basis for justifying a standard contingency fee also runs afoul of a recent New York Court of Appeals decision, *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994). *Cooperman* reinvigorated the client discharge rule, first articulated in *Martin v. Camp*, 114 N.E. 46 (N.Y.), *reh'g denied*, 114 N.E. 1072 (N.Y. 1916), *modified*, 115 N.E. 1044 (N.Y. 1917), that declares it a first principle of fiduciary law that a client can terminate a lawyer for any reason without suffering any penalty. Lawyers have circumvented the client discharge rule by collecting fees in advance for services to be performed and denominating them as nonrefundable. If a client terminated the lawyer prior to completion of the task, then the unearned part of the fee would be forfeited. That would, however, effectively penalize the client for exercising his right to terminate the lawyer or at least chill the discharge right. Accordingly, the *Cooperman* court declared that nonrefundable retainers were unethical and illegal because they penalized a client's right to discharge an attorney. See *Cooperman*, 633 N.E.2d at 1073; Brickman & Cunningham, *A Response*, *supra* note 30, at 14.

When the Committee stated that contingency fees are permissible in all instances because “[t]he lawyer is also being compensated for the risk she assumes that the client will fire the lawyer,” Formal Op. 94-389, *supra* note 1, it adopted a position in opposition to the policy basis for *Cooperman*. The Committee's position is that a component of the contingent fee, that is, some part of the 33% to 40% standard contingency fee, reflects the risk of termination and is therefore justified by that risk. To compensate for the risk of termination, the lawyer adds a component to the fee. But that is precisely what *Cooperman* forbids. A lawyer charging a standard contingency fee which includes a fee component to compensate the lawyer for the loss of expectancy upon termination is penalizing a client for exercising the right to discharge the lawyer. Moreover, the penalty being exacted is one which is applied to all clients, not just those exercising the right to discharge the attorney. This practice, which the Committee acknowledges and approves of, massively increases the penalty exacted against tort claimants for possessing a right of discharge. Note that it is the ABA's analysis—not lawyer practice—that creates the *Cooperman* problem. It is the Committee in its desperate quest for risks to justify charging standard contingency fees that asserts that lawyers effectively add a charge to their contingency fees to compen-

X. MAINTAINING THE STATUS QUO WHILE PAYING LIP SERVICE TO ETHICAL CONSTRAINTS

Despite compelling evidence that lawyers are charging standard and substantial contingency fees in cases without meaningful risk and in violation of ethical mandates, the Committee embraced the status quo.¹⁵⁸ It stated that "even in cases where there is no risk of non-recovery, and the lawyer and client are certain that liability is clear and will be conceded," it is reasonable to charge standard contingency fees.¹⁵⁹ The Committee, however, did admonish lawyers not to charge contingency fees in excess of reasonable fees, but inexplicably did not identify a single example of a clearly unreasonable contingency fee.¹⁶⁰ The feebleness of the "reasonable fee" standard as a restraint on lawyer fees renders this failure all the more telling. Indeed, "reasonable fees" are such an enervated standard that plaintiff lawyers rally beneath its banner, fully confident that it offers not the slightest impediment to their actual fee practices.¹⁶¹

In addition to requiring that contingency fees be reasonable and thus condoning and justifying the current practice of charging standard contingency fees in cases with high reward and little or no meaningful risk, the Committee acknowledged one additional duty of the lawyer: to discuss "the nature (and details) of the [contingency fee] compensation arrangement . . . [with the] client before any final agreement is reached."¹⁶² As stated by the Committee:

The extent of the discussion, of course, will depend on whether it is the lawyer or the client who initiated the idea of proceeding with

sate themselves for the risk of termination. There is no evidence for this assertion and it is inconsistent with the historical record regarding contingency fee charges.

158. I have described the Committee's position on contingency fees as effectively a declaration that contingency fee clients are sheep to be shorn. *See* Hearings on Contingency Fee Abuses Before the Senate Judiciary Comm., 104th Cong., 1st Sess. (1995) (answers of Lester Brickman to written questions posed by Senators Orrin G. Hatch and Strom Thurmond) (on file with the *Fordham Law Review*).

159. Formal Op. 94-389, *supra* note 1.

160. As noted earlier, *see supra* text accompanying notes 73-74, the best the Committee could muster was to acknowledge that "there may . . . be special situations" where charging a standard and substantial contingency fee in a case without risk and where the "lawyer was reasonably confident that as soon as the case was filed the defendant would offer an amount that the client would accept," Formal Op. 94-389, *supra* note 1, might not be appropriate.

161. Thus, the plaintiff bar is in total agreement with the ABA that the appropriately sufficient ethical response to contingency fee abuses is to prosecute those who charge unreasonable and excessive fees. In an initiative sponsored by California trial lawyers titled "Frivolous Lawsuit Limitation Act" and certified to appear on the November 1996 California ballot, the trial lawyers decry the charging of excessive fees and provide for "Relief From Excessive Attorneys' Fees" in § 5 of the Act. After reading the initiative, few can doubt the assertion that "limiting fees" to "reasonable" and "not excessive fees" is simply a subterfuge to confuse the public into thinking that meaningful ethical constraints are being called for when in fact it is the status quo that is being maintained. *See* illustration, *supra* page 247.

162. Formal Op. 94-389, *supra* note 1.

the contingent fee arrangement, the lawyer's prior dealings with the client (including whether there has been any prior contingent fee arrangement), and the experience and sophistication of the client with respect to litigation and other legal matters. Among the factors that should be considered and discussed are the following:

- a. The likelihood of success;
- b. The likely amount of recovery or savings, if the case is successful;
- c. The possibility of an award of exemplary or multiple damages and how that will affect the fee;
- d. The attitude and prior practices of the other side with respect to settlement;
- e. The likelihood of, or any anticipated difficulties in, collecting any judgment;
- f. The availability of alternative dispute resolution as a means of achieving an earlier conclusion to the matter;
- g. The amount of time that is likely to be invested by the lawyer;
- h. The likely amount of the fee if the matter is handled on a non-contingent basis;
- i. The client's ability and willingness to pay a non-contingent fee;
- j. The percentage of any recovery that the lawyer would receive as a contingent fee and whether that percentage will be fixed or on a sliding scale;
- k. Whether the lawyer's fees would be recoverable by the client by reason of statute or common law rule;
- l. Whether the jurisdiction in which the claim will be pursued has any rules or guidelines for contingent fees; and
- m. How expenses of the litigation are to be handled.¹⁶³

Because it indicated in factors (a) and (g) that risk is a detail that the lawyer is obligated to discuss with the client *before* coming to a fee agreement, the Committee seemingly sought at least a partial alteration of the status quo. As indicated earlier, contingency fee lawyers generally do not disclose to clients that meaningful risk is absent and substantial rewards are highly probable; clients generally have no independent basis for assessing risk,¹⁶⁴ and are rarely in a position to bargain over fees.¹⁶⁵ Moreover, any attempt at bargaining is easily squelched by the valid but intentionally misleading assertion that contingency fees are standard throughout the community and that because all lawyers charge the same percentage, then the fee must necessarily be fair.¹⁶⁶

163. *Id.* (citation omitted).

164. Bok, *supra* note 29, at 140.

165. *See infra* note 170.

166. *See* Lester Brickman, *A Massachusetts Debacle: Gagnon v. Shoblum*, 12 *Carozo L. Rev.* 1417, 1429-30 nn.72-73 (1991).

Upon closer analysis, however, the Committee's admonition amounts to mere lip service to the concept of the client's informed consent to the fee structure.¹⁶⁷ Opinion 94-389 is not intended to and will not change the current practice of contingency fee lawyers charging windfall fees and taking advantage of clients' lack of knowledge of risk.

The key to understanding Opinion 94-389 lies in focusing on how the bar will enforce the lawyer's obligation to consider and discuss factors (a) through (m) before entering into a fee agreement. It is the Committee's position that a lawyer—who under the ethical code is “in a better position to evaluate a cause of action”¹⁶⁸—will have fulfilled her ethical obligation by “explain[ing] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹⁶⁹ This explanation would include information about risk, as it relates to the fee structure, through *ex parte* dialogue with a generally unsophisticated client often rendered vulnerable and dependent by the traumatic effects of an injury or illness.¹⁷⁰ How would a failure to fulfill this obligation be detected? There is no paper trail to which to point. Moreover, how will clients know that they have a right to the information required to be disclosed? If clients do not know of the right, how will they know that they have been deprived of this information?

Even if clients were to learn somehow that their attorney had mulcted them by charging a standard contingency fee in a case devoid both of risk and of any communication of this absence to the client, there is little that clients could do. A complaint to a disciplinary agency would have virtually no chance of succeeding; most disciplinary agencies do not accept jurisdiction over claims of excessive fees¹⁷¹ and instead relegate them to fee arbitration, where violations of ethics rules may be disregarded.¹⁷² Furthermore, most disciplinary agencies do not regard the failure to discuss most of the thirteen fac-

167. See Brickman, *Without Contingencies*, *supra* note 30, at 70-74 (developing the fiduciary concept of informed consent as it relates to the fee bargain).

168. Model Code, *supra* note 1, EC 5-7.

169. Model Rules, *supra* note 1, Rule 1.4(b).

170. See Burger *Urges Limits on Lawyer Fees in Personal Injury Cases*, Boston Globe, May 14, 1986, at 17 (noting that “[i]t is becoming more and more clear that in multiple disaster cases . . . , the transaction between an experienced lawyer and inexperienced lay survivors in negotiating a contract for professional services is not an arms-length transaction” and that “[m]any adults, injured persons or survivors of deceased persons, are no more capable of making a valid judgment on the appropriateness of the valid fee contract of 33 or 40 or 50 percent than a 12-year-old child” (quoting Warren E. Burger)).

171. See Rhode, *Institutionalizing Ethics*, *supra* note 11, at 714 (“Most bar disciplinary systems decline jurisdiction over fee-related disputes.”).

172. See Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 Utah L. Rev. 277, 277-78; see also Margaret Jacobs, *Often, Fee Arbitration Isn't Such a Panacea, Especially for Clients*, Wall St. J., Nov. 20, 1995, at B11 (stating that arbitration panels are likely to overlook ethical breaches).

tors listed in Opinion 94-389 with the client before entering into a contingency fee agreement as violative of ethics rules. Indeed, even when clients initiate complaints against contingency fee lawyers alleging fee abuses, these complaints virtually never result in disciplinary action against the lawyers.¹⁷³

173. See Lester Brickman, *Contingency Fee Abuses, Ethical Mandates and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. (forthcoming Dec. 1996). This conclusion is drawn from the empirical data set forth in the article and from analysis of both reported and unreported disciplinary cases. To elicit this data, bar counsel were surveyed and asked to respond to a hypothetical "aggrieved client" letter sent to a disciplinary board, setting forth at least a prima facie case that a contingency fee lawyer charging a standard contingency fee had grossly overcharged the client because the lawyer almost certainly knew at the outset that the case was devoid of risk, that insurance policy limits or amounts close thereto would almost certainly be tendered with little or no effort on the lawyer's part and that the effective hourly rate of return to the lawyer would be at least \$1000 an hour and possibly as much as \$2500 per hour. Less than 10% of the bar counsel surveyed even recognized that such an ethical violation may have occurred. *Id.*

An alternative to filing a disciplinary action would be suing the lawyer for breach of fiduciary obligation. This option is rarely resorted to because of the expense of hiring a second lawyer and the unlikelihood of finding a second lawyer who would accept the matter on contingency. In one such instance where suit was brought, the client prevailed. In *Richfield v. Heuser & Carr*, No. 92 CV 1797 (Colo. Dist. Ct. Jan. 13, 1994) (Order dated Jan. 13, 1994) (on file with the *Fordham Law Review*), a Colorado law firm was barred from recovering its contingent fee or the reasonable value of its services after a jury found that the attorney "did not disclose to the Plaintiff all of the facts of which . . . [they] knew or should have known would influence the Plaintiff . . . to sign the [contingent fee] agreement." *Id.* at 2.

The plaintiff was injured in an automobile accident and while in the hospital entered into a contingent fee agreement with the defendant which provided that the law firm would receive one-third of any recovery obtained. Plaintiff remained hospitalized for two weeks and incurred nearly \$12,000 in medical expenses. Shortly thereafter it was discovered that the responsible party's insurance policy coverage was limited to \$25,000. Before a lawsuit was filed against the insured and within four months of the accident, the insurance company agreed to pay plaintiff \$25,000. The attorney retained \$8333.33 as his one-third contingent fee. *Id.* at 1.

Plaintiff contended that this fee was excessive because the attorney had failed to disclose the following information to her prior to signing the contingent fee agreement: (1) settlement without trial was a probability and would require little effort or legal skill; (2) processing the claim and obtaining a recovery would be accomplished essentially by clerical staff; (3) the attorney would not know at the time of contacting whether a standard one-third contingency fee was fair or excessive, or whether some other fee arrangement would be preferable. See Complaint at 3, *id.* (on file with the *Fordham Law Review*)

The jury found that the attorney had an obligation to make such disclosures before entering the fee arrangement and because he breached that obligation, was not entitled to the fee for which he contracted. Based upon the attorney's testimony that he personally worked on the case "in the ballpark of 15 hours," the jury found that the reasonable value of the attorney's services was \$2250 (15 hours at \$150 per hour). *Id.* at 3 (Order dated Jan. 13, 1994). The judge found this testimony "incredible," stating, "[i]t is difficult to imagine how a lawyer could spend 15 hours on a case such as this." *Id.* Rather than adjust the quantum meruit award, the judge held that the attorney's breach of fiduciary duty was "serious" and "egregious," and therefore ordered the attorney to forfeit "all fees in connection with the case." *Id.* at 5.

The attorney for the client-plaintiff, Robert Dunlap of Colorado Springs, Colorado recently won a similar case on behalf of a contingency fee client by establishing that a

In sum, the Committee urges reliance on an unenforced and unenforceable admonition to counsel to be honest with their clients by candidly discussing fee risk under circumstances where candor could impose severe financial penalties on those same lawyers by depriving them of windfall fees and where the failure to be candid would be virtually undetectable. Thus, the Committee's statement of lawyers' obligations offers no protection for clients, no meaningful guidance to the bar, and, ironically, no establishment of a rule of law process to govern the conduct of a profession which purports to apply such a process to others. The Committee's statement simply protects the status quo.¹⁷⁴

The Committee's position may usefully be contrasted with the position urged in the Letter requesting ethical guidance. Recognizing that there is no current enforcement of the ethical obligation of lawyers to obtain the informed consent of clients to standard contingency fees, the drafters of the Letter urged the Committee to recognize an obligation of the lawyer—before any significant value-adding efforts are undertaken—to determine and so inform the client whether the party believed responsible for the injury is offering to settle the claim. A client negotiating a contingency fee agreement could receive no information more pertinent to the fee risk question. An early settlement offer indicates the absence of risk as to the amount of that offer. More importantly, it would preclude a lawyer from obtaining a windfall fee by charging a standard and substantial contingency fee as against that early offer—which the Committee apparently views as

one-third fee, amounting to \$33,333.33, was excessive and unreasonable. See Complaint at 3, *Eich v. Maceau*, P.C., 94 CV 2242 (Colo. Dist. Ct., Apr. 15, 1996) (detailing the amount of the fee) (on file with the *Fordham Law Review*). The client, injured in an automobile accident by an uninsured motorist, recovered the \$100,000 maximum allowed by her insured motorist policy three months after retaining the attorney. *Id.* at 2. The complaint alleged that the attorney failed to disclose to the client prior to agreeing on a fee that proof of the insurance company's liability "would probably require minimal, if any, legal skill and minimal effort." *Id.* In response to special verdict questions, the jury found that the attorney had charged an unreasonable fee, failed to "act with the utmost fairness," and failed to disclose "all material facts . . . which he knew or should have known and her legal rights relating to the transaction." Special Verdict at 3, 4, *id.* (on file with the *Fordham Law Review*).

174. The Committee's fidelity to the status quo may further be gleaned from an exchange between the author and Lawrence Fox, principal author of Formal Opinion 94-389, which took place during a debate over contingency fees at the 21st National Conference on Professional Responsibility, Plenary Session, 1995. In the course of his presentation, Mr. Fox contended that he saw no problem in current contingency practice and that any violations of ethics rules should be dealt with by resort to the disciplinary system. He then went on to acknowledge that the disciplinary system simply does not work to police fee abuses. There is some reflection of this position at page 3 of Opinion 94-389. See Formal Op. 94-389, *supra* note 1 (addressing "the possibility that . . . the profession's obligation to assure . . . [the] reasonableness [of contingency fees] is sometimes honored in its breach"). By rejecting any interpretation of the ethics rules that would create a self-enforcing mechanism for protecting clients against fee abuses, the Committee gave its imprimatur to preservation of the status quo.

precisely the infirmity of recognizing an ethical obligation to determine whether such an offer is forthcoming and so inform the client. The reason for the Committee's choice of the unenforceable requirement of *ex parte* dialogue and rejection of a simple, self-effectuating, self-enforcing requirement is clear: One perpetuates the status quo; the other purports to change it.

XI. HOW TO CONVEY MEANINGFUL INFORMATION TO THE CLIENT
TO OBTAIN INFORMED CONSENT TO THE FEE STRUCTURE:
A CASE STUDY

By refusing to impose an affirmative duty on the attorney to inform the client whether a settlement offer would be forthcoming at the outset of the representation, the Committee denied a client's correlative right to information critical to the client's determining the fairness of being charged a standard contingency fee. In rooting around for arguments to deny such a duty to inform the client, the Committee inadvertently conceded the essential truth of this proposition. This accidental concession appears in a footnote in support of the Committee's basic conclusion that "even in cases where there is no risk of non-recovery, and the lawyer and client are certain that liability is clear and will be conceded, a fee arrangement contingent on the amount recovered may nonetheless be reasonable."¹⁷⁵ The footnote states:

Evidence that, in such cases, free market forces may result in a substantially reduced contingent fee can be found in airline liability cases. In cases where airline insurers voluntarily sent out the "Alert letter" which makes an early settlement offer *and concedes all legal liability*, average contingent fee rates dropped to 17% and were often only charged on a portion of the recovery.¹⁷⁶

Airline liability cases indeed demonstrate that where free market forces apply, standard contingency fees are replaced by bargained-for fees. But airline liability cases prove far more than the Committee appears to have comprehended and stand in stark contrast to the Committee's rejection of any construction of the ethical codes that would impose a duty to convey the most meaningful fee information that a contingency fee client could have—an early offer of settlement.

The crash of a commercial airplane immediately puts the airline and its insurers on notice that claims will be made on behalf of injured and deceased passengers. Armed with this "notice" of impending claims, the airline's insurance company usually sends out a letter admitting liability, indicating that as soon as they obtain certain information they will make a settlement offer and urging the victim or the family

175. Formal Op. 94-389, *supra* note 1.

176. *Id.* (citing Lee S. Kreindler, *The Letter Should Not Be Sent*, *The Brief*, Nov. 1982, at 4, 38).

not to hire a lawyer until the offer is made.¹⁷⁷ Once the offer is made, the claimants are urged and generally do go to lawyers and bargain for reduced contingency fees that in some cases only apply to the value the lawyer is able to add to the insurance company's offer.¹⁷⁸ Plaintiff lawyers bitterly oppose this practice by the airlines' insurance companies. Thus, the dean of the airline litigation bar, Lee Kreindler, has strongly objected to the Alpert Letter,¹⁷⁹ but, in a moment of candor unusual in the contingency fee arena, admitted that the practice of receiving serious settlement offers before retaining counsel often leads to sharply reduced attorney fees, increased net recoveries for claimants, and more rapid settlements:

In one respect—plaintiff lawyers fees—the Alpert Approach *has benefited the public*. They have dropped from the 33.33 percent that prevails generally in the handling of negligence cases to little more than half that. In the major airlines cases, they currently average about 17.5 percent.

Moreover, *in some cases the plaintiff attorney's fee is based on the excess over what the defendant offers*. In a situation where the claimant has been offered \$800,000 he may be reluctant to retain a lawyer for litigation without something close to a guarantee that he will at least net \$800,000. This has led to a variety of fee arrangements.

The Alpert Approach has also *substantially reduced the fees of defense lawyers*. The negotiation and settlement role is largely exer-

177. This three-page, single-spaced letter is referred to as the "Alpert Letter" after its drafter and signatory, Robert L. Alpert, of United States Aviation Underwriters, Inc., an airline insurer. See Randal R. Craft, Jr., *The Letter Should Be Sent*, The Brief, Nov. 1982, at 4, 4; Kreindler, *supra* note 176, at 4. For further analysis of the relationship between the Alpert Letter and value-added contingency fees, see Brickman, *Without Contingencies*, *supra* note 30, at 109-10, and Horowitz, *supra* note 8, at 189-90.

178. In addition to airline litigation, value-added contingency fees are common in condemnation proceedings, tax certiorari, and some workers compensation cases. See *DeKalb Cty. v. Trustees, Decatur Lodge*, 243 S.E.2d 284 (Ga. Ct. App.), *rev'd on other grounds*, 251 S.E.2d 243 (Ga. 1978); *State Dep't of Transp. & Dev. v. Frabbiele*, 391 So. 2d 1364 (La. Ct. App. 1980); *Mulhern v. Roach*, 494 N.E.2d 1327 (Mass. 1986); *Milwaukee Rescue Mission, Inc. v. Redevelopment Auth.*, 468 N.W.2d 663 (Wis. 1991); see also *Comparing Attorney Fee Arrangements*, 5 Workers Compensation Research Inst., Research Brief 2 (Apr. 1989) (indicating that, in workers compensation proceedings, the value-added method has been adopted by statute in the following eight of the 25 states surveyed: Alabama, Florida, Illinois, Minnesota, New Jersey, Pennsylvania, Washington, and Wisconsin, and also indicating that most states that use the value-added method exclude from attorneys' fees any amounts that have been voluntarily paid or formally offered by the defendant before an attorney entered the case).

179. Kreindler, *supra* note 176, at 10 ("The effect of the . . . Alpert Letter . . . is to deter claimants from seeking the advice of lawyers experienced in aircrash cases and to poison their minds against the contingent fee.").

cised by the central claims office of an insurer, which imposes tight control over the process.¹⁸⁰

These generally positive effects—from society's point of view—depend upon a critical sequence of events. First, the allegedly responsible party must be notified of the claim before a lawyer can undertake substantial value-adding efforts. Effectively, the crash provides this notice. Second, the allegedly responsible party must decide to admit liability and seek settlement; this is undertaken in the form of the Alpert Letter. This provides claimants in airline litigation cases with the ability to bargain for contingency fees individualized to their personal risk equations because they have received settlement offers before meaningful attorney efforts to add value have been undertaken. Not surprisingly, the plaintiff bar vehemently opposes these practices of the airlines' insurance companies. As noted, the practices significantly reduce plaintiff lawyer fees. But as further noted, they also substantially reduce defense lawyer fees. Thus, it is also not surprising that the Committee, even while citing to airline litigation cases as support for its position, holds that as a matter of ethics, lawyers do not have a duty to attempt to provide allegedly responsible parties with early notice of claims to see if they will be forthcoming with settlement offers and thus provide tort claimants with the same information that is often provided to airline crash litigation claimants.¹⁸¹ Providing notice and thereby obtaining possible settlement information would similarly empower tort claimants to bargain for contingency fees based upon what a defendant has offered in settlement.¹⁸² Defendants would therefore have a financial motivation to make early settlement offers in cases where liability was likely¹⁸³ that would lead to a reduction in defense attorney fees¹⁸⁴—just as has been the case in airline litigation cases. Such a result, of course, would not be “socially desirable.”¹⁸⁵

180. *Id.* at 38 (emphasis added). Airline litigation fees today range from 10% to 20%, with many in the 10% to 12% range. For each crash, leading plaintiff lawyers establish a specific percentage which they offer to all claimants who retain them. If a claimant is referred to one of these attorneys, then the claimant will have an additional 10% to 20% tacked on to the bill by the referring lawyer.

181. Formal Op. 94-389, *supra* note 1.

182. As noted in note 178, *supra*, value-added contingency fees are also used in condemnation, tax certiorari, and some workers compensation matters. In these instances, lawyers charge contingency fees that apply to the excess over extant offers.

183. See Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 148-151 (4th ed. 1995); see also Brickman et al., Rethinking Contingency Fees, *supra* note 60, at 26 (discussing the co-authors' contingency fee proposal which would “establish[] a procedure designed to induce early, substantial offers by defendants”).

184. See Brickman et al., Rethinking Contingency Fees, *supra* note 60, at 26 (stating that making early settlement offers would enable defendants “to divert to injured claimants large sums of money which would otherwise be paid to both plaintiffs’ and defendants’ attorneys”).

185. See Armbrister, *supra* note 40 and accompanying text.

CONCLUSION

Formal Opinion 94-389 is a distressing display of ethical insensitivity to the current practice of routinely overcharging contingency fee clients through use of standard contingency fees in cases without meaningful risk, that is, in cases where liability is not in issue and where a substantial reward yielding an effective fee of thousands of dollars an hour is virtually assured. The Opinion reflects the mutual financial interests of the trial and defense bars in protecting windfall fees as a way of promoting litigation. Ironically, not even ATLA has gone as far as the Committee in declaring the legitimacy of standard contingency fees in virtually all settings. Had the Committee merely endorsed ATLA's stated position that contingency fee percentages should be "commensurate with the risk, cost, and effort required,"¹⁸⁶ it could have laid claim to at least some degree of ethical probity. Instead, the Committee allowed blatant self-interest to prevail over any self-imposed ethical regime. In Opinion 94-389, the epic battle between ethics and money played out. There can be no doubt about the outcome.

Money talked; ethics walked.

186. See American Trial Lawyers Association, *supra* note 8, at 4.

APPENDIX A*

February 10, 1994

Chair, Standing Committee
on Ethics and Professional
Responsibility
American Bar Association
541 North Fairbanks Court
14th Floor
Chicago, IL 60611

Attention: Ethics Counsel

To the Committee:

We seek guidance from the Committee on Ethics and Professional Responsibility [the Committee] of the American Bar Association [ABA], with regard to the ethical propriety of a set of practices which are routine if not universal in today's contingency fee system. We offer two questions for resolution by the Committee, directed at the practice of charging risk-based contingency fees in personal injury cases where defendants' liability is likely and/or where the risk is limited that the plaintiff will not recover a measure of claimed damages.

The Model Rules of Professional Conduct [Model Rules], the governing set of ethical standards, bar "unreasonable" fees.¹

* Appendix A is the Letter sent to the Standing Committee on Ethics and Professional Responsibility which elicited Formal Opinion 94-389. Although this Appendix was formatted for reprint, it was not edited by the *Fordham Law Review*.

1. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5(a) (1983) [hereinafter, MODEL RULES]. The prior governing standard, set forth in DR 2-106 of the Model Code of Professional Responsibility [hereinafter, MODEL CODE], barred "clearly excessive" fees. Although the DR 2-106 standard thus appeared highly permissive and in the interest of attorneys and at the expense of clients, it was actually defined in DR 2-106(B) to be the equivalent of a "reasonable" fee: ("When, after a review of the facts, a lawyer of ordinary prudence would be left with the definite and firm conviction that the fee is in excess of a reasonable fee.") See also, discussions of Ethical Considerations 5-7 and 2-20 *infra*. The Kutak Commission, which drafted the MODEL RULES, sought to eliminate any confusion on that score and to expressly *toughen* the MODEL CODE in order to "eliminate. . . the term 'clearly excessive' and therefore prohibit. . . unreasonable as well as patently unconscionable fees." See Report of the American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft: Model Rules of Professional Conduct (Robert Kutak, Chair) (1981) [hereinafter, Kutak Report]. We refer in this letter to appropriate portions of the MODEL CODE because it is cited in relevant judicial and ethics committee opinions and because, as noted, its provisions have been toughened by the MODEL RULES. Reference to the MODEL CODE by the Committee is of course sanctioned by Rule 1 of the Committee's Rules of Procedure. See also, Rule 11 of the Committee's Rules of Procedure. (Committee opinions citing the MODEL CODE or earlier ethical standards "continue in effect to the extent not inconsistent with [MODEL RULES] standards and not overruled or limited by later opinions.")

In making ethical determinations regarding the propriety of fees and fee arrangements, courts and ethics committees have directed that special scrutiny be accorded to contingency fee contracts.² They have done so, *inter alia*, in recognition of the fact that while such contracts are often indispensable in ensuring client access to counsel, they nonetheless pose, as one court typically put it, "a greater potential for overreaching of clients."³

Ethical Consideration 5-7 of the Model Code is to this precise effect. After first noting that it is "[g]enerally. . . undesirable for the lawyer to acquire a proprietary interest in a cause of his client or otherwise to become financially interested in the outcome of the litigation," EC 5-7 nonetheless endorses "reasonable" contingency fees on the ground that they may be the only means of permitting clients to obtain counsel of their choice.⁴ At the same time, EC 5-7 strikes the requisite balance by recognizing an objective standard governing all contingency fee contracts:

[A] lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingency fee arrangement only in those instances where the arrangement will be beneficial to the client.⁵

We come to a core notion of our submission: our view that contingency fees — and, in particular, the standard contingency fees now routinely charged in personal injury cases⁶ — are "beneficial to the

2. See Kutak Report, *supra* note 1, at 36 ("Contingent fees traditionally have been subjected to special judicial scrutiny."). See also MODEL RULES 1.5(a), (c), and (d).

3. Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 114 (W. Va. 1986). See also, Pinzur v. The Hartford, 511 N.E.2d 1281, 1288 (Ill. App. 1987) ("[C]ontingency contracts sometimes lead to solicitation and otherwise bring dishonor upon the law."); McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3rd Cir. 1985) ("Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts."); International Travel Arrangers v. Western Airlines, 623 F.2d 1255, 1277 (8th Cir. 1980); *In re Swartz*, 686 P.2d 1236, 1242 (Ariz. 1984) (en banc); Anderson v. Kenelly, 547 P.2d 260, 261 (Colo. Ct. App. 1976); *In re Kennedy*, 472 A.2d 1317 (Del. 1984), cert. denied, 104 S. Ct. 2388 (1984); Wunschel Law Firm v. Clabaugh, 291 N.W.2d 331, 334 (Iowa 1980); Meagher v. Kavli, 88 N.W.2d 871, 882 (Minn. 1958); American Trial Lawyers Ass'n v. New Jersey Supreme Court, 330 A.2d 350 (N.J. 1974); Harmon v. Pugh, 248 S.E.2d 421, 424 (N.C. Ct. App. 1978).

4. See MODEL CODE, *supra* note 1, at EC 5-7.

5. See MODEL CODE, *supra* note 1, at EC 5-7.

6. Standard contingency fees are typically at least one-third, forty and even fifty percent in cases settled before trial and often more than fifty percent in cases which go to trial. See Sweeney v. Athens Regional Medical Center, 917 F.2d 1560, 1569 (11th Cir. 1990) and Rasmussen v. Nodvin, 329 S.E.2d 541, 542-44 (Ga. App. 1985) (50% of settlement "not excessive"); Mississippi State Bar v. Blackmon, 600 So.2d 166, 176 (Miss. 1992) (dissent on other grounds) ("We might judicially note a once prevailing standard contract of one-third if the claim is settled without suit, forty percent where the suit is filed and fifty percent where the case actually goes to trial. It is more typically stated now as forty percent through trial and fifty percent if appeal is taken."); Fraidin v. Weitzman, 611 A.2d 1046, 1057 (Md. App. 1992); Zaklama v.

client" only to the extent that value-adding attorney efforts are needed to establish or enhance client recoveries. Making a parallel point, Justice Blackmun has written that the "premium [contingency fee] charge" is justified as a *quid pro quo* for attorney assumption of "the risk of nonpayment [of fees]."⁷

The above principle has been adopted with near-universal regularity by the commentators, courts and ethics committees which have considered the matter.⁸ Thus, as noted by Professor Wolfram:

The kind of fee that is properly called contingent is one with an element of risk: however its size is measured, it will accrue only on the happening of a future event whose occurrence is not readily predictable.⁹

And, in typical findings, respectively, of courts and ethics committees:

[Where t]he risk of uncertainty of recovery is . . . low . . . it would be the rare case where an attorney could properly resort to a contingent fee.¹⁰

One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. Conversely, matters which carry no such risk to the lawyer are not usually matters in which a contingent fee arrangement is appropriate.¹¹

Mount Sinai Medical Center, 906 F.2d 650, 652-53 (11th Cir. 1990). *See also* D. Bok, *THE COST OF TALENT* at 140 (1993):

There is little bargaining over the terms of the contingent fee. Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.

7. *Pennsylvania v. Delaware Valley Citizens for Clean Air*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting on other grounds) [emphasis in the original].

8. *Clark v. Sage*, 629 P.2d 657, 661 (Idaho, 1981) ("a contingency fee. . . involves a risk factor."); *Committee on Legal Ethics v. Tatterson*, *supra* note 3, at 113 ("Courts have generally insisted that a contingent fee be truly contingent."); *Thibaut, Thibaut, Garrett and Bacot v. Smith and Loveless Inc.*, 576 So.2d 532, 536 (La. App. 1 Cir. 1990) (In striking down a contingency fee arrangement: "There was no risk undertaken by the attorneys that no recovery would be made."); *Committee on Professional Ethics v. McCullough*, 468 N.W. 2d 458, 460-61 (Iowa 1991) (contingency fee not excessive because, *inter alia*, "the chances of success were very uncertain."); For ethics committee decisions establishing the same principle, *see* notes 11, 12 *infra*; *see also* Professional Guidance Committee of Pennsylvania, *Inquiry* 8-4 (March 21, 1988), *cited in* National Reporter on Legal Ethics and Professional Responsibility, Pa. Ops.-61 (1989) (uniform contingency fee charge without regard to risk or likely work is unethical).

9. C. WOLFRAM, *MODERN LEGAL ETHICS* 526 (1986).

10. *Attorney Grievance Commission v. Kemp*, 496 A.2d 672, 678-9 (1985).

11. *Virginia State Bar Association*, LEO 1461 (Apr. 13, 1992) *cited in* National Reporter on Legal Ethics and Professional Responsibility, Va.-Ops. 21 (1992).

Based on the above, contingency fee representations have routinely been deemed unethical in insurance collection, automobile "no fault" and similar classes of cases in the absence of a prior indication that the defendants will seriously contest liability or damages for the claim.¹² To date, however, the principle neither has been honored in personal injury cases nor been the subject of direct or instructive ethical guidance. This has occurred, moreover, precisely as doctrinal changes in tort law have substantially eased the task of successfully prosecuting tort cases — a development which has created a large and growing proportion of personal injury cases where defendant liability is clear and defendant willingness to make substantial settlement offers correspondingly likely. Despite the above, and broad assertions of ethical principles notwithstanding, "[r]epresentation under contingency fees. . . is used almost universally in personal injury claims."¹³

We of course note that clear and/or acknowledged defendant liability does not exist for all personal injury cases *as a class*, and that many such cases will involve significant disputes over the extent of damages. But that this is so, we believe, should hardly alter the ethical impropriety of charging risk-based contingency fees in the large and growing number (and proportion) of *particular cases* where little value-adding services are likely to be required of or performed by counsel. There is thus, in our view, a vital need for objective and readily enforceable standards which implement the ethical principles governing impermissible contingency fee contracts in personal injury cases. Such standards, we urge, should effectively distinguish between ethical contingency fee contracts where (to use Professor Wolfram's formulation) agreement as to liability or the extent of damages "is not readily predictable," and impermissible contracts in which attorneys charge risk-based premium fees without assuming meaningful risks of non-payment. In simple terms, we believe that there should be an enforce-

12. *E.g.*, Oregon State Bar, Desk Book for Lawyers, Op. 282 (Feb. 15, 1975), *cited in* Digest of Bar Association Ethics Opinions 9843 (American Bar Foundation 1977); South Carolina Ethics Advisory Committee, Op. 83-03 (1983), *cited in* National Reporter on Legal Ethics and Professional Responsibility, S.C.-Ops. 17 (1983); State Bar of Georgia, Advisory Op. 37 (Jan. 20, 1984), *cited in* the National Reporter of Legal Ethics and Professional Responsibility, Ga.-Ops., 5 (1984); *see also* Attorney Grievance Commission v. Kemp, *supra* note 10, at 678-9, *citing* Maryland State Bar Assoc. Ethics Comm. Formal Op. 76-1 (1976); Committee on Legal Ethics v. Tatterson, *supra* note 3; Hausen v. Davis, 112 Misc.2d 992 (Civ. Ct. 1981).

13. *See* WOLFRAM, *supra* note 9, at 526; L. Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 U.C.L.A. L. REV. 29, 74, 92-93 (1989); J. Laufer, *Of Ethics and Economics: Contingent Percentage Fees for Legal Services*, 16 AKRON L. REV. 747, 747-748 (1983) ("The contingent fee is practically the exclusive method of compensating attorneys in personal injury cases."); D. Bok, *supra* note 6, at 139 ("The lure of obtaining a fraction of. . . handsome sums has caused most trial attorneys to insist on contingent fee arrangements, even if their clients can afford to pay the normal hourly rate.").

ment mechanism requiring that "a contingent fee be truly contingent."¹⁴

The Committee has taken up the subject of contingency fees in Informal Opinion 86-1521, a determination which in our view has both been ignored and misconstrued. The operative mandate of 86-1521 — that a contingency fee attorney should "offer a prospective client who can pay a reasonable fixed fee the alternative of doing so and an explanation of the alternatives"¹⁵ — may have been taken as a Committee finding that client consent to a contingency fee overrides the "reasonableness" tests of the Model Rules and Model Code. We believe that such a reading of 86-1521 grossly misreads it:

- EC 2-20, cited at length in 86-1521, is to the effect that when a client is "able to pay a reasonable fixed fee," consent to a contingency fee contract only makes such a contract "not necessarily improper."¹⁶ Unless the term "not necessarily improper" is the equivalent of the term "proper," EC 2-20 thus makes clear that while client consent may be a necessary condition for a contingency fee, it may often not be a sufficient condition for such contracts.

- As earlier noted, EC 5-7 fully confirms the above by establishing an *objective* standard for ethical contingency fee contracts. It does so by compelling¹⁷ that in all cases the contract must be "beneficial" to the client. This view is enhanced by the EC 5-7's basis for its standard: recognition that attorneys are "in a better position to evaluate a cause of action."¹⁸ The EC 5-7 standard, in our view, can thus only be read as a determination that a client's right to a "beneficial" fee is nothing less than the entitlement of a beneficiary from her fiduciary.

- 86-1521 is itself to the same effect, and its mandate that clients must be given the option of entering into fixed or contingency fee contracts should be read in light of the Opinion's recognition that fiduciary principles govern the attorney-client fee relationship.¹⁹ We do not believe that a fiduciary can ethically charge a substantial fee for the recovery of a sum of money which has been paid or offered without significant, discrete effort on her part.²⁰

14. Committee on Legal Ethics v. Tatterson, *supra* note 3, at 114.

15. ABA Committee on Ethics and Professional Responsibility, Informal Op. 86-1521 (1986), cited in ABA/BNA Lawyers' Manual on Professional Conduct 901:310 [hereinafter, 86-1521].

16. See MODEL CODE, *supra* note 1, at EC 2-20.

17. See *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984) (EC 5-7 mandatory in character).

18. See MODEL CODE, *supra* note 1, at EC 5-7.

19. See 86-1521, *supra* note 15. This is not the only view on the subject; the fact that the fee relationship is negotiated contemporaneously with the establishment of an attorney-client relationship has led some to postulate a contractual rather than fiduciary relationship to govern the issue. See *Brickman*, *supra* note 13, at 55-70.

20. The fact that a fiduciary standard is in effect puts to rest a perverse yet often-cited justification for contingency fee abuses: that overcharges against present clients allow attorneys to represent future, hypothetical clients whose claims have higher

- References in 86-1521 to the right of clients to validate a contingency fee contract by consent must be read in the context of the Opinion's finding that such consent is necessary where doubt exists as to whether the contract "is consistent with the client's best interest." The fact that client consent may be of value in cases where doubt may exist as to the value of a contingency fee contract should hardly override the finding of 86-1521 that "[c]ontingency fees are subject to the 'reasonableness' and 'clearly excessive' tests of the Model Rules and the Model Code," and that "[w]hether a contingent fee is reasonable and whether it is in the best interest of the client may be dependent on . . . the degree of contingency in fact involved." In short: If a fee is unreasonable because it lacks a significant "degree of contingency in fact," it is a breach of fiduciary duty to seek or charge it.

- 86-1521 can only be understood as a bold effort by the Committee to answer a question before it and to regulate a practice subject to abuse; it was hardly intended as a *shield* from existing ethical standards. Reading 86-1521 to authorize a consent override of existing ethical standards would, for example, reverse above-cited holdings barring contingency fees in auto no-fault, insurance and related cases — hardly the intent of an opinion designed to *strengthen* client protections. We repeat: 86-1521 established a necessary but not sufficient condition for the validation of contingency fee contracts.

- Finally, we submit that as a real-world, practical matter, effective guidance from this Committee cannot be made to exclusively rely on *ex parte* dialogue between "a lawyer. . . in a better position to evaluate a cause of action,"²¹ and generally unsophisticated first-time clients

risks of nonpayment. This "argument" in support of overreaching a client is perverse in light of the fact that the ethical obligation of an attorney-fiduciary is of course to her *present, existing* clients. Thus, even if it were true that robbing a present Peter literally guaranteed bonus service to a hypothetical Paul, overreaching of the former by his attorney cannot be squared with the attorney's fiduciary obligation to Peter. To sanction such conduct would be no different from excusing a false doubling of claimed hours by an attorney retained on an hourly basis on the ground that her false bill permitted her to engage in extra hours of *pro bono* service. Beyond the ethical, fiduciary considerations posed by the matter, moreover, it is far from true that plaintiffs' lawyers actually engage in significant cross-subsidies of claims with weak cases. See WOLFRAM, *supra* note 9, at 528 n. 9 ("[E]xperienced lawyers can make a prediction about the success of a representation and can refuse cases that are too risky or settle them quickly at any available figure and thus avoid risking much lawyer capital."); M. ROSENBERG, H. SMITH & H. KORN, *ELEMENTS OF CIVIL PROCEDURE*, 64-65 (1985) (Contingency fees "are likely to be acceptable to a lawyer only when there appears to be a reasonably good prospect of recovery."); D. BOK, *supra* note 6, at 140:

[T]here are famous plaintiffs' lawyers who preside over a stable of associates and succeed, year in and year out, in earning incomes of more than \$1 million. Because of their reputation, these attorneys are asked to take many more cases than they can handle. As a result, they can pick and choose more carefully and hence confine their efforts to claims that are likely to produce big verdicts or generous settlements. In this way, they can exploit the rigid contingent fee structure and reap huge rewards for the effort they expend.

21. See MODEL CODE, *supra* note 1, at EC 5-7.

often rendered vulnerable and dependent by the traumatic effects of their accidents. No monitoring of such low-visibility dialogues (which take place in an attorney's office) is realistically possible, and no quantum of signed waivers can ensure compliance with the basic principle that lawyers are entitled to risk-based fees only when they assume real risks of nonpayment for those representations.

In our view, the above discussion creates a compelling need for explicit clarification of Informal Opinion 86-1521, and for a clear reiteration of, and a workable means of ensuring that, contingency fees are permissible only if they are charged against successful case outcomes which were "not readily predictable" when the fee was agreed to.

With the above in mind, we pose our first question to the Committee:

- I. Is it ethical for an attorney to charge a standard contingency fee²² on the entire recovery if the attorney knows or has reason to know that a significant settlement offer is likely to be made without the need for significant effort on her part?

In our view, the above question raises root questions regarding Model Rule 1.5, EC 5-7, DR 2-106, the fiduciary standard of attorney-client relationships confirmed by 86-1521 and the above-cited cases and ethics opinions dealing with the subject. The question asks whether standard contingency fees should, as we believe to be clearly proper, be restricted to cases where real risks are assumed and real, value-adding effort is needed on counsel's part.²³

Moreover and as noted, problems posed by the failure to restrict contingency fees to contingent cases are substantially increasing — i.e., there are increasing numbers of tort cases in which early, substantial defendant offers can, with the right ethical constraints in place, be readily anticipated. This is so because, as scholars and others have noted, such doctrines as strict liability have moved many areas of tort law in the direction of a social insurance system. As noted by Yale Law School Professor George Priest:

22. See note 6, *supra*.

23. See text, *supra* at notes 3, 7-12. We have presented the above question to deal with a core contingency fee practice which we believe to be impermissible. We believe that there are ethical questions raised in cases with less egregious fact patterns, see generally, J.F. Grady, *Some Ethical Questions About Percentage Fees*, 2 LITIGATION 20 (Summer, 1976), but do not seek to burden the Committee with a general inquiry covering the full range of contingency fee practices. Rather, as will be evident from our second question to the Committee and the ensuing discussion, see pp. 11-16, *infra*, our primary concern involves the ethical obligation of contingency fee counsel to solicit early offers so that they and their clients can objectively know, before significant value-adding efforts need to be made by counsel, whether and to what extent real contingencies exist in a case. As discussed *infra*, we believe that such an obligation will obviate the need for ethics committees to engage in the infeasible task of evaluating contingency fee agreements on a case-by-case basis.

[C]ourts have invoked th[e] insurance rationale to limit the defenses of contributory negligence, assumption of risk, and consumer product misuse, to eliminate defenses related to the status of the victim in actions against landowners; and to restrict the effectiveness of statutes of limitation. This insurance justification has supported the affirmative extension of liability th[r]ough standards of retrospective liability and the concept of products unreasonably dangerous per se. It has led to the relaxation of causation requirements. It has been the principal grounds for the more general adoption of comparative negligence. In addition, the maximization of insurance coverage has become the principal interpretive standard for insurance policies in all contexts, encouraging courts to read insurance coverage provisions broadly and exclusions narrowly in order to extend compensation as much as possible.²⁴

In light of the above, what was earlier found by the New York Court of Appeals is clearly truer today:

While liability in the negligence field has been continually expanding and the size and proportion of recoveries has mounted in constantly increasing progression, the risk of the lawyer under contingent fee agreements has been reduced and his remuneration magnified.²⁵

Thus, a leading tort practitioner has observed with regard to mass tort disasters such as hotel fire and train wreck cases: "There is no way in the world that plaintiffs cannot recover."²⁶ Likewise, real world situations presently exist in which a standard contingency fee charge in a major case in which liability is clear has translated into hourly fees in excess of \$10,000 per hour, indeed \$30,000 per hour.²⁷ We find these extreme-end cases difficult to justify as fees which are "reasonable" or "beneficial" to clients within the meaning of Model Rule 1.5, DR 2-106 and EC 5-7. We also believe that standard contingency fees are often indefensible for such common claims as mass accident, asbestos, "slip and fall" and rear-end automobile collision cases when, in recognition of clear liability or for other reasons, defendants are prepared to make substantial payments to injured parties.

24. G. Priest, *The Liability Crisis: A Diagnosis*, 34 Yale L. Rep. 2 (Fall 1987).

25. *Gair v. Peck*, 160 N.E.2d 43, 51-52 (N.Y. 1959), cert. denied, 361 U.S. 374 (1960).

26. *Low, Legal Beagles Unleash Client Hunt*, Feb. 9, 1987 at 63, quoting Phillip Corboy.

27. See Brickman, *supra* note 13, at 77 n.186; J. Pinkerton, *The Spoils of Tragedy; Profiting on Disaster* HOUS. CHRON., Aug. 2, 1992, at A1; L. Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1835 n.61, 1838 n.72; D. Ralles, *84.5 Million Offered in Tainted-Water Case*, ARIZ. REPUBLIC, Feb. 26, 1991, at 1A. See L. BRICKMAN, M.J. HOROWITZ, J. O'CONNELL, *RETHINKING CONTINGENCY FEES* (galley proofs, 1994) 22 [hereinafter, Monograph].

A major clarifying point is here in order: The question of whether a real contingency exists as of the establishment of a contingency fee relationship is in our view a function of whether or not a meaningful defendant offer can be anticipated in the absence of significant, value-adding *effort* by plaintiffs' attorneys. Under this view, it is not sufficient to establish the legitimacy of a contingency fee on the basis of unilateral speculation by a plaintiff's attorney that, without her retention, the claimant might not have received an offer from a defendant.

An attorney may, in her hourly rate, reflect a belief that her reputation is sufficiently intimidating to force defendant offers (or better offers) than her client would have received without retaining an attorney, or by retaining a different attorney. Clients should thus be free to retain Attorney A as likely to produce better results than Attorney B, whose hourly rates are lower. On the other hand, our submission and inquiry to this Committee is based on the view that an attorney acting in a *fiduciary* capacity cannot justify a contingency fee, which lays claim on a significant share of her clients' recoveries, by the mere fact of the presence or reputation. Unless this is so, the fact of retention in and of itself would entitle an attorney to a significant share of her client's settlement without the need for significant effort on the case. Whether there is need for such an effort should in our view determine whether meaningful risk exists in a contingency fee case.

If the Committee finds that a meaningful "degree of contingency in fact involved"²⁸ is an objective requirement for an ethical contingency fee contract, its response to the following question will in our view determine whether its position will be actually honored or merely hortatory, and whether clients will have the hard, critical and objective evidence they need in order to make their 86-1521 choice between a fixed or contingent fee. Our second inquiry to the Committee follows:

II. Is there an ethical obligation for an attorney retained under a contingency fee contract to assist her client in analyzing the risks of a claim by soliciting and conveying early defendant settlement offers; and is it ethical to charge the standard, or any, contingency fee against such early offers?

In asking the above question we first reject, and ask the Committee to reject, the view propounded by plaintiffs' attorney Philip Corboy in his noted debate with Judge John Grady over the nature and ethics of the contingency fee system. According to Corboy, problems of contingency fee overreach should be cured by means of case-by-case judicial scrutiny.²⁹ In our view, presently overtaxed ethics committees and judicial systems would literally be overwhelmed if required to

28. See 86-1521, *supra* note 15.

29. P.H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 LITIGATION 27, 35-36 (Summer 1976).

bear the burden of literally millions of fact-finding reviews of the existence and degree of risk which had been in effect when contingency fee contracts had been entered into. This point has been well and recently made by former Harvard University President and law school dean Derek Bok:

[p]revent[ion of] windfalls would require. . .extensive oversight of the fee system and might embroil judges in detailed inquiries into the amounts of work actually performed in winning large awards. It is far from clear that avoiding excessive fees would be worth the added time and cost of forcing heavily burdened judges to conduct such investigations.³⁰

In addition to the judicial priority and resource concerns voiced by Bok, the case-by-case reviews proposed by Corboy would also be overwhelmingly skewed against claimants; their very lack of knowledge of the risks posed by their claims make it unlikely that many could ever fairly engage in fee disputes with their attorneys.³¹ (As the Model Code itself notes, such lack of knowledge is at the root of the problem itself and a critical reason why reasonable fee mandates were established in the first place.³² Corboy made clear that the stakes involved in solving existing problems of contingency fee overreach were high; he asserted that abuses in the area were no less serious a form of attorney misconduct than jury tampering,³³ and that failure to achieve rapid, effective reform of such abuses would harm both the public and (what may then have been) "the good name that the great majority of lawyers enjoy."³⁴ Particularly in the face of such stakes, we believe it all the more troublesome that Corboy's proposed case-by-case judicial scrutiny approach will ensure certain and continuing nonenforcement of critical ethical violations involving contingency fee overcharges.

Our views are more guided by Judge Grady's critique of the system.³⁵ To Judge Grady, 95% settlement rates, the fact that "[m]any cases involve no real question of liability" and the fact that "[t]he vast majority of personal injury cases involve no uncertainty that the lawyer is going to be paid something," undermined the basic claim that "since the fee is contingent, or uncertain, and the lawyer is taking a

30. Bok, *supra* note 6, at 144 (1993).

31. To repeat, Bok is again instructive:

"Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them. . .when they happen to have an extremely high probability of winning."

Id. at 140

32. MODEL CODE, *supra* note 1, at EC 5-7.

33. Corboy, *supra* note 29, at 35.

34. *Id.* See text at note 51 *infra*, for a description of developing public attitudes towards the bar.

35. Grady, *supra* note 23.

chance of receiving no fee at all, it is equitable to compensate him at a higher rate than if his compensation were certain."³⁶

Of critical note are Judge Grady's three questions, which he believed needed to be answered *before a contingency fee could ethically be charged*.

1. Is there a genuine and substantial question on liability, or is the only real question the amount of damages?
2. Is the case likely to be settled or tried to verdict?
3. Is the amount of the recovery likely to be small or large. . .?³⁷

Judge Grady's view was that "[u]ntil the lawyer knows the answers to these questions, he has insufficient basis for determining whether a percentage fee is proper and, if proper, what percentage would be fair."³⁸

We believe that an affirmative answer to the question we have presented above will permit a *self-enforcing* means of obtaining *early* answers to Judge Grady's questions. It will also give life to ethical prohibitions against "unreasonable fees" established for the protection of clients, and will also help ensure that clients (and even the best of well-meaning lawyers) will not be obliged to speculate over the risks of non-recovery which exist when they enter into contingency fee contracts. Such a Committee view will obviate the need for Corboy's proposed remedy of case-by-case litigated adjudications over the fairness and degree of disclosure of earlier, *ex parte* 86-1521 risk analyses by counsel. Equally, it will help ensure that the principle requiring real contingencies for contingency fee contracts will not be reduced to an unenforceable admonition to counsel to be honest with their clients under circumstances where such honesty will impose severe financial penalties. (In our view, the above is rendered all the more imperative, *inter alia* by the attorney-client fiduciary relationship where fee arrangements are concerned,³⁹ the special scrutiny which the Model Rules and Model Code require for contingency fee contracts,⁴⁰ and EC 5-7's explicit recognition — made in the context of establishing ethical standards for contingency fees — that attorneys "are in a better position to evaluate a cause of action."⁴¹

We submit to the Committee that the above objectives can be met if contingency fees (or, at a minimum, standard contingency fees) can be charged only after clients are able to benefit from settlement offer decisions made before significant time or effort has been spent on their cases.

36. *Id.* at 24.

37. *Id.* at 26.

38. *Id.*

39. See 86-1521, *supra* note 15.

40. See Kutak Report, *supra* note 1.

41. See MODEL CODE, *supra* note 1.

Put in other terms, we believe that the almost universally ignored obligations set forth in Informal Opinion 86-1521 that counsel provide their clients with an *ex parte* view as to whether fixed or contingency fees are beneficial should be supplemented by an obligation of would-be contingency fee counsel to solicit — and, if made, convey to clients — early defendant settlement offers. Such offers, if made, will allow clients to make, on a more certain and independent basis, the very fee choices which 86-1521 affords them. *As importantly, defendant failures to make early offers will serve as critical means of determining the presence of real risks of nonrecovery and will thus make more real and fair any 86-1521 decisions to pay contingency fees.* Thus, under the “solicit and convey” ethical obligation we believe in order, clients will have access to their counsel’s views in order to judge the adequacy of early offers, while attorneys will be required, properly, to assume the contingent risks of proceeding with cases following rejections of early offers.⁴² This will also allow early offers to be made, evaluated and accepted in the very class of cases where fee overreach and unethical contingency fee contracts now occur — cases where contingency fees are now charged despite the fact that defendant liability is either clear, probable or reasonably likely.

In making our final inquiry to the Committee, we submit for its consideration a monograph on the general subject which has been prepared by three of the signatories of this submission.⁴³ The Monograph includes an appendix in the form of a proposed court rule and/or statute, and as such necessarily involves a much greater degree of particularity and proscriptiveness than is possible or proper for the committee to adopt. In our view, however, a Committee determination which just sets forth basic ethical principles — precisely as it did in the case of 86-1521 — will nevertheless be powerfully effective, precisely as it leaves for others (and/or for a later day) the promulgation of specific enforcement policies to implement its ethical principles.

We believe that a Committee opinion of no greater particularity than 86-1521 need only make clear, first, that within the meaning of Model Rule 1.5, EC 5-7 and DR 2-106, a reasonable fee chargeable against an early offer should be substantially lower than today’s 33 $\frac{1}{3}$ -50% norms.⁴⁴ That this should be so results from the limited attorney

42. The Monograph includes a discussion of whether early defendant offers should continue to limit chargeable attorneys’ fees if the offers are rejected. As indicated in the Monograph, we strongly believe that such early offers should have a continuing effect, and that full contingency fees should be ethically chargeable only on recoveries achieved in excess of the offers — *i.e.*, on a *value-added basis* only. Our views are also based on the need to minimize attorney-client conflicts in the rendition of critical advice by the former regarding settlement offers. *See* Monograph, *supra* note 27, at n. 39.

43. *See* Monograph, *supra* note 27.

44. Such reductions, moreover, will generate critically needed additional benefits to the tort-legal system as a whole, including sharply reduced systemic transaction costs, lower health care fraud and cost “build-up,” and speedier and more frequent

time and effort required to satisfy the obligation to facilitate and solicit early defendant offers — an obligation calling for no more than a communication to a defendant setting forth: a) a brief statement of the basis of the claim; and b) documentation (or rapid access to it) of the basis of the damages claims.⁴⁵ Thus, exceptional circumstances aside, where plaintiffs' counsel need to invest significant time and effort in a case during the brief period when defendants are considering responses to early offer solicitations, ethical fees chargeable against early offers can only relate to time spent preparing simple solicitations and time spent advising clients about the merits of early offers. (This is particularly so because plaintiffs' counsel are free to place reasonable limits on the time for defendants to make their early offers.) Under the circumstances, we believe that where modest damage claims are involved there will be few cases where ethical fees chargeable against early offers will amount to more than modest fractions of standard contingency fees; the fees should also be considerably smaller when cases involve substantial damage claims.⁴⁶

As noted, we ask the Committee to call for no more intrusive or burdensome requirements than Informal Opinion 86-1581's determination that when contingency fees are sought, counsel must offer her client: a) a full assessment of "many factors, including the estimated amount of a reasonable fixed fee, the degree of contingency in fact, involved and the probable size of the recovery, factors which the client normally has the right to consider before agreeing to a fee arrangement;"⁴⁷ and b) the choice between a fixed and contingency fee

case settlements. (Rapid settlements have a particularly progressive effect in light of the limited ability of low-income claimants to pay for the costs of their accidents from their own resources.) See Monograph, *supra* note 27, at 30-40. In addition, early offer processes need to be seen in relation to across-the-board fee cap reforms which merely reduce but do not eliminate unethical contingency fee windfalls; on the other side of the ledger, fee caps ask nothing of defendants while nonetheless limiting the effective rates of compensation available to plaintiffs' counsel in contested, genuinely contingent cases. See Monograph, *id.*, at 17, 40 and notes 12-13, 70.

45. If, as we believe, plaintiffs' counsel have an ethical obligation to solicit early defendant offers, it is equally clear that defendants will have limited means of knowing *how much* to offer—even in cases where they may believe themselves liable — without access to routine, claimant-held information regarding the nature and extent of claimants' injuries. Clearly, any ethical obligation to solicit early defendant offers must necessarily call for the submission of far less information to defendants than is required to be submitted under the Monograph's proposal. Compare Monograph, *supra* note 27, at 75-76, §401(b). But given the fact that defendant responses to meaningful early offer solicitations serve the interests of *clients* by potentially limiting their fee obligations and potentially achieving early resolution of their cases, submission to defendants of routine and manifestly discoverable damages information, together with a brief explanation of the basis of a claim, will achieve real benefits for clients at no cost to their interests.

46. The Monograph proposal restricts charges against early offers to hourly fees and caps the fees at 10% of the first \$100,000 offered and 5% as to higher sums. See Monograph, *supra* note 27, at 27, 80-81, §§703(b), 801(a).

47. See 86-1521, *supra* note 15.

arrangement. We only ask the Committee to call on counsel to solicit and convey to their clients the early settlement positions of defendants — conduct which will allow for more informed, less speculative assessments of the contingencies involved in a case.

In sum, the only operational change from the status quo which would result from our request to the Committee would be for contingency fee contracts to set forth a significantly lower fixed fee alternative to be chargeable against early offers made in response to the required solicitation of such offers by plaintiffs' counsel. Moreover, even this would be unnecessary if attorneys chose to satisfy Judge Grady's ethics concern that "it may well be inappropriate to try to settle upon the fee at the first conference with the client."⁴⁸

Our view is further strengthened by Model Rule 1.4 which requires all lawyers to keep their clients "reasonably informed about the status of . . . matter[s]" and, more particularly, Model Rule 104(b), which requires that lawyers "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁴⁹ The latter provision is described in the Rule's Overview notes as "focus[sing] specifically on the client's right to *participate* in his own legal affairs. . . [s]ince [because] the client has the right to make strategic decisions, he must be given the information necessary for informed decisionmaking."⁵⁰ This position is further made clear by the Comment to Model Rule 1.4(b), which explicitly describes the central tenet of the Rule: that "if the client is to make the key decisions about his legal affairs, he must be armed with enough knowledge to make intelligent decisions."⁵¹ Of course, no speculative information regarding the risk of a claim, even when ventured in the best of good faith by counsel during the 86-1521 process, can equal an actual response by a defendant — for either an offer or its absence will serve as the best "information necessary for informed decisionmaking [and] knowledge [with which] to make intelligent decisions."

48. Grady, *supra* note 23, at 27. See MODEL RULE 1.5(b) expressly authorizing contingency fees to be reduced to writing "within a reasonable time *after* commencing a representation." [emphasis added]. Grady further indicated that in some cases it may not be appropriate to charge a contingency fee "until the case is fairly far along in discovery." *Id.* While short term deferral of the fixing of fees may be appropriate while defendants are given a brief period to determine their responses to claimant solicitations of early offers, we believe that satisfaction of Judge Grady's root concern — that contingency fees are not ethical until "it is determined that the liability is really contingent" — should be accommodated by giving claimants the right to assess early defendant offers.

49. MODEL RULE 1.2 (a) is to the same effect in ensuring that clients have a clear right to make informed decisions about settlement offers.

50. See G. HAZARD AND W.W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 64 (1985). [emphasis in the original].

51. *Id.* at 66.

In the end, Committee endorsement of an obligation to solicit and convey early offers will make an extraordinary difference in enhancing ethical practices regarding contingency fees and will strongly move the system away from present-day norms in which contingency fee charges are universally sought and levied without reference to Justice Blackmun's 'risk'-"premium. . .charge" *quid pro quo*. It will further, and appropriately, supplement the bold if ignored step ventured by the Committee when it issued 86-1521.

The questions here presented, we believe, are highly related to the recent acknowledgement by the American Bar Association of the profession's increasing loss of public esteem.⁵² There appears, for example, to have been a near-doubling in the past seven years of the public's view that attorneys charge too much and are "less honest" than most people.⁵³ This is a development which we believe to flow in no small part from current contingency fee practices — which the public almost certainly ascribes to the Bar as a whole.

Many years ago, the late Judge Frederick van Pelt Bryan of the Southern District of New York offered the following observation at an ABA panel devoted to the question of whether the policing of contingency fees should be taken from the profession. His comments become all the more pertinent when respect for attorneys is in precipitous decline, when indifference is near-universal to the ethical requirement that premium, risk-based fees should be chargeable only when real risks are predictable, and when fee overreach has become increasingly common in personal injury cases:

[W]hen I sit in a settlement part of our court, disposing the 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 no police itself thoroughly, somebody other than the Bar is going to

52. See Monograph, *supra* note 27, at 41; ABA Committee on Ethics and Professional Responsibility, Formal Opinion 93-379 (1993) at 2. Having boldly addressed the subject of hourly fee abuses (largely committed against more sophisticated, generally commercial clients) we urge the Committee to act with the same resolve in the case of contingency fee abuses. There, the abuses are generic and the clients generally unsophisticated and more vulnerable; we thus believe that the need for strong Committee action is particularly called for.

53. *Lawyers Still Unpopular*, WALL ST. J., Aug. 2, 1993 at B3 (a National Law Journal Poll found that lawyers are less well respected than any group except politicians. Since 1986, "those who said lawyers are 'less honest' than most increased from 17% to 31%. During the same period, those who believe that lawyers charge too much rose from 23% to 43%.") See also, *First Kiss All the Lawyers*, TIME, Aug. 16, 1993, at 39.

police it, somebody other than the Bench is going to police it. And if that occurs, it will be a sad day.⁵⁴

We fully appreciate the significance of this submission to the Committee but it is for that reason we have presented it. It is also the reason why we respectfully request a Formal Opinion setting forth the Committee's views. (The Monograph estimates that no less than \$7.5 - \$10 billion in unethical, windfall contingency fees are now charged annually.)⁵⁵ We believe that widespread ethics violations of such magnitudes, and today's literal indifference to ethics standards where contingency fee contracts are involved, call for issuance of an opinion whose significance and real effects are equal to the problem, and for Bar resolve to enforce it. We believe that such a step, certain to be controversial, will also address the sharp criticisms of many scholars and observers that the bar-administered ethics process is captive of the special interests of lawyers, reflects attorney self-interest at client expense and, perhaps most importantly, is futile and ignored and has little effect on the real work of the profession.⁵⁶ By certifying the appropriateness of a risk-based standard for contingency fee contracts and by providing a more certain, more objective and less conflicted means by which clients can know those risks, we believe that the Committee would construe existing standards in such a manner as to make them more likely to be enforceable and much more difficult to further ignore.

54. ABA SEC. OF INS. NEG. AND COMP. L. PROC., *Should Contingent Fees in Personal Injury Cases Be Subjected to Judicial Control?*, at 215 (1960). See Monograph, *supra* note 27, at 5-9 (Foreword and Preface by John T. Noonan and Derek Bok, respectively).

55. See Monograph, *supra* note 27, at 40.

56. See generally, R. Abel, *Why Does the ABA Promulgate Ethical Rules*, 59 TEX. L. REV. 639 (1981); D.L. Rhode, *Why the ABA Bothers; A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981). The articles make the strong charge that ABA ethics regulation has been futile and self-serving. See also, R. ABEL, *AMERICAN LAWYERS* 143 (1989)(ethics rules have had no effect on the professional behavior of attorneys).

We of course remain subject to the convenience of the Committee, and thank it for its consideration of our submission.⁵⁷

Very truly yours,

Morris Abram
Robert Bork
Lester Brickman
Edward Costikyan
Norman Dorsen
Thomas Gee
Mary Ann Glendon
Michael Horowitz
Rex Lee
Jeffrey O'Connell
Robert O'Neil
Robert Pitofsky
Leon Silverman

William Barr
Ronald Beard
Samuel Butler
Roger Cramton
Tyron Fahner
Walter Gellhorn
Erwin Griswold
Charles Horsky
Thomas Morgan
Theodore Olson
Shirley Peterson
George Priest
Harry Wellington

57. We note Rule 4 of the Committee's Rules of Procedure. In that regard, if the Committee so desires we can supply it with recent and current instances in which interests of signatories are directly involved in this request, as counsel, as teachers and as parties involved in the tort claim process.

APPENDIX B
AN ETHICAL ALTERNATIVE TO ABA
FORMAL OPINION 94-389 ON
CONTINGENCY FEES*

It is unethical for a lawyer to charge a standard risk-based contingency fee against a client's full recovery where a defendant has indicated the absence of risk as to some or all of the recovery by making a settlement offer either prior to the commencement of the attorney-client relationship or shortly after the commencement of that relationship. A lawyer is under an ethical duty to seek out such early settlement offers as soon as possible after entering into the attorney-client relationship in order to be able to disclose information to the client that will allow the client to give informed consent to the fee structure and in particular provide the client with a basis for determining whether it is beneficial to the client to agree to pay a standard contingency fee applied against the entire recovery.

Rules 1.5(a) and (c); DR 2-106; EC 2-20, 5-7, 7-8.¹

QUESTIONS

(1) Is charging a standard contingency fee on the full recovery in a personal injury claim unethical where a settlement offer has been made prior to retention of the attorney? (2) Is charging a standard contingency fee on the full recovery unethical where the attorney knows or should know that a settlement offer is likely to be forthcoming before any substantial value-adding efforts will have been made? (3) Does an attorney have an ethical responsibility to provide the client—as soon as is possible—with meaningful information regarding the degree of risk the lawyer is undertaking, including whether the responsible party is offering to settle the claim, in order to enable the client to give informed consent to the fee arrangement?

OPINION

I. Role of Contingency Fees

Contingency fees play a vital role in our legal system. They often can ensure that accident victims and other injured persons are able to have access to counsel and to the courts when they would otherwise be unable to do so. Under this financing system, clients unable to afford the risk that they will be liable for counsel fees if they fail to

* Drafted by Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law.

1. See Model Rules of Professional Conduct Rule 1.5(a), (c) (1995) [hereinafter Model Rules]; Model Code of Professional Responsibility DR 2-106, EC 2-20 & 5-7 & 7-8 (1980) [hereinafter Model Code].

recover damages for their injuries are still able to proceed with their cases; their attorneys can only collect their fees from money actually recovered by their clients.² Thus, the contingency fee system is often vital to the vindication of important legal rights. There is a quid pro quo, however, for the agreement to represent clients on a contingency fee basis. As Justice Blackmun has stated: “[L]awyers charge a premium when their entire fee is contingent on winning. . . . The premium added for contingency compensates for the *risk* of nonpayment if the suit does not succeed”³

II. Ethics Rules Applicable to Contingency Fees

Justice Blackmun’s analysis of the contingent fee system is embedded both in fiduciary law and lawyers’ codes of ethics. Under both regimes, fees must be “objectively reasonable. Model Rule 1.5(a) therefore prohibits unreasonable fees without regard to whether the client consents.”⁴ In addition to the requirement of Model Rule 1.5 that “[a] lawyer’s fee shall be reasonable,” DR 2-106(A) provides that a lawyer shall not charge a “clearly excessive fee” which the Model Code defines in DR 2-106(B) as “in excess of a reasonable fee.”⁵ “To the public and clients, few features could be more paramount than the fee—the costs of legal services.”⁶ In making determinations regarding the propriety of fee agreements, both courts and ethics committees have given special scrutiny to fee contracts because they are “affected by lofty principles different from those applicable to commonplace commercial contracts,”⁷ and especially to contingency fee contracts because, although they are often necessary to ensure client access to counsel, they nonetheless pose “a greater potential for overreaching

2. See Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 Emory L.J. 367, 367-68 (1992). In some jurisdictions, however, a client may be obligated to pay a quantum meruit fee even in the absence of a recovery. *Id.*

3. *Pennsylvania v. Delaware Valley Citizens’ Council*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting).

4. 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.5: 101 (2d ed. Supp. 1994).

Legally, the ethical rules proscribing excessive fees are redundant. The law at large fully covers the matter. A contract for a fee is, under general principles of law, a contract between a fiduciary and his protected dependent. As such, it is unenforceable unless its terms are fair to the client.

Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 99 (1978).

5. Model Rules, *supra* note 1, Rule 1.5; Model Code, *supra* note 1, DR 2-106(A)-(B). The “clearly excessive fee” standard in the Model Rules was not believed to afford sufficient protection for the client. Accordingly, the “reasonable fee standard” was used by the drafters to achieve a heightened standard. The Legislative History of the Model Rules of Professional Conduct 40 (1987).

6. *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994).

7. *Id.* at 1072.

of clients.”⁸ Overreaching in the context of contingency fees is the exaggeration of the risk involved in a claim to justify charging a substantial risk premium in the form of a standard contingency fee in the absence of the assumption of meaningful risk.

Recognition of this potential for overreaching is incorporated into Model Rule 1.8(j) and EC 5-7 of the Model Code.⁹ After first noting that it is “[g]enerally . . . undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation,” EC 5-7 still allows a “reasonable” contingency fee on the ground that “it may be the only means by which a layman can obtain the services of a lawyer of his choice.”¹⁰ EC 5-7 recognizes the potential for overreaching in such cases by establishing an objective standard which governs all contingency fee contracts: “[A] lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be *beneficial to the client*.”¹¹ Contingency fees are only beneficial to the client to the extent that value-adding attorney efforts are needed to establish or enhance client recovery.

In requiring that a lawyer enter into a contingency fee only when it is beneficial to the client, EC 5-7 adopts a non-self-interested fiduciary standard as the ethical standard—a standard from which the Model Rules does not recede. As a fiduciary, the lawyer has a duty to deal fairly with the client and to exercise professional judgment on the client’s behalf. This non-self-interested standard has been widely adopted and repeatedly invoked by courts. Thus, in one of the most important ethics cases in recent decades, the New York Court of Appeals stated the non-self-interested standard as one of a litany of fiduciary standards: “The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients’ interests over the lawyer’s.”¹²

8. Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 114 (W. Va. 1986).

9. See Model Rules, *supra* note 1, Rule 1.8(j); Model Code, *supra* note 1, EC 5-7.

10. Model Code, *supra* note 1, EC 5-7.

11. *Id.* (emphasis added).

12. *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994). The list of fiduciary duties enumerated in *Cooperman* is excerpted from an article co-authored by Lester Brickman and Lawrence Cunningham. See Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1, 6 n.21 (1993) [hereinafter Brickman & Cunningham, *Nonrefundable Retainers Revisited*] (“Fiduciary duties include: maintaining confidentiality; maintaining undivided loyalty; avoiding conflicts of interest; operating competently; presenting information and advice honestly and freely; acting fairly; and safeguarding client property.”). The duty to deal fairly requires that the lawyer “advance the client’s interests as the client would define them if fully informed,” i.e., had consulted a second attorney to seek advice about his dealings with the first attorney. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable*

In implementing the duty to deal fairly, “[c]ourts in general have insisted that a contingent fee be truly contingent. The typically elevated fee reflecting the risk to the lawyer of receiving no fee will be permitted only if the representation indeed involves a significant degree of risk.”¹³

In addition to the courts, the codes also mandate that contingency fees be charged only where there is risk. Model Rule 1.5(a)(8) and DR 2-106(B)(8) both provide that “whether the fee is fixed or contingent” is one of the factors to be considered in determining the reasonableness of a fee.¹⁴ This factor cannot be read to mean that simply calling a fee a contingency fee thereby entitles the lawyer to charge more. The codes should not be interpreted with such cynicism and disdain for the public’s and clients’ interests. The obvious intent of the drafters here was to provide that an attorney can charge more only when the fee is contingent for the reasons set forth by Justice Blackmun and Professor Wolfram. Therefore, it must be read to mean that a contingent fee be more than just contingent in name—it must be contingent in fact. Any other interpretation would not only make that factor meaningless by allowing an attorney to charge an otherwise unreasonable fee by simply calling it a contingent fee, but would also serve to affirm public suspicion of the legal profession.¹⁵

Charging a contingency fee in the absence of risk, i.e., charging a risk premium even though there is no meaningful risk, is necessarily charging an excessive fee under the Model Code and an unreasonable fee under the heightened Model Rules standard. This conclusion is supported by *In re Cooperman*¹⁶ which, although dealing with nonrefundable retainers in a Code state, broadly condemned fee arrangements where attorneys charge for services not rendered and thus keep a “fee that has not been earned”.¹⁷ Public policy thus requires that, as fiduciaries, lawyers may not charge fees for services not rendered. Charging a risk-based premium while not actually assuming any risk likewise constitutes charging an excessive and unreasonable fee in violation of public policy because it is charging for services not

Retainers: Impermissible Under Fiduciary, Statutory and Contract Law, 57 Fordham L. Rev. 149, 154-55 (1988).

13. Charles W. Wolfram, *Modern Legal Ethics* 532 (1986).

14. Model Rules, *supra* note 1, Rule 1.5(a)(8); Model Code, *supra* note 1, DR 2-106(B)(8).

15. For an example of the current public view of lawyer behavior, see Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. News & World Rep., Jan. 30, 1995, at 50, 52 (stating that 69% of Americans “say lawyers are only sometimes honest or not usually honest” while only 27% “say lawyers are very honest or mostly honest”; 56% “believe lawyers use the system to protect the powerful and get rich”).

16. 633 N.E.2d 1069 (N.Y. 1994).

17. *Id.* at 1073. Specifically, the court stated that “[i]nstead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire ‘nonrefundable’ fee, no matter what legal services, if any, were rendered. This would be a shameful, not honorable, professional denouement.” *Id.* at 1072-73.

rendered; therefore, it is also an illegal fee which is banned by DR 2-106(A).¹⁸

This argument is further supported by our Formal Opinion 93-379, in which the Committee addressed issues relating to hourly rate billing.¹⁹ In that opinion, the Committee decided that the focus should not be on "what a client could be forced to pay, but rather . . . what the lawyer actually earned."²⁰ The Committee stated:

A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules.²¹

These basic principles of fairness apply to contingency fees as well. Here, too, the focus should not be on "what a client could be forced to pay, but rather. . . what the lawyer actually earned."²² As Professor Thomas Morgan, a legal ethics scholar, has stated:

[T]he 'luck' or 'fortuity' of representing a client who is paralyzed rather than one who suffered a broken leg—or of representing multiple persons injured in the same accident instead of just one—should not be the principal measure of the lawyer's fee. . . . [Moreover], to the extent that a lawyer realizes 'economies' in the representation of a client, the benefit of those economies belong to the client, not the lawyer. Failure to recognize the above principles 'results in the earning of an unreasonable fee' in violation of the Model Rules.²³

18. See Model Code, *supra* note 1, DR 2-106(A). It is notable that contingency fees have been declared violative of fiduciary standards in insurance collection, automobile "no fault" and similar classes of cases where no meaningful risk is borne by the attorney in the absence of any prior indication that the defendants would seriously contest liability or damages for the claim. See Lester Brickman et al., *Rethinking Contingency Fees* 54 n.16, 57 n.34 (1994).

19. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993) [hereinafter Formal Op. 93-379].

20. *Id.*

21. *Id.*

22. *Id.*

23. Letter from Thomas D. Morgan, Oppenheim Professor of Law, George Washington University, to David Isbell, Chair, Standing Comm. on Ethics and Professional Responsibility 2 (Nov. 30, 1994) (on file with author).

Yet, standard contingency fees are often collected when they are not actually earned. As further noted by Professor Morgan:

A lawyer who takes 40% of the \$1 million paid to a client whom the defendant would have paid \$800,000 without a fight is not in principle different from the lawyer who bills travel time to one client and bills another for work done on the plane. A lawyer who takes 33% of the award of each of five accident victims is not in principle different from the lawyer who "spends four hours of time on behalf of three clients" or who uses recycled work product.²⁴

Nevertheless, billing practices which have been declared clearly unethical for an hourly rate lawyer, when hidden behind the cloak of the contingency fee, have somehow escaped scrutiny.

Even if one attempts to justify charging unearned risk premiums in the form of standard contingency fees by arguing that overcharging some clients allows attorneys to finance the claims of hypothetical future clients whose claims bear greater risk of nonpayment, this rob-Peter, pay-Paul rationale is inconsistent with an attorney's fiduciary duty to deal fairly with *each* individual, existing client. Robbing Peter is no more justifiable than billing for double the actual time spent on behalf of hourly rate fee clients in order to subsidize the overcharging attorney's increased pro bono services. It is also instructive to consider who are Peter and Paul. It is conceded by all that Peter is the client being overcharged for attorneys' fees which are unjustified by the risk borne by the attorney.²⁵ Paul, despite his outward appearance, is not a subsequent client, but is instead the lawyer who overcharges Peter to pay himself for accepting a future high-risk case that he would be less likely to accept were he not enriched with the money mulcted from Peter.²⁶ The lawyer accepting the higher risk case does not do so pro bono but instead charges a standard contingency fee with the expectation that the claim will bring a high reward. Moreover, even if the policy rationale could be justified, the claim that windfall fees are justified as cross-subsidies is speculative and unproven as to future clients; in fact, it is fundamentally inconsistent with the routing process by which attorneys screen prospective clients to determine whether the risk-reward ratio of accepting each new case is favorable.²⁷ The existence of cross-subsidies is belied by empirical

24. *Id.*

25. See, e.g., Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. Times, Feb. 11, 1994, at A1 [hereinafter Passell, *Windfall Fees*] (reporting American Trial Lawyers Association President Barry J. Nace's reaction to an early offer proposal: "Further, [Nace] says, successful trial lawyers use fat payouts to cover advocacy that is financially unrewarding. 'The big cases,' he said, 'enable us to provide justice in the little cases.'").

26. See Brickman & Cunningham, *Nonrefundable Retainers Revisited*, *supra* note 12, at 36 n.133.

27. Even a tort practitioner who opposes tort reform admitted that "[a]n astute lawyer will take only one type of case on contingency: where liability is nearly certain and the amount of damage depends on the amount of money available for trial."

evidence that indicates that lawyers only take clients where a substantial likelihood of prevailing exists.²⁸

The charging of unearned risk premiums is an obvious and unavoidable result of the charging of standard and substantial contingency fees in *all* cases; experience demonstrates that some percentage of those cases offer high reward but involve no meaningful risk.²⁹ Although there is no substantive difference between billing for hours not worked and billing for risk not assumed, contingency fee lawyers are more insulated from scrutiny because they do not present time records. Therefore, their hourly rates of return—which can often amount to thousands of dollars, even tens of thousands of dollars an hour, despite the absence of any meaningful risk—are not visible to the bar or the public.³⁰ Nonetheless, lack of visibility does not condone charging for work not done, or overcharging for work done, any more for contingent fee lawyers as it once did for hourly rate lawyers.³¹ Unless meaningful risk exists, and unless a lawyer devotes

Kenneth R. Shaw, *The Right Kind of Case*, N.Y. Times, Feb. 25, 1994, at A28; Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 Emory L.J. 173, 182 (1995); see also Maurice Rosenberg et al., *Elements of Civil Procedure* 64-65 (4th ed. 1985) (stating that contingency fees are "likely to be acceptable to a lawyer only when there appears to be a reasonably good prospect of recovery.").

28. Consider the tax treatment of contingency fee lawyer advances for expenses and costs of litigation. Despite the asserted contingent nature of the repayment, the Internal Revenue Service ("IRS") treats these as nondeductible loans which can be deducted as bad debts only if not repaid, rather than as ordinary and necessary business expenses which would be deductible in the year the money is advanced. See *Burnett v. Commissioner*, 42 T.C. 9 (1964), *aff'd*, 356 F.2d 755 (5th Cir.), *cert. denied*, 385 U.S. 832 (1966). For instance, in *Boccardo v. United States*, the IRS position based its position upon data it assembled indicating that between 80% and 90% of the amount of the advances were eventually repaid. *Boccardo v. United States*, 12 Cl. Ct. 184, 185 (1987), *rev'd on other grounds sub nom. Boccardo v. Commissioner*, 56 F.3d 1016 (9th Cir. 1995). The IRS concluded and courts have concurred that although reimbursement was tied to the recovery of a client's claim, in reality, the risk of nonrecovery was very low because lawyers exercised great care in accepting only those clients whose claims would in all likelihood be successfully concluded. *Id.* at 186-87. Furthermore, firms' screening processes continue even after careful case selection and further ensure a high probability of overall recovery; thus, firms devote more time to and advance more funds on cases in which they end up prevailing than on cases which turn out to be losers—a process of highly profitable investment that continues throughout the life of the claim process. See *id.* at 185.

29. As one personal injury lawyer has acknowledged, "there are good PI cases—with clear liability and high return . . . [generating] quick and easy money." Andrew Blum, *Big Bucks, But . . .*, Nat'l L.J., Apr. 3, 1989, at 1, 47; see also Derek Bok, *The Cost of Talent* 139-40 (1993) ("The lure of obtaining a fraction of . . . handsome sums has caused most trial lawyers to insist on contingent fee arrangements even . . . when they happen to have an extremely high probability of winning.").

30. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 100 n.281 (1989) [hereinafter Brickman, *Contingent Fees Without Contingencies*]; Brickman et al., *supra* note 18, at 22 & n.24; Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. Times, Mar. 24, 1995, at B6.

31. See Formal Op. 93-379, *supra* note 19.

significant value-adding effort to a claim, a standard contingency fee will not in fact be "beneficial to the client."³²

The question that we must therefore address is how to determine whether a contingency fee is in fact beneficial to the client and what information must be disclosed to the client in order that he be able to give informed consent to the fee arrangement. Some argue that a lawyer fulfills his ethical responsibility to the client by candidly presenting all information relevant to the fee structure before entering into a contingency fee arrangement. If the lawyer believes that a substantial settlement offer will likely be made after just a few hours of work, he must disclose that to the client and thereby empower the client to reject a standard contingency fee and instead engage in fee-bargaining. While we agree that lawyers have such a duty of disclosure, its existence is a necessary but not sufficient protection of clients' correlative ethical rights to be dealt with fairly by their lawyers. The commercial standards governing the sale of a used car are not those governing the sale of legal services. As Judge Bellacosa of the New York Court of Appeals has so elegantly stated, "[t]he measure of an attorney's conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships."³³ Judge Bellacosa expresses the highest ideals of the concept of professional responsibility, ideals that we would denigrate if we were simply to declare the existence of a duty of disclosure as fulfilling the profession's responsibility to deal fairly with clients. Stated simply, an ethics rule made to rely exclusively on *ex parte* dialogue between a lawyer who not only has an obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"³⁴ but who is "in a better position to evaluate a cause of action,"³⁵ and a generally unsophisticated client often rendered vulnerable and dependent by the traumatic effects of an injury or illness, is not one meant to be taken seriously.³⁶

When candor and self-interest conflict to such an extent, failure to recognize the limitations of reliance on *ex parte* dialogue amounts to endorsement of the status quo. However, as we recognized in Formal

32. Model Code, *supra* note 1, EC 5-7.

33. *In re Cooperman*, 633 N.E.2d 1069, 1073 (N.Y. 1994).

34. Model Rules, *supra* note 1, Rule 1.4(b).

35. Model Code, *supra* note 1, EC 5-7.

36. As the late Chief Justice Warren Burger stated:

It is becoming more and more clear that in multiple disaster cases, . . . the transaction between an experienced lawyer and inexperienced lay survivors in negotiating a contract for professional services is not an arms-length transaction. . . . Many adults, injured persons or survivors of deceased persons, are no more capable of making a valid judgment on the appropriateness of the valid fee contract of 33 or 40 or 50 percent than a 12-year-old child.

Burger Urges Limits on Lawyer Fees in Personal Injury Cases, Boston Globe, May 14, 1986, at 17.

Opinion 93-379, the status quo with regard to fee practices is unacceptable. We therefore reject the articulation of a list of hortatory, unweighted, overlapping, and at times contradictory general principles as constituting an enforceable ethical standard. Such a list offers no guidance to the bar, no protection to clients, and ironically, no establishment of a rule of law process to govern the conduct of a profession which purports to apply it to others. To fulfill our ethical responsibility, we must articulate an objective and readily enforceable standard which implements the ethical principles governing impermissible contingency fee contracts in personal injury cases. This standard should effectively distinguish between cases in which liability or the amount of damages is not readily predictable and impermissible fee contracts in which attorneys charge risk-based premiums without assuming meaningful risk of nonpayment. In short, we must state a standard that includes a mechanism to ensure that a contingency fee is truly contingent. Any method of enforcement that does not incorporate such a mechanism would be chimerical.

III. *Charging Windfall Fees Contravenes the Public Policy of Those Majority of States Which Have Adopted the Client Discharge Rule*

There are yet other compelling reasons why we must reject any position that effectively lends the imprimatur of this Committee to lawyers' charging windfall fees, i.e., contingency fees that are not earned by meaningful risk assumption or value-adding efforts.

Because of the special nature of the lawyer-client relationship, it has long been the policy of the majority of states that clients could discharge their attorneys without penalty.³⁷ Trust and confidence is essential to the lawyer-client relationship. When a client loses that essential trust and confidence in his lawyer, the fiduciary basis of the relationship is undermined. As a precaution against such an erosive possibility, clients are allowed to terminate the relationship without penalty. The client discharge rule carefully balances the requisites of a fiduciary relationship and the interests of the attorney. It allows the client to terminate the relationship, holding that the fiduciary relationship precludes any expectancy damages, but also allows the attorney to collect in quantum meruit for services actually rendered.

In some instances, the client discharge rule has been rendered nugatory by the charging of nonrefundable retainers. By charging advance fees for services to be rendered and denominating them as nonrefundable even if the client terminated the lawyer prior to the completion of the services, lawyers were thereby able to exact a penalty for dis-

37. *Martin v. Camp*, 114 N.E. 46, 48 (N.Y. 1916); *Brickman & Cunningham, Nonrefundable Retainers Revisited*, *supra* note 12, at 7 n.24; 5 Arthur L. Corbin, *Corbin on Contracts* § 1095(c) (Supp. 1996).

charge, in violation of public policy. Accordingly, the New York Court of Appeals recently declared the charging of nonrefundable retainers per se illegal and unethical in *In re Cooperman*.³⁸ That decision's rationale has already been approved by a number of other courts and jurisdictions.³⁹ Jurisdictions which adhere to the client discharge rule may be expected to adopt the *Cooperman* outcome since the reasoning from the rule to the outcome is inexorable.

Lawyers who set contingency fee compensation at levels that include compensation for the risk of termination in addition to compensation for the risk of a low- or no-fee outcome contravene *Cooperman* and the public policy of states which have adopted the client discharge rule. A lawyer charging a standard contingency fee in all cases is effectively including in that fee structure a payment to compensate her for loss of expectancy upon termination, in addition to compensation for any actual work done. That contravenes both law and ethics in that majority of states that have adopted the client discharge rule.

When the client of a contingency fee lawyer who charges a standard contingency fee in a case without either meaningful risk or significant value-adding efforts terminates the lawyer client-relationship, it is not *that* client who is being penalized by the termination. Rather, it is *all* contingency fee clients being charged standard contingency fees in cases without meaningful risk and significant value-adding efforts who are being penalized in order to compensate all contingency fee lawyers acting in violation of *Martin v. Camp* and *In re Cooperman*. If, however, it is unethical and illegal to exact a penalty for termination against *one* client, the Committee is of the view that it is at least unethical to exact such a penalty of *all* contingency fee clients.

38. *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994).

39. See *Wong v. Kennedy*, 853 F. Supp. 73, 78-80 (E.D.N.Y. 1994); *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463, 472 n.27 (E.D. Va. 1994); *In re National Magazine Publishing Co.*, 172 B.R. 237, 240 (Bankr. N.D. Ohio 1994); *In re Mills*, 170 B.R. 404, 409 (Bankr. D. Ariz. 1994); *Cohen v. Radio-Electrician's Officer's Union*, 645 A.2d 1248, 1254-56 (N.J. Super. Ct. App. Div. 1994); *Sarmiento v. Meyer & Greenfield, N.Y. L.J.*, May 9, 1994, at 29 (N.Y. App. Div.); see also *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 676-77 (Colo. 1995) (stating that an attorney can recover only in quantum meruit when he is discharged without cause in both contingency fee and non-contingency fee cases); *AFLAC, Inc. v. Williams*, 444 S.E.2d 314, 316-17 (Ga. 1994) (declaring unenforceable a contractual provision which imposed a penalty on a client for terminating his attorney); *Cincinnati Bar Ass'n v. Schultz*, 643 N.E.2d 1139, 1140-41 (Ohio 1994) (affirming that an attorney's failure to return an unearned fee is an ethical violation); *Cuyahoga Co. Bar Ass'n v. Okocha*, 632 N.E.2d 1284, 1285, 1286 (Ohio 1994) (affirming that charging a client an unearned fee is unethical). But see *Board of Prof. Resp., Sup. Ct. Tenn., Formal Ethics Op. 92-F-128(b)* (Sept. 10, 1993) (pre-*Cooperman* decision reaffirming earlier opinion approving nonrefundable retainers).

IV. *Current Enforcement of Ethical Rules*

Today, ethical rules applicable to contingency fees are honored more in the breach than in the observance. Although most tort cases involve risk, there is a distinct minority of tort claims in which risk is substantially absent. These cases often result in windfall fees for lawyers, which, as noted, are fees that include substantial risk premium charges in the absence of meaningful risk or significant value-adding efforts. One of the country's leading tort practitioners, in analyzing two mass disasters, stated: "[T]here's no way in the world that the plaintiffs cannot recover in both of these cases. In every mass disaster, you're talking about innocent plaintiffs and clear liability on the defendants' parts."⁴⁰ A federal district court judge with over twenty years of practice experience has stated that "not all personal injury cases [for which contingency fees are charged] are contingent. . . . [T]he lawyer does know in most cases that there will be some payment made by the defendant or his insurance company."⁴¹ Indeed, many cases exist in which liability is not even contested, where the effective hourly rates of compensation obtained by contingent fee lawyers range from \$1000 to \$5000 to as high as \$20,000 to \$25,000 per hour.⁴²

Remarks made over thirty years ago by United States District Judge Frederick VanPelt Bryan accurately foresaw that the failure even then to abide by ethical rules resulting in the abuse of contingency fees would lead to a severe loss of esteem by the bar:

[W]hen 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.⁴³

Based on several recent surveys, that day may be near. For example, a National Law Journal survey, reflecting findings of a national poll

40. C. Low, *Legal Beagles Unleash Client Hunt*, *Insight*, Feb. 9, 1987, at 63 (quoting Philip Corboy).

41. John F. Grady, *Some Ethical Questions About Percentage Fees*, *Litig.*, Summer 1976, at 20, 24.

42. See Brickman, *Contingent Fees Without Contingencies*, *supra* note 30, at 33, 76-77 n.186; Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 *Cardozo L. Rev.* 1819, 1834-35 (1992); Peter Passell, *Windfall Fees*, *supra* note 25, at A1.

43. Walter H. Beckham, Jr., *Should Contingent Fees in Personal Injury Cases Be Subject to Judicial Control?*, 1960 *A.B.A. Sec. Ins., Negl., & Compensation L. Proc.* 194, 214-15.

conducted in mid-July 1993, found lawyers least well-respected among occupational groups with the exception of politicians, and reported the following remarkable changes from a poll conducted a scant seven years earlier:

- an increase in the regard of lawyers as “less honest” than most people from seventeen percent to thirty-one percent;
- an increase in the belief that lawyers charge too much from twenty-three percent to forty-three percent; and
- a decline in those wanting their children to become lawyers from twelve percent to five percent.⁴⁴

An even more recent poll found that sixty-nine percent of Americans believe lawyers are only sometimes honest or not usually honest, and fifty-six percent say lawyers use the system to protect the powerful and enrich themselves.⁴⁵

This view of the profession is not limited to outsiders; even lawyers believe that significant abuses exist. Indeed, it is now widely acknowledged by unbiased observers that windfall fees routinely rain down upon contingency fee lawyers and, until recently, equally acknowledged that effectively applying ethical rules to contingency fees is simply not possible. Thus, Derek Bok has stated:

[Existing rules] do nothing to prevent lawyers with strong cases from pocketing their share of a large settlement without having to devote much time or skill. To prevent these windfalls would require much more extensive judicial oversight of the fee system and might embroil judges in detailed inquiries into the amounts of work actually performed in winning large awards. It is far from clear that avoiding excessive fees would be worth the added time and cost of forcing heavily burdened judges to conduct such investigations.⁴⁶

We agree with former dean and president Bok. Relying on the judiciary to exercise “special scrutiny” of contingency fees is impractical and unworkable. But the need for application of critical ethical principles to contingency fee practices remains unabated. Consider the issue from the perspective of an injured party who has been offered a settlement by an insurance company. Should not that person be encouraged to seek the advice of a lawyer? Yet, under the current contingency fee system, the price of seeking such legal advice can be oppressive. All too often the price for that advice is one-third or more of the offered settlement. When viewed from this perspective, such contingency fees are tolls extracted by lawyers for gaining access to

44. See *Lawyers Still Unpopular*, Wall St. J., Aug. 2, 1993, at B3 (describing National Law Journal poll); see also Lincoln Caplan, *The Lawyers' Race to the Bottom*, N.Y. Times, Aug. 6, 1993, at A29 (discussing reasons for society's negative attitudes toward lawyers); Andrea Sachs et al., *First, Kiss All the Lawyers*, Time, Aug. 16, 1993, at 39, 39 (same).

45. See Budiansky, *supra* note 15, at 52.

46. Bok, *supra* note 29, at 144.

the civil justice system. When the legal profession condones such tolls, the results may be seen in the extremely disturbing opinion poll data mentioned earlier.

One exception to the general failure to observe ethical standards in some contingency fee cases is found in airline disaster cases. In such cases, airline insurers often send a letter to survivors of crash victims immediately following such accidents which: a) acknowledges that the airlines accept legal liability for the accident; b) indicates a readiness to make a substantial settlement offer on receipt of information regarding damages; and c) urges survivors to defer entering into fee relationships with counsel until after settlement offers have been made.⁴⁷ Lee Kreindler, dean of the air crash plaintiffs' bar, while sharply contesting many of the assertions and the ethics of the letter, nonetheless acknowledges that the receipt of serious early defendant offers before retaining counsel has resulted in sharply reduced plaintiff and defendant attorney fees, application of contingency fees only to the excess over the early offer, increases in net recoveries, and more rapid settlements.⁴⁸ To this Committee and to others interested in aligning the contingency fee system with its ethical mandate and policy roots, the market mechanism that has evolved in airline disaster cases presents a powerful lesson: Early offers often induce observance of the ethical requirements applicable to contingency fee practice.

V. *Methods of Effectuating Ethical Rules*

The core issue, therefore, that this opinion addresses is how current ethical rules, now routinely unobserved, may be enforced to achieve results similar to those produced by the Alpert Letter without creating the burdens that Dean Bok has described. As noted earlier, however, any effort to apply ethical standards to contingency fees must overcome the daunting problem of deciding how to decide whether adequate risk existed to justify the charging of a standard contingency fee. That is, how can we create an enforcement mechanism to distinguish between the presence or absence of meaningful risk? It is clear that acknowledged defendant liability does not exist for all or even most personal injury cases as a class and that there are many cases where substantial risk exists because of significant disputes over liability or the seriousness of the injury. At the same time, any enforcement mechanism must protect against the ethical impropriety of charging risk-based contingency fees in the large number of particular cases where little value-adding services are likely to be required of or per-

47. See Lee S. Kreindler, *The Letter Should Not Be Sent*, The Brief, Nov. 1982, at 4, 10. The letter is known as the "Alpert Letter."

48. *Id.* at 38.

formed by counsel. In short, any enforcement mechanism must require that a contingency fee be truly contingent.

One often-suggested method to resolve claims of contingent fee abuses is case-by-case scrutiny.⁴⁹ Unfortunately, this approach is all too often simply a euphemism for the status quo: no meaningful enforcement of ethical rules. Thoughtful lawyers realize that substantial fee abuses occur regularly and that courts, disciplinary boards, and unsophisticated clients are ill-equipped to deal with these abuses. Moreover, courts cannot and should not engage in extensive post-hoc fact-finding reviews of all contingency fee contracts to determine the nature and degree of the risks of nonrecovery which existed when the clients entered into the retainer agreements. Such fact-finding reviews would grossly abuse scarce judicial resources. Even were the resources to be committed, these inquiries would be deeply skewed against the claimants because of their lack of knowledge and attorneys' superior ability to know (and build records regarding) the risks of non-recovery.

Furthermore, many bar association disciplinary boards routinely either refuse to take cognizance of fee disputes or relegate them to secondary importance. In a recent poll of disciplinary agencies, very few recognized any ethical impropriety raised by a client complaint that the lawyer had apparently failed to disclose—in advance of the client's agreeing to pay a standard contingency fee—that the case would likely be settled for an amount near insurance policy limits without much time or effort on the part of the attorney.⁵⁰ Thus, in many instances, relying on case-by-case enforcement does not afford even the semblance of a fig leaf to cover gross ethical abuses in contingency fees. Moreover, accepting jurisdiction over the thousands and thousands of such cases would require far more resources and time than disciplinary committees have. *The challenge then is to devise a method of enforcing ethical rules without primarily relying on courts or disciplinary boards.*

This Standing Committee has previously considered how ethical rules may be enforced in the context of contingency fees in its Informal Opinion 86-1521 where it opined that contingency fee attorneys should "offer a prospective client who can pay a reasonable fixed fee the alternative of doing so and an explanation of the alternatives."⁵¹ In that opinion, we concluded:

49. See Philip H. Corboy, *Contingency Fees: The Individual's Key to the Court-house Door*, Litig., Summer 1976, at 27, 35-36.

50. See Lester Brickman, *Contingency Fee Abuses, Ethical Mandates and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. (forthcoming Dec. 1996).

51. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986) [hereinafter Informal Op. 86-1521]. Under EC 2-20, however, cited by Informal Opinion 86-1521, consent to a contingency fee contract by a client "who is able to pay a reasonable fixed fee" and has been "fully informed of all relevant factors" is

A lawyer has an obligation of fair dealing with even a prospective client who consults the lawyer. . . . The fiduciary requirement of fair dealing is reflected in the "reasonableness" and "clearly excessive" tests of the Model Rules and the Model Code

Contingent fees are subject to the "reasonableness" and "clearly excessive" tests Whether a contingent fee is reasonable and whether it is in the best interest of the client may be dependent on many factors, including the estimated amount of a reasonable fixed fee, *the degree of contingency in fact involved* and the probable size of the recovery, factors which the client normally has the right to consider before agreeing to a fee arrangement.⁵²

We thus opined that charging a substantial contingency fee⁵³ is unreasonable when there is a lack of a significant "degree of contingency in fact" and that it is a breach of both a lawyer's fiduciary duty to charge such a fee and a breach of the ethical duty not to charge an unreasonable and clearly excessive fee.⁵⁴

Model Code of Professional Responsibility EC 5-7 confirms the position we took in Informal Opinion 86-1521—that the contingency fee must be in "the client's best interest"⁵⁵—by establishing an objective standard for ethical contingent fee contracts. It does so by declaring that all contingent fee contracts must be "beneficial" to the client⁵⁶ and, thus, the client has the right correlative to the entitlement of a beneficiary from a fiduciary. Our opinions recognize that fiduciary principles incorporated into ethical requirements govern the attorney-client fee relationship both as a matter of law and of ethics. For a standard contingency fee to be in accord with these principles, that is, to be beneficial to a client and not be an unreasonable and excessive fee, it cannot be applicable to that part of a recovery that was paid or offered to be paid without the lawyer/fiduciary rendering commensurate service or undertaking meaningful risk. Standard contingency fees may only be charged when real contingencies exist at the time of

only "not necessarily improper." Model Code, *supra* note 1, EC 2-20. Informal Opinion 86-1521 does not authorize a consent override of existing ethical standards, i.e., the "reasonable" and "clearly excessive" tests of the Model Code and the Model Rules. If it were read in this manner, it could reverse holdings barring contingency fees in auto no-fault insurance and related cases—clearly not the intent of an opinion designed to strengthen client protection. Instead, the determination of "[w]hether a contingency fee is reasonable and whether it is in the best interest of the client may be dependent on many factors, including . . . the degree of contingency in fact involved." Informal Op. 86-1521, *supra*. Thus, although consent is a necessary condition, where doubt exists as to whether the contingency fee contract "is consistent with the client's best interest," consent alone is not a sufficient condition for such contracts. *Id.*

52. Informal Op. 86-1251, *supra* note 51 (emphasis added).

53. Standard contingency fees today range from one-third to 50%, depending on the jurisdiction; in mass torts and other aggregated actions, standard fees range from 25% to 40%.

54. Informal Op. 86-1521, *supra* note 51.

55. *Id.*

56. Model Code, *supra* note 1, EC 5-7.

the establishment of a contingency fee relationship. Whether such real contingencies exist is best answered by whether a meaningful defendant offer can be anticipated prior to the addition of significant, value-adding effort by the attorney. If such an offer has already been rendered prior to any legal services, such as when elicited by the Alpert Letter,⁵⁷ surely no one could argue in earnest that there was a real contingency as to the amount of that offer at that time. We hold that where a client has received a settlement offer prior to representation and that settlement offer remains open for acceptance, the lawyer, as a fiduciary, may not seek or accept a contingency fee as to the amount of that offer. Therefore, our answer to the first question is in the affirmative.⁵⁸

Because we opine that an attorney cannot charge a standard contingency fee as to the amount of a pre-retention settlement offer both because of the lack of meaningful risk and the lack of any value-adding effort, it follows that where a settlement offer is made shortly after retention, an attorney may not charge a standard contingency fee. Where an offer is made very shortly after retention, the absence of risk as to that amount has become manifest; the lawyer has not yet had an opportunity to do any significant work that would have added meaningful value to the claim. An attorney may, in an hourly rate, reflect a belief that his reputation is sufficiently intimidating to force defendant offers, or better offers than his client would have received without retaining an attorney or by retaining a different attorney. He cannot, however, in his fiduciary capacity, justify charging a standard contingency fee which lays claim to a significant share of his client's recovery, by the mere fact of his presence or reputation.⁵⁹ Otherwise, the fact of retention would itself entitle an attorney to a significant share of his client's settlement without having expended significant effort on the case. Only where there is a need for such value-adding effort does meaningful risk exist and only where meaningful risk exists is a standard contingency fee justified. In the absence of the need for such effort, and thus an absence of meaningful risk, an attorney may not charge a standard contingency fee applicable to the amount of the early settlement offer. Therefore, our answer to the second question is also in the affirmative.

Having answered the first two questions in the affirmative, we must therefore determine whether attorneys have an ethical responsibility,

57. See Kreindler, *supra* note 47, at 10.

58. The lawyer can charge an hourly rate or fixed fee to advise the client about the fairness of an offer. The lawyer may seek and obtain a contingency fee for monies obtained in excess of the pre-retention offer.

59. This identical concept is embedded in Model Rule 3.7 and DR 5-101(B) and DR 5-102. See Model Rules, *supra* note 1, Rule 3.7; Model Code, *supra* note 1, DR 5-101(B) & 5-102; see also Informal Op. 86-1521, *supra* note 51 ("The client with a meritorious claim is entitled to representation and should not be required to relinquish a share of the claim to get representation . . .").

at the outset of the claim process, to solicit and convey settlement offers to a client in order to provide him with meaningful information regarding the degree of risk the lawyer is undertaking and therefore enable the client to give his informed consent to the fee arrangement.⁶⁰ Our answer to this question is guided by United States District Court Judge John Grady's critique of the contingent fee system. In his view, the ninety-five percent settlement rates, the fact that "[m]any cases involve no real question of liability," and the fact that "[t]he vast majority of personal injury cases involve no uncertainty that the lawyer is going to be paid something," undermine the universality of the applicability of the rationale that "since the fee is contingent, or uncertain, and the lawyer is taking a chance of receiving no fee at all, it is equitable to compensate him at a higher rate than if his compensation were certain."⁶¹

Of critical note are Judge Grady's three questions, which he believed needed to be answered before a contingency fee could ethically be charged:

1. Is there a genuine and substantial question on liability, or is the only real question the amount of damages?
2. Is the case likely to be settled or tried to a verdict?
3. Is the amount of the recovery likely to be small or large . . . ?⁶²

Judge Grady's view was that "[u]ntil the lawyer knows the answers to these questions, he has insufficient basis for determining whether a percentage fee is proper and, if proper, what percentage would be fair."⁶³

Only a limited amount of attorney time and effort is required to satisfy the obligation to facilitate and seek early defendant offers. This often involves no more than an exchange of telephone calls and letters to the defendant setting forth a statement of the basis for the claim and documentation of the basis of the damages claim.

Recognizing that attorneys have a duty at the outset of representation to seek and convey settlement offers will permit a self-enforcing means of effectuating ethical rules and obtaining answers to Judge Grady's questions. It will revive ethical prohibitions against "unreasonable and excessive fees" and will ensure that clients and lawyers will not be obligated to speculate, at the client's disadvantage, about

60. Model Rule 1.4(a) provides that all lawyers must keep their clients "reasonably informed about the status of . . . matter[s]." Model Rules, *supra* note 1, Rule 1.4. Model Rule 1.4(b) requires that lawyers "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* Rule 1.4(b). Ethical Consideration 7-8 of the Model Code requires all lawyers to "exert [their] best efforts to insure that decisions of [their] client[s] are made only after the client has been informed of relevant considerations." Model Code, *supra* note 1, EC 7-8.

61. Grady, *supra* note 41, at 23, 24.

62. *Id.* at 26.

63. *Id.*

the risks of non-recovery that exist when they enter into contingency fee contracts. Recognizing such a duty will also do for clients in contingency fee cases exactly what the imposition of a fiduciary relationship is intended to do: produce an efficient protection that substitutes for the client's need to hire a monitor—a second lawyer—to oversee his dealings with his primary lawyer. Consider, for example, the remarks of an attorney who negotiates contingency fees with large sophisticated clients who themselves are represented by counsel in such negotiations:

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 [an early offer proposal]. So what's so awful with [an early offer] rule that assures clients without clout of the same protection against a lawyer windfall?⁶⁴

Thus, recognizing such a duty will ensure that the ethical principle requiring real contingencies for standard contingency fee contracts is not reduced to an unenforceable admonition to counsel to be honest with their clients in *ex parte* discussion under circumstances where such honesty will sometimes impose severe financial penalties on lawyers by their foregoing windfall fees and where the absence of such honesty will be virtually undetectable. That this duty exists is also supported by EC 5-7's explicit recognition that attorneys are "in a better position to evaluate a cause of action."⁶⁵ Ethical objectives can be met only if contingency fees cannot be charged against the undisputed value of a claim without limiting the right of the attorney to charge such fees for value-adding efforts that augment the value of the claim.

We therefore supplement Informal Opinion 86-1521 in which we held that, despite the absence of any such explicit requirement in Model Rule 1.5 or DR 2-106, counsel has an ethical duty to provide their clients both with the information necessary to determine whether fixed or contingency fees are beneficial and the option to pay an hourly rate or fixed fee with the recognition of a duty of contingency fee counsel to seek and convey early defendant settlement offers.⁶⁶ Knowledge of the existence of these offers will allow clients to make, on a more certain and independent basis, the fee choices that Informal Opinion 86-1521 held that they be afforded. More importantly, defendant failures to make early offers will serve as a critical means of determining the presence of real risks of nonrecovery and will thus make more real and fair any decisions to pay standard con-

64. Stephen D. Susman, A Case for a Cease Fire, Address at the Annual Meeting of the TIPS Section of the ABA 8 (Apr. 15, 1994) (transcript available at the Manhattan Institute).

65. Model Code, *supra* note 1, EC 5-7.

66. See Informal Op. 86-1521, *supra* note 51.

tingency fees. Thus, our answer to the third question is also in the affirmative.

CONCLUSION

The root purpose of the tort system is the definition of duties owing to and from all interacting members of society, thus making it a body of law described in an ABA report "as a mirror of morals and a legal vehicle for helping to define them."⁶⁷ Lawyers have a "special responsibility for the quality of justice"⁶⁸ and should "seek improvement of the law [and] the administration of justice."⁶⁹ This duty to "assist in improving the legal system"⁷⁰ arises because "lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."⁷¹ Where corrective measures are needed because of the failure of our ethics system to provide effective client protection in an identifiable and significant subcategory of cases, we are faced with the ultimate question that we as lawyers can confront: a clear and unavoidable conflict between our own financial interests and our self-imposed obligation to act in the public interest. As a profession, we have repeatedly stated that when faced with this ultimate choice, we must choose the public interest over our own. We have stated this clearly and unambiguously in the preambles to our ethics codes, as follows: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar,"⁷² and "in the last analysis it is the desire for the respect and confidence of the members of [the] profession and of the society which [the lawyer] serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction."⁷³

The choice between the clear financial interests of the legal profession and the interests of clients is not without difficulty. Because we are skilled wordsmiths, we can give the appearance of choosing the public interest over our own even as we clearly opt for the latter. Thus, we could simply list the factors that lawyers should take into account in determining whether it is ethically permissible to charge a standard contingency fee and insist that these factors be discussed

67. ABA Special Comm. on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law* 12-5 (1984).

68. Model Rules, *supra* note 1, Preamble.

69. *Id.*

70. Model Code, *supra* note 1, Canon 8.

71. *Id.* EC 8-1.

72. Model Rules, *supra* note 1, Preamble.

73. Model Code, *supra* note 1, Preamble.

with clients before the fee arrangement is concluded. But we would do so knowing that these were unenforceable admonitions to counsel to be honest with clients by candidly discussing fee risk under circumstances where candor would often impose severe financial penalties on the lawyer and where the failure to be candid would be essentially undetectable. Such a listing and admonition would offer no real guidance to the bar, no protection for clients, and, perhaps most importantly, no establishment of a rule of law process to govern the conduct of the profession which has the principal responsibility of applying the rule of law to others.

We have chosen to carry out our "special responsibilities of self-government" by furthering the public interest at the clear and undeniable expense of the "self-interested concerns of the bar."⁷⁴ Accordingly, we hold that meaningful ethical constraints ought to be applied to contingency fees just as we have earlier held that they apply to hourly rate fees.

74. Model Rules, *supra* note 1, Preamble.

