CONTINGENCY FEE CONFLICTS: ATTORNEYS OPT FOR QUICK-KILL SETTLEMENTS WHEN THEIR CLIENTS WOULD BE BETTER OFF GOING TO TRIAL

Steve P. Calandrillo, Chryssa V. Deliganis,** and Neela Brocato****

Despite the checkered history of contingency fees in the practice of law, attorneys often claim that such fee arrangements perfectly align the interests of lawyer and client. After all, contingency fee lawyers proclaim in TV ad after TV ad, "we don't get paid unless you win!" That superficial logic does not withstand economic scrutiny. Utilizing a behavioral economics lens, this Article demonstrates that contingency fee arrangements give attorneys excessive incentives to settle cases that their clients would be better off taking all the way through trial. In addition to highlighting this undertheorized problem in law, we offer normative recommendations to help alleviate the conflict. Ultimately, we need to devise a hybrid fee system that provides compensation proportionate to how hard an attorney works, provides incentives for the best possible outcome for her client (whether obtained at trial or via settlement), and ensures that low-income plaintiffs can still obtain access to the doors of justice.

* Jeffrey & Susan Brotman Professor of Law, University of Washington School of Law. stevecal@uw.edu.

** Visiting Assistant Professor of Law, Seattle University School of Law, cdeliganis@seattleu.edu.

*** J.D., University of Washington School of Law. Eugene Wright Scholar Award Recipient. neelae@uw.edu.

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INTRODUCTION

Despite their checkered history, contingency fees are deeply embedded in the American legal system. As Part I discusses, they have been around since the country's founding, developing alongside the court system and American jurisprudence. Today, the fees are ubiquitous in tort litigation and the dominant form of payment for personal injury cases. Often described as providing a "key to the courthouse," contingency fees have been championed for allowing injured citizens the ability to bring claims that their limited resources might have otherwise prevented. By doing so, advocates of contingency fees contend they also promote deterrence of dangerous behavior, socially optimal levels of care, and progressive jurisprudence.

Contingency fees, however, are hiding a dirty secret. Most recent critiques of the system have focused on their perverse potential for windfall attorney's fees or frivolous lawsuits. That might be true in some situations, but that is not why we wrote this Article. This Article highlights a more surreptitious and fundamental problem. It argues that contingency fees splinter the attorneys' financial interests from their clients' and that lawyers have concealed this divergence from the public. This claim seems counterintuitive at first. Since contingency fee lawyers receive a percentage of their client's recovery, they should be motivated to maximize that amount, right? Wrong. A behavioral economic analysis reveals that contingency fees lead attorneys and their clients to have drastically different amounts for which they would be willing to settle. Acting in their own self-interest, lawyers pocket huge fees by settling while avoiding the cost and risk of going to trial. Such an approach, however, is detrimental to their clients who do best with the highest overall recovery—and that often requires proceeding through trial. Even a client with a slam-dunk trial case may not obtain that large award because its value to contingency fee attorneys can frequently be just as much as settling several small cases. Rapid settlement almost always takes less time and effort than taking a single contingency fee case all the way through trial.

In addition to promoting excessive numbers of settlements in lieu of trials, Part II of this Article demonstrates that contingency fees result in lawyers entering those settlement contracts prematurely, netting plaintiffs much less than their case is worth. This is because a contingent fee lawyer's financial interest is to seek the highest return per hour of time spent working on the case. Therefore, a lawyer is motivated to quickly settle when their fee falls below their opportunity cost of an additional hour spent on a case. In addition to hurting the client,

this "quick-kill" approach has been criticized for allowing attorneys to collect fees for little to no work in cases with little or no real risk. The incentive that contingency fee lawyers have to act in their own self-interest stands in direct opposition to their fiduciary duty to their client. The relationship between a lawyer and client is based on trust that the lawyer is diligently working on behalf of their client's best interest, not their own. The breakdown of that relationship jeopardizes the integrity of the legal system as a whole.

This Article's argument against contingency fees is a contentious one. Therefore, Part II.E and II.F addresses and evaluates assertations put forth by academics and jurists who have reached the opposite conclusion, namely that contingency fees can result in attorneys obtaining the best possible settlement results for their clients in certain situations. We acknowledge claims that other factors may deter lawyers from self-serving behavior, including their sense of professionalism and obligation to comply with the Rules of Professional Responsibility. We rebut such contentions by highlighting research and data showing that lawyers do not in fact possess superior ethics or morals in practice, despite the oaths we take. This Article also exposes and invalidates the common argument that abuse is minimized since contingency fee lawyers need to retain "good reputations" to generate business by showing that clients can't reliably evaluate the quality of their lawyer's work, and that reputation is less important in this type of litigation given the "one-shot" nature of most contingency fee cases.

Part III of this Article proposes solutions to the contingency fee conflicts of interest, some mundane and others quite radical. We analyze approaches taken by other countries, including outlawing the fees and adopting the loser pays rule that England famously employs. Some of the proffered approaches are relatively conservative, like implementing new ethics rules. Others, like allowing plaintiffs to sell their tort claims on the open market to the highest bidder, are more extreme. Finally, in Part IV we suggest and evaluate the benefits and drawbacks of modified contingency fee systems, including those that combine graduated scales, bonuses based on risk assumption and outcome achieved, and hourly rates. Ultimately, America must devise a hybrid fee system that balances its citizens' needs to access the justice system when their resources are limited, with the desire to ensure that contingency fee legal representation does not become a pretext to line lawyers' pockets through quick-kill settlements at the expense of a client's best interest. A brief conclusion follows.

I.
HISTORY OF CONTINGENT FEES AND THE EVOLUTION TOWARDS ACCEPTANCE

A. English Jurisprudence and the Doctrine of Champerty in England

The contingency fee saga can be traced back to medieval England and the doctrine of champerty.[1] Champerty is a "bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds."[2] In England, champerty was prohibited under common law since the Middle Ages.[3]

Why the concern? Champertous agreements were viewed as a tool for wealthy landowners (who already held a disproportionate amount of power during feudalism) to secure even more power and property from their neighbors.[4] The fear was that those already well-to-do individuals would amass even more wealth and influence by pursuing other parties' claims in exchange for a portion of the recovery.[5] By the thirteenth century, champertous agreements were not only prohibited under common law but punishable by statute in some parts of the country.[6] Punishments carried fines and prison sentences of up to three years.[7]

With the attack on champerty in full swing, contingency fees themselves stood little chance. They were viewed as champertous[8] even though they involved a slightly different arrangement. Contingency fees constitute "an arrangement between attorney and client whereby the attorney agrees to represent the client with compensation to be a percentage of the amount recovered."[9] Unlike with landowners, there was no real concern of lawyers usurping too much power in society. However, labeling contingency fee agreements as champertous addressed a different perceived plague on the country—namely,

1. See Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1644 (1996).
2. Champerty, BLACK'S LAW DICTIONARY (11th ed. 2019).
3. See Wennihan, *supra* note 1.
4. Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 263 (1998).
5. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 232 (1998).
6. Landsman, *supra* note 4, at 262.
7. Karsten, *supra* note 5.
8. Wennihan, *supra* note 1, at 1645.
9. Contingency Fee, BLACK'S LAW DICTIONARY (11th ed. 2019).

excessive lawsuits.[10] England had already been trying to preclude any uptick in litigation by implementing a "loser-pays" attorney fees rule, which started to appear in statutes by the thirteenth century.[11] Under the rule, the party that loses in court must pay the winner's legal costs (an intuitive, common sense measure, at least at first blush).[12] Moreover, the outcry over excessive lawsuits often came from the country's aristocrats, who were being sued by members of the lower classes, and who now realized that the costs of being sued outweighed the benefits of using lawsuits to gain power.[13] Given their status, their grievances became a clarion call for establishing regulations on contingency fees. The final blow to contingency fee arrangements came in the eighteenth and nineteenth centuries, when the English courts officially banned all champertous contingency fee contracts.[14]

While hailed by most, one of England's prominent legal scholars denounced the move.[15] Dispelling the notion that contingency fee arrangements were a sword for the rich, Lord Abinger addressed how these agreements could actually aid the country's indigent in accessing the legal system. In 1843, he prominently criticized its ban, saying:

> If a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife.[16]

The argument that contingency fee agreements had the potential to provide the poor with access to justice would be championed further—and realized—in the United States.

B. Contingency Fees in Early American History

Across the pond, American colonists were wrestling with their own stance on champerty and contingency fees. During the 1800s, contingency fees were common in property disputes among early settlers

10. See Wennihan, *supra* note 1, at 1645.
11. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMPAR. L. REV. 583, 590 (2005).
12. *Id.* at 589.
13. Landsman, *supra* note 4.
14. Karsten, *supra* note 5, at 233.
15. *Id.* at 233.
16. *Id.*

in frontier states.[17] Various grants and titles made claiming one's property a logistical nightmare for settlers, and a business opportunity for attorneys.[18] Settlers who were kicked off their land often lacked resources to pay for attorneys to make their case, making them reliant on contingency fees.[19] In such cases, courts typically permitted the use of such fees to provide necessary redress.[20]

Courts' acceptance of contingency fees, however, was not ubiquitous. State Supreme Courts were divided over whether contracts involving contingency fees should be treated as valid or void. By the mid-nineteenth century, the highest courts in several states, including Alabama, Indiana, Massachusetts, and Michigan, banned them outright.[21] Others took the opposite view, as the highest courts in Pennsylvania, Delaware, Louisiana, New York, and Tennessee officially recognized such contracts as valid.[22]

Opponents of contingency fees echoed the critiques of English jurists or expressed reluctance to depart from the mother country's jurisprudence.[23] Proponents relied on their most compelling argument, that contingency fees were necessary for poor plaintiffs to access the courts.[24] The argument became even more relevant and struck a chord with the public, given the socio-economic backdrop. The Industrial Revolution brought with it a surge in work-related[25] and transportation accidents.[26] During this time, many victims could not afford to hire attorneys. Their only means to pursue their legal claims was through the use of contingency fees.[27] By the late nineteenth century, contingency fees had become widely accepted in numerous states through case law.[28] Even the U.S. Supreme Court had deemed contingency fees to be valid[29] in the 1853 case, *Wylie v. Coxe*.[30] The Court reiterated the same stance that contingency fees were legitimate contractual agreements in *Taylor v. Bemiss* (1884), where it upheld a contingency fee agreement

17. Kristin A. Porcu, *Protecting the Poor: The Dangers of Altering the Contingency Fee System*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 149, 151 (2000).
18. *See* Karsten, *supra* note 5, at 236.
19. *Id.* at 236–237.
20. *Id.* at 237.
21. *Id.* at 238–239.
22. *Id.* at 239.
23. *Id.* at 237, 239.
24. *Id.* at 241.
25. Root, *supra* note 11, at 593.
26. Wennihan, *supra* note 1, at 1645–46.
27. *Id.* at 1646.
28. *See* Porcu, *supra* note 17, at 152 & n.31.
29. F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 39 (1964).
30. Wylie v. Coxe, 56 U.S. 415 (1853).

for 50% of plaintiff's recovery. There, the Court articulated the rationale that still prevails today:

> [C]ontracts by attorneys for compensation in prosecuting claims … are not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well-known difficulties and delays in obtaining payment of just claims … justifies a liberal compensation in successful cases, where none is to be received in the case of failure.[31]

America's newfound receptivity to contingency fees also reflected the country's desire to depart from England's legal principles and establish its own. Ingrained in this new ideology was the value of litigation.[32] Rather than viewing lawsuits as a harmful plague, American jurisprudence began to see litigation as a tool to improve society by prompting reform.[33]

Furthermore, the U.S. began to form its own independent notion of what a lawyer is, and what she *should* be. Driven by the philosophy of Jacksonian democracy, traditional professional groups were largely seen as aristocratic rather than formed for the benefit of the common man.[34] The legal profession attempted to avoid the aristocratic label by promoting itself as an ordinary occupation to "earn[] a living."[35] Consistent with this identity was the idea that the economic relationship between a lawyer and client should be governed by laissez-faire principles in establishing the price customers pay for services or goods.[36]

However, by the early twentieth century, contingency fees were once again shrouded in stigma. During that time, contingency fee attorneys began to employ solicitors to drum up business.[37] Such solicitors, including police, ambulance drivers, and hospital staff, were paid to find accident victims and secure their power of attorney on behalf of the contingency fee lawyer.[38] For doing their part, solicitors were usually paid a finder's fee and guaranteed a nominal percentage of the amount recovered. The practice led some contingency fee lawyers to get stuck with the unflattering label, still prevalent today, of "ambulance chasers."

Antipathy against "ambulance chasers" was perhaps best illustrated by the president of the South Carolina Bar Association, J.E. McDonald. In his 1905 address to his own bar association, he bemoaned:

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31. Taylor v. Bemiss, 110 U.S. 42, 45 (1884).
32. Root, *supra* note 11, at 593–94.
33. *Id.* at 594.
34. MacKinnon, *supra* note 29, at 15.
35. *Id.*
36. *Id.*
37. Karsten, *supra* note 5, at 256–57.
38. *Id.* at 257.

> "[T]he ambulance chaser has become a recognized feature of city life. He haunts the hospitals and visits the homes of the afflicted, officiously intruding his presence and persistently offering his services on the basis of a contingent fee. This is not law practice[;] it is simply a form of legalized piracy. No man can adopt such a course and yet retain the respect of his professional brethren, for while the person so doing violates no rule of law, he is guilty of a gross infraction of one of the best known and longest established ethical precepts of the Bar."[39]

Just a few decades after McDonald's address, distasteful paid partnerships between lawyers and solicitors were declared contrary to public policy and prohibited by law.[40]

C. Contingency Fees in the U.S. Today

Despite its contentious history, the contingency fee has not only survived but proliferated in America's modern legal landscape. Today, contingency fees are permitted in every state. Maine was the last holdout, refusing to allow contingency fees until 1965.[41] Some states, including Oklahoma, have expressly written the validity of contingency fee agreements into law through statutes.[42]

There are, however, regulatory limitations on their use. The American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC) list the requirements governing contingency fees. Rule 1.5(c) states that contingency fee agreements must be in writing and signed by the client.[43] The agreement must also clearly describe how the fees will be calculated.[44] The ABA also restricts attorneys from using contingency fees in certain areas of law, including domestic relations and criminal defense,[45] where they are thought to offend public policy.

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39. Max Kennerly, *The Lawyer as an Ambulance Chaser*, CONTINGENT FEE, THE BUSINESS OF LAW (July 4, 2012), https://www.litigationandtrial.com/2012/07/articles/attorney/contingent-fee/ambulance-chaser/ [https://perma.cc/FNQ8-PCBD] (citing J.E. McDonald, President, S.C. Bar Ass'n, *Address at Transactions of the Eleventh Annual Meeting of the South Carolina Bar Association* (Jan. 1903)).

40. Karsten, *supra* note 5, at 259–60. See also MODEL RULES OF PRO. CONDUCT 7.2(b) (AM. BAR ASS'N 2023) [hereinafter, MODEL RULES]: "A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services . . . ." Exceptions to the rule are stated in MODEL RULES r. 7.2(b)(1)–(5).

41. Wennihan, *supra* note 1, at 1644.

42. W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMPAR. L. 361, 376 (1999).

43. MODEL RULES r. 1.5(c) (AM. BAR ASS'N 2023).

44. *Id.*

45. MODEL RULES r. 1.5(d) (AM. BAR ASS'N 2023).

Apart from the Model Rules, courts have also rejected the use of contingency fees in such situations based on principles of contract law.[46] The Restatement (Second) of Contracts explains that "the interest in freedom of contract is [sometimes] outweighed by the overriding interests of society,"[47] including the desire to encourage reconciliation, avoid incentivizing frivolous lawsuits, or allowing attorneys to take advantage of unsophisticated clients.

For example, in domestic relations cases, the "interest of society" is the preservation of marriage. The concern is that attorneys working on contingent fees could be financially incentivized to encourage couples to divorce rather than reconcile.[48] In criminal defense cases by comparison, the worry is that contingency fees could persuade attorneys to use unethical tactics, including bribery and corruption.[49] In its Standards on Criminal Justice, the ABA states, "In the administration of criminal justice the stakes are high, and thus the danger of abuse resulting from a contingency fee is especially great."[50] The ABA also notes that contingency fees are not needed for criminal defendants to secure legal representation, since the right to counsel is guaranteed by the Constitution.[51]

States have also enacted their own restrictions. Lawyers are prohibited from working on a contingent fee basis with lobbyists in more than forty states and the District of Columbia.[52] This means that attorneys cannot collect fees based on the passage of legislation, awarding of a government contract, the issuance of an executive order, or the adoption of regulations.[53] There are also more nuanced constraints. For example, courts in some jurisdictions require attorneys to obtain the court's approval before using contingency fees for cases involving minors.[54]

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46. *See, e.g.*, Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. Rev. 287, 291, 306–07 (2009) (discussing contingency fees in divorce proceedings as unenforceable for violating public policy).

47. Restatement (Second) of Conts. ch. 8, intro. note (Am. L. Inst. 1981).

48. MacKinnon, *supra* note 29, at 46.

49. Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. Crim. L. & Criminology 498, 504 (1991).

50. *Id.* at 513 n.106 (citing 1 Standards For Criminal Justice 4-3.4 (2 ed. 1980)).

51. *Id.*

52. James A. Kahl, *Beware of Contingent Fee Restrictions When Your Association Hires a Lobbyist*, ASAECenter.org (May 4, 2022), https://www.asaecenter.org/resources/articles/an_plus/2022/05-may/beware-of-contingent-fee-restrictions-when-your-association-hires-a-lobbyist/?utm_medium=email&utm_source=rasa_io [https://perma.cc/HX44-K6T6].

53. *Id. See also* Meredith A. Capps, *"Gouging the Government": Why a Federal Contingency Fee Lobbying Prohibition is Consistent With First Amendment Freedoms*, 58 Vand. L. Rev. 1885, 1890 (2019).

54. Porcu, *supra* note 17, at 154.

Absent those exceptions, contingency fees are widely used in several areas of the law, including eminent domain,[55] collections,[56] stockholder's suits,[57] tax practice,[58] and will contests.[59] They have also been creatively utilized in lien foreclosures and ejection lawsuits.[60] However, nowhere else have contingency fees become so ubiquitous as in personal injury law. Today, contingency fees are largely the exclusive method of payment for personal injury litigation.[61] One could argue the prevalence of contingency fees in this area of the law reflects our history, notably the emergence of such fees to deal with low-wage workers' injuries during industrialization.[62]

However, personal injury plaintiffs today are not limited to those making low wages and who cannot afford representation. In fact, plaintiffs who can afford high hourly billing rates still enter into contingency fee agreements with their attorneys in nearly every personal injury case.[63] This supports the claim that contingent fees are the dominant method of payment because lawyers have discovered they are more lucrative for personal injury cases than hourly remuneration, or specified fees.[64] A 1991 report by the Federal Trade Commission found that 97% of lawyers only accepted personal injury cases on a contingency fee basis, and flat-out rejected payment based on hourly fees even when their rates were relatively high.[65] Attorneys' strong preference for contingency fee contracts in personal injury is illustrated by the boom in the "lawyer lending" industry, which involves lenders providing capital to plaintiffs' lawyers to finance personal injury cases.[66]

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55. Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1125 (1970).

56. *E.g.*, Annunziato v. Collecto, Inc., 207 F. Supp. 3d 249, 252 (E.D.N.Y. 2016).

57. Smillie v. Park Chem. Co., 710 F.2d 271, 273, 275 (6th Cir. 1983) (discussing consideration of contingency fees as a relevant factor in the reasonableness of derivative lawsuit attorney fees).

58. 31 C.F.R. § 10.27 (2007) (regulating when contingency fees can cover matters in front of the I.R.S.). One case has invalided this provision, arguing that the I.R.S. lacks the statutory authority to promulgate this regulation. Ridgely v. Lew, 55 F. Supp. 3d 89, 90 (D.D.C. 2014).

59. Davis, *supra* note 42, at 372.

60. Wennihan, *supra* note 1, at 1646.

61. *Id.*

62. *See* Root, *supra* note 11, at 593.

63. Janet Ann Laufer, *Of Ethics and Economics: Contingent Percentage Fees for Legal Services*, 16 AKRON L. REV. 747, 749 (1983).

64. *Appendix A*, 65 FORDHAM L. REV. 299, 302 (1996) (citing DEREK BOK, THE COST OF TALENT 139 (1993)).

65. Davis, *supra* note 42, at 373.

66. *See generally*, Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377 (2014).

Today, contingency fees take various forms. However, all of them share the same condition that no recovery for the client means no fees for the lawyer. Below are four examples of contingency fee structures:

1) The fee could be a flat percentage of any recovery;
2) The fee may involve various percentages, depending on the recovery amount;
3) The fee could be based on a gradated percentage scale tied to the stage of settlement or litigation that resulted in recovery;
4) The fee may also be a flat percentage of recovery above a certain minimum amount. (This can occur when a client does not want to pay a fee for an offer that they already have in hand, but don't want to accept.)[67]

The flat percentage of recovery is the most commonly used contingency fee.[68] In general, contingency fees are usually set at 33% to 40% of the recovery.[69]

II.
Creating Conflicts: Contingency Fees Force Attorney and Client Financial Interests to Diverge

In theory, contingency fees look like they create a "win-win" situation that perfectly aligns the attorney's and client's interests. Since the lawyer's fee depends on the size of her client's recovery, lawyers will presumably be incentivized to act as zealous advocates.[70] Supporters of contingency fees argue, with intuitive appeals to logic, that "[a contingency fee] gives the lawyer an incentive to get the best possible award or settlement for h[er] clients,"[71] since the size of attorneys' recovery depends directly on how much her client receives. Such a rosy, first-blush perception fails to withstand economic scrutiny. In contrast to the superficial logic, the contingency fee system actually creates a serious rift between the interests of the attorney and her client, one which our legal system has systematically ignored, and of which clients are largely unaware.[72]

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67. Davis, *supra* note 42, at 373–74.

68. Steven Susser, *Contingency and Referral Fees for Business Disputes*, 90 Mich. Bar J. 35, 35 (2011).

69. *Fees and Expenses*, Americanbar.org, Dec. 03, 2020, https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses/ [https://perma.cc/5YYB-CNAB].

70. Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 Cornell L. Rev. 529, 536 (1978).

71. *Id.* (citing New York State, Report of the Special Advisory Panel on Medical Malpractice 194 (1976)).

72. *See* Schwartz & Mitchell, *supra* note 55, at 1138. By contrast, we should note that attorneys who bill by the hour have the opposite incentive—the more they work a case, the more they get paid. This can often lead to claims of attorneys "padding the bills"

A. Contingency Fees Incentivize Lawyers to Settle Cases in Their Own Financial Interest

The lawyer's own financial interest incentivizes them to push for settlements (instead of trials) that are frequently suboptimal for their clients.[73] Doing so allows attorneys to avoid the enormous costs of trial, which dwarf the simple filing of a case and quick settlement. As Neil Rickman restated:

> [A]s the [contingency fee] lawyer pays all the costs of the case in return for his proportion of the damages, he is exposed to a strong temptation to settle the claim before incurring the heavy expense of preparing for trial and of the trial itself, although it may not be in the client's interest to do so.[74]

Trial costs for personal injury cases can easily run several thousand to tens of thousands of dollars.[75] Contingency fee agreements usually obligate the lawyer to pay out of pocket litigation costs themselves,[76] which is consistent with the Model Rules.[77] This includes court fees, administrative expenses, deposition charges, and expenses associated with discovery.[78] In addition, almost all personal injury cases require expert witness testimony, which can include medical doctors, product liability specialists, and other experts.[79] Experts charge several hundred dollars per hour to analyze the case, create a report, and testify at trial.[80] The cost may be even higher if the case requires testimony from medical experts whose hourly fee can be more than double that of non-medical

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by spending more time on a matter than is necessary. *See* Peter Lattman, *Suit Offers a Peek at the Practice of Inflating a Legal Bill*, N.Y. TIMES (Mar. 25, 2013, 3:36 PM), https://archive.nytimes.com/dealbook.nytimes.com/2013/03/25/suit-offers-a-peek-at-the-practice-of-padding-a-legal-bill/ [https://perma.cc/NJG9-EXCR].

73. *See* Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fee and the Settlement Process*, 20 J. LEGAL STUD. 187, 188 (1991).

74. Neil Rickman, *The Economics of Contingency Fees in Personal Injury Litigation*, 10 OXFORD REV. ECON. POL'Y 34, 43 (1994) (quoting THE ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, 1979, CMND. 7648 at 177 (1979) (quoting Sir H. Benson)).

75. *See* Curtis Lee, *What are "Costs" in a Personal Injury Case?*, NOLO PRESS, https://www.nolo.com/legal-encyclopedia/what-are-costs-in-a-personal-injury-case.html [https://perma.cc/THB3-T6T8] (last visited Dec. 15, 2022).

76. *See, e.g.*, Daniel J. Capra et al., *The Tobacco Litigation and Attorney's Fees*, 67 FORDHAM L. REV. 2827, 2838 (1999) (discussing the millions of dollars spent out-of-pocket to bring the tobacco litigation).

77. *See* MODEL RULES r. 1.8 (AM. BAR ASS'N 2023) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter . . . .").

78. Lee, *supra* note 75.

79. *Id.*

80. *Id.*

experts.[81] One of the priciest medical experts, hand surgeons, average $1,400 an hour.[82] Importantly, these direct financial costs say nothing about the massive lost opportunity cost – the attorney's own time spent working on the case, and the resulting loss of business she could have procured from other clients.[83]

B. A Simple Economic Model Illustrates the Conflict

The attorney and client's divergent financial interests in settling is obvious when subjected to basic economic analysis. A plaintiff's reservation price for settling (i.e., the minimum amount they will accept to settle) is the same amount that they expect to receive by going through trial discounted by the probability of losing at trial and by the plaintiff's desire for a quicker, more certain recovery (this reflects the time value of money and the plaintiff's risk aversion).[84] In contrast, the lawyer will naturally have a lower reservation price, i.e., lower expected profit from going to trial, since they have to incur 100% of the cost of litigation.[85]

The decision to settle or go to trial, however, depends largely on how confident the parties are about their case and how closely their opinions coincide with each other. Factoring in the probability of winning provides for a more complete picture of an attorney's and a plaintiff's reservation points.[86] Let's consider the following model:[87]

- Plaintiff and her lawyer believe that the probability of winning at trial is 60%
- Defendant believes the plaintiff's chances of winning are 40%
- Amount of damages sought is $100,000
- Trial cost for Plaintiff is $15,000, and for Defendant is $20,000
- Plaintiff's lawyer is working on a flat fee contingency fee rate of 1/3 the recovery, whether obtained through settlement or trial

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81. *See* ALEX BABITSKY ET AL., NATIONAL GUIDE TO EXPERT WITNESS FEES AND BILLING PROCEDURES (2004).

82. Zachary Crockett, *The Lucrative Economics of Expert Witnesses*, THE HUSTLE (June 4, 2022), https://thehustle.co/the-lucrative-economics-of-expert-witnesses/ [https://perma.cc/2DXU-5VP8]. The rate is based on testimony in medical negligence cases.

83. Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 198 (1987).

84. *See* Bruce L. Hay, *Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation*, 23 WM. MITCHELL L. REV. 43, 57–58 (1997).

85. *See id.* at 58.

86. Steven Shavell, Problems accompanying FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (on file with author).

87. *Id.*

First, let's examine the plaintiff's expected gain from trial:

- 60% win probability x (2/3 of $100,000 judgment) = $40,000 expected value of trial

This means that any settlement offer must *net* the plaintiff at least $40,000 to be preferable to trial (assuming risk neutrality and no time value of money). Since her lawyer will take 1/3 of any settlement figure as a contingency fee, the proposed settlement amount must be at least $60,000 for the plaintiff to find it preferable than going through trial. Any settlement offer that comes in below $60,000 should be rejected, as it will fall below the plaintiff's reservation price.[88]

However, let's examine plaintiff's *contingency fee lawyer's* expected gain from trial:

- 60% P wins x (1/3 of $100,000) – (100% of time lawyer bears $15,000 trial costs) = $5,000

Because trial yields an expected payoff of just $5,000 to the contingency fee attorney, and she will take one third of any settlement amount (just like she would a trial verdict), then any settlement offer that comes in greater than $15,000 (1/3 of $15,001 > $5k) is desirable for the lawyer.[89] Simple economic analysis makes it easy to see that a defendant's potential settlement offer between $15,000 and $60,000 ***is*** clearly in the lawyer's financial self-interest, but would certainly ***not*** be in the financial interest of her client (the plaintiff), whose best interests she purportedly represents.[90] Her client is only better off settling the case instead of proceeding to trial if defendant's settlement offer comes in *above $60,000*, which is a far greater sum than the paltry $15,000 needed to make her lawyer abandon trial.[91] The lawyer should be aggressively counseling her client to reject most settlement offers, but the perverse incentive created by the contingency fee arrangement incentivizes the attorney to do precisely the opposite.

New York University law and economics professor Geoffrey Miller was one of the first scholars to expound on the conflicting settlement reservation prices between lawyers and their clients.[92] Miller emphasized that such a formula was based on the attorney having sole authority to reject the settlement offer, which of course should not be the case.[93] It also does not factor in any of the reasons a client may prefer settlement over trial, most notably their degree of risk aversion and

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See* Miller, *supra* note 83, at 200.
93. *Id.*

their desire for a speedy recovery. Plaintiffs, for example, may want to avoid additional trial-related expenses like transportation, childcare,[94] and taking time off work.[95] Realistically, most human beings are also largely risk averse, preferring the certainty of taking a "bird in the hand" (i.e., a guaranteed settlement amount) versus the risk and unpredictable outcome of a trial verdict.

This potential preference for settlement is reinforced by contingency fee attorneys' own desires, who may choose to settle even when going to trial would likely result in a larger jury verdict. This is because they are usually working with several clients, and their financial fortunes are tied to case management. By divvying up their time among numerous small cases and settlements, a lawyer can pocket far more, with less risk exposure, than if they were to take a single case to trial and win.[96]

1. Behavioral Economics Refinements Further Explain Settlement Incentives

The simple economic model can be expanded (and explained) using behavioral economic insights—such as loss aversion, anchoring, present bias, framing, and information asymmetries—to demonstrate that not only do attorneys have a financial incentive to settle early, but also have the power and means to get their clients to agree to these settlements.

Loss aversion explains why clients are fearful of going to trial and prefer to settle. Daniel Kahneman and Amos Tversky developed the theory of loss aversion in 1983[97] as an extension of their Nobel Prize winning[98] work involving "Prospect Theory", which they first introduced in 1979.[99] The idea is that gains and losses are perceived differently—in that a loss of a certain amount decreases utility more than a gain of the same amount increases utility.[100] For example, hypothetically, a gain of $1,000 might increase one's utility by 10, but a loss of the same $1,000 could decrease utility by 12. In the context of settlements, once a settlement offer is made, the client has a guaranteed

94. Clermont & Currivan, *supra* note 70, at 558.

95. Plaintiffs may also want to avoid other drawbacks of trial including time and potentially having to relive traumatic experiences.

96. Allison F. Aranson, Note, *The United States Percentage Contingent Fee System: Ridicule and Reform from an Intellectual Perspective*, 27 TEX. INT'L L.J. 755, 765 (1992).

97. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341, 341 (1983).

98. *Daniel Kahneman Facts*, THE NOBLE PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2002/kahneman/facts/ [https://perma.cc/GE9C-L9HV] (last visited July 25, 2023).

99. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979).

100. EDWARD CARTWRIGHT, BEHAVIORAL ECONOMICS 48–49 (2nd ed. 2014).

payment of that amount of money. The potential upside of receiving a large judgment from trial becomes less appealing, because the potential for zero recovery at trial results in a "loss" of the settlement offer already in hand. Therefore, the client is more likely to want to accept the settlement offer than risk receiving nothing later.

Anchoring effects explain how clients may overvalue their case prior to their initial attorney consultation and undervalue their case before receiving a settlement offer. Anchoring describes how the first information received affects the cognitive process by which people evaluate options before them,[101] such as if someone is told that the price of a product is usually $6, then a price of $8 will appear expensive whereas a "sale" of $4 will appear cheap. Anchoring is part of attorney marketing and case management. TV advertisements will anchor potential clients into believing that their case may be worth a large sum of money, similar to other big wins by the law firm. However, once the client is inside the office of the attorney, the attorney can explain the risks and work required to achieve similar results and significantly lower the client's expectations for success. The final move is to then secure a settlement offer that is just above the client's now deflated expectations, so that the client believes that the attorney has been an incredible negotiator and that the settlement is a great offer.

Present bias explains why people prefer things sooner rather than later, and why the closer they are to receiving an item, the more they prefer receiving it sooner. The idea is that people "hyperbolically discount" the time between two periods.[102] For example, people with a present bias prefer $100 today over $110 tomorrow but prefer $110 in 31 days over $100 in 30 days. This makes immediate rewards particularly desirable compared to longer term rewards. A settlement offer provides immediate money compared to the longer-term reward of a large trial judgement. Thus, a client is more likely to accept the offer over waiting for a trial verdict. For example, a client would likely prefer accepting an offer of $10,000 today instead of waiting two years for an expected judgment of $50,000 but would prefer to wait four years for an expected judgment of $50,000 instead of waiting two years for a settlement of $10,000. The immediate costs of litigation work in the opposite direction. The client's own efforts are the costs of litigation—e.g., calling her attorney, responding to discovery requests, and sitting for depositions—and are borne today instead of in the future. These costs create immediate disutility compared to the heavily discounted future disutility that

101. *Id.* at 43–45.
102. *Id.* at 174–76.

arises from the costs of going to trial and can be eliminated by settling the case today.

Framing explains how an attorney can control her client by presenting information in such a way that makes settlement appear superior to going to trial. Framing is a subset of context effects, which describes how the way in which information is presented ultimately affects a person's decision.[103] For example, an attorney could state that if the client goes to trial there is a 60% chance of winning nothing or could state there is a 40% chance of winning something. These are probabilistically equivalent descriptions; however, the first framing is more negative compared to the second, and therefore a client is more likely to settle if presented with the first description. This is problematic because the attorney is in control of presenting the settlement offer to the client and can present factually equivalent and true information, but still sway the client away from trial by framing trial and its risks in a negative light.

Finally, information asymmetries between the lawyer and client provide the lawyer with the power to exploit the client for their gain. Information asymmetry was introduced by George Akerlof's seminal paper about the "market for lemons." In his model, sellers know whether their car is bad, i.e., a "lemon," or good, but buyers cannot easily distinguish between these cars before purchase, and thus information is asymmetric.[104] The consequences of this asymmetry are dire because most sellers of good cars leave the market because of depressed market prices, resulting in a market of mostly bad cars. Removing or minimizing information asymmetries to protect the public is one of the purposes of other areas of law.[105]

Information asymmetries also exist between lawyers and their clients. Lawyers have legal training, institutional knowledge from practical experience, private information on their own effort levels, information on the value of the case, and information on the likely outcome at trial. The deck is stacked against clients when their attorneys present them a settlement offer while knowing significantly more than them. An attorney can thus exploit this advantage for financial gain with little chance of punishment; the person most able to bring a claim against the attorney does not even understand they are being exploited.

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103. *Id.* at 46–47.

104. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489–91 (1970).

105. *See, e.g.*, Kevin S. Haeberle, *Information Asymmetry and the Protection of Ordinary Investors*, 53 U.C. DAVIS L. REV. 145, 147 (2019) ("Many have long maintained that the core securities laws' dampening effect on information asymmetry is a good thing for the ordinary individuals who invest in the stock market.").

2. *Empirical Evidence of Increased Settlement*

So, what does the empirical data tell us about the predictions (incentivizing settlement over trial) made by this economic model? That the prediction is largely correct even though it is rarely discussed. A few decades ago, an estimated 90% of contingency fee cases settled.[106] Data suggests that incredibly high number has grown even greater in recent years. According to the Bureau of Justice Statistics, just 4% of tort cases, which are dominated by personal injury cases today, were disposed of by a bench or jury trial in 2005.[107] Ninety-six percent were settled. We assume plaintiffs willingly agreed to all of these settlements as required by Rule 1.2(a),[108] but perhaps some plaintiffs (or many) would not have been so eager to sign on the dotted line if they had understood the conflicting economic incentives that their contingency fee arrangement created.

Aside from these lopsided settlement statistics, a growing body of research supports the economic theory that plaintiffs who hire contingency fee lawyers are more likely to have their cases settled to their own detriment. In his research, Terry Thomason examined a sample of New York workers' compensation claims.[109] He used regression analysis to evaluate the lawyers' added value to the claimants.[110] He found that clients who hired contingency fee lawyers had their cases settled more frequently and received less money than claimants who did not use legal counsel.[111] By contrast, in the instances when claims failed to settle and went to a hearing instead, clients with contingency fee lawyers were able to procure higher awards than their non-represented counterparts (i.e., trial outcomes are better than settlements for clients).[112] This implies that lawyers are detrimental to claimants if they only intend to settle, but create value if they go to trial.

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106. Wennihan, *supra* note 1, at 1660.

107. THOMAS H. COHEN, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, BUR. OF JUST. STAT. (2009), https://bjs.ojp.gov/content/pub/pdf/tbjtsc05.pdf [https://perma.cc/N4PN-FSFK].

108. Settlement contracts should make both parties better off, by definition, since they are voluntary, and neither should assent if it were contrary to their interests. Under the Model Rules, lawyers must present settlement offers to clients, who have the sole authority to settle. "A lawyer shall abide by a client's decision whether to settle a matter." MODEL RULES r. 1.2(a) (AM. BAR ASS'N 2023).

109. Thomason, *supra* note 73, at 190.

110. *Id.*

111. *Id.* at 218. Thomason acknowledged that the fee structure he used in his research was not a "pure contingent-fee agreement," since it may have included fee regulations set by the New York Workers' Compensation Board. *Id.* at 222.

112. *Id.* at 218.

Other research corroborates the contention that contingency fee lawyers settle cases to achieve their own financial interests.[113] Andrew Rosenfield analyzed data from more than one hundred class-action lawsuits—cases in which class counsel negotiates their fee amount with the defendants.[114] Data surprisingly revealed that lawyers working under contingency fee deals reaped greater legal fees for settlements than for claims that went to trial.[115] This result seemed strange since trials are more costly and time-consuming than settlements, and should accordingly offer greater remuneration. Rosenfield concluded that the most plausible explanation for this seemingly backwards result was that contingency fee lawyers had accepted smaller settlements for their clients in exchange for personally bigger legal fees received.[116] Defendants were happier because settling made their cases go away, without the risk of huge judgments at trial. Contingency lawyers were happy because their settlement fees were large. The only people left worse off by the settlements (as compared to trial) were the plaintiffs.

In sum, pushing settlements when a case is better off going to trial not only hurts clients, but undermines lawyers' role in our entire justice system. Attorneys purportedly serve in a system that is a "mirror of [our] morals and a legal vehicle for helping to define them[.]"[117] Lawyers have an ethical and fiduciary duty to their clients, and are required to serve them with competence, diligence, and candor, which necessarily means putting the client's interest above their own.[118] Sadly, data from numerous studies examining awards obtained in settlements versus trials do not seem to support attorneys upholding this fundamental duty.

C. Contingency Fee Lawyers Make "Quick Kills" Against Their Client's Best Interests

Contingency fees not only encourage lawyers to settle cases that are better off going to trial, but also to settle prematurely. The early settlement tactic has been referred to cynically as the "quick kill."[119] Legal economists Murray Schwartz and Daniel Mitchell were among the first

113. *Id.* at 189.
114. *Id.*
115. *Id.* at 190.
116. *Id.*
117. Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173, 179 (1995) (quoting ABA SPECIAL COMM. ON THE TORT LIAB. SYS., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 12-5 (1984)).
118. *See* MODEL RULES r. 1.6–1.8 (AM. BAR ASS'N 2023).
119. Wennihan, *supra* note 1, at 1655.

to develop a model that explains how contingency fees incentivize early settlements.[120] Their model is based on the notion that "[t]he aim of the profit-maximizing contingent-fee lawyer is to get the highest possible return per hour of time spent."[121] Therefore, a lawyer's and their client's financial interests will diverge whenever the likely contingency fee recovery falls below the lawyer's opportunity cost.

Suppose, for example, a lawyer is working on a flat fee of one-third the client's recovery, whether it occurs via settlement or trial. The lawyer took the case after estimating she could obtain a settlement for $15,000 by working on it for ten hours. The settlement would give the lawyer $5,000, and the plaintiff would receive $10,000. Let's imagine that after working on the case for a few hours, the lawyer believes she could probably secure a bigger settlement of $21,000 if she worked an extra thirty hours on the case. The lawyer and client would receive $7,000 and $14,000, respectively.

What option will the rational lawyer choose? For the client, a settlement of more than $14,000 is obviously better than $10,000. However, the lawyer may be unwilling to bargain (or work) extra hard for that additional $6,000 of total settlement money. If the lawyer settles the case as originally planned, she will have made $500 per hour. If she chose the second option, the hourly fee drops down to $175. If the lawyer targets making at least $350 per hour, she will desire to settle early and put her efforts towards working with another client.[122] While some lawyers may heavily favor contingency fee work, many personal injury attorneys plug gaps in their time with at least some hourly fee cases.[123] Even lawyers who infrequently work on an hourly basis are likely to know the hourly value of their work and would not generally enjoy spending dozens or hundreds of extra hours working for what they perceive to be relatively low wages.[124]

Research supports the contention that unlimited contingency fees result not only in smaller, but also faster, settlements. Eric Helland and Alexander Tabarrok examined medical malpractice claims in Florida

120. *See* Schwartz & Mitchell, *supra* note 55, at 1139.

121. Earl Johnson, Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 585 (1980–81).

122. *See* Schwartz & Mitchell, *supra* note 55, at 1136. By contrast, lawyers who work under hourly fees would have no incentive to settle early based on the economic model. And in fact, the fee for service model might incentivize the opposite – continuing to work on a case long after it is optimal to do so in order to maximize the number of hours that the attorney gets paid.

123. Clermont & Currivan, *supra* note 70, at 550–51.

124. Like with the previous example, the conclusion assumes the client wants to maximize the amount of their recovery. In reality, plaintiffs might prefer an early settlement if they are in immediate need of financial resources.

before and after the implementation of a law limiting contingency fee agreements.[125] Their analysis revealed that time until settlement was 21% longer in cases where contingency fees were limited.[126] Closed claim data also showed that time until settlement increased by more than 11% in the thirteen months after the law was passed compared to the previous ten months.[127] Hence, limiting contingency fees could actually *prolong* attorneys' labor on a given case.

One might respond that an argument could be made that quicker settlements are simply the result of greater efficiency on the part of the lawyer. However, several surveys refute that claim, finding that contingency fee lawyers put in less time than their counterparts who are working on hourly fees.[128] Professor and legal scholar Herbert Kritzer analyzed interview data from 371 hourly fee attorneys and 267 contingent fee attorneys who had worked on cases in either state or federal court.[129] His research showed that for claims less than $6,000, contingency fee lawyers put in statistically significantly fewer hours than those who were billing hourly.[130] However, fee structure did not have a statistically significant impact on effort for cases above $10,000.[131] Further, his analysis did not address whether a reduced number of hours affected the outcome of cases.[132] Contingency fee lawyers are of equal quality on a per hour basis; however, if they shifted to hourly billing they could disproportionally increase the value of their client's case instead of going for a "quick kill."

The "quick kill" tactic is not only confined to contingency fee lawyers, but also plagues real estate agent representation of home sellers. A study which was popularized in the best-selling book, *Freakonomics*, analyzed real estate agents' behavior when working under commission fee agreements. Agents normally work on a commission basis rather than hourly fee, and typically pocket about 1.5% of a home's

125. Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J. L. Econ. & Org. 517, 517 (2003).

126. *Id.* at 537.

127. *Id.* at 538. However, Helland and Tabarrok argued that the longer time to reach settlement is because hourly rate lawyers purposely drag out settlements to bill more hours. *Id.* at 536. Note that the authors still favor contingency fees overly hourly rates but realize that both present pitfalls. *Id.* at 517, 540.

128. Finding data on the amount of time contingency fee lawyers spend working on cases can be difficult because they do not need to record their hours for billing purposes. As a result, they often do not keep track of such hours. *See* Johnson, *supra* note 121, at 607 n.29.

129. Herbert M. Kritzer, et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 Law & Soc'y Rev. 251, 252 (1985).

130. *Id.* at 268.

131. *Id.* at 272.

132. *Id.* at 273.

final purchase price.[133] Since their commission increases with the sales price of the home, one might argue (as agents long have) that they are incentivized to get the highest possible offer for their client. Given our previous analysis of contingency fees, however, we know that this contention is false. If a house sells for $300,000, the real estate agent pockets $4,500. Assuming the house is worth slightly more to a buyer who has yet to discover it, the client would prefer to wait and try to sell it for $310,000. However, the agent lacks the same motivation, since they would only net another paltry $150, but have to put in additional time and work. A quick sale today is much better for the agent, but much worse for her client. Conversely, real estate agents took a very different approach when listing their *own* property for sale. Those same agents kept their own homes on the market for an average of ten days longer than for homes they were selling on commission, waiting and working for the absolute best offer to come in. In the end, real estate agents were able to obtain an extra 3% on the overall home sale price when selling their own home compared to similarly situated homes of their clients.[134]

D. Excessive and Early Settlement Is at Odds with the Purpose of Contingency Fees

While the self-interested, quick kill tactic is problematic in all instances where professionals are assumed to be serving their clients' best interests, it is arguably even more exploitative in contingency fee cases. That's because it erodes the very purpose of allowing contingency fees in the justice system in the first place.

As their name suggests, contingency fees are meant to be "contingent" on the result obtained, which should be proportional to the amount of work done by an attorney. They are designed to compensate an attorney at "higher effective hourly rates than do hourly rate fees to reflect the risks that lawyers bear."[135] Such a sentiment has been reiterated by members of the Supreme Court. Justice Blackmun opined, "lawyers charge a premium when their entire fee is contingent on winning . . . . The premium added for contingency compensates for the risk of nonpayment [of fees] if the suit does not succeed[.]"[136]

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133. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 7 (rev. & expanded ed. 2020).

134. *See id.* at 68.

135. Lester Brickman, *Early Offers: A Proposal to Counter Attorney Fee Gouging by Aligning the Contingent Fee System with Its Policy Roots and Ethical Mandates*, POINT OF L. (Aug. 17, 2004), https://web.archive.org/web/20210726042251/https://www.pointoflaw.com/feature/fee_ding_frenzy.php [https://perma.cc/3ZQ5-Y96D].

136. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 735–36 (1987).

The attorney bears little risk in settling early for an amount that's suboptimal for the client because tort cases do not reach a trial judgment around 96% of the time—the risk of no recovery is exceedingly rare.[137] Judicial reforms have further taken the uncertainty out of whether a defendant will make an offer. Courts have curbed defenses to tort claims, including contributory negligence and assumption of the risk.[138] They have also unlocked insurance compensation by refusing to read policy provisions through a narrow lens.[139]

In fact, an insurance company study of personal injury claims found that, barring death, 94% of claims involving an objective economic loss were settled for at least that amount.[140] Overall, 96% of claims involved at least some recovery.[141] Any substantial element of risk is often removed by lawyers' initial screening of acceptable cases. Professor Jeffrey Swett argues that contingency fee lawyers routinely decline high-risk cases and only take on those where recovery can likely be anticipated.[142] Research backs up Swett's contention, revealing that at least half of cases that are presented to contingency fee lawyers are rejected at the outset.[143]

But remember, legal fees must be reasonable in relation to the risk taken, and no risk would imply that contingency fees are unreasonable. Under Rule 1.5(a) of the Model Rules, "A lawyer shall not make an agreement for, charge, or collect an *unreasonable* fee or an unreasonable amount for expenses."[144] This has been interpreted to mean that contingency fees should only be used when there is some assumption

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137. COHEN, *supra* note 107, at 1.

138. *See Appendix A*, *supra* note 64, at 306 (citing George L. Priest, *The Liability Crisis: A Diagnosis*, 34 YALE L. REP., Fall 1987, at 2).

139. *Id.*

140. Schwartz & Mitchell, *supra* note 55, at 1155 n.45 (citing AMERICAN INSURANCE ASSOCIATION SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS, Exhibit VIII at 3-7 and mimeo. app. (1968)).

141. *Id.*

142. Jeffrey D. Swett, *Determining a Reasonable Percentage in Establishing a Contingency Fee: A New Tool to Remedy an Old Problem*, 77 TENN. L. REV. 653, 656 (2010).

143. *See* Herbert M. Kritzer, *"Loser Pays" Doesn't*, LEGAL AFFS., Nov. 2005, https://www.legalaffairs.org/issues/November-December-2005/argument_kritzer_novdec05.msp [https://perma.cc/AQ33-4JWB].

144. In determining if a fee is reasonable, the rule states attorneys should consider the following eight factors: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation,

of risk.[145] Such a reading is supported by the courts, which have held that contingency fees are only reasonable when there is a risk that the lawyer won't receive payment.[146] However, this requirement is largely hollow today, since what qualifies as "some risk" has been construed to cover a wide variety of factors, many of which are present in *every* legal case. The ABA's Standing Committee of Ethics and Professional Responsibility provides cover to contingency fee lawyers, stating:

> 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.[147]

In other words, the ABA believes that the mere fact that that an agreement is based on a contingency fee necessarily means there is risk involved. The ABA has also specifically green-lit the use of contingency fees when there is clear liability on the part of defendant, and recovery of some amount is fully anticipated.[148] Such a stance has drawn criticism from legal scholars, who argue this allows contingency fee lawyers to charge large fees for doing little or no actual lawyering.[149] Such abuse undermines the integrity of the legal profession and understandably gives lawyers a bad reputation.[150]

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and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. MODEL RULES r. 1.5(a) (AM. BAR ASS'N 2023).

145. See Swett, *supra* note 142, at 659.

146. *Appendix B: An Ethical Alternative to ABA Formal Opinion 94-389 on Contingency Fees*, 65 FORDHAM L. REV. 316, 319 (1996).

147. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 276 (1996) (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994)).

148. Leonard E. Gross, *Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?*, 19 GEO. J. LEGAL ETHICS 111, 136 (2006).

149. Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1351–52 (1996).

150. A 2022 Gallup poll found that only 21% of people rated lawyers' ethical standards and honesty as "high" or "very high." By contrast, that same rating was 79% for nurses, 62% for doctors, and 50% for police officers. The few professions that were viewed as less ethical than lawyers included car salespeople and telemarketers. See Megan Brenan, *Nurses Retain Top Ethics Rating in U.S., But Below 2020 High*, GALLUP NEWS (Jan. 10, 2023), https://news.gallup.com/poll/467804/nurses-retain-top-ethics-rating-below-2020-high.aspx [https://perma.cc/33VM-YBVY]. The American public also doesn't think that lawyers are helping make society better. A Pew Research

However, supporters of contingency fees like University of Minnesota Law School Professor Herbert Kritzer simply echo the ABA's assertion that expected settlements still involve risks. For example:

> [U]ncertainty about the amount that will be recovered (and hence the fee the lawyer will receive); uncertainty about what it will cost, in both effort and expenses, to obtain the recovery; and uncertainty about how much time will pass before the recovery is obtained.[151]

Other supporters of allowing contingency fees in cases involving routine, expected settlements worry that changing the system would deter lawyers from taking meritorious cases. "If lawyers believe they are only allowed to enforce contingency fee agreements in the context of long and drawn out cases that cost large amounts of money to litigate, then there is a smaller probability these cases will ever be litigated."[152] Another, more controversial, argument is that low-risk settlements allow contingent fee lawyers to finance other costlier and higher risk cases for their clients.[153]

E. Defenders of Contingency Fees Argue That They Benefit Clients' Interests, or at Minimum, Don't Harm Them

Before diving into proposed solutions for the attorney-client financial conflict caused by contingency fees, we first address and rebut some of the main arguments claiming the fees actually make lawyers better advocates for their clients.

Law and economics researcher Shmuel Leshem contends that lawyers' incentives to avoid trial is in fact *good* for plaintiffs. He believes that plaintiffs are still better off delegating control to their attorneys when it comes to settlements in contingency fee cases.[154] The logic is that contingent fee lawyers' desire to avoid the full cost of going to trial incentivizes them to candidly convey the plaintiff's private information about the anticipated recovery at trial.[155] By contrast, plaintiff's own

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Center survey revealed that less than one-fifth of respondents said that lawyers contributed "a lot" to society, while around one-third thought they contributed "not very much or nothing at all." *Public Esteem for Military Still High*, PEW RSCH. CEN. (July 11, 2013), https://www.pewresearch.org/religion/2013/07/11/public-esteem-for-military-still-high [https://perma.cc/YBH2-K5AD].

151. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739, 748 (2002).

152. Porcu, *supra* note 17, at 168.

153. *See* Wennihan, *supra* note 1, at 1657. Such an approach has come under fire for violating a lawyer's fiduciary duty to their client by serving the interests of other people during representation. *Id.* at 1658.

154. Shmuel Leshem, *Contingent Fees, Signaling and Settlement Authority*, 5 REV. L. & ECON. 435, 435 (2009).

155. *Id.*

incentive to signal private information during settlement negotiations is reduced because they do not have to worry about trial costs under contingency fee arrangements.

Leshem expands on this argument, stating that the increased motivation for the contingency fee attorney to convey a plaintiff's private information increases the likelihood of settlement compared to when a plaintiff negotiates a settlement on her own behalf.[156] As a result, the plaintiff's equilibrium payoff is higher under contingency fees compared to when the plaintiff retains personal control in such cases. To summarize, Leshem believes that attorney control in contingency fee cases does not result in excessive settlements to the plaintiff's detriment. Rather, settlements are shaped on the credibility of the plaintiff's case, which was made clear by the lawyer's truthful signaling of the plaintiff's expected trial award.[157]

Other legal scholars similarly reject the argument that contingency fees result in excessive settlements to the detriment of clients.[158] Law and economics scholars A. Mitchell Polinsky and Daniel Rubinfeld say such conclusions have been improperly reached since models fail to take an important factor into consideration: that if a case proceeded to trial, lawyers would spend less time on the case than is in the client's interest.[159] When taken into account, "[contingency fee] lawyers' settlement demands could be higher than their clients would want," which reduces the probability of settling and increases the probability of trial.[160]

A more neutral stance is that contingency fees do not necessarily make lawyers better client advocates, but they also do not make them any worse. Several legal scholars contend that lawyers' own financial interest in contingency fee cases does not significantly increase the likelihood of abuse. Any self-serving behavior is tempered by many other

156. *Id.*

157. However, this argument runs contrary to Terry Thomason's findings that workers' compensation claimants who hired contingency fee lawyers received significantly smaller settlements than their non-represented counterparts. Thomason, *supra* note 73, at 190.

158. A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers*, 22 INT'L REV. L. & ECON. 217, 218 (2002).

159. The attorney is assumed to be welfare-maximizing for herself and when the case proceeds to trial, the attorney will work fewer hours than would be optimal because she bears the full costs of her labor, but only partially benefits from the increased recovery. *See id.*

160. *Id.* This is harmful to the client because the expected recovery falls compared to an attorney under an hourly fee arrangement because while the settlement amount increases, the probability of agreement falls enough to offset the gain leading to lower expected recovery. *Id.* at 223.

factors, including a lawyer's own notion of professionalism.[161] This can include professional satisfaction and taking pride in one's work.[162] It can even include looking at one's work through a lens of societal contribution.[163] Contingency fee lawyers often identify their work with achieving social justice and helping those who are less fortunate, and therefore may be less inclined to manipulate cases in their own financial interest simply because of the economic incentives alone.[164] Moreover, professionalism is also associated with following ethical standards.[165] Comments in the Model Rules clearly state, "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."[166] And, of course, failing to abide by such ethical duties can result in sanctions, including disbarment.[167] Clients can also sue for breach of fiduciary duty, but these lawsuits are exceedingly rare and difficult to win, especially if the claim was an improper settlement amount because of contingency fees given the ubiquity of the arrangements.

F. The Real World

Are lawyers so bound to these ethical considerations that it will keep them from making economically motivated decisions at the expense of their clients? In an ideal world, yes. But in the real world, probably not. While this assumption may sound cynical, it is one that has been supported by courts. In *Goldberger v. Integrated Resources*, the Second Circuit acknowledged the reality that not every lawyer will "fairly subordinate his own commercial interest to those of his client."[168] Despite what we would like to believe, law as a profession does not attract individuals with higher-than-average ethical standards. Research has found the lawyers break professional misconduct rules as much as, or even more than, other professionals.[169] Data comparing lawyers to accountants showed that lawyers are just as likely to commit misconduct for their own self-interest.[170]

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161. Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 Law & Pol'y 347, 348 (1999).
162. Johnson, *supra* note 121, at 603.
163. *Id.* at 604.
164. *Id.*
165. *Id.* at 605.
166. Model Rules r. 1.7 cmt. 10 (Am. Bar Ass'n 2023).
167. *See* Miller, *supra* note 83, at 209.
168. Swett, *supra* note 142, at 667 (quoting Goldberger v. Integrated Resources, 209 F.3d 43 (2d Cir. 2000)).
169. *See* Leonard E. Gross, *supra* note 148, at 132.
170. *Id.* The data included statistics of lawyers and accountants who broke professional rules by converting client funds.

A more compelling, or at least realistic, argument is that competing financial factors deter contingency fee lawyers from working for their own benefit. Proponents of the fees contend that the need to secure *future* business ensures that contingency fee lawyers will serve their current clients' interests.[171] More specifically, they say nothing is more vital to a contingency fee lawyer than having a good reputation,[172] which stems from providing quality service and obtaining "good" results. In damages cases, the evaluation of service relies largely on the amount of the judgment or settlement and the time it took to secure the recovery.[173] Data shows lawyers working on a contingency fee basis have largely been dependent on word-of-mouth referrals from satisfied clients to generate new business. A survey of personal injury specialists showed that almost 28% of respondents said most of their cases came from client referrals.[174] The fact that clients talk also means they end up comparing recovery amounts and experiences with family, friends, and neighbors who had similar personal injuries.[175] Advocates of contingency fees say that threats to an attorney's reputation limit unreasonably low and premature settlements as well. They argue that attorneys are only able to settle if they have a solid reputation for being willing and able to go to trial.[176] Their claim is that an attorney who has a reputation for avoiding trial in order to take the "quick kill" settlement will be railroaded by insurance adjusters and defense attorneys who are experienced negotiators and know her past behavior.[177] The marketplace will then weed out such attorneys.[178]

However, the reliance on reputation to mitigate lawyers' financial conflict of interest is misplaced for several reasons. First, most individual clients lack the knowledge to assess their lawyer's work.[179] They will be unlikely to answer crucial evaluation questions like, "should the case have gone to trial?" Or, "should the settlement award have been significantly higher?" Making this even more difficult is the fact that compensation in personal injury cases depends on numerous factors, including the severity of the victim's injuries, amount of disruption to

171. *See* Kritzer & Krishnan, *supra* note 161, at 348.
172. *Id.* at 349.
173. *Id.* at 365.
174. *Id.* at 351.
175. Kritzer, *Seven Dogged Myths*, *supra* note 151, at 775.
176. *Id*. at 774.
177. *Id.*
178. *Cf.* Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213, 222 (1983) (arguing that risk-adverse attorneys will be eliminated from the contingency fee market).
179. *See* Schwartz & Mitchell, *supra* note 55, at 1125.

daily life, costs of treatment and recovery, certainty of liability, and extent of emotional trauma.[180] As a result, clients cannot simply compare their cases to other personal injury victims, as suggested by backers of contingency fees. An empirical study by Douglas Rosenthal offers support for this reality, as it revealed that 39% of clients surveyed said "there was no way to tell if they had chosen a competent lawyer."[181]

Reputation is also a less effective check on the behavior of contingency fee lawyers because they work mostly with "one-shot" clients.[182] The majority of personal injury clients seek out legal assistance for a single incident. Their need for legal assistance is much different than, say a landlord, who is frequently involved in evictions or insurance companies in medical malpractice cases.[183] As such, one can argue that one-shot clients' level of satisfaction is less important because their lawyers cannot rely on them to bring back any future business.

Moreover, research has shown personal injury clients often choose lawyers based simply on convenience. Instead of seeking out attorneys who have the best reputation in the field, they defer to those who are friends or family members.[184] Once they find a lawyer, clients don't continue to shop around like they do with doctors. "Generally speaking, clients choose the first lawyer they know who comes to mind, the first lawyer recommended to them, or the first lawyer they meet."[185] Some just look up personal injury lawyers in the yellow pages of the phonebook, or now, search it on the internet.

Lastly, defenders of contingency fees claim they cannot cause lawyers to enter into excessive or premature settlement agreements because any final settlement decision must be made by the client herself.[186] In defense of this argument, the Model Rules require lawyers to promptly inform their clients when opposing counsel has made a settlement proposal.[187] Therefore, clients have real-time knowledge of settlement offers and amounts, and can say yes or no at their own discretion. Further, lawyers' authority to act on behalf of their client generally does not extend to making the actual settlement decision for them, unless such

180. *See Eight Factors That Affect Personal Injury Settlements*, Lexis Nexis: LEGAL INSIGHTS (Feb. 25, 2019), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/eight-factors-that-affect-personal-injury-settlements [https://perma.cc/SH2N-DYKD].

181. DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 130 (1974).

182. *See* MACKINNON, *supra* note 29, at 29.

183. *See* Bahaar Hamzehzadeh, *Repeat Player vs. One-Shotter: Is Victory All That Obvious*, 6 HASTINGS BUS. L.J. 239, 243 (2010).

184. *See* ROSENTHAL, *supra* note 181, at 129.

185. *Id.*

186. *See generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-389 (1994).

187. MODEL RULES r. 1.4 cmt. 2 (AM. BAR ASS'N 2023).

action has been expressly authorized by the client.[188] The Model Rules clearly state, "a lawyer shall abide by a *client's* decision whether to settle a matter."[189] Courts have the power to find settlement contracts void in situations where lawyers have disposed of cases without the express consent of their clients.[190]

But such an argument rests on an idealistic and largely inaccurate view of the attorney-client relationship. In reality, lawyers are usually in the driver's seat when it comes to settlement decisions. Several surveys have found that tort clients felt they had little say over how their lawyers handled their cases.[191] The lawyer's ability to control the settlement decision is based on massive information asymmetry. Given their education and experience, lawyers are in the best position to ascertain the value of their client's claim.[192] In contrast, clients are often unable to independently analyze the facts of their case, and the vast majority lack any form of legal education. As a result, they usually do not have a good sense of how much their case is worth or the likelihood of succeeding at trial.[193] In theory, clients could also conduct their own independent research online to find out if a settlement offer was optimal.[194] After all, economists contend that "[i]nformation asymmetries everywhere have in fact been gravely wounded by the Internet."[195] But evaluating one's own legal case is far more difficult than learning about other subjects on which information abounds, since tort and contract settlement figures are not public knowledge. This stands in stark contrast to an individual's ability to evaluate home sale prices, since list prices and final prices for real estate sales are public information.[196] Access to such figures in the legal arena is often far more limited, frequently due to the use of nondisclosure agreements in most personal injury settlements.[197] Perhaps prospective clients could seek out a different attorney to evaluate their settlement offer, but this rarely happens in practice.[198]

Attorneys also exploit information asymmetry by keeping their clients in the dark about the merits of their case, which is a violation

188. *See* MacKinnon, *supra* note 29, at 77.
189. Model Rules r. 1.2(a) (Am. Bar Ass'n 2023) (emphasis added).
190. *See* MacKinnon, *supra* note 29, at 76–77.
191. *See* Brickman, *ABA Regulation of Contingency Fees*, *supra* note 147, at 284.
192. Thomason, *supra* note 73, at 192.
193. *See* Hamzehzadeh, *supra* note 183, at 241.
194. *See* Kritzer, *Seven Dogged Myths*, *supra* note 151, at 774.
195. Levitt & Dubner, *supra* note 133, at 64.
196. Danzon, *supra* note 178, at 217.
197. Jeffrey Johnson, *Personal Injury Settlement Amounts Examples (2023 Guide),* Forbes (Sept. 22, 2022), https://www.forbes.com/advisor/legal/personal-injury/personal-injury-settlement-amounts/ [https://perma.cc/AEE5-B874].
198. Kritzer, *Seven Dogged Myths*, *supra* note 151, at 774.

of legal ethics rules. Model Rule 1.4(b) states "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[199] However, research has shown lawyers are purposely tight-lipped with clients. According to a survey by Rosenthal, 62% of lawyer respondents said they knew of their obligation to discuss the details of a case with their clients.[200] However, less than 20% supported the idea of talking with their clients about when to start a lawsuit, how much to money to seek, whether or not to pursue a jury trial, or how much should be the initial settlement demand.[201] Contingency fee lawyers have even less of an incentive to keep clients informed since their relationship "is not ongoing, but rather deals with a single piece of litigation[.]"[202]

In addition, lawyers have multiple tools of persuasion at their disposal to dictate their client's behavior. Professor Herbert Kritzer has written insightfully about how lawyers use a multiple step strategy to persuade their clients to settle.[203] Just like evidence shows that patients are highly suggestible and influenced by their physician's advice,[204] so are clients suggestible by their lawyers. The steps include managing expectations, preparing the client for settlement, and selling the settlement.[205]

Lawyers control initial expectations by steering clear of specific amounts of potential recovery.[206] For example, lawyers will usually sidestep the question of "How much is my case worth?"[207] They diminish expectations of compensation by pointing out factors that could reduce the amount,[208] and cite low-ball figures to anchor their

199. MODEL RULES r. 1.4(b) (AM. BAR ASS'N 2023).
200. ROSENTHAL, *supra* note 181, at 113.
201. *Id.*
202. Wennihan, *supra* note 1, at 1671.
203. See Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 801–12 (1998).
204. Research has revealed that patients are often reluctant to challenge their doctor's recommendations. A 2012 study found that 70% of survey respondents wanted to be involved in making medical decisions with their doctor and contribute equally to choosing treatment. However, less than 15% said they would disagree with their doctor's advice on treatment if they preferred a different option. Genevra Pittman, *Patients Reluctant to Disagree with Doctor's Advice*, REUTERS, July 11, 2012, https://www.reuters.com/article/us-patients-advice/patients-reluctant-to-disagree-with-doctors-advice-idUSBRE86A18D20120711 [https://perma.cc/2VQK-E79H].
205. Kritzer, *Contingency Fee Lawyers and Their Clients*, *supra* note 203, at 802, 806–10.
206. *Id.* at 802.
207. *See id.*
208. *Id.* One example is workers' compensation statutes.

clients' beliefs.[209] Lawyers also emphasize uncertainty about the potential compensation by highlighting its dependance on the severity of the injury, recovery, and future complications.[210]

Their next step is preparing the client to accept the settlement.[211] This includes multiple tactics, such as playing up the amount of risk involved in jury trials and pointing out the weaknesses of the case.[212] Such a strategy has been referred to as "conversion of information into fear."[213]

The final task is getting the client to actually sign on the dotted line.[214] Lawyers sell settlements by highlighting the amount of money their client could get right then and there.[215] Other tactics include emphasizing the risks and time associated with trial.[216] Convincing the client to accept less than they previously thought their case worth is called "cooling the client out."[217] The approach seems unethical and misleading. That's because it is. It is not only a breach of the attorney's fiduciary duty, but also plain psychological manipulation. However, lawyers have an "out" by contending their words simply constituted a professional opinion of what might be best for the client.[218] "An attorney, like a doctor, is not liable in the exercise of her discretion as to the better way to proceed, or as to a simple error of judgment, where the bases for that judgment are uncertain."[219] The client who signed on with a contingency fee attorney doesn't stand much of a fighting chance.

III.
Insufficient Solutions to the Contingency Fee System

A. Outlaw Contingency Fees?

Is the best way to eliminate the contingency fee's conflict of interest problem simply to eradicate the system itself? Perhaps. While the idea may seem radical, it is the status quo in several other countries. In Germany, contingency fees are not disallowed by statute, but by the ethical rules of the bar instead.[220] They are also prohibited in Austria,

209. *Id.* at 805.
210. *See id.* at 805–06.
211. *Id.* at 806.
212. *Id.* at 807.
213. Levitt & Dubner, *supra* note 133, at 68.
214. Kritzer, *Contingency Fee Lawyers and Their Clients*, *supra* note 203, at 808.
215. *Id.*
216. *Id.* at 810.
217. Rosenthal, *supra* note 181, at 110.
218. *See id.* at 111.
219. *Id.*
220. Davis, *supra* note 42, at 383.

where they are known as erfolgshonorare.[221] Outside of Europe, both Bahrain and Morocco ban contingency fees as well.[222] So the precedent certainly exists.

The problem with barring the contingency fee system lies at the heart of why they were first used in America. The fees do give injured individuals of modest means, who cannot afford to pay an attorney up-front, access to the doors of justice.[223] This is supported by evidence that shows transaction costs in the American legal system are a major deterrent to potential litigants moving forward with a claim.[224] Being able to litigate their claim using a contingency fee arrangement may be the only way for plaintiffs to ever get the compensation they deserve.[225] Collecting damages is viewed by our legal system as a way to restore injured parties to their position prior to the defendant's conduct, helping make them whole.[226] Chief Judge of the California Supreme Court, Ronald George, said, "If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract."[227] The American justice system is built upon the foundation that everyone should be able to have their day in court, even those with limited financial means.[228] Eliminating the contingency fee might produce results that run contrary to the country's sense of restorative justice for those who have suffered wrongs at the hands of another.

However, the expanded use of contingency fees has caused critics to view them more as "a weapon of first choice rather than as a last resort for those who are desperate and unable to find legal services by any other means."[229] Even wealthy corporate clients have used contingency fee agreements.[230] The ABA's Committee on Contingent Fees has stated that nothing in the Model Rules restrict the use of contingency fees to those who can afford to pay hourly or certain fees.[231] There are

221. *Id.*
222. *Commission Report: Decision on Costs in International Arbitration Appendix B: Summary of National Reports*, ICC Commission Reports, https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0049_APPENDIX_B.htm [https://perma.cc/2QJA-37QW] (last visited Dec. 16, 2022).
223. *See* Wennihan, *supra* note 1, at 1649.
224. *See* Rickman, *supra* note 74, at 39.
225. *See* Porcu, *supra* note 17, at 168.
226. Jill Wieber Lens, *Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation*, 59 U. Kan. L. Rev. 231, 235 (2011).
227. Neil F. X. Kelly & Fidelma L. Fitzpatrick, *Access to Justice: The Use of Contingent Fee Arrangements by Public Officials to Vindicate Public Rights*, 13 Cardozo J.L. & Gender 759, 781 (2008).
228. *See* Porcu, *supra* note 17, at 149.
229. Davis, *supra* note 42, at 373.
230. MacKinnon, *supra* note 29, at 89.
231. Wennihan, *supra* note 1, at 1661.

even signs that corporate *defendants* are starting to use contingency fees. Lawyers in these instances more accurately collect "reverse" contingency fees, which are determined by the amount a lawyer saves the defendant.[232]

Nevertheless, the proliferation (and potential abuse) of contingency fees in modern American litigation does not change the fact that they are still often the only way for indigent clients to pursue a claim.[233] According to the Legal Services Corporation (LSC), almost a million poor people who are trying to get help for civil legal issues are denied because of a lack of adequate resources.[234] The LSC's 2022 report, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, estimated that low-income Americans do not receive any or enough legal assistance for 92% of all civil legal problems that were having a substantial impact on them.[235] Those statistics fail to take into account those who are deterred from getting legal help in the first place. The report found that almost half of low-income Americans who did not seek legal assistance said it was because of concerns over costs.[236] The ability to recover damages can be even more crucial for the financially disadvantaged. "[A]n unresolved dispute that may mean frustration and inconvenience to a middle-class person often means loss of property, health, and life to a person below the poverty line in the United States."[237] The poor need some vehicle to aid with legal redress for injury.

The question then becomes, "can't the U.S. simply bolster its legal aid program?" That is a tall task. The LSC operated on a budget of $489 million in 2022, which the nonprofit organization said was "not remotely enough to keep up with inflation."[238] In 2022, it requested $1.26 billion for the 2023 fiscal year, citing lack of resources and increased need for legal services.[239] However, that amount is only adequate to assist the roughly 17% of the population that qualifies for legal aid.[240]

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232. Douglas R. Richmond, *Turns of the Contingent Fee Key to the Courthouse Door*, 65 BUFF. L. REV. 915, 919 (2017).

233. Wennihan, *supra* note 1, at 1649.

234. *The Unmet Need for Legal Aid*, LEGAL SERV. CORP., https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid [https://perma.cc/4JBW-B3SQ] (last visited Dec. 20, 2022).

235. *The Justice Gap*, LEGAL SERV. CORP., https://justicegap.lsc.gov/resource/executive-summary/ [https://perma.cc/P3M8-8LK6] (last visited Dec. 20, 2022).

236. *Id.*

237. Aranson, *supra* note 96, at 782.

238. *Fiscal Year 2023 Budget Request*, LEGAL SERV. CORP., https://www.lsc.gov/our-impact/publications/budget-requests/fiscal-year-2023-budget-request [https://perma.cc/W6BC-9V6S] (last visited Dec. 21, 2022).

239. *Id.*

240. 57 million / 332 million = 17.1%. *See U.S. Population Estimated at 332,403,650 on Jan. 1, 2022,* U.S. DEP'T OF COM. (Jan. 6, 2022), https://www.commerce.gov/

If aid were expanded to cover plaintiffs who previously relied on contingency fees, the required budget would skyrocket. It is unreasonable to assume that states or the federal government would agree to fund such a costly program. Furthermore, even if the government did have the funds, such spending would expose the justice system to exploitation associated with political funding.[241] Lastly, expanded legal aid would still likely possess shortcomings that contingency fees do not. It might take longer for plaintiffs to obtain representation. The availability of federally funded resources could also be more susceptible to the negative impacts caused by external societal factors compared to the private sector. For example, Legal Services requested additional funding of $502 million for the 2023 fiscal year to provide COVID-19 pandemic related legal services.[242] Under legal aid, clients also cannot select their own attorneys.[243] Simply put, society's talk is cheap surrounding access to justice for the poor, as we have never invested the money necessary to procure true access.

Another suggestion might be a push to increase *voluntary* legal services to aid the poor with their claims. Realistically though, volunteer work is not a viable option to fill the massive void in legal services. In fact, the country's history reveals a glaring failure to provide volunteer legal services. Prior to contingency fees becoming engrained in the U.S. legal system, we did in fact experiment with a system in which lawyers volunteered to take meritorious claims for free.[244] If a claimant was successful, the client had the option, but not the obligation, to compensate her lawyer.[245] In *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, W. Kent Davis notes, "The system was supposed to work based on the sheer conscience, charity, and honesty of both the lawyer and client, but regrettably these motivations did not prove successful in the long run."[246] Instead, with no mechanism to enforce collection of fees, lawyers neglected these cases regardless of whether they were

news/blog/2022/01/us-population-estimated-332403650-jan-1-2022 [https://perma.cc/ZA2T-XULD]; Adiel Kaplan, *More People Than Ever Need Legal Aid Services. But the Pandemic Has Hit Legal Aid Funding Hard*, NBC NEWS, (Apr. 25, 2021), https://www.nbcnews.com/business/personal-finance/more-people-ever-need-legal-aid-services-pandemic-has-hit-n1264989 [https://perma.cc/JC56-VLDA] (estimating 57 million people qualified for legal aid prior to the pandemic).

241. *See* Aranson, *supra* note 96, at 785.
242. *Fiscal Year 2023 Budget Request, supra* note 238.
243. Davis, *supra* note 42, at 392.
244. *Id.* at 375.
245. *Id.* at 375–76.
246. *Id.* at 376.

meritorious or not.[247] Our history proves that the dictates of morality and conscience are not as compelling as some would think.

Today, even minor pro bono requirements (as a condition of bar licensure) are met with staunch opposition from bar associations. The most recent Model Rules were at risk of failing to pass because of the addition to Model Rule 6.1,[248] which states, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should *aspire* to render at least (50) hours of pro bono publico legal services per year."[249] Not even mandatory service, just aspirational, proved controversial. More recently, lawyers have opposed even some states' pro bono *disclosure* requirements.[250] Ten states require lawyers to disclose their number of pro bono hours every year.[251] Bar association leaders have criticized the reporting requirement, arguing that any progression toward mandatory pro bono service will make lawyers less likely to render their services to do such work.[252] Meanwhile, New York is actually testing that hypothesis. The state requires individuals to complete 50 hours of pro bono work before they can be sworn into practice.[253] The requirement's impact on pro bono hours and lawyers' attitudes is less than clear.[254] However, critics have analogized the mandate to "indentured servitude," and questioned its usefulness, particularly when lawyers who do not want to be doing the work are serving clients against their will.[255] Unsurprisingly, no other states have followed New York's lead in adopting a pro bono bar admission requirement.[256]

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247. *Id.*

248. Aranson, *supra* note 96, at 782.

249. MODEL RULES r. 6.1 (AM. BAR ASS'N 2023) (emphasis added).

250. Gregory Zeller, *Lawyers Object to Mandatory Pro Bono Reporting*, LONG ISLAND BUS. NEWS (May 14, 2013), https://libn.com/2013/05/14/lawyers-object-to-mandatory-pro-bono-reporting/ [https://perma.cc/H7VD-CQDY].

251. These states include Florida, Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, New York, and starting in 2022, Minnesota. *Pro Bono Reporting*, AMERICANBAR.ORG, (Mar. 19, 2020), https://www.americanbar.org/groups/probono_public_service/policy/arguments/ [https://perma.cc/A6QK-JYYL].

252. *See* Zeller, *supra* note 250.

253. N.Y. CT. RULES FOR THE ADMISSION OF ATT'YS AND COUNS. AT L. § 520.16(a) (2023).

254. *See New York Rule Boosts Pro Bono in Florida,* FLA. BAR (Oct. 9, 2020), https://www.floridabar.org/the-florida-bar-news/new-york-rule-boosts-pro-bono-in-florida/ [https://perma.cc/S5JH-FD5J].

255. Staci Zaretsky, *New York Forces Pro Bono Requirements Upon Would-Be Lawyers Because No One Else Cares About Poor People*, ABOVE THE LAW (May 2, 2012), https://abovethelaw.com/2012/05/new-york-forces-pro-bono-requirements-upon-would-be-lawyers-because-no-one-else-cares-about-poor-people/[https://perma.cc/GLK3-U7B7].

256. *Bar Pre-Admission Pro Bono,* AMERICANBAR.ORG https://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono/[https://perma.cc/G3BJ-PUM3].

In addition to allowing indigent plaintiffs keys to the courthouse, contingency fees have benefitted and continue to benefit society in other ways. Contingent fee cases have been credited with deterring accidents and improving product safety.[257] This, however, is only the case if lawyers diligently pursue trial or settle at the amount the case is actually worth.[258] Outlawing the fees could jeopardize such deterrence. Professors Daniel Rubinfeld and Suzanne Scotchmer used an economic model to analyze how contingency fees arise when there is asymmetric information between lawyer and plaintiff. They concluded, "attempts to cap contingent fees could lead to a reduction in the number of low-quality cases filed as well as the number of cases taken by high-quality attorneys. This is likely to reduce the overall level of deterrence."[259]

Contingency fees have also bolstered "progressive" litigation and overturned "backward-looking law."[260] Some researchers estimate contingency fee cases are responsible for up to 95% of progressive decisions made in the last several decades.[261] These include:

> "[A]bolition of governmental immunity in some states, abrogation of intra-family immunity, the creation of a wife's right to recover for negligent impairment of her husband's consortium, the creation of the tort of negligent infliction of emotional distress, and the right of parents to recover for the wrongful death of an unborn child."[262]

Cases funded by contingency fees continue to profoundly shape litigation and society today. They have been at the heart of unprecedented legal action against the country's most powerful corporations.[263] In 2022, four of the largest U.S. corporations agreed to provide $26 billion to settle thousands of civil claims related to the opioid crisis.[264] Of course, two decades prior, attorneys funded by contingency fees helped pave the

257. *See* Leonard E. Gross, *supra* note 148, at 137 (citing Hugh Gravelle & Michael Waterson, *No Win, No Fee: Some Economics of Contingent Legal Fees*, 103 Econ. J. 1205, 1215, 1218 (1993)).

258. *See id.*

259. Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. Econ. 343, 355 (1993).

260. *See* Wennihan, *supra* note 1, at 1651.

261. *Id.*

262. *Id.* (quoting Eric M. Rhein, *Judicial Regulation of Contingent Fee Contracts*, 48 J. Air L. & Com. 151, 158 (1982)).

263. *See* Nate Raymond, *Lawyers' Fees From $26 Billion Opioid Settlement Capped at 15%, Judge Rules*, Reuters (Aug. 9, 2021), https://www.reuters.com/legal/litigation/lawyers-fees-26-bln-opioid-settlement-capped-15-judge-rules-2021-08-09/[https://perma.cc/ZVJ9-C2UV].

264. Jan Hoffman, *Companies Finalize $26 Billion Deal With States and Cities to End Opioid Lawsuits*, N.Y. Times (Feb. 25, 2022), https://www.nytimes.com/2022/02/25/health/opioids-settlement-distributors-johnson.html [https://perma.cc/8HET-LAC5].

way for the massive $206 billion settlement against tobacco manufacturers for deceiving customers about the health risks of their products. This litigation resulted in numerous valuable reforms on the marketing of tobacco to minors and is largely responsible for much of the reduction in cigarette use since the turn of the current century (smoking rates have been cut in half from 23.3% in 2000 to 11% in 2022).[265] These lawsuits, funded by contingency fees, had a major impact on public health and behavior, and produced an outcome that likely would not have occurred if we relied on the legislation or executive branches of our government alone.[266]

Regardless of the balance of costs and benefits, ending the contingency fee system in the U.S. is unrealistic. A ban would be difficult to perfectly enforce, if it were enforced at all.[267] Awareness of their continued use would only occur in instances where clients were unhappy with the outcome of their case.[268] To evade detection, attorneys could simply establish an hourly rate and not bill the client if they were unsuccessful.[269] Additionally, contingency fees have become so entrenched in our legal system that abolishing them would cause a major disruption

265. *See Cigarette Smoking Among Adults—United States, 2000,* CDC.GOV. (July 26, 2002), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5129a3.htm [https://perma.cc/B6BQ-R96S]. *See also* Jeffrey Jones, *Cigarette Smoking Rates Down Sharply Among Young Adults*, GALLUP NEWS (Nov. 29, 2022), https://news.gallup.com/poll/405884/cigarette-smoking-rates-down-sharply-among-young-adults.aspx [https://perma.cc/LA3S-24PY]. From 2001 to 2003, an average of 35% of U.S. adults between the ages of 18 and 29 said they smoked cigarettes, compared with 12% in the latest estimate. *Id.*

266. In the 1980s and early 1990s, the legislature did little to challenge the deception peddled by the tobacco industry. In contrast, Congress permitted the industry to give opinions through its experts' testimonies that its nicotine was not addictive and that smoking was a free behavioral choice. *See* Jack E Henningfield et al., *Tobacco Industry Litigation Position on Addiction: Continued Dependence on Past Views*, 15 TOBACCO CONTROL iv27 (2006). As a result, Congress allowed tobacco companies to be, in the words of Representative Henry A. Waxman, "exempt from the standards of responsibility and accountability that apply to all other American corporations." *The Regulation of Tobacco Products: Hearing Before the H. Comm. on Energy and Com. Subcomm. on Health and the Env't*, 103rd Cong. 1 (1994) (statement of Rep. Henry A. Waxman, Chairman, H. Subcomm. on Health and the Env't).

267. Professor Samuel Gross points out the illegality of certain agreements has resulted in judges turning a blind eye to certain practices rather than eliminating them. Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 323 (1998) ("For decades judges said that plea bargaining was improper and illegal, and insisted that criminal defendants deny on the record that their guilty pleas were in fact the products of bargaining, while simultaneously they not only condoned plea bargaining but relied on it to run their courts.") (footnote omitted).

268. *See* Porcu, *supra* note 17, at 166.

269. *Id.* at 166–67.

(and potential backlash). Their prevalence in personal injury cases[270] means they comprise a large portion of litigation in trial courts of general jurisdiction, making them a key factor in the business and operation of such courts. Moreover, contingency fees are also pervasive in administrative agencies. They are often the primary method of financing private lawyers' legal services in the administrative process.[271]

B. Replace Contingency Fees with the Loser Pays Rule (aka the "English Rule")

1. The History of the Loser Pays Rule

The "loser pays" rule is a two-way, fee-shifting system[272] where the losing party has to reimburse the successful litigant for legal expenses, including attorney's fees.[273] Loser pays is often referred to as the "English Rule" since it is largely utilized in the U.K. However, such an attribution obfuscates its true origin since the rule can be traced back to beginning stages of Roman law.[274] In fact, this type of cost shifting began to gain traction in the Byzantine Empire. Early on, losers were ordered to reimburse winners in cases involving bad faith. By 486 A.D., however, such reimbursements applied to all cases in the Byzantine Empire.[275]

Looking at slightly more recent history, the rule was statutorily established in England during the year 1275.[276] Early on, the statute allowed recovery of attorney fees for only certain causes of action, and distinguished between defendants and plaintiffs as to whether they could recover if victorious.[277] By the early 1600s, the rule allowed defendants to recover in all actions in which the plaintiff could recover fees.[278] England made a substantial adjustment to the rule in the 19th century, when it changed the awarding of attorneys' fees to the successful party from automatic to the discretion of the court.[279] This remains the status quo today.[280] It is important to note that the loser pays rule

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270. *Id.* at 167.
271. *See* MacKinnon, *supra* note 29, at 109. The conclusion was based on a survey which looked at the use of contingency fees in the "federal agencies' handling of tax, patents, Indian affairs, and the processing of claims by the Veterans Administration and the Social Security Administration" *Id.* at 105.
272. Davis, *supra* note 42, at 403.
273. *Id.*
274. *Id.* at 403–04.
275. *Id.* at 404.
276. Root, *supra* note 11, at 590.
277. *See id.* at 590 & nn.61–63.
278. *Id.* at 590.
279. *Id.*
280. *Id.*; *see also* CPR 44.2 (UK), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#rule44.2 [https://perma.cc/4ZYP-KJ47].

does not apply in all cases. Parties must bear their own fees in cases involving small claims, specific tribunals that require parties bear their own cost, or Legal Aid.[281]

The loser pays rule made a brief appearance in the U.S. as well.[282] The fee-shifting system, which was used in colonial America, survived the American Revolution. However, it began to dissipate by the turn of the eighteenth century. In 1796, the Supreme Court struck a blow to the loser pays rule in the case *Arcambel v. Wiseman.*[283] The Court held:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it, and even if that practice were not strictly correct in principle, it is entitled to the respect of the Court, till it is changed, or modified, by statute.[284]

The decision solidified the "American Rule," in which each party pays their own attorney's fees.[285] However, like all good rules in law, there are exceptions to the American Rule. Attorney's fees are often sought, and sometimes awarded, in several categories, including contracts, bad faith, common fund, substantial benefit, and contempt of court.[286] In addition, Congress and state legislatures have enacted many fee-shifting statutes for certain category-specific causes of action.[287]

Did the U.S. get it wrong by rejecting the loser pays rule all those years ago? The question came up in the 1980s, with a renewed push to swap out the contingency fee system with loser pays.[288] The movement was spearheaded by former Vice President Dan Quayle, who argued that the loser pays rule should apply to diversity cases in federal courts.[289] The reform failed to materialize for the same reasons that the loser pays rule is criticized today; namely, that it chills many meritorious cases and limits access to the doors of justice. Both of the benefits and drawbacks are considered further below.

2. The Loser Pays Rule Alleviates Attorneys' Self Interests

On the positive side, the loser pays rule presents a viable solution to the issue of lawyers accepting subpar settlement offers that are not in

281. Root, *supra* note 11, at 591.
282. *Id.* at 584.
283. 3 U.S. (3 Dall.) 306 (1796).
284. *Id.*
285. Root, *supra* note 11, at 585.
286. *Id.*
287. *Id.* at 585, 588.
288. Philip J. Havers, *Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems,* 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621, 632 (2000).
289. *See* Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 567–69 (1992).

the best interest of their clients, simply so that they get their fees paid. The loser pays rule mitigates this problem by removing the lawyer's financial interests from the case. Lawyers get paid their fees regardless of the outcome of a settlement or trial (either by their own client or by the opposing side, whoever "lost"). By reducing lawyers' economic motivations, the loser pays system may also put clients back in the driver's seat regarding settlement decisions. The rule comes with other debatable benefits, most of which are beyond the scope in this paper.[290]

3. Problems with the Loser Pays Rule

However, despite reducing lawyer-client conflicts of interest, the loser pays rule comes with a host of other potential drawbacks. The rule is often viewed as one that disproportionately disincentivizes members of the lower and middle class from pursuing a claim.[291] Take for example a personal injury claim. Personal injury defendants are often insurance companies.[292] As such, they are often repeat clients, familiar with negotiations and the court system.[293] Moreover, they have the financial resources to litigate cases vigorously and pay any judgments (and lawyers' fees) they lose. Having to pay a plaintiff's attorney's fees will not likely be a significant financial blow to such a corporate defendant or a significant deterrent to litigation.[294] On the other hand, a low- or middle-income plaintiff, who as discussed are often one-time players who have been seriously injured, may be completely wiped out by having to pay a corporate defendant's attorney's fees. The example contingency fee scenario discussed above[295] involved a client with a claim that was potentially worth $100,000 and had a 60% chance of winning. If unsuccessful, the plaintiff would owe nothing under the standard contingency fee "American Rule" agreement. However, the individual plaintiff would have to pay $35,000 ($20,000 + $15,000) under the loser pays rule. It has been argued that such a heightened risk would likely induce the plaintiff to settle for less than their claim is worth, unless they have

290. *See generally* Marie Gryphon, *Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System*, MANHATTAN INST. (Dec. 1, 2008), https://media4.manhattan-institute.org/pdf/cjr_11.pdf [https://perma.cc/A78F-Y35L].

291. Havers, *supra* note 288, at 636.

292. Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245, 276 (2010).

293. *See* Hamzehzadeh, *supra* note 183, at 241.

294. *See* Havers, *supra* note 288, at 633 (arguing corporate defendants can budget for litigation costs and mitigate litigation risk).

295. The cost of trial for the plaintiff was $15,000 and the cost for the defendant was $20,000. The plaintiff's lawyer was working on a standard flat fee of one-third of the client's recovery.

a slam dunk case.[296] In the words of Professor Kritzer, "[w]hile early settlements may be the result of generous offers, it is more likely that plaintiffs are inclined to accept whatever is offered to avoid the risk of cost-shifting."[297] As a result, settlements in England are usually "one-sided in favor of the defendants."[298] Furthermore, critics of loser pays rule say the risk of taking such a financial hit is enough to deter plaintiffs from pursuing legitimate claims in the first instance.[299] This allegation is borne out by the fact that England's litigation rate per capita is 50% less than the United States' litigation per capita.[300] While some of these deterred lawsuits would no doubt prove frivolous, the concomitant deterrence of meritorious lawsuits (based primarily on plaintiff's limited wealth and risk aversion) is essentially the same problem that the contingency fee system successfully addresses.

Another argument against the loser pays rule is that the reasons why it works relatively well in England may be the same reasons that it will fail in America, namely the widespread existence of legal expense insurance, legal aid, and trade unions in the U.K. compared to

296. However, the rule's overall impact on settlement rates remains debatable. Harvard law and economics professor Steven Shavell contends that since neither party can avoid legal costs by avoiding trial, the loser pays rule shrinks the range of mutually acceptable amounts, making settlement less likely. *See* Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2159 (1992). Settlement rates may also drop because the loser pays rule involves higher stakes, which could make going to trial more enticing. *See* Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1079 (1993). In contrast, legal scholar Richard Posner has said that the higher stakes associated with loser pays would increase settlements since risk-averse litigants won't go to trial. *See* John J. Donohue III, *Opting for the British Rule, Or, If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1093 (1991). Lastly, some legal economists contend that implementing the loser pays rule won't make much of a difference on the settlement rates. John Donohue analyzed the issue by applying the Coase Theorem and factoring in the parties' ability to "reorder the apparently fixed environment." Donohue concluded that parties will simply evaluate the two rules and choose the one that is most financially beneficial to them. Such a decision, he argued, will be made independently of the legal standard. *Id.* at 1099. *See also* John J. Donohue III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 197 (1991).

297. Davis, *supra* note 42, at 410–11 (quoting Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 55, 56).

298. *Id.* at 422 (citing HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS 169 (1987)).

299. *Id.* at 410.

300. A 2010 report published by Harvard's John M. Olin Center for Law, Economics, and Business found the litigation rate in the U.S. was more than 1.5 times higher than in the U.K. In the U.S., there were 5,806 lawsuits filed per 100,000 people compared to 3,681 per 100,000 in the U.K. J. Mark Ramseyer & Eric B. Rasmussen, *Comparative Litigation Rates*, The Harvard John M. Olin Discussion Paper Series, 1, 5 (Nov. 2010).

the U.S.[301] Legal expense insurance protects the plaintiff from having to pay all of the opposing party's fees if she loses her case.[302] Such protections are useful for plaintiffs who may have good, but not slam-dunk cases.[303] It also helps curb any disincentive for bringing a meritorious claim that might be due to a plaintiff's limited financial means.[304] The problem is that such insurance does not exist in the U.S.,[305] and a market for the insurance would take time to emerge while facing strong opposition from interest groups, such as tort reform organizations or corporate interest groups, who would prefer for plaintiffs to have to cover the full cost of attorneys' fees.

Finally, plaintiffs in England can also rely on the greater prevalence of trade unions for compensation and representation. According to statistics from the Department for Business, Energy, and Industrial Strategy, 23.1% of U.K. employees were trade union members in 2021.[306] That same year, union members made up 10.3% of the workforce in the U.S.[307] In England, trade unions help their member plaintiffs by providing legal representation and covering litigation costs.[308] Roughly 30% of accident plaintiffs in the country receive assistance from their trade union.[309] By contrast, union involvement in accident litigation in the U.S. is limited to cases where the injury is work-related[310] (and those cases are channeled through our "workers compensation" insurance system instead of the general tort system). Without strong union protections for workers in America, large defendants (like insurance companies) would be able to use the loser pays rule as a "'strategic bargaining tool' to discourage suits against them."[311] One study revealed that defendants made an offer 53% of the time when the claim involved a privately funded plaintiff. However, that number rose to 90% for claims that were funded by labor unions.[312] Power and protection matters.

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301. Root, *supra* note 11, at 601.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Trade Union Membership, UK 1995-2021: Statistical Bulletin*, DEP'T FOR BUS., ENERGY & INDUS. STRATEGY (May 25, 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1077904/Trade_Union_Membership_UK_1995-2021_statistical_bulletin.pdf [https://perma.cc/8UW7-LX8N].
307. *Union Members—2022,* BUR. OF LABOR STAT. (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/P6JK-FNXA]. Union membership in the U.S. has continued to fall reaching only 10.1% in 2022. *Id.*
308. Root, *supra* note 11, at 603.
309. *Id.*
310. *Id.*
311. Davis, *supra* note 42, at 411.
312. *Id.*

Even if there was the political will, introducing the loser pays system to the U.S. would also run into pragmatic problems, including administrative uncertainties associated with its implementation.[313] For example, would the party that lost the lawsuit also have to pay for fees associated with pretrial motions and pleadings that it prevailed on?[314] Such ambiguities are significant compared to England because in the U.S. the pretrial process is time-consuming and consequently expensive.[315] The uncertainties do not end there. Kritzer points out that in many U.S. lawsuits, insurance companies have a financial interest in the plaintiff's case. This may include a health insurance company that has covered the cost of medical treatment. He asks, "If the plaintiff loses, though, [w]ould the insurer be responsible for any of the defendant's costs? How should responsibility be allocated between the named plaintiff and the insurance company?"[316]

Unlike other proposed solutions, we can tentatively evaluate the loser pays rule in the U.S. That is because Alaska is the only state that uses a modified version of the loser pays system.[317] The state Civil Rule 82 allows the prevailing party in civil cases to be reimbursed for a portion of their attorney's fees by the losing party.[318] This differs from the pure loser pays system which requires the loser to pay the entirety of the winner's attorney's fees. Rule 82 has not had the disastrous impacts some critics predicted. A 2011 survey of Alaska's Bar members revealed attorneys were in favor of the rule and against it being rescinded.[319] The attorneys said the rule was working well to provide better compensation for the prevailing party in civil cases.[320]

However, research has shown that other concerns over instituting the loser pays, fee-shifting rule have indeed come to fruition. In the 1990s, the Alaska Judicial Council spearheaded one of most comprehensive studies on the rule's impact. The study found that Rule 82 did

313. *See* Havers, *supra* note 288, at 634.
314. *Id.* at 634–35.
315. *Id.* at 635.
316. *See* Kritzer, *"Loser Pays" Doesn't*, *supra* note 143.
317. Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Case Filings*, 29 ALASKA L. REV. 1, 1–2 (2012). In 1980, Florida implemented a two-way fee shifting rule for medical malpractice claims. However, it was repealed five years later at the behest of the Florida Medical Association after it discovered the rule led to an uptick in lawsuit filings. The rule also ran into enforcement issues, as successful defendants were rarely able to collect. *Id.* at 21.
318. Rule 82 - Attorney's Fees, ALASKA R. CIV. P. 82.
319. Nancy Meade, *Attorney's Fee Shifting: Perceptions on its Impact in Alaska,* NAT'L CTR. FOR STATE CTS. 2, 28 (May 2012), https://www.ncsc.org/__data/assets/pdf_file/0021/16473/attorneys-fee-shifting.pdf [https://perma.cc/VE5V-SHZ2].
320. *Id.* at 2.

in fact deter middle-income plaintiffs from filing claims far more than their wealthy counterparts.[321] Attorneys also acknowledged they viewed the risk of having to reimburse the winning party as an additional reason to settle early.[322] A more recent study analyzed civil and tort filings in the District of Alaska between 1997-2010.[323] It found the filings were lower than the national average, but were not statistically different from similar districts.[324] While Alaska seems to be proof that implementing a modified loser pays system may be feasible, researchers of Rule 82 have still urged caution and stressed that the rule is not a "one-size fits all" approach applicable to the rest of the U.S.[325]

Lastly, several hybrid models have recently emerged which fuse elements of both the American Rule and the loser pays rule. Under the "New Rule" proposed by David A. Root, the attorney still works on a contingent fee.[326] If the case settles, both sides pay their own fees. However, the loser pays rule applies in cases that go to trial, are dismissed during the pre-trial stage, or when there is a directed verdict. If the case goes to a jury trial, however, the court decides whether the losing party will have to pay the winner's legal fees and for what percentage it is responsible.[327] Like many other suggested approaches, the New Rule is aimed at clamping down on frivolous lawsuits thought to be caused by contingency fees. But in the broader picture, it does little to remedy the problem of attorneys settling for their own financial interest.

C. Conflict Disclosure

As discussed, the Model Rules require contingency fee agreements to be in writing, signed by the client, and detail how the fees will be calculated.[328] However, nowhere do the rules state that lawyers must disclose the financial conflict of interest that contingency fees create. Could requiring such a disclosure curb potential abuse by lawyers, ensuring they work in their client's best interest?

While it may not put them fully in the driver's seat, being aware of their attorney's financial interests to seek quick settlements could help plaintiffs make better informed decisions about their claims.[329] At the very least, it would deter clients from blindly following the advice

321. *See* Rennie, *supra* note 317, at 24.
322. Davis, *supra* note 42, at 429.
323. Rennie, *supra* note 317, at 4.
324. *Id.* at 1.
325. *Id.* at 43–44.
326. Root, *supra* note 11, at 610.
327. *Id.* at 610-11.
328. MODEL RULES r. 1.5(c).
329. *See* Johnson, *supra* note 121, at 608.

of their attorney when it runs contrary to their objectives.[330] This is particularly valuable for personal injury clients who often have no prior experience working with lawyers.[331] Earl Johnson has also proposed that having such information may allow the client to better monitor and evaluate her attorney's work.[332]

Requiring disclosure of the contingency fee conflict of interest is, on its face, consistent with the ABA's objectives. Model Rule 1.7 addresses conflicts of interest. In the comment to the rule, the ABA states that conflicts may stem "from the lawyer's own interests."[333] To resolve conflicts of interest the Model Rules require an attorney to "consult with the clients affected . . . and obtain their informed consent, confirmed in writing."[334]

The problem with the disclosure solution is that it depends on lawyers actually following the rules and clients actually realizing the gravity of the problem. Historically, making sure that attorneys disclose information has been challenging to enforce.[335] As legal ethics expert Leonard Gross opines, "if lawyers will not routinely disclose the necessary information for clients to recognize that there is a problem, there is virtually no way to enforce the rule."[336]

Principles of behavioral economics support the notion that lawyers will fail to comply with the disclosure rule, or at the very least try to minimize their own conflict in the client's mind.[337] Leonard Gross explains the various reasons why this occurs. First, lawyers, like the majority of human beings on the planet, are prone to rationalize their own self-interested actions as being ethical.[338] This includes viewing their behavior as consistent with prevailing norms and also thinking that the rules governing "bad" behavior do not apply to their actions, which are of course "good."[339] A lawyer's decision to disclose a conflict will also rely on whether they know of adverse consequences for failing to do so. If they are not aware of another lawyer who was disciplined for violating the conflict disclosure requirement, they may reason that their own

330. *See id.*
331. *See* Rickman, *supra* note 74, at 37.
332. Johnson, *supra* note 121, at 608.
333. MODEL RULES r. 1.7 cmt. 1 (AM. BAR ASS'N 2023).
334. MODEL RULES r. 1.7 cmt. 2 (AM. BAR ASS'N 2023).
335. Havers, *supra* note 288, at 626.
336. Leonard E. Gross, *supra* note 148, at 114.
337. *See id.* at 115.
338. *Id.* As a possible solution, Gross discusses using committees or in-house legal experts instead of attorneys to evaluate potential conflicts. *Id.* at 145. However, such resources may not be available at smaller law firms.
339. *Id.* at 115.

behavior is ethical.[340] This is concerning since few lawyers are publicly disciplined for misconduct. According to the ABA's most recent Profile of the Legal Profession, the number of lawyers who were publicly disciplined in 2019 stood at just one-fifth of one percent (0.2%) of all practicing attorneys.[341] If no one you know faces the consequences of unethical behavior, then it is not that unreasonable to think that you will not either.[342]

Thus, even if attorneys know that their actions pushing settlement constitute an improper conflict of interest, they might still proceed with such behavior because they do not think they will get caught. Such reasoning is supported by people's optimism bias, or the "it won't happen to me" attitude,[343] which is a disposition of productive people generally:[344]

> As lawyers may be reasonably productive (at least when compared to society as a whole) and since law school training may have honed their powers of rationalization, it is reasonable to surmise that lawyers will be at least as likely to be over-optimistic with respect to assessing their own judgment as the public at large.[345]

Rationalization and self-interest may also cause lawyers who do disclose conflicts to persuade their clients to waive them.[346] This would be done by downplaying the significance of the conflict.[347] Such behavior is supported by empirical data. A survey was conducted of more than 150 lawyers who had graduated from Southern Illinois University School of Law.[348] Respondents were asked about their behavior in conflict-of-interest situations. One question asked respondents how often they assured their clients that they could adequately represent them in spite of there being a conflict of interest. Twenty-seven percent said they always told their clients this.[349] Another 17% said they told clients

340. *Id.* at 116.
341. Am. Bar Ass'n, Profile of the Legal Profession 1, 84 (2022) https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [https://perma.cc/7FD9-PNM5].
342. This is evidence of under detection because intuition would suggest that unethical behavior is higher than 0.2% among practicing attorneys, but this is not a true estimate of all attorneys who acted unethically, rather only those who got caught.
343. *See* Leonard E. Gross, *supra* note 148, at 116. *See also* Katherine Gillespie, *It Won't Happen to Me: The Psychology Behind Optimism Bias*, Vice (Oct. 16, 2018, 2:28 AM), https://www.vice.com/en/article/a3an4a/it-wont-happen-to-me-the-psychology-behind-optimism-bias [https://perma.cc/TDK4-W3ZC].
344. *See* Leonard E. Gross, *supra* note 148, at 116.
345. *Id.* (footnotes omitted).
346. *Id.* at 118.
347. *Id.* at 119.
348. *Id.* at 127.
349. *Id.* at 128.

they could still provide them with good representation at least 90% of the time. Only 14% said they communicated such assurances to their clients in more than 75% of situations.[350]

D. Informed Consent

Even if contingency fee lawyers do adequately inform their clients about their misaligned incentives to quickly settle cases, this would hardly be enough to solve the problem, as it falls far short of ensuring true informed consent. As Lester Brickman explains, "[f]or consent, including consent to the fee arrangement, to be 'informed,' the client not only must be given the relevant information, but must comprehend it as well."[351] As discussed throughout this article, inexperience with lawyers and the complexity of certain cases would make it difficult for most individual clients to fully understand the conflict and its implications.[352]

Behavioral economics principles also support the notion that clients will tend to waive conflicts, even if it is not in their best interest. The reasoning is that "people will be inclined to avoid immediate losses much more strongly than losses that might arise in the future."[353] If a client decides not to waive a conflict, they will have wasted time and energy undertaking the relationship with the attorney. They might have already become emotionally invested in their current lawyer. Moreover, they would have to spend resources looking for new representation, who would likely face similar incentives as current counsel.[354] This idea is also supported by findings from the survey of alumni lawyers conducted by Southern Illinois University School of Law. Attorneys were asked how often their clients waived conflicts after receiving assurances of quality representation.[355] Sixty-three percent of respondents said their clients agreed to waive conflicts *every single time* they were told about one, but assured by the lawyer that she could still do a good job.[356] Another 19% said that their clients waived conflicts more than 90% of the time.[357]

The supposed benefit that disclosure would allow clients to better evaluate their lawyer's efforts is also questionable, since many clients

350. *Id.*
351. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 49 (1989) (emphasis added) (footnotes omitted).
352. *See* Havers, *supra* note 288, at 626.
353. Leonard E. Gross, *supra* note 148, at 123.
354. *Id.*
355. *Id.* at 129.
356. *Id.*
357. *Id.* at 129–30.

won't be able to monitor such work. In general, monitoring attorneys is difficult because of the required specialized knowledge to evaluate their work and the physical separation between most of the attorney's lawyering and the client. Further, personal injury lawsuits often involve rear-end and head-on car collisions, pedestrians being struck by cars, falls, and people being struck by falling objects.[358] Such accidents can leave clients with serious physical injuries, wreaking havoc on family life.[359] They can also cause psychological trauma and stress.[360] As a result, clients may not have the capacity to look over their attorney's shoulder and make sure they are working vigorously in their best interest. Monitoring the work effort of one's lawyer is even less of a realistic expectation in class actions[361] and multiple plaintiff lawsuits.

Furthermore, for most clients, the disclosure of a lawyer's conflict of interest is helpful only when they have the option to decide whether to continue being represented by that attorney or seek alternative counsel. That benefit won't apply to contingency fee clients who are using the fee because of limited financial means. Instead, these clients will be stuck with lawyers that suffer from the same financial conflict of interest because they cannot afford to pay hourly fees.

E. Mandatory Disclosure of Additional Valuation Information

Some legal scholars claim that the contingency fee conflict problem could be addressed through the disclosure of specific and substantive information related to a client's individual case. In particular, Lester Brickman proposed an approach that would require lawyers to file the estimated value of a case with the court at the outset of filing.[362] Under Brickman's approach, a case's expected value would be calculated by estimating the likelihood of winning and the potential recovery amount.[363] In theory, this disclosure would address the information asymmetry that allows lawyers to settle cases for less than their worth. Armed with the knowledge of their case's expected value, clients would be immune from the manipulative persuasion tactics described by Kritzer.[364] One concern is that lawyers could file an artificially low

358. *See* ROSENTHAL, *supra* note 181, at 71.
359. *See generally id.* at 74.
360. *See id.* at 73.
361. Thomason, *supra* note 73, at 189.
362. Brickman, *supra* note 351, at 117–20.
363. *Id.* at 117.
364. However, theory may not match with implementation if the attorneys are sufficiently convincing when explaining why a deviation from their prior number is necessary. Additionally so if their role as an authority figure in legal strategy is sufficiently powerful to override the views of their now well-informed clients. For example, in the

expected value with the court. However, Brickman argues that the "reality of judicial superintendence" and risk of sanctions would counteract the "impetus of self-interest" among attorneys.[365]

Brickman's solution is enticing, but, in practice, it would be challenging—if not impossible—to implement his disclosure requirements. It is unrealistic to assume that lawyers can estimate the likelihood of winning at the time a client signs a fee agreement.[366] In particular, the lawyer may lack key information about the case that will come out in the course of discovery.[367] Additionally, the plaintiff's lawyer may also risk exposure to a legal malpractice action by trying to accurately predict what a defendant will be willing to offer so early in the case.[368]

Interest group opposition to failed legislation from the 1990s also undermines the practical appeal of Brickman's solution. For example, the proposed Commonsense Product Liability and Legal Reform Act ("CPLLRA") required contingent fee attorneys to give their client a written statement that described the number of hours that they expected to spend on the case if it settled versus if it went to court.[369] CPLLRA also required attorneys to tell their clients the actual number of hours they spent on a claim that was settled or adjudicated.[370] If the attorney violated CPLLRA's disclosure rules, their client could deduct 10% of their attorney's fee.[371] Senator Hollings took issue with the fact that the act would require contingent fee attorneys to predict hours. In particular, he argued that the calculation of hours would be an administrative hassle[372] which was consistent with contingency fee lawyers

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medical arena, research has revealed that patients are quite suggestible and influenced by their doctor's advice, often reluctant to challenge their doctor's recommendations even if it was against their own preference. A 2012 study found that 70% of survey respondents wanted to be involved in making medical decisions with their doctor and contribute equally to choosing treatment. However, less than 15% said they would disagree with their doctor's advice on treatment if they preferred a different option. Pittman, *supra* note 204.

365. Brickman, *supra* note 351, at 124. For example, the risk of sanctions bolsters the integrity of the federal tax system, which is "essentially self-regulatory."

366. *See* Porcu, *supra* note 17, at 165.

367. Such information may include facts about which the plaintiff was not immediately forthcoming.

368. This puts the plaintiff's lawyer in the untenable position of trying to accurately predict what a defendant will be willing to offer very early in the case, which could unfairly increase exposure to malpractice liability.

369. Wennihan, *supra* note 1, at 1670.

370. *Id.* at 1671. The legislation was designed to give clients more bargaining power over lawyers' contingency fees. *Id.*

371. *Id.* Plaintiffs could also sue their lawyer for damages caused by the failure to disclose. *Id.*

372. *Id.* at 1671–72 & n.269.

seldom keeping detailed records of their hours.[373] Ultimately, President Bill Clinton vetoed CPLLRA.[374] Like CPLLRA, Brickman's approach would require attorneys to make quantifiable predictions at the outset of the case. Furthermore, like CPLLRA, Brickman's proposal would get its bite through the threat of judicial supervision and sanctions. Given these similarities, Brickman's proposed solution would likely suffer a similar fate as CPLLRA.

F. A Sliding Scale with Caps

Another enticing solution to the contingency fee conflict problem is the elimination of the flat contingency fee percentage in favor of a sliding scale system with caps.[375] Under this system, the lawyer's fee would be tied to the stage of settlement or litigation when the plaintiff recovered. The further the case progresses, the higher the contingency fee. For example, a lawyer's fees could be capped at 15% if the case settled early and at 40% if it went to trial. Such caps would deter attorneys from setting excessive fees.

In theory, this approach would mitigate three major problems that mire our current contingency fee system. First, a sliding scale system would disincentivize premature settlements because fees could be made much lower at the outset of the case (perhaps only 10% or 15% after filing). Second, a sliding scale system could diminish a lawyer's motivation to settle cases at all if the ultimate fee recovery would be much larger at trial (perhaps 40% of the damages).

Third, a cap imposed on the sliding scale system could prevent lawyers from collecting large amounts of fees for doing little work. In particular, the sliding scale system's maximum caps would prevent "windfall" recoveries, where attorneys have made tens or hundreds of millions of dollars in fees on a single case (perhaps a given case could be capped at $1 million per year of work). During the tobacco litigation, the payout for many lawyers exceeded hundreds of millions of dollars. For example, as part of its settlement with the tobacco industry, Florida received $11.3 billion—$3.4 billion of which was divided by eleven lawyers involved in the trial, which came out to more than $300 million per attorney.[376] All attorneys involved could retire forever on the work they did on one single case. On the other hand, the victims of cigarettes, many of whom had died long ago from lung cancer, emphysema,

373. *See* Johnson, *supra* note 121, at 607 n.29.
374. Wennihan, *supra* note 1, at 1672.
375. *See* Clermont & Currivan, *supra* note 70, at 594–95.
376. W. KIP VISCUSI, SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL 52 (2002). *See also* Capra et al., *supra* note 76, at 2829, 2832.

or heart disease, received nothing from the settlement agreement.[377] More recently, the attorneys involved in the Flint water crisis settlement sparked protests from residents after they filed a motion seeking 31.6% in attorney's fees, which would have netted them more than $202 million.[378] Following the uproar, a federal judge capped the attorney's fees at 25%.[379] Today, the current opioid litigation promises more of the same, as lawyers will get rich suing the makers of oxycodone while its victims are dead from addiction and overdoses.[380] These lawsuits have punished the wrongdoers and made society safer by internalizing externalities, but "windfall recoveries" fail to provide justice for injured *clients*. Rather, attorneys use the clients to win lottery-size settlements or verdicts that set themselves up for life.

The American Tort Reform Association has endorsed the sliding scale approach,[381] as well as some states. For medical liability claims, Florida, Wisconsin, and Wyoming determine the maximum contingency fee percentage based on how far along the lawsuit was when the client recovered.[382] California has also recently adopted a capped, sliding scale model for medical malpractice cases after previously rejecting such a measure. In 1996, the state's ballot included Proposition 202, which proposed capping contingent fees at 15% when a case settled within 60 days of receipt of a demand for compensation.[383] Predictably,

377. American Lung Association Editorial Staff, *Who Is Really Benefiting From the Tobacco Settlement Money?*, AM. LUNG ASS'N (Feb. 2, 2016), https://www.lung.org/blog/who-benefit-tobacco-settlement [https://perma.cc/B9ZM-7E36] ("*The Master Settlement Agreement involves a 1998 settlement reached between the nation's four largest tobacco companies and attorneys general from 46 states and territories. Despite recent reports on the internet,* ***there is no provision for payments to individuals.***") (emphasis added); *see also* NPR Staff, *15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013, 5:25 PM), https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go [https://perma.cc/6KSX-DBER] (discussing general mismanagement of the settlement funds by states).

378. Ron Fonger, *Attorney Fees Capped at 25 % in Flint Water Settlement*, MICH. LIVE (Feb. 04, 2022, 1:52 PM), https://www.mlive.com/news/flint/2022/02/attorney-fees-capped-at-25-in-flint-water-settlement.html [https://perma.cc/V883-7M26].

379. *Id.*

380. Tom Hals & Nate Raymond, *Opioid Companies Say Lawyers' Fee Demand Threatens Settlement Talks*, REUTERS (Feb. 27, 2020, 1:23 PM), https://www.reuters.com/article/us-usa-opioids-litigation/opioid-companies-say-lawyers-fee-demand-threatens-settlement-talks-idUSKCN20L2PK [https://perma.cc/NK5Q-FJ36] ("The drug companies noted that the attorneys would receive more money from the settlement than even some of the states they represent.").

381. *See* Swett, *supra* note 142, at 661.

382. *Id.* at 662.

383. *Attorneys' Contingent Fees. Limits.* CAL. PROPOSITION 202 (1996), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2122&context=ca_ballot_props [https://perma.cc/7VRH-P8T8]. Moreover, lawyers were still limited to 15% in cases where a settlement offer was rejected, and the plaintiff received a judgement award.

however, the initiative was met with rancor from attorneys,[384] and failed to pass.[385] However, in 2022, California passed Assembly Bill 35.[386] The legislation limits attorneys to collecting 25% of the amount recovered if the case settles before the filing of a complaint or arbitration demand, and 33% for settlements, arbitrations, or judgments after the filing of a civil complaint or arbitration demand.[387] For cases that have gone through trial, plaintiffs' attorneys can request higher percentage fees by filing a motion with the court.[388]

However, the appeal of the sliding scale system as a solution to the contingency fee conflict problem unravels under increased scrutiny. First, the stage of litigation does not necessarily reflect the amount of time and energy a lawyer has put into a case.[389] The approach also fails to financially motivate a lawyer to put in the number of overall hours that a case may require to achieve a result that is in the client's best interest.[390]

Additionally, the sliding scale approach is vulnerable to simple manipulation. In California, for example, lawyers would receive a higher percentage by simply filing a medical malpractice action with the intention of settling the case quickly thereafter,[391] whereas today the same case might be resolved before an action was ever filed. This simple manipulation creates waste in the system, with the lawyer doing additional work for no added value. Simultaneously, the courts could be burdened with additional cases on their already overcrowded dockets, many of which never needed to be filed in the first place.

However, they could collect a percentage of the difference between the judgement and rejected settlement amount. *Id.*

384. Dan Morain, *Prop. 202 Packs a Powerful Potential*, L.A. TIMES, (Mar. 22, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-03-22-mn-50049-story.html [https://perma.cc/PV86-4ZX3].

385. Wennihan, *supra* note 1, at 1673.

386. *Governor Newsom Signs Legislation to Modernize California's Medical Malpractice System,* OFF. OF GOVERNOR GAVIN NEWSOM (May 23, 2022), https://www.gov.ca.gov/2022/05/23/governor-newsom-signs-legislation-to-modernize-californias-medical-malpractice-system/ [https://perma.cc/UD7E-W9GD].

387. Assemb. B. 35, 2021-22 Reg. Sess. (Cal. 2022).

388. *Id.*

389. *See* Clermont & Currivan, *supra* note 70, at 595.

390. *Id.* Clermont and Currivan also addressed implementing a sliding scale where the contingent fee is based on the number of hours the attorney works. They concluded such an approach would only align the lawyer and client's interest when that rate of increase was a specific value, which would need to be altered in every case. *Id.* at 597–98. Furthermore, they argued the model was impractical because it would require an unrealistic amount of information to determine the relationship between the hours worked and the settlement offer for each case. *Id.* at 598.

391. *See* Assemb. B. 35, *supra* note 387.

The sliding scale approach also fails to perfectly align attorney-client interests. It may, in fact, cause the opposite problem by incentivizing lawyers to go to trial when their clients would be better off settling.[392] Let's say, for example, that a defendant makes a large settlement offer on the eve of closing arguments. If the jurisdiction's rules provide for an increased contingency fee percentage if the trial concludes, then the lawyer may push their client to reject the settlement, even if it is greater than the expected judgement award.

Bruce Hay argues that clients may want to avoid a sliding scale approach because the availability of high contingency fees during the settlement phase incentivizes lawyers to act as tough bargainers and fight for larger settlements.[393] For example, attorneys will be far more motivated to engage in thorough pretrial discovery,[394] which could force the opposing party to offer a larger settlement amount.[395] Therefore, the higher settlement amount might justify paying the lawyer a higher percentage fee. Hay goes as far as to say, "[e]ven if settlement is a sure thing and costs the lawyer nothing, the client may want to give the lawyer as high a fee percentage as he would give if trial were unavoidable,"[396] based on the fee making her lawyer work harder in the early stages of litigation.

In summary, the sliding scale system is a widely accepted reform that has the potential to address the contingency fee conflict problem by disincentivizing premature settlements. However, like the aforementioned solutions, the sliding scale system does not come without its drawbacks. For this reason, legal scholars should consider the merits of other more unconventional approaches.

G. Considering Unconventional Approaches

1. Allow Plaintiffs to Sell Their Causes of Action

One unconventional approach to the contingency fee conflict problem involves the sale of causes of action. Schwartz and Mitchell have proposed reforms that would allow clients to sell the rights to their cases to claim-buying organizations.[397] The sale of claim to a collection agent

392. *See* Leonard E. Gross, *supra* note 148, at 136.
393. *See* Hay, *supra* note 84, at 50–51. However, tougher bargaining could decrease the probability of a settlement, which could, in some instances, be detrimental to the client. *Id.* at 51.
394. *Id.* at 52.
395. *Id.*
396. *Id.* at 49.
397. Schwartz & Mitchell, *supra* note 55, at 1154. Schwartz and Mitchell also proposed selling the claims directly to lawyers. *Id.* This approach, however, would do

would eliminate the problem of excessive or early settlements by taking away the attorney's financial stake in the case. The claim-brokers would simply be a go-between for plaintiffs and lawyers. It would also allow individuals who could not afford lawyers' hourly rates to be compensated for their injuries. It may be particularly useful to those with small claims who may have otherwise had a difficult time finding representation under a traditional contingency fee agreement.[398]

However, Schwartz and Mitchell's approach is full of practical challenges.[399] It would require a significant overhaul of our current judicial system and the elements needed to seek judicial relief.[400] In most states, tort claims cannot be assigned.[401] There is a good chance that claim buyers would end up being corporate groups that administer services and compensation to accident victims.[402] This may include health care providers, disability insurers, and labor unions.[403] However, their role as claim buyers could financially incentivize such entities to exploit accident victims and undermine their professional duties to their patients.[404]

Furthermore, since plaintiffs usually do not know how much their claim is worth,[405] the approach relies on a hypothetical competitive marketplace where collection agents are forced to make offers based on the actual value of one's claim.[406] Creating such a market is unrealistic and unlikely to occur. "The unique nature of the product being sold would erect innumerable obstacles, such as the waste entailed in costly, independent investigations of each claim by the buyers."[407]

2. Borrowing Against Potential Claims

Schwartz and Mitchell also propose an overhaul of the loan market to better allow clients to borrow against their potential claims as a potential solution to the contingency fee conflict problem. Under this system, the lender would give the client a loan in order to pay a lawyer

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nothing to solve the problem since it relies on lawyers, who have a financial interest in the claim, honestly evaluating the claim's worth.

398. *See* Swett, *supra* note 142, at 665.

399. Schwartz & Mitchell, *supra* note 55, at 1154.

400. *See* Clermont & Currivan, *supra* note 70, at 596.

401. *See* Samuel R. Gross, *supra* note 267, at 328. Texas, however, is an outlier in that it does allow the assignment of personal injury claims in certain circumstances. *Id.*

402. *Id.* at 326.

403. *Id.*

404. *Id.*

405. *See* Hamzehzadeh, *supra* note 183, at 241.

406. *See* Clermont & Currivan, *supra* note 70, at 596.

407. *Id.*

working on an hourly fee.[408] The client would only repay the loan if they successfully recovered. A lender's risk of nonrecovery would be offset by charging above-average interest rates. This approach runs into a roadblock though when considering that the lawyers themselves would be an obvious candidate to be lenders since they presumably could best assess the prospects for the case.[409] If this were the situation, the approach would mirror the current contingency fee system, and would be plagued by the same problems.[410] Thus, allowing clients to borrow against their potential claims would do little to address the contingency fee conflict problem.

3. Mandate Trials or Use Shared Veto Arrangements for Settlements

A more radical proposal is for clients to commit to only going to trial. Geoffrey Miller imagines using a shared veto arrangement to curb settlements that do not reflect the client's best interest.[411] Such agreements would prohibit the plaintiff or their attorney from settling *without the other's consent*. In theory, the arrangement "would ensure that any settlement obtained would at least equal the return to the claim from trial."[412] However, as discussed previously, lawyers have superior knowledge to their clients regarding the litigation system, [413] which gives them situational control. As a result, attorneys are often able to steer their clients away from insisting upon going to trial. Such an arrangement also runs into practical problems, since courts often find agreements that waive a plaintiff's rights to settle are invalid.[414]

4. Contingency Fee Attorneys Bear A Fraction of the Cost and the Reward of Litigation

Another unconventional solution, proposed by Polinsky and Rubinfeld, is that contingency fee lawyers should bear only a fraction of the total cost of litigation[415]—they suggest the same fraction that the lawyer obtains from her client's award or any settlement.[416] When an attorney

408. Schwartz & Mitchell, *supra* note 55, at 1154.
409. *Id.*
410. *See* Clermont & Currivan, *supra* note 70, at 597. Clermont and Currivan also conclude that such an approach is impractical, arguing "the unique nature of the collateral would make attaining the premised ideal loan market unlikely." *Id.*
411. Miller, *supra* note 83, at 210.
412. *Id.*
413. *See* Thomason, *supra* note 73, at 192.
414. Hay, *supra* note 84, at 72 n.72 (citing to Miller, *supra* note 83, at 210 n.65).
415. A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 Am. L. & Econ. Rev. 165, 165–66 (2003).
416. *Id.*

bears the same fraction of the amount that their client would obtain, she will have an incentive to do what a knowledgeable, risk-neutral client would prefer—whether to bring a case, settle it, or go to trial. By sharing the same percentage of the reward and the same percentage of the cost, lawyers will retain upside and downside, along with their clients. This will reduce conflicts of interest and mitigate the desire for the quick-kill settlement.[417] Unfortunately, by leaving some shared costs on the client, it will not completely solve the judiciary's concerns about providing the indigent access to the keys of justice.

IV.
The Merits of a Hybrid Approach

The discussion thus far has made one thing clear: most solutions to the contingency fee conflict problem come with significant drawbacks. Some reforms fail to preserve access to justice and others are simply impracticable. That said, we should not accept the contingency fee conflict problem as a fact of legal life. Instead, this Article argues that a hybrid system—which combines the elements of hourly compensation with the positives of contingency fees—brings us closer to a true system of compensatory justice.

A. The Contingent Hourly-Percentage Fee Approach

The contingent hourly-percentage fee is a provocative proposal put forth by Kevin Clermont and John Currivan.[418] As with traditional contingency fee agreements used today, lawyers under this arrangement would only be able to collect if their client recovers.[419] But this is an approach that attempts to balance poor plaintiffs' access to justice, provide proportionate earnings to lawyers for their hours worked, and, most significantly, align the lawyer's and the client's economic interest. It is a combination of two basic components: (1) the value of lawyer's hours spent on the case, and (2) a percentage of the amount by which the total recovery was higher than the value of hours worked, to provide a "reward" similar to the contingency fee model.[420]

> Under the assumptions and terminology of the model, the first component is equal to *w* times *h,* where again *w* is the certain hourly wage and *h* is the number of hours worked. This first component pays the lawyer for his time—that is, for his opportunities forgone. The second component is equal to some percentage (x) of *s* minus *w*

417. *Id.* at 167.
418. Clermont & Currivan, *supra* note 70, at 546.
419. *Id.* at 546–47.
420. *Id.*

> [times] *h,* where *s* is the settlement. This compensates the lawyer for those inevitable cases that will prove unsuccessful.[421]

The model represents the contingency fee lawyer's two roles: "laborer and insurer." As a result, the lawyer gets paid fairly for the time they spent on the case, and also gets compensated for bearing the risk of an unsuccessful case.[422]

Clermont and Currivan offer multiple equations to model the proposed fee,[423] and also provide an example, which shows how their proposal aligns attorney-client economic interests. In this scenario, a lawyer is working at a certain rate of $50 per hour and is entitled to 10% of the settlement. If the lawyer spends ten hours on a case, the settlement amount will be $1,760. The lawyer will receive $626 in fees [$50 × 10 hours + ($1,760 - ($50 × 10 hours)) = $626]. That amount is $126 more than their opportunity cost of $500 ($50 × 10 hours). The client will get a net recovery of $1,134.[424] The client's goal is to maximize the settlement amount in order to get the highest net recovery. The example assumes a maximum settlement of $1,920 that would yield the client $1,188. However, achieving this requires the lawyer to spend another two hours on the case for a total of twelve hours.[425] This is usually where we run into a problem with the conventional contingency fee. The client's net recovery would be lower than what it could be because the contingency fee lawyer does not have the financial incentive to put in additional hours to maximize it when doing so would fall below their opportunity cost.[426]

The difference here—under the proposed contingent hourly-percentage fee —is that the lawyer's highest possible return per hour is also met at twelve hours. The lawyer will receive $732 if they work for twelve hours and secure the higher settlement amount. That amount represents $132 more than their opportunity cost of $600.[427] As a result, the lawyer maximizes both her and her client's profit.[428]

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421. *Id.* at 547. Clermont and Currivan contend that the second component aligns the attorney and their client's financial interests.
422. *Id.*
423. *See id.* at 602–03.
424. $1,760 - $626 = $1,134.
425. Clermont & Currivan, *supra* note 70, at 549.
426. *See* Johnson, *supra* note 121, at 585.
427. $50 x 12 hours = $600.
428. $126 < $132. The scenario above, however, relies on several assumptions that are unlikely to hold. First, the plaintiff's lawyer knows the defendant is willing to settle and how much they are willing to offer. The lawyer also knows the amount offered will be sufficient for them and their client to accept. When relaxing such certainties, attorney-client interests may slightly diverge. If the lawyer and client have different views of acceptable settlements, perhaps influenced by their attitudes toward risk, the lawyer

There is value in the simplicity of Clermont and Currivan's approach. In particular, the formula is comprehensible for both lawyers and plaintiffs.[429] This symmetric access to information minimizes the risk of abuse by attorneys, as they would not be able to use their superior knowledge of the legal system and its fees to trick or manipulate clients into "quick kill" settlements.[430] The simplicity of the formula also makes it easier to set and calculate fees.

In fact, the only significant ambiguity in Clermont and Currivan's compensation formula is the value of the contingency fee percentage that kicks in when the recovery is greater than the time charged.[431] Some theorists have voiced concerns that lawyers will charge an excessive percentage rate, which, coupled with a low hourly wage rate, will make the approach "functionally indistinguishable from contingent fees" as they currently exist.[432] However, the ambiguity of the contingency fee component is not a fatal flaw for Clermont and Currivan's approach. For example, the contingency fee percentage could be limited by a regulatory body,[433] such as the ABA. Furthermore, in the absence of such regulation, the contingency fee component would still be subject to the reasonableness requirements under the Model Rules.[434]

Unlike many of the aforementioned reforms, Clermont and Currivan's solution is implementable. The contingent hourly percentage fee carries less risk of being rejected out of hand by lawyers since it melds two fee systems (hourly rate and contingency fees) that are already widely in use.[435] Meanwhile, because the reform is a hybrid approach, implementation would not require an overhaul of our existing legal system. In fact, Clermont and Currivan say that "lawyers, bar associations, or courts could normally implement the proposed fee without the need for legislation or other political action."[436]

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may be inclined to settle earlier. Both the lawyer and the client's settlement thresholds, however, would still be largely aligned.

429. Clermont & Currivan, *supra* note 70, at 581.

430. *See* Kritzer, *Contingency Fee Lawyers and their Clients*, *supra* note 203, at 801–12.

431. Clermont and Currivan suggested setting the value at 10% if the objective was allowing lawyers who previously relied on pure contingency fees to garner the same income. By contrast, they suggested fixing the value at 5% if the intent was to reduce any preference lawyers had between the contingent hourly fee percentage approach and traditional hourly fees. *See* Clermont & Currivan, *supra* note 70, at 583.

432. *See* Samuel R. Gross, *supra* note 267, at 324.

433. Clermont & Currivan, *supra* note 70, at 583.

434. *Id.* at 580.

435. *Id.* at 584.

436. *Id.*

Like any reform, Clermont and Currivan's approach comes with potential drawbacks. It has been criticized for failing to account for the plaintiff's cost of monitoring their attorney's hours.[437] Economists have also argued it is devoid of any mechanism to make sure attorneys are getting competitive returns.[438] However, no proposal is foolproof. For the most part, the hourly contingent fee approach provides a solution to the economic conflict of interest by financially incentivizing lawyers to put in the time needed to best serve their client.[439] Furthermore, in reducing the percentage component for settlements, the approach curbs the lawyer's financial stake in choosing if and when to settle.[440] Lastly, the preservation of the contingency fee aspect preserves access to the legal system for plaintiffs with limited financial means.[441]

B. The Hourly Contingent Fee with an "Uplift"

Another somewhat similar proposal is the hourly contingent fee, with an "uplift" for risk. The approach keeps the contingent element—attorneys only collect fees if their clients are successful—and in addition to their hourly rate, lawyers can collect an "uplift" to their total fee to compensate them for loaned services and the risk of loss.[442] This, in theory, will provide lawyers adequate rationale for accepting cases on a contingency basis.[443] The uplift could be a certain lump sum amount or a percentage, which is adjusted to account for varying degrees of risk at different stages of litigation. Having a set amount "gives the clients a definite number for use in comparing different lawyers' fees, while a percentage 'uplift' allows the client to give the lawyer the extra incentive to increase the opposition's liability at trial."[444]

Proponents contend that this approach reduces the financial conflict of interest between the lawyer and client.[445] Suppose that a lawyer

437. *See* Danzon, *supra* note 178, at 223.
438. *Id.*
439. Clermont & Currivan, *supra* note 70, at 550.
440. *Id.* at 579, 580.
441. *Id.* at 578. Clermont and Currivan acknowledge the approach is susceptible to abuse by lawyers in the form of exorbitantly high hourly wage or percentage rates. However, they say unethical overreaching and bill padding is ubiquitous in all fees systems. Moreover, they contend that the contingent hourly percentage fee is structured in a way that does not make clients any more vulnerable to cost gouging compared to other arrangements. *Id.* at 580.
442. Aranson, *supra* note 96, at 788.
443. *Id.*
444. *Id.* at 789.
445. *Id.* ("Because the fairness of the 'uplift' for risk is measured against the hours a lawyer works on a case, the lawyer will not be excessively rewarded for settling a case. Both the attorney and client will consider the time a case will require.").

works on an hourly rate of $300. The "uplift" could be $10,000 if the case goes to trial, or only $500 if it settles, which is meant to reflect the related risk taken and effort required. Let's say the case goes to trial and the attorney spends 100 hours working on it. If the plaintiff gets a $100,000 judgment award, the lawyer will get a total of $40,000. That includes $30,000 of hourly fees and the uplift of $10,000 to cover the risk of going to court. Taking the uplift into account, the lawyer's hourly compensation was $400 per hour, which is $100 more than their set rate. The client, meanwhile, walks away with the remaining $60,000.

In contrast, suppose the case settled for $15,000 and the lawyer spent ten hours working on it. The lawyer would collect a total of $3,500, which includes $3,000 in hourly fees and the $500 uplift for settlements. That would drop their overall hourly compensation down to $350 per hour.[446] The client would get $11,500. Therefore, proponents of the proposal argue that it gives the lawyer a financial interest to go to trial and maximize the *gross* recovery amount, since doing so allows them to collect the highest possible return per hour.[447]

However, the monetary uplift approach has a major disadvantage, in that it could end up financially harming clients who succeed in their claims. For example, suppose the judgment award in the first scenario was only $30,000 instead of $100,000. The entire award would go toward paying the attorney and the plaintiff would still owe $10,000. The outcome conflicts with the very purpose of contingency fees, which is to allow plaintiffs with insufficient means to access the courtroom by delegating risk to their lawyers.[448] One solution to this issue would be to cancel any debts created by the uplift, leaving the plaintiff in the same position as they started. While the lawsuit will have been a waste of time for the plaintiff, it provides the system valuable information about the efficient allocation of judicial resources, and the lawyer is now less likely to take similar cases because of its demonstrated lower value or settle the case earlier before incurring a large amount of hourly fees. The attorney may work then to the breakeven point where recovery for plaintiff is zero, but all hours are recovered. This still can be socially beneficial because it internalizes any carelessness on the part of the defendant and increases the social incentives of care.

To avoid such a result, the uplift could be tied to a percentage basis.[449] For example, the uplift for going to trial might be 10% of the

446. $350 is more than the lawyer's typical hourly rate of $300. However, it is still less the lawyer's real fee of $400 per hour that occurred when the case went to trial.
447. Aranson, *supra* note 96, at 789.
448. *Id.* at 790.
449. *Id.*

judgment award, and 5% of a settlement amount. Given the same values, this would allow the lawyer to collect $40,000 if the plaintiff won at trial (100 hours x $300 = $30,000) + (10% x $100,000 = $10,000). This would result in an overall hourly compensation of $400 per hour for the lawyer and $60,000 for the plaintiff.

By contrast, if the case settled, the lawyer would receive $3,750, which includes the hourly rate plus $750 (5% of $15,000). The lawyer's overall hourly compensation would be $375 per hour while the plaintiff would walk away with $11,250. When using the percentage uplift, the approach still effectively motivates the attorney to go to trial by maximizing their hourly fee.[450] Therefore, it better aligns attorney-client interests.

Like all other potential solutions, the hourly contingent fee with an "uplift" approach is far from perfect. It also runs into similar pitfalls as the contingent hourly-percentage fee. It does not account for the plaintiff's cost, or the impossibility of monitoring their attorney's hours.[451] The approach involves the attorney and client considering the time a case will require,[452] which assumes that plaintiffs have the knowledge and experience to make such an evaluation.[453] It is also susceptible to abuse if lawyers set excessive uplift percentages.[454] While, this approach is not the ultimate solution, it may prove helpful. It does not eliminate but reduces the incentive for attorneys to accept excessive and premature settlements. It also still allows plaintiffs with insufficient means to obtain the keys to the courthouse.

CONCLUSION

For far too long, contingency fee arrangements between lawyers and clients have been taken for granted. Rarely are students in law schools ever taught, even in their Professional Responsibility courses, what this Article has shown: that contingency fee attorneys are financially incentivized to settle cases when their clients would be better off proceeding to trial. Despite the claims of bar associations and

450. Inputting other values, however, occasionally resulted in the lawyer's real hourly fee being higher in the settlement scenario compared to the trial scenario.

451. *See* Danzon, *supra* note 178, at 223.

452. Aranson, *supra* note 96, at 789.

453. Such an assumption may be a stretch for personal injury plaintiffs who often have no experience with lawyers prior to seeking out representation. *See* Hamzehzadeh, *supra* note 183, at 241.

454. The uplift amount would still have to be reasonable as determined by the discretion of the courts. Aranson, *supra* note 96, at 788. However, relying on case-by-case judicial scrutiny to monitor such amounts is highly unlikely given the already overwhelmed court system. *See Appendix A, supra* note 64, at 308.

contingency fee lawyers, professional ethics and concerns for one's reputation are not powerful enough tools to overcome attorneys' stark financial motivations.

Unfortunately, alternative systems for paying lawyers—hourly fees, loser pays, and even selling claims to the highest bidder—all come with their own significant drawbacks as well. But that doesn't mean we should just accept the status quo as the "right" system or ignore the conflicts that it creates. To paraphrase Voltaire, we cannot let perfection be the enemy of the good.[455] There is no perfect solution to most all of society's problems, but that does not mean we should stop our search for improvement.

It is time that we highlight these perverse conflicts for contingency fee lawyers to take "quick kill" settlements at their clients' unknowing expense. To paraphrase former Justice Louis Brandeis and President Barack Obama, shining sunlight on unethical behavior is a great disinfectant. Therefore, we should discuss the problem openly and honestly so that we may find creative solutions.

Ultimately, switching to a hybrid system which combines the elements of hourly compensation with the positives of contingency fees may enable us to get closer to a true system of compensatory justice. Under this system, we can provide a reward for attorneys for their risk-bearing and guarantee no cost to the plaintiff unless they prevail. This will provide access to the doors of justice for injured plaintiffs who cannot afford traditional fee-for-service attorneys, while simultaneously rewarding attorneys based on the outcome they achieve despite the risks undertaken. Attorneys would never again be perversely incentivized to prematurely settle a case before trial, while running endless misleading TV advertisements proclaiming, "[l]et us fight for you. We don't get paid unless you do. We are on your side." We would all fulfill our oath to represent our *client's* best interests, not our own.

455. *See* 2 VOLTAIRE, QUESTIONS SUR L'ENCYCLOPÉDIE, PAR DES AMATEURS, 250 (1770).