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Legislative and Judicial Controls of Contingency Fees in Tort Cases

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INTRODUCTION ............................................. 82

II. CONTINGENCY FEES ARE UNCONTROLLED IN MOST TORT CASES .. 83

III. INDIVIDUAL PLAINTIFFS HAVE VERY LITTLE BARGAINING POWER IN NEGOTIATING FEE ARRANGEMENTS ......................... 86

IV. A FIDUCIARY RELATIONSHIP EXISTS BETWEEN A LAWYER AND A PROSPECTIVE CLIENT DURING FEE NEGOTIATIONS ............ 89

V. "REFERRAL" FEES SHOULD BE LIMITED AND BASED ONLY ON WORK PERFORMED AND RISK TAKEN ............................... 89

VI. LEGISLATIVE AND JUDICIAL CONTROLS ARE NECESSARY TO PREVENT ABUSES IN FEE NEGOTIATION AND LEGAL REPRESENTATION ..... 91

VII. "FEE POOLING" ARGUMENTS SHOULD NOT BE USED TO JUSTIFY EXCESSIVE FEES ..................................................... 94

VIII. PERCENTAGE CONTINGENCY FEES SHOULD BE CALCULATED ON THE NET RECOVERY (I.E., AFTER DEDUCTION OF COSTS) ........... 95

IX. ANY WORKABLE SOLUTION INVOLVING THE JUDICIARY WOULD REQUIRE MODIFICATION OF THE JUDICIAL SELECTION PROCESS AND/OR

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I. INTRODUCTION

It is a fundamental premise that in our profession fees must be reasonable and not excessive.\(^1\) Although this standard has been in existence for many years, there appears to have been very little effort to apply it.\(^2\) Occasionally clients complain about excessive fees to the West Virginia Ethics Committee and such claims either are rejected or the lawyers are required to return fees and are reprimanded. Infrequently, an attorney loses his or her license for charging an excessive fee.\(^3\) Very few of these situations, however, have involved contingency fees in tort cases. Rather, they typically relate to excessive charges in the


\(^{3}\) The West Virginia State Bar has initiated a mediation program for persons with attorney fee complaints. West Virginia State Bar Executive Director Tom Tinder reports that the system traditionally offered no relief for other than the most egregious fees. Interview with Thomas R. Tinder, Executive Director, West Virginia State Bar, in Charleston, W. Va. (Jan. 23, 1996). From February 1995 to March 1996, the State Bar developed a voluntary fee-dispute mediation program through which attorneys and clients can try to reach a compromise. Mr. Tinder reports that since last February, the program has been involved in approximately seventy fee disputes. Forty-five of those were resolved when a third-party called and spoke with the client and then with the attorney. The other cases advanced to mediation, and in only a few cases have the parties been unable to reach a compromise.

Nonetheless, it would appear that the problem is far from solved, especially in contingency fees in tort litigation, where there is almost no questioning of percentage fee contracts with plaintiff's lawyers. For a discussion of the ethical impact of fee misrepresentation, see Committee on Legal Ethics of the W. Va. State Bar v. Burdette, 445 S.E.2d 733 (W. Va. 1994).
II. CONTINGENCY FEES ARE UNCONTROLLED IN MOST TORT CASES

Contingency fees in tort cases are traditionally reviewed in West Virginia in situations involving infants or incompetents. There are some specific types of cases that require judicial review of fees, including bad faith claims and statutorily based claims such as civil rights in which fees may be awarded to the "prevailing party." Statutorily mandated fee approval involves the submission of hours spent and funds expended on the plaintiffs' behalf, whether the matter is a class action or simply falls within the ambit of legislation or judicial precedent providing for recovery of attorneys' fees. However, in the vast majority of contingent fee cases, there are no legislative or judicial controls. Even in cases involving infants or incompetents, courts generally permit fees to be charged pursuant to the attorney-client fee contract.

It has been argued that market forces will control fees; however, while that is undoubtedly true with hourly fees charged by defense counsel, such forces appear to be virtually nonexistent with regard to plaintiffs' contingency fees in the typical tort case. Because insurance companies and other corporations have sufficient "market power" to negotiate and even dictate fees, the upward mobility

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7 For a discussion of the effects of market forces on fees generally, see Drummonds, supra note 1; John M. Lynn, Out of Control, 8 W. VA. LAW., Feb. 1995, at 14 [hereinafter Out of Control]; John M. Lynn, "No Brainer" Rebuttal, 8 W. VA. LAW., May 1995, at 11 [hereinafter "No Brainer" Rebuttal].
of hourly rates is severely restricted. Indeed, many insurance and corporate clients impose limitations on billing, such as flat fee requirements and the absorption of certain expenses, thereby essentially obtaining "volume discounts" for providing law firms with a flow of business.\textsuperscript{8} No definitive study has been done. However, it appears that typical hourly rates for insurance defense work in West Virginia are in the eighty to one hundred thirty dollar range, although fees are somewhat higher in direct representation of large corporations.\textsuperscript{9}

The argument has been made that plaintiffs' contingency fees should not be regulated unless defense fees are subject to the same regulation.\textsuperscript{10} However, such reasoning is flawed because, as noted, although there already is substantial regulation of defense fees by market forces, virtually none exists in the case of individual plaintiffs' contingency fees.\textsuperscript{11} In subrogation cases on behalf of insurance companies or other corporations, contingency fees are often negotiated. Thus, a substantial claim with relatively clear liability and probable financial responsibility will not be subject to the one-third or forty percent fees almost universally charged in plaintiffs' contingency tort work for individuals.

Plaintiffs' counsel, who carry the burden of proof, also complain that defense lawyers can "run the clock" and thus charge excessive fees because of the

\textsuperscript{8} See Forest J. Bowman, Billing and Collection of Fees in a Competitive Market, BOWMAN'S ETHICS & MALPRACTICE ALERT (Forest J. Bowman, Star City, W. Va.), Aug. 1995, at 1-2 (discussing new billing trends including new policies on hourly rates, fixed fees, contingency fees, reverse contingency fees, combination fees, incremental fees and value billing and recommending the use of such innovations to tailor fees to the client). "Fair and accurate billing depends on the type of client being represented, how complicated the matter is, the degree of legal knowledge and sophistication required, and the expertise of the lawyer." \textit{Id.}

\textsuperscript{9} The 1994 Membership Survey of the West Virginia State Bar Association reports the following statistics. In response to the question "When you charge on a [sic] hourly basis what is your usual hourly rate?", the largest group of respondents (27%) reported charging between ninety-one and one hundred dollars per hour. The next largest group (22%) reported charging sixty-six to ninety dollars, followed by 11% that reported charging one hundred eleven to one hundred thirty-five dollars. The survey's findings are broken down by years of practice, age of attorney, gender, form of business and size of law office, and are available from West Virginia State Bar Executive Director Tom Tinder.


\textsuperscript{11} See Out of Control, supra note 7; "No Brainer" Rebuttal, supra note 7.
time spent, even if the hourly rates are held in check.\textsuperscript{12} However, it is clear that insurance companies and other corporations monitor \textit{closely} the amount of time their lawyers are spending in litigation. Thus, where an hourly rate is applied, defense lawyers are not simply free to generate fees in an unbridled fashion.

Similarly, it is often said that insurance companies or other corporations will use their lawyers to assert frivolous defenses and delay the processing of claims solely to postpone payment of the inevitable recovery.\textsuperscript{13} However, Rule 11 of the Federal and West Virginia Rules of Civil Procedure is being applied more often by the courts and provides a substantial disincentive for defense counsel to engage in improper delaying tactics.\textsuperscript{14} Rule 11 also proscribes the assertion of frivolous claims and other improper actions by plaintiffs' counsel. Thus, it serves to prevent abuses during the litigation process. However, Rule 11

\textsuperscript{12}There are, of course, abuses on both sides. \textit{See} Drummonds, \textit{supra} note 1, at 864 n.22 (finding that "[t]he hourly fee ... invites attorneys to spend more than the optimal amount of time on cases.").

\textsuperscript{13} \textit{"No Brainer" Rebuttal, supra} note 7.

\textsuperscript{14} \textit{Id.}
does not serve to control fees charged to clients.\textsuperscript{15}

III. INDIVIDUAL PLAINTIFFS HAVE VERY LITTLE BARGAINING POWER IN NEGOTIATING FEE ARRANGEMENTS

In the typical personal injury claim, whether it involves a vehicular accident, product liability, medical malpractice or other tort claim, the client has very little, if any, bargaining power, largely because most plaintiffs’ firms charge virtually identical fees. It may be that in rare cases an injured person who becomes aware that he/she has a good case can demand some adjustment in the fees, especially if liability appears even to the lay person to be virtually “open

\textsuperscript{15} West Virginia rules provide that:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit, even though the pleadings to which they respond are verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney’s fee.

W. VA. R. CIV. P. 11.

Plaintiffs’ attorneys often accuse defense counsel and others who suggest controls on excessive contingency fees of being “mouthpieces” for insurance companies and other corporate clients. However, it is not clear exactly how a defense attorney would benefit if plaintiffs’ contingency fees were lower, because to the extent lower fees translate into fewer claims being filed, defense lawyers would end up having less business. Presumably, insurance companies and other corporate defendants would benefit in the long run to the extent the tort system becomes less expensive. However, it is hard to evaluate exactly how reducing and controlling plaintiffs’ contingency fees would affect the system, other than to make it more fair for the individual client. On the one hand, the plaintiff’s attorney would have a strong incentive to settle a case for more money in order to make up for the shortfall of fees. If the client is paying lower fees, however, the net to the client would be greater and perhaps a case could be settled for a lower figure overall, assuming, of course, that the client’s interests are given paramount consideration.
and shut,” the injuries are severe, and financial responsibility on the part of the
tortfeasor seems obvious. Such situations are, however, by far the exception
rather than the rule. It reasonably can be said that the typical prospective plaintiff
has almost no ability to negotiate with prospective counsel over fees, and indeed,
not enough sophistication even to attempt to do so. Some lawyers may agree
to take a case on a 25% basis if it can be settled before suit, and an occasional
“maverick” will offer some further reduction; however, those cases are few and
far between. In fact, the customary fee contract provides for an additional 10%
over the basic fee if the case is appealed. These “standard” fee arrangements
have been in place for decades, and there is very little variation. Indeed, some
courts and legal scholars even have considered whether the standard one-third and
40% fees are violative of the antitrust laws as front price fixing.

It may be that one-third contingency fees can be reasonable in cases
where the liability case is not clear cut, the injuries are not severe, and/or the
potential damage recovery is not substantial; however, a 40% fee seems
excessive and difficult to justify, even in product liability or medical malpractice
cases, which are often more complex. In many contingency fee arrangements,
the fees paid can often be disproportionate to the risk taken, effort expended, and
results obtained. In fact, fees in catastrophic injury cases sometimes run into the

\[16 \text{ See Drummonds, supra note 1, at 868-70.}\]

\[17 \text{ Goldfarb v. Virginia State Bar, 421 U.S. 773, 781-83 (1975) (finding that a set fee schedule and}
\text{its enforcement mechanism constituted price-fixing); see also John E. Lopatka, Antitrust and}
\text{Professional Rules: A Framework for Analysis, 28 SAN DIEGO L. REV. 301 (1991); John G. Branca}
\text{& Marc I. Steinberg, Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb,}
\text{24 UCLA L. REV. 475 (1977).}\]

\[18 \text{ No matter what the circumstances, a 40% fee contract seems to cross the line of reasonableness,}
in that it rapidly approaches 50% of the total recovery and can exceed that 50% if costs are high
enough. In a case with any costs, a 40% base fee will exceed 50% if an appeal is taken and the}
customary 10% appeal fee is included in the retainer agreement. In circumstances where the fee
even approaches 50%, however, the case takes on the complexion of being more the lawyer’s case
than the client’s.}\]
multiple hundreds and even thousands of dollars per hour expended.\textsuperscript{19}

Obviously, if a relatively unsophisticated person with a serious permanent injury were to walk into a lawyer’s office with a potential claim and the lawyer indicated that he or she would take the case for one thousand dollars per hour, such a fee would be deemed excessive \textit{ab initio}. Undoubtedly the client would refuse to enter into such a fee arrangement, recognizing it to be excessive. Historically, there has been something sacrosanct about the contract between a plaintiff’s attorney and the client. However, an attorney has no more right to contract for excessive fees on a contingency basis than on an hourly basis because the prohibition on excessive fees is not dependent on the type of fee contract involved. The only difference is that one can more readily tell whether a fee is likely to be excessive at the beginning if it is on an hourly basis, but the appropriateness of legal fees on a contingency basis cannot be evaluated completely until the case essentially is at an end.\textsuperscript{20} Thus, because of a lack of information concerning the time and effort spent on the case, contingency fee arrangements can mask the fact that excessive fees are being charged.

\textsuperscript{19} While a plaintiff’s attorney legitimately may earn a substantial fee in developing and pursuing a claim against a defendant, when a third-party claim is initiated and prosecuted by the original defendant (although adopted by the plaintiff), plaintiff’s counsel may receive disproportionate financial benefit from defense counsel’s work if full fees are charged on the sums produced with very little involvement by plaintiff’s counsel. This could occur, for example, in a medical malpractice case in which it is claimed that a product defect caused a medical condition in response to which allegedly improper care was given. If the product aspect of such a case is conceived, financed and pursued through discovery and trial primarily by the defendant and its counsel, and a substantial sum thereby is made available to the plaintiff, it may be unconscionable for a plaintiff’s attorney to take a full fee “off the top.” This seems especially true where the \textit{actual} costs of the pursuit of the claim, including attorney’s fees, also must be deducted from the recovery pursuant to an agreement between the plaintiff and the defendant/third-party plaintiff. When such a case involves an infant or other incompetent, where any settlement would require court approval, it would seem appropriate for a guardian ad litem to make a detailed inquiry and object if plaintiff’s counsel appears to be receiving a windfall to the detriment of the client.

\textsuperscript{20} Even an otherwise reasonable hourly fee approved by the client can become excessive if the attorney bills an excessive number of hours. However, unlike contingency fees, where most clients never understand or have input into his or her attorney’s activities, clients billed on an hourly basis typically receive itemized bills that explain the tasks undertaken and the hours expended. This provides a client of any stature with the opportunity to question the work done and the time taken to do it. While this system is not without flaw, it at least offers an additional safeguard to protect clients from unprofessional billing practices. On the other hand, plaintiffs’ lawyers historically have not kept track of their time in typical contingency fee cases and, thus, the time spent on a case is not subject to any meaningful review. For a further discussion of itemized billing, see Drummonds, \textit{supra} note 1 and Bowman, \textit{supra} note 8.
IV. A FIDUCIARY RELATIONSHIP EXISTS BETWEEN A LAWYER AND A PROSPECTIVE CLIENT DURING FEE NEGOTIATIONS

Discussion has arisen about whether the fiduciary relationship between an attorney and a potential client is formed at the beginning of the fee negotiation or whether the attorney is free to negotiate for as much remuneration as possible before formally entering into the relationship on the basis that the fiduciary duty does not arise until after the retainer agreement is signed. Some argue that where ethics are concerned, this is shaming the situation far too thinly and that an attorney has a fiduciary duty to prospective clients as well as actual clients. This is especially true where those prospective clients are unsophisticated and lack appreciable bargaining power. After all, even though, as frequently advertised, an attorney may agree not to charge for the initial meeting with the prospective client, that meeting is nevertheless a “consultation” with a professional, carrying with it the obligation to provide sound advice as to how to proceed.21

V. "REFERRAL" FEES SHOULD BE LIMITED AND BASED ONLY ON WORK PERFORMED AND RISK TAKEN

It also has been customary for attorneys to share fees when one attorney refers a case to a second attorney; e.g., when an out-of-state attorney refers a case to an in-state attorney, the referring attorney generally receives a share of the fee (usually one-third), regardless of the amount of work performed. The West Virginia Rules of Professional Conduct provide some limitation on this practice but do not prohibit referral fees completely, even where no significant amount of

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21 In fact, it seems clear that attorneys do have a responsibility (i.e., fiduciary duty) to “prospective clients.” Nolan v. Forman, 665 F.2d 738, 739 n.3 (5th Cir. 1982); see DeVaux v. American Home Assurance Co., 444 N.E.2d 355, 357 (Mass. 1983) (finding that “[a]n attorney-client relationship need not rest on an express contract,” but may exist “when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance”); Drummonds, supra note 1 (finding it most important that attorneys work to limit the conflict in economic interest by offering alternatives to clients and advising them whether a contingency fee is in their best interest). In an era in which television and print ads offer “free initial consultations,” can there be any doubt that the person is consulting with the attorney as an attorney even at that initial stage? Therefore, is it possible for the attorney to negotiate a fee (with less than full disclosure) without crossing the bounds of economic conflicts of interest? And is it appropriate in a catastrophic injury case, for example, to recommend that the “client” have the fee agreement reviewed by another attorney to determine if the fee arrangement offered by the attorney initially consulted is reasonable? While the problem currently may be without a clear solution, it nonetheless warrants serious consideration, in that fee negotiation demands caution and a clear recognition of the opportunities and dangers of self interest.
work has been performed in the case by the referring attorney. The rationale seems to be that, as between the general practitioner and the specialist, such referral fees are permissible as long as the total fee to the client is not increased. However, if the specialist will handle the case for two-thirds of the fee arranged by the attorney originally consulted, as a practical matter, the total fee is excessive. In such a case, the referral fee process builds in an artificial one-third increase in the fee that otherwise would have been acceptable if the client consulted the specialist in the first place and had the requisite bargaining power to negotiate for the lowest fee the specialist would have been willing to accept.

As in the medical field, it is incumbent upon attorneys to place the interests of clients first and to refer cases beyond their practice area or expertise to more qualified colleagues without obtaining a "piece of the action." If the referring attorney has spent time reviewing the case, that attorney should be paid a reasonable hourly sum and the case should be transferred to a specialist without a referral fee. If, of course, the attorney initially consulted has spent considerable time on the case or the attorneys decide to work together, the total fee should be divided on the basis of the work performed. It also would seem that the financial risk taken by the respective attorneys (i.e., the expenses advanced) should be

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22 Rule 1.5 provides that:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(4) the requirements of "services performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and, (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community.

WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT, Rule 1.5 (1996).

23 Certainly, physicians do not engage in referral fees. When a general practitioner refers a case to a surgeon, for example, it is unheard of for the referring physician to expect or receive a portion of the surgeon's charges for surgery. Rather, each physician charges only for services actually performed. In fact, it is illegal for one physician to give "kick backs" to a referring physician. W. VA. CODE § 30-3-14 (1993).
CONTINGENCY FEES IN TORT CASES

considered as well. There is no doubt that "finders' fees" encourage generalists to serve as clearinghouses, pulling in all possible plaintiffs for redirection for a share of the contingency fee. As a practical matter, this decreases the amount of the recovery by each client, assuming the fee negotiation process otherwise would have worked properly. Indeed, this referral fee practice seems to be regarded as suspect by some professional organizations, such as the American Bar Association. The ABA Model Code of Professional Responsibility outlaws the division of fees among attorneys unless the client consents after full disclosure, the division is made according to the work done by each attorney, and the total fee remains reasonable, without making provisions for referrals. However, the ABA Model Code does not make exceptions for referrals to specialists.

VI. LEGISLATIVE AND JUDICIAL CONTROLS ARE NECESSARY TO PREVENT ABUSES IN FEE NEGOTIATION AND LEGAL REPRESENTATION

Contingency fees serve a useful purpose in our civil justice system by affording representation to those who do not have the resources to hire counsel on an hourly or even flat fee basis. However, it is clear that legislative and judicial controls are necessary to prevent abuses. Indeed, many states have had

24 Incongruities can result, however, when a disproportionately large share of a fee is received by an attorney who advances expenses but does not devote any appreciable time to working on the case. Consider a hypothetical situation of one attorney working up a complicated case and spending a thousand hours in the process and another attorney in another firm advancing $100,000 in expenses. It would seem inappropriate from a fair allocation standpoint for the financial backer to receive the same fee, plus reimbursement of the expenses advanced, as the attorney who actually produced the results in the case through his or her efforts. For example, if the fee in such a case were $500,000, the financial backer would be reimbursed the $100,000 advanced and also would receive a $250,000 fee, assuming the standard practice is followed of the fee coming "off the top." If the advanced sums were outstanding an average of one year, the financial backer would net a 250% profit, quite a return by any standards, even in a relatively risky venture. The other attorney, of course, would receive $250 an hour, which, although a substantial hourly rate, pales by comparison to the profit made by the attorney backing the case.

legislative intervention into the contingency fee arena. New York, for example, has developed a fee schedule in medical malpractice cases that imposes limits on the percentages charged, depending upon the amount of recovery. The New York fee schedule is as follows:

30% of the first $250,000 of the sum recovered;
25% of the next $250,000 of the sum recovered;
20% of the next $500,000 of the sum recovered;
15% of the next $250,000 of the sum recovered;
10% of any amount over $1,250,000 of the sum recovered.
Computed on net sum recovered (after costs)

While this fee schedule seems reasonable on its face, the New York Legislature has recognized that it could be unduly restrictive in certain instances. Thus, it has included a provision that allows lawyers to petition the court for


In the 1996 session of the West Virginia Legislature, a bill was introduced that would limit attorney fees for tort claims. The proposed law would limit fees to “40% of the first $50,000; 25% [sic] of the next $500,000; and 15% of any amount exceeding $600,000.” Bill Limiting Attorneys’ Tort Fees Introduced, LEGIS. REP. (West Virginia Chamber of Commerce, Charleston, W. Va.), Feb. 22, 1996, at 2; H.R. 4627, 72nd Cong., 2d Sess. (1996). For a discussion of other lawsuit reform legislation introduced or to be introduced in West Virginia, see Lawsuit Reform Legislation, NEWS L. (Citizens Against Lawsuit Abuse of S. W. Va., Charleston, W. Va.) Feb. 1996, at 5.

27 N.Y. JUD. LAW § 474-a (McKinney Supp. 1996). The possible impact of such a law is readily apparent. Assuming a recovery of $2,000,000, an attorney would receive $800,000 plus reimbursement of costs under the typical 40% fee arrangement. If the costs exceed $200,000, which is not inconceivable in a complex medical malpractice or product liability case, the client would receive less than 50% of the proceeds. Under the New York statute, the attorney would receive $350,000 plus costs. Both calculations assume that fees are deducted before costs, which is standard in most fee agreements. Assuming the converse were the case, and assuming $200,000 in costs, the 40% fee arrangement would net the attorney $720,000, while the net under the New York statute would be $330,000.
additional fees in exceptional cases. It has been suggested that the standard that should be applied in statutes such as these is whether the statutorily specified fee is adequate based on the risk taken by the lawyer, the effort expended by the lawyer, and the results obtained for the client. In fact, it would be difficult to

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28 The New York statutes allow that:

In the event that claimant’s or plaintiff’s attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on recovery.

N.Y. JUD. LAW § 474-a (4). It would appear, however, that the New York courts are hesitant to depart from the statutory guidelines, strictly construing the word “extraordinary.” In Yalango v. Popp, the court found that the equitable compensation is the key. For instance, the court found that:

[the] statutory fee may be inadequate . . . where the case involves an extremely complicated procedural history or where plaintiff’s counsel is required to expend an inordinate amount of time in pursuing the medical malpractice claim, thereby rendering the hourly rate of compensation exceptionally low or causing a loss of other income or some other financial detriment.

Yalango v. Popp, 644 N.E.2d 1318, 1322 (N.Y. 1995), motion to amend denied, 651 N.E.2d 917 (N.Y. 1995), rev’d, 648 N.Y.S.2d 763 (N.Y. App. Div. 1996). At issue in Popp was a medical malpractice claim centered on complications following brain surgery that resulted in severe and permanent brain damage, blindness and quadriplegia. Id. at 1320. Plaintiff’s counsel settled the case pre-trial for $1,930,000, and plaintiff’s counsel received a fee of $338,731.74 (or approximately $550 per hour for the 620 hours counsel estimated working). Id. Counsel moved the court to increase the fee to one-third of the recovery, or $629,105.81. Id. The supreme court (i.e., lower court in New York) granted counsel’s motion, and the appellate division affirmed. Id. at 1320-21. In reversing the lower courts, the court of appeals found that counsel failed to put forth a threshold showing of inadequacy. Popp, 644 N.E.2d at 1322. Because counsel failed in the initial burden of proof, the court did not have to address the issue of “extraordinary circumstances”; however, the court nonetheless stated that degree of diligence, complexity of issues and successful outcome would not have qualified as “extraordinary” so as to depart from the statutory fees. Id. at 1323. Indeed, the court stated that it expects zealous representation and that all medical malpractice actions have a level of complexity that requires extensive and sophisticated preparation. As for the “success” quotient, the court found that it was already reflected in the statutory breakdown. Id. at 1323.

The court finally stated that among the factors that could have demonstrated extraordinary circumstances were loss of income or practice, or devotion of an inordinate amount of time. Id. at 1324. See also Reid v. County of Nassau, 600 N.Y.S.2d 604 (1993) (finding sufficient $397,638.35 in fees for the settlement of an obstetrical medical malpractice case for $3,020,000, even in light of the parties’ consideration of a novel legal issue); In re Estate of Clinton, 597 N.Y.S.2d 900 (N.Y. Sur. 1993) (finding sufficient a $226,829 fee on a $979,697 settlement of a wrongful death action).

It is unclear, of course, whether the Supreme Court of Appeals of West Virginia would apply the same criteria in determining what constitutes “extraordinary circumstances.”

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29 Drummonds, supra note 1, at 883-91.
construct a credible argument that it is somehow unfair for a lawyer to have his or her fees reviewed on the basis of these factors. Freedom of contract often is cited as a way to circumvent this fundamentally sound logic; however, if, as it should, the fiduciary duty of a lawyer to a client extends to the negotiation of fees, retainer agreements may turn out to be unconscionable because of the circumstances under which they are created. Thus, regulation of fees seems abundantly reasonable, when the concept of fairness is applied to each case.

VII. "FEE POOLING" ARGUMENTS SHOULD NOT BE USED TO JUSTIFY EXCESSIVE FEES

Plaintiffs' counsel have for many years advanced the so-called "fee pooling" argument which means that one client may have to pay excessive fees in his or her case to make up for the inability of the attorney to earn adequate, or any, fees in some other cases. Obviously, the fallacy of this reasoning is that each client deserves equitable treatment in the cost of legal representation, and one client who has a particularly severe injury and a claim with relatively clear liability should not have to pay the price for other cases which have less merit and perhaps should not have been brought. If lawyers engaged in full disclosure and explained that the client may end up subsidizing other individuals, the client who has a good case no doubt would be reluctant to hire the attorney. Indeed, an enhanced duty must be imposed on lawyers to inform clients fully of their options and the appropriateness of the proposed relationship before entering into retainer agreements. It is well established law that physicians have a duty to obtain "informed consent" from patients before embarking on a course of treatment. Lawyers also must provide full disclosure to their clients, not only on such things as the length of time, cost, and risk of the anticipated legal proceedings, but also with regard to the appropriateness of the type of fee and, in contingency fee cases, of the percentages charged.

Rather than asking some clients to subsidize other clients, a more reasonable method for guarding against substantial losses in contingency cases

30 See, e.g., id. at 872 n.56 (discussing the enforcement of contingent fees under contract theory); id. at 882-83 (discussing the effect caps and sliding scales have on the availability of competent legal counsel).

31 Id. at 873-75 (arguing that "lawyers owe a duty to particular clients, not to the set of people who are their clients generally").

32 Cross v. Trapp, 294 S.E.2d 446 (W. Va. 1982) (measuring the scope of a doctor's duty to disclose against what the doctor knew or should have known to be the patient's need to know).
would be for attorneys to evaluate cases carefully before they accept representation. This could include providing for an evaluation period in the retainer agreement, after which the attorney and the client can revisit the issues of fees and the appropriateness of proceeding with the case. In the somewhat rare situation where a plaintiff comes in with a serious case and has a very short time left on the statute of limitations, a voluntary tolling of the statute can be obtained in many instances, or the case can be filed with a clear indication that it is to be held in abeyance until the situation is evaluated further.

The Legislature could assist with this process by providing for a notification of intent to sue and a brief period (perhaps sixty to ninety days) within which the complaint must be filed. In that time frame, competent attorneys should be able to investigate the case sufficiently to know whether or not it has merit. The success of a case, of course, is never completely assured. Thus, substantial fees may be justified. There is no reason to believe that the fee schedule adopted by New York, for example, would place an undue burden on lawyers in most cases; rather, only in the cases in which the risk, effort and results are extraordinary should the fee be greater than that outlined by the statute.

VIII. PERCENTAGE CONTINGENCY FEES SHOULD BE CALCULATED ON THE NET RECOVERY (I.E., AFTER DEDUCTION OF COSTS)

Almost without exception, plaintiffs’ attorneys’ fees are calculated from the total amount of the settlement or verdict before costs are taken into consideration. The New York statute prohibits this practice and requires that the fee be calculated on the “net” recovery (i.e., after costs are deducted).33 In states such as West Virginia which do not preclude this practice, the client frequently is charged, in effect, one-third or 40% of monies that the plaintiff’s lawyer expends on the client’s behalf and recoups in full through the settlement or other recovery. In other words, the lawyer spends the money up front, recoups the money and then charges the client a fee (“interest,” in essence) for having advanced the money. Alternatively, in the rare case in which the client advances all or a portion of the litigation costs, in recouping those costs for the client, the lawyer actually takes a fee from the monies that the lawyer recoups that were paid in originally by the client and that were intended to be returned to the client.

In a $1,000,000 recovery in a relatively expensive medical malpractice case where the lawyer expends $100,000, the lawyer gets a full return of that $100,000, as well as a $40,000 fee on the money. This, in effect, “marks up” the

33 N.Y. JUD. LAW § 474-a.
money advanced by 40%, in addition to the fee obtained on the net proceeds recovered.\textsuperscript{34} Similarly, if the client in a rare case advances $100,000 to attempt to further the interests of the case and the lawyer also charges a fee of $40,000 on that amount, the client ends up paying 40% more in costs than actually were expended in the course of the litigation. Not coincidentally, the interests of the lawyer who stands to make a contingency fee are furthered as well. Either way, it would appear that the "little guy" is the loser. Indeed, it would seem that many of these transactions may be usurious.\textsuperscript{35}

Despite claims by plaintiffs' lawyers that fees conforming with "standard" arrangements are never excessive, they appear to be unwilling to have those fees scrutinized, except where scrutiny is required by statute or by specific judicial precedent.\textsuperscript{36} As noted earlier, even in such cases the courts are reluctant to disturb the fee entitlements set forth in the retainer agreement. At the very least, the contracted-for fee appears to be given presumptive validity, both by guardians ad litem and by courts.\textsuperscript{37}

\textsuperscript{34} Perhaps lawyers who advance monies should be entitled to apply interest at the prevailing rate for the time funds have been outstanding. In any event, the fact that substantial monies were advanced by the attorney, thereby increasing his or her risk, should factor into a determination of the appropriateness of the fee charged.

\textsuperscript{35} It would be interesting to calculate the "rate of return" obtained by the attorney in such cases and measure that against statutes prohibiting usurious transactions. \textit{See} W. VA. CODE § 47-6-6 (1995). For a further consideration of greed and usury in our profession, see Allison F. Aranson, \textit{The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective}, 27 \textit{TEX. INT'L L.J.} 755, 767-73 (1992).

\textsuperscript{36} \textit{See} W. VA. CODE § 56-10-4 (Supp. 1996).

\textsuperscript{37} Courts have recognized that contingency fee contracts have not received the same scrutiny as have commercial contracts. \textit{Jenkins v. McCoy}, 882 F. Supp. 549, 555 n.10 (S.D.W. Va. 1995). Recently, support is being expressed more loudly for the idea of courts reviewing contingency fees, \textit{sua sponte}, if need be, focusing on the reasonableness of the fee in light of the negotiation of the fee and the performance of the contract. \textit{Id.} at 555-56. Traditionally courts have appointed guardians ad litem to fulfill the duty of investigating the case and making recommendations as to the settlement and the appropriateness of the fee. Indeed, recent case law suggests that guardians ad litem can be held responsible for failures to do so. Increased judicial scrutiny of the work done by guardians may reflect a concern that some guardians ad litem have "rubber stamped" their way through some of their duties. \textit{See}, e.g., \textit{In re Lindsey C.}, 473 S.E.2d 110 (W. Va. 1995); \textit{Jackson Gen. Hosp. v. Davis}, 464 S.E.2d 593 (W. Va. 1995).
IX. ANY WORKABLE SOLUTION INVOLVING THE JUDICIARY WOULD REQUIRE MODIFICATION OF THE JUDICIAL SELECTION PROCESS AND/OR LIMITATIONS ON CAMPAIGN CONTRIBUTIONS BY ATTORNEYS

Plaintiffs' attorneys claim that there are virtually no abuses of the system. However, it does not take a great deal of experience to come across cases in which clients have been charged extremely excessive fees.\(^3\) This is not to say, however, that implementing a new policy would be without its own challenges. One of the problems in applying the New York-type statute in any state in which judges are elected\(^3\) is that there can be an "appearance of impropriety" in situations where the court reviews plaintiffs' attorneys' fees simply because lawyers typically are substantial contributors to judicial campaigns.\(^4\) It is axiomatic that these types of situations present a potential conflict, despite the probability that the vast majority of judges are not motivated by concern for whether one side or the other has or will support a judicial campaign. The Canons of Judicial Ethics clearly provide, however, that a judge shall not engage in any conduct which has the appearance of impropriety, and lawyers are

\(^{3}\) See supra note 18.


\(^{40}\) In New York certain state and city judges are appointed by the governor. See, e.g., N.Y. CONST. art. VI, §§ 9, 21; N.Y. JUD. LAW § 68 (McKinney 1987). However, the campaigning activities of the elected judges are severely curtailed. See, e.g., N.Y. JUD. LAW app. Canon 7 (McKinney 1992) (finding in pertinent part that it would be improper for a judge who is a judicial candidate to solicit an attorney's endorsement of his candidacy or solicit others to do so on his behalf, and a lawyer seeking judicial office would stand in no different position), see also Rochelle Olson, Injury Lawyers Biggest Donors in Judicial Races, CHARLESTON GAZETTE, May 21, 1996, at 1C.
proscribed from any such conduct as well. It would be disingenuous to argue that it does not present at least an appearance of impropriety for judges to receive money from lawyers for election and re-election campaigns and then be put in a position of having to determine appropriateness of substantial legal fees for such lawyers. It does not seem that adequate consideration has been given to whether the application for fees by lawyers can pose a conflict in some instances. This, of course, applies both to plaintiffs' and defendants' lawyers, as well as to the litigants themselves. Because of the potential conflicts and other difficulties associated with judicial campaign financing, it would seem that judges would invite a change in the system.

Plainly, the answer to the problem is to take lawyers and others out of the judicial campaign financing business, either by adopting a full-scale judicial merit selection process, which has been strongly supported, or, as an interim step,


There also is a potential conflict if the client seeking a judicial determination of a legal issue is a campaign supporter of the judge called upon to make a ruling.

Surprisingly, a majority of the Circuit Court judges in West Virginia present at the Judicial Conference held Oct. 16-20, 1995, at the Gateway Inn, Barboursville, WV, voted against implementing a merit selection process.

McElwee, supra note 39; Thomas V. Flaherty, Selecting Judges, W. Va. Law., Oct. 1995, at 4. In West Virginia, the subject of the merit selection of judges has been discussed by various civic groups and has been the subject of joint resolutions by both houses of the West Virginia Legislature, although both resolutions died in committee. H.R.J. Res. 17, 72d Leg., 2d Sess. (1996); S.J. Res. 7, 72d Cong., 2d Sess. (1996); Philip B. Hill, Merit Selection of Judges Reviewed, Charleston Gazette, Mar. 15, 1996, at 4A.
modifying judicial campaigns to prevent financing through outside sources. This could be accomplished, perhaps, by increasing court filing fees and creating a fund of money that is distributed equally to those running for judicial office for purposes of public information campaigning, e.g., education, training, experience, etc. Sixteen states hold nonpartisan elections for their judges and twenty-one states have eliminated the process of judicial elections altogether.

X. CONCLUSION

In a profession that relies intrinsically on reasonableness and on ethical behavior, it is unfortunate that abuses continue to exist in the fee arena. While traditionally the discussion of what is to be done about potentially excessive fees has degenerated into far-from-professional squabbles centering on whether plaintiffs' or defense lawyers have the clearest opportunity to transgress, the time has come for something to be done about the pricing system generally. Lost in the barrage have been the unsophisticated clients who do not have sufficient power to negotiate reasonable fee agreements for themselves and yet have to rely on attorneys for advice and for representation. One solution that appears workable is a statutory contingency fee structure, combined with judicial review in order to ensure that the fee received and paid fairly reflects the risks, efforts, and results involved. It is clear that there are numerous abuses in the current

45 Another potential (albeit only partial) solution to this problem would be to restrict the campaign contributions attorneys can make, or even eliminate such contributions completely. However, attorneys, like other citizens, arguably have the right/privilege to participate fully in the election process, including making contributions to judicial campaigns. One safeguard that could be placed upon the system, however, would be to impose complete anonymity on contributions made by attorneys (and others) in judicial elections. Indeed, other facets of campaign contributions, such as disbursements by committee treasurers, verified financial statements, and information required in financial statements, are protected from even the appearance of impropriety by detailed statutory guides. See, e.g., W. Va. Code § 3-8-2a to -12 (Supp. 1996). It would be interesting to see whether, once legally imposed safeguards requiring anonymity were in place, contributions to judicial campaigns would wane. Several organizations are seeking solutions to the problem of the appearance or actual improprieties arising from lawyers' contributions to judicial campaigns. These organizations include Citizens Against Lawsuit Abuse (CALA), a grass-roots organization working to educate citizens on problems with the civil justice system, as well as Attorneys For Integrity, Inc., a not-for-profit corporation formed as a vehicle for individual attorneys to pledge "not to provide any financial support nor make any monetary contribution to any judicial election campaign." Letter from Robert L. Branfass, President, Attorneys For Integrity, Inc., to practicing attorneys (Oct./Nov. 1996) (on file with author). See also Kay Michael, Lawyer Asks Others To End Contributions, CHARLESTON DAILY MAIL, Oct. 29, 1996, at 1A.

46 McElwee, supra note 39.
contingency fee system. It is also clear that fundamental fairness requires a fee approval system in which the reasonableness of contingency fees is determined by judges, coupled with legislative guidance. This is especially true if judicial election procedures and campaign financing laws are changed to free the courts from the appearance of impropriety.