



Colleen Graffy

Director and Assistant Professor of Law
Barrister, Middle Temple

56 Princes Gate
London SW7 2PG
England

Tel: 0171-581 1506
Fax: 0171-581 4377

e-mail: cgraffy@pepperdine.edu

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Building on a Level Foundation

I was recently visiting my parents and family in my hometown of Santa Barbara, California. My father, I learned, had decided to have a new foundation laid in our garage. The contractor insisted that regulations required that the concrete floor had to be poured so that it was on a slant. My father insisted that he did not want a slanted floor. After calling the planning department he learned that it was the custom on the East Coast of the United States to build garages on a slope so that during winter when snow covering the cars melted, the water would run out of the garage. It was not a construction regulation and certainly not a necessity in sunny Santa Barbara. The floor was laid straight. Why was this so important to my father? He explained that he intended to build things in the garage and in order to do that he needed a level foundation. Building on a slanted floor meant that he would have a false level which would impact the integrity of the object that he was building. "As the foundation goes, so goes the structure," he said. "And if you don't believe me, look at the Leaning Tower of Pisa."

This simple story illustrates a simple, yet powerful, fact: a structure ultimately reflects the foundation upon which it is built.

Well, I see that there is another foundation which is about to be recast. And it concerns me, as an English Barrister, because we might be so anxious to build that we are in danger of forgetting the subtle yet critical imbalances which occur when a foundation is not solid and not level. And, like my father, I want to do everything I can to prevent this from happening. The foundation in this case is that of the legal profession in England and depending on the outcome of the draft resolution, the legal profession in Europe as well. And the slant which will develop is caused by a conditional fee or contingency fee system.

As you may know, the Lord Chancellor is proposing to eliminate legal aid for all civil proceedings claiming damages or money and replace it with conditional fees by the middle of 1998. While the system proposed in England is called "conditional fees" and the current system in the United States is referred to as "contingency fees," they are often used interchangeably in the sense that both are based on a "no win, no fee" concept. The difference lies in whether the lawyer takes an "uplift" or "success fee" based on a percentage of the lawyer's normal bill or whether the lawyer takes a straight percentage of the total damages. For example, with conditional fees, if the lawyer's bill (based on hourly billing) came to £1,000 and the uplift-- (based on the amount of risk the case would entail)-- was assessed at 40 per cent, the client would pay £1,400 if the case were successful. With a contingency fees, the lawyer would take an agreed percentage of the damages or settlement and the fee would not be tied to the amount of work expended.

On the surface, the introduction of "no win, no fee," or conditional fees, to England and Wales is simply the introduction of another way of compensating lawyers. They are being introduced as a "key to the courthouse" that will provide vital access to justice for members of

the community who are increasingly ineligible for legal aid. While this may be true, it ignores the more basic and fundamental effect which the seeds of conditional fees will sow: a shift in the foundation of the legal profession. This shift is caused because the "no win, no fee" system changes the dynamics of the legal profession by giving lawyers a financial stake in the outcome of the case. The lawyer is no longer an independent professional adviser but a business agent because he has become part of an economic transaction. The administration of justice depends on the confidence of the Bench and the public in the legal profession. It also requires confidence by members of the legal profession in one another. In a pre-conditional fee world, the lawyer's natural desire to win a case is balanced against the duties to the Court, one's opponent, the client and oneself. A financial motivation to win a case, as conditional fees introduce, upsets this balance. In a conditional fee world, to quote John Mortimer, Q.C. the creator of Rumpole of the Bailey, the lawyer becomes a gambler and whether or not he is tempted to indulge in sharp practices the mutual trust is broken because everyone knows he's a player in a courtroom that has been turned into a casino.

Placing the Risk on the Lawyer: Contingency Fees in the United States

The decision in the United States to fund litigation by placing the risk on the lawyer through contingency fees was partly the result of America's departure from European influence and partly the consequence of the industrial age. Europeans generally admired those in professions while those in the "trade" were held somewhat in disdain. Americans, on the other hand, viewed the professions with suspicion as they derived from aristocratic origins and anti-democratic principles. To incorporate a trade or economic element into the lawyer-client

relationship was, to the American mind, not necessarily a bad thing. Coupled with this attitude was a need because the boom of the industrial age and expansion of transportation had brought with it the bane of work-related accidents. Victims of these injuries were financially unable to seek remedies. The advantage of a system which addressed this injustice outweighed the ethical concerns that were expressed by many in the profession. Also, it was unclear whether the legal profession was more worried about ethics or about competition because contingency fees were best suited to the new immigrant lawyer, with no social connections who would cater to a predominantly working class clientele. This is why many think that reputable lawyers in the US don't accept contingency fees but this is not longer the case.

The contingent fee, which can be traced from the late 19th century, was accepted throughout all of the United States by 1965 (Maine was the last state to prohibit them). The rules vary among states. For example, the lawyer in California may take 40 per cent of the first \$50,000 of a client's damages; 33 1/3 per cent of the next \$50,000; 25 per cent of the next \$500,000; and 15 per cent for amounts in excess of \$600,000. Contingency fee payments in other states are scheduled according to the stage they reach. Generally, this is 25 per cent of a settlement if the case is settled before trial, and 30 - 33 1/3 per cent of a judgment after trial. Almost all personal injury cases are brought through contingency fee agreements. Contingency fees are also used in class actions, debt collection cases, antitrust actions, tax proceedings, employment discrimination, stockholders' suits, suits challenging wills, environmental suits and basically any area where they are not prohibited.

The Ethical Concerns

Despite their widespread acceptance in the United States, debate on the ethics of contingency fees rages on. Scholars, practitioners and judges condemn, criticize and complain about contingency fees for a variety of reasons: 1) they are a means to charge excessive fees to unwitting clients, 2) they create an inevitable conflict between the interests of the lawyer and the interests of the client, 3) they destroy professional independence, 4) they encourage frivolous law suits, and 5) they create unseemly windfalls.

Chief Justice Burger expressed concern for the impact of frivolous law suits on the public: "Is the public perception of lawyers influenced . . . by absurd lawsuits which we have not yet found a way to restrain -- a father suing the school board to raise little Johnny's grade in English from C to B? Or the football fan who sues to revise a referee's ruling on a forward pass or a fumble?" In a recent example of unseemly windfalls, a Florida lawsuit against the tobacco industry led to a \$11.3 billion out-of-court settlement. The judge in the case said the lawyers' demand for \$2.8 billion (at least \$15 million each, plus costs) "shocks the conscience." Because there are no juries in most civil litigation cases in England and Wales (except for libel, slander and malicious prosecution cases, costs follow the cause (loser pays) and damages are set more conservatively by judges, the more extreme examples of frivolous law suits and unseemly profits are unlikely in this country. Conditional fees, which tie reward with the actual hours worked, would help to prevent such windfall profits. However, based upon the Middleton and Policy Studies Institute Report, it is probable that conditional fees, once introduced, will gradually evolve into contingency fees which would have the potential for larger profits for less work.

i. Excessive fees

While a contingency fee of one third of damages is fairly standard, figures of 40 and 50 per cent are well known. But really, the percentage doesn't matter. A 50 per cent fee may be quite reasonable whereas a 25 per cent fee may be unconscionable. Why? The excess in the excessive fee is determined by whether there is a fair correlation between the risk and the reward because therein lies the justification for the lawyer being paid more than his normal costs. The lawyer has a fiduciary obligation, particularly when the case is a no or low risk case, to inform the client of his right to pay an hourly or fixed fee instead. Despite this obligation, the client is usually not informed of the alternatives..

While "the client who loses his case is delighted to avoid the need for paying counsel ...[t]he client who wins obviously feels that he is bearing the burden for others whose cases were lost. . . [and] becomes convinced that the risks of obtaining a verdict and collecting the judgment were in fact minimal." While there is opportunity for abuse in any fee paying system, it is easier to detect abuse in hourly costs than in contingency fees. The information necessary to determine whether there has been abuse through the padding of hours can be judged to a certain extent by objective, external criteria on which the layperson can form a reasonable opinion. The information needed to determine whether the assessment of risk has been exaggerated to obtain a higher contingency fee is subjective and involves judgment and knowledge, experience and attitude.

The theory is that willing plaintiffs bargain with willing attorneys, and the free market system is adequate to prevent unfairness and improprieties. The fallacy of this view is that the free market

system requires a parity of knowledge on the part of the bargaining parties, and this circumstance rarely exists. Lay plaintiffs do not have the same ability to appreciate and evaluate risks of litigation, the nature and length of pretrial investigations and discovery, and a variety of other considerations commonly understood by experienced attorneys. There is neither parity nor equality in the bargaining positions of the parties.

ii. Alignment of Lawyer-Client Interests

Ethical considerations regarding contingency fees include the view that they make the lawyer the managing partner of what may be seen as joint ownership of a claim. The popular belief that contingency fees would cause the lawyer to work harder for the client is false because once the attorney has his own financial interests with which to contend, the client's interests are secondary. Contingency fees do not align the client's economic interests with those of the attorney. "The lawyer's and the client's economic interests come into stark conflict. The lawyer who truly serves his client must penalize himself; the self-interested lawyer underworks." This self-interest manifests itself in determining whether to settle or fight a claim. "Simply put, a quick settlement is often in the lawyer's financial interest, while waiting the insurer out is often in the client's financial interest...[a] lawyer who literally made his client's interest his own . . . would quickly be out of business."

iii. Loss of Independence

At the core of the ethical debate about contingency fees are apprehensions about the loss of professional independence. The contingency fee changes the role of the lawyer from an independent professional giving objective advice, to a business person who is part of an economic transaction in which he has a stake. In the former role, the lawyer is concerned about the process. In the latter role, the lawyer is concerned about the result. The result predominates

because this is where the lawyer establishes whether he will be paid or not. The lawyer's other duties-- to his opponent, the Court, the State, and something called Justice-- become obscured. Charges that lawyers encourage baseless lawsuits, or induce settlements when valid defenses exist, or employ other unscrupulous means, stem from the observation that the lawyer is no longer an independent professional advisor but a player in the courtroom turned casino. It is interesting to note where contingency fees are forbidden. They are prohibited on public policy grounds in domestic relations cases (they may interfere with reconciliation), criminal prosecutions (prosecutions would be pursued on the basis of chances for convictions rather than on whether the conviction would be just), criminal defence work (the fee may interfere with the defendant's acceptance of a plea bargain or trial and could promote unscrupulous representation) and public litigation for government civil cases (the fee would jeopardize the absolute neutrality that is to be demanded from a representative of the government). Why are these same concerns not also valid in civil litigation claims? The public policy reasons behind prohibiting contingency fees in these cases from concerns about the loss of professional independence. Public policy dictates that the lawyer should not have an interest in the outcome of these cases because justice must not only be done, but be seen to be done, in order to maintain public confidence in the system. This may well cause members of the public to ask why these very strong principles are not equally valid in civil law? Why is loss of independence and objectivity intolerable in one area of the law and tolerable in another?

Law as a Business: Effects on the Public and the Profession

In America, the majority of lawyers are good, honest, skilled individuals but the image of lawyers has changed. In the court of U.S. public opinion, lawyers are losing. The perception is that lawyers are greedy, lack caring and compassion and have poor ethical standards. Almost 1/3 of Americans believe that lawyers are less honest than the average citizen.

The 1977 case of *Bates v. The State Bar of Arizona* eliminated the bans on lawyers advertising. Coupled with contingency fees, they have also led to "overreaching" by lawyers who seek to convince a disinclined individual to sue when they would not naturally have viewed legal action as the appropriate means to resolve their problem. It helps to foster the view that litigation is the panacea for all problems, real or imagined, for which someone, somewhere must pay. It creates an 'ambulance chasing' image which is damaging to the reputation of the legal profession and hence the consumer's confidence in it. The contingent fee is viewed as giving the lawyer an interest in the actual accident or disaster and this creates a distasteful image.

Winning has become everything. Lawyers and law firms market themselves on the basis of promised results or more competitive pricing rather than on objective advice, reputation and sound judgement. They have become more concerned about the result than they are about the process!

This attitude has led to the decline of civility and courtesy among lawyers. The current President of the American Bar Association, Jerome Shestack, says there is a heightened desire to win at all costs, to show a client that your zeal knows no bounds. It has led to an aggressive, aggravating litigation style in which all civility is lost, and rudeness and ruckus are

routine. Discovery and motion practice provide a litany of ways for litigants to irritate, goad, pester, torment, pique, vex and nettle one another.

Chief Justice William H. Rehnquist counselled that, "[e]thical considerations, after all, are factors which counsel against maximization of income in the best Adam Smith tradition, and the stronger the pressure to maximize income the more difficult it is to avoid the ethical margins."

Supreme Court Justice, Sandra Day O'Connor wrote that "[i]mbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest." "It is . . . an undeniable truth," Judge Kocoras warns, "that the nature of contingent fee relationships does, at times, create conflicts of economic interest between the lawyers on the one hand and their clients on the other. It is often unnatural for people not to act in their own economic self-interest, even when the ethics of their profession require it."

Having placed financial gain above the ideals of public service, dedicated service to clients, and devotion to the administration of justice, lawyers have forfeited the respect and admiration enjoyed in past generations.

The Gradual Shift

The shift in the foundation of the legal profession in the United States was a gradual one. There were many factors that contributed to the shift including: the tremendous growth in the number of lawyers, the abandonment of the prohibition against advertising, and the specialisation and growth of mega-firms. But the introduction of contingency fees was the most fundamental because it changed the basic role of the lawyer. The litigator, being the most visible of all of the

various types of lawyers, ensured that contingency fee abuses and the "lawyer as player" image would be widely perceived.

While modern society requires business efficiency in its legal system, it also requires confidence in the ethical standards and integrity of the legal profession. As the American experience has shown, it is vital to get the balance right between law as a business and law as a profession. We must not put profit before principles or commercialism before professionalism.

The Extension of Conditional Fees in England and Wales

The Lord Chancellor's efforts to introduce conditional fees in England and Wales is essentially Treasury driven, although he refutes this. "Legal aid," he said, "has become a leviathan with a ferocious appetite."

In proposing the extension of conditional fees, the Lord Chancellor indicated reliance on two reports which had evaluated the limited use of conditional fees since formal implementation in July 1995. One report was the *Review of Civil Justice and Legal Aid* by Sir Peter Middleton and the second was *The Price of Success: Lawyers, Clients and Conditional Fees* by the Policy Studies Institute (PSI Report). The Middleton Report does not address in his report the whole range of ethical issues that arise when the "lawyer take the risk." As Lord Ackner (in the House of Lords debate on Civil Justice and Legal Aid) notes, "Sir Peter Middleton, not being a lawyer, did not appreciate the ethical problems that the extension of conditional fees gives rise to."

The PSI Report observes:

The proportion of conditional fee cases with low estimated chances of success is surprising and raises questions about the way in which solicitors are assessing risk. This could cause a doubt over the fairness of the entire scheme. . . [T]he inconsistency in the uplift applied to cases with similar chances of success is worrying. The uplift appears to be either too low or (more often) too high, in almost half the cases. . . [A] cynical interpretation is that some solicitors might be

deliberately overestimating risk to justify charging clients a higher uplift.

Even on this trial and limited basis, the PSI Report expresses the same foreboding which were illustrated earlier in this paper as challenging the U.S. legal profession:

If the public suspects that solicitors are inaccurately estimating the risk, it will undermine their confidence in the whole system. If they believe that solicitors are doing so in order deliberately to inflate the uplift, despite rules on professional conduct, there is a risk that the whole conditional fees system could be brought into disrepute. . .

The nub of the problem is the imbalance of knowledge between solicitor and client. The vast majority of clients are simply not in a position to judge whether the estimate of risk is accurate or not.

There is no mention of these concerns by either the Lord Chancellor or his Parliamentary Secretary, Geoffrey Hoon, M.P., who presented the case for conditional fees in the House of Commons.

The Report does not address the alignment of lawyer-client interest, the loss of independence, or the erosion of the cab rank principle. *The Price of Success* does not include in its calculations the price of integrity in the legal profession, the price of public confidence in the legal system nor the price of losing both.

Protecting Access to Justice and the Integrity of the Legal System: The Contingency Legal Aid Fund as Alternative

How does the Lord Chancellor fulfill his duty to the public and protect both access to justice and the integrity of the legal system? The Bar Council and Law Society in England and Wales have proposed a system that is used successfully in Hong Kong and Australia.

Prospective litigants would apply to the Contingency Legal Aid Fund. If accepted, the Fund would undertake to pay the costs of the litigant. If successful, the litigant would pay a percentage of the amount recovered back into the Fund. If the action was not successful, the Fund would pay the costs which would include any award of costs in favour of the opposing party. This would be an advantage over the legal aid system because successful parties are generally unable to recover costs against legally aided litigants. The percentage recovered would be calculated so as to cover the costs paid out in unsuccessful cases. The Contingency Legal Aid Fund would essentially be a self-financing mutual insurance fund.

By spreading the risk nation-wide, rather than on the lawyer, it prevents the lawyer from having a financial stake in the outcome of his client's case and all of the abuses that have been described. It also resolves one of the most disconcerting aspects of the legal aid system: defendants facing legally aided plaintiffs would get their costs. And finally, it would open up access to justice in that applicants would be judged on a merits test alone and not on a means test.

BUILDING ON A LEVEL FOUNDATION

Once the Pandora's Box of "no win, no fee" has been opened, it can never be closed. For this reason, there must be serious and sensible debate. The debate is not improved by anti-lawyer spinning and "fat cat" attacks by the Lord Chancellor on his profession. Misleading argument which inevitably leads to emotive tabloid headlines is no substitute for reasoned argument and is unworthy of the head of the judicial system.

I urge members of this conference to listen. Not only to those that are present here today, but those that are not present. By that I mean the voices of the past, and the voices of the future.

Our predecessors in law helped to shape the foundation that lays at the heart of the current legal profession. Perhaps foremost amongst them was Thomas Erskine who, in defending Thomas Paine, declared: "I will ever and at all hazards assert the dignity, independence, and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence." While we are inheritors of this rich past, we are also trustees of its future. Before recasting our foundation, we should reflect carefully on the integrity of the structure which a new foundation will create. For this structure will be the future of our profession.

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Tel. 01865 434459

Fax. 01865 794882