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Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement

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Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement

Lester Brickman*

Table of Contents

Introduction	1340
I. Ethical Mandates Governing Contingency Fees	1346
II. Methods of Enforcing Ethical Mandates Governing Contingency Fees	1349
III. Summary of Survey Results	1359
IV. The Methodology	1360
V. Letter from Aggrieved Client to Disciplinary Agency	1362
VI. Issues in the Hypothetical	1363
VII. The Results of the Survey	1366
A. Disciplinary Counsel Who Viewed the Hypothetical As a Matter for Fee Arbitration	1366
B. Disciplinary Counsel Who Did Not View the Hypothetical As a Matter for Fee Arbitration	1367
Conclusion	1373
Appendix I The Questionnaire	1374
Appendix II Breakdown of Responses to the Questionnaire by Percentage	1375
Appendix III Fee Arbitration Responses	1376

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Introduction

Contingency fee abuses are attracting increased public attention.¹ Particular interest is focused on the enormous contingency fees generated by mass tort litigation; in some cases, lawyers are collecting multi-million dollar fees essentially for performing paralegal work.² In addition, the relationship between the availability of enormous contingency fees and the amassing of thousands of claims of injury in order to dramatically shift the litigation dynamic in favor of plaintiffs is becoming increasingly apparent.³ For example, the possibility that major ongoing massive litigations, such as those involving silicone breast implants and the as yet nascent litigation involving the contraceptive Norplant, have much less to do with injury and much more to do with contingency fees is being increasingly broached in the press, even in newspapers that usually have opposed most tort reform efforts.⁴

1. See generally *Contingency Fee Abuses: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong. (Nov. 7, 1995) [hereinafter *Contingency Fee Hearings*].

2. U.S. District Court Judge Robert R. Merhige, presiding over the Dalkon Shield Claimants Trust litigation, has stated:

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

In re A.H. Robins Co., 182 B.R. 128, 137 n.10 (E.D. Va. 1995).

3. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995); Lester Brickman, *Class Action Reform: Beyond Rhone-Poulenc Rorer*, Research Memorandum, Manhattan Institute 2-5 (October 1995) (on file with author); Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1778-82 (1994) [hereinafter Brickman, *On the Relevance of Admissibility*].

4. See Gina Kolata & Barry Meier, *Implant Lawsuits Create A Medical Rush to Cash In*, N.Y. TIMES, Sept. 18, 1995, at A1 (indicating that treatment for women with silicone breast implants "has generated millions of dollars for a few doctors, who get bulk referrals from lawyers"). These doctors have been criticized for "running assembly-line practices intended more to help women collect vast court awards than to treat medical problems." *Id.* The president of the American College of Rheumatology stated that "many of the tests and treatments [were] 'a racket — there's no other word for it.'" *Id.* at B8. Describing how women could qualify to receive \$200,000 or more from a settlement fund for complaints of nonverifiable injuries such as aches and fatigue, one doctor admitted that "one of the categories was so broad that you or I would have fit into it." *Id.* The article further indicated that while some doctors — including doctors who frequently testify on behalf of plaintiffs — found silicone related problems in 90% of their patients, another doctor has found

In addition to stories in the print media on contingency fee abuses,⁵ similar stories by television journalism programs now fill the airwaves.⁶ A contingency fee reform proposal co-authored by Professor Jeffrey O'Connell of the University of Virginia Law School, Michael Horowitz of the Hudson Institute, and myself,⁷ first announced in February 1994,⁸ has elicited support from a broad range of practitioners, judges, scholars, and editorial writers.⁹ The proposal has also received attention from state

that "just one to four percent of his patients had illnesses related to their implants." *Id.* Additionally, the article noted that "frequently, women are referred to [these] doctors by their lawyers" and some of these doctors agreed to defer their fees until after a settlement or court award. *Id.* One doctor explained that if he "did not diagnose silicone disease or if the woman did not win her lawsuit, he would have to try to collect the money from the woman, not her lawyer." *Id.*; see also Gina Kolata, *New Study Finds No Link Between Implants and Illness*, N.Y. TIMES, June 22, 1995, at A18 (indicating that definitive study of health effects of silicone breast implants failed to find any association between implants and auto-immune tissue diseases, and further indicating that despite scientific evidence, implant makers had entered into \$4 billion settlement of class action suit brought on behalf of women with implants); Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. TIMES, May 28, 1995, § 3 at 1 (describing parallels between Norplant litigation and breast implant litigation and discussing financial interests of lawyers and doctors). One woman was told by her attorney to remove her Norplant implant in order to preserve her claim for damages, even though she was very happy with Norplant. *Id.* She reportedly asked her doctor: "Once I get my money, can I get a second Norplant put in?" *Id.*; see also Anne Tergesen, *Norplant Under Siege*, THE RECORD, Aug. 28, 1995, at B1 (discussing report which shows that majority of Norplant users are satisfied despite most having suffered at least one side effect and also stating that some complaints filed by lawyers have been "carbon copies of one another, right down to typographical errors").

5. Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50 (describing how contingency fee system has created "powerful incentive" for lawyers to commit wide range of abuses, e.g., bribery, fraud, and charging risk-based fees when there is no risk of nonrecovery).

6. See *ABC News Special: The Trouble With Lawyers* (ABC television broadcast, Jan. 2, 1996) (giving examples of how plaintiff lawyers are enriching themselves by filing unmeritorious class action suits against defendants who are willing to settle to avoid larger litigation costs, and further indicating that although lawyers earn tremendous fees, their clients often see little return and sometimes end up worse off). The program also presented Professor John Langbein who remarked: "This is not far removed from what Al Capone used to do to shopkeepers on the west side of Chicago It's extortion." *Id.*; see also John Stossel, *Protect Us from Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8 (previewing *ABC News Special*, *supra*); *60 Minutes: Women At Risk* (CBS television broadcast, Oct. 22, 1995) (discussing how breast implant litigation has less to do with scientific causation than with lawyers' fees and suggesting that plaintiffs experts' testimony may be significantly influenced by fees).

7. LESTER BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES* (1994).

8. See Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. TIMES, Feb. 11, 1994, at A1.

9. The basic elements of the proposal were first endorsed by a group of distinguished academics, practicing attorneys, and former government officials including: Morris Abram,

legislatures,¹⁰ and a version appeared on the March 1996 California ballot.¹¹

William Barr, Ronald Beard, Derek Bok, Robert Bork, Samuel Butler, Edward Costykian, Robert Cramton, Norman Dorsen, Tyrone Fahner, Thomas Gee, Walter Gellhorn, Mary Ann Glendon, Erwin Griswold, Charles Horsky, Rex Lee, Thomas Morgan, John Noonan, Theodore Olson, Robert O'Neil, Shirley Peterson, Robert Pitofsky, George Priest, Leon Silverman, and Harry Wellington. Editorial columns and editorials supporting the proposal have appeared in more than 40 newspapers across the country and elsewhere. See, e.g., Joe M. Dove, *Contingency Fees "Unethical Windfall" for Some Lawyers*, THE CLARION-LEDGER (Jackson, Miss.), Jan. 22, 1995, at C1; David Foppert, *Putting Contingency Fees On Trial*, BEST'S REVIEW — PROP./CASUALTY INS. EDITION, July 1994, at 38; Malcolm S. Forbes, Jr., *Fact And Comment*, FORBES, Dec. 4, 1995, at 23; Brent Larkin, *Reformers Target Lawyers' Fees*, CLEV. PLAIN-DEALER, Feb. 27, 1994, at 1C; Anthony Lewis, *Make Haste Slowly*, N.Y. TIMES, May 15, 1995, at A17; Margot Norman, *Thin Cases, Fat Fees: Why Are We Importing the Worst of US Justice?*, TIMES (London), May 17, 1994, at 14; Stuart Taylor, Jr., *Taking Leave: Making Litigation Not Pay*, LEGAL TIMES, Feb. 13, 1995, at 27; see also Editorial, *Capping Contingency Fees*, SACRAMENTO BEE, Mar. 8, 1994, at B6; Editorial, *Place Some Limits on Contingency Fees*, HARTFORD COURANT, Mar. 8, 1994, at B10; Editorial, *Review & Outlook: Taming Runaway Lawyers*, WALL ST. J., Jan. 24, 1995, at A22; Editorial, *Streamlining Civil Litigation*, WASH. POST, Feb. 6, 1995, at A18.

Paul Crotty, Corporation Counsel for New York City, has recently urged the New York Court of Appeals to adopt the proposal as a court rule for three reasons: "lower overhead, smoother proceedings in cases that do not settle, and a reduced total payout, with a greater amount of money going to the injured party." Letter from Paul A. Crotty, Corporation Counsel for the City of New York, to Judith S. Kaye, Chief Judge, New York Court of Appeals 5 (Jan. 23, 1995) (on file with author).

10. A Michigan Senate bill, S. 344, 88th Leg., introduced on February 28, 1995, was referred to the Michigan Committee on Economic Development, International Trade and Regulatory Affairs, where it was amended to include the "early offer" proposal on May 10, 1995 and subsequently approved by the Michigan Senate on that same date. See MICHIGAN SENATE JOURNAL 862-63 (1995). The "early offer" amendment was not reported out by the Michigan House of Representatives and was not included in the bill that was signed by the Governor on December 25, 1995. Interest in the proposal remains high and the legislative sponsors of the proposal are considering re-introducing the bill in the near future.

11. On December 20, 1994, a modestly altered version of the proposal was filed with the California Attorney General by an alliance of consumer activists and businessmen for the purpose of qualifying it as a 1996 initiative. It qualified as Proposition 202 and appeared on the March 1996 ballot. Proposition 202 was defeated by a 51% to 49% margin. See Dan Bernstein, *More Legal Reform Votes?*, SACRAMENTO BEE, Mar. 28, 1996, at A16. The alliance was led by Silicon Valley businessman Thomas Proulx, insurance industry critic and author Andrew Tobias, and remarkably, Voter Revolt, the Nader-affiliated consumer group that sponsored California Proposition 103 mandating sharp automobile insurance rate reduction. See Dan Morain, *1996 Expected to Be Boom Year for Initiatives*, L.A. TIMES, Dec. 9, 1995, at A1. In 1988, Voter Revolt had successfully opposed California Proposition 106, which sought to limit attorney fees, but its political director, Bill Zimmerman, distinguished the proposal from Proposition 202 as follows:

[T]he attorney fee limits in Proposition 106 were too severe. Attorneys would have refused to take cases under that system which would have limited access to justice for too many legitimate clients. *This proposal is a progressive, pro-consumer measure.*

The proposal was also introduced in the U.S. Senate,¹² where hearings have been held on contingency fee abuses.¹³

The American Bar Association (ABA) has also taken note of the increased public concern. A plenary session of a recent National Conference on Professional Responsibility was devoted to "a debate regarding the call to rethink contingency fees."¹⁴ Perhaps the most significant step taken by the ABA has been to respond to a request from a group of practitioners, educators, and scholars for ethical guidance regarding the use of standard contingency fees.¹⁵ In its response,¹⁶ the Standing Committee on Ethics and Professional Responsibility (the Committee) essentially absolved contingency fee lawyers from any meaningful ethical mandates pertaining to fees, holding that charging standard and substantial contingency fees is not inappropriate in cases that do not include an issue of liability and in which substantial settlement offers prior to the rendering of any significant services are almost certain.¹⁷ While elevating the financial interests of lawyers

Alliance to Revitalize California, Two Initiatives Filed to Unclog Courts and Lower Auto Insurance Rates 3 (Dec. 20, 1994) (unpublished press release draft on file with author) (emphasis added). Several articles discuss the initiative and two others qualified by the Alliance. See Lester Brickman, *Curb Legal Feeding Frenzy*, USA TODAY, Jan. 10, 1996, at 11A; Robert Stowe England, *Ambulance Chaser Alert Next March*, FIN. WORLD, Oct. 10, 1995, at 28; Christopher John Farley, *Fed Up with Lawyers*, TIME, Jan. 8, 1996, at 36; Tim W. Ferguson, *Tort Retort*, FORBES, Feb. 12, 1996, at 47; Margaret A. Jacobs, *Business Groups, Lawyers Face Off Over California Litigation Reform*, WALL ST. J., Jan. 15, 1996, at B5; Peter Passell, *Economic Scene*, N.Y. TIMES, Feb. 22, 1996, at D2; Stuart Taylor, *Tort Lawyers vs. Consumers*, LEGAL TIMES, Jan. 29, 1996, at 23.

12. Lawsuit Reform Act of 1995, S. 300, 104th Cong. (1995).

13. See *Contingency Fee Hearings*, *supra* note 1.

14. See ABA, 21st National Conference on Professional Responsibility, San Diego, Cal. (June 1-3, 1995). The title of the session may have revealed more of their views than the conference organizers intended. While the subtitle read: "A debate regarding the call to rethink contingency fees," the title read: "Contingency Fees: Is One Third Of A Loaf Better Than None?"

15. See Letter to the Chair of the Standing Committee on Ethics and Professional Responsibility 1 (Feb. 10, 1994) (on file with author). The signatories of the letter were: Morris Abram, William Barr, Ronald Beard, Robert Bork, Lester Brickman, Samuel Butler, Edward Costikyan, Roger Crampton, Norman Dorsen, Tyron Fahner, Thomas Gee, Walter Gellhorn, Mary Ann Glendon, Erwin Griswold, Michael Horowitz, Charles Horsky, Rex Lee, Thomas Morgan, Jeffrey O'Connell, Theodore Olson, Robert O'Neil, Shirley Peterson, Robert Pitofsky, George Priest, Leon Silverman, and Harry Wellington. *Id.* at 18.

16. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994), reprinted in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 1001:248 (1995) [hereinafter Formal Opinion 94-389].

17. See Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 290-95 (1996).

over those of clients and the public,¹⁸ the ABA Committee did acknowledge that although charging standard contingency fee rates was virtually always ethically permissible, such charges had to be "reasonable."¹⁹

To many, the recital of the "reasonable fee" mantra²⁰ no doubt appears to be responsive to the considerable evidence of abusive fee practices. On closer analysis, however, the reasonable fee declaration is an essentially ritualistic incantation designed to give an appearance of effective disciplinary enforcement of ethics rules, but in reality, is devoid of substance. In fact, the reasonable fee invocation is nothing more than a ringing endorsement of the status quo,²¹ in which lawyers routinely charge and obtain

18. See *id.*

19. Formal Opinion 94-389, *supra* note 16, at 1001:249. See the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1995) for the reasonableness requirement. For its analogue, see the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1986). The Model Code states: "A Lawyer shall not . . . charge . . . an . . . excessive fee." *Id.*

20. The reasonable fee mantra has been used to justify the rejection of a per se ban on nonrefundable retainers. The argument advanced is that lawyers charging unethical nonrefundable retainers can instead be disciplined for breaching the codes by charging unreasonable and unethical fees; hence there is no need for a per se ban. The argument fails for at least two reasons. First, as with contingency fees, there is virtually no enforcement of the requirement that fees be reasonable and not excessive. As a colleague and I have previously noted:

[R]elying on the ban on excessive and unreasonable fees is, in reality, full toleration of nonrefundable retainers. Consider reality. Before *Cooperman*, no prosecutions of the use of nonrefundable retainers under DR 2-106 or Rule 1.5 had been brought. Further, *Cooperman* itself was brought not on the theory that the lawyer had charged an excessive fee, but on the grounds that nonrefundable retainers are per se unethical. Moreover, *Cooperman* was not brought until we had supplied the intellectual architecture needed to construct the ban. In short, the ban on excessive and unreasonable fees offers not even the slenderest hope of deterring the egregious fee abuses that congregate under the nonrefundable retainer banner.

Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 37-38 (1995) (citation omitted). A second reason why the argument fails is that it does not accord with fiduciary law or relevant public policy. See Brief of Amicus Curiae in Opposition to Respondent-Appellant's Appeal, *In Re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (No. 25), reprinted in 64 U. CIN. L. REV. 11, app. A at 57-58 (1995).

21. When lawyers who oppose any tort reform that would reduce their incomes, regardless of the merits, congregate under the banner of "reasonable fees," caution is advised. When both plaintiff and defendant lawyers do so, then George Bernard Shaw's words of wisdom that "professions are conspiracies against the laity," ring especially true: It is therefore noteworthy that the plaintiffs' bar is in total agreement with the ABA that the appropriately sufficient ethical response to contingency fee abuses is to prosecute those who charge unreasonable and excessive fees. In an initiative sponsored by the California trial

substantial and sometimes enormous windfall fees in cases without risk. These fees can easily amount to thousands and even tens of thousands of dollars per hour.²²

The ABA Committee's claim that it is indeed enforcing ethical standards by invoking the reasonable fee standard is based on the following syllogism: Lawyers who charge "unreasonable" contingency fees violate the ethics codes. Violations of the ethics codes result in disciplinary sanctions. Therefore, in the world of the ABA, contingency fee lawyers are subject to ethical constraints. However, there is a critical flaw in the syllogism. Contingency fee lawyers are virtually never disciplined for charging unreasonable fees, that is, for charging substantial risk premiums in cases without meaningful risk.²³ Presumably the ABA must know that there are virtually

lawyers, titled "Frivolous Lawsuit Limitation Act," certified to appear on the November 1996 California ballot, the trial lawyers decry the charging of excessive fees and provide for "relief from excessive attorneys' fees." Cal. Prop. 207 § 5 (1996). After reading the initiative, few can doubt the assertion that "limiting fees" to "reasonable" and "not excessive fees" is simply a subterfuge to confuse the public into thinking that meaningful ethical constraints are being called for when in fact the status quo is being maintained. This trial lawyer initiative was intended to reverse the expected passage of the "early offer" initiative that appeared on the March 1996 California ballot to limit contingency fees in cases when early settlement offers are made. An outpouring of trial lawyer money led to the defeat, in a close vote, of the early offer initiative. See *supra* note 11 (discussing Proposition 202). If the trial lawyer initiative is passed, its only effect now will be to preclude the California legislature from enacting laws to regulate lawyer fees.

22. See Brickman, *On the Relevance of Admissibility*, *supra* note 3, at 1773; see also Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 77 n.186 (1989) [hereinafter Brickman, *Contingent Fees*]. Illustrative examples of ethically impermissible rates of return abound. See, e.g., Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6 (discussing settlements resulting from Phillips Petroleum case that yielded law firm "\$65 million fee [which] translates into almost \$20,000 an hour, a windfall in a case where tens of millions in compensation was a foregone conclusion"); James Pinkerton, *The Spoils of Tragedy: Profiting on Disaster*, HOUS. CHRON., Aug. 2, 1992, at A1 (describing Texas school bus disaster settlement that yielded contingency fee conservatively estimated to be \$25,000-\$35,000 per hour despite notable fact that most attorneys who reaped these riches did not participate in settlement process, nor did they engage in significant preparatory work for trial because issue of liability was clear-cut and likelihood of very substantial settlement was overwhelming); Dee Ralles, *\$84.5 Million Offered in Tainted Water Case*, ARIZ. REPUBLIC, Feb. 26, 1991, at A1 (discussing settlement that yielded \$33.8 million in attorneys fees, suggesting rates of return in excess of \$30,000 per hour).

23. See JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966) (presenting broader critique of ABA enforcement of disciplinary rules); David O. Burbank & Robert S. Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U. L. REV. 66, 91-93 (1974); F. Raymond Marks & Darlene Cathcart,

no disciplinary sanctions applied to contingency fee lawyers for charging unreasonable fees. Thus, the ethical standards of the ABA itself could properly be questioned.²⁴ Moreover, the stratagem of relying on disciplinary sanctions to conceal the core position of the ABA — a resounding endorsement of the status quo — would be stripped of its stealth sheathing, exposing in the raw an underlying financial self-interest.

If this were so, we would expect that the plaintiffs' bar would have adopted a similar stratagem because the financial interests of defense lawyers, predominantly represented by the ABA, and the financial interests of plaintiff contingency fee lawyers coincide.²⁵ Indeed, the plaintiffs' bar has done so. The stratagem is frequently referred to as the "case-by-case approach." Under this approach, if there are violations of the ethical mandate that contingency fees be reasonable, then these should be prosecuted in the disciplinary system on a case-by-case basis.²⁶ Therefore, there is no need for any systemic reform of contingency fee abuses.

To unmask the ABA's position on the application of ethical constraints on contingency fees, I have undertaken to determine the efficacy of the case-by-case approach to enforcement of ethics rules violations regarding contingency fees. To that end, I have surveyed those who administer the disciplinary system — state bar counsel — to determine what they regard as violations of the ethics codes and how they respond to such violations. This Article presents the results of that survey. To place the survey in context, I begin with a brief analysis of the ethical rules regulating contingency fees, the various methods of enforcement of those rules proffered by the bar, and the efficacy of those methods.

I. Ethical Mandates Governing Contingency Fees

Contingency fees are a system for financing tort litigation that enables injured persons to gain access to the legal system when they would not

Discipline Within the Legal Profession: Is It Self-Regulation?, 1974 U. ILL. L.F. 193, 214-19 (same); see also ABA CTR. FOR PROFESSIONAL RESPONSIBILITY, STANDING COMM. ON PROFESSIONAL DISCIPLINE, 1990 SURVEY ON LAWYER DISCIPLINE SYSTEMS (1992) (providing statistical evidence demonstrating lack of enforcement).

24. Indeed, I have questioned the ABA's ethical standards elsewhere. See Brickman, *supra* note 17, at 250-56.

25. See *id.* at n.31 (presenting exposition of commonality of interest of plaintiff and defense lawyers in maintaining high contingency fees and therefore high litigation levels).

26. See Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 LITIG., Summer 1976, at 27.

otherwise be able to do so. Lawyers assume the risk of receiving no fee or a low fee in exchange for a share of any recovery, generally ranging from 33% to 50%.²⁷ In exchange for bearing such risk, "lawyers charge a premium . . . [which] compensates for the *risk* of nonpayment if the suit does not succeed" ²⁸

Effective hourly rates received by lawyers charging contingency fees are usually higher than normal hourly rate charges.²⁹ To justify these higher fees, that is, to meet the ethics codes' requirements that fees be reasonable and not clearly excessive,³⁰ "[c]ourts in general have insisted that a contingent fee be truly contingent. The typically elevated fee reflecting the risk to the lawyer of receiving no fee will be permitted only if the representation indeed involves a significant degree of risk."³¹ Indeed, the ethics codes mandate that contingency fees are legitimate only when there is an assumption of meaningful risk. Model Rule 1.5(a)(8) and Model Code DR2-106(B)(8) provide that one of the factors to be considered in determining the reasonableness of a fee is "whether the fee is fixed or contingent." This factor can be read literally to mean that simply calling a fee contingent thereby entitles a lawyer to charge a higher fee — but to do so would be wrong. However self-serving the codes may be,³² they should not be interpreted with such utter cynicism and total disdain for the profession's responsibility "to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."³³ The obvious intent of the drafters was to allow lawyers ethically to charge a higher fee provided that they were bearing a meaningful fee risk. The codes are correctly read to mean that a contingent fee must be more than just contingent in name — it must be contingent in fact.³⁴

27. See BRICKMAN ET AL., *supra* note 7, at 49 n.3.

28. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting on other grounds).

29. Contingent fees usually produce a higher fee than a fixed or hourly fee would for the same service. See Comm. on Legal Ethics, *Legal Ethics Case 149*, 2 W.VA. ST. BAR NEWS 75 (1961), noted in MARU & CLOUGH, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS, No. 4711, at 516 (1970). Maru and Clough comment that "[w]here no agreement exists with regard to a fee, it is proper to charge only a reasonable fee, which will ordinarily be less than a fee fixed on a contingent basis." *Id.*

30. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1995).

31. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4, at 532 (1986).

32. See Brickman, *supra* note 17, at 250-59.

33. MODEL RULES OF PROFESSIONAL CONDUCT, preamble (1995).

34. The codes also mandate that contingency fees only be charged when they are

Although most tort claims involve risk that justifies the charging of risk premiums, that is, standard contingency fees, a significant fraction of claims involve no meaningful risk. Because of the severity of injury, the absence of any issue of liability, and the existence of insurance, lawyers representing such claimants often anticipate at the time of undertaking the representation that substantial settlement offers will be made without the need for any significant expenditure of time. Nonetheless, most lawyers charge standard and substantial contingency fees ranging from 33% to 50% in such cases.³⁵ As former Harvard President and Law School Dean Derek Bok has observed:

Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.³⁶

It is beyond dispute that the charging of standard and substantial contingency fees in *all* cases violates the codes' mandates that fees be reasonable and that contingency fees are justified only when there is commensurate risk.³⁷ These routine violations of ethical mandates occur because of the enormous windfall fees generated. The lure of easy money in cases with "clear liability and high return" is overpowering.³⁸ The principal challenge facing those who would apply ethical mandates to contingency fees is to devise a way to distinguish between cases in which there is meaningful

beneficial to the client. See Brickman, *supra* note 17, at 316 app. B. Appendix B is titled: *An Ethical Alternative to ABA Formal Opinion 44-389 on Contingency Fees*.

35. See BRICKMAN ET AL., *supra* note 7, at 49 n.3.

36. DEREK BOK, *THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA* 140 (1993).

37. Incredibly, even as the ABA Standing Committee on Ethics and Professional Responsibility opined that lawyers could charge contingency fees without regard to risk, *see supra* notes 16-17 and accompanying text, the American Trial Lawyers Association (ATLA) was holding forth that contingency fees ought to be commensurate to risk. Thus, ATLA "publicly urge[d] its members to 'exercise sound judgment in using a percentage in the contingent fee contract that is commensurate with the risk, cost, and effort required.'" AMERICAN TRIAL LAWYERS ASS'N, *KEYS TO THE COURTHOUSE: QUICK FACTS ON THE CONTINGENT FEE SYSTEM* 4 (1994).

38. See Andrew Blum, *Big Bucks, But . . . Cash Flow a Problem*, NAT'L L.J., Apr. 3, 1989, at 1, 47 (providing interviews with five high-income-earning personal injury attorneys which revealed agreement that "there are . . . good PI cases — with clear liability and high return . . . [generating] quick and easy money").

risk — because liability or the level of damages is seriously contested — and those in which meaningful risk is absent.

II. Methods of Enforcing Ethical Mandates Governing Contingency Fees

Four methods have been proffered to deal with the problem of violations of ethical mandates regulating contingency fees. One method is to set limits on lawyers' contingency fees.³⁹ These fee caps have come into wide use, especially with regard to medical malpractice litigation.⁴⁰ Although the main purpose of fee caps is to diminish the amount of litigation,⁴¹ an auxiliary purpose is to prohibit lawyers from charging excessive fees.⁴² However, fee caps do not discriminate between claims subject to serious risks of low recovery and nonrecovery and those claims in which fee caps do not appreciably reduce the incidence of windfall fees.

A second method of enforcement of ethical mandates is "judicial scrutiny, where necessary, on a case-by-case basis."⁴³ This is the method advocated by Philip H. Corboy, a leading torts practitioner.⁴⁴ Those who call for judicial scrutiny of contingency fees as a principal form of enforcement of ethical mandates, however, face an overwhelming task. Each year, approximately one million new contingency fee cases are filed.⁴⁵ Many

39. See BRICKMAN ET AL., *supra* note 7, at 17.

40. For a list of medical malpractice fee caps, see Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 950 n.6 (1990).

41. See Patricia M. Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213, 222 (1984) ("The reduction in expected payoff will reduce the number of claims filed.").

42. See Corboy, *supra* note 26, at 36 (advocating schedule of permissible contingency fee rates as solution to lawyer overcharging).

43. *Id.* at 35.

44. Mr. Corboy's "judicial scrutiny," however, appears to be a disguised version of the fee cap. In addition to other measures, Corboy suggests that "the profession should . . . adopt a schedule of percentage-based contingent fees." *Id.* at 36.

45. The one million figure is a conservative approximation based on recent compilations and reports of tort cases filed in federal and state courts. Although the vast majority of tort cases are filed in state courts, there is no nationwide compilation of state tort case filings. To arrive at the approximation therefore requires some statistical estimation. For example, the National Center for State Courts (NCSC) reported 592,425 state tort case filings in 1993 based on data collected from only 32 state courts and the District of Columbia and Puerto Rico. See NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1993, at 196-98 (1995). Tort caseload statistics from the following states were not included in NCSC's study: Alabama, Delaware, Georgia, Illinois,

more representations on a contingency fee basis take place outside of courts. It would be a physical impossibility for courts to scrutinize even a small percentage of these cases on an *ex ante* basis to determine whether

Iowa, Kentucky, Louisiana, Mississippi, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, and West Virginia. Further, the filing data did not include medical malpractice and product liability cases filed in California, and was underinclusive for many of the other states. *See id.* at 198. If we assume that the number of filings in each of the 18 states excluded from the NCSC study is equal to the mean number of reported filings, 17,424 ($592,425 \div 34$), then the total number of state court tort filings for 1993 would be 906,057 ($17,424 \times 18 + 592,425$). The number of tort cases in federal courts in 1993 was 43,259. *See* Editorial, *Tort's Collateral Damages*, INV. BUS. DAILY, Mar. 31, 1995, at A2 (citing Federal Judicial Center data). The estimate of one million tort filings is certainly "in the ballpark" based on the federal data and the incomplete and underinclusive state data referenced above.

Another method of estimating the number of annual state tort filings nationwide is to extrapolate from data comparing the number of state tort filings to the number of state civil filings. In 1989, the NCSC reported 17,321,125 state civil filings. *See* NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1989, at 4 (1991), *cited in* Michael J. Saks, *Do We Really Know Anything About Behavior of the Tort Litigation System - And Why Not?*, 140 U. PA. L. REV. 1147, 1205 & n.187 (1992). While torts constituted less than 5% of state civil filings in Colorado, Idaho, Kansas, North Dakota, and Utah from 1984 to 1989, the percentage ranged from 26% to 31% in Maine and from 27% to 30% in New York during the same period. Saks, *supra*, at 1208 & n.201. Assuming that 8% of the civil cases filed in 1989 were tort cases, the number of state tort filings in 1989 would have been 1.38 million. This percentage seems to be a reasonable estimate in light of the NCSC's 1990 report that state tort filings represented 10% of 18.4 million state civil cases filings, or 1.84 million filings. *See* NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, at 18 (1992), *cited in* Randall Samborn, *State Court Filings Hit New Highs*, NAT'L L.J., May 4, 1992, at 7. Even if the percentage of state tort filings is actually somewhat lower than 8%, the total number of state tort cases filed today would probably still exceed one million because the number of civil cases filed in state courts has risen since 1989. *See* Brian Cummings, *Study Finds Down-Trend in State Tort Filings*, CHI. DAILY L. BULL., May 12, 1995, at 1 (indicating that "nearly 20 million" civil cases were filed in state courts in 1993). The Rand Institute for Civil Justice estimated that "of 89 million cases filed in the state courts in 1993, about 1.5 percent were tort — or — injury cases." Claire Cooper, *Few Injured Americans Sue, Study Concludes*, L.A. DAILY NEWS, May 28, 1995, at N10. This estimate would produce a figure of 1.335 million state court tort filings.

The assertion that at least approximately one million tort cases are filed annually nationwide is supported by additional reports. According to the Rand Institute for Civil Justice, 911,000 tort suits were filed in federal and state courts in 1985. *See* J. KAKALIK & N. PACE, COSTS OF COMPENSATION PAID IN TORT LITIGATION (1986), *cited in* P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1009 n.31. Further, the NCSC estimated that 1.155 million tort cases were filed in 1991. *See* NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS ANNUAL REPORT 1991, at 19 (1993), *cited in* Randall Samborn, *In Courts: Caseloads Still Rise*, NAT'L L.J., July 5, 1993, at 10.

there was meaningful risk at the time of entering into the fee contract that would have justified the charging of a standard contingency fee. Moreover, even if courts were to seek to take on some responsibility in this area by selecting the most egregious instances of overreaching, how would they know which cases to select for further inquiry?⁴⁶ Virtually all tort-related contingency fees today range from 25% to 50%; other than in class actions, aggregations, and claims on behalf of minors where fees are fixed by the courts, contingency fee rates seldom amount to less than 33% of recoveries when cases are settled without trial, 40% if cases go to trial, and 50% if appeals are necessary to sustain the judgments.⁴⁷ Because contingency fees have thus become standardized, clients who have been charged substantial risk premiums in cases in which the lawyer assumed no meaningful risk have no basis to conclude that they have been mulcted; hence, they perceive no basis on which to file a fee complaint.⁴⁸

The daunting task faced by courts has resulted in a virtual total abdication of the role of courts in policing contingency fee abuses.⁴⁹ Instead, case-by-case enforcement by the judiciary has become a pseudonym for the status quo: there is virtually no enforcement of DR 2-106(A) and Model Rule 1.5(a) against contingency fee lawyers grossly overcharging clients in cases in which liability is clear and known to be so at the outset and in

46. See Corboy, *supra* note 42, at 35 (asking how judges would know "where [it was] necessary").

47. See BRICKMAN ET AL., *supra* note 7, at 13 n.3.

48. See Lester Brickman, *A Massachusetts Debacle: Gagnon v. Shoblom*, 12 CARDOZO L. REV. 1417, 1429-30 nn.72-73 (1991).

49. Judicial scrutiny had been an essential feature of the process of legitimation of contingency fees. Thus, Canon 13 of the first ABA code of ethics, adopted August 27, 1908, provided: "Contingent fees, where sanctioned by law, should be under supervision of the court in order that clients may be protected from unjust charges." 33 REPORTS OF AMERICAN BAR ASSOCIATION (1908). As amended on August 31, 1933, the Canon read in pertinent part: "A contract for a contingent fee where sanctioned by law, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court as to its reasonableness." 58 REPORTS OF AMERICAN BAR ASSOCIATION (1908).

From the very beginning of their use, courts have pronounced with great frequency that contingency fees require "special scrutiny" because of the danger of overreaching. For a listing of cases so providing see Brickman, *Contingent Fees*, *supra* note 22, at 137 nn.96-97.

Despite these repeated incantations, with the exception of class actions, judicial scrutiny of contingency fees today — in an era when a million or more contingency fee cases are filed annually — is receding to the point of irrelevance. The occasional utterance is more than blotted out by the resounding silence.

which a substantial insurance payment or at least a minimum anticipated sum is likely to be tendered with little or no work by the lawyer.

The third method is one adopted by the ABA Standing Committee on Ethics and Professional Responsibility in response to a request for ethical guidance relating to charging standard contingency fees in the absence of assumption of any realistic fee risk (Formal Opinion 94-389).⁵⁰ In addition to invoking the reasonable fee mantra and effectively condoning and justifying the current practice of charging standard contingency fees in cases with high reward and little or no meaningful risk, the Committee did acknowledge one additional duty of the lawyer: to discuss "the nature (and details) of the [contingency fee] compensation agreement . . . [with the] client before any final agreement is reached."⁵¹

50. See Formal Opinion 94-389, *supra* note 16, at 1001:250-51; see also *supra* notes 15-19.

51. See Formal Opinion 94-389, *supra* note 16, at 1001:251. The ABA further provides:

The extent of the discussion, of course, will depend on whether it is the lawyer or the client who initiated the idea of proceeding with the contingent fee arrangement, the lawyer's prior dealings with the client (including whether there has been any prior contingent fee arrangement), and the experience and sophistication of the client with respect to litigation and other legal matters. Among the factors that should be considered and discussed are the following:

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

Id.

Because the factors to be discussed with the client *before* there is a fee agreement include the degree of risk that the lawyer will assume,⁵² it may be thought that the Committee sought to alter the status quo somewhat. As indicated earlier, however, contingency fee lawyers generally do not disclose to clients when meaningful risk is absent and substantial rewards are highly probable; moreover, clients generally have no independent basis for assessing risk,⁵³ and are rarely in a position to bargain over fees.⁵⁴ In addition, any attempt at bargaining is easily squelched by the valid but intentionally misleading assertions that contingency fees are standard throughout the community and that because all lawyers charge the same percentage, then the fee must necessarily be fair.⁵⁵

On closer analysis, therefore, the Committee's admonition amounts to mere lip service to the concept of the client giving her informed consent to the fee structure.⁵⁶ With Formal Opinion 94-389, the Committee did not intend to change, nor will the opinion change, the current practice of contingency fee lawyers charging windfall fees and taking advantage of clients' lack of knowledge of risk.

The key to understanding the strategy behind the drafting of Formal Opinion 94-389 — that is, of appearing to advance an ethical admonition while in fact endorsing the status quo — lies in focusing on how the bar will enforce the lawyer's obligation to "consider and discuss" the risk factors before entering into a fee agreement. It is the Committee's position that a lawyer, who according to the ethics code is "in a better position to evaluate a cause of action,"⁵⁷ will have fulfilled her ethical obligation by "explain[ing] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"⁵⁸ including information about risk as it relates to the fee structure, through *ex parte* dialogue with a generally unsophisticated client often rendered vulnerable and dependent by the traumatic effects of an injury or illness.⁵⁹ How would a fail-

52. Factors *a* and *g* and to a lesser extent, factors *b*, *c*, and *d* relate to the risk assumed by the lawyer. *Id.*

53. See BOK, *supra* note 36, at 140.

54. See *infra* note 59.

55. See Brickman, *supra* note 48, at 1429-30.

56. See Brickman, *Contingent Fees*, *supra* note 22, at 49-54, 70-74 (developing fiduciary concept of informed consent as it relates to fee bargain).

57. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-7 (1986).

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1995).

59. See *Burger Urges Limits on Lawyer Fees in Personal Injury Cases*, BOSTON GLOBE, May 14, 1986, at 17. Chief Justice Burger stated:

It is becoming more and more clear that in multiple disaster cases . . . , the

ure to fulfill this obligation be detected? There is no paper trail to which to point. Moreover, how will clients know that they have a right to the information required to be disclosed, and if clients do not know, then how will they know that the attorneys have deprived them of this information?

Even if clients were somehow to learn that their attorney had mulcted them by charging a standard contingency fee in a case devoid of both risk and any communication thereof to the client, there is little that clients could do. A complaint to a disciplinary agency would have little chance of success. As elaborated below, many disciplinary agencies do not accept jurisdiction over claims of excessive fees,⁶⁰ and instead relegate them to fee arbitration where arbitrators may disregard violations of ethics rules.⁶¹ Furthermore, most disciplinary agencies do not regard the failure to discuss the thirteen factors listed in Formal Opinion 94-389 with the client before entering into a contingency fee agreement as a violation of ethics rules. This conclusion applies with particular force to a failure to discuss the risk factors. Indeed, even when clients initiate complaints against contingency fee lawyers and allege fee abuses, these complaints almost never result in disciplinary action against the lawyers.⁶²

Nonetheless, the fourth method advanced by those claiming that ethical mandates are in fact applied to contingency fee abuses is reliance on disciplinary authorities to pursue violations of the Model Rules and the Model Code. It may appear that reliance on case-by-case enforcement is more rational because it involves a resort to an extant disciplinary mechanism and because bar counsel are the frontline troops in policing ethical abuses and therefore should be less reticent than courts to initiate disciplinary proceedings. Here too, however, case-by-case enforcement fails for many of the same reasons that judicial enforcement fails. Clients who are charged standard contingency fees in cases in which the lawyer has borne no mean-

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

Id.

60. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 714 (1994) ("Most bar disciplinary systems decline jurisdiction over fee-related disputes.").

61. See Lester Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 299-302; see also Margaret Jacobs, *Often, Fee Arbitration Isn't Such a Panacea, Especially for Clients*, WALL ST. J., Nov. 20, 1995, at B11.

62. See *infra* Part III.

ingful risk are not aware of the overcharging — even gross overcharging. Hence, the clients do not come forward and file complaints.

Even when clients do come forward, as indicated in Part III, they are virtually never successful. Moreover, although disciplinary agencies have the authority to act *sua sponte* and sometimes do, they almost never initiate actions charging violations of ethical rules that require risk as the basis for charging a substantial risk premium. This inaction results because disciplinary agencies typically do not regard lawyers who charge clients standard contingency fees in the absence of assuming meaningful fee risk as violating the ethics codes. This is true even if the overcharge is massive, as is the case when a lawyer knows in advance that an insurance company will almost certainly tender payment near or at the policy limits and that the case requires very little work. As counsel for a disciplinary agency recently observed in referring to such circumstances in which a one-third fee was charged: "The percentages provided in the agreement do not appear to be outside the range of contingency fees charged generally in such matters in this jurisdiction and thus do not present an issue of excessive recovery under our ethical rules."⁶³

This bar counsel effectively deleted the risk requirement in contingency fees from the ethics rules. Other bar counsel indicated they were of like mind. One noted: "The two most relevant facts are: (1) a contingency fee agreement was entered into and (2) grievant accepted settlement offer."⁶⁴ Not only do bar counsel ordinarily view standard contingency fees as insulated from ethical restraints, many also view complaints about fees not as issues of ethics, but rather as fee disputes — tar babies that they seek to divert to fee dispute mechanisms such as fee arbitration.⁶⁵

For these reasons, even when clients initiate complaints alleging fee abuses against contingency fee lawyers, these complaints virtually never result in disciplinary action being taken against the lawyer. Even a jury

63. Statement of a surveyed bar counsel, kept on file with the author [hereinafter Bar Counsel Statement]. To preserve the anonymity of the various bar counsel, any references to the bar counsel statements will cite to the generic "Bar Counsel Statement" for support, see *infra* text accompanying and following notes 75-77.

Some bar counsel view the four corners of the fee agreement as controlling and will not take cognizance of ethical violations in a contingency fee contract entered into between the parties: "Unless there were some unusual circumstances we would not go behind the contract signed by the client." Bar Counsel Statement. "[I]f that rule [(the state statute requiring contingency fee agreements to be in writing)] is satisfied, contract law would probably require enforcement of the contract and a disciplinary outcome is very unlikely." Bar Counsel Statement.

64. Bar Counsel Statement.

65. See *infra* Part VII.A.

finding that a lawyer failed to disclose to a contingency fee client that the case would likely be settled for policy limits with little effort and that charging a standard contingency fee under such circumstances violated the lawyer's fiduciary obligation to the client has been found to be an insufficient basis for public sanction.⁶⁶

Overwhelmingly, bar counsel not only totally disregard the ethics codes' requirements that the lawyer must be exposed to a fee risk in order to justify charging the substantial risk premium embedded in a standard contingency fee agreement, they additionally disregard the ABA Standing Committee's admonition that the lawyer discuss risk factors before entering the fee agreement. Thus, one bar counsel volunteered:

66. In *Richfield v. Heuser and Carr*, a Colorado law firm was sued by its former client because of an improper contingency fee representation. *Richfield v. Heuser and Carr*, No. 92 CV 1797, slip op. at 1 (Dist. Court, El Paso County, Colo., Div. 1, Jan. 13, 1994). The firm was required to return the contingency fee that it had retained from a settlement and was further barred from obtaining the reasonable value of its services after a jury found that the attorney "did not disclose to the plaintiff all of the facts of which they were aware which they knew or should have known would influence the plaintiff . . . to sign the [contingent fee] agreement" *Id.*

The plaintiff was injured in an automobile accident and while in the hospital entered into a contingency fee agreement with the defendant which provided that the law firm would receive one-third of any recovery obtained. *Id.* The plaintiff remained hospitalized for two weeks and incurred nearly \$12,000 in medical expenses. *Id.* at 2. Shortly thereafter it was discovered that the responsible party's insurance policy coverage was limited to \$25,000. *Id.* Before a lawsuit was filed against the insured and within four months of the accident, the insurance company agreed to pay the plaintiff \$25,000. *Id.* at 3. The attorney retained \$8,333.33 as his one-third contingent fee. *Id.* at 1.

The plaintiff contended that this fee was excessive because the attorney had failed to disclose the following information to her prior to signing the contingent fee agreement: (1) settlement without trial was a probability and would require little effort or legal skill; (2) processing the claim and obtaining a recovery would be accomplished essentially by clerical staff; and (3) the attorney would not know at the time of contracting whether a standard one-third contingency fee was fair or excessive, or whether some other fee arrangement would be preferable. *Id.* The jury found that the attorney had an obligation to make such disclosures before entering the fee arrangement, and because he breached that obligation, the attorney was not entitled to his contracted fee. *Id.* at 2-3. Based on the attorney's testimony that he personally worked on the case "in the ballpark of 15 hours," the jury found that the reasonable value of the attorney's services was \$2250 (15 hours at \$150 per hour). *Id.* at 3. The judge found this testimony "incredible," stating that "[i]t is difficult to imagine how a lawyer could spend 15 hours on a case such as this." *Id.* However, rather than adjust the quantum meruit award, the judge held that the attorney's breach of fiduciary duty was "serious" and "egregious" and that the contingency fee was a "gross overcharge," and therefore ordered the attorney to forfeit "all fees in connection with the case." *Id.* at 5.

These facts were brought to the attention of the Colorado Office of Disciplinary Counsel, which declined to institute disciplinary proceedings. (Letters on file with author.)

The fact (if established) that the attorney did little or no work to "earn" the fee would carry little if any weight as a disciplinary matter, given that the essential feature of the contingency agreement is that the client secures legal representation without advance payments in exchange for surrender of a known percentage of the recovery.⁶⁷

Stated simply, if a lawyer charges a standard contingency fee in a tort claim, then that essentially ends the ethics inquiry. There is no case-by-case enforcement of even gross abuses of ethical rules regulating contingency fee use. The failure of the disciplinary process is so massive that in the context of the ethical issues raised in this Article one may say that there are no ethical rules regulating the use of standard contingency fees. In addition to the survey results, analysis of both reported and unreported disciplinary cases confirms this conclusion.⁶⁸

67. Bar Counsel Statement.

68. Over the course of more than a half century of disciplinary enforcement of ethics codes and at least one hundred million standard contingency fee tort representations, there have been, at most, three cases in which lawyers have been disciplined for charging standard contingency fees in tort cases when ethically mandated commensurate risk was absent. That number was obtained by counting cases in which the disciplinary penalty was the result of more seriously regarded infractions. See *People v. Robertson*, 908 P.2d 96, 97 (Colo. 1995). In consolidated disciplinary proceedings brought against a lawyer, the court held that the lawyer violated MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) by charging a one-third contingency fee in an automobile accident case in which the responsible party's insurance company did not dispute liability and offered the full limit of the insurance policy to the plaintiff. Thus, there was "effectively no risk of nonrecovery and little work was performed on the client's behalf." *Id.* In two other disciplinary matters, the lawyer's misconduct involved contingency fee abuses, but also the more seriously regarded violations of conversion of client funds, abandoning clients, misrepresentation, and forgery. See Committee on Legal Ethics of the W. Va. State Bar v. *Gallaher*, 376 S.E.2d 346, 350 (W.Va. 1988); *infra* note 102 (providing discussion of *Gallaher*); see also *In re Swartz*, 686 P. 2d 1236, 1243-44 (Ariz. 1984) (holding that one-third contingency fee was "unreasonable and clearly excessive" because: "There was nothing novel or difficult about the case and it was not even necessary to file a legal action. At the most, only thirty hours of time were expended on the case."). For a critique of *Swartz*, see Brickman, *Contingent Fees*, *supra* note 22, at 86.

There are an additional 20 cases in which courts have disciplined lawyers for charging standard contingency fees for processing claims for life insurance proceeds, estate proceeds, personal injury protection (no fault) first party auto insurance proceeds, and courts have disciplined lawyers in similar nontort situations when there was no risk of nonrecovery and for combining standard contingency fees with other fees that, in toto, constituted "clearly excessive fees." See *In re Myrland*, 95 P.2d 56, 58-60 (Ariz. 1939) (disciplining lawyer who charged client one-third contingency fee to file and collect payment of creditor's claim against estate). In *Myrland*, the court described the lawyer's service as "something an ordinary law clerk could have done" because the claim was not contested or unrecoverable. *Id.* The court also noted that the law firm had requested that a fixed fee be negotiated in advance even if the claim was not contested. *Id.* The court held that the "fee charge is not only excessive and

unconscionable, but a ruthless disregard of the rights of the forwarding attorneys," who were authorized to charge their creditor/client only up to \$100. *Id.* at 60; *see also In re Zang*, 741 P.2d 267, 285 (Ariz. 1987), *aff'd*, 762 P.2d 538, 540 (Ariz. 1988) (stating that one-third contingency fee was "excessive" because lawyers "did nothing to earn a fee" for collecting medical payment received in error or for collecting property settlement which had been offered twice to client by insurance company before lawyers had been retained); *In re Kennedy*, 472 A.2d 1317, 1322 (Del. 1983) (concluding that 40% contingency fee was "clearly excessive" when client had "clear entitlement" to temporary total disability payments under Workers' Compensation statute); *Florida Bar v. Gentry*, 475 So. 2d 678, 679 (Fla. 1985) (finding that one-third contingency fee for recovery of client's personal injury protection (PIP) benefits was "excessive" because "[t]he noncontingent PIP benefits were paid over without undue hesitation on the part of the insurance carrier," and lawyer's fee was "based solely on the labor" of having carrier re-issue check); *Florida Bar v. Moriber*, 314 So. 2d 145, 148 (Fla. 1975) (concluding that one-third contingency fee was "manifestly improper" in case in which major asset of estate passed to client/beneficiary by operation of law and observing that case "frankly could have easily been performed by a layman"); *Florida Bar v. Winn*, 208 So. 2d 809, 810 (Fla. 1968) (affirming disciplinary board's finding that 50% contingency fee for recovery of property in divorce case was "extortionate" because client was entitled to deceased husband's share in estate held by entireties by operation of law of survivorship); *In re Cohan*, 396 S.E.2d 782, 782-83 (Ga. 1990) (finding that 50% contingency fee in case in which estate proceeds passed to client by operation of law violated prohibition against charging "illegal or clearly excessive fee," but lawyer was disciplined for his "false and fraudulent" representation to client "that he was billing her for services rendered by him in recovering assets" because fee violation was not alleged in complaint); *In re Gerard*, 548 N.E.2d 1051, 1057 (Ill. 1989) (concluding that one-third contingency fee was "excessive" in case in which elderly client mistakenly believed that her certificates of deposit had been stolen and that lawyer "recovered" them by telephoning client's banks); *In re Teichner*, 470 N.E.2d 972, 977-78 (Ill. 1984) (stating that 25% contingency fee for collecting "unquestioned, routine payment" under group life insurance policy was "not only in excess of a reasonable fee, but was unconscionable"); *Kentucky Bar Ass'n v. Newberg*, 839 S.W.2d 280, 281 (Ky. 1992) (finding that 45% contingency fee was "clearly excessive" based solely on recovery of basic reparation benefits paid by insurance company to administratrix of estate); *Westchester County Bar Ass'n v. St. John*, 350 N.Y.S.2d 737, 739 (N.Y. App. Div. 1974) (concluding that one-third contingency fee was "excessive" for processing insurance claim for accidental death benefits); *Cleveland Bar Ass'n v. Podor*, 647 N.E.2d 470, 470 (Ohio 1995) (finding that collecting contingency fee of 40% on both slip-and-fall settlement and HMO lien on settlement constituted "clearly excessive fee" under DR 2-106(A) and that such fee, in addition to attorney's conflict of interest, warranted six-month suspension that could be suspended if attorney completed two-year monitored probation); *Cuyahoga County Bar Ass'n v. Okocha*, 632 N.E.2d 1284, 1285-86 (Ohio 1994) (finding that charging "nonrefundable retainer" of \$12,000 plus 40% contingency fee, after first agreeing to "forgo any contingent fee as well as the retainer fee," "twice violated DR 2-106(A) (charging clearly excessive fee)," and, in addition to dishonesty and commingling client funds, warranted indefinite suspension); *Cincinnati Bar Ass'n v. Schultz*, 643 N.E.2d 1139, 1140 (Ohio 1994) (finding that contingent fee agreement authorizing collection of fee on any subrogated claims paid from client settlement or judgment and hourly rate charge if client discharged firm was "contrary to the shared risk of nonrecovery that a contingent-fee agreement represents;" also finding that collecting nonrefundable fees and not allowing client access to file until signing undated release warranted holding majority share-

III. Summary of Survey Results

To elicit the empirical data leading to this conclusion, I surveyed bar counsel and asked them to respond to a hypothetical "aggrieved client" letter sent to a disciplinary board. The letter set forth at least a *prima facie* case that a contingency fee lawyer, charging a standard contingency fee, had grossly overcharged the client. As conveyed in the letter, the lawyer almost certainly knew at the outset that the case was devoid of risk, that insurance policy limits or close thereto would almost certainly be tendered with little or no effort on the lawyer's part, and that the effective hourly rate of return to the lawyer would be at least \$1000 per hour and possibly as much as \$2500 per hour.⁶⁹

The responses to the survey divide into two broad groupings: (1) those who saw the issue raised by the hypothetical client letter as a fee dispute and therefore not involving any ethical issue or meriting any further interest from bar counsel (37.7%) and (2) those who indicated that the client letter would elicit further proceedings by the office of the disciplinary counsel (62.3%) — a group which included those that saw ethical issues raised by the lawyer's conduct set forth in the hypothetical client letter. Because the

holder of legal professional association vicariously liable for these disciplinary offenses by association's attorneys); *Lake County Bar Ass'n v. Lillback*, 535 N.E.2d 300, 301 (Ohio 1989) (noting that 25% contingency fee violated DR 2-106 in case in which lawyer "had nothing to do with obtaining the estate proceeds" for client and lawyer would have charged substantially smaller fee for his services had he billed hourly fee); *In re Taylor*, 5 DB Rptr. 1, 2-4 (Or. 1991) (finding public reprimand as sanction for charging standard contingency fee when lawyer knew insurance company would pay PIP benefits to client before being retained); *In re Richards*, 274 P.2d 797, 797 (Or. 1954) (stating that 50% contingent fee was "so exorbitant and wholly disproportionate to the services performed as to shock the conscience" in case in which 84-year-old client of "low grade education" was entitled to receive one-half the value of his wife's estate as her widower: "[t]here was no warrant in taking the business on a contingent basis" because "[n]o opposition was imminent and no legal problems of consequence were evident when . . . [the lawyer] made his contingent fee agreement") (citations omitted); *In re Hanna*, 362 S.E.2d 632, 634 (S.C. 1987) (finding that 40% contingency fee for collection of client's PIP benefits was "excessive" because "[n]othing was required by the [insurance] carrier for prompt payment . . . except that the application be completed"); *In re Stafford*, 216 P.2d 746, 747-48 (Wash. 1950) (concluding that 50% contingency fee was "exorbitant and unconscionable" when client was beneficiary of life insurance policy and "[n]o legal problems were involved" in collection of proceeds); *Committee on Legal Ethics of the W. Va. State Bar v. Tatterson*, 352 S.E.2d. 107, 112 (W.Va 1986) (determining that 33% contingent fee was "clearly excessive" for recovering life insurance payment when there was "never any legitimate doubt about the receipt of the proceeds").

69. See *infra* Part V (providing copy of Letter from Aggrieved Client to Disciplinary Agency used in survey).

hypothetical client letter raised multiple issues, the responses of the latter required analysis to isolate those bar counsel who identified the lawyer's gross overcharges by use of a standard contingency fee as the dominant ethical issue from those who saw other ethical issues as dominant.

Of those who saw that the lawyer's conduct raised ethical questions, most identified the dominant issues as violations of statutory fee limits, failure to communicate, failure to enter into a written contingency fee agreement, and failure to provide a closing statement. *The total number of bar counsel who clearly identified the gross overcharge as the primary issue was four out of fifty-three responses!* Even had these four bar counsel pursued the matter by instituting a disciplinary proceeding, based on an analysis of reported disciplinary cases in the United States⁷⁰ and extensive discussion with bar counsel regarding unpublished cases, the probability is extremely low — bordering on nonexistent — that even in so clear-cut an instance, the disciplinary agency would have disciplined the lawyer, let alone ordered her to refund a portion of the fee to the client.⁷¹

Thus, the data make clear that case-by-case enforcement is, in reality, a shibboleth — a stratagem advocated by those who want to give the appearance of active enforcement, but who in fact favor the status quo. At the disciplinary board level, there is essentially no enforcement of ethical mandates purporting to avert or even to deter gross overcharging by contingency fee lawyers.

IV. The Methodology

To determine the efficacy of the case-by-case enforcement method, a survey form was prepared and sent to all Puerto Rico's and fifty states'

70. See *supra* note 68 (listing disciplinary cases).

71. Apart from the views of bar counsel, the lack of enforcement may also be attributed to institutional factors. Thus, one bar counsel observed:

In relation to disciplinary proceedings and ethical violations [involving fee disputes], the burden is upon Bar Counsel to demonstrate by clear and convincing evidence misconduct (i.e., violation of an ethical rule). For these reasons, quite often a fee dispute does not rise to the level of an ethical violation (or at least an ethical violation which can be proved).

Bar Counsel Statement. Another bar counsel indicated:

Clients often fear overreaching in contingent fee agreements, and there is a common belief that contingent fees are "standard." Misconduct is very difficult to prove by clear and convincing evidence. . . . I don't have to tell you how much ambivalence lawyers bring to fees where professional responsibility is concerned.

Bar Counsel Statement.

disciplinary counsel listed in the ABA's *Directory of Lawyer Disciplinary Agencies*.⁷² The survey consisted of a cover letter explaining the purpose of the survey, a two-page hypothetical "client letter,"⁷³ a one-page questionnaire,⁷⁴ and a self-addressed stamped envelope. A second mailing and telephone calls followed the original survey. In total, sixty-six questionnaires elicited fifty-three responses — an 80.3% response rate.⁷⁵

Reporting the results of the survey required a decision whether to attribute responses to specific bar counsel, to bar counsel offices, or not at all. The survey inferred but did not promise anonymity.⁷⁶ Some bar counsel identified their office; a few identified themselves. I was able to identify the office of most bar counsel either from cases cited, identifications listed, or postmarks. This turned out to be critical in obtaining the very high response rate. Those offices that had not responded were subjected to a barrage of follow-up phone calls, faxes, and letters, leaving only the truly intransigent as nonrespondents.⁷⁷

72. Originally, 69 questionnaires were mailed out. The number of questionnaires exceeds the number of states because in some instances a state has more than one bar disciplinary agency, e.g., some are divided geographically. Puerto Rico accounts for three of the questionnaires and Ohio for seven. The total number of outstanding questionnaires was reduced to 66 when one state's bar counsel answered for his own office and two other offices in his state, and another state's bar counsel answered for both of its two state offices.

73. See *infra* Part V (providing reproduction of sample client letter).

74. See *infra* appendix I (providing copy of questionnaire).

75. I received responses from 53 offices. Fifty-one offices returned questionnaires, and two offices submitted a letter of explanation without a questionnaire. Of those responding by questionnaire, some also included a cover letter of explanation or a marked-up "client letter" or both.

For the two responses that sent a letter of explanation without including a questionnaire, their responses to Question One were deduced from the content of their letters. For a description of how this was accomplished, see *infra* note 86. Additionally, one bar counsel office returned two questionnaires. These two questionnaires, which were virtually identical, were combined to constitute one questionnaire from that state. All of the answers from this state's questionnaire were included in the statistics.

Although only the questionnaire responses were included in the statistics, the other materials submitted were used to aid in determining which issues the disciplinary counsel viewed as significant.

76. See *infra* appendix I (providing questionnaire). Question Nine stated: "(Optional) please identify the name of your office."

77. The cover letters stated that reading the client letter and filling out the questionnaire would only take a moment. One respondent answered the first six questions and in response to Question Seven, stated: "You said it would only take a moment. I have given you the moment you requested." Bar Counsel Statement. For Question Eight, the bar counsel responded: "See Answer to No. 7." *Id.*

In keeping with an unspoken promise, I have opted not to identify bar counsel by name or office. This accounts for the frequent reference in footnotes to "Bar Counsel Statement." In some instances, however, bar counsel cited to cases, and analysis of those cases played a significant role in classification of ambiguous responses. Without access to those cases, others could not subject my reasoning to scrutiny. Accordingly, I have listed the cases. In those instances when the case citations are reproduced, the bar counsel offices are thus effectively identified.

V. Letter from Aggrieved Client to Disciplinary Agency

The following letter was sent to sixty-nine disciplinary agencies:

Dear Sirs:

Four months ago, I retained Mr. Shane, an attorney, to represent me in a suit against Globus Trucking. One of their vehicles hit me while I was stopped at a stop light. I have been laid up for several months and I am only now getting back to work. Per the request of my lawyer who advised me that this was the standard arrangement, I signed a contingency fee agreement whereby I agreed to pay 33% of the gross amount of any settlement, 40% if it went to trial and 50% if the trial went to verdict.

My lawyer told me the case was worth several hundred thousand dollars. However, the settlement he obtained was for \$40,000. When I complained, he indicated the maximum insurance coverage available was \$50,000 and that litigating for the additional \$10,000 could jeopardize the entire recovery. His fee was \$13,333.00 and I received \$26,350 out of which I paid almost \$7500 in hospital and doctor bills which were not covered by my insurance; also not covered was \$8600 of wages which I lost while laid up.

I have tried to pay close attention to what has been going on — even calling from my hospital room. Most of the time, my lawyer was unable to come to the phone. Now I am trying to find out what work my lawyer did on this case. He keeps telling me that when he took the case he had no idea that there would be any recovery, though that is not what he told me then. When I asked for more details, he replied with answers like: I had to spend a lot of time convincing the insurance company to pay up, preparing for trial, investigating the accident, etc. When I asked for copies of correspondence, he replied that most of the work had been done by phone. When I asked him how much time he had spent, he replied that he doesn't keep time records but that the time required was considerable and that but for his considerable skill, there was a good chance that the offer would have been much lower.

Despite this, I believe that my lawyer overcharged me. Based upon the first few conversations I had with him, I think he was able to settle this in the first few weeks while doing very little work and he just strung me along for a few months so I would believe that more was going on. Can he do this? Is this ethical? Am I entitled to some refund?

Please respond at your earliest convenience.

Respectfully yours,

/s/

LB:lc

VI. Issues in the Hypothetical

I constructed the hypothetical with multiple issues for several reasons. One reason was that I was concerned that the bar counsel would too quickly conclude that this was a fee dispute to be relegated to an arbitration or mediation process and thus end their consideration of the questionnaire almost instantly. To engage these bar counsel in further examination, I presented additional issues in the hope that this would lead them to more considered thought about the fee issue. These additional issues, however, were collateral to my main purpose, which was to determine whether the bar counsel regard a lawyer's charging a standard contingency fee likely amounting to \$1000 to \$2500 per hour in a matter in which there was (1) no issue of liability, (2) very little work to be done — perhaps a few telephone calls or letters, (3) a virtual certainty of a substantial insurance payment, and (4) the foreknowledge of the above by the attorney at the time of contracting as raising a potential violation of DR 2-106(A) or Model Rule 1.5(a)'s proscription of charging excessive or unreasonable fees.⁷⁸ If most bar counsel do not perceive such facts to constitute a violation, then it is reasonable to conclude that there is no case-by-case enforcement of the ethical rules.

The collateral issues raised by the hypothetical included: (1) the lack of communication;⁷⁹ (2) questions of competence, i.e., whether the attorney properly investigated whether other assets were available in addition to the insurance proceeds;⁸⁰ (3) the lack of a signed retainer agreement;⁸¹ and

78. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1995).

79. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1995).

80. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.3 (1995).

81. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1995).

(4) the lack of a closing statement.⁸² The core ethical issue posed by the hypothetical, however, involved the charging of a standard contingency fee in the circumstances enumerated. One may analyze this issue as a matter of the fiduciary obligation of the lawyer to deal fairly with the client in fee-setting negotiations by presenting sufficient information to the client to enable the client to consent to both the fee structure and the fee.⁸³

It is the duty of the attorney to deal fairly with prospective clients and to avoid unilateral determination of the fee arrangement. This fiduciary obligation is mirrored in the ethics codes. In interpreting the Model Code, ABA Informal Opinion 86-1521 advised that "[a] lawyer normally has an obligation to offer a prospective client an alternative fee arrangement before accepting a matter on a contingent fee basis."⁸⁴ It appears quite likely that

82. *Id.*; see *infra* note 101 (compiling statistical information of collateral issues raised in hypothetical). Other less significant issues may be gleaned from the hypothetical. For example, one issue may be the attorney's puffing the value of the case in order to entice the client into retaining the attorney. The medical bills of the client amounted to \$7500 and lost wages were \$8600, and yet the attorney advised the client that the case was worth "several hundred thousand dollars." After the settlement offer, the attorney then stated that when he took the case he did not know if there would even be a recovery. This at least suggests that the attorney attempted to induce the client to enter into a retainer agreement by substantially overstating the likely outcome. This is a violation of DR 1-102(A)(4) and Model Rule 8.4(c).

83. See Brickman, *Contingent Fees*, *supra* note 22, at 49-70.

84. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986), *reprinted in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 901:310. The ABA addressed the question of "whether a lawyer has an ethical obligation to offer a client an alternative fee arrangement before accepting a matter on a contingent fee basis." *Id.* The ABA stated:

Although neither Rule 1.5 nor DR 2-106 states specifically whether a lawyer must offer an alternative fee arrangement, that issue must be addressed in a context of the "reasonableness" and "clearly excessive" tests of the Model Rules and the Model Code, the commonly expressed rationale for permitting contingent fees and the Comment to Rule 1.5 and the Ethical Considerations of the Model Code. The Comment to Rule 1.5 states: "When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications." EC 2-20 of the Model Code notes the rationale for permitting contingent fees and then states: "Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement." As noted in the EC, contingent fees are not necessarily improper even when the client has the money to pay a fixed fee; however, if the client is in a position to pay a fixed fee, the lawyer should permit the client to make the decision whether

the client was not offered a choice of a fee arrangement in place of the standard contingency fee agreement foisted on him by the attorney. In addition to the requirement that the lawyer offer the client a choice between a fixed or hourly rate fee instead of a contingency fee, "regardless of whether the lawyer, the prospective client, or both, are initially inclined towards a contingent fee," the lawyer had an obligation, as stated in Formal Opinion 94-389, to discuss with the client "the nature (and details) of the compensation arrangement" *before* entering into the fee agreement.⁸⁵

In applying the factors that the ABA Standing Committee opined a lawyer was ethically obligated to discuss with the client before entering into a fee agreement to the facts of the hypothetical case, it appears: (1) that success is likely (factor *a*); (2) that collection from the insurance company would not be difficult (factor *e*); (3) that the lawyer's investment in time would be minimal (factor *g*); and (4) that an hourly fee would be economically advantageous to the client (factor *h*). Therefore, the attorney should have disclosed to the client before proffering a standard contingency fee agreement: (1) that an hourly rate fee would have been in the client's interest; (2) that if the client nonetheless chose to enter into a contingency fee agreement, the degree of risk and the likely recovery would not justify charging a standard contingency fee; and (3) that virtually all risk of nonrecovery would be eliminated by waiting to enter into a contingency fee agreement with the attorney until after he had contacted the responsible party's insurance company.

Irrespective of the ABA factors, and of critical importance, it appears highly likely that the attorney charged a grossly excessive and unreasonable fee in violation of DR 2-106(A), DR 2-106(B)(8), and Model Rule 1.5(a).

to pay a reasonable fixed fee or to pay a percentage fee contingent on results. Similarly, under the Comment to Rule 1.5, when a client is in a position to pay a fixed fee, the lawyer should not seek unilaterally to determine whether a contingent fee is consistent with the client's best interest, but should provide the client with the opportunity to make that determination after consultation.

Id. at 901:311 (citation omitted). The opinion went on to state:

[W]hen there is any doubt whether a contingent fee is consistent with the client's best interest, which can normally be determined only in light of all the facts and circumstances after consultation with the client, the lawyer must offer the client the opportunity to engage counsel on a reasonable fixed fee basis before entering into a contingent fee arrangement.

Id. at 901:312.

85. Formal Opinion 94-389, *supra* note 16, at 1001:251 (emphasis added). The ABA's opinion lists 13 factors that the attorney should "consider[] and discuss[]" with the client before determining the compensation arrangement. *See supra* note 51 for a list of these factors.

The attorney collected a fee of \$13,333.00 for his representation, which occurred over a period of four months. However, from the facts presented by the client, it is highly probable that the lawyer negotiated the settlement after the expenditure of five to ten hours of the attorney's time, leading to the possibility that the effective rate of return was \$1300 to \$2600 per hour.

The letter written by the aggrieved client raised, if it did not demonstrate, the strong possibility that the lawyer knew at the time of his retention that given the severity of the injuries and the nearly complete absence of any issue of liability, Globus's insurance company would tender an amount close to the policy limit with little or no effort on the lawyer's part. By charging a standard (and therefore substantial) contingency fee under such circumstances, the facts in the letter present a strong basis for concluding that a violation of ethical mandates occurred. Indeed, it would appear that the attorney was well aware at the time of contracting that he would be obtaining a fee of \$1000 to \$2500 per hour (assuming five to ten hours of effort to obtain the settlement offer and the fee of \$13,333.00) — all this in the absence of any meaningful risk of a low or no fee recovery. At a minimum, the client letter raised the issues of whether the attorney informed the client at the time of entering into the fee arrangement that the insurance company would likely tender the policy limits with little work to be done by the attorney, and whether the attorney's failure to do so deprived the client of the information essential to giving informed consent to the proffered standard contingency fee agreement. Furthermore, the letter raised the issue whether that failure alone constituted charging an excessive or unreasonable fee.

Disciplinary counsel overwhelmingly did not perceive that the letter raised any ethical issue by charging a standard contingency fee in a case substantially devoid of any contingency.

VII. The Results of the Survey

A. Disciplinary Counsel Who Viewed the Hypothetical As a Matter for Fee Arbitration

More than one-third (twenty of fifty-three, or 37.7%) of the responses did not view the hypothetical as raising an ethics issue, but rather a fee dispute to be resolved through fee arbitration.⁸⁶ These disciplinary counsel indicated

86. For the bar counsel who sent letters of explanation in place of a questionnaire, I constructed an answer to Question One in keeping with the contents of the letters. One bar counsel letter made clear that they regarded the issue as a fee dispute to be resolved by a separate committee, the Committee for the Resolution of Fee Disputes. For comparative purposes, I listed their answer to Question One as 75%. The letter from another bar counsel identified the hypothetical as a fee dispute to be referred to the bar's Attorney-Client

that there was a high probability that referral to fee arbitration would occur on the hypothetical facts. For example, one stated that "virtually all [such complaints] are dismissed with or without a hearing."⁸⁷ This is supported by another bar counsel who stated: "If the documentation established that the attorney had taken the matter on the contingency as described, we would dismiss the disciplinary grievance while referring the client to the Bar's Attorney-Client Arbitration Board."⁸⁸

*B. Disciplinary Counsel Who Did Not View the Hypothetical
As a Matter for Fee Arbitration*

A majority of bar counsel (thirty-three of fifty-three, or 62.3%) did not view the hypothetical as simply, or primarily, a matter for fee arbitration.⁸⁹ Consistent with this position, 84.8% of this majority group indicated in response to Question Two that it was highly likely that the client letter would result in further proceedings by their office.⁹⁰ Not surprisingly, 90.9% of this group responded to Question Four that the likelihood was great that the attorney would be requested to supply more information.⁹¹ This indicates

Arbitration Board and not to be considered as an ethical violation. Accordingly, I listed their answer to Question One as 100%. Both of these answers were included in the statistics relating to Question One.

As explained *supra* in note 75, one bar counsel returned two questionnaires. As both questionnaires tracked each other's answers almost identically, one combined questionnaire was constructed and included in the statistics.

Accordingly, 20 disciplinary counsel responded that there was a 75% or greater likelihood the matter would be referred to fee arbitration and that no further action would be taken (Question One). See *infra* appendix III (presenting fee arbitration responses and analyzing 20 responses indicating likelihood of arbitration).

87. Bar Counsel Statement. In a similar vein, other bar counsel stated: "[T]his type of common complaint would ordinarily be referred to a fee arbitration program." Bar Counsel Statement. "It is very unlikely this type of grievance would be opened for investigation." Bar Counsel Statement..

88. Bar Counsel Statement.

89. Of the bar counsel responding to Question One, 30 responded that there was a 25% or less likelihood that the matter would be referred to fee arbitration. Although three disciplinary counsel did not respond to this question, their remaining answers indicated that they did not view the hypothetical as a matter for fee arbitration. Therefore, they would also fall into this category, bringing the total of those judging the likelihood of referral to fee arbitration at 25% or less to 33.

90. Twenty-eight of the 33 bar counsel in the majority group stated that there was a better than 75% likelihood that further proceedings would be instituted (Question Two).

91. Thirty of the 33 bar counsel in the majority group responded that there was a 75% or better likelihood that the attorney would be requested to supply more information (Question Four).

that these bar counsel believed that the lawyer's conduct raised ethical issues. Thus, a discontinuity appears in the data. Given the responses discussed so far, especially the responses to Question Two — concerning the need for further proceedings — it is reasonable to anticipate that the answers to subsequent questions would indicate that disciplinary proceedings would likely result in a significant number of instances and that citations to examples of similar disciplinary events would be provided. The survey results, however, contradict any such expectation. Question Three asks about the likelihood that a disciplinary event would result. Only seven of these thirty-three (21.2%) thought there was a 50% likelihood that a disciplinary event would result based on the client's letter and only two of the thirty-three (6.1%) thought there was a 100% likelihood that a disciplinary event would result.⁹² The significance of these responses is accentuated by the fact that although 78.8% of the majority group responded that they recalled having situations arise in their office similar to the hypothetical (Question Five),⁹³ they further indicated that only 50% of those situations resulted in a disciplinary event (Question Six). It appears then that bar counsel are indicating that whatever further actions they initially undertook, including seeking further information and instituting further proceedings,⁹⁴ these actions would rarely result in a disciplinary event. As one bar counsel concisely described it: "This matter would likely be evaluated and investigated, but then probably dismissed with referral to a fee dispute mediator."⁹⁵

To determine which bar counsel perceived the core ethics issue, I excluded from further consideration those bar counsel who answered "no" to Question Five, assuming that every disciplinary office has received at least some client complaints of gross overcharging by contingency fee lawyers.⁹⁶ Therefore, a response stating that the bar counsel did not "recall ever having situations arise in your office similar to the hypothetical in which

92. Fifteen of the 33 (45.5%) answered that a disciplinary outcome was unlikely. Nine out of 33 (27.3%) did not answer the question.

93. Twenty-six of the 33 bar counsel in the majority group recalled having a similar situation occur in their office and which resulted in a follow-up (Question Five).

94. This initially aggressive stance of the bar counsel is borne out by their comments: "We would definitely look into the matter as a disciplinary case" Bar Counsel Statement. "Since this case raises a spectra of fraud, it would be thoroughly investigated by Bar counsel and unless this attorney had a really good response (which I can't imagine) he would be in big trouble" Bar Counsel Statement.

95. Bar Counsel Statement.

96. As one bar counsel observed: "[C]lients often complain that the fees were excessive." Bar Counsel Statement.

your office had followed up" is the equivalent of stating such gross overcharges were not regarded as a disciplinable response.⁹⁷

From those twenty-six who answered "yes" to Question Five, I then excluded from further consideration those who answered "no" to Question Six, regarding disciplinary events in response to any similar complaints.⁹⁸ The basis for this decision is that the most reasonable explanation of why a disciplinary agency would fail to discipline a lawyer who engaged in conduct similar to that set forth in the hypothetical, when such conduct had been brought to the attention of the agency, is that the agency did not regard the gross overcharging by the contingency fee lawyer as a violation of the ethical requirements.⁹⁹

97. One bar counsel who responded "no" to Question Five, listed an on-point excessive contingency fee case, *In re Taylor*, 5 DB Rptr. 1 (Or. 1991), in which a lawyer retained to collect PIP insurance benefits knew before being retained that an insurance company was going to pay the claim, but charged standard contingency fees, which yielded him an hourly rate of \$280 to \$350. *In re Taylor*, 5 DB Rptr. 1, 2-4 (Or. 1991). The court found that the lawyer violated DR 2-106(A) by clear and convincing evidence necessitating a public reprimand. *Id.* Despite the definitiveness of a "no" answer to Question Five, I placed that bar counsel in the final group of four that perceived the core ethics issue because the case citation supplied was directly on point.

98. Of the 26 bar counsel who did not characterize the matter as one for fee arbitration and who had followed up on similar situations to the hypothetical that occurred in their office, 13 of the 26 answered that those follow-ups resulted in a disciplinary event (Question Six).

Two other bar counsel who recognized possible grounds for a disciplinary proceeding supplied citations. However, they were not included in the group of 13 bar counsel who indicated that situations similar to the hypothetical had occurred in their office and which had resulted in a disciplinary event. One bar counsel responded that although their office followed up on a situation similar to the hypothetical, no disciplinary event resulted, and the other bar counsel responded that no situations had arisen in their office similar to the hypothetical which led to a follow-up.

In confirmation of this decision, the former bar counsel cited a case not on point and responded that no disciplinary events had occurred in their office on facts similar to our hypothetical. See *In re Jones*, 889 P.2d 837, 838 (N.M. 1995) (giving two-year suspension for commingling client and office funds, using funds for attorney's personal use, and charging excessive fee because attorney performed no work). The latter bar counsel cited two cases, one of which was generally on point. *In re Taylor*, 5 DB Rptr 1, 2-4 (Or. 1991); see *supra* note 97 (discussing *Taylor* case). As noted, although this bar counsel responded that they did not have situations in their office similar to the hypothetical which were followed up, based upon the case citation, I advanced that bar counsel response into the final group of those who recognized the core ethics issue.

99. On one occasion, a bar counsel answering "yes" to Question Five and "no" to Question Six illustrated nonrecognition of the ethical violation by stating that the issues he or she perceived were a failure to communicate and the possible charging of a contingent fee in excess of a statutory limit.

As indicated, one-half of all responding bar counsel who did not characterize the matter as one for fee arbitration, stated in response to Question Five, that a similar situation arose in their office.¹⁰⁰ One-half of that group, or thirteen, answered in response to Question Six that these similar situations had resulted in a disciplinary event. Thus, the critical question becomes: On which ethical issues was that group of thirteen bar counsel focusing? Were they focusing on the violation of statutory requirements, a lack of communication, the absence of a signed retainer agreement, a lack of competence, or the excessive fee and core contingency fee issues?¹⁰¹

The answer may be found in the responses to Questions Seven and Eight. Question Seven asked that citations be given for the disciplinary outcomes generated by situations similar to the hypothetical. Question Eight asked for the number of such disciplinary events over the past ten years if they had not been reported.

Of the thirteen jurisdictions indicating that there had been previous disciplinary proceedings in circumstances similar to those contained in the hypothetical, only two listed citations to such proceedings. One dealt with the excessive fee issue in the broad context of a contingency fee agreement similar to the one set out in the hypothetical.¹⁰² The other citation dealt

100. See *supra* note 93 (stating number of bar counsel who recalled having similar situation which resulted in follow-up).

101. The disciplinary counsel who commented on the hypothetical, either directly on their questionnaires, by returning a marked-up client letter, or by enclosing an explanatory cover letter, noted many issues to be considered. Some responses indicated multiple issues while others indicated only one. See *supra* text accompanying notes 79-82.

In order of frequency, seven responses cited the attorney's failure to communicate; five noted the attorney's failure to account for or turn over the file to the client; four cited the excessiveness of the fee charged; two noted the apparent incompetence of the attorney, questioned the amount of the fee in general terms, noted the possibility that a settlement might have been reached without client approval, or noted that statutory fee limits were exceeded; and one indicated the attorney's lack of diligence, the lack of a written agreement, or the puffing of the claim's potential value.

102. See Committee on Legal Ethics of the W. Va. State Bar v. Gallaher, 376 S.E.2d 346, 351 (W. Va. 1988) (holding that 50% fee was excessive, but 33% fee was proper). In *Gallaher*, the claimant suffered an injury while a passenger in a car driven by her son and incurred medical bills in excess of \$2300. *Id.* at 347. Her son's insurance company offered \$726.25 in settlement, which she rejected. *Id.* The claimant, who could neither read nor write and had no prior experience with lawyers, then retained counsel. *Id.* She told her lawyer that she would not sue her son. *Id.* The claimant did not execute a fee contract and did not discuss fees with the lawyer. *Id.* The lawyer reviewed medical records and bills and made a demand on the insurance company. *Id.* Three weeks later, the insurance company offered \$4500. *Id.* The claimant's counsel accepted, only later obtaining the client's assent. *Id.* at 348. At that time, the lawyer said his fee would be 50% of the recovery. *Id.* The claimant stated that the lawyer said the insurance company would

with misrepresenting matters to a client,¹⁰³ indicating that the bar counsel either did not recognize or rejected the core excessive fee issue. Eliminating the latter response, the pool of bar counsel who had similar situations in their office that resulted in disciplinary proceedings, and who likely had in mind the excessive and unreasonable fee issue shrinks to twelve.

Of the twelve remaining responses, five questionnaires provided no explicit clues as to the driving force behind the bar counsel's answers. However, the fact that none of these five bar counsel cited to any published disciplinary proceedings similar to the hypothetical and failed to indicate that there were any nonpublished proceedings such as private reprimands, strongly indicates that they did not regard the excessive fee issue as *the*, or even *a*, dominant one in the litany of issues raised by the hypothetical. How else to explain that these bar counsel, who indicated that there had been previous disciplinary proceedings in their office in circumstances similar to those described in the hypothetical, failed to identify disciplinary proceedings involving contingency fee lawyers charging standard contingency fees in cases with a very high probability of a substantial insurance payment with little or no effort by the lawyer and thus an absence of risk? Accordingly, these five responses were eliminated.

From the remaining seven bar counsel who indicated that there were previous disciplinary proceedings in circumstances similar to the hypothetical, but who did not provide citations, comments on their questionnaires showed that four of the bar counsel did not regard the core fee issue as dominant. One bar counsel commented that "[t]he matter would likely be evaluated and investigated, but then probably dismissed with referral to a

pay all future medical bills — which it did not. *Id.* The attorney claimed to have worked 16.6 hours for an hourly fee of \$140. *Id.* The court concluded that the 50% fee was excessive and that it violated DR 2-106. *Id.* at 350. The court recited several facts to support its conclusion: there was never any anticipation that suit would be filed (due to the family relationship); it was clear that the claimant was prepared to accept a modest settlement; the lawyer's investment of time and skill was de minimis; and even though risk was involved, the fee was grossly disproportionate. *Id.* The court found a one-third fee reasonable, ordered the lawyer to refund the difference, and issued a public reprimand to the lawyer. *Id.* at 350-51.

103. See *In re Foley*, 604 N.Y.S.2d 467, 468 (N.Y. App. Div. 1993) (censuring attorney even after considering 36-year unblemished record when attorney misrepresented settlement offer to client, prepared fake closing statement, paid client from attorney's own account, falsely stated to workers' compensation carrier that claim had been settled, and paid carrier out of attorney's own funds). In addition to citing *Foley*, the bar counsel who answered that there was a 100% likelihood that more information would be sought, stated that "[a]ll complaints concerning an attorney's failure to properly account to a client for settlement funds are thoroughly investigated." Bar Counsel Statement.

fee dispute mediator,"¹⁰⁴ thus removing this bar counsel from the pool. Two questionnaires had comments indicating that discipline had previously been imposed for failure to communicate adequately with clients.¹⁰⁵ Another bar counsel commented: "Have no fee arbitration procedure. Upon further inquiry many 'fee' type complaints reveal possible violations of Model Rules 1.3, 1.4(a) or (b), 8.4(c)."¹⁰⁶ Because these Model Rules sections respectively deal with matters of diligence, keeping the client informed, explaining matters to clients so that the client may make informed decisions, and prohibiting fraud, dishonesty, deceit, or misrepresentation, it appears that neither this bar counsel, nor the bar counsel who indicated that the matter would likely be dismissed and referred to a mediator, nor the two bar counsel focusing on the attorney's failure to communicate considered the excessiveness of the contingency fee charged to be an issue. However, one bar counsel of the seven answered Question Seven "unearned fee — 6 mo-2 year suspensions"¹⁰⁷ and another answered Question Seven "private censure with return of portion of fee."¹⁰⁸ Based on these comments, it is reasonable to conclude that these two bar counsel focused on the core excessive fee issue.¹⁰⁹

Therefore, we are left with a total of four bar counsel who recognized the excessive contingency fee issue: the two bar counsel who had commented that they were concerned primarily with the excessive fee issue;¹¹⁰ the bar counsel who cited a disciplinary case on excessive fees in contingency fee cases;¹¹¹ and the bar counsel who cited an on-point excessive contingency fee case even though he answered "no" to Question Five¹¹²

104. Bar Counsel Statement.

105. Bar Counsel Statements.

106. Bar Counsel Statement.

107. Bar Counsel Statement.

108. Bar Counsel Statement.

109. Curiously, a search of case law in the jurisdiction of one of these two bar counsel revealed no instance of discipline for charging an excessive fee in a standard contingency fee context. *See infra* notes 132-34. Given the disciplinary jurisprudence of that state, it is doubtful that a successful prosecution could be mounted. The same is true for the state jurisprudence of the other bar counsel respondent. Nonetheless, I credited both responses as recognizing the core issue.

110. *See supra* notes 107-08.

111. *See supra* note 102 and accompanying text (discussing case that bar counsel cited involving excessive fee dispute). Even though I included this bar counsel's response in the final four, his answer to Question Three, based on the facts of the hypothetical and the work that his office would likely do, was that there was a small likelihood (10% to 25%) that the lawyer would be disciplined.

112. *See supra* note 97.

regarding whether a similar situation had arisen in his office. These four positive responses represent 7.5% of the total of fifty-three responses.¹¹³ The conclusion is clear: There is no case-by-case enforcement of the ethics codes' requirements that contingency fees be reasonable and not clearly excessive.

Conclusion

The claim of case-by-case enforcement of the ethics codes' admonition against unreasonable and clearly excessive fees in the contingency fee context is a pretextual practice utilized to maintain the status quo. It does not exist — even for the most flagrant violations. If there is to be any enforcement of ethical admonitions with regard to contingency fees, it will have to come from outside of the disciplinary process. But from where? The rejection by the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 94-389, of the request to permit contingency fee clients even the barest modicum of consumer protection would indicate that the self-regulatory process itself has failed in this area.

The success of the assault on ethical standards is instructive. If contingency fee clients are to receive any protection, it will not be from the ABA, the judiciary, or the disciplinary process. *Sed quis custodiet ipsos Custodes.*¹¹⁴

113. One of the four positive responses came from a bar counsel in a state that has never disciplined a lawyer for charging a standard contingency fee in personal injury representation when liability was not an issue and when the lawyer knew at the outset that a substantial settlement would likely be obtained with little effort. See *supra* note 109. Moreover, giving the benefit of the doubt to the five questionnaires that did not indicate that the primary focus of the disciplinary proceedings was based on the excessive fee issue, see *supra* text following note 103, still produces only a total of nine bar counsels — or just 17% of those polled — that recognized that an excessive contingency fee raised ethical issues necessitating investigation and possibly resulting in discipline.

114. JUVENAL, VI SATIRES, at line 347, quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 122 (Emily Morison Beck ed., 15th ed. 1980) ("But who is to guard the guards themselves?"). Plato effectively countered this question 300 years earlier: "What an absurd idea — a guardian to need a guardian!" PLATO, THE REPUBLIC, Book 3, 403-E, quoted in BARTLETT, *supra*, at 122 n.8. However, Plato never met the ABA.

Appendix I
The Questionnaire

1. What is the likelihood that your office would refer the sender to a fee arbitration service and that your office would take no further action?
____ 0% ____ 10-25% ____ 50% ____ 75% ____ 100%
2. How likely is it that this letter would result in further proceedings by your office other than simple acknowledgment of receipt or reference to a fee arbitration system?
____ 0% ____ 10-25% ____ 50% ____ 75% ____ 100%
3. What is the likelihood that as a consequence of this letter, a disciplinary event (defined as private censure or a more serious sanction) would result?
____ 0% ____ 10-25% ____ 50% ____ 75% ____ 100%
4. What is the likelihood that if your office received this letter you would request the attorney to supply more information?
____ 0% ____ 10-25% ____ 50% ____ 75% ____ 100%
5. Do you recall ever having a situation arise in your office similar to the hypothetical in which your office had followed up?
____ Yes ____ No
6. If your answer to the preceding question was "Yes" did the follow-up by your office ever result in a disciplinary event?
____ Yes ____ No
7. If there have been disciplinary outcomes of which you are aware generated by situations similar to the hypothetical described in the "client letter," please give appropriate citations.
8. If any of the disciplinary events remain confidential (such as private reprimands) how many such disciplinary outcomes have occurred in the last 10 years in your office?
____ (number)
9. (Optional) Please identify the name of your office.

Appendix II

Breakdown of Responses to the Questionnaire by Percentage

	Response					
	0%	10-25%	50%	75%	100%	No Answer
Question 1 (# of responses)	45.3% (24)	11.3% (6)	0% (0)	22.6% (12) ¹¹⁵	15.1% (8) ¹¹⁶	5.7% (3)
Question 2 (# of responses)	12% (6)	24% (12)	0% (0)	18% (9)	44% (22)	2% (1)
Question 3 (# of responses)	16% (8)	46% (23)	14% (7)	0% (0)	4% (2)	20% (10)
Question 4 (# of responses)	12% (6)	14% (7)	4% (2)	10% (5)	60% (30)	0% (0)

	Yes	No	No Answer
Question 5 (# of responses)	80% (40)	18% (9)	2% (1)
Question 6¹¹⁷ (# of responses)	50% (20)	37.5% (15)	12.5% (5)

115. This total includes the constructed response for one jurisdiction based on a letter response and not a completed questionnaire. *See supra* note 86.

116. This total includes the response constructed from one jurisdiction's letter of explanation and the combination of the two questionnaires submitted by one of the jurisdictions. *See supra* note 86.

117. Only those disciplinary counsel who responded "yes" to Question Five were included in the results of Question Six.

Appendix III

Fee Arbitration Responses

More than one-third (37.7%) of the responses viewed the hypothetical as raising a fee dispute to be resolved through fee arbitration rather than an ethics issue.¹¹⁸ Of the group who categorized the complaint as one for fee arbitration, 83.3% responded that it was unlikely that further proceedings would be instituted other than reference to fee arbitration.¹¹⁹ Not surprisingly, 61.1% of those bar counsel inclined towards fee arbitration were unlikely to request more information from the attorney.¹²⁰ A disciplinary event was not likely to occur according to 94.4% of those bar counsel inclined towards fee arbitration.¹²¹

118. Twenty disciplinary counsel responded that there was a 75% or greater likelihood the matter would be referred to fee arbitration and that no further action would be taken (Question One). *See supra* note 86 (explaining derivation of three responses).

Although most of these bar counsel wore fee arbitration blinders, some commented that disciplinary infractions might be present although they also concluded that a disciplinary result was unlikely to occur, *see infra* note 121. Some bar counsel comments included: "In this case, a [fee arbitration] panel may well recommend an investigation since the contingent percentages appear high (40% to 50%) and the attorney may have misrepresented developments in the case to the client [P]anels here are not impressed by a lack of time records and tend to hold that against an attorney in determining the reasonableness of the fee." Bar Counsel Statement. "The grievance would originally be referred to our fee grievance committee, and would only be further investigated if evidence that fee was clearly excessive or illegal, or if evidence of other misconduct." Bar Counsel Statement. "We would review to see if fees charged were extortionate or fraudulent." Bar Counsel Statement.

Another bar counsel noted: "Some complaints [similar to the hypothetical] have been referred to a hearing committee. Virtually all are dismissed with or without a hearing." Bar Counsel Statement.

Conversely, two bar counsel saw no issues worthy of discipline presented by the hypothetical. Their responses tracked each other and stated that the matter would be referred to fee arbitration, no further action would be undertaken by their office, there was no chance a disciplinary event would occur, no information would be requested from the attorney, and no similar situations had ever occurred in their office.

119. Fifteen of the 18 bar counsel choosing the fee arbitration route responded that there was a 25% or less likelihood that further proceedings would be instituted (Question Two).

120. Eleven of the 18 bar counsel inclined towards fee arbitration responded that there was a 25% or less likelihood that more information would be requested from the attorney (Question Four).

121. Seventeen of those 18 bar counsel inclined to refer the matter to fee arbitration replied that there was a 25% or less likelihood that a disciplinary event (defined as private censure or a more serious sanction) would result (Question Three).

Despite this categorical fee arbitration classification, 83.3% of bar counsel favoring arbitration responded that they recalled following up on a similar situation to the hypothetical.¹²² Furthermore, 46.7% of these bar counsel responded that their follow-up resulted in a disciplinary event.¹²³ How are these responses to be reconciled? Once again the critical question becomes: Even if the bar counsel perceived the matter as raising ethical issues, on which ethical issues were they focusing?

Of the seven responses indicating that follow-up of a situation similar to the hypothetical resulted in a disciplinary event, two indicated by their comments that they did not recognize, or rejected as an issue, the excessive contingency fee: "the fee dispute would be referred,"¹²⁴ and the "fee arbitration petitions are often accompanied by grievance complaints stating the same facts There are cases where the charges have included not paying a fee arbitration award."¹²⁵

Of the remaining five responses indicating follow-up resulted in a disciplinary event, two provided case citations. One was a disciplinary proceeding in which an attorney collected cumulative fees — thus missing the hypothetical's core issue of excessive contingency fees.¹²⁶ The other bar counsel, although citing a disciplinary proceeding holding a standard contingency fee to be excessive in the facts at issue,¹²⁷ nevertheless responded that

122. Fifteen of the 18 bar counsel recalled following up on a situation similar to the hypothetical in their office (Question Five).

123. Seven of the 15 bar counsel favoring fee arbitration who recalled having a situation similar to the hypothetical in their office responded that the follow-up by their office resulted in a disciplinary event (Question Six). It should be noted, however, that one of these seven responded that there was no chance that a disciplinary event would result from the hypothetical (Question Three), and that this bar counsel and another responded that there was a 100% likelihood that they would refer the matter to arbitration and take no further action. Although these responses conflict with their answers that follow-ups had resulted in disciplinary events in situations similar to the hypothetical in their offices, they are not problematic for our purposes because both bar counsel are ultimately eliminated for failing to recognize the core contingent fee issue.

124. Bar Counsel Statement.

125. Bar Counsel Statement. This bar counsel also commented on Question Four by stating that there was a 100% likelihood of requiring the attorney to produce more information, "but as part of fee arbitration initially."

126. See *Attorney Grievance Comm'n v. Harlan*, 578 A.2d 1196, 1201 (Md. 1990) (finding that attorney taking fee on damages recovered in tort action that were paid out to creditor in addition to fee already charged client was clearly excessive and mandated six-month suspension).

127. See *In re Swartz*, 686 P.2d 1236, 1248 (Ariz. 1984) (holding one-third contingency fee "unreasonable and clearly excessive" because: "There was nothing novel or difficult about the case and it was not even necessary to file a legal action. At the most,

a disciplinary event occurring on our hypothetical facts was unlikely. More importantly, his comments demonstrated his failure to recognize, or his rejection of, the excessive fee issue in the hypothetical: "If the failure to communicate were of longer duration (i.e., > 4 mos.), that aspect might trigger further investigation. There is also some indication that the lawyer accepted the settlement without client approval: we might follow up on that issue."¹²⁸

Of the remaining three bar counsel who indicated that follow-up resulted in a disciplinary event, two stated that discipline imposed on facts similar to the hypothetical would be private.¹²⁹ These two bar counsel, however, stated that there was a 75% likelihood that they would refer the sender to fee arbitration and take no further action, and that there was only a 10% to 25% likelihood that a follow-up disciplinary event would result. Although these bar counsel may have recognized the excessive fee issue as an ethical matter, it is more likely that they were referring to the failure of an attorney to submit to arbitration or to comply with the outcome of an arbitration and the ensuing disciplinary proceedings.

The remaining bar counsel commented that a client complaint of the sort in the hypothetical would "originally be referred to our fee grievance committee, and would only be further investigated if evidence" was discovered indicating that the "fee was clearly excessive or illegal."¹³⁰ Because of these comments, I searched that state's case law to determine the instances in which contingency fees were found to violate DR 2-106(A) and unearthed a total of seven disciplinary cases in which contingency fees and DR 2-106 played a role. Of these seven disciplinary proceedings, none dealt squarely with the ethical issue of charging a contingency fee in the absence of assuming any meaningful fee risk. The case closest to the core ethics issue was not even a disciplinary case.¹³¹ Of the disciplinary cases,

only thirty hours of time were expended on the case.").

128. Bar Counsel Statement.

129. Bar Counsel Statements.

130. Bar Counsel Statement.

131. See *In re Settlements of Betts*, 587 N.E.2d 997, 1005 (Ohio Ct. C.P. 1991) (finding excessive contingency fee). In *Betts*, upon an attorney's application for court approval of a settlement and for attorney's fees in a personal injury case involving two minors severely injured by a drunk driver, the probate court held that because "there never was any risk in this case of a non-recovery" against the "substantial insurance policy," the requested 33% contingency fee was too great in light of the eight factors contained in DR 2-106. *Id.* at 1004. Despite the total absence of any contingency, the court awarded 20% of the minor's recovery as "the reasonable value of such legal services." *Id.* at 1005.

only one broached the subject obliquely,¹³² while the others involved attorneys that altered the terms of the retainer agreement¹³³ or double-charged clients.¹³⁴ Accordingly, it is difficult to perceive the basis on which a bar counsel in Ohio — which has no private reprimand system — responded affirmatively to Question Six unless that counsel was referring to different ethical questions than those at the core of the hypothetical.¹³⁵ Therefore, none of the bar counsel who responded that a disciplinary event resulted from pursuing situations in their offices similar to the hypothetical appear to have recognized the core issue of excessive contingency fees.

132. See *Lake County Bar Ass'n v. Lillback*, 535 N.E.2d 300, 300-02 (Ohio 1989) (lying to probate court regarding source of guardianship funds and charging client one-third contingency fee in simple probate case, even though lawyer had nothing to do with obtaining the estate proceeds, warranted two-year suspension from the practice of law for violating DR 2-106 (excessive fees) and DR 1-102 (dishonest conduct)).

133. See *Akron Bar Ass'n v. Naumoff*, 578 N.E.2d 452, 453 (Ohio 1991) (finding that collecting \$14,744.30 contingency fee from client who had already signed an hourly retainer, under which the fee amounted to \$2400, and who had not agreed to switch to contingency fee warranted public reprimand and restitution).

134. See *Cleveland Bar Ass'n v. Podor*, 647 N.E.2d 470, 470-71 (Ohio 1995) (finding that collecting contingency fee of 40% on both slip-and-fall settlement and HMO lien on settlement constituted "clearly excessive fee" under DR 2-106(A) and that such fee, in addition to attorney's conflict of interest, warranted six-month suspension that could be suspended if attorney completed two-year monitored probation); *Cincinnati Bar Ass'n v. Schultz*, 643 N.E.2d 1139, 1140-41 (Ohio 1994) (finding that contingent fee agreement authorizing collection of fee on any subrogated claims paid from client settlement or judgment and hourly rate charge if client discharged firm was "contrary to the shared risk of nonrecovery that a contingent-fee agreement represents"; also finding that collecting nonrefundable fees and not allowing client access to file until signing undated release warranted holding majority shareholder of legal professional association vicariously liable for these disciplinary offenses by association's attorneys); *Cuyahoga County Bar Ass'n v. Okocha*, 632 N.E.2d 1284, 1286 (Ohio 1994) (finding that charging "nonrefundable retainer" of \$12,000 plus 40% contingency fee, after first agreeing to "forgo any contingent fee as well as the retainer fee," "twice violated DR 2-106(A) (charging clearly excessive fee)," and, in addition to dishonesty and commingling of client funds, warranted indefinite suspension); *Cuyahoga County Bar Ass'n v. Berger*, 597 N.E.2d 81, 82 (Ohio 1992) (finding that charging 50% contingency fee in 42 U.S.C. § 1983 action in addition to court-awarded attorney fees (giving lawyer more than 50% of total damages) and creating strict confidentiality agreement to hide settlements from bar association warranted one-year suspension); *Cincinnati Bar Ass'n v. Fehler-Schultz*, 597 N.E.2d 79, 81 (Ohio 1992) (collecting contingency fee of 33% of settlement in serious car accident in addition to 33% fee for reducing injured client's insurance reimbursement request (effectively collecting 50% of total fee which was in excess of the written contingency fee agreement), in addition to aiding a nonlawyer in practice of law, warranted indefinite suspension).

135. Nonetheless, I counted one of the Ohio bar counsel responses as indicating recognition of the core ethics issue. See *supra* note 107.

