

CONTINGENCY FEES IN AMERICA

With hourly legal billings going out of style in the last 10 years contingency fee arrangements have become standard not only in injury cases, but in commercial litigation, will contests, collections, civil rights, securities, and antitrust cases. Even “reverse contingent fees” are popular in matters like real estate tax appeals where a lawyer charges a percentage of what he saves the client by reducing the property tax bill.

However, as contingency fees become more common, they are coming increasingly under attack. “Contingent fees allow lawyers to routinely receive enormous windfalls in cases with no risk for performing what is essentially paralegal work,” charges Professor Lester Brickman, leader of the opponents. Defenders disagree “Plaintiffs’ attorneys who work on contingency perform a valuable service to the public because they take cases that the poor and middle class could not otherwise afford to bring.” Convinced that tort law favors Plaintiffs, the Tort Reform Association seeks to lower contingent fees to help Defendants like insurance companies. They agree with the U.S. Justice Department study on the liability insurance crisis which called for lowering Plaintiff’s contingency fees to 25% of the first \$100,000, 20% of the 2nd, 15% on the 3rd, and 10% of everything over \$400,000. Congress considered anti-contingency legislation in 1995; California had initiative measures on the ballot in 1988 and 1994. None of these were ever adopted because of heavy opposition from trial lawyers.

Why does American law allow contingency fees when they are prohibited in civil law and all other common law jurisdictions? Canada, England, France, and Germany agree it is unethical for lawyers to accept contingent fees for the reason that they put the lawyer’s interest ahead of the client’s and promote too much unnecessary litigation. “Doesn’t the U.S. have too much litigation?” they ask, and offer the contingent fee as one of the reasons.

The contingency fee has made more overnight millionaires than any business in America. When *Forbes* magazine interviewed the wealthiest lawyers in America they found that an overwhelming majority had made their fortunes on contingency fees. Is it time to admit that lawyers who win contingent fee settlements earn more than the time spent on the case justifies, and in many cases hundreds of times more than if they charged by the hour? Everyone believes so after the tobacco attorneys were successful in their fee claims. Private lawyers for the states in the recent tobacco case settlements became billionaires by collecting contingency fees from settlements that never went to trial. A majority of the public and the bar are starting to doubt that a lawyer should receive a percentage of a case that was certain to gain a settlement from the beginning, and where payment is made before it goes to trial. In the tobacco cases they suspect that part of the fees went back to politicians who selected the lawyer.

The practicing attorney, unfortunately, is caught in the middle of the contingency vs. hourly fee dispute. Clients dislike hourly billings; they also desire to tie their lawyer’s compensation to performance and to give him incentive to produce results. Value billing is therefore in style and is really another way of saying contingency billing because both are based on results of labor rather than time spent. Clients also suspect that their lawyer work harder and faster on a case when he is their partner. This is an important advantage of the contingency fee because some of

the most common complaints to Bar Associations about lawyers are their lack of time, attention, and diligence on the client's case.

The American bar should continue to allow contingency fees but should require attorneys to notify contingency clients in writing of alternative methods of payment, require written waiver of alternatives, and should lower the lawyer's percentage amounts over \$1,000,000 to a maximum of ten or twenty percent.