



June 22, 2000

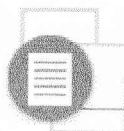
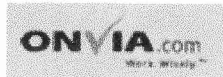
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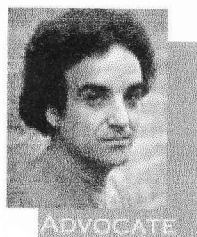
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Pricey Contingency Fees

By *David A. Giacalone*



ADVOCATE

There oughtta be a law.

People who've been injured need a law requiring that they be told their rights before they agree to a fee arrangement with a personal injury lawyer.

THIS!

You've seen the ads: lawyers promising they'll get us everything we deserve after an accident or injury. Sadly, despite their promises and ethical obligations, many lawyers take advantage of the public's ignorance of contingency fees — an arrangement that gives attorneys no fee unless they win the case.

Most people believe personal injury cases must be handled on a contingency fee basis and the fee level cannot be negotiated. Instead of telling clients about their rights, virtually every personal injury lawyer presents a contingency fee contract that states the "standard" or usual fee in that jurisdiction — one-third in many places, 40 percent in others.

As a result, injured consumers are forced into becoming partners with their lawyers — granting them a share of their claim to get representation. Clients with the best cases subsidize those with the weakest. Contingency fees have changed from a useful "key to the courthouse" for clients unable to afford a lawyer to being a lottery for lawyers, with decent odds of a hefty payout.

It's consumer ignorance that allows this to happen — along with a code of silence within the legal profession.

Law and Ethics

No state law requires injured consumers to hire personal injury lawyers on a contingency fee basis. And no rule sets the level of contingency fees. In fact, the "standard" contingency fee used by most lawyers is actually the maximum fee allowed in that state, meant to apply to cases where the lawyer risks doing substantial work without pay.

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Anyone injured and in need of a lawyer deserves to know:

- That you have the right to pay by the hour
- That you have the right to negotiate a fair contingency fee, one that reflects the risk the lawyer is taking in working many unpaid hours
- That you have the right to receive enough information from your lawyer to make an intelligent choice between an hourly, flat and contingency fee.

The concepts of client's rights and a lawyer's ethical responsibilities aren't radical notions; they're just radically different from what occurs in most personal injury cases. In 1994, the ethical principles that should be applied in every contingency fee situation were spelled out by the American Bar Association's Standing Committee on Ethics and Professional Responsibility — then totally ignored by the profession.

The principles are laid out in what's called Opinion 389, which requires the lawyer to fully inform the client "of all appropriate alternative billing arrangements and their implications," including the chance to work on a "reasonable fixed fee basis." A lawyer may not insist on a contingency fee and may not apply a standard percentage fee to each client. Instead, Opinion 389 stresses that the lawyer "should take all these factors into account in evaluating every case" and should discuss them with every client:

- The likelihood of success
- The likely amount of recovery, if the case succeeds
- The possibility of an award of punitive damages — damages awarded because the injury was so avoidable or despicable — or damages that are multiplied by state statute, and how that will affect the fee
- The attitude and prior practices of the other side with respect to settlement
- The likelihood of collecting any judgment
- The availability of alternative dispute resolution
- The amount of time that a lawyer is likely to spend on the case
- The likely range of the fee if the matter's handled on a non-contingency basis
- The client's ability and willingness to pay a non-contingency fee
- The percentage of any recovery that the lawyer would receive as a contingency fee and whether that percentage is fixed or on a sliding scale (depending, for example, on whether a settlement is reached before a complaint is filed, or a trial is held or an appeal is needed)
- How expenses of the litigation will be handled.

In short, the percentage fee charged should reflect how likely the client is to win, how much money is likely to be rewarded and collected, and how much work the lawyer is likely to have to do. When the defendant is clearly liable and has deep pockets (or even adequate insurance), a reasonable fee should be far less than one-third, because the lawyer is taking a very small risk and is adding very little to the value of the claim.

The Solution

With rare exceptions, the legal profession has shown no willingness to live up to these ethical standards. We don't have to ban contingency fees, as most

other countries have done, but we must give the choice back to the client.

It looks like legislation or court-mandated regulation is needed in every state to protect injured consumers from their own lawyers. Florida is the only state that protects consumers even partially in this area, by requiring that a Statement of Clients' Rights for Contingency Fees be given to each personal injury client — a brief statement informing clients that there is no set fee and they can negotiate the fee level. Although a good start, this isn't enough information for the consumer to bargain with intelligently.

A few years ago, a Washington-based legal reform group called HALT proposed an Injured Consumer Bill of Rights that would require lawyers to give clients information equivalent to that required in the ABA's Opinion 389 — enough information to allow them to make a smart choice in bargaining for a fair contingency fee.


Unfortunately, trial lawyer lobbyists now seem to have sway over the very politicians who might normally lead this consumer crusade. And judges seem quite reluctant to force their legal brethren to live up to ethical standards when it comes to contingency fees.

Until a legislative or regulatory solution arises, consumers will have to educate themselves and each other to assert their rights. It may only take a few price-oriented or rights-oriented ads for real competition to break out among personal injury lawyers.

Maybe those TV or Internet ads will finally promise, "We get you everything you deserve and take only what we deserve."

David Giacalone practiced law for more than 20 years — a decade at the Federal Trade Commission, then as a divorce mediator and children's lawyer. He recently hung up his lawyer's sword, preferring to use pen and PC as a consumer advocate. He currently resides in Rochester, N. Y.

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