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CONTINGENT FEES—A JUDGE'S PERCH

*The Honorable Charles Kocoras**

The question of whether the contingent fee financing of litigation in America should be repealed, curtailed or expanded is a subject more properly left to legislators and regulators, not to judges. We may have views on the subject, but we do not have singular wisdom about the values at play in the decision. Although most personal injury cases are handled in state court rather than in federal court, we have had a fair share of these and other kinds of contingent fee cases in federal court upon which to base some observations.

My personal view is that many cases which are brought by lawyers operating with contingent fee contracts have enabled plaintiffs to secure a measure of justice which would otherwise have been difficult or impossible to obtain. I have seen many cases which support that belief. So, in a general sense, the prohibition of contingent fee contracts as a method of financing litigation is a difficult argument to make. The more difficult questions are whether the attorney-client contingent fee relationship needs to be supervised or regulated and, if so, by whom and in what form.

Some may argue that contingent fee agreements should be controlled by the marketplace and that no regulation of these relationships is necessary. The theory is that willing plaintiffs bargain with willing attorneys, and the free market system is adequate to prevent unfairness and improprieties. The fallacy of this view is that the free market system requires a parity of knowledge on the part of the bargaining parties, and this circumstance rarely exists. Lay plaintiffs do not have the same ability to appreciate and evaluate risks of litigation, the nature and length of pretrial investigations and discovery, and a variety of other considerations commonly understood by experienced attorneys. There is neither parity nor equality in the bargaining positions of the parties.

It is also an undeniable truth that the nature of contingent fee relationships does, at times, create conflicts of economic interest between

* Federal District Judge for the Northern District of Illinois. An earlier version of this Comment was presented at the Third Annual Clifford Seminar on Tort Law and Social Policy, addressing Contingent Fee Financing of Litigation in America, Chicago, Illinois, April 4-5, 1997.

the lawyers on the one hand and their clients on the other. It is often unnatural for people not to act in their own economic self-interest, even when the ethics of their profession require it. The need for some potential or actual oversight is manifest.

So, who is best to do it? Are the judges who are presiding over the plaintiff's cause of action and are thereby familiar with many of the circumstances of the case the best choice? If you put that to a vote of the judges, we would probably say no. It is sometimes a difficult enough job to bring about a just result in the substantive disputes between parties. The idea of getting enmeshed in determining how much a client should pay his lawyer is distasteful and unappetizing. Lawyers' fee issues, whether arising as part of a contingent fee contract or by virtue of statutory or other types of considerations, do not rank high on a judge's menu of things he or she cannot wait to address.

But trial judges were not afforded the vote to oversee these matters—we have that responsibility and obligation by virtue of our office. Shortly after my appointment in 1980, the Seventh Circuit dealt with the precise question of the district judge's responsibility in contingent fee matters. In a personal injury case which had been removed to federal court on the basis of diversity jurisdiction which involved, among others, minor children as plaintiffs, the Seventh Circuit pointed out that counsel fees have been subjected to district court oversight when the client is unable fully to protect his own interests. Additionally, the Seventh Circuit added the following:

The district court's appraisal of the amount of the fee is also justified by the court's inherent right to supervise the members of its bar. See *Schlesinger v. Teitelbaum*, 475 F.2d [137, . . .] 141 [(3d Cir.), cert. denied, 414 U.S. 1111 (1973)] ("The district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established.") Even when the validity of the fee contract itself has not been challenged by the parties, it is within the court's inherent power of supervision over the bar to examine the attorney's fee for conformance with the reasonable standard of the Code of Ethics. *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 90-91 (1st Cir. 1970); *Elder v. Metropolitan Freight Carriers, Inc.*, 543 F.2d 513, 518 (3d Cir. 1976); *Cappel v. Adams*, 434 F.2d [1278, . . .] 1280 [(5th Cir. 1970)]. Cf., *Dunn [v. H.K. Porter Co.]*, 602 F.2d [1105, . . .] 1114 [(3rd Cir. 1979)] (district courts have authority to examine *sua sponte* attorney's fees pursuant to inherent supervisory power and the duties imposed by Fed. R. Civ. P. 23(e)); *In [r]e Michaelson*, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 [. . .] (1975) (court has authority to inquire into fee arrangements to protect clients from excessive fees and suspected conflicts of interest). The courts have not

automatically required the client to object to the fee agreement. As the First Circuit explained: "That a client, as here, remains willing to abide by his fee contract is relevant but not controlling, for the object of the court's concern is not only a particular party but the conformance of the legal profession to its own high standards of fairness." *Farmington*, 421 F.2d at 90 n.62. Courts have a stake in attorney's fees contracts; the fairness of the terms reflects directly on the court and its bar.

We do not, of course, imply that the court should *sua sponte* review every attorney's fee contract. An agreement between two freely consenting, competent adults will most often be controlling; courts rarely interfere with such contracts. But that restraint is based on the presumption that the parties can identify their own interests, can assess their bargaining position[s], and are equally able to assert their opposition. But those normal assumptions are not fulfilled here; in the circumstances of this case, the district court was right to be wary not to become an unwitting accessory to an excessive fee, see *Farmington*, 421 F.2d at 87.¹

It is interesting to note that my court, the Northern District of Illinois, recently abrogated a rule of procedure which required counsel to file an affidavit of ethical compliance at the outset of a case, along with a copy of any contingent fee agreement between party and counsel. It was the experience of the clerk's office that judges rarely sought review of the contracts.

Not having undertaken an in-depth or critical study of the field of contingent fee contracts, I do not feel adequate in recommending the best form of regulation appropriate to the subject. I do hold the view that some form of oversight is clearly necessary. The law I administer visits that obligation upon me as a jurist and, so long as it does, like it or not, I will do my duty.

1. *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982).

