THE CONTINGENT FEE A RE-EXAMINAE

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"The best service of the professional man is often rendered for no equivalent or for trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward."[1] This quote may embody the essence of the legal profession and practice in the idealistic sense but a more modern and practical view would be: "The legal profession cannot remain a viable source in fulfilling its role in our society unless its members receive adequate compensation for services rendered . . . ."[2]

In early legal forms each party to an action pleaded his own case. Then in Athens, and later in Rome the idea of personal representation was introduced. With it came the problem associated with fees. At first no fees were charged at all. Instead a system of *honorarium* existed whereby a voluntary gift from the client was the only remuneration the attorney could expect. This presumed that the attorney had in some way a personal connection with the client instead of a professional one and the attorney had an honourable duty to assist in the administration of justice, which honour would be offended by the sale of his legal services.[3] This voluntary gift from client to attorney was exactly that; a gift or present, and the client was under no legal obligation to pay. This Roman view was carried over into the Court of Chancery and left a permanent impression on English Law as is summed up by Blackstone: "[I]t is established with us, that a counsel can maintain no action for his fees; which are given . . . not as salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation, as is also laid down with regard to advocates in the civil law . . . ."[4] This inflexible rule of the bar of England exists today and a barrister in England cannot maintain an action for his fees.[5] It has, however, long been the law of Canada that a solicitor/barrister can bring an action to enforce payment of his fees, and this is generally embodied in the statutes of the provinces.[6] As a further sophistication of the system, a solicitor's lien exists both at common law and by statute whereby the solicitor can retain property in any deed, paper, or personal chattel which came into the lawyer's possession in the course of his employment until he shall have been paid his costs due him in his professional capacity.[7] Recognition is given to the right of lien in the *C.B.A. Code of Professional Conduct* with guidelines for its usage outlined: "Generally speaking the

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1. R. Pound, *The Lawyer from Antiquity to Modern Times* (1953) 10.
2. *A.B.A. Code of Professional Responsibility and Code of Judicial Conduct* (1976) EC2-16 (hereinafter referred to as the *ABA Code*).
3. E. Wood, *Fee Contracts of Lawyers* (1936) 2.
4. 3 *Blackstone's Commentaries on the Laws of England* (1897) s. 28.
5. *Hodgson* v. *Scarlett* (1818). 1 B & Aid. 232; 106 E.R. 86 (K.B.).
6. *See* M. Orkin, *Legal Ethics* (1957) 145 n. 1; specifically *The Law Society Act*, R.S.M. 1970, c. L100, s. 40.
7. *Ackerman* v. *Lockhart*, [1898] 2 Ch. 1 (C.A.); *The Law Society Act*, R.S.M. 1970, c. L100, s. 51.

lawyer should not enforce his lien if the result would be to materially prejudice the client's position in any uncompleted manner."[8]

> The method by which a professional service is financed is a major factor in determining, in the long run, its quality and the extent of its availability to all members o the community. Together with court costs and expenses of litigation, lawyers' fees make up the bill which must be paid by those who use the courts for resolution of civil controversies; therefore, fees are intimately associated with the practical effectiveness of our system for the administration of justice.[9]

Fee contracts of lawyers with clients are of two distinct types: the retaining fee contract, and the fee contract for legal services. The retaining fee contract "is an engagement fee; that is, a fee to engage and hold an attorney to render services to a client . . . ."[10] The client gives money to retain the services of the lawyer of his choice and creates an obligation on the part of the lawyer to consider his professional services engaged and held by the client for such retaining fee. The retaining fee contract may be express, oral or written, depending on the general law of contract and the terms of the retainer.

The fee contract for legal services creates an obligation on the part of the client to pay his lawyer compensation for his professional services and may be express or implied. Unless such an express or implied fee contract exists, no compensation whatsoever for professional legal services can be recovered. This system of fee payment results in a certain hourly fee being charged for the work done by the lawyer. The elements of express fee contracts for legal services are certainty of terms, mutual consent, consideration, a subject matter concerning legal services, and competent parties. Generally, when entering into any agreement with a client, a lawyer must not take advantage of his position to impose any undue influence or pressure on his client. Accordingly, unintentional strong language used by a solicitor representing to a client that, unless he enter into an agreement as regards remuneration the suit would be lost, has been held to constitute undue influence on the client, resulting in a lack of independent mind of the client, and rendering the fee contract void.[11]

The Contingent Fee

The contingent fee contract is a form of the fee contract for legal services. It is sometimes called a "speculative action" and has been the source of much judicial criticism as regards its use particularly in contentious matters.[12] In some provinces the use of contingent fee contracts is specifically prohibited by statute.[13] More specifically, the contingent fee contract can be defined as:

> a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for the client, the lawyer is not entitled to a fee.[14]

8. *C.B.A. Code of Professional Conduct* (1974) 45, s. 10 (hereinafter referred to as the *CBA Code*).
9. F. MacKinnon, *Contingent Fees for Legal Services* (1964) 3.
10. *Saulsbury* v. *American Vulcanized Fibre Co.* (1914), 91 A. 536, 541 (Del. Super. Ct.).
11. *See Preston* v. *Nugent* (1900), 13 Man. R. 511 (K.B.).
12. B. Arlidge, "Contingent Fees' (1974), 6 Ottawa L. Rev. 375, 382-83.
13. *E.g. The Solicitors Act*, R.S.O. 1970, c. 441, s. 30.
14. *Supra* n. 9.

Before the lawyer is entitled to his fee he must complete the performance required by the contract, a task usually put in such terms as "to recover damages" or to "effect a full and final settlement." It should be noted that the fee is computed on the basis of the amount actually received by the claimant or his lawyer, and not the amount set forth in a settlement agreement or judgment of a court. A fee measured by contingency is quite different from the other fee contracts mentioned above, those not being measured by the results. The amount of compensation for legal services based on services rendered is obviously affected by the benefit to the client and is measured after the service is performed. The fundamental aspect of the contingency fee arrangement which differs from that of the retaining fee contract and the fee contract for legal services is that the agreement is usually made before the action is commenced. A contingent fee contract for legal services is never implied; it must be express and between attorney and client.[15] The court cannot create contingency fees.[16]

It must be noted that the client is usually liable for the costs and disbursements of the lawyer whether he wins or loses. However, variations on the liability of the client for costs, etc., can be made terms of the contract. The most common format for a contingent fee contract is a stipulation that the lawyer is to receive a certain percentage of the recovery. Variations of this include a decreasing or increasing percentage depending on the size of recovery, stage of proceedings, etc., or simply a flat percentage. With other forms of contract between lawyer and client, and under the contingent contract, the client is free to discharge the lawyer at any time, with or without cause.[17] The lawyer does not have such freedom.

As noted previously, the contingency contract for fees has been and still is a contentious issue in itself. Much of the argument and criticism can be recognized from the history of the contingency agreement. In medieval England, from whence Canada and at one time the United States obtained the Common Law, there developed, in reaction to abuses real and supposed, a body of prohibitive laws and principles that we know under the exotic names of barratry, maintenance, and champerty. Today in England and Canada those principles are archaic, if not dead,[18] but their ghosts linger on and, beyond question, those ancient laws have shaped and moulded our present attitudes, laws, and ethics respecting contingent fees. Barratry consists of the repeated stirring up of lawsuits and quarrels by one who is a stranger to them; the target is the officious troublemaker and the essence is the repeated action. Maintenance is defined as "where one officiously intermeddles in a suit . . . which in no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit."[19] Champerty is derived from *cambi partia* (division of the field)[20] and occurs when the person maintaining another stipulates for a share of the proceeds. It is apparent therefore, that there can be no champerty without

15. *Ellis* v. *Woodburn* (1891), 89 Cal. 129; 26P. 963 (Cal. S.C.).

16. *Crumlish's Administrator* v. *Shenanduah Valley R.R.* (1895), 40 W. Va. 627, 22 S.E. 90 (C.A.).

17. *See Supra* n. 8, c. XI.

18. *See Criminal Law Act 1967*, 1967, c. 58, s. 13 (U.K.); *Criminal Code*, R.S.C. 1970, c. C-34, s. 8.

19. *Neville* v. *London "Express" Newspaper Ltd.*, [1919] A.C. 368, 378-79 (H.L.).

20. From *campus*, a field, and partus divided: *Black's Law Dictionary* (5th ed.) 186.

maintenance but not *vice versa*. The Common Law condemns champerty because of the abuses it might bring, such as the temptation of the maintainer to inflate damages or suppress evidence, etc., for his own personal gain. It was considered to be against public policy that litigation should be promoted and supported by those who had no concern in it: "This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression."[21] The connection between contingency contracts and these ancient crimes should be obvious. The lawyer, by entering into a contingency arrangement with his client is "maintaining" the client during the time of the trial,[22] and in a champertous manner is expecting, and indeed is contracting for, a share of the proceeds of that trial, if successful. The contingency lies only in the fact that there is no recovery whatsoever if the suit is unsuccessful or settlement is not achieved.

There are some recognized exceptions to the general rule against maintenance, the first being charity; so long as there is no mercenary bargain in addition to the charitable motive,[23] and where litigants have a common interest in the subject matter or result of the litigation, for example, husband and wife, parent and child.[24] In England, where the rigidly entrenched abhorrence of contingency contracts has remained steadfast, the *Attorneys' and Solicitors' Act, 1870*[25] allowed solicitors to enter into binding agreements with their clients where the amount of remuneration might be measured by percentage or commission. It must be noted that these current provisions pertain to noncontentious matters only. The unequivocal disdain of such a use in contentious issues is noted by Lord Denning in *In Re Trepca Mines Ltd. (No. 2)*[26] where he elicits the support of Section 65 of the *Solicitors' Act, 1957.*[27]

In Canada, the common law crimes of maintenance and champerty were abolished as crimes in 1954.[28] However, by reason of the provincial property and civil rights jurisdiction, and the thrust of the case law, it seems clear that the Provinces have the power to abolish maintenance and champerty as civil wrongs, but no Province has yet done so. All but Newfoundland, Saskatchewan, Prince Edward Island, Ontario, Nova Scotia and the Yukon recognize contingency contracts in one form or another as being acceptable methods of remuneration.[29]

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21. 4 *Blackstone's Commentaries, Supra* n. 4, at s. 12.

22. In essence, the lawyer is keeping the strife alive.

23. *See Holden* v. *Thompson,* [1907] 2 K.B. 489, at 493.

24. *See Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1 at 11.

25. 33 & 34 Vict., c. 28 (U.K.).

26. [1963] Ch. 199, 220 (C.A.).

27. "Nothing . . . shall give validity to any purchase by a solicitor of the interest . . . of his client in any action suit or other contentious proceeding." *Solicitor's Act, 1957,* 1957, c. 27, s. 65(1)(a) (U.K.).

28. *Supra* n. 18.

29. *See The Judicature Act,* R.S.A. 1970, c. 193, s. 40, and *The Supreme Court Rules* 615-18, 646, Alta. Reg. 390/68; *Legal Professions Act,* R.S.B.C. 1960, c. 214, s. 108, as am by S.B.C. 1969, c. 15, s. 20, and *The Supreme Court Rules, 1961,* Order 65, Rule 27, Reg. 29; *Judicature Ordinance,* O.N.W.T. 1970 (3rd Sess.), c. 5, s. 25(1); *Bar Act,* S.R.Q. 1964, c.247, s. 39, and By-Law #1 of the Bar of the Province of Quebec, Arts. 86, 87: *Professional Conduct Handbook of the Barristers' Society of New Brunswick, 1971* (1971) Arts. 3(2), 31(8), 37, and Rule E-2, as authorized by *Barristers Society Act, 1931* S.N.B. 1931, c. 50, s. 11(6).

The Province of Manitoba is considered a maverick jurisdiction because it has statutorially authorized the making of "contingency contracts" between lawyer and client since 1890.[30] If that statute were not enough in Manitoba to preclude any doubt of the validity of such agreements, the case of *Thomson* v. *Wishart* settled the question.[31] In that case the client refused to pay a contingent fee of 50%, claiming that the contract was illegal due to its contributing to maintenance and champerty. Perdue, J.A. based his decision on the statute of the Parliament of Canada enacted to introduce into Manitoba the laws of England as of July 15, 1870, relating to matters within its jurisdiction.[32] Part of that enactment was the *Criminal Code,* stipulating that the criminal law of England "in so far as it is applicable to the Province of Manitoba" on July 15, 1870, shall be the criminal law of Manitoba.[33] Perdue then concluded that maintenance and champerty were not "applicable," in that the settlers of Rupert's Land 1670 had no courts or litigation and no need for champerty; the charter of the Hudson's Bay Company did not introduce all the laws of England into Canada, and therefore Section 65 of *The Law Society Act,*[34] which allows an attorney or solicitor to make an agreement with his client for a share in the recovery of the suit, is not *ultra vires* the Province as opposing the criminal law of Canada.

Today, *The Law Society Act*[35] governs the making of contingency agreements between lawyer and client. Section 49(2) requires that the client be furnished with copies of the agreement and of the provisions of the *Act* pertaining to the client's rights to challenge the agreement as unfair or unreasonable to him. Queen's Bench Rule 638A(3) requires filing of any such contingency agreement with the Prothonotary once the action is instituted.

The following is a summary of the numbers and kinds of contingent fee contracts filed in Manitoba as of November, 1978 as compiled by the author:

Contingent Contracts Filed in Manitoba

Years:	No.	Year:	No.
1956-1960	2	1970	8
1961-1965	20	1971	8
1966-1970	43	1972	8
1971-1975	23	1973	3
1976-1978	27	1974	2
		1975	2
		1976	10
		1977	10
		1978	7
			(as of Nov/78)

30. *An Act to Amend Certain Acts,* S.M. 1890, c. 2, s. 37; *see also The Law Society Act,* R.S.M. 1970, c. L100, s. 49.
31. (1910), 19 Man. R. 340 (C.A.).
32. *An act respecting the application of certain laws therein mentioned to the Province of Manitoba,* 51 Vict., c. 33.
33. R.S.C. 1906, c. 146, s. 12.
34. R.S.M. 1962, c. 95.
35. R.S.M. 1970, c. L100 (hereinafter referred to as the *Act*).

Type of suit	1970	1971	1972	1973	1974	1975	1976	1977	1978
personal injury	6	6	7	1	2	2	9	9	6
insurance	1		1	1					1
estate	1			1			1		
contract (loan)		1							
other								1	

The most common percentage fee charged was 33⅓% but some percentages did go as low as 20% and as high as 50%. Some contracts stipulated an increase in the fee charged if the case should go to trial as opposed to being settled out of court. For example: if the case is settled the fee is 25% of general damages, 20% of special damages. If the case were to go to trial the fee was to increase to 30% and 25% respectively. A less common term of some contracts stipulated that disbursements were to be paid only if the client were successful in his suit.

The *CBA Code* in Chapter X provides that a lawyer "should not(a) stipulate for, charge or accept any fee which is not fully-disclosed, fair and reasonable." Such is extended to contingency fees as well.[36] It has been established that "fair" refers to how the agreement was entered into and "reasonable" refers to the quantum of money to be received by the lawyer.[37] It has been held that a solicitor's recovery of 40% of damages plus $1,000 of taxed costs was unreasonable in view of the total settlement of $10,000, where the case was not technically difficult. In *obiter* the Judge took the view that a client should be informed by the solicitor of some notion of the expected results (amount) in advance.[38] In Manitoba, non-compliance with the requirements of the *Act* for contingency contracts results in the contract being set aside. Remuneration is assessed as what would have been obtained had no such contract been entered into. In one recent case, a lawyer was disciplined by the Judicial Committee of the Law Society of Manitoba for non-compliance.[39] In that case the contract was not reduced to writing, not filed with the Prothonotary, and no copies of the Sections of the *Act* were supplied to the client. The lawyer was found guilty of unprofessional conduct or conduct unbecoming a barrister. The Committee made reference to and distinguished the case of *Wozniak* v. *Osborne*[40] where a lawyer had failed to file the contract but had put the document before the court when it came time to deal with the questions of costs. The Judge in that case preferred to regard the failure to file as inadvertence.

Arguments Pro and Con

The arguments for and against contingent fee contracts continue; few new and startling issues or proposals come to the surface. The question is really one of economics. Both positions involve cynical attitudes about the administration of justice and the role of lawyers who carry with them their own moral, ethical, personal, financial, and professional interests. One

36. For guidelines to fee assessments generally, see the commentary on Chap. X of the *CBA Code.*
37. *Galbraith* v. *Murray,* [1920] 3 W.W.R. 120 (Man. K.B.).
38. *Re MacFarlane and MacLaughlin* [1975] 1 W.W.R. 764 (B.C.S.C.) (per Hutcheon J.).
39. Unreported, referred to in Minutes of the Meeting of the Benchers, Law Society of Manitoba (Sept. 30, 1976).
40. (1960), 33 W.W.R. 559 (Man. Q.B.).

must be generous but practical, objective but not naive, when assessing the arguments.

There is an old English idea that litigation is inherently evil, or at least not desirable, and it is recognized at least by some that contingency agreements can increase the number of ill-founded suits brought: "The contingent fee certainly increases the possibility that vexacious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of poverty of the claimants . . ."[41] It is to be hoped, however, that lawyers would be dissuaded by good judgment from taking on ill-founded suits, particularly on a contingency basis. While it has been suggested that the lawyer's judgment is clouded by his own self-interest, in the United States, lawyers are prohibited from handing cases which are instituted purely for harassment or malice. It is felt that if this rule were rigidly enforced one of the major arguments against contingencies would disappear.[42]

On the other hand, there are most certainly clients whose justified and valid claims to justice have been furthered by the existence of contingency agreements. The courts today are used to resolve and fight such issues as racism, destruction of the environment, welfare rights, which are often brought by poor people. In the United States there is no overall government-sponsored Legal Aid system and local assistance programs refrain from taking cases which the private bar would handle on a contingency. In Manitoba the Legal Aid scheme would assist many persons with worthy legal claims. It should be remembered that persons must meet certain income requirements to qualify for assistance under the scheme; it is probable that some persons who do not qualify will find contingency contracts necessary to further their actions. The Legal Aid scheme refuses, on policy alone, to handle personal injury suits unless the private bar declines to handle the case on a contingency. Some members of the profession in Manitoba are adamantly in favour of contingencies to the extent that they insist that everyone, including persons who otherwise would qualify for Legal Aid, should be able to choose contingencies as a form of fee payment.[43] It must not be overlooked that there are some provisions in the Queen's Bench Rules of Manitoba to assist needy persons in payment of legal fees and such payments can be directed to be paid out of moneys recovered.[44]

The *Law Society Act* and the *CBA Code* make no distinction between entering into a contingency with clients who can otherwise pay and those who cannot. The *ABA Code* accepts contingency fee contracts as ethical because they are the only means by which some can pay legal fees, but goes on to state that it is also acceptable to contract on this basis with persons who can pay the normal fees.[45] Another rule of the *ABA Code* states that such agreements should be entered into "only in those instances where the

41. M. Radin, "Contingent Fees in California" (1940), 28 Cal. L. Rev. 587, at 589.

42. A. Kraut, "Contingent Fee: Champerty or Champion?" (1972), 21 Clev. St. L. Rev. 15, at 24.

43. Special Committee on Contingency Agreements Report to the Law Society of Manitoba (1975).

44. Rules 697-705.

45. *Supra* n. 2, at EC2-20.

arrangement will be beneficial to the client."[46] Strictly interpreted, that rule could be held to represent "benefit" as the ability to institute the action not otherwise available financially, or, more loosely interpreted, the "benefit" as a general convenience. It is true, however, that where the client is able to pay a regular fee, all the evils of the contingent fee contract exist without the great justification for its use; no indigent person is being helped to press a cause of action whose merits would not otherwise be tested.

However, the arguments for the contingent contract are not solely based on its practical utility to the poor. There are other arguments in its favor. Whether the client is poor or not, the contingent contract is the same, and if ethical in one case, will be so in the other.[47] A fairly recent case in the United States demonstrates exactly what that country considers as unethical. A lawyer was disbarred in Ohio for advancing money to a client for living expenses. The Court held that the only way the lawyer could expect to recover this "loan" was from the settlement and he had therefore bought an interest in the case. However, the Supreme Court of Ohio refused to disbar him on the basis that the client was indigent.[48]

Contestants claim that it is against public policy to allow a person to promote and support a suit in which he has no interest other than economic. In so doing the lawyer becomes a co-litigant, purchasing an interest in the litigation and possibly placing himself in a conflict of interests situation: "Because he is betting on the outcome of the case, the lawyer is an *interested party*. However strongly we may justify it, we cannot deny the truth of the matter."[49] This conflict begins at the very outset, when the contract is being negotiated between lawyer and client. As a partner in this venture into justice the lawyer is subject to his own temptations to obtain the best deal for himself. The conflict is particularly evident at the time for settlement. The advice given the client is crucial and should be motivated by desires to benefit the client only. Once the fee contract is signed the lawyer has a strongly protected financial interest in the claim; as he invests time and money in it, his stake in the outcome increases. He gets paid only if the outcome favours his client. The recovery determines both the client's compensation and the lawyer's remuneration. For these reasons, decisions as to when to settle and for how much assume a greater significance for the lawyer under the contingency fee arrangement. Theoretically control rests with the client but practically it is the lawyers who handles the settlement.[50] Usually, the common interest in a larger recovery assures that the settlement is favourable to the client. On the other hand, it may be financially more profitable for the lawyer to handle a mass of small claims, with a minimum of time expenditure on each and the possibility of quick settlements, than to treat each as a unique case and fight for the maximum possible recovery for the client.

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46. *Id.*, at EC5-7.

47. For an interesting questionnaire on the subject, see: J. Taggart, "Are Contingent Fees Ethical Where Client Is Able To Pay A Retainer" (1959), 20 Ohio St. L.J. 329, at 341 n. 58.

48. *Mahoning County Bar Assn.* v. *Ruffalo* (1964), 178 Ohio 263; 199 N.E. (2d) 396 (S.C.).

49. J. Rhoads, "Acquiring Interest in Litigation — the Role of the Contingent Fee" (1965), 54 Ky. L.J. 155, at 157.

50. For a client's duty to settle under a contingent fee contract, *see Hleck* v. *Manz*, [1977] 2 W.W.R. 557 (Sask. Dt. Ct.).

The other conflict which can be breached as an indirect result of contingency contracts is the lawyer's duty to the court and to the administration of justice generally. The successful operation of the adversary system depends on a certain degree of self-restraint by the lawyer in the presentation and argument of his client's case. It has frequently been claimed that, due to the speculative investment in the proceedings, the lawyer may exert unprofessional efforts in order to capitalize on his contingent interest. Alleged abuses include: "building a case" by the construction of evidence, improper coaching of witnesses, use of professionally partisan expert witnesses (at times themselves appearing for a contingent fee), demonstrative evidence designed solely to elicit the emotions and sympathies of the jury, improper examinations and cross-examinations, and inflammation of damages. As one judge put it: "How . . . can the courts put full faith in the sincerity of our labours as aids to them in the administration of justice if they have reason to suspect us of having bargained for a share of the result?"[51]

Defenders of the contingent contract allege that a lawyer may be interested in winning his case, that the evils quoted above, if they exist, should be dealt with by the proper bar association disciplinary procedures, but they are not a result of contingency contracts alone causing unprofessional zeal. But, it is a fact that the contingency fee arrangement places a pressure on the barrister which is absent when the fee is payable regardless of the outcome; the extent to which this pressure is manifested is unknown but hotly debated.[52]

Another major complaint of those opposed is that the use of contingent contracts results in excessive fees; the contingent fee means that no real thought has been given to the value set for the services rendered and the case is undertaken as a joint venture. Both Canadian and American Codes of Professional Ethics require that the fees charged must be reasonable. The A.B.A. has shown no interest in setting a maximum fee, preferring to leave the matter to attorney and client.[53] In Manitoba, there are provisions in *The Law Society Act* for the client to challenge the fees charged by his lawyer and for review by the court. The court can and does order taxation of the fees, and in many cases fees are reduced by the taxing officer. The Law Society of Manitoba also has its own Legal Fees Advisory Committee to which it can submit any complaints received concerning fees. The fees will then be taxed. No decision by the Committee is binding on the complainant, and he may still take proceedings under the Rules of Court to have the lawyer's fees taxed. As mentioned above, there are reported cases where the percentage has been deemed unfair and unreasonable and set aside.

Advocates of the contingent fee say the above constitute ample provisions for review and taxation to protect the client from any unfairness. While these statutory safeguards are available to the client to protect his interests, the mere acknowledgement of these provisions somehow avoids the core of the issue. Not all, and probably very few, clients will petition the

51. *Re Solicitor* (1907), 14 O.L.R. 464, at 466 (H.C.).

52. *See Supra* n. 9, at 207 n. 10.

53. The major problem in the United States seems to be the question of when the fee is deducted — before or after costs and expenses.

court for review of fees. Many clients will have no concept of what is a reasonable fee. There is, at least a real possibility that contingency fees may be excessive in some instances. Where a lawyer with expert knowledge is capable of assessing the merits of a case he may take advantage of this knowledge to enter into a contract at a higher fee where the client considers that the case involves a greater risk than is actually present.[54] Defenders of the contingent fee point out that these contracts are freely entered into and contend that the contingency for recovery is a valid reason for a higher fee than would otherwise be charged. Critics argue, however, that occasional losses are more than offset by the high rate paid on recoveries. It is difficult to speak of fairness in terms only of the rate, because the actual fee is a product of both the recovery and the rate. However, such a determination by percentage alone is done and, for instance, 50% has been deemed unreasonable. The difficulty in determining what is unfair arises from the existence of two different principles of "fair" pricing. On the one hand, if the fee in the individual case is examined according to the usual methods for assessing the value of legal services, any value over this amount would be unfair. Thus, each client's case is treated as a unique transaction. On the other hand, when the mass of cases is taken as a whole the idea of using over-charges to some clients to offset undercharges (losses) to others does not seem an unfair way to support a legal system for clients who need it. This latter "insurance" type of system of spreading the risk may seem repugnant to some concepts of morality and ethics. Such a scheme essentially requires the client in one action to share part of his recovery with his lawyer to compensate for cases that the lawyer has lost or will lose for which he is not adequately paid. This impersonal, institutional approach to legal representation is a long way from the "noble profession" image of the Romans or England of today where the paramount concern is the individual's right to representation and the barrister has no right to compensation. In the "evening-out the losses with the wins" approach the individual client is viewed as but one small cog in the greater schematic wheel of legal administration. The clients appear to exist solely to keep the wheel well greased and rolling along the road to justice as opposed to the administration of justice existing for the use of those clients with rights to be exercised and realized. One could ask — who exists in order to assist whom? Originally lawyers existed to assist the public. Is there a change in that model? Has fee contracting for legal representation become a tool by which the more educated, informed and powerful have taken control and altered the intended purpose of the legal profession to their own interests?

Other arguments for and against contingent fees involve a realization that personal attitudes, principles, morals, and views of the world and the legal profession are the overriding issues. As a result there is no solution to these opposing views. There are those who feel that such fee contracts could or do promote "ambulance chasing": "Things have gone from bad to worse on this downward grade, for now the 'American Ambulance-Chaser' has become a visible factor in so-called professional life. His function is to hustle after injured sufferers,with shameless solicitation . . . ."[55] For many

54. B. Grannary, "Contingent Fees Revisited" (1975), 33 Advocate 208, at 211.

55. *Supra* n. 51.

it is simply a matter of priority. There are those who feel that "[T]he contingent fee is the poor man's key to the courthouse door."[56] As such no other justification is required. It is recognized in the United States that were a Legal Aid system to exist this justification would disappear. Americans prefer to think that Legal Aid is too expensive and leads to a radicalization of the poor who will flood the courts with litigation and cause financial loss to the private bar.[57] These denials of an alternative in order to maintain the present system are based on practical as opposed to ethical considerations. Does this mean that there are no ways to justify contingent contracts by an ethical approach? It is interesting that the opponents of Legal Aid and the opponents of contingent fees both fear an increase in litigation by the poor. These two groups are adversaries on this issue but use the same presumption to reach different conclusions.

Those in favour of contingent fee contracts say that they have several advantages: the encouragement of early consultation with a lawyer, particularly with accident claim victims, and the promotion of earlier, more accurate evidence gathering; lawyers on contingencies are apparently more diligent and will investigate further than they would otherwise. Lawyers are businessmen, not only representatives for the administration of justice, and thereby should and can conduct their practice as a business for the realization of profit in the most expedient fashion.

The *C.B.A. Canons of Legal Ethics* state that "The profession is a branch of the administration of justice and not a mere money getting trade"[58] but they also declare: "the lawyer is entitled to a reasonable compensation for his services . . . ."[59] The lawyer's saleable product is words, albeit a very special kind of words. The basic financial measure of his words is his and his staff's time. From his words and measured time he earns money. Whether the money earned is incidental to a service or central to a business should not and cannot be viewed in isolation from the practical need of lawyers to earn a living. The *C.B.A. Canons* are above stated infer a conflict between the balancing of the ethical ideals and the practical reality. Ethical behavior and an acceptable profit from a lawyer's services to the public can co-exist. All that is required to achieve this dual purpose is that the participants in the legal system be reasonable and have integrity in the same way as is required for the proper functioning of all trades, professions, and institutions. One must always be able to rely on the individual at some point. The author feels that such a view of the situation is not merely a rationalization of what presently exists in Manitoba but is careful to point out that the integrity of those individuals must be challenged by society as a whole when necessary. More important are the private ethics of individual lawyers. Those must necessarily be resolved with a careful balancing of personal and self-effacing public interest, with care not to approach the ethical dilemma through the veiled, guided eyes of a legal personality in isolation from others' humanity.

56. H. McNamara, *2,000 Famous Legal Quotations* (1967) 215.

57. A. Champagne, "Lawyers and Government Funded Legal Services" (1976), 21 Vill. L. Rev. 860.

58. *C.B.A. Canons of Legal Ethics* (1920) 3(10).

59. *Id.*, at 3(9).

It is unquestionable that clients, rich and poor, prefer contingency agreements in many cases for obvious reasons, perhaps succumbing to the same human desire to defer the cost of consumer purchases with a charge card. There are those who consider this an argument for the use of contingency agreements. Persuasive it is. However, if we make any examination of whether some practice is right or wrong, ethical or unethical, let us not fall into the trap of saying "give them what they want and call it proper." Such superficial reasoning is tantamount to no reasoning at all.

Those in favour of contingent fee contracts also take note that moral and ethical standards have changed and the conditions which gave rise to the crimes of maintenance and champerty and the abhorrence of litigation no longer exist. Thus neither should the attitudes accompanying them. Litigation is no longer considered to be evil and the legal system and profession should encourage valid suits as an ultimate betterment to society as a whole. There is, however, a realistic recognition that while the local bar associations and courts have been lax in enforcing rules as to fees generally, and contingent fees especially, they must still try to protect against any misuse of the system and establish workable controls.

Methods for Control

Various methods for control and fair application of the contingent fee have been proposed or are in use. They include the sliding scale of percentages, where the percentage fee declines as the size of the recovery increases, and the graduated scale according to the stage of litigation, where the percentage of recovery increases at successive stages of litigation to meet the increased demand on lawyers' time and skill. However, some inequities of this system are experienced. For example, in very small claims where there is a settlement before trial, the lawyer is being underpaid for his time; but where there are very large claims closed at trial or appeal, the fee is probably disproportionately large. A third method would be to assess the fee against only that part of the award exceeding any offer of settlement made before the lawyer's services were rendered and therefore due to the lawyer's efforts. The free competition approach presumes that the contingent fee contract is the result of deliberation between two parties where a free intelligent agreement is made. In such a system it can be presumed that the excesses are effectively controlled by the action of the parties within the free presumed that the excesses of the application of standard rates to unusual cases are effectively controled by the action of the parties within the free market system for legal services. Such a situation probably exists only in arm's length transactions between businessmen and lawyers and such a presumption is ill-founded in personal injury or Workmen's Compensation cases, for example.

A recent article proposes a system of fee payment intermediate to either the hourly or contingent fee systems.[60] The writers recognize the existence

60. K. Clermont and J. Currivan, "Improving on the Contingent Fee" (1978), 63 Cornell L. Rev. 529.

of economic conflicts of interest inherent in both systems primarily in the area of number of hours to be spent by the lawyer on the particular case. The proposal is a system of fees payable only in the event of recovery and computed by adding the lawyer's time charge for the hours worked to a small percentage (5% or 10%) of the amount by which the recovery exceeds that time charge. They call it the contingent hourly-percentage fee and claim that it would largely dispense with the economic conflict of interest between lawyer and client while maintaining accessibility to the poor. In addition the system is a good measure of the cost to the lawyer and value to the client of the legal services rendered.

The self-restraint lawyers from excessive charging in contingent contracts should not be overlooked. This professional self-limitation can be viewed as a safety factor within the system and in Manitoba the review of the court of any questionably "reasonble" agreement is a further reminder that such self-restraint needs constant notice.[61]

Conclusion

The question of the propriety and morality of contingent contracts for fees is not yet settled. Both camps on the issue argue to the extremes, but it remains that there are few hard facts to substantiate either side's contentions. As one writer put it — the whole subject of contingent fee contracts approaches the theological.[62] It must be noted, however, that the arguments which are generally offered to support the propriety of the contingent fee are based on practical rather than ethical considerations. So perhaps one ultimately resolves the question for oneself by firstly deciding whether one is a pragmatist or an idealist.

61. *See generally, Supra* n. 9, Chap. 9.

62. *Supra* n. 12, at 395.