The Contingent Fee Contract in Massachusetts

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THE CONTINGENT FEE CONTRACT IN MASSACHUSETTS

KENNETH B. HUGHES*

The central question to which this article is addressed is that raised, but not decided, by our Supreme Judicial Court in the case of Sullivan v. Goulette. The Question: "Is it reasonable to continue to apply the principle stated in the cited cases to the effect (1) that an agreement for a contingent fee for legal services in litigation is void for champerty, if the attorney's services will not give rise to a debt due him from the client, and the attorney's prospective share of a recovery is to be his only compensation, and (2) that such an agreement will not be saved from champerty solely by an arrangement that the client is to furnish the necessary money to pay expenses?"

It is my position, and that of the several Massachusetts bar associations responding to the Court's invitation to appear in the Sullivan case as amici curiae, that the answer to that question should be "No." Or cast affirmatively, that reason and logic support, and justice requires a forthright judicial validation of the contingent fee agreement in this Commonwealth. That such an agreement between an attorney and his client in which the attorney looks solely to his prospective share in any recovery for his compensation should not be void for champerty. We would further recommend, however, that this general and long overdue validation of the use of contingent fee contracts not extend to actions for divorce or legal separation; nor, of course, to those actions or proceedings wherein the legislature has provided statutory forms for the ascertainment and award of legal fees. The several considerations which move this view receive particular attention under appropriate sections of this article, which follow.

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1 182 N.E.2d 519 (Mass. 1962). See Order for Reargument, dated Jan. 23, 1962. In its final determination of the case, the court found it unnecessary to furnish a judicial answer to a question it had raised, or to re-examine the currently applied rule against contingent fee contracts implicit in the question. No issue is taken with the result reached in the principal case. It is regrettable, however, that in deciding the case upon the narrower grounds, a question vital to the administration of justice in this Commonwealth went by default.
I.
The Overwhelming Weight of American Authority Holds the Contingent Fee Contract to Be Neither Immoral Nor Illegal

In assessing the utility and reasonableness of the currently applied Massachusetts rule that the contract for a contingent fee for legal services is void for champerty, it is relevant to compare the local view with those adhered to in other jurisdictions worthy of our respect. Indeed, in its own prior decisions relating to the contingent fee problem, this court has consistently looked for and cited the results reached by other courts as providing subjacent support for its own disposition of cases under consideration. For example, in Holdsworth v. Healey, the court mentions England and eight American states as being in accord with the Massachusetts view that a contingent fee contract is void for champerty, stating further, that "our law is in accord with the great weight of authority elsewhere, as declared in recent as well as older decisions, although there are adjudications somewhat contrary." It is a matter of compelling interest to note that if Holdsworth v. Healey were up for decision today, seven of those eight states referred to are now aligned in favor of the contingent fee contract. Of the eight only Maine, and there by statute, persists in the view that the contingent fee contract is void for champerty.

By now, it is clear that the contingent fee system, whereby the attorney's fee is contingent upon a recovery, has received the sanction and approval of every state in the United States, excepting only Massachusetts and Maine. On the federal side, the contingent fee contract for legal services received the early validation of the Supreme Court of the United States in Taylor v. Berniss in the following terms:

Contracts by attorneys for compensation in prosecuting claims against the United States are not void because the amount is made contingent upon success, or upon the sum recovered. And the well-known difficulties and delays in obtaining payment of just claims justifies a liberal compensation in successful cases, where none is to be received in case of failure.

The contingent fee contract sustained by the Supreme Court in this case was for fifty percent of any recovery.

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2 249 Mass. 436, 144 N.E. 386 (1924).
3 Id. at 439, 144 N.E. at 387.
6 110 U.S. 42 (1884).
7 Id. at 45.
This flat rejection by the overwhelming majority of American jurisdictions of the doctrine of champerty as defined by the English courts has been achieved over a long history. With enactment of the Field Code in 1848 and its repeal of statutory fees taxable as costs (a borrowing from the English system) New York validated the contingent fee contract. By 1878, New Jersey by court action had repudiated the ancient doctrine of champerty as "wholly unnecessary in this country." One of the last states to recognize contingent fees was New Hampshire. In *Markarian v. Bartis*, the New Hampshire Court considered its earlier position on the subject and reviewed the authorities throughout the country, and concluded: "Thus today, in this state, the mere fact that an attorney's fees are to be contingent upon his success and are to constitute a share of the proceeds recovered can scarcely be said to offend the public conscience."

By 1908, the American Bar Association had recognized the ethical propriety of contingent fees by its original adoption of Canon 13. In 1933, Canon 13 was amended to read: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the 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." To date, thirty-five of the fifty American states have signified their approval of the ABA Canons, including Canon 13 in its amended form. Twelve other states have adopted their own canons, and have approved of the contingent fee either in those canons or by court decision. In South Carolina, which has not adopted a set of canons, the contingent fee contract has been likewise approved by court decision. The District of Columbia has adopted the ABA Canons; and Puerto Rico has adopted its own canons which recognize the propriety of the contingent fee.

I would recommend, however, that this general validation of the use of contingent fee contracts not extend to actions for divorce or legal separation; nor, of course, to those actions or proceedings wherein the legislature has provided statutory forms for the award and ascertainment of fees. This recommended limitation upon the use of contingent fee contracts appears to be in force in all jurisdictions which have otherwise validated their general employment.

The Massachusetts rule against contingent fee contracts is undoubtedly of English origin, and no possible exception may be taken to a

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8 Schomp v. Schenck, 40 N.J.L. 195 (Sup. Ct. 1878).
9 89 N.H. 370, 199 Atl. 573 (1938).
10 Id. at 374, 199 Atl. at 576.
citation of English authority to that fact. Aside from which, there is also a great deal about English jurisprudence which we may be inclined to admire. But it is equally clear that it adds nothing to the discussion of the propriety or impropriety of contingent fee contracts in this Commonwealth, to note with approval that the contingent fee is illegal in England and that the cases so hold. The English view with respect to contingent fee contracts has nothing to do with morality, public or private. The simple fact is that there is no need and no place for the contingent fee contract within the complicated structure of statutes, which operate to fix and assure the English lawyer's compensation for legal services. It will be recalled that under the English system, the "costs" assessed against a losing party include in almost all instances attorney's fees. Thus the prevailing party in the English courts may look forward to receiving, from his unsuccessful adversary, the expense incurred on behalf of his solicitor and barrister. Further, under the Legal Aid and Advice Act of 1949, as amended in 1960, large segments of the population indigent only in the sense that financing a lawsuit would be burdensome are entitled to have their lawyers paid by the government. Under the 1960 amendment to this social welfare legislation, the barristers and solicitors receive 90% of what their normal remuneration would be in a similar non-aided action.12 The high cost of English justice has been often noted in legal literature; the fees awarded are excessive by American standards, particularly when the relative real purchasing power of the dollar and the English pound is considered.13 Upon these facts, English "rejection" of the contingent fee contract today relates to extrinsic considerations deeply involved in their concept of the Bar as an arm of the Welfare State. Clearly, this furnishes no sufficient predicate for any rejection of the contingent fee within the American concept of judicial administration.

In summary, all American jurisdictions both state and federal, and excepting only Maine and Massachusetts, have accepted the contingent fee contract as a basis for compensation for legal services. And even in Massachusetts, as we shall develop in a later section of this article, a contingent fee contract is not viewed as per se a wrongful act.14 The Canons of Ethics of the American Bar Association expressly validate both the morality and the legality of the contingent fee. All of the treatises and casebooks on the subject of Legal Ethics which I have been able to examine take a similar affirmative position.15 Indeed, a thorough research of law reviews and related publications as listed in

12 Legal Aid & Advice Act, 12 & 13 Geo. 6, c. 51, at 632 (1949); 8 & 9 Eliz. 2, c. 28 (1960).
13 To this point, Greenberger, Study of Fee Systems in England & the United States 1-8, nn.1-5, 49 (1960), on file with the Inst. of Jud. Adm. of N.Y.U.
15 See, e.g., Drinker, Legal Ethics 4-6, 176-77 (1953).
the Index to Legal Periodicals has failed to produce a single article advocating abolition of the contingent fee contract. All of these factors combine strongly to support the recommendation that our Supreme Judicial Court take occasion to declare it to be lawful for an attorney to contract for a reasonable percentage or portion of the proceeds realized from a client’s claim or cause of action.

II.

THE CONTINGENT FEE BASIS FOR COMPENSATION CONFORMS WITH OUR NOTIONS OF JUSTICE

The contingent fee agreement, reasonable in its terms, operates to implement at the action level certain irreducible objects of judicial administration to which we are constitutionally committed in this Commonwealth. It is my firm conviction that no critical evaluation of the contingent fee may derive from a clinging to terms which under modern conditions are denuded of content. The bland argument that contingent fee agreements are champertous, and therefore cannot be countenanced, marks no constructive approach to the problem of whether such agreements are socially desirable under our system for the administration of justice. Under such an approach nothing is gained, and a great deal is lost, through substitution of an ancient taboo for logical reasoning and formulation of sound public policy. It is abundantly clear that neither criticism nor defense of the contingent fee rule will have validity, unless it relates to the extent to which such rule does or does not aid in the implementation at the action level of our accepted notions of justice.

Deeply involved in this whole process of rule-evaluation, and affective of it at every turn, is our notion of what our idea of justice is. Throughout his history, man seems always to have aspired to the creation and enjoyment of some kind of just and workable order. Every society of which we have record has at least claimed a devotion to some idea of justice. It hardly requires mention that such ideas have varied widely with respect to time and place, and the conditions under which asserted. It is equally established that every society has therefore provided tribunals and some kind of framework of rules and procedures, whereby right and justice according to their variable lights might find support and expression within that political community.

The idea of justice which bears most directly and fundamentally upon the matter at hand finds expression in the Massachusetts Constitution, Part 1, article 11:

Every subject of this Commonwealth ought to find a Certain Remedy, by having recourse to the Laws, for all injuries or wrongs which he may receive in his person, property, or character. He
ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

This Constitutional mandate contemplates nothing less than the free and easy availability of means whereby every person so injured or so wronged may gain a fair, effective, and prompt resolution of any claim having support in the law. To this end, the Commonwealth has provided fair, efficient and well-ordered tribunals to settle those juridical disputes brought before them. Additionally, the Commonwealth has imposed high standards of training, craftsmanship, and moral fitness upon those admitted to the Bar in order that the practice of legal representation might be meaningful and entirely consistent with the objects constitutionally declared.

The fair import of all of this is that litigation in Massachusetts is not regarded as an evil; nor is litigiousness a vice where the litigant’s claim or defense finds support in the law. By terms of the constitutional provision, the right of the subject to “find a certain remedy, by having recourse to the Laws, for all injuries or wrongs” which he may have suffered, is not qualified. It applies to the man who is not able to finance from collateral sources his necessary legal representation, as well as the more fortunately situated citizen who is so able. If this were not true, equality before the law would be illusory, and the “certain remedy” of the law would be the private preserve of the economically powerful and self-sufficient. The decision of whether a legal claim would be pursued to a just result would not turn upon the justness of the cause, but upon whether the claimant, however just his cause, could actually or sensibly obligate himself to the payment of attorney’s fees regardless of outcome. For our constitutional mandate to be meaningful at the action level, justice requires that the contingent fee contract be validated by our court, as providing the ordinary citizen with the only sure means of prosecuting his claims to judgment. Such action by the court would be entirely consistent with its own expressed view that “The constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments.”

III.

The Contingent Fee Agreement Performs a Worthy and Necessary Function in the Settlement of Juridical Disputes

As we have seen in section I of this article the question of the ethical propriety of contingent fee contracts was settled by the American Bar

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Association as early as 1908, after the most careful consideration and deliberation. And, both before and since that time, by the overwhelming approval of the contingent fee in all American jurisdictions save two. Nor is our evaluation of the contingent fee as an effective instrument of judicial administration, in our times, blurred by any retained part of medieval doctrine that litigation is evil and contrary to religious precept.\(^{17}\)

It is equally clear that nothing will be gained, and much will be lost, if we allow our view of the contingent fee to suffer the distorting effects of ancient labels. To call the contingent fee contract "champertous" is an abuse of terms, whether in the historical or in the modern sense. It admits to a great confusion in the practices to which the doctrine related, \(e.g.,\) the solicitation and outright purchase of claims; the interposition of feudal lords in cases in which they had no interest; and embracery involving direct intimidation of the court.\(^{18}\) As applied to the contingent fee contract under modern conditions, the term "champerty" is as remote in fact as the feudal system is in time. The single test to be applied to the worth and validity of the contingent fee agreement is the extent to which it does or does not implement, at the action level, the legitimate objects of judicial administration in our own society. By this test, it may be fairly concluded that the use of the contingent fee agreement performs a worthy and necessary function in the settlement of juridical disputes. The several considerations which move and support this conclusion are set forth in the following sections.

IV.

THE CONTINGENT FEE AGREEMENT HELPS TO ASSURE TRUE EQUALITY BEFORE THE LAW

As earlier noted in section II of this presentation, the constitutional mandate guaranteeing the availability of means whereby the citizen may gain legal redress for injuries or wrongs he has suffered, is without qualification. It runs in favor of the impecunious claimant, as well as the most affluent. The justness of his cause, and not the ready availability of means to prosecute that cause, should be the test of whether a person pursues the remedial action which the law provides. Life for the average person in our modern society is a risky, complicated, and expensive business. It is equally clear that the law, as it always has, reflects the complexity of the society it serves. The new and added risks of injury or wrong to which the citizen is exposed have led to the

\(^{17}\) Mass. Const. part I, art. 11; Radin, Maintenance by Champerty, 24 Calif. L. Rev. 48, 70 (1935).

\(^{18}\) Radin, op. cit. supra note 17, at 66.
creation of whole new bodies of law, and the reach of earlier laws has been extended to afford him redress under changed conditions.

All of this response of the law to new and changed conditions would be without meaning unless there were also provided sensible access for the average person to the processes of the law. It is no mere coincidence that general acceptance of the contingent fee agreement in other American jurisdictions came, in point of time, with the machine age—with its multitude of casualties to a new and relatively impecunious class of litigant. Indeed, the ultimate justification for the use of the contingent fee agreement is that it provides a substantial majority of those injured or wronged with the only opportunity they will have to prosecute their legal claims through the normal and recommended channels of legal representation. Faced with the same pervasive problem, and rejecting the contingent fee idea, the English Bar was propelled into becoming a handmaiden of the Welfare State; with their fees from "assigned" cases payable from public funds. It is submitted that this English "solution" to the problem of meaningful legal representation is not one to find favor in this Commonwealth.

V.

THE CONTINGENT FEE AGREEMENT ENABLES THE CLAIMANT TO SECURE THE SERVICES OF COUNSEL POSSESSED OF THE REQUISITE SKILL AND LEARNING

I have noted that the contingent fee agreement constitutes for the truly indigent person the only available means open to him for legal representation. But the contingent fee arrangement serves other segments of the population equally well. Because a person is solvent in the technical sense of the term furnishes no predicate for judicial assumption that he will be in a position to pay a fixed and irretrievable fee, for the kind and quality of legal representation his claim may demand. Through the contingent fee arrangement, the person of average means is able to be represented by counsel of his choice, unaffected by personal economic limitations. This exercise of the freedom of choice in the selection of counsel by claimants is beneficial to the Bar as a whole. It encourages lawyers to advance their learning and perfect their skills, in order to merit their selection by claimants having this competitive advantage of unrestricted choice. Speaking to this point, the Supreme Court of Colorado has noted:

[A] claimant requires the assistance of counsel possessed of skill and learning. The insurer in such cases usually is represented by very able and expert counsel, and in the administration of justice a

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19 Legal Aid & Advice Act, 12 & 13 Geo. 6, c. 51, at 632 (1949); 8 & 9 Eliz. 2, c. 28 (1960).
measure of equality in ability of counsel representing the litigants is a great aid in arriving at a just solution of the issues involved.  

VI.

THE CONTINGENT FEE, LIKE ALL OTHER FEES, MUST MEET THE TEST OF REASONABLENESS

Clearly, a contingent fee and an excessive fee are not convertible terms. As Professor Radin pointed out, in the case law and complaints before grievance committees of the Bar, there have been as many complaints of excessive fees which were not dependent upon the result of litigation, as of those which were so dependent. The spectre of over-reaching appears to be omnipresent in any consideration of the practice of law. The point to be made is, whether a fee is fair or whether it is unconscionable bears no necessary or demonstrable dependence upon the method of fee ascertainment used in the particular case. The occasional unscrupulous lawyer bent upon taking unfair advantage of his client in the matter of fees will do so, whether he is working upon a fixed fee, a retainer, or a contingency. The contingent fee agreement offers a further valuable protection to the client against overcharging, in that any fee claimed must be related to success achieved in the matter represented. Fixed fee contracts do not have this built-in protection against machinations of the overreaching lawyer. Fortunately, cases of actual overreaching are rarely encountered; and where they are, adequate procedures are available to test the reasonableness of the fee.

In my judgment, to condemn the contingent fee agreement out of hand as “champertous” is to subsume that by its nature such fee must be excessive and unconscionable. As I have shown, such an argument against the contingent fee has no support in logic or experience. Today, it draws its sole “support” from a spate of designedly misleading articles, such as that which appeared under the title “When the Lawyer Gets the Spoils.” It is my position that in looking at the worth and validity of any agreement for legal fees, whether fixed or upon a contingency, our court should exercise its judgment with respect to the particular case, and the circumstances involved. The court should not indulge in judgment by category; that no fee arrangement is either good or bad, in itself; that the test to be applied is as to its reasonableness under all the circumstances, and the extent to which the fee arrangement operates to enable a just result in the given cause.

21 Radin, Contingent Fees in California, 28 Calif. L. Rev. 587, 591 (1940).
22 Readers Digest, Mar. 1960; see reply by John D. Randall, then president of the American Bar Association, with its well-reasoned refutation of the smears and innuendos in the Digest article, in 31 Okla. B.A.J. 1189-91 (1960).
23 Cf. ABA Canons of Ethics 12 & 13.
VII.
THE CONTINGENT FEE AGREEMENT PROMOTES THE NON-JUDICIAL SETTLEMENT OF LEGAL DISPUTES, TAKING A BURDEN OFF THE COURTS

I have previously noted the salutary effect of the contingent fee agreement upon the just resolution of legal disputes in those matters brought before the courts, by providing equality before the law through access to meaningful legal representation. It is clear that the contingent fee agreement, by making legal representation available at the earliest stages of pre-litigative negotiation, has brought about one of the most significant features of the modern practice of law. This is the uniquely American procedure under which the overwhelming majority of all juridical claims that lawyers are retained to press, are ultimately disposed of by negotiated settlement without assuming the form of litigation.

The motor vehicle tort field in Massachusetts offers a striking illustration of this sharp trend toward out-of-court settlement of claims—a trend that parallels the increased percentage of lawyer representation from the time the claim is filed with the insurance carrier. For example, during the years 1941-1942 in all Massachusetts courts having cognizance of motor vehicle tort cases, 37,262 such cases were commenced. During the years 1957-1958, this number of filings fell below 29,000. Within this same sixteen year period, it is conservatively estimated that the number of motor vehicle tort cases responding to negotiated settlement increased twenty-fold.24

Information informally supplied by some of the largest carriers of compulsory motor vehicle liability insurance in Massachusetts indicates that about 200,000 third-party claims were filed against them in 1960; and that sixty-five to seventy percent of the claimants were represented by counsel at the time the claim was filed; this percentage of representation marking a sharp and constant increase over past years. The conclusion is inescapable that in Massachusetts as in all other jurisdictions, and regardless of the subtle and delicate refinements of language imposed by the local rule now under re-examination, these cases are negotiated to settlement under a contingent fee arrangement of one kind or another. It is equally clear that the contingent fee agreement is a matter of vital necessity in this area of negotiated settlements. Without such agreements as to fees contingent upon success in the matter, most claimants would be deprived of the right of legal representation at this vital stage. The law favors settlements, and a just settlement most often depends upon the earliest fact-investigation and legal evaluation of the claim. Indeed, the quality of proof and degree of persuasion required to effect a just settlement is likely to be greater when tried to

the carrier, than when tried to the jury. Since the jury stands relatively indifferent to the verdict, while the insurance company stands to pay any settlement it is persuaded to approve.  

In the motor vehicle tort field, the contingent fee is directly related to and reflects the highly "contingent" nature of the claim itself. Aside from the usual failures of proof, the pervasive effect of contributory negligence and like defenses is to make any recovery highly speculative from the standpoint of both claimant and attorney. Locally, I am told, about forty percent of all such claims are rejected in full by the carriers. While local statistics are lacking and unavailable, it is a fair estimate based upon the velocity of such claims and total awards paid, that the average settlement reached in personal injury claims does not exceed seven hundred dollars, with the median at less than five hundred dollars. These estimates compare favorably with those reached in a New York City survey of claims settled without suit.  

The Bar should be encouraged to continue to provide expert representation for claimants at the negotiatory stage for these relatively small claims, which usually admit of settlement without court action. Otherwise, claimants would be at the mercy of the carriers who in every instance are represented by able counsel. Justice requires, and sound principles of judicial administration clearly sustain, the validation of the contingent fee agreement as a necessary adjunct to the negotiated settlement of claims.  

VIII.  
THE CONTINGENT FEE AGREEMENT PROVIDES A FAIR AND EQUITABLE BASIS FOR THE VALUATION OF LEGAL SERVICES  

The question of what a lawyer's services are reasonably worth is a pervasive problem, and admits of no general answer. This problem of valuation is not solely or uniquely related to the contingency fee agreement. The question is raised, and must be met, in every kind of fee arrangement open to the attorney and his client. In every case where legal representation is sought and accepted, it must be assumed that both attorney and client believe they have a just cause, and a chance of winning. It is highly relevant to consider, in general, what counsel for a claimant undertakes to do when he accepts the case, because this will have an important bearing as to when, and upon what basis, a reasonable valuation may be placed upon his services in the matter.  

25 For reports of similar experience and conclusions in Ohio, see Comment, Are Contingent Fees Ethical Where Client Is Able to Pay a Retainer, 20 Ohio St. L.J. 329, 344 (1959); in New Jersey, Report of Court Administrator for 1955.  
26 Closing Statement Survey, The Project for Effective Justice, Colum. Univ. Law School (1958): For suits, the median recovery was $725; for claims, the median was $575. The averages were: for suits, $2,058; for claims, $912.
In almost every instance, the attorney is involved in the factual reconstruction of some past event, the precise nature and happening of which is the basis of the claim. Ultimately, he must persuade the tribunal (court, agency board, or claims department) by every ethical procedure the law provides, that his competing version of the facts is the true one; that his theory of the law applicable is correct; and that justice requires the result for which he contends. At what stage of this complicated and exhaustive undertaking, if ever, may his charge for services be fixed with some semblance of accuracy? How do we value professional skill and judgment in a given case? Obviously, there is no magic formula to cover any situation so elusive on the facts, and fraught with so many intangibles. No fee, however set, can make any claim to mathematical certainty as it relates to the question of its fairness under all the circumstances. Every fee, contingent or otherwise, represents no more than the best judgment to the matter by those most closely connected with the case, the attorney and his client.

As I have stated, the decision to press a claim must proceed upon an assumption jointly held by the claimant and his attorney that the cause is a just one, and that they have a reasonable chance of winning. Cast in other terms, the probability of successful outcome is and should be a significant factor in their thinking. Otherwise, the case qualifies as no more than a vexatious proceeding which the law will not countenance. It is at this point that the rationality of the contingent fee agreement is perfectly apparent. United as they are in their commitment to pursue every ethical procedure to achieve the successful outcome which justice would support, there can be nothing unnatural or improper in the assumption that payment of fees should be as contingent as the result. That this is the reasoned view of the overwhelming majority of claimants and lawyers is no longer open to doubt. Every statistical survey that has come to our attention confirms it.

It is worthy of note that every local bar association in this Commonwealth which publishes minimum fee schedules, makes provision therein for the handling of tort claims on a contingent fee basis, in that the lawyer's compensation is related to a stated percentage of the recovery. While these expressed views of lawyers and clients they serve may not be determinative of the issue, such singular unanimity of opinion offers

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27 ABA Canons of Ethics. Canon 30 states that a lawyer must decline to conduct a civil case that is intended merely to harass or injure the other party.

28 See, e.g., Comment, Are Contingent Fees Ethical Where Client Is Able to Pay a Retainer, 20 Ohio St. L.J. 329, 344 (1959) (survey among Ohio lawyers and judges): "contingent fee almost unchallenged among those polled"; also, 1955 Report of Hudson County Bar Association to Supreme Court of New Jersey re Canon 13, to the effect that contingent fee used in at least 95% of tort cases tried in New Jersey Courts.
the strongest support to the basic reasonableness of the contingent fee concept.\(^{29}\)

In an earlier section of this article, the point was made that the contingent fee and an excessive fee are not convertible terms. The test to be applied with respect to any fee, contingent or fixed, is its reasonableness under all the circumstances. It is clear that as to the contingent fee, no question of reasonableness may be raised in the case where no recovery has been effected, since the lawyer takes nothing for his effort. Under fixed fee arrangements, to the contrary, the reasonableness of the fee is always issuable whether the case is won or lost—and particularly, if the loss may be ascribed to a lack of skill or judgment. In such cases, the element of fairness runs clearly to the side of the contingent fee, over the fixed fee contract.

Amateur critics of the contingent fee profess to find a great arbitrariness, and therefore inherent unreasonableness, in the application of standardized fixed percentages to the amount of recovery as the basis for a fee.\(^{30}\) This admits to a great confusion about the contingent fee, and the unexpressed criteria upon which it is based. Under Canon 12 of the Canons of Professional Ethics six criteria are stated as proper to consider in determining the amount of any fee for legal services. It is important to note that the contingent fee takes into necessary account every single one of the six criteria listed; including three of extreme significance: the amount involved in the controversy and the benefits resulting to the client from the services; and the contingency or certainty of the compensation.\(^ {31}\)

Available statistics indicate that the percentages customarily applied under contingent fee agreements run from 20% to 50%, with the average around 30% for all cases.\(^{32}\) This sliding scale of percentage takes into account whether the matter was settled without litigation, after or during trial, or involved an appeal. What does this mean in terms of actual compensation received? First, we must set to one side, but always keep in mind, the thirty to forty percent of cases taken on a contingency in which there is no recovery, and thus no fee at all. Then we proceed to the claims taken on contingency which are settled by negotiation with the insurance carriers, without the aid of court action. In a preceding section it was noted that the average personal injury claim was settled by local carriers for less than seven hundred dollars, with the median at less than five hundred dollars. With forty


\(^{30}\) See, e.g., Bloom, When the Lawyer Gets the Spoils, Reader's Digest, Mar. 1960.

\(^{31}\) ABA Canon 12, §§ 4 & 5.

percent of all such claims entered being rejected totally by the insurance companies. Next, what about the claims taken on contingency which actually go to trial? Here, the information available is even more illuminating. During 1954 and 1955 the Judicial Council of this Commonwealth collected statistics on the size of verdicts taken. The Judicial Council reported that in 1953-1954 the plaintiff received either nothing or less than five hundred dollars in more than half the cases tried to a conclusion. In the Superior Court in 1954-1955 jury verdicts for plaintiffs were taken in 878 cases; the recovery being less than five hundred dollars in 25% of the cases, and less than one thousand dollars in 45% of the cases. In his evaluation of these reports of the Judicial Council, Professor Field of the Harvard Law School concludes “it seems fair to assume, moreover, that the likely amount of the plaintiff’s recovery in the cases he lost was at least as low as the actual recovery in those he won.”

With respect to the dollar dimensions of recoveries taken in personal injury cases, the New York experience is substantially similar to that in Massachusetts. In its 1958 survey of personal injury litigation in New York City, the Project for Effective Justice, of Columbia University Law School concludes:

Although the recoveries ran as high as $132,500, modest size was characteristic of the overwhelming majority of the 3,000 case sample. This is true whether the recovery came with or without suit. Only 8.9% of the cases grossed more than $3,000; and only 29.7% grossed more than $1,000. Nearly half (47.2%) showed recoveries of less than $600; and about one-fourth (24.4%) less than $300.

These figures provide explanation for the fact that during the past ten years, in the face of mounting taxes and costs of living and doing business, lawyer income has increased only 46%, compared with an increase for the medical profession of 148% for the same period.

All of this admits to but one fair conclusion: in meeting his overriding responsibility of providing equality before the law for a large proportion of our population who would otherwise be deprived of their right to legal representation, the lawyer working on a contingent fee basis receives consistently less for his contribution than justice would seem to require. In the great generality of cases so handled, his actual compensation falls far short of that which the fixed fee would reasonably

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33 30th Report Judicial Council of Massachusetts 11a; Field, Annual Survey of Massachusetts Law 244 (1955).
35 See Canon 12: In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which underestimate them.
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contemplate for cases involving the same complexity and extensive service. Adding to this the high incidence of cases in which there is no recovery at all, it is clear that any generalized objection to the contingent fee as to its demonstrated "fairness" is without merit. To the contrary, the contingent fee agreement does provide a fair and equitable basis for the valuation of legal services. The cases of actual overreaching are extremely rare, and where encountered, adequate procedures are available to test the reasonableness of the fee charged.

IX.

FORTHRIGHT JUDICIAL VALIDATION OF CONTINGENT FEE AGREEMENTS IS URGENTLY REQUIRED TO DISPEL EXISTING UNCERTAINTY AND CONFUSION IN THE CURRENTLY APPLIED RULES

The problem of the contingent fee agreement is one which all American jurisdictions have had to face. And the vote has been overwhelmingly in favor of validation of the contingent fee, not as any regrettable retreat from a loftier standard, but as an institution which serves a useful and necessary purpose in the administration of justice under modern conditions. Massachusetts, to the contrary, has persisted in an adherence to the ancient idea that the contingent fee agreement is champertous, but has sought to achieve some semblance of liberalizing effect by hedging that idea about with fine distinctions. This approach, reflected in more than one hundred years of local jurisprudence, has failed in not meeting the issues squarely, and for the reason that the distinctions drawn are tenuous and abstruse, and the limitations imposed bear no visible relation to the contingent fee idea in our times.

From the case-law on the subject, it is clear that an agreement for a contingent fee for legal services is deemed void for champerty in Massachusetts, if the attorney's services will not give rise to a debt due him from the client and the attorney's prospective share of a recovery is agreed to be his only compensation. Despite the undoubted accuracy and seeming clarity of this judicial statement of the Massachusetts rule, it provides no measure of the uncertainty and frustration which attaches to its application at the practice level, nor of its irrationality, when tested by the legitimate objects of judicial administration.

Quite obviously, rules in governance of fee contract arrangements between a lawyer and his client do not operate in a vacuum. Faced with a client who has a just though highly contingent claim to press, and

37 See, e.g., Smith v. Weeks, 252 Mass. 244, 147 N.E. 676 (1925), fee agreement held not champertous; case remanded to determine reasonableness of fee to be allowed.
38 Stated effect of the case law, by our court in its Order for Reargument, supra note 1.
who is unable or sensibly unwilling to risk more than the bare expenses of litigation, the Massachusetts lawyer for his own protection must produce a fee agreement which will at once avoid the taint of champerty, and yet conform to the felt needs of his client. As soon as the client learns that the agreement by its terms must give rise to a “debt” for legal services, and that the attorney’s prospective share of a recovery must not be his only compensation, the client’s immediate reaction is predictable. But assuming sufficient acuity and drafting skill are brought to bear upon the problem, a fee arrangement may be worked out that is wholly contingent in effect if not in form. And such may conform with the letter if not with the spirit of the out-worn rule against champerty locally applied. Equality before the law will have been made available to the necessitous client. But the lawyer must speculate upon the rationality of a rule which has been wholly rejected as antiquated and incongruous in forty-eight other American states, in the District of Columbia, Puerto Rico, and all courts under the federal system. The client, contemplating the legal circuities seemingly required to achieve what in his mind is only a matter of simple justice, is quite likely to carry away with him an unfavorable image of the law and all its works. It is submitted that these stated conclusions find ample support in the local case-law to the question.

Under Massachusetts authority, the taint of champerty will not be deemed to attach to a fee contract otherwise contingent in form, under any of the following conditions. (1) If the attorney has a direct or indirect personal interest in the thing to be recovered, or if he had reasonable ground to believe he had such an interest although he was not in fact so interested.39 (2) If the action does not involve or contemplate suit or other antagonistic proceeding.40 (3) If the services called for are of a commercial nature.41

Aside from those above-mentioned areas as wholly excluded from operation of the rule against champerty, certain other opportunities are open to avoid its impact. For example, the lawyer may elect to have the client agree to pay him a small retainer in a specified amount, and a stated percentage of the sums recovered. They may be open to some question, but such an agreement was validated in Walsh v. White.42 Also, a contract to receive a percentage of the recovery may be sustained where the fact of there being a recovery is certain (e.g., condemnation taking of client’s land by railroad) and it is only the amount of the fee which is contingent.43

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In the much cited case of Blaisdell v. Ahern, the tenuousness of the stated requirement that the fee agreement must put the client under a debt to the attorney was completely exposed. The contract provided "whereas, said counsel and attorney are to depend upon the contingency of success for the fees for all services rendered" and that said counsel employed "shall, in view of the uncertainty of the result in their payment be entitled to very large and liberal fees, in no event to exceed fifty percent of the amount collected." The court found the contract valid, on the ground that if successful in the suit, the attorney could have maintained an action for his fees in a very large and liberal amount, and that there was no actual agreement that the attorney should receive a share of the amount recovered as compensation. As the court reasoned,

The contract under consideration was nothing more than an agreement by the plaintiff to give his services without charge if the suit should not be successful, and an agreement by the defendant to pay large and liberal fees if successful; and we know no authority and no reason in public policy why, under the relations and circumstances of the parties, it was not a lawful contract which they had a right to enter into.

In essence, upon the authority of Blaisdell v. Ahern, supra, a contingent fee in Massachusetts is champertous only if it is agreed that it is to be paid solely from the amount recovered, without any personal liability of the client. If the client is personally—though contingently in fact—liable, the agreement is valid. Under this view, a fee contract providing for the personal liability of the client in an amount equal to a stated percentage of the net amount collected is likewise valid.

From the foregoing, it is reasonable to conclude as I do that the currently applied Massachusetts rule in governance of contingent fee contracts has reduced itself, in large part, to a sheer exercise in semantics and strained construction of language. The imposed requirement of the local rule, that a contingent fee contract to be valid must give rise to an extrinsic "debt" running from client to attorney, bears no visible relation to any protective interest sought to be asserted. If the thrust of the requirement is directed against the bringing of vexatious suits, it is shadow-boxing against an asserted evil which in our society finds its sole support in the assertion itself, and not in any demonstration of the fact either in Massachusetts, or in those other American jurisdictions having proven and satisfactory experience with the contingent fee agreement. "The Laws Against Witches," said Selden, "do not prove

44 144 Mass. 393, 11 N.E. 681 (1887).
45 Id. at 395, 11 N.E. at 684.
that there be any.” If our rule is directed against the purchase of interests in litigation, or solicitation of claims, or agreements to bear the expenses of litigation, it achieves no such purpose by mistaking the contingent fee agreement as the object of difficulty. These forms of lawyer misconduct are not convertible either in terms or effect with the contingent fee idea.\(^4\)

Added to the general ineptness of the locally applied rule under examination, it has proven itself to be neither just, nor workable—thus failing to satisfy either of the twin tests customarily required of a rule of procedure. The rule is not workable, because in the event the lawyer has been able to negotiate the semantic tight-rope, and provide for a “debt” running to him from the client as our rule requires, there is little likelihood that such provision will ever have legal effect. Under these circumstances the lawyer is under no legal obligation to enforce the “debt,” and in good conscience will refuse to do so. First, because any such paper obligation thus created is contrary to the real objects and purposes of the fee contract; and further, because in the great generality of cases such enforcement effort would be an exercise in futility by reason of the impecuniousness of the client. Litigation under these circumstances would be clearly vexatious, and contrary to the rules of professional conduct.\(^4\)

That our rule has produced grave injustices is beyond doubt. Osten-sibly directed against vexatious litigation, the rule has operated to deny recovery of fees in cases where the cause was clearly just, where the attorney had prosecuted the claim with great skill and judgment, and gained the successful result for his client which justice required. Any rule which operates under these circumstances to deny a fee recovery, and to label an ethical, conscientious attorney a champertor is a perversion of justice as we understand the term in our times.

It may be fairly concluded that the Massachusetts rule under re-examination finds no support in reason or logic. That as a vestigial remnant of an outgrown past, it has only time on its side as the sole argument for its retention. Under many circumstances, stare decisis is a useful and necessary force in the administration of justice. But this doctrine does not prevent re-examination and correction of principles previously declared, to the end that the law may better conform to the ideas of justice in the society it serves. Any contrary view would be worse than a mere unreasoned response to the status quo; it would admit to a great confusion between the distinctly subsidiary rule itself,

\(^4\) See ABA Canons of Ethics, 10, 13, 28 and 42, maintaining careful distinction between these separate and unrelated matters: Acquiring Interest in Litigation; Contingent Fees; Stirring Up Litigation; Bearing Expenses of Litigation.

\(^4\) ABA Canon 14: lawsuits with clients should be resorted to only to prevent injustice or fraud.
and the irreducible objects of judicial administration to which the rule
to be valid must relate.

In the last analysis, responsibility for the charging of reasonable
fees—whether by way of fixed amount, retainer, or on contingency—
should be placed, first upon the lawyer himself, with an expectation of
honorable conduct; and second, on those bodies primarily responsible
for enforcing the Canons of Professional Ethics; with recourse to the
courts always available to any contested issue of the reasonableness of
any fee charged.