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## *Contingent Fee: Champerty or Champion?*

Arthur L. Kraut\*

IN 1952, AN ARTICLE APPEARED in Reader's Digest magazine castigating both the contingent fee system of financing litigation and the trial lawyers of the United States.<sup>1</sup> Since that article appeared, the client public has been barraged with a stream of propaganda aimed at barring the use of the contingent fee as a means of retaining a lawyer.<sup>2</sup>

Basically, the contingent fee contract or arrangement consists of an agreement between a lawyer and his client that the lawyer will render his professional services, in order to obtain a judgment or settlement for his client, and the client will pay, as a fee to his lawyer, an amount equal to a certain percentage of the ultimate recovery. The fee may be a flat percentage of any recovery, a series of increasing or decreasing percentages depending upon the size of the recovery, or a series of increasing percentages depending upon the stage of the negotiation or litigation at which the recovery is achieved. If the lawyer is successful in carrying his client's cause to fruition, he is entitled to his fee as agreed upon. If the claim is defeated and no recovery is had, the client pays the lawyer no legal fee whatsoever.<sup>3</sup>

On its face, the contingent fee would appear to be quite a bargain for the client and a considerable risk for the attorney. Despite the risk involved—that the attorney may expend a considerable amount of time and effort on a case and receive no compensation in the event he is unable to achieve a judgment for his client—the contingent fee is now the dominant means of financing litigation in several important areas of legal practice in the United States, such as: the collection of overdue commercial accounts, stockholder's suits, class actions, tax practice, condemnation proceedings, will contests, and, to the greatest extent, in personal injury litigation.<sup>4</sup>

The claims asserted by opponents of the contingent fee are that the contingency of the fee adds a high degree of speculation to the practice of law. This speculation gives rise to such practices, on the part of attorneys, they say, as soliciting and "quickie" settlements, the purpose of which is to achieve a higher rate of return through increased quantity of clients and suits. As a consequence, it is asserted,

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<sup>1</sup> Velie, *And Then—Sudden Ruin*, Reader's Digest, Sept., 1952 at 79.

<sup>2</sup> See M. T. BLOOM, *THE TROUBLE WITH LAWYERS* (1968); BUS. W., Jan. 12, 1963, at 113; LAWYER REFORM NEWS, June-July, 1971, at 1, col. 1.

<sup>3</sup> *Report of the Committee on Personal Injury Claims: Sec. 15 Contingent Fees*, 40 CALIF. ST. B. J. 148, 189 (1965).

<sup>4</sup> F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* at 25 (1964).

the quality of professional services suffers because the attorney becomes a *partner* in the lawsuit rather than an impartial advocate of his client's cause. The claim is made that the attorney, by reason of the contingent fee contract, is changed from a knight in shining armor, protecting his client's case, into an *ambulance chaser* and *shyster*, protecting only his fee.<sup>5</sup>

While one element of the opposition seeks control of only unreasonable contingent fee agreements, other members of the anti-contingent fee group consider the contingent fee to be *malum in se*, and therefore, are lobbying the legislatures to obtain statutory prohibition of the use of the contingent fee. This view that the contingent fee is intrinsically evil and should be prohibited is the majority view in the world at large. Outside the United States the contingent fee is considered champertous and is prohibited by statute or common law. Before the late 1800's, the common law prohibition of contingent fees existed in a number of United States jurisdictions as well, but today the validity of contingent fee contracts as a means of financing legal services is firmly established in the majority of United States jurisdictions including the federal jurisdictions.<sup>6</sup>

Before considering whether the use of the contingent fee agreement is another progressive movement within the United States legal system or a corruption of the legal profession demanding strict control or prohibition, the law and rules presently attached to the contingent fee system in the majority of jurisdictions will be presented, based on an examination of the contingent fee in the state of Ohio, which is typical of the United States majority allowing the use of the contingent fee.

### Contingent Fees, Champerty, and the Courts

As early as 1823, it was established in Ohio that champertous agreements would not be enforced by the Ohio courts despite the lack of any statutes establishing champerty and maintenance as criminal in Ohio, or declaring champertous contracts void or even voidable. In the landmark case of *Key v. Vattier*,<sup>7</sup> an attorney, Key, and one Vattier signed an agreement whereby the attorney would render his professional services to regain certain land and personalty for Vattier. In return for these services, the attorney was to receive as his sole compensation, a portion of the land recovered. Vattier, on his part, also agreed not to settle the case without Key's consent.

<sup>5</sup> Supra note 2; *Panel Discussion: Contingent Fees*, 18 FED. INS. COUNS. Q. 63 (1967); Rhoads, *Acquiring Interest in Litigation—The Role of the Contingent Fee*, 54, KY. L. J. 155 at 157 (1965); M. MAYER, *THE LAWYERS* at 261 (1967).

<sup>6</sup> For a detailed history and background of the contingent fee see MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* Parts One and Two (1964); Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587 (1940); Williston, *The Contingent Fee in Canada*, 6 ALBERTA L. REV. 184 (1968).

<sup>7</sup> *Key v. Vattier*, 1 Ohio 132 (1823).

At this point, the contract entered into by Key and Vattier should be compared to the definitions of Champerty and Maintenance in the Restatement of Contracts, which defines *maintenance* to be the maintaining, supporting or promoting of litigation of another person, while *champerty* is the division of the proceeds of litigation between the owner of the litigated claim and a party supporting or enforcing the litigation.<sup>8</sup> The Restatement reads further that "... a bargain to endeavor to enforce a claim in consideration of a promise of a share of the proceeds, or of any other fee contingent on success, is illegal, if it is also part of the bargain that (a) the party seeking to enforce the claim shall pay the expenses incident thereto, or that (b) the owner of the claim shall not settle or discharge it."<sup>9</sup>

According to the terms of the contract between Vattier and his attorney, Vattier need do nothing. Key would enforce the claim at his own expense. This would bring the contract within the definition of maintenance. By the terms of the contract, if Key were successful in enforcing Vattier's claim, he would share 50/50 in the proceeds of the litigation, which, as defined above, constitutes champerty.

The fact that a contingent fee arrangement was champerty and maintenance would have made it illegal at common law,<sup>10</sup> but a contingent fee *per se* was not and is not today illegal in the United States<sup>11</sup> except in certain New England states,<sup>12</sup> and in all jurisdictions, in particular, in proceedings such as criminal trials and divorce proceedings. However, in Key and Vattier's contract, the agreement included the lawyer's promise to save the client free from *all* costs regardless of the outcome. Vattier also agreed not to settle without his lawyer's consent. Such agreements are said to be bargains tending to obstruct the administration of justice and are, therefore, deemed unethical and invalid in the greater part of American jurisdictions.<sup>14</sup>

After successfully recovering the land and personalty for his client, the attorney, Key, sought to collect his fee, 50% of the land as agreed upon, but Vattier refused to convey or pay. Suit was brought for specific performance of the contingent fee contract and the question of the validity of the contract reached the Ohio Supreme Court. Judge Burnet, in speaking for the court, stated that the agreement did constitute champerty and maintenance at common law; however, the common law in Ohio regarding crimes and misdemeanors

<sup>8</sup> RESTATEMENT OF CONTRACTS § 540 (1932).

<sup>9</sup> RESTATEMENT OF CONTRACTS § 542 (1932).

<sup>10</sup> Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935).

<sup>11</sup> Supra note 4, at 39.

<sup>12</sup> ME. REV. STAT. tit. 13 § 18 (1964); *Hinckley v. Giberson*, 129 Me. 308, 151 A. 542 (1930); *Sullivan v. Goulette*, 182 N.E.2d 519 (Mass. Sup. Ct. 1962); *McInerney v. Massosoit Greyhound Assn.*,—Mass.—, 269 N.E.2d 211 (1970).

<sup>13</sup> RESTATEMENT OF CONTRACTS § 542(2) (1932); see also *ABA CODE OF PROFESSIONAL RESPONSIBILITY* EC 2-20 & DR 2-106(c).

<sup>14</sup> F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* at 75 (1964); *Peck v. Heurich*, 167 U.S. 624 (1897); *Watkins v. Sedberry*, 261 U.S. 571 (1923).

was abrogated by codification and the prohibitions against champerty and maintenance were left uncoded. He went on to say that since there was no common law in Ohio due to the codification nor any statute prohibiting acts of champerty and maintenance, it would seem that the court would have no choice but to enforce the contract. However, the court had a spare arrow in its quiver, namely, public policy. The court looked to the reasons for the common law prohibition against champerty and maintenance. Judge Burnet noted that contingent fee contracts tended to make it easy to bring suit and often fostered litigation rather than settlement, and were injurious to the peace and happiness of the community. Champertous contracts were used by the lords in England of old to harass the smaller land owners. The court found that the reasons behind the public policy prohibiting such contracts was as valid today as it was in medieval times. The judge concluded by ruling that contracts which would have constituted champerty at common law were still against public policy.<sup>15</sup>

Since the contract for a contingent fee as devised by Key was against public policy, why didn't the legislature codify that policy into the law of the state? Judge Burnet suggested that the state legislature's failure to enact statutes declaring champerty and maintenance to be illegal was a tacit reliance by the legislature on the fact that champertous contracts were void at common law and the ability of the courts to refuse to enforce champertous contracts on the basis of public policy and punish acts of champerty committed before the court as contempt was enough to control the contingent fee contract in Ohio, making a criminal indictment to protect the public unnecessary. Champertous contracts were deemed intrinsically evil in that they contribute to the stirring up of lawsuits, which has always been considered violative of public policy. The contingent fee contract between Key and Vattier was declared to be champertous and, therefore, against public policy and unenforceable in the courts of Ohio regardless of the absence of statute or even any injury shown, as no statute or actual injury is needed to avoid a contract which is violative of public policy.<sup>16</sup>

The principles laid down in *Key v. Vattier* were restated 21 years later in *Weakly v. Hall*<sup>17</sup> where the court again admitting the lack of any statute declared that champertous contracts were void and unenforceable, in or out of the legal profession. In a later case, *Stewart v. Welch*,<sup>18</sup> the court held that a champertous clause in a contract could not be severed from the whole and such contracts were void in their entirety.

<sup>15</sup> *Key v. Vattier*, 1 Ohio 132 (1823).

<sup>16</sup> *Id.*

<sup>17</sup> *Weakly v. Hall*, 13 Ohio 167 (1844).

<sup>18</sup> *Stewart v. Welch*, 41 Ohio St. 483 (1885).

This stand of the Ohio courts against the enforcement of contingent fee contracts, which had a taint of champerty and maintenance, weakened as the use of this type of fee arrangement increased without the legislature taking any action against its abuses. The Courts refused to act as super legislatures in this area. Case law in Ohio contains only a handful of decisions declaring a contract champertous during the 20th century.<sup>19</sup> To the contrary, in cases involving the issue of the validity of a contingent fee contract, it was held that a client could assign an interest in a judgment in payment to his attorney for services rendered in getting the judgment and for any subsequent services necessary to ultimately collect it. The statements in *Key v. Vattier*, *Weakly v. Hall*, and *Stewart v. Welch* that such contracts gave the attorney an interest in the litigation that was champertous at common law and against public policy and, therefore, were void and unenforceable were held not to be a correct statement of the law today. The reasons existing for the laws prohibiting champerty and maintenance in England during medieval times were declared non-existent today.<sup>20</sup>

Even where the courts have declared a fee arrangement to be unenforceable, by reason of champerty, the attorney has been allowed to recover in quantum meruit the reasonable value of the legal services he has rendered.<sup>21</sup>

The prior holding that the law will not tolerate a lien on a judgment in or out of the legal profession has also been reversed as courts of equity have allowed the attorney what is known as a special or charging lien on the judgment, decree, or award obtained for his client.<sup>22</sup> Such liens are granted on the theory that the services of the attorney created the fund.<sup>23</sup> Where the client and attorney have contracted that the latter shall receive a specified amount of the recovery, such agreement has been held to operate as an equitable lien in favor of the attorney.<sup>24</sup>

In effect, the courts have allowed attorneys to freely engage in common law champerty, the only penalty for getting caught being the loss of that amount over the reasonable value of the lawyer's services. The attorney cannot only engage in contracts with his client which give him an interest in the judgment, decree, or award, but the courts will allow such an interest to be obtained in any instance where his professional services in a lawsuit create a fund.<sup>25</sup> It cannot

<sup>19</sup> *Dombey, Tyler, Richards and Grieser v. Detroit T. & I. R. Co.*, 351 F.2d 121 (6th Cir. 1965) & cases cited therein.

<sup>20</sup> *P. C., C. & St. L. v. Volkert*, 58 Ohio St. 362, 50 N.E. 924 (1898); *Reece v. Kyle*, 49 Ohio St. 475, 37 N.E. 747 (1892).

<sup>21</sup> *Brown v. Bruner*, 10 Ohio App 314 (1919); 100 ALR 2d 1378 (1965).

<sup>22</sup> *Ohio Jur.2d Attorneys at Law* § 137 (1968); *Stevens, Our Inadequate Attorney's Lien Statutes—A Suggestion*, 131 WASH. L. REV. 1 (1956).

<sup>23</sup> *Cohen v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923).

<sup>24</sup> *Chapman v. Lee*, 45 Ohio St. 356, 13 N.E. 736 (1887); 143 ALR 204 (1943).

<sup>25</sup> *Weakly v. Hall*, 13 Ohio 167 (1844); *Stewart v. Welch*, 41 Ohio St. 483 (1885).

be denied that the courts have now legalized practices which were heretofore considered champertous and illegal not only in England but in 19th century Ohio.<sup>26</sup>

There are still some contingent fee contracts which will still be held void and unenforceable in Ohio. The contingent fee is void if coupled with a clause calling for mutual consent of the lawyer and the client to any settlement.<sup>27</sup> Anything that interferes or would tend to interfere with a settlement is frowned upon by courts with overcrowded trial dockets. The attorneys point to the practices of certain insurance companies, which use any trick possible to get the client to settle against the client's interest. The fact that a clause prohibiting unilateral settlement protects the attorney's fee is claimed to be only incidental to the protection such a clause affords the client against over-reaching by unscrupulous defendants.<sup>28</sup>

The insurance companies are quick to point out the abuses which an attorney could commit under such a mutual consent clause. The attorney may think that carrying a case through trial may cut into his fee too much and, therefore, settle, when his client's best interests would be served by going to trial. On the other hand, the attorney might choose to go to trial on a gamble to increase his fee, even though the settlement offer is fair and more reasonable a choice under the circumstances, considering the cost and time involved in trials for the clients.<sup>29</sup> Opponents of the contingent fee contract go so far as to claim that, even without the mutual consent clause, the contingent fee creates a conflict of interest between the attorney and his client.<sup>30</sup>

As the law stands today, while a contract for a contingent fee is ordinarily valid, it becomes champertous by the addition of the stipulation that the client shall not compromise or settle his claim without the consent of his attorney. The illegal clause taints the entire contract and cannot be ignored while the other provisions are enforced. The contract is voidable at the option of the client and its illegality will constitute a defense in any action against third parties, such as the insurance company, which settles with the client without the knowledge or consent of the attorney.<sup>31</sup> An attorney may protect himself to a certain extent by providing in the fee agreement that he will receive a certain amount whether the case is settled by the attorney with consent of the client or by the client alone. Then the attorney

<sup>26</sup> Sonenfield, *Survey of Ohio Law—1955: Attorneys at Law, Champerty and Maintenance*, 3 W. RES. L. REV. 232 (1956).

<sup>27</sup> *Lo Guidice v. Harris*, 98 Ohio App 230, 128 N.E.2d 842, 845 (1954); *Dombey, Tyler, Richards and Grieser v. Detroit T. & I. R. Co.*, 351 F.2d 121 (6th Cir. 1965).

<sup>28</sup> H. ROSS, SETTLED OUT OF COURT at 81-86 (1970); F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES at 75 (1964).

<sup>29</sup> *Panel Discussion: Contingent Fees*, 18 FED. INS. COUNS. Q. 63, 72 (1967).

<sup>30</sup> Williston, *The Contingent Fee in Canada*, 6 ALBERTA L. REV. 184, 199 (1968); H. ROSS, SETTLED OUT OF COURT, (1970) at 80.

<sup>31</sup> *Davy v. Fidelity & Casualty Ins. Co.*, 78 Ohio St. 256, 85 N.E. 504 (1908).

may have a lien against the fund which even insurance companies cannot defeat by payment to the client.<sup>32</sup>

The liberal treatment of the contingent fee by the courts in the majority of United States jurisdictions has, in effect, altered the definition of common law champerty. The contingent fee in these jurisdictions is no longer considered champertous per se. Only when the contingent fee contract includes a restraint on settlement or is unconscionable according to standard contract principles will the courts declare the agreement champertous and void. If the attorney agrees to bear the entire expense of litigating the suit, this would constitute maintenance and will also void the contract. The only vestige of the common law prohibition against champerty which still exists is the distinction that the courts now make in allowing the use of the contingent fee, that the fee be measured by the amount of the recovery and not be a contract to pay over to the attorney a share of the actual proceeds (e.g., stocks and bonds or land) recovered.<sup>33</sup> This distinction is form without substance, as the client, especially the indigent client will have to sell the property recovered to pay the legal fee and in the case where cash is recovered, the legal fee will usually be paid out of the cash received from the defendant.<sup>34</sup> For all practical purposes, common law champerty is no longer considered a restraint on legal fees by the courts.

### Ethical Considerations

The position of the legal profession in the United States, on the use of contingent fees to finance litigation, can best be gleaned by examining the codes of ethics adopted for self-regulation of the bar.

Canon 10 of the American Bar Association's Canons of Professional Ethics, adopted by the Supreme Court of Ohio on November 13, 1952, cautions the lawyer not to purchase any interest in the subject-matter of the claim he is asserting for his client.<sup>35</sup> Canon 42, usually cited along with Canon 10 in cases dealing with champerty, maintenance, and like activity, warns that a lawyer may not properly agree to bear all the costs and expenses of litigation without an agreement by the client to repay the monies advanced by the attorney.<sup>36</sup> If the attorney and his client enter into a contingent fee contract it would seem that the attorney would be obtaining an interest in the litigation in violation of the above Canons 10 and 42, but Canon 13 allows contingent fee agreements provided only that such con-

<sup>32</sup> *Bailey v. Toledo & O. C. R. Co.*, 3 Ohio N.P.N.S. 366, 15 Ohio D.N.P. 745 (1905); *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N.E. 55 (1908); *Roberts v. Montgomery*, 115 Ohio St. 502, 154 N.E. 740 (1926).

<sup>33</sup> For an example of this distinction made by the courts see *McInerney v. Massosoit Greyhound Assn.*,—Mass.—,269 N.E.2d 211 (1970).

<sup>34</sup> *Id.*

<sup>35</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 10.

<sup>36</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 42.



tracts be reasonable.<sup>37</sup> The average contingent fee charged is 33%.<sup>38</sup> Whether this is reasonable can only be determined by a court of law, where the client contests the fee.<sup>39</sup>

The last major disciplinary case involving violations of the Canons of Professional Ethics, in the realm of champerty and maintenance, came before the Ohio Supreme Court in *Mahoning County Bar Association v. Ruffalo* (1964).<sup>40</sup> In that case, an action was brought to disbar a lawyer for, among other things, advancing living expenses to his client. The attorney pleaded that the client had agreed to repay the "loan" advanced, as required by the Canons. The court held that, though the client had agreed to repay the expenses advanced, it was obvious that if the lawyer had to advance living expenses, the only way the client could repay him was out of the proceeds received by judgment or settlement. The court held, the attorney had in fact purchased an interest in the subject-matter of the litigation. He was bearing all of the cost of the suit, looking solely to the judgment for compensation. Piercing the veil of the "loan", the state court found that the attorney in this case had violated the Canons and was guilty of champerty and maintenance upon which the Canons are based. The attorney was disbarred by the state courts, but the federal courts, viewing his actions as necessary under the circumstances, as his client was indigent, did not disbar him.<sup>41</sup>

In October, 1970, the state of Ohio adopted the Code of Professional Responsibility as its new ethical code of conduct for the legal profession.<sup>42</sup> A violation of the disciplinary rules within the 9 canons of the Code could subject the guilty lawyer to action by the bar associations' grievance committees and subsequently, to discipline by the state courts, including possible disbarment.<sup>43</sup>

Disciplinary Rule 5-103 AVOIDING ACQUISITION OF INTEREST IN LITIGATION restates Canons 10 and 42 of the Canons of Professional Ethics.<sup>44</sup> The type of expenses which may be properly advanced by

<sup>37</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 13 as adopted Aug. 27, 1908 was worded: "Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges." As amended on Aug 31, 1933, Canon 13 now reads: "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."

<sup>38</sup> F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES at 116 (1964); *Report of the Committee on Personal Injury Claims: Sec. 15 Contingent Fees*, 40, CALIF. B. J. 148, 189 (1965).

<sup>39</sup> See Rommell, *Reasonable Fee and Professional Discipline*, 14, CLEV-MAR. L. REV. 94 (1966).

<sup>40</sup> *Mahoning County Bar Assn. v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396 (1964).

<sup>41</sup> *Id.*

<sup>42</sup> Code of Professional Responsibility, 23 Ohio St. 2d 1 (1970).

<sup>43</sup> O. SCHROEDER JR., LAWYER DISCIPLINE: THE OHIO STORY at 20 (1967).

<sup>44</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY: PRELIMINARY DRAFT at 71 n.5 & 6 (Jan. 15, 1969).

the attorney and the situations in which they may be advanced are set out with the provision that ". . . the client remains ultimately liable for such expenses."<sup>45</sup> Therefore, if a lawyer advances funds for his client's living expenses, looking to the recovery for repayment, he would be subject to the same disciplinary action as was taken in *Mahoning County Bar Association v. Ruffalo*.<sup>46</sup>

The validity of the contingent fee itself is recognized by the Code. In EC 2-16 lawyers are counseled to participate in ethical activities designed to assure persons who are unable to pay all or a portion of a reasonable fee the means to obtain necessary legal services.<sup>47</sup> The view of the courts and bar associations regarding contingent fees specifically is stated in the following ethical considerations, which are worth quoting in their entirety:

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.<sup>48</sup>

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation,

<sup>45</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5.

<sup>46</sup> *Mahoning County Bar Ass'n. v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396 (1964).

<sup>47</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2.

<sup>48</sup> *Id.*

a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.<sup>49</sup>

These ethical considerations leave it up to the attorney himself to regulate his use of the contingent fee along the guidelines set out in the Code. They are not as strong a rein on lawyer's misconduct as the disciplinary rules.<sup>50</sup>

Though the Code allows the free use of the contingent fee contract, DR 2-109 does provide that an attorney shall not enter into an agreement with his client where it is obvious that the client seeks to bring an action merely for the purpose of harassing or maliciously injuring any person.<sup>51</sup> DR 2-110 makes it mandatory that the attorney withdraw his services in such a case.<sup>52</sup> The major foundation for the prohibition of contingent fees at common law was that they were used as a means of stirring up litigation for purposes of harassment.<sup>53</sup> If the provisions of the Canons of Professional Ethics and Code of Professional Responsibility were strictly enforced by the courts and bar associations, the claim made against the contingent fee, that it tends to make it easy to institute malicious and spurious suits, would not carry as much weight as it presently does. However, the bar associations and the courts have been quite lax in enforcing the rules regarding fees in general and the contingent fee particularly.<sup>54</sup> Crowded court dockets is the reason given for the failure of the courts in disciplining over-reaching lawyers. The bar associations' failure to adequately regulate attorneys fees and punish violations of the codes of ethics is based on fragmentation of the bar associations and therefore the lack of real power to act.<sup>55</sup>

The minimum fee schedule of most bar associations provide for contingent fees of 33-1/3% before trial and 40% after suit is filed.<sup>56</sup> These fee schedules are only recommended minimum fees that should be charged in order to maintain professional standards and provide a reasonable return for lawyers in general.<sup>57</sup> The suggested fee is

<sup>49</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5.

<sup>50</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE.

<sup>51</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2.

<sup>52</sup> *Id.*

<sup>53</sup> Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935).

<sup>54</sup> *Supra* note 29, at 63, 74.

<sup>55</sup> ABA Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, (June 1970) at 92-100; For a detailed analysis of legal ethics in practice and self-regulation of the legal profession see J. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966).

<sup>56</sup> *E.g.*, THE MINIMUM FEE SCHEDULE AND THE CONSTITUTION OF THE CUYAHOGA COUNTY BAR ASSN. (1970).

<sup>57</sup> ABA OPINION 302 (1961).

the least a lawyer should charge.<sup>58</sup> No upper limit is suggested for legal fees.<sup>59</sup> The bar associations have not shown an interest in suggesting a maximum fee, on the theory that the fee is a matter between attorney and client to be arrived at by contract, free of external restraint other than traditional contract law.<sup>60</sup>

The bar associations have found no reason to further restrain, let alone prohibit, the use of the contingent fee. The only complaints that the bar associations receive from clients involve the amount of the fee charged. Particularly the question arises as to whether the contingent fee is to be taken out of the recovery before or after other expenses and costs of the suit are deducted. The bar associations maintain that disputes over the reasonableness of the contingent fee and how it should be deducted from the total recovery arise primarily where there is no written agreement. It is further claimed, that, if the contingent fee arrangement is reduced to a written contract and is fully explained to the client, complaints by clients would be reduced to a negligible number.<sup>61</sup>

It can safely be said that the courts, bar associations, and the legal profession in general, in the majority of United States jurisdictions, support the use of the contingent fee and do not restrain nor prohibit its use as violative of public policy or professional ethics. The contingent fee contract is treated like any other contract between two or more parties. If it is reasonable, the contract will be upheld. If the contract is unreasonable the attorney will be allowed only to receive payment in quantum meruit, without an allowance for the risk involved in contingent fee arrangements. The contingent fee per se is no longer considered to give the attorney such an interest in the subject-matter of the litigation as to constitute champerty and be void.

### Criticism and Commendation of Contingent Fees

With the preceding background of the state of the law regarding the contingent fee, the claims asserted against the use of this fee system may now be more particularly examined.

A traditional complaint made against the contingent fee is that it encourages persons to commence suits which they might not other-

<sup>58</sup> *Supra* note 56. Forward to Minimum Fee Schedule.

<sup>59</sup> *Id.*

<sup>60</sup> F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 13, 22 (1964); *Report of the Committee on Personal Injury Claims: Sec. 15 Contingent Fees*, 40 CALIF. ST. B. J. 148, 190 (1965); also see M. BLOOM, THE TROUBLE WITH LAWYERS at 192 (1968) for the view that lawyers, bar associations, and courts support the minimum fee schedules because they discourage "shopping around" by clients—but they also are used to justify unreasonably high fees.

<sup>61</sup> Committee on Personal Injury Claims, The State Bar of Calif., *The Case for Contingent Fees*, 6 LAW OFFICE ECON. & MANAGEMENT 189, 194 (1965-66).

wise maintain. It tends to promote spurious claims.<sup>62</sup> In days of old, law suits were considered evil and to be avoided.<sup>63</sup> Today, if a person has a valid claim, the popular view in the United States is that he should have an opportunity to assert that claim regardless of his financial situation.<sup>64</sup> If the court dockets are bursting at the seams, the solution lies in reforming the judicial system, not in denying a litigant the use of the contingent fee as a means of financing his worthy suit. If modern pretrial procedure and discovery methods now provided in most court systems<sup>65</sup> are properly used, the spurious suit may be eliminated without the prohibition of the contingent fee.<sup>66</sup>

Another traditional criticism of the contingent fee system is that it is against public policy that litigation should be promoted and supported by those who have no concern in it.<sup>67</sup> Such a view of public policy is outdated. Again, litigation is no longer considered an evil. It is now recognized that great progress may be made in freeing our society from such evils as sweatshops, racial discrimination, and destruction of our environment, through the use of our judicial system.<sup>68</sup> Litigation in these areas is initiated primarily by individuals and groups too poor to pay a fixed fee. The contingent fee system has allowed persons, who otherwise could not afford a lawsuit, to assert their claims and have their day in court as guaranteed by the United States Constitution.<sup>69</sup> Even in England, where the contingent fee is prohibited, the public policy that litigation should not be promoted and supported by those not a party to the lawsuit, is no longer the popular view. The government now subsidizes those unable to pay the fixed legal fees.<sup>70</sup> The United States experience has been that less government control of an individual's actions is preferable to the *big brother* concept of government.<sup>71</sup> A government subsidized program providing legal services for those unable to pay a fixed fee, "Judi-care," as a substitute for the present contingent fee system is incompatible with the American ideal. Why should an indigent person

<sup>62</sup> F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES at 5 (1964); Williston, *The Contingent Fee in Canada*, 6 ALBERTA L. REV. 184 (1968); Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587 (1940); M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968); M. MAYER, *THE LAWYERS* at 261 (1967); H. ROSS, *SETTLED OUT OF COURT* at 82 (1970).

<sup>63</sup> F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES at 210 (1964); Radin, *Maintenance by Champerty*, 24, CALIF. L. REV. 48 (1935).

<sup>64</sup> B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* at 142-146 (1970).

<sup>65</sup> FED. R. CIV. P.11

<sup>66</sup> *E.g.*, OHIO REV. CODE § 2917. 43 (page 1970) provides for a fine of no more than \$500 for stirring up lawsuits. A more strict punishment and more frequent enforcement of this statute could have a deterrent effect upon the anti-social practices popularly attributed to the use of the contingent fee.

<sup>67</sup> *Supra* note 62.

<sup>68</sup> *See* NAACP v. Button, 371 U.S. 415 (1963); R. SMITH, *JUSTICE AND THE POOR* (1919); *The Case for Contingent Fees*, 6 LAW OFFICE ECON. & MANAGEMENT 189, 191 (1965-66).

<sup>69</sup> U. S. CONST., amend. XIV; generally and amend. VI in criminal prosecutions.

<sup>70</sup> *Supra* note 29, at 63, 65, 74.

<sup>71</sup> *Supra* note 64 at 71-81.

with a valid personal injury claim be restricted to the use of government legal services, where a bureaucrat decides whether the claim is worthy enough to deserve assertion by a government picked lawyer, when, under the contingent fee system, the indigent may obtain the lawyer of his own choosing and get that personal attention that is lacking in the services rendered by an overloaded government bureau?<sup>72</sup> Will the government salaried attorney be more concerned with his client's cause than the attorney working under a contingent fee contract whose very fee depends upon the successful advocacy of his client's claim?<sup>73</sup> The great cost of government subsidy of civil suits should also be borne in mind. The government is presently hard pressed to provide funds for the existing Office of Economic Opportunity legal services let alone to provide for expansion of these legal services to fee generating cases.<sup>74</sup>

A government or commercially sponsored insurance program<sup>75</sup> may help those that can afford to pay the premiums of legal insurance, but what is to become of those who cannot afford to pay for such insurance, if the contingent fee is prohibited?

Given the fact that today litigation of a valid claim is not considered an evil, but rather is considered a right which, in the long run, benefits society as a whole, the traditional criticisms of the contingent fee, asserting that promotion and support of litigation by "outsiders" is against public policy, are no longer valid.

More recent criticism of the contingent fee is that it leads to a deterioration of the ethical standards of the legal profession. The lawyer, by reason of his fee being contingent, will stop at nothing to assure a judgment for his client, even to the point of inflating damages, suppressing evidence, or bribing witnesses. It is claimed that the contingent fee tends to promote *ambulance chasing*.<sup>76</sup> It is probably impossible to make any sort of reliable statistical analysis to determine if these claims are true. Assuming that these practices are committed under contingent fee contracts, a greater effort by the bar associations and the courts in the area of lawyer discipline would be more desirable than prohibiting the use of the contingent fee. Soliciting and other forms of malpractice mentioned above are

<sup>72</sup> *Panel Discussion: Contingent Fees*, 18 FED. INS. COUNS. Q. 63, 66 (1967); Williston, *The Contingent Fee in Canada*, 6 ALBERTA L. REV. 184, 200-201 (1968); M. MAYER, *THE LAWYERS* 272-302 (1967).

<sup>73</sup> *Id.*

<sup>74</sup> This writer worked for the OEO Legal Services in Jersey City, New Jersey in 1968 and remembers well the problems encountered in attempting to provide adequate legal services, while no one knew whether the political powers that be would renew the office's grant for the coming year.

<sup>75</sup> See B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970); R. KEETON, *COMPENSATION SYSTEMS: THE SEARCH FOR A VIABLE ALTERNATIVE* (1969); R. KEETON & J. O'CONNELL, *AFTER CARS CRASH* (1967).

<sup>76</sup> M. BLOOM, *THE TROUBLE WITH LAWYERS*, (1968); Rhoads, *Acquiring Interest in Litigation—The Role of the Contingent Fee*, 54 KY. L. J. 155, 157 (1965); 1 *LAWYER REFORM NEWS*, June-July 1971, at 1, Col. 1.

not inherent in the contingent fee. They are practiced as well by lawyers working under fixed fee contracts and will not disappear with the prohibition of the contingent fee.

The previously mentioned criticisms of the contingent fee were those asserted by members of the legal profession, members of the press, and the insurance industry.<sup>77</sup> The client public has had only one major complaint against the contingent fee arrangement, that the fee charged is unreasonably high.<sup>78</sup> When the client first seeks legal services in litigating his claim, he usually prefers that the fee be taken on a contingency basis. This is so even though the client could afford a fixed fee.<sup>79</sup> The reason for this is that the contingent fee arrangement tends to minimize the very heavy expenses the client may incur in the event that his action is unsuccessful.<sup>80</sup> If the lawyer is willing to gamble his fee on the strength of his client's cause, the client is usually willing to affix his signature to a fee contract whereby he has seemingly nothing to lose. It is not until the attorney successfully executes the suit that the client complains of over-reaching and the unreasonableness of the bargain. The client forgets the gamble that the lawyer took and claims only that the lawyer has not spent enough time, labor, or overhead to deserve almost 50% of the recovery.<sup>81</sup> What is a reasonable return on a contingent fee contract will depend on the strength of the client's case which is hard to accurately judge at the time the contingent fee contract is entered into.

However, it is admitted that over-reaching does exist under contingent fee contracts.<sup>82</sup> In those cases where the fee is so unreasonable as to constitute an unconscionable bargain, the courts have always retained the power to declare the contingent fee contract unenforceable and discipline the over-reaching attorney if necessary.<sup>83</sup> If the courts in a particular jurisdiction find that the contingent fees in their jurisdiction are consistently unreasonable, in that they are unrelated to the work performed and the risks involved, the courts may follow the example of the First and Second Judicial Departments of the New York Court of Appeals and establish maximum fees that

<sup>77</sup> *Report of the Committee on Personal Injury Claims: Sec. 15 Contingent Fees*, 40 CALIF. ST. B. J. 148, 191 (1965); R. KEETON & J. O'CONNELL, *AFTER CARS CRASH* at 30 (1967).

<sup>78</sup> *Supra* note 61 at 189, 190.

<sup>79</sup> This fact is admitted by opponents of the contingent fee.

<sup>80</sup> Williston, *The Contingent Fee in Canada*, 6 ALBERTA L. REV. 184, 200 (1968).

<sup>81</sup> M. BLOOM, *THE TROUBLE WITH LAWYERS* at 141 (1968) examines claims that to the contrary there is no risk involved as 90% of all claims are settled; see also Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970) where economic models are used to show the fixed fee system to be more profitable for both the attorney and his client in the long run.

<sup>82</sup> Richter, *Laymen, Lawyers and Legal Fees*, 27 ALA. LAWYER 203, 205 (1966).

<sup>83</sup> Romell, *The Reasonable Fee and Professional Discipline*, 14 CLEVE-MAR. L. REV. 94, 100 (1965).

will be enforced within the jurisdiction.<sup>84</sup> Such action by the courts preserves the contingent fee system, recognizing the benefits derived from it, while at the same time, effective control is provided over those who would abuse the contingent fee system for personal gain.

In summary, the old saying, "The contingent fee is the poor man's key to the courthouse door",<sup>85</sup> being still true today, it would seem that the liberal approach to legal fees presently followed in the majority of United States jurisdictions is preferable to any system proposed by opponents of the contingent fee. The claims asserted to justify the prohibition of the contingent fee become no more than echoes of a deservedly dead feudal system without substance in a country which prides itself on the fact that theoretically its courts are open to all without regard to class, race, or economic condition.

Though abuses of the system are evident in everyday experience, no study yet conducted has shown that a prohibition of the use of contingent fees would be a better cure than freeing the courts from their overload and giving more power to bar association grievance committees. By taking these steps the contingent fee may be so supervised that the abuses surrounding its use and other breaches of professional responsibility to the public may be checked.

The claim is made by laymen and even some members of the bar, that the courts, legislatures, and bar associations are made up of lawyers supporting abuses of the contingent fee system.<sup>86</sup> Only by self-regulation according to the Canons of Professional Ethics and the Code of Professional Responsibility and by active support of movements to increase the effectiveness of regulation of lawyer discipline by the courts and bar associations can this criticism of the contingent fee and the trial bar be met and stilled. This action, coupled with more publicity as to the benefits to be derived from the contingent fee system of financing litigation, will assure the continuance of the contingent fee for the benefit of both attorney and client.

<sup>84</sup> For an examination of the N. Y. Court Rule see Romell, *The Reasonable Fee and Professional Discipline*, 14 CLEVELAND MAR. L. REV. 94, 105 (1965); *Panel Discussion: Contingent Fees*, 18 FED. INS. COUNS. Q. 63, 75-86 (1967); F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 161-167 (1964); *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43 110 N.Y.S.2d 784 (1959) affirming the power of the court to adopt Rule 4 but also recognizing the importance of and necessity for retaining the contingent fee system.

<sup>85</sup> M. McNAMARA, 2,000 FAMOUS LEGAL QUOTATIONS at 215 (1967).

<sup>86</sup> LAWYER REFORM NEWS, a new publication, is published by Lawyer Reform of the U.S., a California based organization which allows attorneys to subscribe to its newspaper, but refuses membership to attorneys on the grounds that they have a vested interest in what the organization calls "the present corruption". 1 LAWYER REFORM NEWS, June-July 1971, at 2.