THE CONTINUING ASSAULT ON THE CITADEL OF FIDUCIARY PROTECTION: ETHICS 2000'S REVISION OF MODEL RULE 1.5

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The attorney-client relationship typifies a fiduciary relationship. At a minimum, attorneys are required to deal fairly and reasonably with their clients while avoiding any inclination to act in a self-interested manner. Nowhere is the tension between a lawyer's self-interest and their fiduciary obligations to a client greater than in the area of fee structures.

Contingency fees were developed to allow clients representation when they otherwise may not be able to afford such representation, while compensating a lawyer in a manner commensurate with the degree of risk presented by the case. Despite the inherent self-interest encountered by lawyers when presented by potentially large contingency fees, lawyers are in the unique position to gauge the risk presented by a particular case and counsel their clients accordingly. Questions have arisen whether some in the contemporary contingency fee bar have struck the balance too far in favor of their own self-interest, rather than in their client's best interest, when failing to present alternative fee structures. These questions have poignantly come to light after the extraordinarily large fees demanded following the recent tobacco litigation. Are lawyers honoring their fiduciary obligations to their clients?

Professor Brickman urges that the balance has been struck clearly in favor of lawyers' self-interest. Beginning with a detailed examination of both the origins of fiduciary obligations and previous efforts at establishing a lawyer's duties in presenting alternative fee structures, Brickman lays the foundation of the modern contingency fee structure and a lawyer's corresponding fiduciary obligations. Brickman then turns to the role of the Ethics 2000 Commission in

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clarifying a lawyer's obligations, examining the Commission's changes to the Comment to Model Rule 1.5 addressing contingency fees. He finds that, rather than stem the tide of what he identifies as widespread contingency fee abuse and disregard for fiduciary obligations, the Ethics 2000 Commission not only removed well-established protections for clients, but facilitated abuse in the contingency fee system. Despite early efforts indicating that the Commission would place a renewed emphasis on the reasonableness of contingency fees, Brickman finds the Commission ultimately found that increased scrutiny of contingency fees posed too great a threat to the status quo. He concludes that the changes fly in the face of an attorney's historical fiduciary obligation and materially diminishes the protections afforded to contingency fee clients.

I. INTRODUCTION

Our common-law heritage includes development of the three main branches of our civil law: contracts, torts, and fiduciary obligation. Under the latter, one designated as a fiduciary is obligated to exercise the utmost good faith and refrain from self-interested actions in dealing with clients, patients, beneficiaries, shareholders, and others designated as entitled to the protections of fiduciary status. The attorney-client relationship is the archetype for the fiduciary obligation, and its roots can be traced back for centuries, to the earliest period of development of our legal heritage.

The principal fiduciary obligations imposed on the lawyer include the duties of confidentiality, loyalty, safeguarding property, giving disinterested advice, and acting fairly towards the client. The duties to act fairly and in a non-self-interested fashion, in particular, relate to the financial relationship between the lawyer and client and require that a lawyer present the client with information regarding the fee arrangement that approximates what the client would obtain if the client consulted a second lawyer for assistance in negotiating the fee arrangement with the primary lawyer. Fairness is to be determined according to a heightened fiduciary standard rather than the arms-length marketplace standard. This standard, in turn, is commonly expressed as a requirement that fees must be "reasonable."

In recent decades, the fiducial[1] rights of clients have been under assault. Lawyers' self-interest is increasingly overpowering their self-restraint. Fiducial rights of clients carefully constructed over the course of a millennium are being eroded. Among the protective structures that are being undermined are the rights of clients to hold lawyers accountable in aggregative actions, the substantial elimination of fiduciary pro-

1. A fiduciary obligation imposed on the lawyer may be said to create a correlative fiduciary right for the client. I refer to those rights in this Article as "fiducial."

tections for contingency fee clients, and the increasing irrelevance of the "reasonable fee" requirement.

In particular, the obligations to charge a tort claimant fair and reasonable fees and to fully inform that client of fee options and how they comport with the client's interest—the very core of the traditional fiduciary obligation and its ban on overreaching—has been eroded by decades of attorney practices in the marketplace which have effectively received the imprimatur of the judiciary and by lax or nonexistent disciplinary oversight of contingency fees.

The Ethics 2000 Commission (the Commission) could have sought to counter this erosion by resoundingly reaffirming basic and traditional fiduciary protections for contingency fee clients—to be sure, a courageous act in an era of unparallel power exercised by such attorneys. Absent such courage, it could have chosen to remain silent, an act of capitulation to current practices. Instead, it chose a third path. It elected to elevate attorney profits over the obligation to treat clients fairly by proposing to eliminate a clause in the Comment to Rule 1.5 articulating a client's right to be given a choice of whether to pay an hourly rate or the standard 33.5%–40% contingency fee charged by personal injury lawyers and to have the lawyer's non-self-interested advice as to which is in a client's best interest. While contingency fee lawyers routinely ignore this obligation, instead of reaffirming this traditional duty owed the client as the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility recently did, the Commission has proposed to expunge virtually all of the meaningful fiduciary and ethical obligations relating to contingency fees from the ABA's Model Rules, for the convenience and profit of lawyers. Had the American Trial Lawyers Association been delegated the responsibility to propose changes to Model Rule 1.5, its recommendations would likely have approximated the Ethics 2000 proposals.

This article critiques the Ethics 2000 proposals regarding Model Rule 1.5. It begins with a brief examination of the origin and concept of fiduciary obligation, the nature of the fiduciary obligation imposed on the lawyer and, in particular, those obligations that superintend the financial relationship with the client. It then focuses on how fiduciary protections for clients have been and are being eroded as lawyers increasingly succeed in exempting themselves from the very rules that they have been instrumental in creating to regulate and make actionable the conduct of others. Having thus set the stage, the article then critically analyzes the Ethics 2000 proposal to undo a stated (though unenforced) protection of long standing for contingency fee clients—the right to make an informed choice among alternative fee structures.

II. A BACKGROUND ON FIDUCIARY OBLIGATIONS

A. The Fiduciary Obligation: Designation and Definition

Fiduciary obligation denotes a legally defined relationship in which the person designated as a fiduciary is burdened with obligations to another party,[2] the breach of which can give rise to claims for damages by the protected party. One who is cloaked in fiduciary garb is held to a standard of fairness when dealing with the protected party.[3] He must exercise the utmost good faith in his dealings with that party, make full and honest disclosure of material facts and refrain from taking any advantage of that party.[4]

2. There is no generic word to designate the party to whom a fiduciary obligation is owed. The range of terms applied in specific contexts includes: client, patient, beneficiary, shareholder, partner, ward, franchisee, and debtor. Although the standard that a fiduciary is held to, once a court has found that a fiduciary relationship exists, is clearly delineated, defining the parameters of relationships that fall within the fiduciary category is quite another matter. It is commonly said that a fiduciary relationship "exists when there is reposing of faith, confidence, and trust, and the placing of reliance by one upon the judgment and advice of the other." Williams v. Griffin, 192 N.W.2d 283, 285 (Mich. Ct. App. 1971) (citations omitted); *see also* Penato v. George, 383 N.Y.S.2d 900, 904 (2d Dept. 1976) ("[A] fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. . . . [T]he relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed."); RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1979) ("A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.").

Another common way to define when the relationship applies is that it exists when one party is required to act primarily for another person's benefit, RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); WILLIAM F. FRATCHER & AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 2.5 (4th ed. 1987); or "[whenever] there is *confidence reposed* on one side *and resulting domination and influence* on the other," Denison State Bank v. Madeira, 640 P.2d 1235, 1241–42 (Kan. 1982) (quoting 36A C.J.S., *Fiduciary* 386–87 (1961)). The Kansas courts, however, have preferred to "identify common characteristics" of the fiduciary relationship rather than "provid[e] an all encompassing definition of a fiduciary relation." Ritchie Enters. v. Honeywell Bull, Inc., 730 F. Supp. 1041, 1052 (D. Kan. 1990).

These definitions are obviously overinclusive. That *A* reposes trust and confidence in *B* or acts primarily for *B*'s benefit does not necessarily mean that a fiduciary relationship exists between them. In one sense, the relationship exists when a court so declares. Definitions based upon such declarations are tautological. Statements of principles or definitions do not yet exist in the literature that enable reasonably reliable predictions of when fiduciary status is to be conferred. This has been ascribed, in part, to the haphazard development of the concept by the English chancery courts. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 881 ("The evolution of fiduciary obligation . . . owed much to the situation-specificity and flexibility that were Equity's hallmarks . . . . [However,] the interstitial nature of Equity's doctrines and functions made these doctrines and functions resistant to precise definition."). Indeed, there are those that decry not the absence of definition but rather the attempt at definition. *See, e.g.*, J. C. SHEPHERD, THE LAW OF FIDUCIARIES 3–11 (1981) (noting the legal system's reluctance to define fiduciary on the grounds that the concept is "intrinsically non-rational" and that defining fiduciary would "rob it of its dynamics and therefore its soul").

3. *See* DeMott, *supra* note 2, at 882; *see also* Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 266 (2d Cir. 1984) ("[T]he duty of loyalty requires [a fiduciary] to demonstrate that any actions it does take are fair and reasonable.").

4. Out of [the fiduciary] relation, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other . . . .

B. Why Society Imposes Fiduciary Obligation

An essential feature of the attorney, guardian, franchisor, controlling minority shareholder, majority partner, accountant, doctor, or other party burdened with fiduciary status is that she is in a position to exert undue power and influence over the party she is dealing with, whether a client, ward, franchisee, shareholder, minority partner, or patient.[5] One theory to explain why persons exercising such power and influence ought to be so burdened is that it promotes economic efficiency; that is, the imposition of fiduciary obligation facilitates the efficient allocation of resources by protecting the beneficiary of the fiduciary relationship from overreaching by the provider of services.[6] Typically, that provider is a professional who specializes in the provision of that service.[7] The specialization of function forces individuals to rely on others to produce goods and services on fair terms.[8] That reliance has necessarily afforded the opportunity for specialists to act in a self-interested fashion at the expense of the entrustor by using their superior knowledge or skills.[9] Accordingly, the fiduciary standard is applied to minimize the transaction costs of regulating specialized exchanges.[10] To promote the efficiency gains of specialization, society imposes special regulations on occupational groups having the greatest latitude to drive hard bargains.[11] The activities of the fiduciary are, therefore, policed by imposing certain du-

BLACK'S LAW DICTIONARY 564 (5th ed. 1979); *see also* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.").

5. *See, e.g.*, *In re* Estate of Heilman, 345 N.E.2d 536, 540 (Ill. App. Ct. 1976) ("A fiduciary relation arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal.").

6. *See, e.g.*, Graham v. Mimms, 444 N.E.2d 549, 555 (Ill. App. Ct. 1982) ("The law of fiduciary obligations facilitates commercial efficiency by imposing a duty of loyalty on fiduciaries . . . .").

7. Specialization is the hallmark of an advanced industrial economy; it purportedly increases the value of the resources produced in the economy. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 801–03 (1983). This is done by freeing capital and labor to work in the areas where it is most productive and thereby increasing the overall output of the economy. *See id.*

8. Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness & Corporate Structure*, 25 UCLA L. REV. 738, 739–40 (1978).

9. Because "[f]iduciaries are typically decision makers, their specialized function is that of recommending or making decisions. . . ." *Id.* at 757. As a result, specialization has created the opportunity for the specialist to negotiate an unfair deal vis-à-vis the nonspecialist. *Id.* at 740; *see also* Frankel, *supra* note 7, at 800–01 (arguing that a salient feature of the fiduciary relationship is that the fiduciary has the ability to abuse his position); Arthur J. Jacobson, *Capturing Fiduciary Obligation: Shepherd's Law of Fiduciaries*, 3 CARDOZO L. REV. 519, 527 (1982).

10. *See* Anderson, *supra* note 8, at 758–60 (arguing that the disparate levels of expertise and the complexity of the fiduciary role make negotiation difficult and inefficient).

11. Hard bargains can discourage the optimal allocation of resources. Weaker parties will abstain from specialized exchange if they perceive that they are dealt with unfairly, which eventually will impose costs on society. *See* Anderson, *supra* note 8, at 750–53. The costs on society will come from the weaker party's abstention or from the increased regulation necessary to convince the weaker party that the specialized exchange will be of benefit to him. *Id.* Moreover, to the extent that the weaker or less-informed party is unable to discern that his best interests are not served by an exchange, a hard bargain will lead to inefficient exchange. An example of this type of legislation is modern warranty and product liability law. Jacobson, *supra* note 9, at 527–28.

ties upon the specialist-fiduciary; these duties are imposed to avoid the inefficiencies resulting from specialist overreaching.[12] Accordingly, the fiduciary's duty of loyalty requires the fiduciary to follow the course of conduct the beneficiary would have chosen if the beneficiary had either the same expertise as the fiduciary or had consulted another fiduciary. The fiduciary duty is also imposed to limit the fiduciary from taking his self-interest into account when dealing with his beneficiary.[13]

C. *The Origin of Fiduciary Obligation*

Fiduciary law is commonly said to have originated in the English chancery courts;[14] however, functional equivalents of fiduciary relationships can be traced as far back as Roman Law.[15] Moreover, development

12. "Fiduciaries are typically decision makers; their specialized function is that of recommending or making decisions . . . ." Anderson, *supra* note 8, at 757; *see also* Jacobson, *supra* note 9, at 527.

13. As a prophylactic measure, many states expressly prohibit self-dealing by fiduciaries in an effort to protect decision making from being affected by self-interest. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW §§ 59-01-10, 59-01-11 (1966); *cf.* Rosenfeld v. Black, 445 F.2d 1337, 1342 (2d Cir. 1971) ("[N]o matter how high-minded a particular fiduciary may be, the only certain way to insure full compliance with that duty is to eliminate any possibility of personal gain.").

Another theory to explain the basis for imposition of fiduciary protection proceeds from the recognition of the inherent vulnerability of one of the parties as the motivating factor for imposing on the party with superior knowledge or resources an obligation not to take unfair advantage of that position. That is, the protection for certain vulnerable parties may be seen to arise out of a sense of fundamental fairness rather than solely for reasons of efficiency.

14. *See, e.g.*, PAUL D. FINN, FIDUCIARY OBLIGATION 2–4 (1977) (noting that the regulation of those bound by fiduciary ties evolved from the Chancery's analogy to the regulation of a trustee); DeMott, *supra* note 2, at 880; *see also* SHEPHERD, *supra* note 2, at 14. Shepherd acknowledges "tangled historical roots" of fiduciary law prior to the Chancery era but fails to specifically delineate them. *Id.* at 12.

15. *See* ERNEST VINTER, A TREATISE ON THE HISTORY & LAW OF FIDUCIARY RELATIONSHIPS AND RESULTING TRUSTS 2–12 (3d ed. 1955). The fledgling Roman doctrine equivalent to fiduciary law evolved from matters entrusted to the Roman Praetors. Praetors were municipal officers of the city of Rome, who served as magistrates and possessed an extensive equitable jurisdiction. BLACK'S LAW DICTIONARY 1058 (5th ed. 1979). "The praetor has often been compared to the Chancellor of English equity: both presided in courts outside the traditional private-law jurisdiction; and both were prepared to intervene on behalf of equity and against tradition." DAVID JOHNSTON, THE ROMAN LAW OF TRUSTS 4–5 (1988).

Guardianship was one of the most prominent topics of the Praetor's jurisdiction. The role of guardian was regarded as a public service rather than a private arrangement and was considered a duty rendered to the state. *Id.* at 290–91. Similar to situations where fiduciary obligations are imposed today, these relationships all represent situations where the former could take advantage of the latter because of his superior knowledge or position thereby making the latter vulnerable. The Roman law, under the Praetor, therefore, imposed certain trust relationships to protect the vulnerable party. Thus, certain vulnerable classes could bring disputes before the Praetor.

One area of Roman law particularly exemplary of the imposition of trust is the *fidei commissa* or gift trust. *Id.* at 9. The *fidei commissa* arose in an effort to avoid the restrictions of the Roman civil law governing legacies. *Id.* Because some persons, such as anyone not a citizen of Rome, were legally unable to take under a will, a testator, who wished to make a bequest to such a person, would request (and trust) that his legal heir would turn over the bequest in accordance with the testator's desire. SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME: AN AID TO THE STUDY OF SCIENTIFIC AND COMPARATIVE JURISPRUDENCE 366 (1987); JUSTINIAN'S INSTITUTES § 2.23, at 87 (Peter Birks & Grant McLead trans., 1987). Although the legal heirs were not bound by the request, the testator relied on the heirs to carry out his wishes. Accordingly, "[t]he whole matter was based on of certain features of English law long preceded the role of the chancery courts in advancing fiduciary concepts. One such example is the development of status-based obligations which were first imposed in the fourteenth century on common carriers and those engaged in "common callings."[16]

In addition to status-imposed obligations on the common professional, other obligations that may be seen as precursors of our modern law of fiduciary obligation were those imposed as a function of the English feudal system.[17] Among these obligations were those derived from sworn oaths of loyalty to one's lord, known as fealty and homage.[18] Fe-

trust." PAUL VAN WARMELO, AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW 141 (1976).

The branch of Roman law dealing with *fidei commissa* was in large part adopted by the English Courts of Equity when dealing with heirs and expectants. 2 PATRICK M.C. DECOLQHOUN, A SUMMARY OF THE ROMAN CIVIL LAW § 1336, at 288 (photo. reprint 1988) (1854); VINTER, *supra*, at 6. *But see* GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 2, at 5 (5th ed. 1973) ("[Trusts] were not based on the *fidei-commissum* of the Roman law."). In the eighteenth and nineteenth centuries, the Chancery Courts had jurisdiction to regulate breaches of confidence. As Frederick W. Maitland wrote, "These three give place in court of conscience, Fraud, accident, and breach of confidence." L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69, 69 (1962) (quoting F. W. MAITLAND, EQUITY 7 n.1 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936)). Initially, the breadth of an action characterized as either a breach of confidence or trust was extremely wide and non-technical. In fact, a breach of confidence or trust included what today would be characterized as a breach of fiduciary obligation. For instance, a breach of confidence could occur when one party undertook to exercise power for another, or when one party was dependent upon another for advice, or even when one party was able to influence the decisions of the other because of a dominant character or position; if the confidence was abused in any way, a party was entitled to relief in equity. *Id.* at 69–70.

16. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 186 (1971). "Common callings" were occupations which required the exercise of skilled training and made the tradesman who professed such skill liable in trespass on the case for negligence, if he were at fault. *See id.* Professions generally included in this classification were smiths or "farriers," surgeons and veterinary surgeons, carpenters, barbers, and ferrymen (although they may also have been considered carriers). S.J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 29–30 (1975); *see also* CECIL H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 157–58 (1949) (compiling many scholars' catalogues of trades considered to be callings). *But cf.* ALFRED W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 229–33 (1975) [hereinafter COMMON LAW OF CONTRACT] (asserting that "common" meant merely available to the general public as opposed to private and attached no legal significance to the word it modified, and maintaining "callings" were a miscellaneous compilation, each possessing its own requirements for liability). While most other early actions in trespass on the case required an allegation of an express undertaking, or assumpsit, to impose liability for negligent performance, the common professional was liable for his defaults independently of contract. As with the modern fiduciary, the common professional could not contract out of or lessen his duty of care. This establishment of a more stringent standard of care for professionals was a harbinger of modern malpractice liability. *See* Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 191 (1926) (referring to the callings as one of "the more conspicuous threads in the earlier history of negligence" and in establishing liability concurrent with one's voluntarily assumed duty of care).

17. The feudal system divided the entire English populace into social strata based on their relationships to land. In medieval England, all rights to land derived from the king, who "owned" all the land in his jurisdiction. 2 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 199 (1923) [hereinafter ENGLISH LAW]. The king granted tenures—or the right to use portions of his land—to lords, who in turn subinfeudated portions of their land to other lords. *Id.*

18. The word "fealty" is derived from the Latin *fidelitas*, or faithful. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 831 (1993). The ceremony entailed the oath taker placing his right hand on a bible, swearing to be faithful to the lord and then kissing the bible. SIR THOMAS LITTLE-

alty and homage mirror modern fiduciary obligations in that both represent legally enforceable duties of loyalty based on membership in a certain social stratum. Although these oaths were voluntarily sworn, they were a *sine qua non* for the possession of property in order to sustain the existence of the feudal system. Thus, while there was an element of choice in selecting to be a landed lord, that element of choice is identical to, say, the modern attorney/fiduciary who chooses to engage in the practice of law and then is compelled to accept the fiduciary duties imposed on that profession.

An early common-law-created obligation, which closely resembles modern fiduciary law, is the obligation of rendering an account based on the lawful possession of property owned by another and enforced by an action in account.[19] The action in account was used more frequently with the expansion of commerce and trade,[20] but gradually diminished throughout the Middle Ages.[21] The growth of the jurisdiction of the Courts of Chancery and that court's power to compel discovery and ad-

TON, LYTTLETON, HIS TREATISE OF TENURES 123–25 (Thomas Edlyne Tomlins ed., Russell & Russell 1970) (1841). Homage consisted of a solemn public ceremony whereby the tenant became his lord's man. The tenant swore to protect the lord with his own life and to serve him above all others. In return, he was entitled to the lord's protection and warranted possession of his land. *Id.* at 117–22.

19. Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction*, 2 HARV. L. REV. 241, 245 (1889) ("[O]wnership by the plaintiff must concur with possession by the defendant. Until these two things co-exist, the obligation to account cannot exist; and when they cease to co-exist, the obligation to account will cease to exist."). The accountant's liability arose from a "legal duty" to provide a reckoning to the principal, rather than from the accountant's voluntary undertaking. *See generally* 3 THOMAS A. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 99 (Hein 1980) (1906).

At its inception as early as 1232, the common-law action in account could only be brought against three special classes of persons: guardians in socage, bailiffs, and receivers. FIFOOT, *supra* note 16, at 260–69. The amount found to be due was not recoverable in account, however—the accounting process merely transformed the balance due into a debt, which was recoverable by that writ. This cumbersome procedure made account a "tedious and troublesome action" and contributed to account's eventual demise. Wilkins v. Wilkins, Comb. 149, 90 Eng. Rep. 397 (K.B. 1689). For a general procedural description of account, see COMMON LAW OF CONTRACT, *supra* note 16, at 177–79; S.J. Stoljar, *The Transformation of Account*, 80 L.Q. REV. 203, 212–15 (1964). While liability in account was later extended to other groups, initially, account was an extremely restricted remedy. *Id.* at 204. ("Account, in other words, did not begin as the expression of a general principle . . . of accountability, of application to all manner of agents and fiduciaries."). The limited availability of this writ was one of the factors which may have contributed to its eventual demise.

20. As the English economy developed from feudal to mercantile, so the action in account not only was applied to bailiffs and receivers on agricultural estates, but to partners in business, merchants and factors. Edmund O. Belsheim, *The Old Action of Account*, 45 HARV. L. REV. 466, 485–86 (1932). The action was also applied to increased categories of individuals, such as factors and partners, in this mercantile era. They were charged as "constructive" guardians, receivers, or bailiffs since they did not fit those groups' traditional definitions. Theodore F.T. Plucknett, *Words*, 14 CORNELL L.Q. 263, 271 (1929) ("As the middle ages proceed more and more people are admitted into the category of bailiffs . . . .").

21. Unlike account which provided a remedy only to specific individuals, indebitatus assumpsit allowed anyone to put forth an equitable claim "for money had and received" based on early contractual principles. This action more than covered the ground previously governed by account and made the separation of the latter "unnecessary." STREET, *supra* note 19, at 108.

minister accountings by numerous parties and for multiple claims added to account's disfavor.[22]

Numerous parallels can be drawn between common-law accountability and modern fiduciary obligation. First, both impose stricter duties on certain classes of individuals.[23] Additionally, like today's fiduciaries, common-law accountants were obligated to advance, serve and protect their proprietors' interests, and to make management choices solely for their principal's benefit, not their own.[24] In that respect, they resemble the modern fiduciary who also must act in a non-self-interested manner. Also, the common-law accountant's duties were imposed by law, not by the voluntary agreement of the parties.[25] Thus, they were unable to contract out of their responsibilities or lessen their obligations, much like the modern fiduciary.[26]

The development of agency law, which occurred relatively late in the development of the common law, also contributed to the development of fiduciary law, and in particular, the law regulating the lawyer-client relationship.[27] Agency imposed a more formal model of the lawyer's responsibilities on the common-law conception of the lawyer as officer of the court by defining the lawyer as an agent.[28] Concomitantly, agency law declared that certain principal-agent relationships—most notably the attorney-client relationship—were fiduciary in nature.[29]

Trust law—which regulated a party entrusted with another's property to manage on his behalf, and was an offshoot of agency law—is the branch of English law most closely associated with modern fiduciary law.[30] Historically, in English law, when confidence reposed in advisors

22. Belsheim, *supra* note 20, at 499 n.166. Belsheim relates not only how the unified procedures in equity made actions there more attractive and easier to administer, but also maintains that account's concurrent jurisdiction with other writs and its limited applicability to certain groups of people also contributed to that action's demise.

23. The classes those duties were imposed on in account are similar to today's fiduciary categories. The guardian in socage mirrors the modern trustee or estate administrator and parent/child relationships. The bailiff resembles a corporate director, personal representative, investment advisor, attorney, trustee and bailee. The receiver possesses characteristics of attorney as escrowee, principal/agent, modern receiver, and banker/customer. Even the mercantile expansions of the classes of accountable persons at common law to partners and factors are similar to co-owner and bailor fiduciaries today.

24. *See* Langdell, *supra* note 19, at 245–47.

25. "The relations between the plaintiff and the defendant may or may not have derived from a prior arrangement, but the liability to account was in either event imposed *ab extra*." FIFOOT, *supra* note 16, at 273.

26. Other common elements include: the power of the accountant over the principal's affairs; the position of trust the accountant was placed in; and their accountability for not only profits made, but for profits lost through errors in the accountant's judgment.

27. *See* POLLACK & MAITLAND, *supra* note 19, at 211.

28. *See* RESTATEMENT (SECOND) OF AGENCY § 390 cmt. c.

29. *Id*.

30. *See* SHEPHERD, *supra* note 2, at 14–16. In England, the law of trusts was created and controlled by the Court of Chancery to deal with amorphous relationships that the common law did not provide for. Trusts, along with the law of agency, which was recognized by the common law, came together in the application of fiduciary principles. *Id.* Our modern law of fiduciary obligation may be seen to be a function of the extension of the fiduciary element that was at the core of trust law, to per-

or agents was breached, courts began to refer to these breaches as "quasi-trusts."[31] The term "trust" came to embody a specific legal meaning rather than merely being analogous with confidence. However, there still remained much confusion over the precise meaning of these terms. This confusion, along with the birth of the terminology, "fiduciary obligation," is illustrated in the discussion in *Gibson v. Jeyes.*[32]

In *Gibson,* the court, while explaining the decision to rescind the sale of an annuity by an attorney to his client, announced that "[one] who bargains in matter of advantage with a person placing confidence in him is bound to sh[o]w, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys or anyone else."[33] The courts eventually settled on "fiduciary" to denominate relationships of trust and confidence and denominated the doctrine (applied in *Gibson*) regulating these confidential relationships as "constructive fraud."[34] By the mid-nineteenth century, the doctrine of constructive fraud was said to "arise from some peculiar confidential or fiduciary relation between the parties."[35]

Like constructive fraud, fiduciary obligation is imposed to protect confidences that, if violated, would injure public or private interests.[36] Therefore, the imposition of fiduciary status obligates the person in whom confidence is reposed to exercise the utmost good faith in his deal-

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sons not acting as trustees. D. WATER, THE CONSTRUCTIVE TRUST, THE CASE FOR A NEW APPROACH IN ENGLISH LAW 3–5 (1964).

31. Sealy, *supra* note 15, at 69, 71.

32. 31 Eng. Rep. 1044 (1801); *see also* Sealy, *supra* note 15, at 69, 71. The transition from the precursor strands of English law to fiduciary obligation is substantially complete by the beginning of the nineteenth century with the discussion in *Gibson*. *Id.*

33. *Gibson*, 31 Eng. Rep. at 1050; Sealy, *supra* note 15, at 278.

34. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 307, at 309 (13th ed. 1886). "Constructive fraud may be defined as a breach of duty which, irrespective of moral guilt and intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence or to injure public or private interests which the law deems worthy of a special protection." Brown v. Lockwood, 432 N.Y.S.2d 186, 193 (N.Y. App. Div. 1980) (citations omitted).

35. 1 STORY, *supra* note 34, at 309; *see also* Sealy, *supra* note 15, at 72 n.11 (stating that the use of the term "fiduciary" did not arise until the 1850s and was largely a result of the textbook writers). "The doctrine [of fiduciary relationships] originally was confined to persons occupying certain recognised fiduciary positions, such as trustees. . . ." VINTER, *supra* note 15, at 1. *But see* Bishop of Winchester v. Knight, 24 Eng. Rep. 447, 448 (1717) (early judicial use of "fiduciary" as one in whom trust is reposed).

36. So, fiduciary obligation:

> [D]oes not apply merely to those who bear a formal relation of trust to those with whom they deal—not only to attorneys, physicians, trustees, clergyman, kinsmen, and others who by the very force of their occupations or relationship are presumed to be in the class of persons bound to act with the utmost good faith. It applies in every case 'where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.

Stevens v. Marco, 305 P.2d 669, 679 (Cal. 1957) (citing Cox v. Schnerr, 156 P. 509, 513 (Cal. 1916) (emphasis omitted); *see also* Lappas v. Barker, 375 S.W.2d 248, 251 (Ky. 1964) (a fiduciary relationship "exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence"). Accordingly, fiduciary duties can arise because a relationship has certain characteristics rather than because a relationship is characterized as one commonly embodied by fiduciary duties.

ings with the beneficiary,[37] to make full and honest disclosure of all material facts,[38] and to refrain from any advantage at the expense of the confiding party.[39] These obligations include invalidating any transaction between a fiduciary and a protected party unless the fiduciary demonstrates that the transaction is fair and that he has not taken advantage of the confidence reposed in him.[40]

D. Derivation of the Fiduciary Obligation of the Lawyer

Lawyers are the quintessential fiduciary.[41] Over the course of centuries, and from many different strands of law, they have had devolved upon them "[t]he duty to deal fairly, honestly and with undivided loyalty [that] superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interests, operating competently, safeguarding client property and honoring the client's interests over the lawyer's."[42]

The origin of specific fiduciary obligations of the lawyer may be traced back to the Statute of Westminster I, which defined and prohibited certain forms of lawyer misconduct.[43] Among these was the crimi-

37. *See* Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959) ("One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability."); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."); Smoot v. Lund, 369 P.2d 933, 936 (Utah 1962) ("[A lawyer's] fiduciary duty is of the highest order and he must not represent interests adverse to those of the client. It is also true that because of his professional responsibility and the confidence and trust which his client may legitimately repose in him, he must adhere to a high standard of honesty, integrity and good faith in dealing with his client.").

38. *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 228 (1980) ("[T]he duty to disclose arises . . .because of a fiduciary or other similar relation of trust and confidence." (citing RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976))).

39. *See, e.g.*, Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513 (Tex. 1942) ("It is the duty of a fiduciary to deal openly, and to make full disclosure to the party with whom he stands in such relationship."); *see also* 37 AM. JUR. 2D, *Fraud and Deceit*, § 15 (1968); SHEPHERD, *supra* note 2, at 41.

40. *Schnerr*, 156 P. at 513 (when a fiduciary relationship exists, then a court will presume undue advantage was taken by the fiduciary unless the person acted on his own volition with full comprehension of his actions); Parker v. Parker, 413 N.Y.S.2d 388 (App. Div. 1979).

41. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146 (1986) ("[T]he designation of 'fiduciary' . . . surely attaches to the [attorney-client] relationship."). *See generally* Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357 (1994).

42. *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) (citation omitted) (essentially adopting the formulation in Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited,* 72 N.C. L. REV. 1, 6 n.21 (1993) [hereinafter *Retainers Revisited*] ("maintaining confidentiality; maintaining undivided loyalty; avoiding conflicts of interest; operating competently; presenting information and advice honestly and freely; acting fairly; and safeguarding client property"); *see also* Mirabito v. Liccardo, 4 Cal. App. 4th 41 (Cal. Ct. App. 1992) (citation omitted) ("[Disciplinary] rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes . . . [a] client.").

43. Statute of Westminster I, 1275, 3 Edw. 1, ch. 29 (Eng.).

nalization of "ambidexterity," the act of engaging in a conflict of interest by taking retainers from both sides of a case.[44] The Statute, as well as contemporary pronouncements of judges condemning disloyalty to a client, began the process of forming standards of conduct and professional ethics.[45]

The lawyer's obligation to deal fairly with the client probably derives from the extension of fiduciary law from trustee and beneficiary to principal and agent,[46] which, of course, encompasses the attorney-client relationship. It is likely that in addition to its derivation from principal and agent law, significant contributions have been made to fiduciary law by the law of equity, especially with regard to the development of the "fairness in fact" fiduciary standard.[47]

III. The Assault on the Citadel of Fiduciary Protection

A. *Special Rules for Lawyers*

Even as lawyers, qua judges, have been the driving force behind the development of fiduciary norms, lawyers, qua lawyers, have sought to insulate themselves from all forms of societal oversight. For example, lawyers invoke codes of ethics to justify self-regulatory status, thus insulating themselves from societal regulation as well as the ambit of certain laws such as those prohibiting fraudulent activity,[48] while declaring that viola-

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44. *See* Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 151–83 (2000).

45. *See* JOHN HAMILTON BAKER, *Audience in the Courts*, *in* THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW 77, 81–82 (2000) (describing speeches by the lord chief justice at the induction of serjeants—the earliest English form of lawyer—into the bar, which emphasized lawyers' duties to justice and the importance of honesty and obligations of trust); *see also* Jonathan Rose, *Of Ambidexters and Daffidowndillies: Defamation of Lawyers, Legal Ethics, and Professional Reputation*, 8 U. CHI. L. SCH. ROUNDTABLE 423, 442 (2001) (indicating "[l]oyalty and confidentiality [were] implicit in these exhortations" and, that the duty of confidentiality was also specifically referred to).

46. *See* Arthur Jacobson, *Capturing Fiduciary Obligation: Shepherd's Law of Fiduciaries*, 3 CARDOZO L. REV. 519, 524 (1982).

47. Indeed, the fiduciary "fairness in fact" standard is at least a kissing cousin of the fairness standard in equity—"he who seeks equity must do equity." The earliest cases on fair dealing between attorney and client dealt with principles of equity rather than assertedly fiduciary principles. *See, e.g.*, Ransom v. Ransom, 127 N.Y.S. 1027, 1032 (N.Y. Sup. Ct. 1910) ("Plaintiff [attorney] has come into a court of equity [to enforce his fee] and he can obtain a decree for so much only as equitable doctrines permit."), *rev'd*, 133 N.Y.S.2d 173 (N.Y. App. Div. 1911); De Rose v. Fay, 4 Edw. Ch. 369 (N.Y. Ch. 1842) ("Upon principles of public policy, all dealings between solicitor and client are to be anxiously scrutinized in equity, in order to protect the client from the consequences of his own acts done under the influence or ascendancy which the former is supposed to acquire over the latter."); Gibson v. Jeyes, 31 Eng. Rep. 1044, 1050 (Ch. 1801); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 311 (13th ed. 1886) ("[T]he burden of establishing . . . [the contract's] perfect fairness, adequacy, and equity is thrown upon the attorney . . . . If no such proof is established, Courts of Equity treat the case as one of constructive fraud." (footnote omitted)). The transition to fiduciary obligation may be seen in *Etzel v. Duncan*, 76 A. 493, 495 (Md. 1910), where the court of equity described the relation of attorney and client as being "*quasi*-fiduciary."

48. State courts have held that lawyers as a class are exempted from consumer protection laws designed to deter fraudulent business activity. In those states, lawyers who bring actions on behalf of consumers defrauded by corporate entities and thus generate substantial fees in the case of aggregated

tions of codes of ethics are not a basis for civil liability.[49] With regard to fiduciary protections for clients, the lawyers' assault on that citadel is being carried out on a broad front. Using their unique position in the lawmaking process,[50] lawyers have countered the special fiduciary protections afforded clients by constructing special rules exempting themselves from the same standards that, by their own efforts, are imposed on others. For example, while lawyers thrive on obtaining punitive damage awards against others for egregious misconduct, they have, in some instances, been able to insulate themselves against such awards for their own acts of negligence.[51] With regard to the obligation to act competently, lawyers have constructed rules that often exempt themselves from many acts of malpractice, which, in equivalent circumstances, impose liability against other professionals, especially doctors.[52] The differential

actions, are, at the true time, insulated from civil proceedings alleging similar deceitful conduct. *See, e.g.*, Jamgochian & PKR Enter. v. Prousalis, No. 99C-10-022, 2000 Del. Super. LEXIS 373, at *8 (Super. Ct. Aug. 31, 2000); Cripe v. Leiter, 703 N.E.2d 100 (Ill. 1998). *But see* DeBakey v. Staggs, 605 S.W.2d 631 (Tex. 1980) (holding that legal services were covered under Texas's Deceptive Trade Practices Act).

49. "Violation of a[n] [ethical] Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability." MODEL RULES OF PROF'L CONDUCT Scope (2001); *see also* Hizey v. Carpenter, 830 P.2d 646 (Wash. 1992).

> 50. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government . . . .

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51. *See, e.g.*, O'Connell v. Bean, 556 S.E.2d 741, 743 (Va. 2002) (essentially exempting attorneys from the imposition of punitive damages on an attorney for breach of fiduciary duty and constructive fraud by reasoning that while these actions "sound[] in tort, [they are actions] for breach of contract." Therefore, "punitive damages may not be awarded for any such breaches in the absence of an independent, willful tort giving rise to such damages."). *But cf.* Cripe v. Leiter, 683 N.E.2d 516 (Ill. App. Ct. 1997) (holding that 735 ILL. COMP. STAT. 5/2-1115 (West 1994), prohibiting the award of punitive damages in cases of legal or medical malpractice, did not preclude seeking punitive damages against an attorney in a suit where the client's guardian alleged false billing statements because the latter was an action for fraud, not legal malpractice).

52. While both the frequency and severity of malpractice awards against attorneys have been substantially increasing since the 1960s, thus driving up lawyers' malpractice insurance rates, *see* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 1011 (1995); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret,* 47 VAND. L. REV. 1657 (1994), lawyers still remain substantially insulated from the full impact of the malpractice rules that they have crafted and applied to doctors. The latter evaluates conduct in light of the customary practice of physicians in good standing and requires that "there must be a want of ordinary and reasonable care, leading to a bad result." Pike v. Honsinger, 49 N.E. 760, 762 (N.Y. 1898); *see also* Mack v. Lydia E. Hall Hosp., 503 N.Y.S.2d 131 (App. Div. 1986); PATRICIA M. DANZON, MEDICAL MALPRACTICE 139–40 (1985). Even if, however, a patient (or his estate) cannot prove by a preponderance of the evidence that the ultimate injury was caused by the doctor's negligence, under the "loss of chance" doctrine adopted by a majority of states, the plaintiff can still obtain damages for a heightened risk of death or injury. *See, e.g.,* Mays v. U.S., 608 F. Supp. 1476, 1479–80 (D. Colo. 1985), *rev'd on other grounds*, 806 F.2d 976 (10th Cir. 1986), *cert. den.* 482 U.S. 913 (1987); Jorgensen v. Vener, 616 N.W.2d 366, 371–72 (S.D. 2000); Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 479 (Wash. 1983); Paul Speaker, *The Application of the Loss of Chance Doctrine in Class Actions*, 21 REV. LITIG. 345, 345–49 (2002). Conversely, under the malpractice rule for lawyers, in many jurisdictions the client must show that "but for" the lawyer's negligence, the client would have won. *See, e.g.*, Sage v. Glaze, 798 P.2d 974 (Kan. Ct. App. 1988); Basic Food Indus., Inc. v. Grant, 310 N.W.2d 26 (Mich. Ct. App. 1981); Pool v. Burlison, 736 S.W.2d 485 (Mo. Ct. App. 1987); Katsaris v. Scelsi, 453 N.Y.S.2d 994 (N.Y.

standard lawyers have created for measuring the standard of care to be imposed on lawyers engaged in litigation versus that of doctors in equivalent surgical and trauma settings is especially telling.[53] The special rules thus erected to protect lawyers from liability to which other professionals are exposed to—an exposure which redounds to the benefit of lawyers in the form of legal fees—also extends to the liability of for-profit entities selling access to professional services.[54]

Sup. Ct. 1982); Rorrer v. Cooke, 317 S.E.2d 34 (N.C. Ct. App. 1984), *rev'd*, 329 S.E.2d 355 (N.C. 1985); Chocktoot v. Smith, 571 P.2d 1255 (Or. 1977) (en banc); RONALD E. MALLEN & VICTOR B. LEVIT, LEGAL MALPRACTICE § 583, at 738 (2d ed. 1981 & Supp. 1985). The "but for" rule that requires the client to prove that he would have prevailed frequently insulates lawyers from liability by placing a formidable, almost unsustainable burden on the client. *But see* Ippolito v. McCormack, 265 A.D.2d 303 (N.Y. App. Div. 1999) (holding that the "but for" test is satisfied if the plaintiff demonstrates that he likely would have prevailed).

Consider the lawyer who fails to file a notice of appeal within the allotted time and whose client is thereby deprived of his right to appeal. To be able to prevail against the lawyer in a malpractice action, the client must show that had the notice been timely filed, the appeal would have been successful. If the client is able to show (by expert testimony, for example) that had the appeal been timely filed, there would have been a ninety-percent chance of prevailing, the client would nonetheless lose under the "but for" standard. Under the loss of chance doctrine applicable to doctors, however, if an inaccurate diagnosis results in the omission of a specific medical protocol and, as a consequence, the patient's chance of survival is lowered from fifty percent to twenty percent, and the patient subsequently dies, the doctor's conduct, if it breached the standard of care, is actionable. The patient is entitled to compensation for the "loss of chance"—the chance of avoiding some adverse result or achieving some favorable result. In this case, the compensation would be equal to thirty percent of the value of his or her life. *See* Alberts v. Schultz, 975 P.2d 1279, 1287 (N.M. 1999).

The "but for" standard is so contrary to the usual operating technique of the lawyer that its use in the legal malpractice standard seems disingenuous. Consider the typical case of the client who comes to the lawyer seeking redress for injury to his person or rights. Given the vagaries of courts and juries, the lawyer generally speaks in terms of likelihood, such as, "We have a good chance," never stating, "We will win the case." *See generally* Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983) (discussing uncertainty of legal system). But that is exactly what the client must often prove to sustain a malpractice claim against a lawyer. *See* Md. Cas. Co. v. Price, 231 F. 397, 403 (4th Cir. 1916); Erik M. Jensen, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666 (1978).

53. Attorneys in litigation are substantially immune from malpractice claims with regard to such decisions as "selecting the forum in which to sue, the theories to plead, how to oppose a motion for summary judgment, the tactics in litigation, what evidence to present, whether to cross-appeal, recommendation of settlement, the manner in which to appeal and the issues to be raised." RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 29.7, at 638–39 (4th ed. 1996); *id.* at 638–39 nn.11–19 (demonstrating the breadth of lawyers' discretion in each of the aforementioned areas of litigation practice); *see also id*. at 640 n.25 (citing a number of cases organized by state, that have accepted the proposition that there is immunity for attorneys' erroneous tactical decisions).

54. *Compare* Petrovich v. Share Health Plan of Ill., Inc., 719 N.E.2d 756 (Ill. 1999) (holding that an HMO can be held vicariously liable for the negligence of its independent contractor physicians), *with* Gonzalzles v. Am. Express Credit Corp., 733 N.E.2d 345 (Ill. App. Ct. 2000) (holding that a for-profit legal services plan which contracted to furnish purchasers paying monthly fees with a licensed attorney at a specific price, was not liable to the purchaser for the negligent acts of the lawyer designated by the plan to provide the purchaser with the covered services).

Another example of lawyers creating a special rule for themselves[55] is their exemption from liability for injury to third parties with whom they are not in privity,[56] even where the lawyer knows or should know that the work for the client was intended to influence that third party.[57] Meanwhile, lawyers extend such liability to other professionals[58] such as accountants.[59] Although many jurisdictions have loosened this privity

55. For a distinctly contrary view from that expressed in this Article with regard to lawyers' success in crafting special rules for themselves, see Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002). In this work, Wolfram argues that activist courts have been enforcing lawyers' own law developed to facilitate tort recoveries, against lawyers. *Id.* at 209–10. He also states that there has been a proliferation of new theories and remedies for legal malpractice, *id.* at 214, and that clients have received increasing protection from courts in fee disputes with lawyers, *id.* at 216. Wolfram also argues that

> the machinery of the regulatory state, designed and implemented primarily by lawyers (beginning in the third decade of the twentieth century), has proved inexorable in its appetite—in this instance drawing within its orbit the same profession that unwittingly designed, energized, and nurtured it and that has profited immensely from servicing it or perhaps more often, from opposing it. Thus, just as much of the rest of the American economy has fallen into the embrace of the administrative state, lawyers—ultimately incapable of fending off regulation any more effectively than their clients—have themselves fallen into its unstoppable regulatory gravitational force.

Id. at 218–19.

56. *See* Sav. Bank v. Ward, 100 U.S. 195, 200 (1879) (recognizing that, absent "something in the circumstances of [the] case to take it out of the general rule," to sustain a claim of negligence against an attorney, privity is required). For a list of cases arranged by state upholding the proposition that only the client in privity with the attorney may sue for negligence, see MALLEN & SMITH, *supra* note 53, § 7.12 n.12.

57. *See* Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987) (applying Illinois law); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) (indicating situations in which a lawyer owes a duty of care to a nonclient).

58. *Compare* Kirsch v. Duryea, 578 P.2d 935, 939 (Cal. 1978) (unfair to make attorney pay damages for mere "mistake in choice"); Friedman v. Dozorc, 312 N.W.2d 585, 592 (Mich. 1981) (attorney owes no duty of care to adverse party in litigation); Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716, 718 (Tex. Ct. App. 1986), *vacated by* 729 S.W.2d 690 (Tex. 1987) (attorney owes no duty of care to those outside attorney-client privilege); Bell v. Manning, 613 S.W.2d 335, 338 (Tex. Ct. App. 1981), *abrogated by* 991 S.W.2d 787 (Tex. 1999) (same); Hawkins v. King County, 602 P.2d 361, 365 (Wash. Ct. App. 1979) (lawyer generally owes no duty to disclose client information unless aware of client's intent to harm unknowing victim), *with* H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 153 (N.J. 1983) (auditor owes duty to all foreseeable recipients of financial statements); Armstrong v. Morgan, 545 S.W.2d 45, 47 (Tex. Ct. App. 1976) (physician owes duty of care not to injure patient during physical examination and to give accurate report); Petersen v. State, 671 P.2d 230, 237 (Wash. 1983) (physician owes duty of care to anyone foreseeably injured by patient with drug related mental problem).

59. The juxtaposition of standards of liability applied to attorneys and accountants respectively further elucidates the proposition that lawyers have helped to create a self-serving regime of liability. *See* Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L. J. 1309, 1322–23 (1991). *Compare* Abell v. Potomac Ins. Co., 858 F.2d 1104, 1131–33 (5th Cir. 1988); Moss v. Zafiris, 524 So. 2d 1010, 1011 (Fla. 1988); Schuler v. Meschke, 435 N.W.2d 156, 162–63 (Minn. Ct. App. 1989) (applying the privity rule for liability of attorneys, respectively in Louisiana, Texas, Florida, and Minnesota); First Mun. Leasing v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 413 (Tex. Ct. App. 1983), *with* First Nat'l Bank of Commerce v. Monco Agency, 911 F.2d 1053, 1060–62 (5th Cir. 1990); First Fla. Bank v. Max Mitchell & Co., 558 So. 2d 9, 12–16 (Fla. 1990); Bonhiver v. Graff, 248 N.W.2d 291, 298–303 (Minn. 1976) (applying a test that holds accountants to a heightened standard of care thus generating higher levels of liability); Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378, 382–83 (Mo. Ct. App. 1973) (extending liability of certified public accountants for negligent accounting to third parties, not in privity, to whom the accountant knows the recipient of the audit intends to supply such information); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876–80 (Tex. Ct. App. 1971).

requirement with regard to the liability of lawyers to the beneficiaries of wills negligently drafted by those lawyers,[60] many continue to maintain such a requirement as a way of insulating lawyers from liability to those they have harmed.[61]

Perhaps, however, some of the most successful assaults on the citadel of client fiduciary protection occur in class action claiming. Responding to unparalleled incentives to engage in self-interested behavior at the expense of the interests of large numbers of claimants who have been conscripted into a class, lawyers have succeeded in institutionalizing large scale deviations from the standards of care and conduct owed to these clients.[62] For example, lawyers structure settlements to include small numbers of seriously injured claimants in a much larger group of lesser injured or arguably noninjured claimants, to maximize fees at the expense of the seriously injured class members.[63] When lawyers breach their obligations to individual clients, the latter may seek redress by asserting claims for breaches of the standard of care and of fiduciary obligation. However, when such breaches occur in class actions, these client rights have been largely eviscerated. Class action lawyers who engage in self-dealing at the clients' expense have been largely immunized from accountability.[64]

B. The Assault on Fiduciary Fee Protections

The fiduciary duties to act fairly and provide disinterested advice, relate in particular to the financial relationship between lawyer and client. Under fiduciary principles, fee contracts between a lawyer and a client must be objectively reasonable; unreasonable fees are unenforceable.[65] Moreover, because the fiduciary prohibition against unreasonable fees has been codified in ethics codes, the charging of unreasonable fees

60. While a majority of states permit an aggrieved beneficiary to recover from a lawyer who negligently drafted a will, some states place significant limits on that action and a few others, including Maryland, Nebraska, New York, Ohio, and Texas, retain the strict privity rule as a complete bar to such claims. *See* Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 262–63, 275, 302, n.277 (2001).

61. For example, New York courts have refused to extend the concept of third-party liability in contract cases to attorney liability, even in situations where a nonclient consequently sustained injuries from the attorney's negligence. *See* Nat'l Westminster Bank v. Weksel, 511 N.Y.S.2d 626, 630 (N.Y. App. Div. 1987) (holding that the lawyer for the debtor was not liable to the lender for an allegedly negligent statement that the debtor was creditworthy). *See generally* Lucia Ann Silecchia, *New York Attorney Malpractice to Non-Clients: Toward a Rule of Reason and Predictability*, 15 PACE L. REV. 391, 401 (1995).

62. *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 265–70 (2001) [hereinafter Brickman, *Aggregative Litigation*].

63. *Id.* at 268–69.

64. *Id.* at 297–305.

65. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 99 (1978); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 8.4 (3d ed. 2001).

also constitutes a disciplinary violation.[66] Nonetheless, disciplinary enforcement of unreasonable fee provisions in ethics codes has become essentially chimerical and, in the case of contingency fees, virtually nonexistent.[67]

C. Fiduciary Law and Contingency Fees

Nowhere is the corrosion of fiduciary fee protection in recent years more apparent than in the area of contingency fees. As first formally approved by the bar in 1908, the Canons of Ethics provided that contingency fees "should be under the supervision of the court, in order that clients may be protected from unjust charges."[68] While courts responded to this frank acknowledgment of the of likelihood self-interested behavior by invalidating the use of standard contingency fees where lawyers did not assume any meaningful risk,[69] in recent decades courts have become more hospitable to lawyers' financial interests. A major step in that direction was the development of the doctrine that fee contracts entered into prior to or contemporaneously with the commencement of the attorney-client relationship are exempt from the requirement of special

66. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106 (1980); MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (1983). Many fiduciary obligations of lawyers have been codified as rules of ethics. *See* RONALD E. MALLEN & VICTOR B. LEVITT, LEGAL MALPRACTICE § 29.10 (4th ed. 1996); *see also* United States v. Anderson 798 F.2d 919, 923–24 (7th Cir. 1986); Bevan v. Fix, 42 P.3d 1013, 1029 (Wyo. 2002) ("[T]his court . . . expressly recognizes the fiduciary duties of confidentiality and loyalty . . . embodied in Wyoming Rules of Professional Conduct §§ 1.6 and 1.9 as a codification of the common law."). Accordingly, a violation of a lawyer's fiduciary duty is not only a breach of the civil standard, creating liability for damages, but is often a violation of a specific ethical admonition as well. Likewise, a violation of an ethical duty may be a violation of civil law. Saucier v. Hayes Diary Prod., Inc., 373 So. 2d 102, 115 (La. 1979) (on rehearing). The commonality of fiduciary law and ethical obligation is illustrated in Avianca, Inc. v. Corriea, 705 F. Supp. 666, 678–79 (D.D.C. 1989).

67. *See* Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-By-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996) [hereinafter Brickman, *Disciplinary Enforcement*].

68. Canons of Ethics, Canon 13, 33 A.B.A. REP. 80, at 579 (1908). This admonition was simply an application of the policy developed in equity that all contractual dealings between lawyer and client had to be carefully scrutinized and that the burden was on the lawyer to establish the fairness of the transaction. Gibson v. Jeyes, 31 Eng. Rep. 1044 (Ch. 1801); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 311 (9th ed. 1866) ("[T]he burden of establishing [the contract's] perfect fairness, adequacy, and equity is thrown upon the attorney. . . . If no such proof is established, courts of equity treat the case as one of constructive fraud." (footnotes omitted)). The application of these general fiduciary principles to the lawyer-client fee relationship can be seen in *Ransom v. Ransom*, 127 N.Y.S. 1027, 1032 (N.Y. Sup. Ct. 1910) (citing Whitehead v. Kennedy, 69 N.Y. 462, 466 (1897)) ("Plaintiff [attorney] has come into a court of equity [to enforce his fee], and he can obtain a decree for so much only as equitable doctrines permit."), *rev'd*, 147 A.D. 835, 133 N.Y.S. 173 (N.Y. App. Div. 1911); DeRose v. Fay, 4 Edw. Ch. 40, 44 (N.Y. Ch. 1842) ("Upon principles of public policy, all dealings between solicitor and client are to be anxiously scrutinized in equity, in order to protect the client from the consequences of his own acts done under the influence or ascendancy which the former is supposed to acquire over the latter.").

69. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 273–74 (1996) [hereinafter Brickman, *Money Talks*]; Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 55 n.95 (1989) [hereinafter Brickman, *Contingent Fees*]; *see also infra* note 90.

judicial scrutiny.[70] Under that doctrine, a lawyer has an incentive to have the client sign a retainer agreement before delving deeply into the facts so that in the event the lawyer learns immediately thereafter that there is no realistic contingency involved and that, instead, there is a high likelihood of a substantial settlement offer being proffered before any substantial services will be required, that information will pose no burden to the lawyers' charging a standard contingency fee.[71] Doing so thus insulates the lawyer from the fiduciary obligation to fully disclose that information to the client before entering into a fee arrangement since *before* the relationship commences, he has no such information to disclose.

As contingency fee representation has consequently become more lucrative—often generating effective hourly rates of thousands of dollars[72]—and the use of contingency fees has become more widespread,[73] financial self-interest has become increasingly at odds with both fiduciary standards and the self-proclaimed responsibility of the bar to self-regulate in the public interest.[74] Growing greed, complicit courts, and diminished discipline have allowed the standard contingency fee system to become standard practice—despite clear reminders in a series of judicial and ethics opinions that only fully informed consumer choice of fee arrangements can fulfill the attorney's fiduciary obligations attendant upon charging contingency fees.[75] "Plaintiff lawyers, charging standard contingency fees, are [routinely] able to earn substantial, indeed enormous, fees which are not commensurate with either the effort required, the risk assumed, or" rules of ethics limiting fees to reasonable

70. *See* Brickman, *Contingent Fees*, *supra* note 69, at 76–84.

71. A Canadian court invalidated a twenty-five-percent contingent fee contract entered into by a passenger rendered a quadriplegic in an auto accident, when there was a policy limits settlement of $524,900 after very little effort by the attorney. *See* Usipuik v. Jensen, Mitchell & Co., [1986] B.C.L.R.2d 283 (Can.). The court stated:

> When the [retainer] contract was made, Mr. Fischer [the lawyer] did not know what the position of the insurer was on liability. It does not seem right to me that a lawyer should permit a would-be client to enter into this sort of contract when neither he nor the client has any idea what position the Insurance Corporation . . . is going to take on liability. If the practice were adopted of postponing the contract until an enquiry was made of the Insurance Corporation . . . as to its position on liability and if the Insurance Corporation . . . were to reply promptly and sensibly to such an enquiry, a proper assessment of risk on liability could be made. The contact could then be founded on the risks so disclosed. I do not see how it can be fair for a contract such as this to be made when both parties to it are in a state of unnecessary ignorance.

Id. at 298*; see also*, Brickman, *Contingent Fees*, *supra* note 69, at 65–70.

72. *See, e.g.*, Brickman, *Contingent Fees*, *supra* note 69, at 73–74, 92–93; Brickman, *Money Talks*, *supra* note 69, at 280–83; Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1772–73 (1994); *see also The Top Trial Lawyers*, FORBES, Nov. 6, 1995, at 160 (reporting that a contingency fee attorney in Texas earned $90 million in 1995, another earned $40 million and several others earned more than $10 million in a single year).

73. *See* Brickman, *Money Talks*, *supra* note 69, at 259.

74. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar . . . .

MODEL RULES OF PROF'L CONDUCT Preamble ¶ 11, (2002).

75. *See infra* note 90.

amounts.[76] Contingency fees have simply become too lucrative to be bounded by either ethical or fiduciary standards.

Evidence of the increased role of self-interest may be found in an opinion of the ABA Standing Committee on Ethics and Professional Responsibility (the Standing Committee) in which it stoutly resisted unequivocally declaring that contingency fee lawyers charging standard and substantial contingency fees, irrespective of the degree of risk and the likelihood at the time of contracting of a substantial settlement offer being made prior to the rendering of any significant service, were acting unethically.[77] The Standing Committee did, however, reiterate the broad fiduciary and ethical principles and requirements relating to contingency fees that the Commission elected to reject,[78] and did acknowledge that standard contingency fee rates nonetheless had to be "reasonable."[79]

Presumably, the invocation of the "reasonable fee" requirement was meant to convey the impression that lawyers charging unreasonable contingency fees were subject to discipline. In fact, however, contingency fee lawyers are virtually never disciplined for charging fees grossly disproportionate to any risks assumed.[80] Indeed, on the basis of an empirical survey of disciplinary agency activity and a search of disciplinary cases, it is plain that the reasonable fee invocation is, in reality, a resounding endorsement of the status quo in which lawyers routinely charge and obtain substantial and sometimes enormous windfall fees in cases without meaningful risk, often amounting to effective hourly rates of thousands and even tens of thousands of dollars per hour.[81]

IV. THE ETHICS 2000 PROPOSALS REGARDING CONTINGENCY FEES[82]

A. *Tracing the Commission's Proposals*

Though Ethics 2000's proposals to amend Rule 1.5—the Model Rule dealing with fees—augments and endorses efforts to vitiate fiduciary protections for contingency fee clients, the Commission's initial focus

76. *See* Brickman, *Aggregative Litigation*, *supra* note 62, at 245–46.

77. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 389 (1994) [hereinafter Formal Op. 94-389]. I have previously critiqued this opinion. *See* Brickman, *Money Talks*, *supra* note 69, at 249.

78. *See infra* note 119 and accompanying text.

79. Formal Op. 94-389, *supra* note 77.

80. *See generally* Brickman, *Disciplinary Enforcement*, *supra* note 67.

81. *Id.* at 1344–45.

82. Whether or not Ethics 2000's proposal to delete the fiduciary fee protections that are the focus of this Article is merely a singular event, thus distinguishable from the remainder of the Commission's proposals, or part of a pattern is beyond the scope of this Article. That the latter, however, may be an appropriate defining characteristic is suggested by another article in this symposium. *See* Robert P. Burns & Steven Lubet, *Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 U. ILL. L. REV. 1275 (indicating that the Ethics 2000 Comment to Rule 1.2, coupled with the enlarged bases for withdrawal under Rule 1.16, essentially eviscerates the notion of client control or even meaningful impact, concerning the means of representation).

on Rule 1.5 was modestly auspicious. In an early stage of its proceedings, the Commission proposed to amend one of the list of eight factors to be considered in determining the reasonableness of a fee: "whether the fee is fixed or contingent."[83] Though as originally drafted that choice of language left much to be desired, it was nonetheless reasonably clear that it meant that a lawyer charging a contingency fee in a matter in which he bore the risk of receiving little or no fee was entitled to charge a higher fee than if the fee had no element of contingency.[84] Thus, when Ethics 2000 sought to make the risk element more explicit by proposing that it be changed to "the degree of risk assumed by the lawyer when the fee is fixed or contingent on the outcome of a matter,"[85] it was clarifying rather than changing the substance of the rule. To be sure, the added language would make more explicit what had been only implicit: that the ethical validity of a contingency fee is a function of the risk being assumed by the lawyer. This explicit recognition could only be seen as especially welcome given the incomprehensible legal fees generated by the recent tobacco litigation settlements which bear no relationship to *any* ethical standard.[86]

In addition to this modest clarification, the Commission considered adding a comment to clarify the relationship between the ethical validity of the contingency fee charged and the degree of contingency or risk being assumed, thus making the implicit relationship between risk and reward still more explicit:

> [2] Contingency fees, like any other fees, are subject to the reasonableness standard of this Rule. Ordinarily, reasonableness of a contingent fee should be determined based on the facts known at the time the fee agreement was reached. However, a contingent fee may only be greater than a non-contingent fee to the extent of the actual risk [that] the contingency will not occur. Thus, for example the amount of a contingent fee may [be] unreasonable if there was a high likelihood of substantial recovery by trial or settlement so that the lawyer bore little risk of nonpayment or if the client's recovery was likely to be so large that the lawyer's fee would clearly exceed a sum appropriate in light of the services performed and risks assumed. In other words, a lawyer may not assume in charging a contingent fee that the client's claim had no value before the lawyer was retained. Only value added by the lawyer should be subject to the standard contingent fee. For example, a substantial early offer in response to a claim would often evidence an inherent value in the

83. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B) (1983); MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(8) (1999).

84. *See* Brickman, *Contingent Fees*, *supra* note 69, at 70–74.

85. ABA Ethics 2000 Comm'n, MODEL RULES Proposed R. 1.5 (Discussion Draft 1999).

86. *See Panel Discussion: The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827, 2830 (1999) (remarks of Lester Brickman); Lester Brickman, *Will Legal Ethics Go Up in Smoke?*, WALL ST. J., June 16, 1998, at A18; Lester Brickman, *Want To Be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A10.

> claim such that charging a standard contingent fee against that value would be unreasonable. *When there is reasonable doubt whether charging a contingent fee is consistent with the client's best interest, a lawyer must offer the client alternative bases for the fee and explain their implications. Applicable law also may impose limitations on contingent fees such as a ceiling on the percentage allowable.*[87]

The May 1999 discussion draft in which the above proposed comment appeared was succeeded by a somewhat less ambitious version several months later:

> [2] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule, including consideration of the degree of risk assumed by the lawyer at the outset of the representation. Reasonableness of a contingent fee should ordinarily be determined based on the facts known at the time the fee agreement was reached. The amount of a contingent fee may be unreasonable if there was a high likelihood of substantial recovery by trial or settlement so that the lawyer bore little risk of nonpayment or if the client's recovery was so large that the lawyer's fee would clearly exceed a sum appropriate in light of the services performed and risk assumed. Applicable law also may impose limitations on contingent fees such as a ceiling on the percentage allowable.[88]

Even in its less ambitious form, the proposed language endorsed the proposition that it would be ethically improper to charge a standard contingency fee in a case where the lawyer should reasonably expect that a substantial settlement offer would be made after the expenditure of little effort and without having to bear meaningful risk, thus generating a windfall fee. Moreover, by inclusion of the second and third sentences of proposed Comment 2, the Model Rules would absorb the proposition set forth in Section 35, Comment c of the American Law Institute's Restatement of the Law Governing Lawyers, which provides that "large [contingency] fees unearned by either effort or a significant period of risk are unreasonable."[89] Thus, revised proposed Comment 2 was an acknowledgment that, in addition to the usual *ex ante* analysis of the ethical

87. ABA Ethics 2000 Comm'n, MODEL RULES Proposed R. 1.5 (Draft No. 1 1999) (emphasis added). The italicized language is substantially identical to that in the current comment to Rule 1.5. MODEL RULES R. 1.5 cmt.

88. ABA Ethics 2000 Comm'n, MODEL RULES Proposed R. 1.5 (Discussion Draft 1999).

89. Comment c of the ALI's Restatement of the Law Governing Lawyers goes on to state:

> A tribunal will find a contingent fee unreasonable due to a defect in the calculation of risk in two kinds of cases in particular: those in which there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore little risk of nonpayment; and those in which the client's recovery was likely to be so large that the lawyer's fee would clearly exceed the sum appropriate to pay for services performed and risks assumed. A lawyer's failure to disclose to the client the general likelihood of recovery, the approximate probable size of any recovery, or the availability or alternative fee systems can also bear upon whether the fee is reasonable.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. c (2000).

legitimacy of a contingency fee, there are circumstances where an *ex post* analysis of the reasonableness of a contingency fee is also ethically mandated. Under such an *ex post* analysis, the determination of reasonableness would include an examination of the actual risk borne, work done and outcome achieved. Of course, this addition to the Rules simply mirrored a standard that courts have long applied.[90]

Nonetheless, early on in its deliberation, the Commission discontinued this effort to incorporate language into the Comment focusing on the "reasonableness" of charging standard (and substantial) contingency fees unearned by any commensurate risk, generating windfall fees for lawyers. In addition, the Commission, apparently succumbing to opposition from contingency fees lawyers,[91] omitted the clause that it had previously added stating that "the degree of risk assumed by the lawyer" was relevant to the determination of the reasonableness of a contingency fee.

Had the Commission simply stopped at that point with regard to proposed changes to Rule 1.5, it would be merely deserving of criticism for failing to have even attempted to fulfill the profession's self-professed responsibility "to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[92] Instead, in violation of the well-known medical aphorism, *primum non nocere*,[93] and in furtherance of the "parochial . . . self-interested concerns of the bar,"[94] the Commission further assaulted the citadel of fiduciary fee protection for clients by (1) adding new language to the Comments to Rule 1.5 and (2) deleting language now in the Comments.

With regard to the former, the Commission acted in a manner so surreptitious as to provide compelling circumstantial evidence that it had allied itself with contingency fee lawyers to not only abandon any at-

90. Attorney Grievance Comm'n v. Kemp, 496 A.2d 672, 678–79 (Md. 1985) ("[Where] the risk of uncertainty of recovery is . . . low . . . it would be the rare case where an attorney could properly resort to a contingent fee . . . ."); Virginia State Bar Association, LEO 1461 (Apr. 13, 1992), *cited in* Nat'l Reporter on Legal Ethics and Prof'l Responsibility, Va. Ops. (1992) ("[M]atters which carry no such risk to the lawyer are not usually matters in which a contingent fee arrangement is appropriate."); *see also* Gair v. Peck, 160 N.E.2d 43, 48 (N.Y. 1959) ("Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered.").

91. The Association of Trial Lawyers of America (ATLA) opposed the addition of this language. TRIAL, Nov. 2001, at 12. ATLA apparently determined that its prior pronouncements that risk was relevant to the reasonableness of contingency fees was no longer operative. *See* AMERICAN TRIAL LAWYERS ASSOCIATION; KEYS TO THE COURTHOUSE: QUICK FACTS ON THE CONTINGENT FEE SYSTEM 4 (1994) ("ATLA publicly urges its members to 'exercise sound judgment in using a percentage in the contingent fee contract that is commensurate with the risk, cost, and effort required.'").

92. MODEL RULES OF, Preamble ¶ 11.

93. "First (or, primarily) do no harm." It is commonly thought that this phrase comes from the Hippocratic Oath. In fact, it does not, but does appear to have its origin in other writings of Hippocrates. *See* C. Sandulescu, *Primum Non Nocere: Philogical Commentaries on a Medical Aphorism*, 13 ACTA ANTIQUA HUNGARICA 359 (1965); *see also "First, Do No Harm" Is Not in the Hippocratic Oath*, *at* http://www.geocities.com/everwild7/noharm.html (last visited Aug. 27, 2002).

94. *See supra* note 92 and accompanying text.

tempt to protect clients' interests but to weaken the fiduciary protections remaining in Rule 1.5. In its revised Comment 1, the Commission provided that Rule 1.5(a), listing the eight factors to be considered in determining the reasonableness of a fee:

> [1]. . . requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive.
>
> Nor will each factor be relevant in each instance . . . .
>
> [3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.[95]

These facially innocuous provisions mask an intent to further weaken fiduciary fee protections for clients. While the list of factors in Rule 1.5 (a) and its identical predecessor, Model Code DR2-106(b), is connected by the conjunctive "and" and has always been so interpreted, Comment [1] states a new and different interpretation: that some of the factors will not be relevant in some circumstances. As the provision existed prior to the Commission's proposal, each of the eight factors was relevant to the determination of the reasonableness of a fee irrespective of whether the fee was fixed or contingent.[96] A malevolent reading of the Commission's motivation is supported by the language inserted in Comment [3] that in determining "whether a particular contingent fee is reasonable or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances."[97] Under this gloss, consider whether factors such as risk and amount of effort are still to be taken into account in determining the reasonableness of a contingency fee. As provided by the Rule and its predecessor Disciplinary Regulation, those and all other factors set forth in Rule 1.5(a) are relevant.[98] But, by stealth, the Commission seeks to

95. ABA Ethics Comm'n 2000, Report 401, as passed by the House of Delegates Feb. 5, 2002, 19, *at* http://www.abanet.org/cpr/e2k-redline.html (last visited Mar. 11, 2003) (on file with the University of Illinois Law Review).

96. "In deciding whether a contingent fee arrangement is reasonable the lawyer *must* consider the . . . factors set forth in Model Rule 1.5 (a)." Formal Op. 94-389, *supra* note 77 (emphasis supplied). To be sure, the materiality of each factor is to be determined on an *ad hoc* basis.

97. *See supra* note 95.

98. *See* Formal Op. 94-389, *supra* note 77 (noting that "all these factors [must be taken] into account in evaluating" the reasonableness of a contingency fee).

change the Rule and render factors such as risk and degree of effort irrelevant to the issue of the reasonableness of a contingency fee.[99]

In addition to the proposed addition to the Comment to Rule 1.5, the Commission also proposed to delete the following language which currently appears in the Comment to Rule 1.5: "When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications."[100] In a moment of candor, later to be recanted, the Commission acknowledged that the reason it was proposing to delete the sentence was because it conflicted with the financial self-interest of contingency fee lawyers:

> The Commission noted that some lawyers only charge contingent fees, and offering a fixed fee or hourly rate alternative to clients who would benefit thereby might require a change in such lawyers' regular practice.[101]

The language that the Commission proposed to delete is simply a replication of a basic fiduciary duty owed by the lawyer to the client. At the heart of the fiduciary relationship is the obligation to deal fairly with the client. This obligation requires that the client give informed consent to all important decisions which are the client's to make.[102] For consent, including consent to the fee arrangement, to be "informed," the client not only must be given the relevant information,[103] but must comprehend

99. I am indebted to David Giacalone for pointing out the significance of this change. *See* Letter from David Giacalone, former Assistant to the Directors of the FTC Bureau of Competition and Bureau of Consumer Protection, to Tim Muris, Chairman of the FTC (Apr. 11, 2002) (on file with the author).

100. MODEL RULES OF PROF'L CONDUCT R. 1.5, cmt. (1998). As quoted, the Commission's version of the sentence, before it deleted it, varied slightly and in insignificant ways. Ethics 2000 Commission, Model Rules Proposed R. 1.5, (Draft No. 1 1999) (see italicized language).

101. ABA Ethics 2000 Comm'n, MODEL RULES OF PROF'L RESPONSIBILITY Proposed R.1.5 (Discussion Draft 1999).

102. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (2001) (as fiduciary, the "lawyer should exert his best efforts to insure that decisions of his clients are made only after the client has been informed of relevant considerations"); MODEL RULES R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). *See generally* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing that the doctrine of informed consent should be applied to the lawyer-client relationship). The duty of the lawyer to disclose all material information to the client comes from the law of agency. *See* FLOYD R. MECHAM, OUTLINES OF THE LAW OF AGENCY § 541 (4th ed. 1952); *cf.* RESTATEMENT (SECOND) OF AGENCY § 381 (1957).

103. *See, e.g.*, Burnham v. Heselton, 20 A. 80 (Me. 1890) (after determining that payment of a $250 note was assured, but not disclosing that information to client, lawyer hired to collect the note proposed and client accepted fee of all collected proceeds above seventy-five dollars; struck down because the lawyer had not informed the client of all material facts bearing on the appropriateness of the fee known to the lawyer); Kickland v. Egan, 155 N.W. 192, 195 (S.D. 1915) (lawyer should have advised client before bargaining for fee that services would be nominal because another firm was representing the estate and would be doing most of the work; one-third contingent fee of the amount client was to receive by will was struck down). "Only after . . . disclosure [of all fee information] is given can a client's consent to pay a specified fee be considered truly voluntary." GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1, at 5:101 (1985 & Supp. 1994).

it as well.[104] Application of the fiduciary standard of informed consent to the contingent fee context means, *inter alia*, that the choice of whether to pay a contingent, hourly, or fixed fee is the client's; therefore, the client has the right to good faith advice from the attorney as to which option appears to represent his best interest.[105] That advice should approximate what an attorney hired solely to negotiate the fee arrangement on behalf of the client would advise the client.

B. Forgotten Efforts: The Commission's Disregard for Previously Stated Fiduciary Protections

Even as the Commission seeks to erode if not eviscerate this protection, it is useful to ponder the profound professional legacy that is to be jettisoned. In 1986, in responding to an ethics inquiry whether "a lawyer has an ethical obligation to offer a client an alternative fee arrangement before accepting a matter on a contingent fee basis," the ABA Standing Committee on Ethics and Professional Responsibility (Standing Committee) stated: "[W]hen there is any doubt whether a contingent fee is con-

104. *See* Gair v. Peck, 160 N.E.2d 43, 48 (N.Y. 1959) ("'[T]he amount of the [contingent] fee standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client . . . .'") (quoting Ransom v. Ransom, 133 N.Y.S. 173, 183 (App. Div. 1911)); High Point Casket Co. v. Wheeler, 109 S.E. 378, 383 (N.C. 1921) (contingent fee percentage alone can show that unfair advantage has been taken of client); Comm. on Legal Ethics v. Tatterson, 352 S.E.2d 107, 112–14 (W. Va. 1986) (client agreed to pay contingent fee exceeding risk of nonrecovery; court assumed client did not understand discussion of risk and had not given "fully informed consent"); *see also* Kiser v. Miller, 364 F. Supp. 1311, 1319 (D.D.C. 1973), *aff'd in part and rev'd in part sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974); Florida Bar v. Moriber, 314 So. 2d 145, 148–49 (Fla. 1975); *In re* Kutner, 399 N.E.2d 963 (Ill. 1979); Cooper & Keys v. Bell, 153 S.W. 844, 846–47 (Tenn. 1913); CAL. R. PROF. CONDUCT CODE § 2-107(B)(9) (West 1989); *cf.* Klemm v. Superior Court, 142 Cal. Rptr. 509, 512 (App. Dep't. Super. Ct. 1977) ("As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed."); Schenk v. Hill, Lent & Troescher, 530 N.Y.S.2d 486, 487 (N.Y. Sup. Ct. 1988) (a lawyer hired to sue another lawyer for malpractice was himself a potential defendant in the same action, and obtained client consent to waive the conflict of interest. In disqualifying the lawyer, the court said: "[T]he consent obtained in this case does not reflect a full understanding of the legal rights being waived. . . . [T]he unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him."); Wade v. Clemmons, 377 N.Y.S.2d 415, 419 (N.Y. Sup. Ct. 1975) (striking down contingent fee because client would have refused to agree to settlement offer yielding fee if properly advised). *But cf.* Jones v. Jones, 63 S.W.2d 146, 149–50 (Mo. 1933).

105. *See* 520 E. 72nd Commercial Corp. v. 520 E. 72nd Owners Corp., 691 F. Supp. 728, 738 (S.D.N.Y. 1988), *aff'd*, 872 F.2d. 1021 (2d Cir. 1989); MODEL CODE EC 2-20.

> [A] lawyer generally should decline to accept employment on a contingent fee basis . . . [if his client] is able to pay a reasonable fixed fee . . . [but] where justified by the particular circumstances of a case [it is not necessarily improper for a lawyer] to enter into a contingent fee contract in a civil case with [a] client who, after being fully informed of all relevant factors, desires that arrangement.

See also id. at EC 5-7; MODEL RULES R. 1.5 cmt. 2; 2 EDWARD M. THORNTON, ATTORNEYS AT LAW 743 (1914) ("Attorneys, in entering into contracts of employment with clients, are required to exercise the highest order of good faith . . . disclosing all information . . . as to facts which would or might influence him either in entering into, or refusing to execute, the contract."). The lawyer has a fiduciary duty "to present fairly and fully the nature of what he might be called upon to do in the prospective lawsuit and the nature of his representation, the values at stake, and the likelihood of success." *Id.*

sistent with the client's best interest . . . the lawyer must offer the client the opportunity to engage counsel on a reasonable fixed fee basis before entering into a contingent fee arrangement."[106] The Standing Committee acknowledged:

> Although neither Rule 1.5 nor DR 2-106 states specifically whether a lawyer must offer an alternative fee arrangement, that issue must be addressed in a context of the "reasonableness" and "clearly excessive" tests of the Model Rules and the Model Code, the commonly expressed rationale for permitting contingent fees and the Comment to Rule 1.5 and the Ethical Considerations of the Model Code.[107]

The Standing Committee then cited to the precise language in the Comment to Rule 1.5 which the Commission now proposes to eliminate. It is clear from the context of the Standing Committee's opinion that in citing to that language, the Standing Committee was elevating "the client's best interest" over the financial self-interest of lawyers. Indeed, the Standing Committee specifically noted:

> [U]nder the Comment to Rule 1.5, when a client is in a position to pay a fixed fee, the lawyer should not seek unilaterally to determine whether a contingent fee is consistent with the client's best interest, but should provide the client with the opportunity to make that determination after consultation.[108]

The Standing Committee also relied upon Ethical Consideration 2-20 of the Model Code of Professional Responsibility, which states:

> 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.*[109]

Somewhat surprisingly, the Standing Committee omitted reference to Ethical Consideration 5-7, which is even more emphatic in imposing upon the lawyer the fiduciary obligation to act in a disinterested fashion,

106. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1521 (1986) [hereinafter Informal Op. 86-1521].
107. *Id.*
108. *Id.*
109. MODEL CODE EC 2-20 (emphasis added).

even when negotiating a fee arrangement. Ethical Consideration 5-7 provides that "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."[110]

Finally, seemingly anticipating a future attempt to jettison this codification of fiduciary law set forth in the Comment to Rule 1.5, the Standing Committee scornfully rejected any such attempt as blatantly self-interested, stating:

> The client with a meritorious claim is entitled to representation and should not be required to relinquish a share of the claim to get representation if the client has money to pay a reasonable fixed fee and is willing to assume the contingency risk.[111]

The Standing Committee reaffirmed its position in Formal Opinion 94-389[112] when it again opined that the ethical validity of contingency fees depended on the lawyer "fully advis[ing the client] of the availability of alternative fee arrangements."[113] After endorsing Informal Opinion 86-1521[114] and its conclusion that the lawyer "must offer the client the opportunity to engage counsel on a reasonable fixed fee basis before entering into a contingent fee arrangement,"[115] the Standing Committee went on to state that "regardless of whether the lawyer, the prospective client, or both, are initially inclined towards a contingent fee, the nature (and details) of the compensation arrangement should be fully discussed by the lawyer and client before any final agreement is reached."[116] The Standing Committee then went on to list a number of factors to be discussed with the client prior to reaching a final agreement on the fee arrangement, including a discussion of the likelihood of success and the likely amount of the fee if the matter were handled on a noncontingent basis.[117] While "as a general proposition contingent fees are appropriate and ethical in situations where liability is certain and some recovery is likely,"[118] the Standing Committee acknowledged:

> [T]here may nonetheless be special situations in which a contingent fee may not be appropriate. For example, if in a particular instance a lawyer was reasonably confident that as soon as the case was filed the defendant would offer an amount that the client would accept, it might be that the only appropriate fee would be one based on the

110. MODEL CODE EC 5-7. For further explication, see Brickman, *Contingent Fees*, *supra* note 69, at 49–74.

111. Informal Op. 86-1521, *supra* note 106.

112. *See supra* note 77. As noted, I have criticized that opinion because of its failure to declare that charging standard contingency fees in cases devoid of risk where substantial windfall fees would be reasonably anticipated, is unethical. *See supra* notes 69, 77.

113. Formal Op. 94-389, *supra* note 77.

114. *Supra* note 106.

115. *Id.*

116. Formal Op. 94-389, *supra* note 77.

117. *Id.*

118. *Id.*

> lawyer's time spent on the case since, from the information known to the lawyer, there was little risk of non-recovery and the lawyer's efforts would have brought little value to the client's recovery. And even if, in such circumstances, after a full discussion, it were agreed between lawyer and client that a contingent fee was appropriate, the fee arrangement should recognize the likelihood of an early favorable result by providing for a significantly smaller percentage recovery if the anticipated offer is received and accepted than if the case must go forward through discovery, trial and appeal.[119]

Having stated emphatically and without qualification that a client seeking representation for a tort claim and therefore confronted with paying a contingency fee: (1) must be allowed to make a fully informed choice between pricing arrangements, (2) that for a contingency fee to be ethically valid, such alternative pricing arrangement must be offered by each and every attorney prior to a client's selection of a contingency fee arrangement, (3) that any contingency fee must both be appropriate when entered into (which includes consideration of the risk involved and the client's ability to pay a fixed or hourly fee), and (4) reasonable in light of each individual case (which includes consideration of the amount of work likely to be done by the attorney),[120] the Standing Committee then went on to confront the fact that these requirements are wholly ignored by the contingency fee bar:

> Nor does the possibility that . . . the profession's obligation to assure appropriateness and reasonableness is sometimes honored in its breach mean that contingent fees are inherently ethically questionable. Rather, any lapse from the applicable requirements by some member of the profession simply suggests that the profession should redouble its efforts to assure that the ethical obligations associated with entering into a contingent fee arrangement are fully understood and observed.[121]

C. *Lost Opportunities*

Instead of taking advantage of the opportunity to incorporate these basic requirements into the Model Code or at least citing favorably to Formal Opinion 389 in the Comments, the Commission elected to both delete and obscure parts of the Model Rules that support the traditional fiduciary duties of the attorney.

Standing in contrast to the thrust of the Commission's effort are one thousand years of development of fiduciary law, four hundred years of development of the fiduciary obligation of the lawyer, Formal Opinion 94-389, the explicit content of Ethical Considerations 2-20 and 5-7 and the Comment to Model Rule 1.5 that the Commission has proposed to

119. *Id.* (citations omitted).
120. *See id.*
121. *Id*.

delete. These developments and principles present a clear and compelling message. Lawyers are obligated to counsel clients as to the fee arrangements that are in the best interests of their clients even if that advice is contrary to a lawyer's financial self-interest.[122] Clients have a fiducial entitlement to be fully informed by their lawyer with regard to a proposed fee agreement. This information is particularly necessary in the contingency fee context where there is an extreme informational imbalance between lawyers' knowledge of the extent of risk and value of the claim and that of clients.[123]

Most clients lack sufficient information upon which to base an informed judgment regarding the fee structure and hence must rely on their lawyer for that knowledge. Contingency fee lawyers, however, not only routinely fail to provide their clients with such knowledge,[124] they also act collusively in a manner designed to mislead clients. By uniformly charging contingency fees and maintaining standard percentages within a community, lawyers indirectly communicate to clients that not only do the clients not have any fee options but that the standard contingency fee is nonnegotiable.[125] This misinformation is also communicated by such direct statements as: "it's the going rate," "it's what all the other lawyers charge," and other similar statements. Both the system of contingency fee setting and lawyers' use of that system are designed to and do advance contingency fee lawyers' self-interest at the expense of tort claimants. To allow contingency fee lawyers to be guided by self-interest in these circumstances is simply intolerable. That is why the drafters of the Model Code, the Model Rules, Formal Opinion 94-389 and Informal Opinion 86-1521 as well as numerous courts have rejected the unregulated market in favor of imposing a fiduciary standard to regulate lawyer-client fee agreements.[126]

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122. *See* Usipuik v. Jensen, Mitchell & Co., [1986] B.C.L.R.2d 283, 292–93 (Can.) ("I appreciate that a contract of retainer in many circumstances cannot be said to be, in strict theory, a contract with a client for until the contract is made there is no solicitor-client relationship. But the layman who goes to see a lawyer has put himself, on the question of the retainer agreement, in the lawyer's hands. To say that there is no duty to advise the would-be client properly on the agreement is to permit unscrupulous lawyers (and regrettably there are a few) to take advantage.").

123. Brickman, *Contingent Fees*, *supra* note 69, at 56, 66, 68–71.

124. As former Harvard president and law school dean Derek Bok has observed:

> The lure of obtaining a fraction of . . . handsome sums has caused most trial lawyers to insist on contingent fee arrangements, even if their clients can afford to pay the normal hourly rate. . . . There is little bargaining over the terms of the contingent fee. Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.

DEREK BOK, THE COST OF TALENT 139, 140 (1993).

125. *See* Lester Brickman, *A Massachusetts Debacle:* Gagnon v. Shoblom, 12 CARDOZO L. REV. 1417, 1429–30 (1991).

126. Brickman, *Contingent Fees*, *supra* note 69, at 68–69, 83–94.

I urged these views on the Commission by testifying both in writing and orally, at one of the several hearings held by the Commission to receive commentary, as follows:[127]

> In the course of reevaluating its stance, it may be useful to the Commission to consider why some if not most all contingency fee attorneys do indeed insist on charging contingency fees to the exclusion of fixed fees or hourly rate fees. It is, stated simply, blatant self-interest. Contingency fees yield 3–10 times the effective hourly rate that plaintiff lawyers would charge if they did charge on an hourly rate basis. From that prospective, contingency fees are clothed in stealth sheathing. They enable contingency fee lawyers to charge effective hourly rates of thousands of dollars an hour without disclosure or detection—even in cases where from the outset it is apparent that a substantial settlement offer is going to be made after the expenditure of only a handful of hours and in the absence of any meaningful risk of nonrecovery.
>
> Today, the sad truth is that an accident victim who receives a settlement offer and then seeks legal counsel as to the fairness of the offer is frequently if not virtually always compelled to enter into a contingency fee agreement to gain that advice even if the effect of doing so is a net financial loss to the claimant. I receive dozens of calls every year from claimants who have been subjected to just such abuse. While I inform some of these claimants that they have been the victims of deceptive practices and can file a complaint with disciplinary authorities, I also candidly state my appraisal of the likelihood of even an admonition issuing to the lawyer for mulcting his client as one in 50,000,000—lottery odds. Indeed, in an empirical survey of bar counsel, that is precisely what I documented.
>
> Ratification by the ABA of deceptive lawyer behavior with regard to fees may well be seen by the public as simply self-interest on the part of the organized bar, thus confirming what opinion polls already indicate with regard to the public's perception of the level of lawyers' fees. For this deception, however, to be facilitated by a panel with such a distinguished membership established for the purpose of evaluating the ethical rules, can only be regarded with profound disappointment.[128]

D. The Final Assault

Also profoundly disappointing was the strong support for the deletion by the Reporter for the Commission. In response to several comments received by the Commission in reaction to its Public Discussion Draft, the Reporter stated:

127. Letter Testimony of Lester Brickman, Mar. 23, 2000, Ethics 2000 Hearing of June 2, 2000; Notice of Public Hearings, Commission on Evaluation of the Rules of Professional Conduct, New Orleans, La., June 2, 2000.

128. *Id.* (citation omitted).

> Several commentators objected to the deletion of the requirement of offering alternatives in contingent fee cases, suggesting that it might be modified to clarify that the lawyer need not offer such an alternative himself or herself, but only advise the client that hourly billing might be available with another lawyer. The Reporter continues to believe that this requirement unfairly singles out contingent fee lawyers, when no other lawyers are required to inform clients that other lawyers may use a different basis or rate of fee.[129]

On its face, the statement argues that because hourly rate lawyers are not required to inform clients that other lawyers may offer them different hourly rates or a fixed fee, it is unfair to single out contingency fee lawyers by imposing a requirement that they inform clients that other lawyers may be available on an hourly rate. To be sure, it would be nonsensical to require a contingency fee attorney in a tort case to advise a would-be client that other tort lawyers may use a different fee basis or rate. That is so because the factual premise of the statement—that there are other contingency fee lawyers in the community who charge on "a different basis or rate of fee"—is false. Contingency fees in a community are almost always uniform, not subject to bargaining,[130] and range from thirty-three to fifty percent.[131] In addition to the erroneous factual premise, the statement is at least misleading in that it mischaracterizes the "requirement" in the current Comment. The Comment that the Commission deleted did not require that the contingency fee attorney disclose to a would-be client that other lawyers might be willing to enter into alternative fee arrangements; it required that that attorney proposing to charge a contingency fee offer the client alternative fee arrangements

129. ABA Ethics 2000 Comm'n, MODEL RULES Proposed R.1.5 (Discussion Draft 1999) (Issues Raised by Comments Received (undated, circa March 2000)).

130. *See* Jeffrey O'Connell et al., *Yellow Pages Ads As Evidence of Widespread Overcharging by Plaintiffs' Personal Injury Bar—and a Proposed Solution,* 6 CONN. INS. L.J. 423, 426–30 (2000).

131. *See* WILLIAM W. JACOBS ET. AL., IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 100 (report of the Staff of the Cleveland Regional Office and Bureau of Economics of the Federal Trade Commission to the Federal Trade Commission) (1984) (indicating that contingent fee rates in seventeen surveyed cities ranged from 30% to 37% with a median and mean of 33%; these contingency fees were the amounts charged if the case settled before trial.); *see also* Walther v. Multicraft Constr. Co., 423 S.E.2d 725, 727 (Ga. Ct. App. 1992) (quoting plaintiff's lawyer: "Slip and fall cases where it's raining and snowing and there's ice on the sidewalk and somebody walks in off of ice [sic] into the front door of a shop and slips and falls, where we're going to have a hard time proving negligence, if we take this case, we charge them 50 percent."); Miss. State Bar v. Blackmon, 600 So. 2d 166, 176 (Miss. 1992) (Banks, J., dissenting) ("We might judicially note a once prevailing standard contract of one-third, if the claim is settled without suit, forty percent where the suit is filed and fifty percent where the case actually goes to trial. It is more typically stated now as forty percent through trial and fifty percent if an appeal is taken."); 1 AM. JUR. TRIALS, § 93 (1964) (A 50% contingency fee is not unusual, even in cases which are settled before trial.); Brickman, *Contingent Fees*, *supra* note 69, at 100 n.280. Contingency fees in asbestos litigation range from 25% to 50% with most falling in the 33%–45% range; K.M. Clearmont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 594 (1978); M.L. Schwartz & J.D.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1144 (1970); s*ee also In re* Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 867 (Bankr. S.D.N.Y. 1991); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1834 n.60 (1992).

and inform the client of the various considerations in selecting among them for that representation.

Finally, the statement betrays a profound ignorance of the history of contingency fees. The implicit proposition being advanced for the deletion is that, from the perspective of client protection, there is no substantive difference between charging hourly or fixed fees versus contingency fees. This premise is absurd. Contingency fees are different. From their very inception, the bar and courts realized that contingency fees posed a unique risk to clients.[132] Since the contingency fee includes a premium to compensate the lawyer for the risks involved,[133] the lawyer is in a position to exaggerate the risks he is bearing in the representation to justify charging a substantial risk premium in the form of a standard contingency fee.[134] This abusive fee practice, endemic to contingent fees, was traditionally termed "overreaching" and is found to occur when lawyers use their superior knowledge regarding the amount of time to be required and the likelihood of prevailing in the litigation to justify an unreasonably high percentage.[135]

The judicial literature on contingency fees is replete with hundreds, if not thousands, of statements recognizing the responsibility of courts to protect clients from abusive contingency fee practices.[136] These concerns

132. *See supra* note 68.

133. *See* Taylor v. Bemise, 110 U.S. 42, 46 (1884).

134. *See*, *e.g.*, *In re* Rappaport, 558 F.2d 87, 88 n.3 (2d Cir. 1977); Robinson v. Sharp, 66 N.E. 299, 302 (Ill. 1903) (finding that lawyer aroused serious misapprehensions); *In re* William K. Hefron, 771 N.E.2d 1157, 1163 (Ind. 2002) (disciplining a lawyer who represented a client in an action to recover assets belonging to an estate, because the lawyer renegotiated an hourly rate retainer agreement to a contingent fee agreement, though he knew that no litigation would be required but nonetheless misled the client into believing "that litigation was likely"); Westchester County Bar Ass'n v. St. John, 350 N.Y.S.2d 737, 740–41 (App. Div. 1974); Ransom v. Ransom, 127 N.Y.S. 1027, 1035–36 (Sup. Ct. 1910), *rev'd.,* 133 N.Y.S. 173 (App. Div. 1911); Haight v. Moore, 37 N.Y. Super. Ct. 161, 165–66 (N.Y. Super. Ct. 1874); Kickland v. Egan, 155 N.W. 192 (S.D. 1915); Nugent v. Moddy, 271 S.W. 266 (Tex. Civ. App. 1925); Comm. on Legal Ethics v. Tatterson, 352 S.E.2d 107, 112, 114 (W. Va. 1986) (lawyer "misrepresent[ed] . . . the difficulty in obtaining the . . . proceeds"); *cf.* United States v. Blitstein, 626 F.2d 774 (10th Cir. 1980); Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331, 336 (Iowa 1980); Renegar v. Staples, 388 P.2d 867 (Okla. 1963).

135. Gisbrecht v. Barnhart, 122 S. Ct. 1817, 1819 (2002) ("Arrangements yielding exorbitant fees reserved for the lawyer one-third to one-half of the accrued benefits."); Henry v. Vance, 63 S.W. 273, 274 (Ky. 1901); WOLFRAM, *supra* note 41, § 9.4.1, at 529; Note, *Advertising, Solicitation, and the Professional Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1200 (1972).

136. *See*, *e.g.*, *Gisbrecht*, 122 S. Ct. at 1819 ("Contingent-fee[s.] . . [are] problematic, particularly when not exposed to court review . . . ."); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 226 (2d Cir. 1987), *cert. denied sub. nom.*, Schwartz v. Dean, 484 U.S. 926 (1987); Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, 778 F.2d 890, 896 (1st Cir. 1985); McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir. 1985) ("Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts."); Cooper v. Singer, 719 F.2d 1496, 1505 (10th Cir. 1983); Allen v. United States, 606 F.2d 432, 435 (4th Cir. 1979); Dunn v. H.K. Porter Co., 602 F.2d 1105, 1108 (3d Cir. 1979) ("Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts . . . courts have the power to monitor such contracts either through rule-making or on an *ad hoc* basis." (citation omitted)); *In re* Michaelson, 511 F.2d 882 (9th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975); Schlesinger v. Teitelbaum, 475 F.2d 137, 141 (3d Cir. 1973) ("[I]n its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such

are further reflected in the form of court rules and legislation on both the federal and state levels prescribing maximum allowable contingency fee percentages.[137]

To be sure, fee abuses by contingency fee lawyers remain an intrinsic part of contingency fee practice despite legislative and judicial pronouncements seeking to protect client interests. Quite enormous contingency fees are being obtained in cases where lawyers bear no meaningful risk of low or nonrecovery.[138] The hallmark of the gross overcharging that permeates contingency fee practice is the zero based accounting system that plaintiff lawyers use. When a client hires a lawyer to process a tort claim, the lawyer assigns the initial value of the claim as zero. Even if the case is a "no brainer" and a multimillion dollar settlement is a virtual absolute certainty as, for example, when a doctor amputates the wrong limb, operates on the wrong side of the patient's brain, or engages in other equally impactuous acts of egregious medical malpractice, a standard contingency fee is charged. The standard fee applies not only to the value added to the claim by the lawyer, but to the value of the entire claim, irrespective of the fact that the claim already had substantial value at the time the client hired the lawyer.[139]

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members, including the charges of contingent fees."), *cert. denied*, 616 U.S. 1111 (1973); Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 87 (1st Cir. 1970); Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951); York v. Ala. State Bd. of Educ., 631 F. Supp. 78, 87 (M.D. Ala. 1986); People v. Nutt, 696 P.2d 242, 248 (Colo. 1984); Anderson v. Kenelly, 547 P.2d 60, 261 (Colo. Ct. App. 1976); Gruskay v. Simenauskas, 140 A. 724, 727 (Conn. 1928); Rosenthal v. First Nat'l Bank of Chicago, 262 N.E.2d 262, 265 (Ill. App. Ct. 1970); Am. Trial Lawyers Ass'n v. N.J. Supreme Court, 330 A.2d 350 (N.J. 1974); Lewis v. Morgan, 28 A.2d 215, 217 (N.J. Ch. 1942); *In re* Cohen, 166 N.E.2d 672, 676, (N.Y. 1960), *aff'd,* 374 U.S. 857 (1963) (citing Gair v. Peck, 160 N.E.2d 43 (N.Y. 1959), *cert. denied*, 361 U.S. 374 (1960)); Randolph v. Schuyler, 201 S.E.2d 833 (N.C. 1974); *In re* Estate of Thompson, 232 A.2d 625 (Pa. 1967); *see also* ROBERT L. ROSSI, ATTORNEYS' FEES § 2:8 (3d ed. 2001).

137. *See* ROSSI, *supra* note 136 § 2:10; Brickman, *Contingent Fees*, *supra* note 69, at 30 n.1, 114 n. 348; *see also* Federal Tort Claims Act, 28 U.S.C. § 2678 (2000) (fee restricted to 25% of judgments and 20% of settlements); False Claims Act, 31 U.S.C. § 3730(d)(1) (2000) (fees restricted to 15%–25% range); Veterans' Benefits, 38 U.S.C. § 5904(d)(1) (20% cap); Social Security Benefits, 42 U.S.C. § 406(b)(1)(A) (2000) (25% fee); Social Security Disability regulations, 20 C.F.R. § 404.1730 (2001) (25% fee or fee fixed by agency or fee fixed between attorney and claimant, whichever is least).

138. The thesis that very high fees are being routinely obtained in contingency fee cases without meaningful risk, yielding "windfall fees," is one that I have previously advanced. *See* Brickman, *Contingent Fees*, *supra* 69, at 92–93; Brickman, *Money Talks*, *supra* note 69, at 280 n.112.

139. In commenting on a contingency fee in an age discrimination case which a federal appellate court had described as "speculative in nature," the Tax Court stated: "Despite characterizing petitioner's right to recovery as speculative, his cause of action had value in the very beginning; otherwise, it is unlikely that . . . [the law firm] would have agreed to represent petitioner on a contingent basis. . . . [The] attorney . . . assisted in realizing the value already inherent in the cause of action." Kenseth v. Commissioner, 114 T.C. 399, 413 (2000); *see also* Brickman, *Contingent Fees*, *supra* note 69, at 32–33. For a discussion of an alternative to such ethically challenged zero-based accounting, see *id.* at 94–99;. *see also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 139–51 (4th ed. 1995):

> We permit contingent fees to be larger than what would constitute a reasonable hourly fee because the lawyer takes the chance, if the contingency does not occur, of going uncompensated. But most personal injury cases have some value. Prospective defendants are often willing to pay something to resolve them. Why should the plaintiff's lawyer get a full contingent fee for "recovering" this amount?

Quite apart from the extensive history of contingency fee abuse and judicial and legislative responses, there are plainly apparent intrinsic differences between hourly rate fees and contingency fees. Clients know that lawyers charge different hourly rates and that they must make choices based upon issues of cost and quality. Contingency fees, on the other hand, have a stealth component. The actual effective hourly rate that the lawyer is charging flies below radar screens. Clients do not know, indeed, are not entitled to know, the effective hourly rate they are paying the lawyer.[140] Consequently, they have little ability to realize when they are being vastly overcharged.[141] In addition to not knowing what hourly rate they are effectively paying to the lawyer or whether they are being overcharged, clients simply have no choice with regard to payment of the standard contingency fee prevalent in that community.[142] They either have to "relinquish a [standard] share of the claim to get representation,"[143] or else forego litigating their claims.

In addition to critiquing the substantive basis for the proposed omission, I also critiqued the rationale the Commission offered in support of its proposal: that some lawyers only charge contingency fees and requiring them to offer alternative fee structures to the client "might require a change in such lawyers' regular practice."[144] My objection was stated as follows:

> The Commission's stated reason for its proposed omission is also objectionable because of its implicit policy content. If the Commission were to take note of the fact that some lawyers routinely violate Rule 1.5(e) by failing to get their clients' written consent [prior] to forwarding the claim to another lawyer or violate Rule 1.15 by not promptly paying clients settlement funds received by the lawyers, surely it would not then recommend that these

140. *Cf.* Public Perceptions of Lawyers, Consumer Research Findings, prepared on behalf of the Section of Litigation of the ABA (Apr. 2002) ("[O]f all the criticisms that consumers raise about their personal experiences with lawyers [whose profession they rank as second lowest of all legal institutions and branches of government], the greatest number of complaints arise around lawyers' fees. Consumers say that lawyers charge too much for their services, are often not up front about their fees; and are unwilling to account for their charges or hours.").

141. *See* Vonde M. Smith Hitch, Comment, *Ethics and the Reasonableness of Contingency Fees: A Survey of State and Federal Law Addressing the Reasonableness of Costs as They Relate to Contingency Fees Arrangements*, 29 LAND & WATER L. REV. 215, 215, 245 (1994) ("Often clients accept whatever rate an attorney suggests merely because it seems to be the 'going rate', and thus they do not realize that they are being overcharged.").

142. *See* Kenseth v. Commissioner, 114 T.C. 399, 444 (2000) (Beghe, J., dissenting) ("[A] contingent fee agreement in all significant respects amounts to a 'contract of adhesion' . . . 'to be signed by [the client] who has little choice about the terms.'"); *id.* at 422 ("[It] was a standardized form contract prepared by . . . [the attorney who] would have declined to represent . . . [the client] if he had not entered into the contingent fee agreement. . . ."); *see also* Gisbrecht v. Barnhart, 122 S. Ct. 1817, 1830 (2002) (Scalia, J., dissenting) ("It is uncontested that the specialized Social-Security bar charges uniform contingent fees (the statutory maximum of 25%), which are presumably presented to the typically unsophisticated client on a take-it-or-leave-it basis.").

143. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1521 (1986).

144. *See* Letter Testimony of Lester Brickman, *supra* note 127.

Model Rule requirements be dropped because retaining them "might require a change in such lawyers' regular practice."[145]

Effectively replying to my criticism of its rationale, the Commission changed the reason listed for the omission. In place of justifying the deletion on the basis that lawyers routinely violate the fiduciary rule and, therefore, adhering to the rule "might require a change in such lawyers' regular practice," the Commission stated:

> [5] The Commission proposes to delete the next to the last sentence of current Comment [3] because the statement is merely advisory, given that the requirement of offering an alternative type of fee is not stated or implied in any textual provision. If the contingent fee is reasonable, then lawyers need not offer an alternative fee nor need they inform clients that other lawyers might offer an alternative.[146]

The Commission is correct that the deleted statement is "merely advisory." That however, proves too much. Why have Comments at all except to advise attorneys on the meaning of the Rules and guide them towards choosing ethical practices? The Commission is also correct that the deleted statement did not appear in the text of Rule 1.5 or in its predecessor, DR2-106. It is incorrect, however, to state that it is not implied. The analysis in this article of the fiduciary obligations of the lawyer, as well as Formal Opinion 94-389 and Informal Opinion 86-1521, coupled with the historic justification for the special protections to be afforded contingency fee clients and the reasonableness provisions of Rule 1.5, strongly imply the fiducial and ethical right of the client to have a choice as to whether to pay a standard and substantial percentage of a tort claim. The legal profession rejects fiduciary standards applicable to contingency fees and demands that tort claimants pay a substantial percentage of their claims to lawyers irrespective of either the value of the claim at the time the client retained a lawyer or the risk and effort to be required. Ethics 2000 endorses and enshrines this rejection of the standard of the fiduciary.

V. CONCLUSION

Though the Commission omitted its self-incriminatory explanation of the reason for proposing to delete the language in the Comment, it did not otherwise change its position on Rule 1.5. Inexplicably, it did not even acknowledge that the changes it was proposing were directly contrary to the position taken by the Standing Committee in Informal Opinion 86-1521 and Formal Opinion 94-389. Ultimately, the Commission's

145. *Id.*
146. Ethics 2000, Model Rule 1.5, Reporter's Explanation of Changes, *at* http://www.abanet.org/cpr/e2k-rule1.5rem.html (last visited Nov. 1, 2001).

proposed changes to Rule 1.5 were approved by the ABA House of Delegates.[147]

Ethics 2000 started out to endorse client rights, but ended up joining the assault on the citadel of fiduciary protection. Financial self-interest has once again triumphed over fidelity to fiduciary principles.[148]

147. ABA Ethics 2000 Comm'n, Report 401, as passed by the ABA House of Delegates Feb. 5, 2002, *at* http://www.abanet.org/cpr/e2k-redline.html (last visited Mar. 11, 2003); *see also* Mark Hansen, *Just in Time: Except for MJP, House Completes Review of Proposed Ethics Changes*, A.B.A. J., Apr. 2002, at 65.

148. *See* Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1557 (2002) ("[R]egulation of the legal profession has been designed primarily by and for the profession, and too often protects its concerns at the expense of the public.").