2 A PIECE OF THE ACTION: The Triumph of the Contingency Fee

Karen Michaels: You'd do all that . . . just for a part in a play?
Eve Harrington: I'd do much more, for a part that good.

—All About Eve *(Twentieth-Century Fox, 1950)*

For years the New York City firm of Morris Eisen P.C. ran one of the nation's biggest personal injury law practices, employing fifty lawyers and handling hundreds of cases at a time. Like all big law firms that specialize in injury lawsuits, it worked on contingency— keeping a share of its clients' winnings, if any ("no fee unless successful").

It all came undone in 1990 when a federal grand jury indicted Eisen and seven persons associated with his firm on charges that included bribing witnesses and court personnel, suborning false expert testimony, doctoring photographs, and manufacturing other physical evidence. Among those charged along with Eisen were two lawyers, a former office manager, and four private investigators who worked regularly with his firm.

U.S. Attorney Andrew Maloney of the Eastern District of New York detailed the charges. "They produced an eyewitness to two automobile accidents," he said. "The witness was never at either accident and, at the time of one accident, he was serving time on a forgery charge." In another case, where one of Eisen's employees claimed to have tripped at a racetrack parking lot, Maloney said one of the suspects used a pickax to widen a pothole so it could be blamed for the supposed incident. Two of the group were charged with causing a witness to give false testimony in another lawsuit where an injured woman claimed that a bus driver had signaled for her to cross the street into traffic; New York City settled that case for $1 million. Altogether the nineteen lawsuits where wrongdoing was alleged had brought in $9 million in awards and settlements, of which the lawyers had pocketed an estimated third as contingency fees, along with some additional sum to cover their reported expenses.

Around the rest of the country a wave of similar scandals was breaking. A front-page series in the *Miami Herald* told how a North Miami legal practice had conspired to manufacture and exaggerate injury claims. Florida prosecutors followed with a thirty-two-count indictment of three lawyers, two doctors, and three others. A federal indictment charged two New Jersey lawyers and a doctor with fifty-eight counts in an alleged scheme of massive fraud in auto-accident claims.

One reason lawyering has always been treated as something of a special line of work is that lawyers come under such intense and varied ethical pressures. They face countless temptations to exploit opponents and clients alike. Huge amounts of money can hang on the choices they make when no one is looking over their shoulder. Few occupations offer such chances for dishonest persons to become very rich.

A job that offers enormous returns to unscrupulousness will attract many unscrupulous persons and corrupt many persons of ordinary character. Most of the possible ways to sort out the bad apples are not very promising.

Criminal prosecution, disbarment, and other heavy-duty disciplinary measures can help in the few cases where abuses can be brought to light and proved conclusively. In practice only a few relatively flagrant cases of lawyer misconduct (mostly embezzlement of client funds and the like) are caught and corrected in this way. Advance screening of bar applicants for "good character" is a subjective affair that can imperil the merely unpopular applicant along with the shady one; it has fallen largely into disuse. Civil lawsuits against lawyers, as we shall see later, provide occasional recourse for victimized clients but next to none for victimized opponents.

Finally there is the idea of reducing the temptations for dishonesty within the practice of law itself.

The ethical rules of many professions share a common underlying principle: if temptations are allowed to get out of hand, many will yield. To put it in raw dollar terms, if under system A people can grab a thousand dollars by telling a lie, and under system B they can grab a million by telling the same lie, more people—not all, but more—will tell the lie under system B. No system could block all chances to profit from lying, cheating, and corner-cutting; that would be hopelessly utopian. What a practical system of ethics can do is fence off the steepest and most slippery slopes, lowering the rewards for dishonesty not to zero but to a point where most people can be trained in the habit of resisting.

One ethical rule commonly found in professional sports forbids athletes to bet on their games. There are obvious reasons for not letting them bet against their own teams. The reasons for not letting them bet in favor are in the end no less compelling. Some athlete-gamblers would throw their strength into certain contests at the expense of the season as a whole. More generally, kneeing and below-the-belt gouging of opponents would run wild: badminton would soon get as mean as hockey, and who can think what hockey itself would be like?

Likewise doctors have never been allowed to charge contingency fees—in effect to place bets with their patients on the success of their therapies. Under a system of medical contingency fees, doctors would dispense with their fees if a patient remained sick. If he rallied, they would charge higher-than-usual fees. And if he got well enough to go back to work, they might even arrange to take a share of his future earnings, to reflect the value of their efforts.

Why would this be unethical? One reason is that it would open up so many temptations for doctors to depart from honesty. Under such a fee arrangement some doctors would portray transient maladies, best treated by doing nothing, as life-threatening to scare patients into promising a whopping contingency. Some would cure an illness with harsh remedies that left the body vulnerable to worse assaults later on. Some would allow patients who were still sick to believe they were cured, perhaps administering feel-good potions toward that end, although their best judgment would otherwise be to recommend drastic measures to stave off an imminent relapse. Falsification of test results, bedside charts, and autopsy findings would go on constantly. Even doctors of ordinary integrity would feel their objectivity subtly disoriented, and the truly unscrupulous would find chances to become very rich indeed. Observing this, more unscrupulous persons would enter the medical profession instead of other lines of work.

And so the custom arose of paying doctors by the hour, as work went along, whether their patients recovered miraculously, feebly, or not at all. By achieving a surprise cure a doctor might hope to get valuable word-of-mouth and repeat business. But that is the difference between more and some, not between feast and famine. Many of the subsidiary rules of medical ethics, such as the separation of medicine from pharmacy, follow similar lines. By shielding doctors from a sharp financial interest in drug dispensing, we avoid clouding their decision whether to prescribe or withhold drugs in borderline cases.

The ethical rules of the medical profession, however, carry some very real costs. Medical contingency fees would offer at least two enormous advantages over the familiar hourly-fee way of paying doctors. One would be to spur productivity. The evidence from every other line of work is overwhelming: when people are exposed to very sharp incentives, when their compensation is tied directly to their results, they really hustle. Salesmen who get paid on commission scramble to set volume records, while those on straight salary are taking long coffee breaks and chatting with friends. Garment workers paid for piecework far outperform those paid by the hour. Most doctors already work hard, but they would set an even more impressive pace were their paychecks tied directly to the medical outcomes of the cases they handled. Of the extra cures they provided, not all would be fake; many would be real.

The second advantage might appear even more tempting in an age that places a high value on equality. Medical contingency fees might seem the ideal way to bring medicine within the reach of persons short on ready cash. It is just the person who stays sick, after all, who most needs to have his doctor's bill forgiven. And it is just the one who gets well enough to go back to work who can best afford to pay a larger or proportional fee. Many patients would be glad to accept that deal. Some would propose it themselves. The doctor's contingency fee, if allowed to spread, might also relieve the medical profession and society at large of a good part of the burden of providing care on a charitable basis to poorer persons. No doubt it would soon come to be extolled as the "key to the hospital" for the working man.

These are not advantages to be laughed at. Ethics rules are not free, and we give up some real benefits, as well as some illusory ones, as the price of keeping doctors (more) honest. The medical profession itself gives up what would probably be a ticket to vastly greater wealth and influence; under a contingency-fee system many doctors would become instant millionaires just by finding the right patient to treat at the right time.

In virtually every other country in the world, the case of lawyers is seen as very much like the case of doctors. The near-universal view is that neither clients nor (especially) opponents are very good at looking out for themselves; that no direct means of policing lawyers' misconduct is likely to be even halfway effective; and that the first line of ethical defense for lawyers is therefore to insulate them from a direct stake in the outcomes of their fights. The tradition of the English common law, the French and German civil law, and the Roman law all agree that it is unethical for lawyers to accept contingency fees. In 1975 British judges strenuously opposed even a closely regulated version of the fee, in which a contingency suit could go forward so long as leading lawyers verified its reasonableness. They explained that lawyers would no longer make their cases "with scrupulous fairness and integrity."

Why is America the glaring exception? What has emboldened our lawyers to accept this sort of fee?

The American exception on contingency fees seems to have developed naturally and inevitably from a wider and more profound American exception on legal fees in general, an exception that is central to understanding the problems of our legal system. America is the only major country that denies to the winner of a lawsuit the right to collect legal fees from the loser. In other countries, the promise of a fee recoupment from the opponent gives lawyers good reason to take on a solidly meritorious case for even a poor client. Oxford's Patrick Atiyah notes that "the reality is that the accident victim with a reasonable case should be able to find a lawyer with equal ease in England and America." The obvious result of not allowing recoupment is that clients must find some other way to compensate their lawyers. Unless the client has independent sources of cash, the only place for the fee to come from is out of the recovery itself.

At first much of America tried a not-very-promising substitute for the contingency fee: volunteer legal service. Lawyers were supposed to make a reasonable effort to handle a poor person's claim for free when it appeared meritorious. When a suit of this sort was a money claim and it succeeded, the now not so penniless client might offer the lawyer a grateful recompense but was not obliged to do so. The system was supposed to work on two-way altruism, first from the lawyer, then from the beneficiary.

Systems that depend too heavily on pure altruism to work do not tend to chug along forever. Without a legal right to recover fees in case of victory lawyers did not donate enough time to these *pro bono publico* cases, and some meritorious claims slipped through the cracks. The straightforward solution of shifting fees to the losers of lawsuits was obstinately resisted. So, amid misgivings and reluctance, the contingency fee was admitted state by state; Maine was the last state to legalize it, in the 1960s.

Restrictions hedged in the use of the fee, confining it to the necessary cases. The arrangement was to be discouraged unless a client was too poor to pay the normal freight. Crucially, lawyers could represent only plaintiffs on this basis, and never *defendants*, either civil or criminal. And although contingencies were permitted for most money claims, they were disallowed in many other kinds of lawsuits, divorces in particular.

A further web of swaddling rules protected lawyers from dealings by which, purposely or not, they might end up obtaining stakes in the cases they pressed. They could not buy up a promissory note to collect at a profit, or buy businesses or parcels of land to which lawsuits attached unless their primary aim were to acquire the property rather than the incidental share of its value represented by legal claims. They could not give money to their clients for free for fear of the appearance that they were paying to keep a lawsuit alive (which, as the offense of "maintenance," was punishable at common law by imprisonment). In fact, to avoid pitfalls of this nature, they were advised not to enter into business dealings with their clients at all.

The older American legal ethicists emphasized the need for vigilance against the special corrupting dangers of the contingency fee. Lawyers were to recognize that taking a share in the spoils subjected them to a sort of moral vertigo that should be shunned when not necessary and handled with tightrope care where it was. They would have to cultivate a special humility and detachment when they worked on this basis, trying harder than other lawyers to remember that winning wasn't everything, struggling to forget that victory in the case at hand might bring personal riches or that loss might come as a financial blow. In short, the system was asked to run on a new kind of altruism, the self-restraint of lawyers with fortunes at stake.

Just as salesmen paid on commission step forward and make eye contact when the customer walks into the store, so contingency-fee lawyers have a strong incentive to get clients interested in the merchandise. And sales pick up. The standard American text on legal ethics, by Judge George Sharswood of Pennsylvania, said the fee gave "an undue encouragement to litigation." Street-level views could be much more scathing. By the 1920s one federal prosecutor was calling the fee the "arch tempter to the ambulance chaser" (as well as the fount of "false claims, witness fixing and perjury"). Henry Drinker, a relative pussyfooter, described it as "somewhat inconsistent" with the lawyer's duty not to stir up lawsuits.

With their incentive to go for volume, volume, and more volume, contingency-fee lawyers, exactly as one would expect, have long done far more than their share of advertising and solicitation, both lawful and un-. "MY CUSTOM T.V. ADS CAN MAKE YOU MILLIONS" promises a full-page pitch on page three of the December 1985 *Trial*, the magazine for injury lawyers. "27 Lawyers have become millionaires while running my custom T.V. commercials; 9 are multimillionaires and 22 are close (net worth between $450,000 and $975,000"), asserts independent ad producer Paul Landauer. "Some started with less than nothing! One borrowed $6,000 to go on the air and took in an off-shore injury case the second week that settled for $3.8 million." Smart lawyers, he explains, know that attracting clients "in bunches and droves" increases the odds of getting a "big one." "I give you an elegant, 100% custom, 'dream lawyer' image the TV audience can't wait to call."

Getting potential clients, elegance-impressed or otherwise, to dial the operators standing by to receive their call, may be the initial step in the encouragement of litigation. But it will not be the last step. The encouragement naturally extends to every later stage of the dispute. The true cultivator of discontent does not sow the seeds of grievance and then retire while the seedlings grow or wither as Nature ordains. He waters and fertilizes the tender shoots to a state of garish bloom.

The popular television show *L.A. Law* has made famous the character of divorce lawyer Arnie Becker. A woman comes in who is thinking of splitting up with her husband: they haven't been fighting, but they seem to have drifted apart; maybe it's time to work out a parting of the ways. As Arnie drops a word here and a hint there, her mood subtly changes. She begins to feel annoyed at her hubby, then downright aggrieved; by the next commercial she is howling for his scalp on toast.

This edifying style of consciousness-raising or client education can be applied to virtually any legal problem. Someone walks into the office in a far from combative frame of mind, feeling there is something to be said for both sides, not at all in the right mood for litigation services. The entrepreneur can artfully lay out the full gravity of the other side's conduct. The client who wants help in rescheduling overdue bills can begin to appreciate how irresponsible the banks were to send him so many credit cards. The frightened tenant behind on the rent can realize, the thought coming as if unbidden, that the landlord's delay in repairing the sink is really little short of depravity.

None of this would have surprised old-time lawyers in the least, and it was one reason for the insistence on detachment and passivity that runs like a shot of lidocaine through their writings on the lawyer/client relationship. Yes, lawyers were to apprise clients fully of their rights and options, but it was best done clinically, so as not to inflame any latent feelings of fear, rage, envy, or avarice. If the case did proceed to litigation, the client as "master of his suit" was to provide the impetus not only for the initial filing but for any major escalation of the battle. Given a client of lawful intent, the ideal lawyer did not try to shape even his attitudes, let alone his story.

If you have hired a contingency-fee lawyer you surely know already about the great advantage of giving him a piece of the action: he gets a powerful incentive to bring in the absolutely biggest cash amount. But when you think about it the absolutely biggest cash amount may not be what you want.

You may not, for example, be feeling angry enough to fire off every arrow in your quiver of legal rights. Maybe it strikes you as a little rough to sue the nurse as well as the doctor and hospital just to get a few dollars more, or brand your ex-business partner as a racketeer as part of your action seeking a fairer division of the enterprise property. You may not want to pry into the other side's private life or invite prying into your own. Then, too, litigation can end in many ways. The bitterest marital fallings-out have been known to end in a miraculous reconciliation. (Most states still forbid contingency fees for obtaining divorce decrees because they so clearly give the lawyer a reason to sabotage any such development.) A new management might take over at the workplace where you were fired and offer you a job instead of a back-pay settlement. The magazine you sued for libel might print your side of the story. In a University of Iowa study of libel complainants interviewed after their suits were over, a substantial majority said they would have been satisfied at least initially with a correction or retraction instead of cash damages.

But there is a new dynamic at work to take the decision out of your hands. If someone else fronted the money to get you into court, the action is no longer yours alone. You have a new partner in your lawsuit, maybe a senior partner, to whom words of forgiveness butter no parsnips and gestures of mercy pay for no beachfront condos. You may be pushed toward high-ticket strategies, though they end in hatred and self-reproach.

Timing is a common source of conflict between lawyer and client interests. Most litigants tire of their fights, if not at first, then after a while, and at some point would rather get on with their lives than hold out for a little more. The incentive of the lawyer with a big war chest can be to make you wait in order to go for the extra money. Every so often the roles are reversed: some clients have complained, and at least one legal-malpractice suit has charged, that lawyers settled too early for a low figure because they needed help with the cash flow in their own office.

Hiring a lawyer on an hourly fee puts you in control of the direction of your affairs, much as a taxi fare gives you wide discretion to name your own destination and hop off when you want. The contingency fee takes you along for someone else's ride, aboard a high-powered machine typically geared to breaking altitude records. With luck, it might be a ride to riches. But it is best not to complain about the steering. And although you may think you have the right to change lawyers in mid-lawsuit if things get too ugly, just try it.

There is no point denying that contingency fees have certain productivity advantages. Paying people only if their efforts culminate in success definitely coaxes more effort out of them, but the question is always whether the effort is aimed in the right direction. Much of the economy is run on a fee-for-results basis. Farmers get paid for cabbages based on how many edible cabbages they come up with, not how many hours they spend in the cabbage patch. Realtors and travel agents work on straight commission. So, for that matter, do authors who hope to make royalties past the advance on their books: if the product doesn't sell, they may get no recompense for an extra hundred hours of work.

Not all occupations are like cabbage, house, or book selling. Contingency fees tend to be disfavored in professions to whom the interests of others are helplessly entrusted, where misconduct is hard to monitor. Accountants have long been barred from accepting contingency fees ("I'll pay twice your normal rate if my taxes go down, the bank stays happy, and I survive the next annual meeting without being voted out"); we hope they will stay independent enough to tell the client unwelcome truths. Salesmen are not always paid on commission because the hustle factor in salesmanship can be turned in a destructive direction: commissioned salesmen, although they outperform the hourly variety, are also more tempted to use high-pressure sales techniques and manipulative tactics that "make their numbers look good" to the boss.

Contingency fees are particularly frowned on where the costs of abuse fall on third parties who are not taking part voluntarily. Giving traffic cops contingency fees by hinging their bonuses on whether they make a ticket quota arouses widespread anger because it so obviously tempts the officer running under quota to be unfair to the motorist. The same is true of giving tax collectors contingency fees by hinging their bonuses on how many deductions they disallow or how many assets they seize. ("Tax farming," the old system where private parties were deputized to collect taxes and keep some of the haul for themselves, was abolished long ago in well-run countries, not because it was the least bit inefficient—it was a favorite way for Roman emperors to extract revenue from conquered provinces—but because it encouraged brutality and trampling of due process in tax collection.) Giving soldiers contingency fees for successful attacks, by letting them loot the towns they capture, was long favored as a way of encouraging warlike zeal but came under gradual ethical control as civilization progressed; we now give out medals and ribbons instead of the contents of civilian homes.

Which interests are helplessly entrusted to lawyers? Their clients', of course, in many cases. In the classic underworld injury racket, the operator, after pocketing the defendant's tender of settlement, gives the accident victim whatever pocket change it is thought should satisfy him, or just dumps him back on the street with no money at all. (Any back talk from the victim and he is in trouble compared with which his original accident was minor.) Most clients of today's litigation industry fortunately do not get treated that badly. But many are quite surprised to discover at the end of a suit that the lawyer's claimed "expenses"—copying, filing costs, expert witness fees and so forth—have somehow ballooned to represent a huge share of the settlement on top of the contingency fee itself. (Some naive souls never find out for themselves how much the defendant paid to settle, but take the lawyer's word for it.) If the client gets any real accounting of the expenses, it can be extraordinarily hard to challenge.

Although contingency-fee lawyers face many temptations to exploit their clients, the worst dangers of the fee do not rest primarily on that ground. Alert clients can be on guard against being exploited by their own lawyers; as the abuses are more widely publicized, more may learn to avoid the lawyers who get too greedy in bill reckonings. The real problem with the contingency fee derives not so much from the conflicts it creates between the interests of lawyer and client as from the even more dangerous identity it creates between their interests as against everyone else's. In truth, many clients are delighted to find a lawyer who is much more ruthlessly committed to winning than the hourly-fee lawyer who represents their opponent. They seek out the operator who knows how to turn a worthless or low-value claim into a cash bonanza even if he keeps most of the extra money for himself. If they are made to cooperate in truth-shading or worse, they are not bothered. Some are only too glad to think up new embellishments of their own.

The case against the contingency fee has always rested on the danger it poses not to the one who pays it but to the opponent and more widely to justice itself. As other nations recognize, it can yoke together lawyer and client in a perfectly harmonious and efficient assault on the general public. There are things lawyers will do when a fortune for themselves is on the line that they won't do when it's just a fortune for a client. Taking all in all, we don't want them to do those things.

Contingency-fee law has made more overnight millionaires than just about any business one could name. *Forbes* surveyed the richest lawyers in America and found that the big fortunes were overwhelmingly made in contingency-fee work, not the corporate law and transaction planning that have always represented the zenith of prestige law practice. Among the top scorers on its list were a Detroit lawyer whose thriving practice takes in an estimated $100 million a year in settlements; a Brooklyn Law grad who specializes in suing doctors and carts home an estimated $12 million a year; a Wichita lawyer who sues vaccine makers and has made more than $5 million in each of the last ten years. Tucson's Richard Grand did not make the list, but Laurence Bodine of the trial lawyers' newsletter *Lawyers' Alert* reports that Grand has collected $200 million in verdicts and settlements over his career, with sixty cases exceeding $1 million. At a one-third contingency, that would add up to $67 million. Harry Lipsig, czar of lawsuits against New York City, has "been earning well into the seven figures every year for as long as anyone can remember," a spokeswoman for his office was quoted as saying in 1988. South Carolina asbestos-litigation king Ron Motley admits to earning a meager $1.5 million a year, but that is still reportedly enough to make his 255-employee firm the third-biggest employer in his section of the state, following a nuclear power plant and a large textile mill.

These men (very few are women) seldom seem to favor sober, understated ways of spending their newfound wealth. One has turned lawsuits against doctors into a villa in the south of France and a $2 million Paris apartment. A list of their known holdings is spangled with the ranches, jets, and very fancy cars that befit tycoons riding a cash wave with no end in sight. And indeed, no end is in sight. Something about today's contingency-fee system has made these lawyers very much richer than most of the doctors, hospital administrators, and corporate CEOs whose decisions they second-guess, and incomparably richer than the defense lawyers who oppose them.

There is a funny thing about this brand of lawyering: the more opulent it becomes, the more cloying an odor of sanctity it gives off. Self-righteousness is an occupational disease in several sectors of the legal profession, but injury lawyers top all. A spokesman for Morris Eisen had no apologies when he was indicted on charges of massive claims faking. Just the reverse. The charges, he said, were "a brazen effort to cripple the advocates of the men, women and children who have been crippled and maimed." Suing people for a share of the proceeds has become, like one or two famous television ministries, a venture in hellfire preaching and unctuous handwringing that enables its practitioners to live in the luxury of Babylon.

What is supposed to make all this okay is that it is done in the name of persons of modest means. Injury lawyers carry on endlessly about how their favored fee arrangement provides the "key to the courthouse" for the widow and orphan. But they seldom much care for the method all other countries use to provide that key: an hourly fee paid by the losing opponent. And it turns out that they happily charge contingency fees to middle- and upper-income and business clients that could easily afford to pay on an hourly basis. A group of companies stymied in efforts to build a coal slurry pipeline hired the big Houston firm of Vinson & Elkins on a contingency basis to file antitrust charges against several railroads for allegedly blocking the project: the law firm reportedly pocketed nearly $200 million in contingency fees from the resulting settlements. *The Wall Street Journal* has reported that the state of Massachusetts has hired private lawyers on a contingency fee of up to 30 percent to pursue some property-repair claims with an estimated value of $100 million.

In fact, mysteriously, the contingency fee has become the *only* way most individual clients can get a lawyer for injury cases, even if they would rather pay an hourly fee. Some clients suspect that a phone call or two from a lawyer, or a letter on his stationery, may be all they need to get a satisfactory resolution of their problem. Giving him a third of the amount won in such a case, they might feel, would be an undeserved windfall. But they are out of luck. A report from the Federal Trade Commission showed that 97 percent of lawyers took injury cases only on contingency, refusing to consider hourly rates, however generous. Lawyers seem to have come to the conclusion that a good injury case is a plum and, damn it, they have a right to a share, as befits a player rather than a taxi driver. They are also loath to undercut the "going rate" fee percentage, even when success in a case seems virtually assured. In some of the rougher towns like Philadelphia, Detroit and Kansas City, the going rates over the years have been reported to run at 40 and even 50 percent.

As lawyers have discovered how very profitable this kind of practice can be, more of them have gotten over their scruples. The contingency fee is coming to be seen as the basis of an industry boldly and openly run for profit, as an enthusiastic first resort for the general case rather than a troubled last resort for the special. Even big-name firms like Washington's Williams & Connally and Arnold & Porter are now reported to take work on contingency. And in a trend that is full of implications for the future, the fee is spreading to litigation over employment matters, child support, will contests, copyrights, taxes, and, perhaps most ominously, divorces.

In Texas, where the contingency-fee industry is unusually well developed, it is having a profound effect on commercial litigation. Texas lawyer John O'Quinn may represent a one-man wave of the future. His full-page Yellow Pages ad, as quoted in a *Wall Street*

Journal report, says he is dedicated to "helping injured people obtain cash damages" and promises an "attorney on call 24 hours a day." State bar officials have accused him of illegally using runners to acquire injury cases. What makes O'Quinn an interesting and apparently a very, very rich man is that he also applies his methods to otherwise routine disputes between businesses, with astonishing success. His most startling victory came in 1988 when a jury awarded $600 million to one of his clients, an Ohio natural gas producer, in a contract dispute with the giant Tenneco Corporation.

O'Quinn believes the techniques of personal-injury advocacy are highly effective in these disputes over how the business world is run. "We tend to approach the cases in a common sense way—simplify it," he says. Avoid the boring details, and get personal. He depicted the gas-producer plaintiffs as "hard-working, honest Christian people—your basic small-town Americans" facing an impersonal corporation. "Business lawyers—they talk like they're talking to a bunch of lawyers. I think lawyers who do what I do are actually better equipped to do these cases."

In recent years the Texas courts have handed out a string of astoundingly large verdicts. A verdict in a second natural gas case nearly matched O'Quinn's $600 million bite out of Tenneco; another Texas jury hit five railroads with a $1.3 billion antitrust verdict; and yet another Texas jury, of course, gave Pennzoil a $10.5-billion verdict in its 1985 trial against Texaco, with lawyer Joseph Jamail taking a contingency cut of the eventual $3 billion settlement.

The tycoons of the lawsuit business emerged at roughly the same time as those of the 1980s investment-banking and corporate dealmaking boom, although their stratospheric earnings have continued year after year instead of falling back after a short, spiky peak. The parallels and differences are instructive. For a long time many Wall Street advisers were paid whether or not a deal went through, let alone whether or not the client's stock went up afterward. In the 1980s, Drexel Burnham Lambert led the Street into taking "equity kickers" and warrant packages that greatly sharpened the advisors' financial incentive to make deals come out with favorable numbers. From middlemen they soon graduated to "players," and their power and income surged dramatically, as often happens to highly talented persons who get to work on contingency. Of course their temptation to sharp practices also increased. Some succumbed.

Was the added productivity worth the added misconduct? That depends on the answer to two questions. Can an investment banker's own clients reap the benefit of the hustling without falling victim to it? And can third parties stay out of the way, or will some of the cost of the deals be dumped on them? One school of thought sees the clients of investment bankers as somewhat pigeonlike, and third parties (such as holders of earlier debt that loses market value when a company issues new junk bonds) as highly vulnerable. Those of this view tend to see the Wall Street dealmaking of the 1980s as an ethical disaster area. Another school of thought sees both clients and outsiders as competent to fend for themselves over the long run. Those of this view tend to applaud, as a move toward market efficiency, the undeniable torrent of energy and creativity that characterized the new, contingency-fee-oriented Wall Street.

Of course many injury lawyers would profess great outrage at being compared with Wall Street operators. With their constantly proclaimed identification with the "little

guy," they often assume a marked moral superiority to mere business people, whose ethical corner-cutting, real or conjured-up, is a favorite topic of theirs before juries.
The comparison is indeed unfair, but not in the way they imagine. Entrepreneurs of litigation are middlemen not of commerce but of combat. They search out and sedulously promote chances for their fellow citizens to fight, not produce or trade. A better comparison might be with the impresarios of the boxing arena, whose productions, in pain and ringside drama, have so much in common with those of the courtroom. On second thought, that would be unfair to boxing promoters. In their spectacles, the contestants have come into the ring of their own free will.

CHAPTER 2

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