

## **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.













