

# SEVEN DOGGED MYTHS CONCERNING CONTINGENCY FEES

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## INTRODUCTION

One of the hallmarks of litigation in the United States is what we call the contingency fee. Given the alleged litigation explosion in the United States<sup>1</sup> and the supposed litigiousness of the American populace,<sup>2</sup> the contingency fee is a frequent target of the proponents of so-called tort reform who seek to reduce both the exposure to lawsuits and the amounts paid out in damages.<sup>3</sup>

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1. See generally PATRICK M. GARRY, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* (1997); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Derek C. Bok, *A Flawed System*, 85 HARV. MAG. 38 (1983). For critiques of the litigation explosion argument, see Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1988); Richard D. Catenacci, *Hyperlexis or Hyperbole: Subdividing the Landscape of Disputes and Defusing the Litigation Explosion*, 8 REV. LITIG. 297 (1989); Stephen Daniels, *We Are Not a Litigious Society*, 24(2) JUDGES' J. 18 (1985); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

2. A variety of evidence suggests that the United States may not be uniquely litigious. See Christian Wollschläger, *Exploring Global Landscapes of Litigation Rates*, in *SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60 GEBURTSTAG* (Brand & Stempel eds., 1998); Basil S. Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different?*, 49 CAMBRIDGE L.J. 233 (1990).

3. See Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?* 37 UCLA L. REV. 29 (1989); 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 (1994); LESTER BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES*

One recent example targeted by critics is the huge fees received by lawyers representing states in the health-care cost tobacco litigation.<sup>4</sup>

The goals of these supposed reformers were clearly brought home to me in December 2001. I received a telephone call from an attorney representing a large American corporation. The company had produced a product that had caused a significant number of deaths in several countries outside the United States. Importantly, as the lawyer described the situation to me, there was no real question about liability; the concern was to minimize the damages to be paid out. This had become important because a number of American attorneys were seeking to sign clients from these countries to contingency fee retainer agreements in order to sue the American company in courts in the United States. The lawyer who contacted me was trying to find someone to whom public relations people working on behalf of his client could refer media representatives from the foreign countries; the lawyer's intention was to get the word out about "how bad contingency fees were for the clients" and "how it was often the case that clients ended up with very little after paying the lawyers their exorbitant fees." I told the lawyer who called me that I would be happy to talk to any media people who contacted me, but I would not be able to convey the message his client wanted to get into circulation.<sup>5</sup>

Proponents of so-called reform have propounded a variety of criticisms of contingency fees, along the way creating a variety of myths about the nature and operation of contingency fees. Here, I demonstrate that the most frequently advanced myths are just that—myths. In particular, in the pages that follow, I examine the following assertions:

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(1994). See also Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247, 269 (1996). A good example can be found in the Republican Contract with America, which was the cornerstone of Newt Gingrich's successful effort to lead Republicans to the control of Congress; the ninth bill on the "We Will Pass" list was "The Common Sense Legal Reform Act" available at [www.house.gov/house/Contract/CONTRACT.html](http://www.house.gov/house/Contract/CONTRACT.html) (last visited Feb. 7, 2002). In 1996, a series of initiatives on the California ballot would have limited contingency fees (Proposition 202), imposed fee shifting in shareholder litigation (Proposition 201), and mandated a no-fault auto insurance (Proposition 200). See Peter Passell, *California Propositions Are Anti-lawyer, and No Joke*, *N.Y. TIMES*, Feb. 8, 1996, at D2.

4. Links to a selection of this critical commentary can be found at <http://overlawyered.com/topics/tobacco.html> (last visited Apr. 4, 2002).

5. There can be cases in which clients receive relatively small portions of the defendant's payment; however, when this happens in individual cases (other than class actions), it is usually not so much a function of the fees and expenses of the lawyer but rather a function of other claims against the settlement, such as those from medical providers, health insurers, or workers' compensation insurers.

- Contingency fees are peculiarly American.
- There is in reality little risk to the attorneys in most contingency fee cases because most cases result in some recovery for the client.
- The use of modern advertising techniques by contingency fee lawyers has produced a flood of clients seeking compensation.
- Contingency fee lawyers accept most cases that potential clients bring to them.
- Contingency fee lawyers charge a “standard” fee of one-third of the recovery.
- Lawyers routinely obtain windfalls from contingency fee cases.
- The interests of contingency fee lawyers and their clients are routinely in conflict.

In the discussion that follows I draw upon a variety of sources of data, both published and unpublished. My most important source of unpublished data is a study I have conducted of contingency fee practice in Wisconsin.<sup>6</sup> I also draw on data from the RAND Corporation’s evaluation of the 1990 Civil Justice Reform Act.<sup>7</sup> Before turning to the seven myths, I briefly describe these two studies.

### *The Wisconsin Contingency Fee Study*

My primary source of original data is my study of contingency fee practice in Wisconsin. To obtain direct and current information on contingency fees, this study involved a variety of types of data collection:

- a structured survey of contingency fee practitioners to obtain basic descriptive information about the lawyers’ practices and information on a sample of cases handled by the lawyers;

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6. I have published a series of articles based on this study, many of which I will cite in the course of this Article. All of the publications, and several unpublished papers, can be accessed from my web site: <http://www.polisci.wisc.edu/~kritzer/research/research.htm>. I am working on a book based on this research, tentatively entitled *The Political Economy of the American Contingency Fee*.

7. The results of the evaluation are reported in JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) [hereinafter KAKALIK].

- observation of lawyers at work to obtain an in-depth understanding of key processes such as case screening and negotiation; and
- semistructured interviewing to ascertain whether the observational findings are *sui generis*.

The survey of contingency fee practitioners, which was carried out during the fall of 1995, relied upon a sampling frame defined by the Litigation Section of the State Bar of Wisconsin.<sup>8</sup> Lawyers provided a total of 511 usable responses representing an estimated response rate of 48%.<sup>9</sup> To obtain information on a sample of actual cases, the survey requested data on up to three cases: the case closed most recently after a trial had begun, the case closed most recently after filing but before the start of trial, and the case closed most recently before filing. Requesting data on the “most recent” cases in each category provides an approximation to random sampling, and the three different disposition stages provide for stratification along the key dimension of when a case is closed.<sup>10</sup> Overall, lawyers provided information on 989 cases (332 unfiled, 390 filed but not tried, and 267 that went to trial).

My observations in law offices during 1996 involved three different practices.<sup>11</sup> I was excluded from very little that was relevant to my work.<sup>12</sup> The three settings were very different. One was a specialist plaintiffs’ firm, one was a contingency fee plaintiffs’ specialist in a medium-sized general-practice firm, and the other was a litigation (broadly defined to include criminal, civil, and family litigation) specialist in a small general-practice firm.

Finally, I conducted a total of forty-seven semistructured interviews, twenty-eight with contingency fee practitioners, thirteen with litigation

8. After removing government lawyers and others clearly not engaged in contingency fee practice, the sample included a total of 1,850 target respondents.

9. I say “estimated” because the survey was mailed to a sample that included many lawyers not involved in contingency fee practice. I included with the survey a postcard which respondents could return indicating that they did not do any contingency fee work. Of the 1,850 lawyers who received the questionnaire, 1,192 provided some kind of response. In order to estimate the number of contingency practitioners among the 658 who did not respond, a research assistant called about 200 law offices and asked whether the lawyer handled cases on a contingency fee basis. Putting this all together, I estimate that 1,072 of the 1,850 lawyers receiving the questionnaire did at least some contingency fee work.

10. To further frame the sample of cases, I asked only about cases that the lawyer had closed during the preceding twelve months (or previous fiscal year, if that was easier). I also collected information on the number of cases the lawyer had closed in each of those categories during the time period; this made possible the development of a weighting scheme to adjust for the relative frequency of different types of dispositions and the lawyer’s practice volume.

11. Only one of the four lawyers I approached turned me down. The first two lawyers I contacted said “yes,” the third said “no,” and the fourth said “yes.”

12. I was excluded from a firm business meeting in one practice, a trip to talk to an expert in another, and a number of noncontingency fee-related events in the third.

defense lawyers, and six with current or retired insurance claims adjusters. I conducted the interviews between May and October 1996. I drew the sample of contingency fee practitioners using a combination of legal directories and Yellow Pages advertisements. These interviews averaged about one hour in length, and all were tape recorded and transcribed. I identified the defense-side respondents from directories and in the course of interviews with other respondents.<sup>13</sup> These interviews were conducted by telephone and were also, with one exception, tape recorded and transcribed.

### *Civil Justice Reform Act Study*

The second source of unpublished data that I use is a study conducted by the RAND Corporation of federal civil cases. RAND conducted this study under contract with the Administrative Office of the U.S. Courts as an evaluation of the impact of the Civil Justice Reform Act (CJRA). For my purposes, I have employed data from two separate samples drawn by RAND.<sup>14</sup> The first sample is from cases terminated during 1991 (up to December 15); the second is from cases filed in 1992 (and in some situations 1993). Cases were taken from twenty federal districts around the country, some of which were involved in pilot projects under the CJRA and some of which served as comparison districts. Samples were stratified to include adequate numbers of cases for each of the types of case-processing interventions adopted in response to the CJRA and to include adequate numbers of cases in each of the three categories of work burdens placed on federal judges; asbestos cases were specifically omitted from the study. RAND constructed sample weights to comparisons to take into account variations in sampling rates. Each of the two samples (1991 terminations and 1992-93 filings) contained approximately 5,000 cases. Surveys of the lawyers involved in each case were then carried out (omitting the 7% of cases from the 1992-93 sample that were still pending as of January 1996 when the final surveys were sent out); the response rate from lawyers was around 50%.<sup>15</sup> A total of 742 respondents from the 1991 sample reported being paid on a contingency fee basis, and as did 603 respondents for the

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13. In my interviews with contingency fee practitioners, I solicited names of defense lawyers and adjusters with whom I might speak. From the defense lawyers, I solicited names of additional adjusters, focusing on individuals who had recently retired (on the assumption that they would feel less constraint than would individuals currently employed by insurance companies).

14. For details on the complex design employed by RAND, see KAKALIK, *supra* note 7, at 95-128.

15. There are differing ways to compute the response rate; hence the somewhat ambiguous figure provided above. *See id.* at 117.

1992-93 sample. 

Questions on the lawyer survey captured information on the amount of time spent by lawyers on the case (Question 9A); legal fees paid by the lawyer's client excluding expenses (Question 27A); the amount at stake ("the best likely monetary outcome"—Question 16B); the numbers of years the lawyer had been practicing law (Question 28); the percentage of the lawyer's practice devoted to federal district court litigation during the previous five years (Question 29); and the size of the lawyer's firm (Question 30).<sup>16</sup> The ways some of the questions were asked would tend to provide underestimates of the amount of lawyer effort involved (some respondents could not provide estimates of the hours worked by *all* attorneys for their client and hence provided only partial estimates of lawyer effort, and lawyers were instructed to exclude the number of hours devoted to proceedings before administrative agencies or in state courts involving the dispute in the federal court case) and overestimates of the fees they received (the fee question asked for the fees paid for all lawyers for their client). The result is that effective hourly rates and mean hourly returns may be overestimated in the analysis based on the CJRA data that I report below. The information on hours and fees required for analysis was available for 392 (weighted) respondents from the 1991 sample and 297 (weighted) respondents for the 1992-93 sample.<sup>17</sup>

In addition to the data from the lawyer survey, I was able to draw on data RAND researchers coded from the court records. The key variables from the court records are the type of case as indicated by the plaintiff's lawyer at the time of filing and the stage of processing when the case was terminated.

### MYTH 1: CONTINGENCY FEES ARE A UNIQUELY AMERICAN PHENOMENON

Contingency fees have a long history in the United States. One scholar has found evidence of such fees as far back as the early nineteenth century,<sup>18</sup> although the widespread use of such fees did not come until much later.<sup>19</sup> A popular perception both inside and outside the United States is that it is contingency fees that set the United States apart from the rest of the world.<sup>20</sup>

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16. The full questionnaire can be found in KAKALIK, *supra* note 7, at 281-85.

17. The results reported in this section all employ the sampling weights prepared by the RAND staff. *Id.* at 95-128.

18. See Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998).

19. See RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY* (1992).

20. Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in*

In fact, contingency fees—by which I mean “no win, no pay” fees—are not unique to the United States. Some form of legally accepted “no win, no pay” fee exists in a number of other countries:

- All provinces of Canada except Ontario permit such fees,<sup>21</sup> some for over 100 years;<sup>22</sup> since 1992 Ontario has permitted them in class action cases.<sup>23</sup> At least some of the provinces permit percentage-of-recovery contingency fees.<sup>24</sup>
- Scotland has long permitted lawyers to act on a “speculative basis.” If the plaintiff wins, he or she pays the lawyer the normal fee, but the plaintiff pays nothing if he or she loses.<sup>25</sup>
- In Northern Ireland, “speculative fee arrangements have operated unofficially . . . for many years.”<sup>26</sup>
- In the Irish Republic, barristers take cases on a “no goal, no fee” basis, in which the barrister receives his or her normal fee unless no recovery is obtained.<sup>27</sup>
- In New Zealand, both barristers and solicitors may charge on a “speculative basis.”<sup>28</sup>
- Australian courts began to recognize the appropriateness of “no win, no pay” fee arrangements in 1960, although it was not until 1994 that such fee arrangements started to be available for

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*Ontario*, 47 LAW & CONTEMP. PROB. 125 (1984).

21. See ELENI SKORDAKI & DANIELLE WALKER, REGULATING AND CHARGING FOR LEGAL SERVICES: AN INTERNATIONAL COMPARISON (1994). In fact, it is not clear that Ontario still bans contingency fees generally in personal injury cases. A number of recent Ontario Court of Appeals decisions have upheld the principle of solicitors charging on a contingency (and percentage) basis. See *Raphael Partners v. Lam*, 2002 CarswellOnt 3077; *McIntyre Estate v. Ontario*, 2002 CarswellOnt 2880. Furthermore, a bill is pending before the Ontario Legislative Assembly that would clearly end whatever ban effectively remains. See *An Act to amend the Solicitors Act to permit and to regulate contingency fee agreements* [Bill 178 2002].

22. See Loraine Minish, *The Contingency Fee A Re-Examine*, 10 MANITOBA L.J. 65 (1979). Several provinces have adopted rules permitting contingency fees in the last twenty-five years. See Jean V. Swartz, *Lawyer Contingent Fee Agreements in Canada*, at 4 (1976) (memorandum prepared by the American-British Law Division, Law Library, Library of Congress; on file with author) (reporting that as of 1976, Ontario, Nova Scotia, Prince Edward Island, Newfoundland, and the Yukon did not permit contingency fees).

23. Class Proceedings Act, 1992 (Ontario) § 33.

24. See *McIntyre Estate v. Ontario*, 53 O.R.3d 137 (2001), at Appendix I.

25. See SKORDAKI & WALKER, *supra* note 21, at 26.

26. *Id.* at 29.

27. *Id.* at 43.

28. *Id.* at 33.

potential litigants in certain types of cases (e.g., product disputes) in any type of routine way.<sup>29</sup>

- In France, major Paris law firms are using contingency fees increasingly,<sup>30</sup> and they are now being permitted to base fees in part on results achieved.<sup>31</sup>
- While few auto accident cases in Japan lead to law suits, in those cases that do go to court, the lawyers (*bengoshi*) representing the claimant normally charge on a contingency (“no win, no fee”) basis.<sup>32</sup>
- Since 1995, English solicitors could charge clients in a growing variety of cases on a “conditional fee” basis in which the client pays nothing if no recovery is obtained and pays an “uplift” of up to 100% over the normal fee if there is a recovery.<sup>33</sup> In 1999, the government moved to greatly expand the use of conditional fees in order to reduce the cost of legal aid,<sup>34</sup> and under provisions of the Access to Justice Act 1999, successful plaintiffs can now recover the “uplift” from the defendant.<sup>35</sup> Furthermore, in a 1998 decision, the Court of Appeal in England ruled that it was not contrary to law for English solicitors to act on a contingency basis whereby the solicitor would forgo some or all of his or her *normal* fee if the case was not successful.<sup>36</sup> Most recently, serious discussion has

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29. See MICHAEL CANNON, *THAT DISREPUTABLE FIRM: THE INSIDE STORY OF SLATER AND GORDON* (1998); Cathy Bolt, *WA Canola Farmers in Class Action Over Seeds*, 1999 WL 5065023, 1/21/99 AUSTL. FIN. REV. 2.

30. See SKORDAKI & WALKER, *supra* note 21, at 61.

31. See MAURICE SHERIDAN & JAMES CAMERON, *EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE* (1992) [hereinafter SHERIDAN & CAMERON].

32. See Takao Tanase, *The Management of Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990).

33. See STELLA YARROW, *JUST REWARDS? THE OUTCOME OF CONDITIONAL FEE CASES* [SUMMARY] (2000); STELLA YARROW, *THE PRICE OF SUCCESS: LAWYERS, CLIENTS AND CONDITIONAL FEES* (1998); STELLA YARROW & PAMELA ABRAMS, *NOTHING TO LOSE? CLIENTS' EXPERIENCES OF USING CONDITIONAL FEES* (1999); Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272 (1999). Two recent Court of Appeals cases have cast substantial uncertainty on the magnitude of the uplift that solicitors can charge (or, at least, that can be recovered from the client). See *Halloran v. Delaney*, 2002 WL 2029079 (Eng. C.A.); *Callery v. Gray* [2001] 1 W. L. R. 2112 (Eng. C.A.).

34. See LORD CHANCELLOR'S DEPARTMENT, *ACCESS TO JUSTICE WITH CONDITIONAL FEES* (1998); Michael Zander, *The Government's Plans on Legal Aid and Conditional Fees*, 61 MOD. L. REV. 538 (1998).

35. See JON ROBINS, *THE PRICE OF SUCCESS* (1999); Kerry Underwood, *Conditional Fees in Practice*, 143 SOLICITORS J. 1000 (1999).

36. See *Thai Trading Co. v. Taylor* [1998] 1 Q.B. 781, C.A. While England was long noted as a



begun about the possibility of adopting percentage fees such as those used in the United States.<sup>37</sup>

- Greece permits percentage fees much like the American contingency fee, but with a limit of 20% of the amount recovered;<sup>38</sup> Greece also allows lawyers to consider the result achieved in setting a fee.<sup>39</sup>
- The Dominican Republic allows percentage fees much like those in the United States; such fees, called *cuota litis*, are limited to no more than 30% of the recovery.<sup>40</sup>
- Several countries permit elements of contingency (i.e., fees based in part on results achieved). In Italy this supplementary fee is called the *palamaro*.<sup>41</sup> Other countries that permit this include Luxembourg<sup>42</sup> and Portugal.<sup>43</sup> Brazil allows fees that include a contingency/percentage element.<sup>44</sup>

As the above listing shows, each country's system is somewhat different. Nonetheless, the assertion that contingency fees are peculiarly American is clearly false. Moreover, even an assertion that the percentage-based contingency fee is specific to the United States is not correct.

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country where contingency fees were not permitted, in a 1998 decision, the Court of Appeal noted:

It is not uncommon for solicitors to take on a case for an impecunious client with a meritorious case, knowing that there is no realistic prospect of recovering their costs from the client if the case is lost, without thereby waiving their legal right to their fees in that event. As every debt collector knows, what is legally recoverable and what is recoverable in practice are not the same.

*Id.* at 788-89.

37. See Michael Zander, *If Conditional Fees, Why Not Contingency Fees*, New Law J., May 24, 2002, at 797. See also Glenn Marshall, *The Economics of Speculative Fee Arrangements*, 21 CIV. JUST. Q. 326 (2002).

38. See SKORDAKI & WALKER, *supra* note 7, at 57.

39. See SHERIDAN & CAMERON, *supra* note 31, at Greece-10; K.D. Kerameus & S. Koussoulis, *Civil Justice Reform: Access, Costs, and Delay. A Greek Perspective*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE (Adrian Zuckerman ed., 1999).

40. See Santos Pastor & Carmen Vargas, *La Justicia Civil en la República Dominicana* (Apr. 2000) at 17 (unpublished manuscript on file with author).

41. See SHERIDAN & CAMERON, *supra* note 31, at Italy-20.

42. See *id.* at Luxembourg-12.

43. See *id.* at Portugal-13.

44. See Sergio Bermudes, *Administration of Civil Justice in Brazil*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE (Adrian Zuckerman ed., 1999).

## MYTH 2: MOST CONTINGENCY FEE CASES INVOLVE LITTLE RISK FOR LAWYERS

While there are some areas of litigation where lawyers face substantial risk of nonrecovery and hence no fee if a case is being handled on a contingency fee basis,<sup>45</sup> most contingency fee cases do yield some recovery and hence some fee. However, this assertion misses the real contingencies of contingency fee practice. For both the lawyer and the client, recovery or no recovery is only one part of the uncertainty inherent in litigation. The other contingencies faced by the lawyer (and the client) include:

- uncertainty about the amount that will be recovered (and hence the fee the lawyer will receive);
- uncertainty about what it will cost, in both effort and expenses, to obtain the recovery; and
- uncertainty about how much time will pass before the recovery is obtained.

In fact, for most cases the real contingencies are not whether there will be a recovery but these other areas of uncertainty.

It is easy to understand the importance of uncertainty over the amount to be recovered and the cost of obtaining the recovery by imagining a first meeting between a lawyer and a potential client. Perhaps there is no issue at all of liability; the lawyer's client was a pedestrian on the sidewalk who suffered a soft-tissue injury and bruises while dodging a car driven by a well-insured driver who was convicted after the accident of driving under the influence. The lawyer might say to the client at the first meeting (ignoring ethical strictures against such a statement), "I can guarantee that I will get a recovery for you." The lawyer then asks the client whether she would rather pay the lawyer on an hourly basis at \$125 per hour due monthly or on a percentage basis at 33% payable at the conclusion of the case. Almost certainly the client would then ask the lawyer two questions: "How much would your fee be on an hourly basis? How much do you think you will recover for me?" To this, the lawyer might well respond, "I can't say with a lot of certainty either how much the fee would be on an hourly basis because

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45. One such area is medical malpractice. See NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 49-92 (1995). Another area that tends to be high risk is job discrimination cases. See Sharon Walsh, *The Vanishing Job-Bias Lawyers: Attorneys, Law Firms Say They Can't Afford to Try Rights Cases*, WASH. POST, July 6, 1990, at C1.

that will depend on how difficult the other side is in settling the case, and whether we have to file suit. I also can't say for sure what the recovery will be; you are still in treatment, and the recovery will depend on whether you have any continuing problems or fully recover from your injuries." The client might then ask the lawyer for a worst-case scenario, to which the lawyer might say that the recovery could be as little as \$5,000 if the client's medical condition resolves itself quickly and there is no residual problem. The lawyer would also respond that, if it is necessary to file suit, that would involve at least twenty to twenty-five hours of the lawyer's time, and two or three times that if the case actually has to go to trial. A little quick arithmetic on the part of the client would show that with a trial (albeit this is very unlikely<sup>46</sup>) the lawyer's fee could exceed the amount recovered. Even without a trial, the client could end up with very little after paying the lawyer \$125 per hour. Moreover, the client has to come up with the lawyer's fee as the case progresses, rather than waiting until the end. With all of these considerations, most clients would choose the contingency fee over the hourly fee.

While I have presented the above from the viewpoint of the client choosing between hourly and contingency fees, it also serves illustrate the uncertainty for the lawyer taking the case on a contingency fee. The lawyer needs to be prepared to accept a fee that yields a low return on the lawyer's investment. One of the lawyers I observed settled a case on the eve of trial for \$60,000, having started out with a demand for \$200,000. The lawyer, who had a nominal billing rate of \$175 per hour, had devoted about 300 hours to the case. While the lawyer did receive a fee of \$20,000, about \$8,000 of this went into time devoted to the case by the lawyer's paralegal. In the end, the lawyer netted about \$40 per hour. From the viewpoint of the lawyer, this case was a clear loser.

### MYTH 3: PLAINTIFFS' LAWYERS OBTAIN A SIGNIFICANT PORTION OF THEIR CLIENTS THROUGH ADVERTISING, PARTICULARLY MEDIA ADVERTISING AND DIRECT MAIL

The Supreme Court decision in *Bates v. Arizona*<sup>47</sup> freed lawyers from traditional strictures on advertising. Within the legal profession, personal injury specialists have probably been the most aggressive in using advertising. This has produced a bonanza in revenue for the telephone

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46. A trial on damages could occur even if the defendant stipulated as to liability.

47. 433 U.S. 350 (1977).

companies that put out Yellow Pages, and in every major media market one sees significant television advertising by lawyers seeking personal injury clients. Most controversial has been direct mail solicitation where lawyers mine publically available reports of traffic accidents to identify potential clients and then send letters to these individuals telling them about the possibility of obtaining compensation and inviting them to contact the lawyer for a no-cost consultation.<sup>48</sup>

Given the amount of advertising done by lawyers, one might expect that advertising is the dominant vehicle through which most lawyers get personal injury clients. This is not in fact true. In my survey of Wisconsin contingency fee practitioners,<sup>49</sup> I ask them what percentage of their clients come from each of a variety of sources including:

- referrals from other lawyers;
- referrals from other clients;
- advertisements in Yellow Pages;
- advertising in other media;
- existing clients;
- community contacts and word-of-mouth;
- direct mail advertising;
- other; and
- unknown.

Table 1 summarizes the responses, showing the mean percentage obtained from each source and breaking this down between those lawyers who are personal injury specialists and those who are not. The only advertising source that produces a significant proportion of clients across the respondents advertisements in the Yellow Pages. The dominant sources of cases are the traditional ones of client referrals, referrals from other lawyers,

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48. A number of states have tried to ban any such contacts, but in 1988 the United States Supreme Court in *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988), ruled that states could not do so. In a later case, *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618 (1995), the Court ruled that states could bar lawyers from sending such solicitations for thirty days, and a number of states have implemented such a limitation.

49. This discussion draws on an analysis presented in Herbert M. Kritzer & Jayanth Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 20 LAW & POL'Y 347 (1999) [hereinafter Kritzer & Krishnan]. More detailed analysis can be found in that article.

and referrals through community contacts. One surprising source, at least for the personal injury specialists, is “current clients.” I interpret this as referring to repeat clients; as one personal injury lawyer described it to me, a surprising number of clients come back with new cases.

Table 1: Sources of Cases: Wisconsin\*

Source	All Respondents	Personal Injury Specialists	Non-Personal Injury Specialists
Lawyer referrals	19.4%	19.1%	19.6%
Client referrals	25.3	27.7	25.2
Existing client	19.2	11.4	23.0
Yellow Pages advertising	10.6	16.0	7.9
Other media advertising	3.0	7.7	0.6
Direct mail	0.2	0.5	<0.1
Community contacts	15.4	13.6	16.3
Other and unknown	6.9	5.9	7.4
(n)	(471)	(153)	(318)

\* Cell entries are the mean percentage reported for the source.

Source: Herbert M. Kritzer & Jayanth M. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 LAW & POL'Y 347, 351 (1999).

One might question whether this analysis obscures the possibility that a small group of lawyers, those who invest the most into media advertising and direct mail, are highly dependent on these sources. In fact, only 8 of the 471 respondents in my survey of Wisconsin practitioners reported that they were currently using direct mail, and only one of those reported getting more than 15% of his clients through his direct mail efforts. One of the lawyers I interviewed had been an aggressive user of direct mail, and he reported that despite all of his efforts he never got more than 20% of his clients through this medium; most of his clients were referrals from former clients or from other lawyers.

A significant minority (37%) of personal injury specialists do use non-Yellow Pages advertising. Among those who do use advertising in Yellow Pages, most obtained fewer than one-third of their clients through it (and almost none obtained one-half or more of their clients this way). Lawyers in one firm that was a heavy user of television advertising reported that when their advertisements were running, they could expect ten or more calls per day. Most of the calls concerned cases which had no significant fee potential or issues that they did not handle (or could not be handled on a contingency basis). The lawyers in this firm were happy if a week's worth of phone calls

yielded two or three cases. One lawyer in this firm estimated that advertising (both in media and in Yellow Pages) directly produced only about one-quarter of his revenue, although he attributed another one-quarter to indirect effects of advertising (i.e., referrals from former clients who themselves originally came in as a result of the advertising).

Are these findings peculiar to Wisconsin? Stephen Daniels and Joanne Martin have been engaged in a study of the personal injury plaintiffs' bar in Texas. Their study has involved both semistructured interviews and a mail survey. Based on ninety-five semistructured interviews, they found that only 10% of the respondents obtained more than one-half of their clients through "direct marketing," which included all forms of advertising (Yellow Pages, television, radio, newspaper, billboards, direct mail, etc.). In contrast, 27% obtained more than one-half of their clients through client referrals, and 51% obtained more than one-half of their clients through lawyer referrals.<sup>50</sup> Daniels and Martin's mail survey produced responses from 552 plaintiffs' lawyers practicing in Texas.<sup>51</sup> They split their respondents into four groups depending on the types of cases the lawyers handled: Bread and Butter 1 (handling the most routine cases); Bread and Butter 2; Heavy Hitters 1; and Heavy Hitters 2 (handling the largest, most complex cases). Table 2 shows the average percentage of clients in each category from each source listed in Daniels and Martin's questionnaire. Advertising in general accounts for about 12% of clients, and two-thirds of this 12% comes generally from Yellow Pages advertising. Advertising is least important for those at the top end of practice and most important for those toward the bottom; however, even for those in the group most dependent on advertising, only an average of about 21% of their clients are obtained in this way, and again, two-thirds of those come from Yellow Pages advertising. Thus, even for the group most dependent on advertising, no more than about 6% of clients come from a combination of television and direct mail.

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50. See Stephen Daniels & Joanne Martin, "That's 95% of the Game, Just Getting the Case": Markets, Norms, and How Texas Plaintiffs' Lawyers Get Clients, 21 LAW & POL'Y 377 (1999).

51. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2000) [hereinafter Daniels & Martin].

Table 2: Sources of Cases: Texas\*

Source	All	Bread and Butter I	Bread and Butter II	Heavy Hitter I	Heavy Hitter II
Referrals from other plaintiffs' lawyers	18.3%	10.0%	14.2%	21.5%	27.5%
Referrals from other lawyers	19.1	10.5	17.7	20.7	27.8
Referrals from former clients	28.9	36.4	34.1	26.2	18.2
Other referrals	12.8	13.8	11.8	14.4	11.3
All advertising	12.3	20.0	13.0	9.2	6.9
Yellow Pages advertising	8.4	14.8	9.3	6.0	3.2
Television advertising	2.6	3.8	2.2	1.8	2.8
Direct mail	0.3	0.2	0.2	0.2	0.5
Other advertising	1.1	1.2	1.3	1.2	0.4
Other sources	6.3	6.9	5.7	5.4	6.9
(n)	(540)	138	141	134	139

\* Cell entries are the mean percentage reported for the source.

Source: Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2000). Some of the detail was provided to the author by Stephen Daniels (personal correspondence on file with author).

Despite all of the prominence of modern advertising, most lawyers representing clients on a contingency fee basis get the vast majority of those clients through the tried-and-true means of referrals, largely from satisfied clients and from other lawyers. What these analyses cannot measure is whether the advertising prompts people to seek out lawyers through one of these traditional means. For example, it is certainly possible that someone receiving a direct mail solicitation from a lawyer after an accident would be prompted to seek out a recommendation for a lawyer and then consult that lawyer, even if the solicitation did not draw the individual into the office of the lawyer who sent the solicitation.<sup>52</sup> Likewise, television advertising may have sensitized injury victims to the availability of compensation. However, it is hard to firmly link any changes in patterns of contacting a lawyer to these developments, first because it is not clear that there have been changes in those patterns, and second because there is no good baseline against which to compare earlier patterns to present patterns.

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52. A study of direct mail solicitation recipients in Wisconsin found that only 5% hired a lawyer from whom they received a letter, while 10% of the respondents who read the letter found it helpful. See Kritzer & Krishnan, *supra* 49, at 354.

#### MYTH 4: LAWYERS ACCEPT AS CLIENTS MOST OF THOSE INDIVIDUALS WHO CONTACT THEM WITH POTENTIAL CLAIMS

One popular image of plaintiffs' lawyers is that they are so anxious to get clients that they will represent virtually anyone who calls on the telephone or walks in the door. In *A Nation Under Lawyers*, Mary Ann Glendon argues that, at least in the past, good lawyers did as much to discourage litigation as to advance it; she quotes an observation attributed to Elihu Root that "[a]bout half of the practice of the decent lawyer consists in telling would-be clients that they are damned fools and should stop."<sup>53</sup> The press furthers the image of contingency fee lawyers as stirring up litigation in reports of swarms of lawyers gathering whenever there is some major event that could produce litigation.<sup>54</sup> Even without such reports one should not be surprised that contingency fee lawyers have a reputation of stirring up trouble given the apparent logic of the contingency fee: the lawyers get a cut of whatever they recover, and without cases there is no cut to get.

Undoubtedly, there are lawyers who push the edge of the liability frontier or who engage in practices pejoratively referred to as ambulance chasing. However, the day-to-day reality of most contingency fee legal practices is very different from this image. While virtually every contingency fee practitioner wants to find highly lucrative cases, such cases are relatively rare. Many cases presented to lawyers are not winnable or do not offer a prospect of even a moderately acceptable fee. The contingency fee practitioner seeks to choose cases that offer a high probability of providing at least an acceptable return and hopes to find some fraction of cases that present the opportunity to generate a significant fee.<sup>55</sup> Lawyers evaluate potential cases in terms of the risks involved and the potential returns associated with those risks. An attorney will reject cases that do not satisfy the attorney's risk-to-return criteria. Thus, contingency fee lawyers resemble portfolio managers, choosing to "invest" (their time) in risky cases hoping to obtain adequate-or-better returns.

What does this mean in terms of actual practice when a potential client contacts a contingency fee lawyer? In my survey of Wisconsin practitioners,

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53. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 37 (1994).

54. On Bhopal, see William K. Stevens, *U.S. Lawyers Are Arriving To Prepare Big Damage Suits*, N.Y. TIMES, Dec. 12, 1984, at A10; John Riley, *U.S. Lawyers Court Disaster in Bhopal*, NAT'L L.J. 3 (Dec. 31, 1984); Marc Galanter, *Bhopals, Past and Present: The Changing Legal Response to Mass Disaster*, 10 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 151 (1990). On Enron, see David Barboza, *Enron Cases Await. Let the Swaggering Begin*, N.Y. TIMES, Mar. 23, 2002, at B1.

55. See Mark Crane, *Lawyers Don't Take Every Case*, NAT'L L.J. 1 (Jan. 25, 1988).



I asked my respondents how many contacts they had received from potential clients in the prior year and how many of those contacts had led to a retainer agreement.<sup>56</sup> There are at least two ways to convert these figures into acceptance rates. First, we can look at it from the perspective of the lawyer by asking what is the typical proportion of potential cases lawyers accept? This involves looking at mean or median acceptance rates across the sample of lawyers. Alternatively, from the viewpoint of the potential client, one can ask what is the likelihood that a randomly selected client calling a randomly selected lawyer will have his or her case accepted by that lawyer? To look at this, the best estimate involves aggregating across lawyers: adding up the number of cases accepted across all of the lawyers and the number of contacts received across all of the lawyers and dividing the two figures. I present both types of estimates.

Table 3: Acceptance Rates: Wisconsin\*

Number of contacts	Number of respondents (weighted)	Mean percentage accepted	Total number of contacts	Total number of cases accepted	Percentage of total cases accepted
1-10	236	51%	1,513	764	50%
11-25	279	54%	5,403	2,868	53%
26-75	251	53%	10,830	5,602	52%
76-200	125	35%	15,707	5,469	35%
201-1000	47	37%	19,831	7,616	38%
over 1000	7	7%	16,700	1,295	8%
All	945	49%	53,584	23,614	34%

\* Results based on weighted data; unweighted n is 455.

Overall, lawyers reported accepting cases from a mean of 49% (median 50%) of the potential clients who contacted them; the first and third quartiles are 25% and 75%, respectively. Aggregating across the 455 lawyers,<sup>57</sup> the lawyers accepted 23,614 (of 69,984) cases for an acceptance rate of 34%. Eliminating the seven respondents reporting 1,000 or more contacts gives an aggregate acceptance rate of 42%. As shown in Table 3, there appears to be a fairly clear linkage between volume and selectivity. For those lawyers or firms receiving about one-and-one-half or fewer contacts per week, the acceptance rate tends to be on the order of 50%; for those with 1.5 to about 20 contacts per week (1,000 cases per year), the acceptance rate is under

56. The results discussed below differ somewhat from those I previously reported in Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (July-Aug. 1997). The difference reflects my adjustments in this article to take into account the underrepresentation in the sample of lawyers with a general practice.

57. Weighting brings the nominal *n* up to 945, which is the figure shown in Table 3.

40%. For the very high-volume practices with more than twenty contacts per week, the acceptance rate drops off sharply to 8%.

I also asked lawyers why they declined cases, asking them to estimate the percentage of uses declined for the following reasons:

- questions about liability;
- low damages;
- a combination of questionable liability and low damages;
- outside of the lawyer’s area of practice; and
- other.

Table 4 shows that the dominant reason for refusing cases involves questions of liability.

Table 4: Reasons for Declining Cases\*

	All respondents	Omitting respondents with more than 1,000 contacts	0 to 75 contacts	76 to 1,000 contacts
	Aggregate Percentages			
Lack of liability	47%	41%	35%	43%
Inadequate damages	17%	22%	23%	22%
Both lack of liability and inadequate damages	13%	15%	20%	13%
Outside lawyer’s area of practice	11%	10%	12%	10%
Other reasons	11%	12%	11%	12%
	Mean Percentages			
Lack of liability	36%	36%	34%	44%
Inadequate damages	18%	18%	17%	20%
Both lack of liability and inadequate damages	20%	20%	21%	13%
Outside lawyer’s area of practice	10%	10%	10%	9%
Other reasons	13%	13%	13%	14%

\* Results based on weighted data.

Again, one might ask whether these patterns are peculiar to Wisconsin. They are not. In their survey of Texas plaintiffs’ lawyers, Daniels and Martin asked the lawyers to estimate the percentage of calls from potential personal injury clients that lead to a signed contingency fee agreement.<sup>58</sup> Table 5

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58. Daniels & Martin, *supra* note 51, at 8-17; I have compiled Table 6 from figures reported in Daniel and Martin’s text.

shows the pattern both for all respondents and broken down into the same four categories of lawyers discussed previously. Overall, the typical respondent reports that about one-quarter of calls lead to representation. For lawyers handling the most routine cases, this figure rises to about one-third, and for those lawyers handling the biggest cases, the figure drops to under 20%. Based on these data, my findings for Wisconsin, if anything, overstate the acceptance rates.<sup>59</sup>

Table 5: Acceptance Rates: Texas\*

Source	All	Bread and Butter I	Bread and Butter II	Heavy Hitter I	Heavy Hitter II
Calls/month, Firm					
Mean	36.2	37.8	35.3	38.6	33.6
Median	15	18	20	20	20
Calls/month, Respondent					
Mean	18.9	21.9	18.3	18.5	16.8
Median	10	12.5	10	10	8
Percent accepted, Firm					
Mean	25.4%	35.1%	26.7%	24.2%	16.6%
Median	15%	30%	15%	15%	10%
Percent accepted, Respondent					
Mean	26.7%	35.1%	27.0%	26.8%	17.9%
Median	20%	30%	20%	20%	10%
(n)	540	138	141	134	139

\* Cell entries are the mean percentage reported for the source.

Source: Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2000). Some detail was provided to the author Stephen Daniel. Letter from Stephen Daniel to the author (on file with author).

## MYTH 5: CONTINGENCY FEES ARE STANDARDIZED AT A RATE OF 33%

I frequently hear comments about the “standard, one-third contingency fee.”<sup>60</sup> In my interviews with Wisconsin practitioners, many did in fact say that they normally charged one-third (unless statutes limited the percentage

59. It is possible that some of the differences between Wisconsin and Texas reflect changes in the approximately five years between my survey and the Texas survey. Daniels and Martin also asked their respondents to estimate the number of calls per month and the percentage of cases accepted five years prior to their survey. The lawyers reported both a drop in the number of calls and a drop in the percentage of cases accepted. Five years earlier, the mean and median percentage accepted at the firm level were 35.9% and 30%, respectively; for the individual lawyers, the mean and median five years ago were 36.4% and 30%, respectively. *Id.* at 29. However, even these higher figures are lower than the figures in Wisconsin.

60. “Standard contingency fees are typically at least one-third, forty and even fifty percent in cases settled before trial and often more than fifty percent [of the net recovery] in cases which go to trial.” Brickman, *ABA Regulation of Contingency Fees*, *supra* note 3, at 268.

in some way<sup>61</sup>); however, others reported much less standardization in fees, and many of these lawyers who reported that they had a “normal” fee of one-third indicated that in some circumstances they would deviate from the standard fee.

My survey of Wisconsin practitioners makes it clear that there is substantial variation in the contingency fees that lawyers charge.<sup>62</sup> In my survey, I asked the lawyers to tell me about three specific cases: the most recent case settled without filing, the most recent case settled or disposed after filing but before trial, and the most recent case disposed by trial. For each of these cases, I asked the lawyers to describe the contingency fee arrangement they had with their client. Table 6 summarizes the responses.

Table 6: Variation In Contingency Fees: Wisconsin\*

Fee arrangement	Percentage of cases	Range of percentage fees charged for variable percent	
		Maximum	Minimum
Flat third	57%		
Flat quarter	3%		
Other flat percent	1%		
Flat, percent unknown	4%		
Variable percent	31%		
No lawsuit		33%	15%
No trial		43%	20%
Trial		50%	25%
Appeal		50%	33%
Other	5%		
(n)	(822)		

\* Based on weighted data

61. Wisconsin limits percentage fees in medical malpractice cases (33% or 25% of the first \$1 million depending on whether the liability is stipulated within a statutory deadline, and 20% of any amount over \$1 million). WIS. STAT. § 655.013 (1986). In worker’s compensation cases, attorney’s fees are limited to 20% of disputed benefits. WIS. STAT. § 102.26(2) (1993)). In federal social security cases, fees are typically limited to no more than 25% of back benefits up to a maximum of \$4,000. See 42 U.S.C. § 406(a)(2). See also M. Wade Baughman, Note, *Reasonable Attorney’s Fees under the Social Security Act: The Case for Contingency Agreements*, 1997 U. ILL. L. REV. 253 (1997); Marcia Coyle, *High Court to Hear Social Security Cases*, NAT’L L.J. A15.

62. This section draws upon results previously reported in Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998) [hereinafter Kritzer, *Wages of Risk*].

Excluding those types of cases for which fees are specifically governed by statutes or regulations, 64% of the cases in my sample involved retainers specifying a fee as a flat percentage of the recovery; 31% employed a variable percentage; and 5% employed some other type of contingency arrangement. Of the cases with a fixed percentage, a contingency fee of one-third was by far the most common, accounting for 88% of those cases. Five percent of the cases called for fees of 25% or less, 1% specified fees around 30%, less than 1% specified fees exceeding one-third of the recovery; the exact percentage was not ascertained for 4% of the cases. Thus, on the order of 60% of the cases employed the standard one-third contingency fee.

The most common pattern for those cases employing a variable percentage called for a contingency fee of one-quarter if the case did not involve substantial trial preparation (or, in some cases, did not get to trial) and one-third if the case got beyond that point. The contingency fee rose to 40% or more if the case resulted in an appeal. For cases not involving a lawsuit, the contingency fee percentage could be as low as 15% or as high as 33%. The range for those cases involving a suit but not trial was 20% to 43%. For those going to trial, the range was from 25% to as high as 50%. One of the lawyers told me that he would consider taking certain types of risky cases which he saw as having a high likelihood of going to trial only if the contingency fee percentage was 50% if the case went to trial. Another lawyer explained that he would consider quoting a fee that might involve a percentage as high as 50% in cases where the potential client came in with an offer in hand. In these cases, the fee would be based only on any recovery over and above the offer in hand, with the fee being the lesser of 50% of the additional recovery or 33% of the total recovery.

Thirty-four cases in the sample involved a fee with a contingency element that did not conform to the standard percentage fee arrangement. The variations included:

- An hourly fee paid until an initial settlement offer is obtained, and then 50% of anything over and above that offer.
- An hourly fee capped at 33% of the recovery.
- A flat retainer plus a percentage.
- An hourly retainer plus a percentage once that time is exhausted.
- An hourly fee up to a set maximum with a percentage if that maximum is exceeded.
- A premium hourly rate with no fee if there is no recovery.

- A reduced hourly rate plus a bonus based on recovery.
- A reduced hourly rate plus a reduced percentage.
- A capped hourly rate plus a percentage.

In my interviews, it was clear that some lawyers were very open to negotiating individualized retainer agreements, while others were very firm in offering only specific types of arrangements. Some lawyers expressed a willingness to negotiate with the client to get a case that they viewed as good; others rejected any idea of such negotiations. Others told me that they specifically laid out the choice of an hourly fee versus a contingency fee.<sup>63</sup> Another lawyer, whose practice was exclusively contingency fee, told me that in a case of clear liability, severe injury, and a relatively low policy limit, he would charge 5% or less (e.g., \$5,000 on a \$100,000 recovery) if he was able to get the insurer quickly to tender its policy limits.

Again, one can ask whether the variation in fees is peculiar to Wisconsin. Some evidence from the RAND CJRA survey of federal cases shows that this is not the case, although that study does not provide the same level of detail found in the Wisconsin survey.<sup>64</sup> Specifically, the question asked by the RAND CJRA survey did not allow respondents to describe a fee that varied depending on the stage of disposition or that involved alternative types of contingency arrangements. Of the cases handled under a contingent fee in the RAND survey, 55% involved a one-third contingency fee, 25% involved a contingency fee of less than one-third of the recovery, and 20% involved a contingency fee of more than one-third of the recovery. This pattern is both similar and different from the Wisconsin pattern. It is similar in the percentage of cases that involved a one-third fee; it is different in that the RAND survey showed a substantially larger proportion of cases involved a contingency fee of more than one-third of the recovery. Despite these differences, it is clear that while the average contingency fee may be on the order of one-third, there is significant variation from this supposed “standard.”<sup>65</sup>

My research in Wisconsin revealed a number of other important

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63. Wisconsin law specifically requires this for medical malpractice cases. WIS. STAT. § 655.013(2) (1986).

64. In this section, I report my own analysis of data collected by RAND; RAND's report of its analysis can be found in KAKALIK, *supra* note 7.

65. Further evidence on this point is provided by a 1991 national survey of Association of Trial Lawyers of American (ATLA) members that found that only 54.3% of respondents reported that they always stated fees as a fixed percentage of recovery. See James H. Stock, Compensation for Nonpayment Risk in Legal Cases Taken on Contingency: Economic Framework and Empirical Results (1992) at app. B, question 12 (unpublished manuscript on file with author) [hereinafter Stock].

variations worth noting. First, while the fee is usually described as being based on the gross recovery (i.e., before the lawyer is reimbursed for expenses), some lawyers in Wisconsin treat the gross recovery for fee-computation purposes as the recovery less any payments to subrogated interests. Even when they do not do this, lawyers typically seek to get the subrogated parties to take a reduced payment, which serves as a way of netting more for the client (or as a way of having the subrogated party pay a share of the attorney's fee).

Second, it is not at all uncommon for lawyers to reduce the percentage that they are entitled to under the retainer agreement. In the survey, I asked lawyers if the final fee differed from the fee specified in the retainer. In 18% of the cases for which the respondents obtained some recovery for their clients, the final fee was less than what they could have taken under the terms of the contingency fee agreement. The survey did not include questions as to why these reductions occurred. Follow-up interviews suggested that two primary elements drove the decision to take a lower fee. First, there was a perception on the part of the lawyer that taking a smaller fee would facilitate a settlement. For example, a lawyer might feel that the client would be more likely to go along if the legal fee was cut from 33% to 30% or 25% or even 20%. A large proportion of the reductions were from one "round" figure (e.g., 33% or 25%) to another (e.g., 30% or 25% or 20%). Second, some lawyers expressed the view that the lawyer should not walk away with more than the client. In cases in which substantial payments had to be made to subrogated parties, lawyers often reduced their fee to a level that they split what was left after paying the subrogated claims with the client. Occasionally, when the case yields a minimal payoff, the lawyer will simply waive any fees owed. Sometimes a lawyer will waive a fee on a small case as a means of generating good will, particularly if the client is in a good position to refer future potential clients to the lawyer.

#### MYTH 6: LAWYERS ROUTINELY RECEIVE WINDFALL FEES FROM CONTINGENCY FEE WORK

There is no doubt that on occasion lawyers handling cases on a contingency fee basis obtain very large fees, whether you measure those fees in absolute terms or against the time the lawyer devoted to the case. What is important in considering changes to the types of fees that are allowed is the nature of *typical* contingency fees. Changes that fail to recognize the day-to-day reality of contingency fees are likely to impact the system in ways that deny redress to those harmed by the actions of others.

In thinking about returns from contingency fees, the first issue to deal

with is measurement. I consider that issue before turning to estimates of returns.

### *Measurement*

The first measure that I employed was the “effective hourly rate” (EHR): the fee received by the lawyer divided by the amount of time the lawyer had to expend to obtain that fee. This measure captures the various elements of the contingencies facing the lawyer:

$$EHR = \frac{\text{fee received}}{\text{hours}}$$

This measure is useful because it is precisely this figure that some critics of contingency fees have attacked, suggesting that lawyers are frequently able to obtain “effective hourly rates of thousands and even tens of thousands of dollars.”<sup>66</sup> While there are some cases that do earn lawyers fees that translate into rates of \$1,000 or more per hour, we know little or nothing about the frequency of such cases or, *more importantly*, what the typical effective hourly rate looks like. Economists would argue that the economically rational lawyer would demand to do better, on average, from contingency fees than from hourly (or flat) fees because the contingency fee lawyer is providing additional services to the client which merit compensation.<sup>67</sup> However, this type of economic rationality presumes an opportunity cost analysis in which the contingency fee lawyer has alternative uses for his or her time which will provide a known level of compensation; in situations where a lawyer has otherwise unused time, the lawyer may be willing to accept cases where the lawyer expects the compensation to be less than what the lawyer would like to believe is the value of the time involved.<sup>68</sup>

One problem with the effective hourly rate measure is that it measures returns at the level of the individual investment, not at the level of what might be called the lawyer’s overall portfolio. Short of a complete audit of a lawyer’s cases over a period of time, there is no ready way to measure the overall performance, or “yield,” on a portfolio. One might be tempted to view the mean effective hourly rate or the median effective hourly rate as a measure of portfolio performance, but that is flawed. Using such a measure

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66. See *supra* note 3.

67. See Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1150-54. See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 448-49 (1977).

68. See generally JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962).



would presume that all cases should be treated equally. It is a bit like the situation where a stock investor with \$25,000 to invest puts \$1,000 into a penny stock and the remaining \$24,000 into three stocks costing \$8,000 each. If the investor sells all of the stock a year later, receiving \$5,000 for the penny stock and \$9,000 for each of the mainstream stocks, the total received on the \$24,000 is \$32,000 for a yield of \$8,000 or (33.33%) of the original \$24,000. However, the individual returns are 400% on the penny stock and 12.5% on each of the mainstream stocks. If one were to average these returns, the average would be 109.375%. Which measure makes more sense as an overall indicator of yield on the portfolio?

While I do not have the data needed to look at the portfolio return for individual lawyers, I can obtain estimates of the yield from what I will label the “meta-portfolio.” By this I mean returns across sets of cases using information from sets of respondents. This would be something like taking all of the stocks listed on the New York Stock Exchange, the total dividends paid out by the companies for these shares (i.e., multiplying the dividend by number of shares for each company, and adding these up), computing the total capitalization of each company’s listed stock (the selling price times the number of shares, and adding these up), and then dividing the total dividends by the total capitalization. The same operation can be done for definable subsets of stocks (e.g., the thirty industrial companies in the Dow Jones Index, banks, technology companies, insurance companies, etc.) as a way of getting an average return for the subset.<sup>69</sup>

In the case of yields for contingency fee portfolios, I compute the meta-portfolio returns by adding up the fees received across the sampled cases and adding up the hours worked; the resulting total fees and total hours can be divided to produce a “mean hourly return” (MHR) which is a measure of the yield for the meta-portfolio:

As with the stock example, this procedure can be applied to meta-portfolios defined along various dimensions (e.g., unfiled cases, filed cases, tried cases, auto accident cases, etc.). The advantage of the mean hourly return figure is that a very high return for a relatively small case will not dominate the calculation because the computation is effectively weighted to reflect the size of a case.

$$MHR = \frac{\sum fees}{\sum hours}$$

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69. In fact, there is an investment trust, DIAMONDS, traded on the American Stock Exchange that is intended to produce a yield that mirrors the Dow Jones Industrials. See <http://www.amex.com/asp/indexshares.asp?symbol=DIA>.

## *Establishing an Appropriate Basis for Comparison and Other Estimation Issues*

To understand and assess the returns lawyers earn for contingency fee work requires some base for comparison. There are many possible comparisons that one could make. For example, what types of effective hourly rates do various types of physicians earn? About the time of the data collection, I had a minor dermatological procedure carried out. The fees by the physician came to \$195 for ten to fifteen minutes of his time (and the clinic billed another \$112 for the use of its facilities); the hourly rate then was something between \$800 and \$1,200. More recently, one of my adult children had a three-hour surgical procedure for which the surgeon billed over \$12,000, or more than \$4,000 per hour.

Alternatively, one might compare to the effective hourly rate charged by a good automotive service operation. There the stated hourly rate for the mechanic might be \$45; however, the billing is based on the “book time,” and a good mechanic can beat the book time by 25% to 50%; to that, one needs to add the markup on the parts that the shop sells to its customers. All together, a good auto mechanic shop might generate \$75 to \$100 per mechanic-hour excluding the wholesale value of the replacement parts.

One good potential comparison is to the hourly rates charged by lawyers with comparable training and experience. An examination of the hourly rates reported by insurance defense lawyers in the economic surveys of state bars during the mid-1990s showed that these rates tended to be in the \$80- to \$100-per-hour range.<sup>70</sup> If anything, this is probably a low-end estimate of comparable hourly rates because insurance companies have sufficient purchasing power that they are able to keep the hourly rates paid to outside counsel at the low end of market rates. In a sense, the insurance companies are able to buy outside legal services wholesale and pay wholesale rather than retail rates.<sup>71</sup>

Probably the best comparison would be to the hourly rates actually

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70. See Kritzer, *Wages of Risk*, *supra* note 62.

71. See Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205 (1997). The above figures may be less comparable than they appear to be at first glance. Insurance defense lawyers bill for everything at the full rate, including things that they might be inclined to discount for clients paying “retail” rather than “wholesale” rates. As one defense lawyer described this to me, for a “retail” client he might decide to discount his charges for a trip to take an out-of-town deposition, particularly if the deposition proved to be unproductive; however, he would not discount this for an insurance company client paying “wholesale” rates. This same lawyer pointed out that with insurance defense work, time is more productive in that relatively little effort needs to be devoted to acquiring business, unlike other areas of practice (particularly plaintiffs’ work).

charged by the lawyers who responded to my survey. As it turns out, most of the lawyers (85%) had done at least some work on an hourly basis during the previous year. In my survey, I asked them for the hourly rate quoted for the most recent matter they accepted on an hourly basis. A total of 389 lawyers provided information on that hourly rate; the median hourly rate was \$125 per hour and the mean was \$124 per hour. This then provides one baseline for comparison in the discussion that follows.

A second baseline comes from the RAND CJRA data. While the focus of my analysis is on the returns from contingency fee work, a much larger proportion of the lawyers who responded to the RAND survey were working on an hourly fee basis. These lawyers were asked to report the hourly rate they were charging for the sample case.<sup>72</sup> Information on hourly rates was requested from those lawyers handling cases on an hourly basis; 41.5% and 43.3% of the respondents provided that information for the 1991 and 1992-93 surveys, respectively. Based on a frequency distribution published by RAND,<sup>73</sup> I estimate the mean hourly rates for the two sets of cases (1991 and 1992-93) as \$136 per hour and \$144 per hour, respectively; the corresponding medians are \$125 per hour and \$133 per hour, respectively.<sup>74</sup> These figures represent a second baseline for comparison.

### *Estimation Issues*

In making comparisons between the contingency fee lawyers' fees and the rates charged by lawyers billing on an hourly basis, it is necessary to be careful to exclude from the fees obtained by contingency fee lawyers components that hourly fee lawyers would typically bill separately. Under both fee arrangements, expenses such as copying, travel, witness fees, and filing fees are normally handled as separate billable expenses. In contrast, while most hourly fee lawyers also bill separately for paralegal time, this is an expense absorbed within the typical contingency fee. Consequently, to estimate the effective hourly rate of contingency fee lawyers, it is necessary to deduct from the gross fee the equivalent of what would be charged for any paralegal time devoted to the case.

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72. For cases extending over a period of years, the hourly rates may have changed over the course of the case. If more than one lawyer worked on the case, the respondent was directed to provide the average rate.

73. See KAKALIK, *supra* note 7, at 283. The RAND survey used a closed-ended question in which the respondents were asked to choose from among the following categories: \$75 or less, \$76-\$125, \$126-\$175, \$176-\$250, or more than \$250.

74. I estimated the means and medians using standard methods described in H.M. BLALOCK, JR., *SOCIAL STATISTICS* 61-66 (1979).

A second issue is that many lawyers do not maintain time records for their work on contingency fee cases. Interestingly, the majority of the lawyers who responded to my survey reported that they did keep time records, but only about one-quarter of the respondents actually consulted those records. Even if all of the lawyers did keep time records and did consult those records, my observations of the lawyers at work (two of whom did keep time records) made clear that the nature of contingency fee practice (i.e., constant shifting from one case to another) makes tracking time, at best, an effort at approximation. This same problem may apply to many hourly fee lawyers, as well. The result is that it is typically necessary to rely upon estimates of effort; this means that a specific figure for an individual case might involve some significant error, but if the errors are essentially random, they will cancel out across a set of cases. As a check, I do present below an analysis of the effective hourly rates obtained by those lawyers who kept time records and who reported that they referred to those records in completing the survey.

### *Effective Hourly Rates and Mean Hourly Returns in Wisconsin*

How do contingency fee lawyers do in terms of the effective hourly rates that they earn from contingency fee legal practice?<sup>75</sup> I was able to compute an effective hourly rate for 878 cases. About 4% of these exceeded \$1,000, and 1% exceeded \$2,000; in three of the cases, the rate exceeded \$3,000, with the highest single rate at \$4,473. In contrast, in about 11% of the cases the effective hourly rate was negative or zero. One lawyer had an effective hourly rate of -\$2,617 and another's rate was -\$1,225; these negative figures arise because of the costs of paralegal time spent on the case. Thus, if one uses \$1,000 as the "jackpot," lawyers were 2.5 times as likely to be total losers than they were to win the jackpot.<sup>76</sup> A final indicator of the variability is that the standard deviation for effective hourly rate is extremely high—\$430—reflecting the fact that the distribution in effective hourly rates is highly skewed toward a small number of very large figures.

One problem with the figures above is that they do not adjust for the characteristics of my sample, where cases handled by high-volume lawyers are underrepresented, cases handled by general practitioners are

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75. The analysis discussed in this section is similar to that which I previously reported in Kritzer, *Wages of Risk*, *supra* note 62, at 290-303. Note that the specific figures discussed here differ somewhat from those previously reported because I have employed a more refined case weighting scheme.

76. If one uses \$500 per hour as the "jackpot" figure, then the chances of being complete losers and winning the jackpot are about equal.

underrepresented, and cases going to trial are overrepresented. If I weight my sample to try to approximate the population of cases in Wisconsin, the figures shift somewhat. At under 8% of effective hourly rates exceed \$1,000 and about 2% exceeded \$2,000; only about 7% were zero or negative. With the weighting, the variability of effective hourly rates is even greater, with a standard deviation of \$631.

The variability, and the potential of “jackpots,” is not surprising. That is, in one sense, the essence of the contingency fee. However, how do lawyers do in the “typical” case? How we define “typical” becomes important. The presence of a small number of very high hourly rates leads to the result that we will see very different things depending on whether we look at the median (the middle case) or the arithmetic mean (the common average). In fact, as I will argue below, the gap between the median and the mean tells us important things about the nature of contingency fee practice. If I simply take all of the cases in my sample, without considering the lawyer’s caseloads or the way I designed the sample (i.e., oversampling cases that went to trial, undersampling general practitioners), I find that the median effective hourly rate is \$132, which is almost the same as the mean/median hourly rate that these same lawyers report charging for their hourly fee work; in fact, \$125 falls at the 49th percentile. Thus, in about one-half of the cases in my sample, lawyers did better than the median hourly rate for hourly fee work and in about one-half of the cases they did worse.

If this were the end of the story, an economist would probably conclude that contingency fee lawyers were not pursuing an economically rational course of action given that the economist expects the contingency fee lawyer to extract higher fees to reflect the risks the lawyer bears and the financing services the lawyer provides. These higher fees appear in the mean effective hourly rate, which is considerably higher: \$142, which corresponds to the 72nd percentile of what the lawyers report charging for their hourly fee work. That is, in the typical case, the contingency fee lawyer does not do better than the median hourly rate, but across a set of cases, the lawyer will do better. This was best expressed by one lawyer I interviewed who had a very high-volume practice. He told me that 60% to 70% of his gross fees came from perhaps a dozen of the cases he closes each year; in most of his cases, he was lucky if he met the costs of running his practice. Eliminating the top 10% of the cases from the sample leaves the mean effective hourly rate for the remaining 90% of the sample at \$136, which is virtually the same as the overall median.<sup>77</sup>

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77. The median for this “right-trimmed” sample is \$113. Because generally the medians are not

One additional refinement is needed. The results need to be adjusted to take into account the sample structure (i.e., the oversampling of tried cases and the undersampling of cases handled by general practitioners and high-volume practitioners). With the appropriate weighting, the median effective hourly rate rises to \$181, and the mean goes up to \$345, reflecting the fact that it is the upper tail that is pushing up the mean. Eliminating the top 10% of cases reduces the weighted mean effective hourly rate to \$181.

What type of overall picture emerges from focusing on the “mean hourly return” (estimated by adding up all of the hours reported on the cases in the sample and all of the fees received, adjusted for the costs of paralegal time, and dividing these two figures)? The result, unadjusted for the sampling structure, is \$169. As with the mean effective hourly rate, this estimate is greatly influenced by relatively small numbers of extremely profitable cases. Dropping the most profitable 10% of cases from the sample leaves a 10%-trimmed sample-wide mean hourly return of \$104; dropping only the most profitable 5% of cases leads to a mean hourly return of \$137, virtually identical to the median. This pattern reemphasizes the role of a relatively small portion of cases as generating the “profits” across a portfolio of contingency fee cases. Again, the pattern is different if we rely on the weighted data. There, the mean hourly return is \$207 and the 10%-trimmed sample-wide mean hourly return is \$147.

### *The Record-Keeping Issue*

As noted previously, one of the possible problems with the estimates above is that, even though many of the attorneys in the sample did keep time records, only a small fraction of those who had such records referred to their records in responding to the survey. One might expect that attorneys overestimate their time, either remembering it incorrectly or responding strategically in order to make their per-hour return look more acceptable.

When I was first thinking about doing the current study, I had the impression that virtually no lawyers working on a contingency fee basis maintained time records. In conversations with several local attorneys, I became aware that there were at least some lawyers who did keep track of their time while doing work on a contingency fee basis. Drawing upon a list of attorneys who were likely to be in practices where this was true (provided to me by several local persons knowledgeable about various practices), I conducted an unscientific survey where I asked these attorneys to provide me

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affected greatly by the trimming, I will not report trimmed medians in the tables or discussion.

with information on contingency fee cases closed over a recent time period.<sup>78</sup>

These lawyers provided me with information on a total of ninety-two cases (with gross fees received ranging from \$0 to \$910,000 and lawyer effort ranging from 3 hours to 7,000 hours.<sup>79</sup> Dividing net fee by lawyer-hours produced an estimate of the effective hourly rate. The median was \$125;<sup>80</sup> the mean effective hourly rate was \$189.<sup>81</sup>

In the sample from the systematic Wisconsin survey, there were 151 cases with information on effective hourly rate for which the lawyers reported having consulted their case files where those files contained time records;<sup>82</sup> this is only 17% of the entire sample, and consequently the data need to be treated with caution. For these 151 cases, the median effective hourly rate was \$111 and the mean was \$170, both somewhat less than the corresponding figures for the overall sample.<sup>83</sup>

Taken together, both the earlier unscientific sample and the subsample from the 1995 survey show that, if anything, the absence of time records may have led to an overestimation of the effective hourly rates that lawyers are earning from contingency fee work.

### *Effective Hourly Rates in Federal Cases: The CJRA Data*

One obvious question from the analysis above is whether the patterns I report are peculiar to Wisconsin and Wisconsin practitioners. Ideally, one would like to have closely comparable data drawn from a nationwide sample. I do not have such data, but the CJRA evaluation conducted by the RAND Corporation provides information for a sample of cases handled in the federal district courts in the early to mid-1990s.

Before turning to the results from the CJRA data, there are two key differences between the cases represented in the CJRA data and the

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78. The time frame varied from lawyer to lawyer, depending upon his or her case volume.

79. In addition to attorney-hours, I asked each respondent to provide information on paralegal-hours. Many cases involved no paralegal time, but others consumed substantial quantities. To adjust for this, I subtracted an estimate of the cost of paralegal time (I assumed that the gross cost was \$30 per hour). With this adjustment, two of the cases actually yielded negative net fees; the median adjusted fee was \$6,550, with the first and third quartiles at \$2,600 and \$15,000.

80. The first and third quartiles are \$61 to \$250.


81. The mean hourly return—obtained in the usual way by summing all of the hours reported, summing all of the fees (after adjusting for paralegal time), and dividing these two sums to get the per hour fee—was \$160.

82. The questionnaire did not specifically ask the lawyers whether they consulted their time records; rather, if asked only if they consulted their case files and if those files contained time records.

83. This figures are derived from the unweighted data (i.e., I have made no adjustments for sample structure). Looking separately at the unfiled, filed, and tried cases, the respective medians and means are \$146 and \$224 (n=51), \$109 and \$170 (n=61), and \$95 and \$99 (n=39).

Wisconsin cases discussed above. First, all of the cases in the CJRA sample were filed in court; unlike the Wisconsin data, there are no cases that were resolved prior to court filing. Second, the federal cases involve substantially higher monetary stakes. Specifically, about 20% of the CJRA cases involved a potential recovery of \$50,000 or less compared to 73% of the Wisconsin cases; only 17% of the Wisconsin cases involved potential recoveries of over \$100,000 compared to more than 50% of the CJRA cases; and only 5% of the Wisconsin cases involved potential recoveries of over \$300,000 compared to over 20% of the CJRA cases.<sup>84</sup>

One additional difference in the data should also be noted. With the Wisconsin data, I was able to adjust the returns to take into account the cost of paralegal time. I can make no such adjustment with the CJRA data, which means that, compared to the Wisconsin data, I am overestimating the returns based on the CJRA data

Table 7 shows the returns contingency fee lawyers report for cases in the two CJRA samples.  A striking feature of the table is the generally much higher values shown for 1991 compared to 1992-93. Recall that the 1991 sample is of cases terminated in 1991 while the 1992-93 is of cases filed in 1992 or 1993 and terminated by January 1996; approximately 7% of the cases originally included in the 1992-93 sample had not terminated by January 1996 and were excluded from the final surveys. One possible explanation for the difference between the two samples is that the high-return cases are those that are in the last 7% of cases terminated. However, this does not completely explain the difference in results for the two samples; excluding the slowest 7% of cases from the 1991 sample does not bring the figures for that sample into line with the figures for the 1992-93 sample. In the following discussion I reference both figures, showing the lower 1992-93 figures in parentheses.<sup>85</sup>

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84. These comparisons are rough because the two surveys measured stakes using different questions.

85. Reference appendix pages for a discussion of what might account for the differences between the two samples.



Table 7: Returns from Contingency Fee Cases: CJRA Data

	Mean Effective Hourly Rate	Median Effective Hourly Rate	Mean Hourly Return	10%-Trimmed Mean Effective Hourly Rate	10%-Trimmed Mean Hourly Return
Federal cases: 1991	\$425	\$127	\$215	\$209	\$160
Federal cases: 1992-93	\$236	\$108	\$157	\$125	\$110

Overall, I assess the patterns for the CJRA data as quite consistent with the Wisconsin data. Table 8 shows the comparison across the samples. In terms of overall level, the median effective hourly rate, mean effective hourly rate, and mean hourly return for the CJRA data are \$127 (\$108), \$425 (\$236), and \$215 (\$157). If one compares these to the overall (weighted) figures for Wisconsin—\$167, \$365, and \$207 for the three statistics respectively—the differences cut both ways, with Wisconsin higher for some and the CJRA data (from the 1991 sample) higher for others. If one limits the comparison to the Wisconsin cases with \$50,000 or more at stake, the Wisconsin data show considerably higher returns than do the federal cases from around the country—\$285, \$239, and \$261. One can further refine the comparison by limiting the Wisconsin cases to those that were filed in court. For this subset of cases, the median effective hourly rate, mean effective hourly rate, and mean hourly return for Wisconsin are \$155, \$281, and \$218; further limiting this subset to only those cases involving \$50,000 or more creates comparable figures of \$310, \$497, and \$274, respectively. Table 8 also shows figures for the federal cases involving \$50,000 or more (about 20% of the federal cases, the respondents report stakes as \$50,000 or less);<sup>86</sup> this does not affect the inferences to be drawn from the patterns in the data. The general conclusion from this overall analysis is that the figures from the Wisconsin survey are not significantly out of line with patterns that one would expect to find from national studies.<sup>87</sup>

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86. Stakes are not measured in the same way in the two surveys, so the controls for amount at stake are only approximate.

87. One other partial comparison is possible. The appendix to Stock's report of the survey of ATLA members, Stock, *supra* note 65, includes some summary data from the survey. Specifically, the respondents were asked about their "last contingency fee case, whether successful or not." Included among the questions were the fee received and the hours invested; the means of the responses to these two questions are \$65,700 and 279.4 respectively. This yields a mean hourly return of \$235.

Table 8: Returns from Contingency Fee Cases: Wisconsin and CJRA Compared

	Mean Effective Hourly Rate	Median Effective Hourly Rate	Mean Hourly Return	10%-Trimmed Mean Effective Hourly Rate	10%-Trimmed Mean Hourly Return
Federal cases: 1991	\$425	\$127	\$215	\$209	\$160
without cases: \$50,000 or more	\$506	\$147	\$225	\$213	\$174
Federal Cases 1992-93	\$236	\$108	\$157	\$125	\$110
without cases \$50,000 or less	\$262	\$120	\$163	\$135	\$118
All Wisconsin Cases	\$365	\$167	\$207	\$184	\$147
"High Stakes" Wisconsin Cases	\$739	\$285	\$261	\$196	\$162
All Wisconsin Court-Filed Cases	\$281	\$155	\$218	\$182	\$156
"High Stakes" Wisconsin Court	\$497	\$310	\$274	\$237	\$181

COMMENTS: THE RETURNS FROM CONTINGENCY FEE WORK

Clearly, there are profits to be made from contingency fee work. While it is the top 10% of cases that tend to produce the most significant profits, the typical contingency fee practitioner can expect even the remaining 90% of cases to produce over a portfolio of cases a fee premium amounting to 25% to 30% over what hourly fee work generates. Contingency fee work can be very lucrative, particularly for those lawyers who develop expertise and processes for handling large numbers of cases. The high profitability comes from locating a small segment of the cases that produce extremely good returns on the lawyer's investment of time. Some lawyers are able to "cherry pick" the good cases; others handle large volumes of cases in order to find the occasional very profitable case. Relatively few lawyers ever see "the really big one." One of the lawyers I observed had been doing plaintiffs' contingent fee work for twenty years, had a very successful practice, and had never collected a fee of over \$100,000 on a case.<sup>88</sup>

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88. A conversation with this lawyer more than five years after I had observed in his practice revealed that the "big one" had finally come in, and he had settled a case that generated a fee in excess \$250,000.

## MYTH 7: THE INTERESTS OF CONTINGENCY FEE LAWYERS AND THEIR CLIENTS ROUTINELY DIVERGE<sup>89</sup>

A frequent critique of contingency fees is that the interests of lawyers and clients may diverge.<sup>90</sup> Lawyers may want to settle cases too quickly and for lower amounts than a client might prefer, or lawyers may prefer to accept higher risk, taking a case to trial in the hopes of a large verdict while the client would prefer to settle and be assured of compensation. A simple example makes it clear how the former situation might happen. A lawyer handling a case with a maximum payment of \$25,000 comes out better by settling the case for \$10,000 after ten or twenty hours of work (investigating the claim, collecting documentation, drafting a demand letter, and negotiating a settlement) than by taking the case to trial and winning \$25,000 after 100 or 150 hours of work. With the settlement, a lawyer receiving a 25% fee earns \$125 to \$250 per hour; with the trial, even with a 33% fee, the lawyer earns only \$55 to \$83 per hour.

The problem arises for two reasons. First, for modest cases, the rational client paying on an hourly fee basis will make very different choices than the rational client paying on a percentage basis. The hourly fee client would want to limit the amount of time the lawyer put into the case and would probably opt to accept a lower gross settlement because the client will obtain a higher net. The percentage fee client does not care about what it costs in terms of lawyer-hours to obtain a result; all the client cares about is maximizing recovery (discounting for risk preference).<sup>91</sup>

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89. This section draws on material previously published in Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOCIAL INQUIRY 795 (1998) [hereinafter Kritzer, *Contingent-Fee Lawyers*].

90. See F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES* (1964); Geoffrey P. Miller, *Some Agency Problems in Settlement*, XVI J. LEG. STUD. 189 (1987); Neil Rickman, *The Economics of Contingency Fees in Personal Injury Litigation*, 10 OXFORD REV. ECON. POL'Y 34 (1994); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); Kevin M. Clermont & J.D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Patricia M. Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213 (1983); Hugh Gravelle & Michael Waterson, *No Win, No Fee: Some Economics of Contingent Legal Fees*, 103 ECON. J. 1205 (1993); Bruce L. Hay, *Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation*, 23 WM. MITCHELL L. REV. 43 (1997); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEG. STUD. 503 (1996); Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343 (1993); Earl Johnson, Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment and Decisions*, 15 LAW & SOC. REV. 567 (1980-81); Murray K. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

91. It is also important to note that using an hourly fee arrangement does not eliminate the conflict of interest between lawyer and client, it only changes the nature of that conflict. See Johnson,

The second source of the problem of conflict arises because the client is not well situated to evaluate whether a settlement offer is a good one. How does the client assess an offer? A client could try to locate jury verdict reporters or literature on case valuation and use this to come to an independent estimate of the case value. Alternately, a client could pay another lawyer a fee specifically to evaluate a settlement offer. However, such things virtually never happen. Few clients are willing to bear the expense of an independent evaluation, and relying on published sources would at best provide a sense of the range of values into which the client's case probably falls. Moreover, lawyers have a variety of ways of manipulating clients' expectations and assessments.<sup>92</sup>

It is undoubtedly true that most lawyers handling cases on a contingency fee basis are extremely mindful of their own interests as they negotiate settlements. However, this does not mean they are not very concerned about the interests of their clients.<sup>93</sup> The key here is that for the lawyer, it is not the outcome of a single case that typically matters but the outcomes across the set of cases. This means that the lawyer has to be concerned not only about his or her return from current cases but of the prospect of getting future cases.

One way to think about this is that the lawyer must take into consideration the entire set of cases currently in the lawyer's portfolio and what implications a specific case might have both for the current portfolio and for cases that might come into the portfolio later. Consequently, lawyers do not always handle a given case in the manner one would predict of someone who was seeking to profit-maximize on a case-by-case basis. The lawyer must consider both the short-term payoffs from current cases and the long-term reputational issues, both with regard to future clients and future opponents. It was extremely clear during my observation that the three lawyers I observed are very cognizant of their reputations, and the issue of reputation came up repeatedly in my subsequent interviews.

The typical view is that a lawyer must be recognized as someone who would be willing and able to take cases to trial because insurance adjusters and defense attorneys are less inclined to make top-dollar settlement offers to a lawyer with a reputation for wanting to settle quickly. The best way to get quick, good settlements is to have a reputation for being an aggressive trial lawyer—aggressive both at trial and in negotiation. Interestingly, the lawyers who have reputations for being most aggressive in moving toward trial may

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*supra* note 90, at 575-82.

92. See Kritzer, *Contingent-Fee Lawyers*, *supra* note 89.

93. In this discussion, I focus only on economic incentives. The behavior of lawyers can also be constrained by professional norms and formal rules of conduct.

also be the lawyers who are most able to turn over cases quickly once a client's medical situation has become clear; if an insurer knows that a lawyer is moving to get a case ready for trial, the insurer has an incentive to get the case settled.

But reputational issues are not just important for settling cases. They are also important for getting clients. First, a reputation for being an effective negotiator and litigator is crucial to obtaining referrals from other lawyers. This is most obvious when a referring lawyer will receive a referral fee; the referring lawyer wants to maximize the referral fee, and this will lead the referrer to consider the receiving lawyer's reputation.<sup>94</sup> Even when no referral fee is paid, from my observation, lawyers making such referrals are mindful of the expertise and success of the lawyers to whom they make referrals.

Second, the other major source of clients for most contingency fee lawyers is satisfied clients who will refer friends, family members, or coworkers who in the future need a lawyers, or even come back themselves with a new case. It is not helpful to a lawyer's long-term financial interest to have clients later realize that a coworker or neighbor who had a similar injury received a much larger settlement check.<sup>95</sup> How is this the case for former contingency fee clients who do not have sophisticated knowledge of what cases are worth? Very simply, clients talk about their experiences and compare their experiences with those of their friends. A client who obtained a settlement of \$2,000 or \$3,000 for a serious injury such as a broken leg is likely to hear things from others that suggest that the injury was substantially undercompensated. Contingency fee lawyers want their clients to leave satisfied with the result the lawyer obtained on their behalf; more importantly, the lawyers want the clients to *stay* satisfied. A lawyer who settles cases too cheaply may have trouble maintaining the reputation necessary to create the flow of potential clients that is in the lawyer's long-term interest.

The emphasis on satisfied clients as a source of referrals was very evident at one of the practices where I observed. The lawyer always wanted to be present when the client picked up the settlement check. The typical routine

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94. For a theoretical analysis of referral fees, see Bruce L. Hay, *The Economics of Lawyer Referrals* (1996) (Discussion Paper No. 203, on file with the Center for Law, Economics, and Business, Harvard University). One way to think about the referring lawyer is as a sophisticated client who is able to make a good assessment of the worth of a case. This provides strong motivations for lawyers wanting referrals from other lawyers to insure that they obtain good results.

95. A good reputation among former clients can reflect things in addition to the recovery: responding well to client contacts (i.e., returning telephone calls), keeping the client abreast of developments, and interacting positively and effectively with the client.

was for the lawyer to hand the client the check and his business card and say to the client something like, “Hopefully, you won’t need me again. If you know anyone who does [need me], please send them in.”<sup>96</sup> Lawyers want their clients not only to leave the case satisfied but also to stay satisfied as they discuss their experiences with family, friends, neighbors, and coworkers.

Particularly those lawyers who handle the most routine cases want clients to be satisfied because a surprising number of clients may be repeaters. In one of the practices where I observed, one of the partners estimated that 10% to 15% of the firm’s clients are repeaters (consistent with the broader patterns described above). He emphasized that some of his firm’s practices with regards to setting the final fee are geared specifically to making sure that clients leave satisfied; in particular, he believes that it is not in the firm’s long-term interest to take a fee that exceeds the net to the client, even though there are no ethical strictures against such fees and the firm’s contingency fee retainer agreement would clearly permit such fees. The role of reputation through word-of-mouth and repeat clients is important for a successful practice, even for practices that aggressively seek clients through media or direct mail advertising. The head of a firm that makes extensive use of direct mail to auto accident victims told me that 80% of his firm’s cases come from repeat clients and prior client referrals; only 15% to 20% of the uses come from direct mail.

The result of all of these considerations is that lawyers do not simply manipulate clients to maximize their own short-term economic benefits. Lawyers regularly accept fee reductions and push cases beyond the point that their own immediate economic interest would suggest was rational. Furthermore, the lawyers are extremely attentive to the way that their clients see what has been accomplished on their behalf.

## CONCLUSION

Myths and misinformation abound in connection with the American contingency fee. Many of the myths contain elements of reality, but the reality is usually more complex and nuanced than the myths would lead one to expect.

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96. The desire to encourage clients to refer others was evident in other ways in this lawyer’s practice. First, the lawyer looked much more carefully at potential cases that came as referrals than at cold calls; he was more likely to take a marginal case on a referral because he wanted to encourage the referrer to refer additional potential clients. Second, if a past client had referred others, the lawyer was willing to handle matters for that referrer that he would not otherwise handle, and even to do so without charging any fee at all for a very small matter.

Central to the reality of the contingency fee is that the repeat-player contingency fee attorney is able to act as a risk-neutral agent on behalf of the client, essentially providing a kind of insurance against the range of contingencies involved in the case. The most important of these contingencies concern not whether the lawyer will be paid, but rather how much the lawyer will be paid and how much time and other resources the lawyer will have to invest to obtain that fee. The latter uncertainty has relatively little to do with the nature of the case—or even the clarity of the case—but rather with the actions of the opposing side.

My goal in this analysis has not been to show that contingency fees always produce reasonable returns to lawyers. Rather, it seeks to provide a more accurate portrait of the realities of contingency fees in typical cases. This is important because proposals for change do not try to single out in any way the small subset of cases where returns are extremely high—“excessive” or “windfall,” in the words of advocates of reform. The types of proposals advanced would affect contingency fee practice in general without regard for whether the kinds of cases impacted are the types that raise problems, and without regard for the realities of contingency fee practice.

One oft-cited proposal advanced during the 1990s would have limited the fees that could be collected for “early” settlements to 10% of the damages recovered up to \$100,000 and 5% of any amounts over \$100,000. An early settlement offer is any offer made within sixty days from receipt of a demand for settlement from a plaintiff’s counsel.<sup>97</sup> The proposal failed to take into account that a significant proportion of cases handled on a contingency basis are quite small. Data collected from automobile claims closed in 1997 show that the median case involving a represented claimant produced a bodily injury payout of \$7,500; 25% of the cases involved a payout of \$4,000 or less.<sup>98</sup> Assuming an hourly rate of \$125 and a 10% cap, the median case could never cover more than six hours of a lawyer’s opportunity cost. Moreover, such proposals reflect a lack of understanding of what representation of injured parties entails. From my observation, the lawyers move reasonably promptly to settle routine cases as soon as the client’s medical condition has reached a suitable state; through that time, the lawyer has been monitoring the client’s medical situation, collecting documentation related to expenses and other losses, and counseling the client to be sure that

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97. See BRICKMAN, *supra* note 3, at 27.

98. This figure is based on my own analysis of data collected by the Insurance Research Council as part of its series of periodic surveys of closed automobile injury claims; for details on this survey. See INSURANCE RESEARCH COUNCIL, *INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS* (1999).

there is documentation and that the client has obtained appropriate treatment. By the time the case is ripe for settlement, the lawyer will have put in a nontrivial amount of time. The time required to prepare a demand letter with the relevant documentation of loss and to negotiate the actual settlement will, for a large proportion of cases, represent a time investment worth considerably more than 10% of the recovery.

While some might assert that insurers would have settled the case without the lawyer's involvement for more than the claimant will net after paying a lawyer's fee, I find the claim highly dubious. Insurers may happily pay a claimant based on the expenses the claimant documents, but the typical claimant does not know what is compensable, nor does he or she know how to document all the expenses that a lawyer would present to an insurer (for many cases, this is in fact the lawyer's most important contribution). Insurance claims adjusters are not paid to help personal injury claimants identify all compensable elements of their claims; they are paid to dispose of claims quickly and economically, and this means a claims adjuster will not tell a claimant to wait to settle in case the injury does not fully heal. An adjuster will also not tell a claimant when the claimant has overlooked some obvious (to the adjuster) element of damages. Turning again to the data on closed automobile accident injury claims, I isolated all cases in which the most serious injury was a fracture of a weight-bearing bone. There is no obvious reason to assume that there are systematic differences in these cases based on whether there was or was not attorney representation. However, with lawyer representation, the insurer paid the limits of the policy in significantly more cases: 43% compared to only 31% when there was no lawyer representation (chi square = 7.297,  $p = 0.026$ ).

If lawyers are in fact systematically overcompensated in personal injury cases, the alternative to restricting contingency fees is to modify the market for representation of personal injury claimants. Insurance claims adjusters handle claims just fine for insurance companies. Why should there not be "plaintiffs' claims adjusters" available to represent injured parties in negotiating settlements?<sup>99</sup> There are independent adjusters who work with persons and companies who have sustained a casualty loss in assessing the amount of that loss; these adjusters also negotiate on behalf of their clients with the casualty insurer. Is there any reason to suppose that an individual

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99. The equivalent of the plaintiffs' claims adjuster does exist in England. See Herbert M. Kritzer, *Courts, Justice, and Politics in England*, in HERBERT JACOB ET AL., *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 142 (1996). See also BRIAN BLACKWELL, *THE REPORT OF THE LORD CHANCELLOR'S COMMITTEE TO INVESTIGATE THE ACTIVITIES OF NON-LEGALLY QUALIFIED CLAIMS ASSESSORS AND EMPLOYMENT ADVISORS* (2000).



with significant experience as a claims adjuster handling personal injury claims would not be able to document and present a claim on behalf of clients? The plaintiffs' bar would argue that nonlawyers would not be able to bring suit if an insurer balked at making a reasonable settlement; in such cases, a lawyer could be hired to handle the case. More importantly, if there are cases that do not merit paying a lawyer a one-third contingency fee because they can be easily settled, then such cases could be handled by nonlawyers; nonlawyers who handled only such cases would be able to charge fees considerably lower than those charged by lawyers.

In other words, if the real goal is to protect the injured parties from greedy, overcharging lawyers, then the route is not to restrict contingency fees. Rather, the route is to let the market find the appropriate level for such fees by removing artificial controls that allow lawyers to overcharge in a clearly identifiable subset of cases.

## APPENDIX: VARIATIONS IN EFFECTIVE HOURLY RATES

One would expect the returns lawyers earn from contingency fee work to vary systematically based on either case or lawyer factors. In this appendix, I examine some of those variations within the Wisconsin and CJRA samples.

### *Variations Based on the Wisconsin Sample*

Tables 9a and 9b show a variety of measures of return broken down by the following variables:

- Nature of disposition.
- Amount at stake.
- Area of law.
- Gender of lawyer.
- Lawyer's advertising practices.
- Type of firm.
- Lawyer's position.
- Lawyer's years of experience.
- Geographic location of practice.
- Nature of lawyer's practice.
- Lawyer's income from the practice of law.
- Lawyer's caseload.

Table 9a shows the measures without applying weighting to adjust for the sample structure, and Table 9b shows measures applying weights. Both weighted and unweighted results are shown because of the complexity of the weighting problem. Some of the variables listed above are the factors involved in the sample design (type of disposition, type of practice, and caseload), which necessitates applying modified weights to the breakdowns for those categories. As with the overall measures, the weighted versions of most the measures are higher for the weighted results than for the unweighted results.

These tables are dense with information. In addition to the various summary measures discussed previously, they show several additional positional measures—the first and third quartiles (the 25th and 75th

percentiles) which give a sense of variability, and the 90th percentile.<sup>100</sup> In the following discussion, I will not attempt to explicate in detail everything that the tables show. Rather, I will focus on broad patterns.

Some general patterns shown in the tables reflect the skew involved in a small number of highly profitable cases. This shows up in the much higher figures for the overall mean effective hourly rate than for either the median effective hourly rate or the mean hourly return. It also shows up in the very sharp drop in the mean effective hourly rate and the mean hourly return when I trim the 10% of cases with the highest effective hourly rates.<sup>101</sup> For example, looking at cases involving less than \$20,000, the unweighted mean effective hourly rate is \$163 (weighted mean \$244)<sup>102</sup> compared to a median of \$109 (\$138) and a mean hourly return of \$104 (\$139). Applying a 10% trim to the data, the mean effective hourly rate drops to \$127 (\$171) and the mean hourly return drops to \$95 (\$125). Note that the impact of “trimming” for this category of cases is relatively minor because relatively few cases get trimmed out. In contrast, if one looks at the cases involving more than \$50,000, the impacts are dramatic. The mean effective hourly rate is \$392 (\$739) and the mean hourly return is \$199 (\$261); trimming the top 10%, leaves a mean of \$136 (\$196) and a mean hourly return of \$108 (\$162).

Let me now turn to the variations shown in Tables 9a and 9b. My conclusions are as follows:

### *Disposition*

Returns tend to be lowest for cases that go to trial. This is not surprising given that cases that go to trial take more time on the part of the lawyer and are more likely to produce a zero return. The pattern between unfiled and filed-untried cases is less clear. Overall, unfiled cases seem to produce a slightly better return, but this is not true when the 10%-trimmed statistics are examined.

### *Stakes*

Overall returns tend to improve as stakes go up, and this is true regardless of whether one looks at the mean effective hourly rate, the median effective hourly rate, or the mean hourly return. However, this is clearly a function of

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100. The distance between the first and third quartile is called the midspread. It is a better measure of variability for my purposes because the more common measure, the standard deviation, is greatly inflated when the data are highly skewed as is the case here.

101. In computing the trimmed figures for the weighted data, I used differing cut points depending the specific weight employed.

102. In the remainder of this section, I will show weighted figures in parentheses.

the results from the highest return cases; the 10%-trimmed statistics show less variation based on stakes.

### *Area of Law*

There is a lot of inconsistency in the patterns when controlling for area of law. There is some indication that returns for tort cases are higher than for nontort cases. Perhaps of most interest is medical malpractice, where the mean actually goes down with the weighted data; this may reflect the relatively small number of medical malpractice cases in the data set, but it is also reflective of the higher level of uncertainty in these cases.<sup>103</sup> Leaving aside medical malpractice, auto injury cases appear to produce the best typical returns.

### *Type of Practice*

Personal injury plaintiffs' specialists tend to do somewhat better than other lawyers. This probably reflects a combination of expertise and efficiencies that these lawyers are able to obtain.

### *Type of Law Firm*

Consistent with type of practice, lawyers in firms specializing in personal injury plaintiffs' work produce higher returns. It may also be the case that lawyers in specialized personal injury firms get better cases.

### *Advertising Practices*

Lawyers in firms that employ media or direct mail advertising produce higher returns. This reflects, at least in part, that those employing this type of advertising tend to be in firms that specialize in personal injury work.

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103. One of the lawyers I observed was working on a large medical malpractice case, and at one point I worked through with him the likely outcomes of the case and their probabilities (these ranged from a 50% chance of getting nothing to a 10% chance of getting \$8 million). We estimated that his expected fee was \$500,000 (although his actual fee could range as high as \$1.7 million under the rules governing legal fees in medical malpractice cases in Wisconsin). Given the amount of time the lawyer had devoted to the case, and what was yet to come, I estimated that while he might end up making as much as \$1,100 per hour, his expected effective hourly rate was \$330. When I later examined the medical malpractice cases in the sample from my survey, I had information on 39 cases. The median effective hourly rate was only \$36, which is what is shown in Table 2a. However, this reflected in part that 45% resulted in no payment at all. The maximum effective hourly rate reported was \$2,900, and 10% of the cases had effective hourly rates of \$1,000 or more. The mean effective hourly rate was \$314, and the mean hourly return across the 39 cases was \$316 per hour.

### *Geographic Location of Practice*

There are no clear relationships between typical returns and the kind of community where the law firm is based.

### *Lawyer's Position in the Firm*

Somewhat different patterns appear depending on whether one looks at the weighted or unweighted data. With the unweighted data, the ordering of returns consistently puts partners first, then solo practitioners, and finally nonpartners in firms (associates and employees). With the weighted data, the ordering of solo practitioners and nonpartners reverses.

### *Year's of Experience*

Looking at the unweighted data, there is a consistent pattern that more experienced lawyers produce better returns. However, with the weighted data, the pattern is more ambiguous.

### *Lawyer's Caseload*

Looking at the overall results, higher caseloads are associated with better returns. However, looking at the 10%-trimmed results, the pattern is less clear. Undoubtedly this reflects that those with larger caseloads are more likely to get some of the highly profitable cases.

### *Lawyer's Income*

Not surprisingly, lawyers with higher incomes produce higher returns; perhaps it would be better to say that those lawyers who produce higher returns have higher incomes.

### *Lawyer's Gender*

The evidence on the impact of gender is ambiguous. Looking at the unweighted data, males appear to produce higher returns than females; however, looking at the weighted data, the pattern is reversed.

### *Variations in the CJRA Data*

Tables 10a and 10b show that some of the general patterns of variation found in the Wisconsin data show up in the national CJRA data. Again, the returns lawyers receive are highly skewed. Median effective hourly rates are much, much lower than mean effective hourly rates, as are mean hourly returns; applying a 10% trim to the upper tail of effective hourly rates greatly reduces both the mean effective hourly rate and the mean hourly return. Other patterns that appear again here include the following:

- returns tend to go up with the size of case, with larger cases yielding better returns for the lawyer;
- returns tend to be higher when cases are resolved early;
- tort cases tend to produce better returns than other types of cases (e.g., contract, civil rights); and
- solo practitioners tend to get somewhat lower returns than lawyers in firms (although whether that is a function of the types of cases solo practitioners get or something else about solo practice, I cannot say).

The patterns relating returns to years of experience and concentration on federal court practice are not consistent between the two sample years; the 1991 sample produces a pattern indicating that there are relationships (with returns going up with experience and concentration on federal court work) while the 1992-93 sample does not show such patterns.

Finally, there are some hints in Tables 10a and 10b as to why the returns for the 1991 sample appear to be much higher than those for the 1992-93 sample. The large differences appear for tort cases, with much higher returns in 1991 for auto cases and “other torts” (1992-92 is actually higher for product liability cases). Perhaps more important are the comparisons controlling for stakes: the 1991 sample shows a mean effective hourly rate of over \$1,000 for cases with more than \$300,000 at stake compared to only \$283 for the 1992-93 samples, and the other summary statistics for this group of cases show figures on the order of 50% higher for 1991 than for 1992-93. Moreover, only 20% of the 1992-93 sample is in the over-\$300,000 category compared to 27% of the 1991 sample.