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EDITOR: JOHN A. RITTER
REPORTERS: J.DUQUE, Z. GONANO

Law Professor
Lawyer
Speaker-Lecturer
(For seminars & speeches)
jar@rzllaw.com

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CONTINGENCY FEES

As hourly legal billing goes out of style, contingency fee arrangements have become standard not only in personal injury cases, but in commercial litigation, will contests, collections, civil rights, securities, and antitrust cases. Even "reverse contingent fees" are popular in matters like real estate tax appeals where a lawyer charges a percentage of what he saves the client by reducing the property tax bill.

Contingent fees have been blamed for the staggering rise of litigation costs and have been labeled unjust and the lawyers who accept them denounced as undeserving millionaires. Since the 1970s, a variety of measures to reform the contingency fee system have been proposed in Congress and state legislatures to limit or ban contingency fees. Proponents of contingency fee reform argue that plaintiffs, not lawyers, deserve the bulk of any damage awards. Opponents, however, stress that contingency fee arrangements allow plaintiffs access to the courtroom who would otherwise be unable to risk paying high fixed hourly rates with the possibility of no financial return.

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MODERN JURY SELECTION

Criminal defense lawyers pick jurors by ethnic and occupational backgrounds. Clarence Darrow selected Irish and Jews for his juries "because they have hearts," and excluded English and Germans "because they don't". Johnny Cochran would agree with Darrow that ethnic criteria are best, but would disagree with his choice of Irish and Jewish Americans because they are too likely to trust police today. The country has changed and so have its jury panels; African-Americans and Mexican-Americans fit Cochran's anti-police profiles.

Occupational criteria are sought by many criminal defense attorneys. "I want barbers, beauticians, and cab drivers on my jury," explained defense lawyer Percy Foreman, "because they understand people's imperfections. I reject bookkeepers and accountants because they expect everything to fit into place and balance perfectly."

The truth is that most trials are not for murder or serious crimes, but much more mundane matters. The majority of trial lawyers try civil cases dominated by insurance issues. Ethnic rules and jury selection secrets are of little help in these cases. That's why so many lawyers today turn to trial consultants -- most of them nonlawyers. Before trial they prepare jury selection profiles, community attitude surveys, and pretrial jury questionnaires. At the trial they evaluate jurors, draft questions for jury selection, and conduct mock trials to prepare lawyers and

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They argue that measures to restrict contingency fees could hurt the poor's ability to make claims for personal injury. Moreover, studies have shown that even people who had the financial means to pay attorneys' fees up front still preferred a contingency fee arrangement, even if that arrangement meant they were ultimately likely to pay more in fees.

Professor Lester Brickman from Yeshiva University, a leading opponent of contingency fees has proposed the Early Offer Model of allocating contingent fees as a way of compromising on contingency reform. In brief, the model would limit the application of contingency fees in cases where the defendant makes an offer to settle early. Specifically, defendants are given 60 days to make an early settlement offer. If the early offer is accepted, then the plaintiff's lawyer is paid based on a capped hourly rate. However, if the early offer is rejected, then a contingency fee can be applied to awards in excess of the amount of the early offer. If there is no early offer then the case would be unaffected by this reform.

The Early Offer Model has only been applied in fewer than 10 U.S. states and only for medical malpractice claims. Reform opponents, who are skeptical of Brickman's claim that the early offer system alone would generate savings of approximately $7.5 to $10 billion, have vigorously lobbied against the enactment of this reform. Brickman has countered that he doesn't oppose contingent fees, he merely opposes their abuse; and that is what contingency fee reform should be all about. "Take any automobile case where there's no issue of liability," states Brickman. "Charging a standard contingency fee is likely to produce a windfall fee and therefore is an abuse of the system."

The practicing attorney is caught in the middle of the contingency fee vs. hourly fee dispute. Clients dislike hourly billings and also desire to tie their lawyer's compensation to performance and results. Value billing is therefore in style and is often another way of

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witnesses. With millions of dollars at stake, clients are willing to go to any expense to remove the uncertainty inherent in jury trials.

Profiles and surveys are used to draft questions for prospective jurors to help decide which to exclude. A community attitude survey tests prevailing feelings of the jury panel for and against the two sides. Voir dire questions are tailored by consultants to elicit juror sympathy or hostility toward a party. Some lawyers even use psychologists as consultants to sit in on voir dire questioning and evaluate prospective jurors on character traits like candor and hostility.

Clarence Darrow would never have used a jury consultant, but then the typical American trial and juror have changed since the early 1900s. Courtroom surprise is a thing of the past. A lawyer's sixth sense is no longer enough to pick a jury in a complex civil or criminal case. It takes a team of experts to predict a prospective juror's views on product liability, pollution responsibility, or age discrimination. Jury consultants are now a permanent part of the legal profession's approach to picking juries because they are more likely to predict biases than a trial lawyer's "sixth sense".

ALCOHOLIC LAWYERS

One of the first well-known and famous alcoholic lawyers was Earl Rogers, three of whose trials were models for the first three Perry Mason novels. He is famous for his reply to a trial judge who inquired, "Mr. Rogers, do I detect the scent of alcohol on your breath?" Without batting an eye, the drunken trial lawyer snapped back, "If his Honor's sense of justice is as keen as his sense of smell, I have no fear of the outcome of this case."

In Rogers' day at the turn of the century, there were no 12-step programs for drinkers. Today the majority of state Bars have Alcohol and Drug Intervention Programs

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saying contingency billing because both are based on results of labor rather than on time spent. Clients also suspect that their lawyer works harder and faster on a case when he is their partner. This is an important advantage of the contingency fee because some of the most common complaints to Bar Associations about lawyers are their lack of time, attention, and diligence on the client's case.

The American bar should continue to allow contingency fees, but should lower the lawyer's percentage amounts over $1,000,000 to a maximum of ten or twenty percent. This would lower windfall fees that make millionaires out of so many personal injury lawyers.

YOU BE THE JUDGE

JUROR CRAZY BUT NOT STUPID

Joe and Rick were the new whiz kids on Wall Street. They thought they could make some easy money quickly by manipulating stock. Their scheme failed, and they were brought to trial. Rick decided to try the easy way out and turned State's evidence against his old friend and co-conspirator, Joe. Joe was found guilty and sentenced to five years in prison; Rick was back on Wall Street.

A few days after the trial, Tina, one of the jurors sitting during the case, sent a letter to Joe in jail. The letter was written on stationery bearing the sign of Libra, and in the letter Tina spoke of her clairvoyant powers. She told Joe that his downfall was getting mixed up with someone like Rick. She also told him he was basically a good person, but still guilty, and beseeched him to repent.

Joe's lawyers showed the letter to seven psychiatrists who all agreed that Tina suffered from hallucinatory tendencies, possible paranoia and inability to appreciate reality. Joe demanded a new trial saying, "I'm

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and Lawyer Recovery Networks for alcoholic lawyers—estimated to be 15% of bar membership as opposed to alcoholics comprising only 10% of the general population. A growing number of participants in the Bar's alcohol and drug recovery programs are reported to be law students. The national ABA convention sets aside time and meeting rooms for Alcoholics Anonymous groups, in admission of their great number and need.

Help is there. But does it work? "Yes," says Paul Van Valkenberg in an ABA Journal article: "In the 5 years since I quit and admitted I was an alcoholic my clients remained loyal and new ones did not care. Nobody thinks less of me because I am a recovering alcoholic."

The question remains—why so many alcoholics in a profession filled with leaders, politicians, the intelligent and the powerful? One attorney answers "I always had to hit the home run so clients, employees and other lawyers would tolerate my lifestyle".

None ever read George Washington Plunkett's advice to Tammany Hall. "No matter how well you play the legal, political, or business game, you won't make a lasting success of it if you're a drinking man. Temperance is a business proposition and anyone who gets his business out of politics or law must keep sober to succeed just like in any other business."

Now that the organized Bar admits it regulates a business as well as a profession, it finally advocates lawyers staying sober - probably because it found out that the majority of lawyers convicted of ethics violations had alcohol or drug problems. The Bar now makes attendance at AA Recovery programs a requirement of many of its disciplinary sentences for lawyers. Today's legal profession no longer smiles at lawyers with alcohol on their breath or who "bob and weave" in court. Its leaders intervene to end

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entitled to twelve sane jurors." The Judge said, "Sorry, but no new trial, she may like to fantasize, but she could still recognize right from wrong."

At the Court of Appeals, if you were the Judge, would you reverse the verdict and grant a new trial?

A new trial is denied. The evidence must be absolutely clear that a juror was incompetent at the time of the trial and unable to understand the issues and deliberate a verdict. "For a new trial to be granted it is not enough that a juror was shown to have weird ideas after the trial," said the Judge.

Additional *YOU BE THE JUDGE* cases can be found at: johnaritter.com

LEGAL PEARLS

Doctors and not lawyers should chase ambulances. Lawyers should chase clients on the golf course.

the conduct, much to the credit of the Bar and the profession.

TOP 10 REASONS TO GO TO LAW SCHOOL

1. You can't get into med school.

2. No mathematical knowledge needed.

3. Postpone working for three more years.

4. Learn how to speak in long sentences that have whereases and wherefores in them.

5. Make your rich Daddy happy that you'll be able to legally protect him and the family.

6. Make your poor Daddy happy that you will get rich and support the family someday so he can retire.

7. Join the crowded legal profession of 1,116,000 lawyers in the United States.

8. Learn how to win arguments with your spouse.

9. Make people think you are going to be rich someday.

10. Everybody loves a law student (even though everybody hates a lawyer).