Commentary

Facts About Fees: Lessons For Legal Ethics

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There is no question that some lawyers misbehave, and that attorneys' fees create incentives for lawyers to do so. Less clear, and less frequently discussed, is whether the ethics rules regarding fees affect these incentives for misbehavior and, if not, whether there is any empirical basis for those rules. In this Comment, I briefly take up these questions with regard to two popular fee arrangements, the contingent fee and the hourly rate. I further limit my analysis to an especially problematic category of attorney misbehavior—misbehavior that stems from a lack of alignment between the attorney's incentives and the best interests of the client (*i.e.*, what economists call "agency problems"[1]).

My discussion takes up and builds upon Professor Herbert Kritzer's conclusion in his contribution to this Symposium that "there is no empirical evidence that any type of fee arrangement increases the likelihood of unethical behavior, although the specific nature of unethical conduct most likely does vary depending on the type of payment structure."[2] My examination proceeds in four parts. I begin by briefly summarizing certain incentives toward misbehavior that the contingent fee and the hourly rate each provide.

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1. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (1988). Professors Cooter and Ulen state:

> The owners (the shareholders) of a firm typically delegate the control of the firm to a management team, over whom the owners have imperfect control. This imperfect control gives rise to what is known in the literature as a 'principal-agent' problem. In that literature, the principals (the owners of the corporation) hire agents (the firm's management) to implement their program, but because of the high cost of monitoring the agents' compliance with the principals' desires, the principals' goal (maximum profits) may not be achieved.

Id. at 389.

2. Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEXAS L. REV. 1943, 1980 (2001).

I then discuss the existing ethics rules governing fees and suggest that those rules seem unlikely to alter any of the incentives toward misbehavior—for either type of fee arrangement—described in the previous part. Third, I present some questions raised by the existing ethics rules that deserve further study and empirical examination. I conclude with three lessons that drafters of legal ethics rules might take away from this analysis.

A. *Fee Arrangements and Agency Problems: The Contingent Fee Versus the Hourly Rate*

The contingent fee is undoubtedly the fee arrangement that has received the most scholarly scrutiny.[3] Not surprisingly, the incentives it provides for attorneys to misbehave have provoked much discussion.[4] Within the specific category of "agency problems," three such incentives are particularly noteworthy. First, and arguably most importantly, the contingent fee may provide an incentive for attorneys to attempt to settle the plaintiff-client's case too quickly and for too little. This is particularly significant in a regime under which more than ninety percent of all cases settle.[5] Unlike the plaintiff-client, who typically is involved in only one lawsuit at a time, a contingent fee lawyer is likely to have both an existing portfolio of lawsuits

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3. Westlaw searches of the JLR (Journals & Law Reviews) database performed on April 13, 2002 revealed 1859 documents containing "contingent fee" in the same sentence as "attorney" but only 1451 documents containing "hourly fee" or "hourly rate" in the same sentence as "attorney." Similarly, there were 61 documents with "contingent fee" in the title, compared to only 14 with "hourly fee" or "hourly rate" in the title.

4. *See, e.g.*, Lucian Arye Bebchuck & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996); Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349 (1993); Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213 (1983); Winand Emons, *Expertise, Contingent Fees, and Insufficient Attorney Effort*, 20 INT'L REV. L. & ECON. 21 (2000); Bruce L. Hay, *Contingent Fees, Principal-Agent Problems, and the Settlement of Litigation*, 23 WM. MITCHELL L. REV. 43 (1997); Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813 (1989); Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381 (1991); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); A. MITCHELL POLINSKY & DANIEL L. RUBINFELD, A NOTE ON SETTLEMENTS UNDER THE CONTINGENT FEE METHOD OF COMPENSATING LAWYERS (Stanford Law Sch., John M. Olin Program in Law & Econ., Working Paper No. 224, 2001) (unpublished manuscript, on file with the author); Neil Rickman, *Contingent Fees and Litigation Settlement*, 19 INT'L REV. L. & ECON. 295 (1999); Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343 (1993); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970); Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. LEGAL STUD. 187 (1991). For examples of Herbert Kritzer's contribution to this discussion, see *infra* note 23.

5. *See* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEXAS L. REV. 1985, 2108 (2002) (discussing empirical studies indicating that the percentage of civil cases tried to verdict has declined over time and is today approximately 3–8%).

and the opportunity to take on additional cases. Thus, the lawyer's decision to pursue any one case has measurable opportunity costs in terms of both time and other resources.[6] These opportunity costs may rationally induce the lawyer to settle plaintiff-client A's case for $100,000 today, rather than continue litigating the case for another two months in the hope of settling it for $150,000—*if* spending those two months on some other case is likely to earn the lawyer *more* than the fee on the additional $50,000, or is *more likely* to earn the lawyer the same amount.

Of course, the client must consent to any settlement of his case,[7] so one might reasonably ask why the plaintiff-client would agree to settle his case for too little. One plausible explanation is that the client may not appreciate that the settlement offer *is* too low because determining the value of a case, net of litigation expenses and the risk of non-recovery, is far from a precise science. In addition, the plaintiff-client has hired his attorney to provide precisely the sort of "expert" information reflected in the valuation of the client's claim. The client is therefore highly likely to heed the attorney's (potentially self-interested) recommendation to settle at a particular time and for a particular amount.

The lawyer's opportunity costs and the resulting principal-agent mismatch are at the root of two other incentives toward misbehavior that the contingent fee provides. First, the lawyer may be (self-interestedly) overly pessimistic in assessing (or at least conveying to the client the lawyer's assessment of) the plaintiff-client's likely net gain from going to trial. Second, the lawyer may do too little work on the plaintiff-client's case if the lawyer's goal is an early, reasonable settlement rather than maximizing the client's return from the litigation.

Before one concludes from these criticisms that the contingent fee should simply be prohibited outright, one should take into account the various "market" deterrents to such misbehavior that are intrinsic in this fee structure. These deterrents include the likelihood that a cheap settlement will set an unnecessarily low benchmark for the value of similar claims the attorney may bring against that defendant (or others) in the future,[8] and the

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6. *See* Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998). The authors note:

> [E]ven related claims invariably have unique aspects that require individual attention. When devoting their time to these unique issues, lawyers subordinate the interests of some clients for the benefit of others. A lawyer's time and advice may be his stock in trade, but a lawyer's financial resources also matter. Lawyers inevitably ration financial resources in ways that compromise some clients' interests.

Id. at 1491–92.

7. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."); TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(a)(2) ("[A] lawyer shall abide by a client's decision[] ... whether to accept an offer of settlement of a matter, except as otherwise authorized by law ....").

8. *See* Silver & Baker, *supra* note 6, at 1528–29 (discussing this phenomenon in the context of asbestos litigation).

importance of litigating selected cases to a verdict in order to establish the market values for future settlements of similar cases. In addition, the contingent fee arrangement also has special, countervailing benefits for clients and the civil justice system including: providing access to both the courts and top-flight legal counsel to individuals with meritorious claims who otherwise might not be able to afford them; and increasing the likelihood that strong claims are litigated while simultaneously reducing the likelihood that weak claims are pursued.

Perhaps most importantly, one should take care not to judge the contingent fee in isolation, but rather should evaluate its costs and benefits in the larger context of the available alternatives. That is, any fee arrangement that might substitute for the contingent fee might well provide attorneys incentives to misbehave that are no less troublesome than those described above, and might not have the contingent fee's countervailing benefits.

A close examination of the hourly rate, for example, reveals that it contains at least three incentives toward attorney misbehavior that stand in intriguing juxtaposition to the agency problems present in the contingent fee arrangement.[9] First, the hourly rate encourages the attorney to settle the defendant-client's case too slowly, rather than too quickly. In part, this is because the attorney's opportunity costs under an hourly rate are very different—in a sense, non-existent. Assuming the lawyer charges the same hourly rate to all of her clients, one case is as good as another in terms of the attorney's income. Moreover, certain types of settlements—such as global mass-tort settlements—may mean a potentially irreplaceable loss of income to the hourly rate defense attorney. This gives the attorney significant incentives not to settle, or to settle too slowly, even if an earlier settlement is likely to be optimal from the defendant-client's perspective. It is important to note that because the hourly rate attorney's compensation is not tied to the *amount* of the ultimate settlement, the potential agency problem is not the amount of the settlement, but only the speed with which a "good" settlement, from the perspective of the defendant-client, is reached.

One might now ask why the hourly rate defendant-client does not simply, at the optimal time, instruct his attorney to make a settlement offer that the client considers acceptable, rather than permitting the attorney to prolong the litigation at the client's expense. The likely explanation here is

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9. *See, e.g.*, WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS (1996); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Lisa G. Lerman, *Gross Profits? Questions about Lawyer Billing Practices*, 22 HOFSTRA L. REV. 645 (1994); Lisa G. Lerman, *Regulation of Unethical Billing Practices: Progress and Prospects*, 10 PROF. LAW. 89 (1998); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990); Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191 (1994); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991). *See also* many of the sources cited *supra* note 4.

substantially analogous to that suggested above for the contingent fee client: (1) determining the optimal timing and amount of a successful settlement offer is far from a precise science, involving calculation of both the expected cost of a claim to the defendant-client (including attorney's fees and other litigation expenses) and the probability of a finding of no liability at trial; and (2) the defendant-client has likely hired the attorney to provide precisely this sort of "expert" information, and is therefore highly likely to heed the attorney's (potentially self-interested) recommendation regarding the timing and amount of any settlement offer.

The nature of the hourly rate lawyer's opportunity costs also is at the root of two other agency costs inherent in this particular fee structure, and these incentives toward misbehavior have contrasting counterparts in the contingent fee. First, the hourly rate lawyer is likely to be (self-interestedly) *optimistic* in assessing (or at least conveying to the client) the defendant-client's expected net gain from going to trial. This is especially likely to be the case when a "global" settlement involving a large number of claims is at issue for the defendant-client, given the impact of such a settlement on the lawyer's future work load (and, therefore, income stream). Second, the hourly rate lawyer has an incentive to "pad" her bills, whether by exaggerating the number of hours worked, doing unnecessary or redundant work, or using lawyers to do work that could be done more cheaply and as well by non-lawyers.

As with the analysis of the contingent fee, however, the above analysis is not meant to suggest that the hourly rate fee structure is inherently and irreparably problematic and should be prohibited. It, too, has unique countervailing benefits for clients, including: providing the lawyer an incentive to do more, rather than less, work on the client's case; providing the lawyer an incentive to communicate more often with each individual client; and sometimes costing the client less in total attorneys' fees relative to some contingent fee arrangements.

In the end, this brief examination of two popular fee arrangements suggests that each taken alone provides problematic incentives toward attorney misbehavior while simultaneously affording clients unique countervailing benefits. Thus, there appears to be no logical *ex ante* reason to prefer one fee arrangement to the other as a matter of public policy.

B. The Ethics Rules Regarding Attorneys' Fees

Given the above analysis of some of the agency problems inherent in two popular fee arrangements, it should not be surprising that every state's ethics rules contain a provision explicitly addressing fees. What is something of a puzzle, however, is why the ethics rules focus almost exclusively on the *size* of the fee. The ethics rules concerning fees require

that the fee be "reasonable" (according to various indicia)[10] and that the attorney provide the client certain information about the fee "before or within a reasonable time after commencing the representation."[11]

As the above analysis suggests, however, the most noteworthy incentives toward attorney misbehavior inherent in the two most popular fee structures do not involve the size of the fee or the client's lack of knowledge of the fee to be charged. Even in the case of the incentive the hourly fee gives an attorney to "pad" her bill in various ways, the potential misbehavior has little to do with the size of the hourly rate—which is the focus of the ethics rules[12]—but rather with charging the client for "make work" that the attorney knows in advance will not further the client's economic interests or otherwise contribute to the client's welfare. Thus, the existing ethics rules regarding fees seem unlikely to deter any of the attorney misbehavior described above. Stated differently, if one were asked to draft an ethics rule aimed at deterring the types of attorney misbehavior discussed above, the existing rules governing fees would not be the expected result.[13]

Of course, the above analysis did not address all possible fee arrangements, nor was it intended to be comprehensive. So perhaps the ethics rules governing fees deter other important attorney misbehavior. Although initially plausible, closer examination reveals this possibility also to be unlikely. Price is the characteristic of goods and services that is easiest for inexpert, lay consumers to monitor. Therefore, it is presumably the characteristic of legal services that least requires regulation to protect consumers appropriately from attorney malfeasance.

As the economist Phillip Nelson taught us decades ago, all goods and services have characteristics that can be divided into two basic categories:

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10. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001) ("A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following . . . ."); TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(a)–(b) (2001) ("A lawyer sball not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable . . . . Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following . . . .").

11. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2001) ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."); TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(c) (2001) (same).

12. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001) (noting that the factors used to judge a fee's reasonableness include "(3) the fee customarily charged in the locality for similar legal services; (4) the amount involved . . . ."); TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(b) (2001) (same).

13. For examples of proposals aimed at minimizing the agency problems in attorneys' fee arrangements, see Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996) (attempting to model the fee structure that maximizes the client's welfare in the presence of attorney moral hazard); A. MITCHELL POLINSKY & DANIEL L. RUBINFELD, ALIGNING THE INTERESTS OF LAWYERS AND CLIENTS (Stanford Law Scb., John M. Olin Program in Law & Econ., Working Paper No. 223, 2001) (unpublished paper, on file with the author) (proposing "a new method of compensating lawyers that resolves the conflict of interest between the lawyer and the client").

search and experience.[14] "Search" characteristics of goods and services are those in which the information relevant to the purchasing decision can be acquired easily (often by examining the product itself) and prior to purchase. This includes characteristics such as the color of a blouse or the price of an oil change. "Experience" characteristics are qualities relevant to the purchasing decision that are not observable prior to purchase, such as the effectiveness of a shampoo or the longevity of a light bulb.

Under Nelson's framework, the fee charged by an attorney seems unlikely to need external regulation. The client will usually have this information prior to the decision to employ the attorney. If the attorney does not offer this information, the client is highly likely to ask about it. The client can "comparison shop" with regard to the fees charged by different attorneys. The client also can easily ascertain the fee charges she will incur during the course of the litigation. The client who has employed an hourly rate attorney is presumably receiving monthly or other periodic bills for the attorney's services, and the client who has employed a contingent fee attorney knows from the beginning of the engagement what total percentage of the ultimate recovery will constitute the attorneys' fees. Further, based on the fee information provided by the attorney, even an unsophisticated client often can determine whether it will be cost-effective to pursue her claim at all. Despite the client's ability to easily and effectively monitor the size of the fee, and despite the vastly greater difficulties the client faces in attempting to deter the types of attorney misbehavior described above, however, it is the size of the fee itself that the ethics rules seek to regulate. One might reasonably wonder why.

C. Empirical Questions Waiting for Answers

The above discussion suggests that there is no obvious *a priori* logical basis for the existing ethics rules regarding fees. Nor is there any published empirical evidence to suggest that regulation of fee size along the lines of the existing rules is beneficial to clients. This lack of supporting data is significant because the existing rules provide an additional basis for administrative and judicial review of the attorney-client relationship and, therefore, an opportunity for administrative and judicial error and the attendant social costs.

The likelihood and costs of administrative and judicial error are often overlooked in normative discussions of regulations, particularly in the area of legal ethics. Any regulation gives the adjudicating body the opportunity to

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14. *See* Phillip Nelson, *Advertising as Information*, 81 J. POL. ECON. 729, 730 (1974) (describing the "fundamental distinction between qualities of a brand that the consumer can determine by inspection prior to purchase of the brand—'search qualities'—and qualities that are not determined prior to purchase—'experience qualities.' An example of a search quality is the style of a dress; an example of an experience quality is the taste of a brand of canned tuna fish"); *see also* Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213, 214 (1975); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 311–12 (1970).

decrease individual and aggregate social welfare by invalidating a beneficial agreement or terminating a beneficial practice or enterprise. Thus, the ethics rules' requirement that fees be "reasonable"[15] provides the opportunity for Bar Disciplinary Committees and courts to interfere with fee arrangements in ways that may or may not increase the aggregate welfare of the contracting parties or society. The opportunity to "do good" that the ethics rules provide decisionmaking bodies is merely an opportunity—and harm will sometimes (perhaps often) be the result.

In addition, the existing rules may impose another important cost. The mere existence of the rules—with their unambiguous and seemingly comprehensive heading of "Fees"—might persuade us that we have solved (or at least mitigated) an important set of problems, when in fact we have not. That is, the rules governing the size of fees may cause us to ignore the various incentives toward misbehavior inherent in different fee structures that are not at all affected by the existing rules. The rules may also misdirect our attention, causing us simultaneously to focus on a relative non-problem (the size of fees), and to ignore the many real concerns about, and costs imposed by, attorney misbehavior that *are* ultimately traceable to different fee arrangements.

The existing rules governing fees raise at least two other interesting questions deserving of further study and empirical examination. First, the existing rules quite explicitly treat contingent fee arrangements differently—as more deserving of regulation—than other fee arrangements.[16] For example, the rules state that a contingent fee agreement "shall be in writing" while they require only that other types of fee arrangements "be communicated to the client, preferably in writing." The rules also require a contingent fee agreement to set forth the "litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." In contrast, the rules do not require information about litigation expenses to be communicated to the client in other types of fee arrangements. Finally, the rules state that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." No such final statement, written or otherwise, is mandated at the conclusion of matters governed by alternative fee structures.

These requirements imposed only on contingent fee arrangements seem eminently reasonable and likely to minimize misunderstandings between the attorney and client regarding the actual cost of the attorney's services. One

15. *See supra* note 12.

16. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.5(a)–(b) (2001) (regarding attorney's fees in general), *with id.* 1.5(c) (regarding a "contingent fee agreement"); *compare also* TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(a)–(c) (2001) (regarding attorney's fees in general), *with id.* 1.04(d) (regarding a "contingent fee agreement").

therefore wonders why the rules do not impose similar requirements on lawyers working under alternative fee arrangements. There are no published empirical data suggesting that such information is useful only to clients under contingent fee arrangements, or that lawyers employed under alternative fee arrangements are less likely than contingent fee attorneys to charge clients for unjustified or inappropriate expenses, or that they are more likely than contingent fee attorneys to provide comprehensive information about litigation expenses as a matter of course. Indeed, the client paying an hourly rate may run a greater risk than the contingent fee client of being overcharged for (or otherwise paying too much in the way of) litigation expenses, since the latter may never be obligated to pay any litigation expenses (or attorneys' fees) at all. That is, the contingent fee client is typically obligated to pay litigation expenses only upon a favorable resolution of his case, while the hourly rate client typically must pay those expenses as the litigation proceeds and without regard to its outcome.

Why, then, does the rule treat contingent fee attorneys (and their clients) as if they were more in need of regulation and professional oversight than attorneys (and their clients) under alternative fee arrangements? One possibility is that the contingent fee client may be more in need of protection from his attorney if he is more likely than the hourly fee client to be an individual (rather than a corporate or other entity) and therefore also a less sophisticated consumer of legal services. But this facially plausible explanation for the heightened regulation of the contingent fee relationship raises other questions. If the true concern is the unsophisticated client, why does the heightened regulation of the rule apply only if he is a contingent fee client and not if he is an hourly rate client? And, similarly, why does the rule therefore provide for heightened regulation of the contingent fee relationship even if the client involved is a corporation or other entity with substantial experience and sophistication as a consumer of legal services? Finally, if the true concern is mitigating the special agency problems that may inhere in fee arrangements involving unsophisticated clients, is the sort of heightened regulation present in the existing rule likely to be an effective means toward that end?

Consider another example of the apparently unjustified disparate treatment of the contingent fee arrangement under the ethics rules. The fee provisions of the Model Rules discussed above were originally adopted in 1983,[17] and several had no counterpart in the Model Rules' predecessor, the Disciplinary Rules of the Model Code.[18] Instead, the Disciplinary Rules, promulgated in 1969,[19] provided, for example, that "[c]ontingent fee

17. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (6th ed., 2002).

18. *Id.* at 59 (explaining that there was no counterpart to Rule 1.5(b) or 1.5(c) in the Disciplinary Rules of the Model Code).

19. *Id.* at 3.

arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee . . . ."[20] This rule reveals a clear preference in favor of the "reasonable fixed fee" (whatever that may be) relative to the contingent fee, and seems further to suggest that the use of the contingent fee is acceptable only in cases in which the client is otherwise not able to afford legal counsel.

The drafters of the Model Code appear to have appreciated one obvious social benefit of the contingent fee—its ability to make access to the courthouse and to first-rate legal counsel available even to the very poor. At the same time, however, the drafters seem *not* to have appreciated that whether the client involved is rich or poor, the contingent fee arrangement affords another important social benefit while the hourly rate imposes a contrasting social cost: the contingent fee is a gatekeeper that helps keep weak and frivolous cases from consuming valuable resources within the civil justice system because it powerfully deters lawyers from taking weak or frivolous cases. The hourly rate, in contrast, provides lawyers the opposite incentive—to take any case that a client will pay the lawyer to take, no matter how weak, since the lawyer's income from that case is not tied to the ultimate outcome. Despite this significant problem with the hourly rate that does not inhere in the contingent fee, the Model Code explicitly and strongly preferred the use of the "reasonable fixed fee" whenever the client could afford to pay it.

Perhaps most interesting, if least surprising, is that the drafters of the Model Code give no evidence of having been aware of the potential dangers to clients of encouraging a regime under which an attorney would have some contingent fee clients and some hourly rate (or "reasonable fixed fee") clients. Although many variables will determine which clients will be the winners and which the losers under such a hybrid regime, the result is likely to be significantly more disparate treatment of clients than under a homogeneous fee regime. As Dean Saul Levmore explained, "[u]niformity in rewards mitigates the problem of conflicts among principals because joint revenue maximization is much more certain if an agent receives similar compensation from several principals."[21]

In the end, what is most striking about the fees provision of the predecessor Model Code is its confident expression of the view that the contingent fee is more problematic for the client (and presumably also for the larger society) than the "reasonable fixed fee," notwithstanding the absence of any supporting evidence. Even today there are no published empirical data suggesting that the contingent fee is on balance more problematic for the

20. *Id.* at 59 (discussing the historical evolution of MODEL RULES OF PROF'L CONDUCT R. 1.5(c)).

21. Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Etate Brokers, Underwriters, and Other Agents' Rewards*, 36 J.L. & ECON. 503, 505 (1993).

client or society than the "reasonable fixed fee" or any other fee arrangement. Nonetheless, the drafters of the Model Code saw fit to enshrine their unsubstantiated skepticism regarding the contingent fee in the regulations governing the legal profession. And one is left to wonder why.

D. Conclusion: Lessons for Legal Ethics

The above analysis leads me to three lessons for the drafters of rules of legal ethics. First, the goal of ethics rules should be to solve real problems. And the rules ultimately adopted should in fact mitigate the identified problem. Whether there is a problem in need of solving is in large part an empirical question, and the effectiveness of the relevant rule is also subject to empirical verification over time.

Second, ethics rules that are merely aspirational and not aimed at solving identified problems, or that do not mitigate the problem they purportedly exist to solve, may well have costs that exceed any benefits. These costs may include the costs of administrative and judicial errors, and the possible misperception by policy makers that a problem has been solved when it in fact has not.

Third, discriminatory ethics rules—such as the ones regarding fees that I have briefly discussed in this Comment—should never be adopted without empirical support. All categories of attorney-client relationships should be presumed to require similar degrees of regulation and levels of professional oversight absent systematic empirical evidence to the contrary. And any such categories ultimately deemed in need of heightened regulation should be delineated as precisely and narrowly as possible.

There is, in sum, an important need for continued empirical research relevant to the regulation of the legal profession itself. Herbert Kritzer's empirical and theoretical work on attorneys' fees—including his contribution to this Symposium[22]—is valuable both for its substantive contribution and as a model of the sort of work that needs to be done.[23]

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22. *See* Kritzer, *supra* note 2.

23. *See, e.g.*, HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990); HERBERT M. KRITZER, RHETORIC AND REALITY, USES AND ABUSES, CONTINGENCIES AND CERTAINTIES: THE POLITICAL ECONOMY OF THE AMERICAN CONTINGENT FEE (1996); Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795 (1998); Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, LAW & CONTEMP. PROBS., Winter 1984, at 125; Herbert M. Kritzer, *Research Note: Fee Arrangements and Negotiation*, 21 LAW & SOC'Y REV. 341 (1987); Herbert Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251 (1985); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1997); Herbert M. Kritzer et al., *Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer*, 1984 AM. B. FOUND. RES. J. 559 (1984); HERBERT M. KRITZER, RHETORIC AND REALITY... USES AND ABUSES... CONTINGENCIES AND CERTAINTIES: THE AMERICAN CONTINGENT FEE IN OPERATION (Univ. of Wisconsin Law Sch., Inst. for Legal Studies, Dispute Processing Research Program, Working Paper No. 12-2, 1996) (unpublished manuscript, on file with author)).

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