FIDUCIARIES AND FEES: PRELIMINARY THOUGHTS

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INTRODUCTION

This Article focuses on problems that arise in connection with the representation of plaintiffs by lawyers who charge contingent fees. These problems require clear thinking about the boundary that separates matters to which lawyers' fiduciary responsibilities apply from other matters to which they do not. On the one hand, the fiduciary duty encourages lawyers to serve clients well by requiring lawyers to pursue clients' interests exclusively. In matters to which the duty applies, lawyers must be "disinterested"[1]—they must pursue clients' interests exclusively and must keep themselves free of, or obtain clients' informed consent to, conflicting interests and other pressures that might tempt them to act disloyally.

On the other hand, contingent fee contracts encourage lawyers to serve clients well by making successful representation profitable for attorneys. Because contingent-fee lawyers earn more when their clients recover larger sums, they have incentives to treat their clients well. For contingent fee arrangements to work, however, lawyers must collect fees and expense reimbursements *from* clients at the end of the day. This obviously makes lawyers better off at clients' expense.

Other actions associated with the collection of compensation also evidence this conflict. For example, lawyers may secure payments by threatening to withdraw, by suing clients, by asserting liens on clients' property, and by using confidential information against clients in legal

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1. *See* Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 9–10 (2000) (noting that the "core obligation" of the fiduciary/trustee is "to promote the interests of the beneficiaries," and "[m]ost important of all the ancillary obligations, he must act disinterestedly. The obligation to act disinterestedly is often put as an obligation not to profit from the trust"); *see also* Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS 577, 578 (A. Burrows & Lord Rodger of Earlsferry eds., 2006) (describing Birks' notion of the fiduciary's "duty of disinterestedness" as "'parasitic', in that it existed to ensure that in certain sensitive situations self-interest would not interfere with correct performance of the duties of the fiduciary 'to preserve and promote'").

proceedings.[2] Lawyers may also use non-payment of fees as a reason for withdrawing from a representation. Although withdrawal may not help lawyers collect compensation, it gives lawyers leverage over clients and demonstrates that lawyers may properly put their own interests ahead of their clients' interests on certain occasions.

Obviously, the fiduciary duty permits contingent-fee lawyers (and other fiduciaries, including lawyers who work for flat fees or at hourly rates) to collect compensation. Lawyers have been charging clients fees for centuries. The matter could not be otherwise. A prohibition on fee collection (whether imposed by the common law or any other source) would quickly cause the legal profession to disappear.

Yet, the boundary that separates the area in which the contractual right to payment operates from the area in which the fiduciary duty applies is contested and, as a result, the propriety of actions associated with fee collection is disputed. Consider the exception to the confidentiality requirement that allows lawyers to reveal confidences in suits brought to collect fees. Both the American Bar Association (ABA) and the American Law Institute endorse the exception,[3] but the American Lawyer's Code of Conduct (ALCC) rejects it. As Professor Monroe Freedman, a pioneer of legal ethics in the United States and the primary drafter of the ALCC points out, the ALCC "expressly forbids a lawyer to reveal client confidences to collect a fee."[4] Freedman describes the exception permitted by the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers as "an invitation to blackmail,"[5] a characterization Professor Deborah Rhode also accepts.[6] Is the exception a proper incident to the collection of contracted-for compensation or an unwarranted expansion of permissible actions adverse to a client that exists for no better reason than that lawyers make the rules? Without a theory explaining how the fiduciary duty and the right to payment interrelate, it is difficult to know.

The propriety of other self-enriching actions is also indeterminate. In *Evans v. Jeff D.*,[7] a lawyer who brought a civil rights action on behalf of a group of institutionalized children received a highly attractive settlement offer that was conditioned on waiver of the class's statutory right to an

2. *See generally* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (2006).

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2010) (permitting a lawyer to reveal confidential information "to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 65 (2000) ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer.").

4. Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1719 (2002) (citing THE AMERICAN LAWYER'S CODE OF CONDUCT Ch. 1 cmt., at 106 (Am. Trial Lawyers Found., Public Discussion Draft 1980)).

5. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 146 (4th ed. 2010).

6. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 113 (2000).

7. 475 U.S. 717 (1986).

award of attorneys' fees.[8] By supporting the settlement, which was good for the class, the lawyer sacrificed any legal or equitable right to payment he possessed, as the fee award constituted his only possible source of compensation. Did the fiduciary duty require the lawyer to endorse the settlement, or could he have rejected the settlement offer and demanded to be paid what he was due?

In recent multidistrict litigations (MDLs) and other mass tort lawsuits, judges have cut lawyers' fees, and lawyers have questioned or challenged the reductions. Clients have sizeable stakes in these battles, which, because they occur after settlements are negotiated, can put more money in their pockets without compromising the quality of the representation. By challenging judges' power to cut fees and otherwise seeking to enforce their contractual payment rights, did the lawyers violate the duty to put their clients' interests ahead of their own? In the *Vioxx* MDL, for example, the presiding judge ordered that the attorneys' fees be capped, then ruled that the lawyers' interests conflicted with their clients' interests regarding attorneys' fees and *sua sponte* appointed new counsel to represent the clients on fees.[9] Was the order disqualifying the attorneys on the issue of fees justified, even though when it was entered not a single client had complained about the fees they had contracted to pay their attorneys?

Some states (and now, some judges) cap the fees lawyers can charge, and some states (and judges) impose lower caps than others. Lawyers are often aware of these restrictions, which can greatly reduce their compensation. When a lawyer may file a client's lawsuit in any of several venues, some of which permit more generous fees than others, must the lawyer choose the venue that most severely limits attorneys' fees if, from the client's perspective, the forums are otherwise equally good? Must the lawyer tell the client about the differing fee caps when choosing among, or recommending, forum options? Or may the lawyer disregard the caps entirely, the fee having been set in the retainer agreement and approved by the client?

Lawyers seeking answers to these questions and others will find little case law or scholarship on which to rely, and will rightly think that much of what they do find is superficial.

In this Article, we make a preliminary effort to identify a principled basis for distinguishing self-interested conduct that violates the fiduciary duty

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8. *Id.* at 720–22.

9. *See In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 607 (E.D. La. 2008) [hereinafter Vioxx Fee Cap Order I] (order capping attorneys' fees at thirty-two percent); Order, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Dec. 19, 2008) [hereinafter Vioxx Disqualification Order], *available at* http://vioxx.laed.uscourts.gov/Orders/TulaneClinic.pdf (order disqualifying Vioxx Litigation Consortium (VLC) from representing its clients on the issue of fees and appointing the Civil Litigation Clinic at the Tulane Law School to act on the clients' behalf); *see also In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 564–65 (E.D. La. 2009) [hereinafter Vioxx Fee Cap Order II] (order reaffirming the initial order capping attorneys' fees at thirty-two percent, but providing for possibility of departures from the cap, upwards or downwards, in "certain rare circumstances").

from similar conduct that is a proper exercise or assertion of an attorney's contractual right to payment. We believe that a start at distinguishing properly selfish from improperly selfish behavior can be made by examining the reasonable expectations of clients and attorneys. To find that self-interested behavior violates the fiduciary duty, one must believe that a client reasonably expects a lawyer to do what is best for the client when handling the identified task, regardless of the consequences for the lawyer. To conclude that self-interested behavior is proper, one must believe that such an expectation by the client would be unreasonable. Thus, it is proper for an attorney to sue a client who refuses to pay a contracted-for fee because a client cannot reasonably expect a lawyer to sacrifice a legal right to payment for which the lawyer bargained in advance, even though such a sacrifice would make the client better off.

An implication of this expectations-based approach is that attorney-client retainer agreements trump the common law fiduciary duty on matters to which the contracts properly apply. Sometimes, applicability will be obvious, as when a retainer agreement entitles a lawyer to collect a settlement payment on a client's behalf (an action that helps secure payment) and to deduct a contingent fee of a given size. Other times, it will be less clear, as when a lawyer takes a step that is necessary and proper for the enjoyment of a contractual right but that is not authorized expressly. An example might be suing a client who refuses to pay. A contrary rule that elevated the fiduciary duty over the contract would prevent contingent fee agreements from serving their core function: aligning the interests of clients and lawyers by rewarding lawyers financially for actions that make clients better off. A contrary rule would also ignore the role of contracts as sources of information about lawyers' and clients' expectations. By entering into a retainer agreement, a client endows a lawyer with legal rights *against* the client. The only reasonable expectation the client can have is that the lawyer will look out for his own interests, *not* the client's, when handling matters governed by those rights.

Some activities relating to fees or expenses fall into the fiduciary realm, however. By pursuing their own interests when handling these aspects of representations, lawyers would act disloyally. The distinguishing feature of these activities, we contend, is the absence of a connection to language in the retainer agreement intended to protect the attorney. When no connection exists, the only reasonable expectation is that the activity is one the lawyer must handle with the sole object of benefiting the client. Therefore, when handling any aspect of a representation relating to a client's objective, other than an aspect excluded in a retainer agreement, a lawyer must be disinterested. When handling these aspects, a contingent-fee lawyer may act in ways that enhance his compensation beyond the contracted-for amount only as a consequence or side-effect of increasing a client's net recovery. Actions that enrich lawyers in other ways violate the fiduciary duty and are wrongly disloyal.

On the approach we suggest, the chief difficulty lies in deciding whether an action that enriches a lawyer is appropriately connected to an enumerated contract right. If courts follow our approach, this problem should lessen over time. Lawyers will come to appreciate the importance of using contracts to delineate their rights and will make contracts clearer. This will also benefit clients by reducing uncertainty about the occasions on which lawyers will pursue their own interests.

Here and throughout, we emphasize the limited nature and tentativeness of our position. Fiduciary law covers an enormous amount of territory, including many relationships that bear little resemblance to attorney-client relationships. We disavow any intention of writing about fiduciary relationships in general. We also ignore certain important issues, such as how far lawyers can go when using contractual provisions to carve out areas in which they may consider their own interests. Our object is to begin a scholarly discussion, not to have the final say in one. We urge readers to keep this in mind when evaluating our conclusions, some of which may seem jarring or counterintuitive.

In Part I, we examine the little existing law regarding the boundaries that separate matters to which lawyers' fiduciary responsibilities apply from other matters to which they are inapplicable, and further elaborate on the basic principles that we believe to be useful in this area.

In Part II, we first examine two fee issues that contingent-fee plaintiffs' attorneys have recently confronted which our proposed principles suggest should not constitute a breach of an attorney's fiduciary duties. Thus, we believe that these scenarios fall on the side of permissible fee collection. The first issue is whether it is a breach of fiduciary duty for a contingent-fee attorney to challenge a court's *sua sponte* order reducing the attorney's fees below the amount set out in the attorney-client contract. The second issue is whether, when confronted with a variety of possible venues in which to file or settle a case, the attorney has a fiduciary obligation to choose the venue that ensures that the client pays the smallest possible fee to the attorney. We go on to examine a third issue of recent interest to contingent-fee plaintiffs' attorneys that we believe *does* constitute a breach of the attorney's fiduciary obligations: whether it is permissible for the attorney to negotiate a settlement agreement with the defendant that obligates the client to pay for a service that would not otherwise be properly chargeable to the client, such as the resolution by a third party of any Medicare liens on the client's settlement proceeds.

I. BASIC PRINCIPLES

Most agents need to protect their own interests, which, on some occasions, may differ from the interests of their principals. For example, an agent with a long-term interest in cultivating a reputation of a particular sort may want to refuse to take certain actions that would enable her principals to reap short-term gains. In recognition of this, the law permits agents to separate actions that are subject to the fiduciary duty from those that are not. An agent need only delineate the scope of a representation contractually.

This approach works because the duty of loyalty exists only with respect to actions within the scope of the representation. Agents can therefore protect themselves by excluding from the representation those matters which, when handling, they desire to put their own interests first. Typically, agents do this by negotiating contractual rights for themselves at the outset of the relationship with a principal. This approach gives principals notice that they must retain other agents if they wish to have their interests represented on excluded matters.

Normally, lawyers obtain contractual rights to charge contingent fees when representations commence. By doing so, they inform clients that, when handling matters relating to fees, they will act selfishly. Because the parties stand at arm's length at this time, the fiduciary duty does not attach, meaning that lawyers can properly use these negotiations to protect themselves.[10] For example, although the lawyers' fees specified in a

10. This principle has been repeatedly affirmed by the courts since the 1870s. *See, e.g.*, Dickinson v. Bradford, 59 Ala. 581, 581 (1877) ("An attorney may, before entering on the business of his client, lawfully contract for the measure of his compensation, and any contract then made is as valid and unobjectionable as if made between other persons competent to contract with each other; but, after the fiduciary relation has commenced, no subsequent agreement with his client for compensation can be supported, unless it is a fair and just remuneration for his services."); Cooley v. Miller & Lux, 105 P. 981, 987 (Cal. 1909) ("The presumption [that the attorney exercised undue influence over the client] does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client. . . . Nor is it applicable to a contract by which the relation is originally created and the compensation of the attorney fixed. The confidential relation does not exist until such contract is made, and in agreeing upon its terms the parties deal at arm's length." (citations omitted)); Elmore v. Johnson, 32 N.E. 413, 416 (Ill. 1892) ("Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists, and the parties deal with each other at arm's length. . . . But the law watches with unusual jealousy over all transactions between the parties which occur while the relation exists.").

For more recent decisions on this issue, see, *e.g*., Jones v. Harris Associates L.P., 527 F.3d 627, 632–33 (7th Cir. 2008) ("A trustee owes an obligation of candor in negotiation, and honesty in performance, but may negotiate in his own interest and accept what the settler or governance institution agrees to pay." (citing RESTATEMENT (SECOND) OF TRUSTS § 242 & cmt. f (1959)); *id.* ("Lawyers have fiduciary duties to their clients but are free to negotiate for high hourly wages or compensation from any judgment. . . . A lawyer cannot deceive his client or take strategic advantage of the dependence that develops once representation begins, but hard bargaining and seemingly steep rates are lawful."); Setzer v. Robinson, 368 P.2d 124, 126 (Cal. 1962) (en banc) ("No attorney could safely or reasonably negotiate any fee agreement with a prospective client without some preliminary investigation of the facts of the case and a disclosure to the prospective client of the legal steps which in his judgment must be taken. If by the very fact of such investigation and disclosure the relationship of attorney and client would thereby be created, the attorney would be placed in the impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not."); *see also* Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 55 (1989) ("[I]t is a widely held view that fee contracts entered into prior to or contemporaneously with the commencement of the attorney-client relationship are irrebuttably presumed to be arm's length transactions, governed by contract and not by fiduciary law." (citations omitted)).

retainer agreement must be reasonable,[11] retainer agreements negotiated at the outset of representations are enforceable and subject to no special presumptions that distinguish them from other contracts. Fees negotiated (or renegotiated) post-retention are another matter. Because a lawyer becomes a fiduciary once a representation begins,[12] post-retention fee negotiations are suspect, and contracts entered into with clients post-retention are presumptively unreasonable.[13] When discussing fees in this Article, we assume they are set before a representation formally commences and are "reasonable."

Lopez v. Munoz, Hockema & Reed, L.L.P.[14] makes the point that pre-retention fee contracts are like contracts in general. There, the retainer agreement entitled the law firm to a 40% contingent fee unless the case was "appealed to a higher court," in which event the contract set the fee at 45%.[15] After a trial yielded a large verdict for the plaintiffs, the parties entered into a tentative settlement.[16] Wanting to preserve the option of appealing in case the settlement fell through, the defendant filed a cash deposit in lieu of a cost bond.[17] Believing that this action constituted an appeal, the law firm collected the higher fee.[18] The clients initially agreed, but later sued the attorneys for breach of contract and breach of fiduciary duty, among other causes of action.[19]

Applying ordinary contract law, the Texas Supreme Court ruled that the fee agreement was clear and that it entitled the firm to 45% of the recovery.[20] Under the Texas Rules of Appellate Procedure, the defendant, by filing the cash deposit, perfected an appeal and invoked the appellate court's jurisdiction.[21] Under the plain language of the contract, this

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11. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2010) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . .").

12. An attorney may also acquire certain obligations to a *prospective* client, even when no formal retention ensues, such as a duty to keep confidential the information provided by the client during the initial consultation. *See, e.g.*, *id.* R. 1.18(b) ("Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."). These situations do not concern us for purposes of this Article.

13. *See, e.g.*, Boyd v. Daily, 83 N.Y.S. 539, 544, *aff'd* 176 N.Y. 613 (1903) ("[T]he general rule is that as to contracts made between the attorney and client, subsequent to the employment, which are beneficial to the attorney, it is incumbent upon the latter to show that the provisions are fair and reasonable and were fully known and understood by the client, but this rule does not apply to agreements for compensation made between an attorney and client prior to the establishment of that relation . . . ." (citations omitted)); *see also supra* note 10.

14. 22 S.W.3d 857 (Tex. 2000).

15. *Id.* at 859.

16. *Id.*

17. *Id.*

18. *Id.* at 859–60.

19. *Id.* at 860.

20. *Id.* at 861–62.

21. *Id.* at 861.

triggered the firm's right to the fee increase.[22] The clients' breach of fiduciary duty claim against the attorneys was dismissed.[23]

For present purposes, the legal basis for the result in *Lopez* is more important than the result itself. Whether the firm was entitled to 45% or 40% of the recovery as compensation was held to be a matter of contract, as it should have been. If a pre-retention contract is to serve any purpose, it must vest lawyers with enforceable rights against clients, including rights to compensation. Consequently, collecting a fee pursuant to a contract must be a permissible act. It follows that even if the contract at issue in *Lopez* had entitled the firm to only 40%, whether because the contract was ambiguous or for some other reason, the proper result would have been a finding that the attorneys breached their contract, and the proper remedy would have been contract damages.

Lopez almost says this, but not quite. The court's decision to dismiss the breach of fiduciary duty claim rested not on a clear legal principle but on the manner in which that claim was plead.[24] The clients' complaint specified no unique content for the breach of fiduciary duty claim, but merely asserted that the attorneys' alleged breach of contract constituted a breach of the fiduciary duty as well.[25] The court noted the limited nature of the complaint when refusing to grapple with theories that Texans for Reasonable Legal Fees (TRLF) raised in an amicus brief.[26] TRLF argued that the law firm breached its fiduciary duty by charging a fee that was excessive, even if contractually specified, and by failing to advise the clients that the contractual language had a colorable interpretation that differed from the one the law firm applied.[27] The court refused to consider these assertions, noting that "[w]hether or not [TRLF's] theories have merit, they are not before us."[28]

By handling TRLF's arguments this way, the court left murky waters it might easily have made clear. Suppose the 45% fee was excessive, as TRLF claimed. Would an excessive fee have supported a breach of fiduciary duty claim? No. Excessiveness can be a matter of contract law, which deals with the problem under the heading of unconscionability.[29] It can also be governed by state bar ethics rules, which require that fees be reasonable.[30] But neither contract doctrine nor a state bar rule can turn an excessive fee into a violation of fiduciary duty law. The unconscionability

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22. *Id.*
23. *Id.* at 862.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id. See generally* Brief for Texans for Reasonable Legal Fees as Amici Curiae Supporting Petitioners, *Lopez*, 22 S.W.2d 857 (No. 98-0994), 1999 WL 33744062.
29. *See, e.g.*, Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir. 1979) (setting out legal standard of unconscionability as applied to contract for legal fees).
30. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT R. 1.5(a) (2010) ("A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee . . . ."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(b) (2005) (setting out "[f]actors that may be considered in determining the reasonableness of a fee").

doctrine simply voids the fee provision, limiting the lawyer to reasonable compensation. The state bar rules may support a grievance action and may also serve as evidence supporting a civil cause of action that already exists, such as an unconscionability claim. But a violation of a state bar ethics rule cannot create a new civil cause of action, which is what a breach of fiduciary duty claim would be.[31] For a breach of fiduciary duty claim to exist in this context, the duty of loyalty must apply to contractual fee claims. When fees are set by means of contracts negotiated pre-retention, the duty of loyalty cannot govern them.

TRLF was also wrong in contending that the law firm's failure to tell the clients about alternative ways of interpreting the contract supported a breach of fiduciary duty claim. The point of regulating a subject contractually is to set it outside the range of activities to which the fiduciary duty applies. In other words, it is to negate any expectation that the lawyer will advance the client's interest with regard to the excluded matter. In this respect, a contractual provision entitling a lawyer to collect a payment from a client could hardly be clearer. It is obvious that such a provision protects a lawyer's interest and that a lawyer will make his own interests paramount when the rights such a provision creates are at issue. Because the only reasonable expectation is that a lawyer will advance his own interests when collecting contractual compensation, TRLF's assertion that a fiduciary duty attaches to a payment right produces a conceptual muddle.

TRLF's position is deeply incompatible with contingent fee representations—an unsurprising fact given that TRLF describes itself as a tort reform group that was expressly founded to oppose the payment of contingent attorneys' fees in the Texas tobacco litigation.[32] Contingent fee contracts align the interests of plaintiffs and lawyers by taking fees off the table. Once fees are set contractually, lawyers can focus on maximizing clients' recoveries, knowing that their compensation will fall out automatically if and when a recovery is obtained. TRLF would destabilize this arrangement by reintroducing fees as a matter for discussion and renegotiation on the back end. Its position in *Lopez*, for example, would have made it harder for the firm to collect the contractual fee by increasing the likelihood of a fee dispute and by giving the clients extra-contractual grounds to sue—grounds that, in theory, could have led to complete fee

31. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, pmbl., Scope ¶ 15 (2005) ("These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.").

32. Texans for Reasonable Legal Fees (TRLF) has formally described itself as having been "created in response to the contingent legal fees sought by the lawyers hired by then-Attorney General Dan Morales in the [Texas] State's tobacco case" and as "an association of business, consumer and tort reform groups" that "seeks public enforcement of rules intended to prevent excessive legal fees and public debate over abuses." *See* Brief for Texans for Reasonable Legal Fees as Amici Curiae Supporting Respondent, Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) (No. 98-0184), 1998 WL 34193038, at *1, *4 [hereinafter TRLF Amici Brief].

forfeiture.[33] The gambit's political appeal is obvious. In cases that are *sub judice*, TRLF appears to be helping the clients by attempting to lower the fee. The destabilizing effect and, ultimately, the disadvantage to clients are felt in cases that never make it to the courts because, when contingent fees become unreliable and/or unprofitable, lawyers refuse to take cases on that basis.[34]

Although *Lopez* drew the line between an attorney's properly self-enriching behavior and actions subject to the fiduciary duty less clearly than it should have, the distinction is sharply made elsewhere. Contracts may contain carve outs for matters other than compensation and, speaking generally, the law enforces them. In *Fiduciary Boundaries*, Professor Deborah DeMott discusses a series of cases in which auction houses, relying on contractual provisions, acted to consignors' detriment or against their subsequently expressed wishes, even though the relationship between consignor and auction house is one of principal and agent.[35] In one case, an auction house retained a coin expert the consignor disliked and ignored the consignor's verbal instruction that the expert not be employed. Citing a contract provision that gave the auction house "'absolute discretion as to . . . consulting with any expert,'" the court found no duty to follow the consignor's instruction or even to disclose to the consignor that the despised expert was retained.[36] As DeMott observes, "the consignment

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33. In *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), the Supreme Court of Texas held that a client can obtain partial or complete forfeiture of attorneys' fees by proving a breach of fiduciary duty, even in the absence of any showing that the attorney's breach resulted in economic harm to the client. *Id.* at 240. TRLF submitted an amicus brief arguing in favor of this remedy. *See* TRLF Amici Brief, *supra* note 32, at *23–36. We submitted multiple amicus briefs opposing it. *See* Brief for Law Professors Lynn A. Baker and Charles Silver as Amici Curiae Supporting Petitioner, *Burrow*, 997 S.W.2d 229 (No. 98-0184), 1998 WL 35336105, at *6–18; Supplemental Brief for Law Professors Lynn A. Baker and Charles Silver as Amici Curiae Supporting Petitioner, *Burrow*, 997 S.W.2d 229 (No. 98-0184), 1999 WL 35047216; Letter Brief for Law Professors Lynn A. Baker and Charles Silver as Amici Curiae Supporting Petitioner, *Burrow*, 997 S.W.2d 229 (No. 98-0184), 1999 WL 35047215.

34. Statistics provide the best evidence of the impact of tort reform campaigns waged by TRLF and other groups, and they make it clear that access to counsel has fallen precipitously. A preliminary study co-authored by one of us (Silver) finds that since 2003, when Texas adopted a far-reaching package of lawsuit restrictions, the frequency of medical malpractice claims has fallen by sixty percent and payments per claim have dropped by thirty-three percent, implying a seventy-five percent drop in total payouts attributable to tort reform. *See* Myungho Paik et al., *How Do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform?: Evidence from Texas, 1988–2007*, at 22–23 (Northwestern Univ. Law Sch. et al., Working Paper No. 09-24, 2010), *available at* http://ssrn.com/abstract=1605331. Neither improved access to health care nor reduced health care costs offset these losses in compensation. *See, e.g.*, Charles M. Silver et al., *The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric*, TEX. ADVOC., Fall 2008, at 25 (finding that the supply of physicians in Texas grew more slowly after 2003 than before).

35. Deborah A. DeMott, Fiduciary Boundaries (2011) (unpublished manuscript) (on file with the authors).

36. Reale v. Sotheby's, Inc, 718 N.Y.S.2d 37, 38 (N.Y. App. Div. 2000). One might quarrel with some of these results. For example, the usual rule of agency is that an agent may not ignore an instruction from a principal, even if the instruction is unauthorized or one the principal promised in advance not to give. Once an instruction is given, an agent must

agreement . . . reliev[ed] the auction house of duties of performance that an agent conventionally owes a principal."[37] In another case, a court permitted an auction house to enter into a side agreement with a buyer which was not disclosed to the consignor and which entitled the buyer to return a painting if an expert subsequently determined that it was not the work of the attributed artist.[38] This agreement with the buyer seemingly conflicted with the auction house's duty of loyalty to the consignor. In this case, however, the court determined that the actions were permissible because the consignment agreement gave the auction house discretion to rescind a sale and accept the return of the property under certain circumstances.[39] In consideration of this, DeMott concluded that although "the auction house acted in its own interests and arguably at odds with those of the consignors, the consignment agreement placed its right to do so outside the scope of its agency and its fiduciary obligation to the consignors."[40]

The most extreme cases, for present purposes, may be those in which lawyers use clients' failure to pay their bills as a reason for withdrawing from representations on the courthouse steps. Consider the recent case of *King v. NAIAD Inflatables of Newport, Inc.*,[41] in which the defendant-clients were more than $49,000 in arrears.[42] After arbitration failed, and with a trial impending, the law firm told the clients it would withdraw unless they caught up on the past due legal bills.[43] The clients neither paid the bills nor contested the firm's motion to withdraw, but the trial judge denied the attorneys' motion, even so.[44] Pointing out that successor counsel had not been arranged, the trial judge concluded that withdrawal would have "'a materially adverse effect'" on the clients, "'tantamount to leaving [the] clients unrepresented.'"[45] The Rhode Island Supreme Court reversed.[46] It found that the law firm faced "significant financial burdens," that the firm's retainer agreement "obligated the clients to pay all invoiced costs and fees 'upon receipt,'" and that the retainer agreement also "expressly" recognized non-payment of fees as a basis for "terminat[ing] the engagement" and withdrawing.[47] In language that makes the essential

respect it or withdraw. This principle was violated when the auction house hired the expert the consignor had specifically ruled out.

37. DeMott, *supra* note 35, at 11 (citations omitted); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.09 (2006) (agent's duty to comply with all lawful instructions received from principal); *id.* § 8.11 (agent's duty to use reasonable effort to provide facts to the principal when agent has reason to know principal would wish to have them).

38. Kohler v. Leslie Hindman, Inc., 80 F.3d 1181, 1184 (7th Cir. 1996); *see* DeMott, *supra* note 35, at 12–13.

39. *Kohler*, 80 F.3d 1186–88; DeMott, *supra* note 35, at 13.

40. DeMott, *supra* note 35, at 15.

41. No. 2009-141-Appeal, 2010 WL 5129689 (R.I. Dec. 14, 2010).

42. *Id.* at *1.

43. *Id.*

44. *Id.* at *1–2.

45. *Id.* at *2.

46. *Id.* at *3.

47. *Id.* at *2.

point, the court wrote: "Lawyers are no different from other professionals; they are entitled to be paid for their work on a timely basis."[48]

The possibility of confining the scope of the representation also accounts for the potential of representation agreements to eliminate interest conflicts by excluding services in areas where conflicts may exist. One of us (Silver) has discussed this potential at length in the insurance defense context.[49] By defining the purpose of the representation as minimizing the loss to the liability claimant, a defense lawyer can avoid becoming embroiled in conflicts between carriers and policyholders relating to other matters, such as settlement and coverage.

In fact, the connection between the scope of the representation and the existence of conflicts is a fixture of legal ethics. It enables a law firm to handle Matter 1 for Client A and Matter 2 for Client B, even though A and B are suing each other in unrelated Matter 3. A firm "may . . . provide legal services to both clients in matters [that are] unrelated to the litigation because as to those matters the clients' interests are not in conflict."[50] The ability to contractually limit the scope of a representation enables a lawyer to represent co-plaintiffs who may have claims against each other, as well as against their common defendant, by excluding responsibilities relating to the former claims. Lawyers representing co-defendants may restrict the scope of representation to avoid becoming involved in disputes over the allocation of any eventual responsibility for settlement payments to the common plaintiffs. At the most general level, all conflict rules contain language limiting their application to situations in which lawyers are subject to pressures or duties that may prevent them from fulfilling their responsibilities to each of their clients. Because the identified responsibilities exist only within the agreed scope of a representation, the conflict rules assume that the scope is contractually defined.

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48. *Id.*

49. *See generally* Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000); Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29 (2001); Charles Silver & Kent D. Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995) (discussing the manner of determining the scope of insurance defense representations and the importance of the scope).

50. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iii), illus. 5 (2000). This approach is similarly adopted in Rule 1.7(b) of the Model Rules of Professional Conduct, which states that

> Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> . . .
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation . . .; and
>
> (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2010).

II. THREE PUZZLES REGARDING ATTORNEYS' COMPENSATION

In this Part, we examine, and apply our analysis above to, three puzzles that contingent-fee plaintiffs' attorneys have recently confronted regarding their fiduciary obligations: (1) whether attorneys can permissibly challenge judicially created fee caps; (2) what factors attorneys can permissibly consider when choosing venues when the states in which clients' cases may be filed treat attorneys' fees differently; and (3) whether attorneys can permissibly use settlement negotiations with the defendant to provide for payment of third-party service providers, specifically, companies that help resolve governmental liens on claimants' settlement proceeds.

A. Responding to Judges' Efforts to Reduce Contingent Fees

In a spate of recent decisions, judges presiding over aggregate litigations encompassing thousands of claimants issued orders capping the fees that the plaintiffs' attorneys could charge.[51] These orders were striking for at least two reasons. First, the aggregations were not class actions. Every claimant hired an attorney directly and fixed the lawyer's compensation contractually, in most cases providing for a payment that exceeded the judicially-imposed cap. Thus, by capping the lawyers' fees, the judges rewrote thousands of individual attorney-client contracts. They did so even though no client had challenged either the overall validity of a fee agreement or the reasonableness of the contracted-for fee.

Second, the fee cuts were substantial. In the *Zyprexa* MDL, federal district Judge Jack Weinstein limited attorneys' fees to 20% in the approximately 1,000 cases receiving settlements of $5,000, and limited fees in the remaining 7,300 or so cases to 35%.[52] In the *Guidant* MDL, federal district Judge Donovan W. Frank ultimately capped fees for all counsel at

51. *See, e.g.*, Vioxx Fee Cap Order II, *supra* note 9, at 565; Vioxx Fee Cap Order I, *supra* note 9, at *passim*; Memorandum Opinion and Order Regarding Special Masters' June 30, 2008 Report and Recommendation Concerning Individual Contingency Fees, *In re* Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 3896006, at *8–10 (D. Minn. Aug. 21, 2008) [hereinafter Guidant Fee Cap Order II]; Memorandum Opinion and Amended Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees, *In re* Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *20 (D. Minn. Mar. 7, 2008) [hereinafter Guidant Fee Cap Order I]; Memorandum & Order on Fees, *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) [hereinafter Zyprexa Fee Cap Order]; *see also* Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *In re* WTC Disaster Site Litig., No. 21 MC 100 (AKH), at 1 (S.D.N.Y. June 10, 2010) [hereinafter WTC Disaster Preliminary Approval Order], *available at* http://www.nysd.uscourts.gov/cases/show.php?db=911&id=562 (preliminarily approving proposed Amended Settlement Process Agreement that included among its "improvements and benefits" relative to the agreement discussed at the hearing on March 19, 2010, a "voluntary reduction" of plaintiffs' attorney's fees to 25%); Transcript of Hearing before Hon. Alvin K. Hellerstein, *In re* WTC Disaster Site Litig., No. 21 MC 100 (AKH), at 56 (S.D.N.Y. March 19, 2010) [hereinafter March 19, 2010 Hellerstein Hearing Transcript].

52. Zyprexa Fee Cap Order, *supra* note 51, at 490–91. Professor Baker served as a consultant to various plaintiffs' attorneys in connection with the Zyprexa litigation and settlements.

37.18% of the total gross settlement amount, including 14.375% of the total gross settlement amount that was reserved for common benefit fees.[53] A few months later, in the $4.85 billion nationwide Vioxx settlement, federal district Judge Eldon Fallon ordered total attorneys' fees capped at 32%, including the payment of common benefit fees,[54] which he later set at 6.5%.[55] Most recently, in March 2010, federal district Judge Alvin Hellerstein rejected a proposed settlement of approximately 10,000 claims filed on behalf of 9/11 rescue and cleanup workers. Although he agreed that the plaintiffs' lawyers "[were] entitled to a reasonable and perhaps even generous fee," he held that "they [were] not entitled to their contract rights of a third, thereabouts."[56] Settlement negotiations conducted in the shadow of Judge Hellerstein's order limited attorneys' fees to 25%.[57]

Although one can question the wisdom and the legality of such *sua sponte* judicial fee cuts on many grounds, we reserve those subjects for another day. Instead, using the *Vioxx* MDL as an example, we focus on the ethical position of a lawyer whose retainer agreement with a client specifies a 40% contingent fee and who would like to oppose the court's order capping this fee at 32%. At first glance, this lawyer might seem to have no option but to comply with the court's order. The lawyer's clients obviously stand to gain from the order, which would reduce the clients' fee obligations by 8%.[58] In addition, the settlement was already in place at the time Judge Fallon issued the order, so it seems unlikely that the fee cut could harm the clients by weakening their lawyers' incentives to obtain the greatest possible recovery for their claims. If, by complying with the court's order an attorney would make her clients better off, would it not be a breach of the attorney's fiduciary duties to those clients if the attorney challenged the order?

Most lawyers with clients participating in the Vioxx settlement chose to comply with the court's order. Some questioned whether they could ethically oppose a court order that indisputably made their clients better off.[59] Others may have thought that they would seem "greedy," and that it

53. Guidant Fee Cap Order II, *supra* note 51, at *6, *10.

54. Vioxx Fee Cap Order II, *supra* note 9, at 564. Professor Baker served as a consultant to one of the Negotiating Plaintiffs' Counsel in connection with the Vioxx settlement.

55. *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2010 WL 5576193, at *17 (E.D. La. Oct. 19, 2010) [hereinafter Vioxx Common Benefit Attorneys' Fee Order] (ordering common benefit attorneys' fees of 6.5% of the $4.85 billion total gross settlement fund).

56. March 19, 2010 Hellerstein Hearing Transcript, *supra* note 51, at 55–56.

57. *See* WTC Disaster Preliminary Approval Order, *supra* note 51, at 1–2; World Trade Center Litigation Settlement Process Agreement, as Amended, *In re* WTC Disaster Site Litig., No. 21 MC 100 (AKH), at 15 (S.D.N.Y. June 10, 2010), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540.

58. Here and throughout, we state the percentages that would appear in subtractions. Thus, to reduce a 40% fee to a 32% fee, one subtracts 8%. From the lawyer's perspective, however, the reduction is much larger. For example, a lawyer with a 40% fee agreement whose client recovered $2500 would have earned $1000 before the cap but took home only $800 after it, a 20% loss.

59. Confidential conversations of various plaintiffs' attorneys with Professor Baker (2008).

would be bad for business in the long run, to seek enforcement of their contracted-for fees in the face of Judge Fallon's order, even if doing so *were* ethically permissible. As a practical matter, Judge Fallon's *sua sponte* order clearly put all of the plaintiffs' attorneys in a difficult position, whatever their legal and ethical options might be. The attorneys had taken clients' cases and pursued the litigation with the expectation of receiving a particular fee if their efforts were successful. Now, when the litigation was at an end, that fee was unexpectedly cut, to their detriment, but to the seeming benefit of their clients.

One group of lawyers working together as the Vioxx Litigation Consortium (VLC) did object to Judge Fallon's fee order and filed a motion for reconsideration.[60] Thereafter, Judge Fallon issued another *sua sponte* order disqualifying the members of the VLC from speaking for their clients on the subject of fees and appointing the Tulane Civil Litigation Clinic (TCLC) to act for the clients in their stead.[61]

Did the members of the VLC violate their fiduciary duties to their signed clients by challenging the fee cut? Many lawyers have defended their right to payment against *clients'* claims of overcharging.[62] Given that this action is lawful and ethical, how could it be unlawful or unethical for a lawyer to challenge a fee cut imposed by a court? The lawyer's fiduciary duty runs to the client, not the trial judge.

There is no question that the VLC lawyers would have been entitled to notice and a hearing if any of their clients had sought a reduction in their contracted-for fee.[63] In that context, the contracted-for fee would have

60. *See* Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingent Fees and Alternatively for Entry of Judgment by VLC at 2, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549 (E.D. La. Dec. 10, 2008) [hereinafter VLC Memorandum on Fee Cap]. Professor Silver served as a consultant to the VLC.

61. *See* Vioxx Disqualification Order, *supra* note 9, at *1–2. This order also required the dissenting lawyers to send copies of Judge Fallon's orders to their clients, who numbered about 5000 in all. *Id.* at *2. The charitable view of this order, which, like the first order capping attorneys' fees, was issued without notice or a prior hearing, is that Judge Fallon wanted the clients to know what their lawyers were doing and that the clients would be represented by the TCLC on the issue of fees. The uncharitable view is that he hoped to dissuade the VLC from challenging his authority to regulate fees by threatening to enmesh them in litigation with their clients.

62. *See, e.g.*, Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir. 1979). In *Brobeck*, Telex, a sophisticated corporation, entered into a written agreement to pay the Brobeck firm a $25,000 retainer plus a maximum of $5,000,000 in contingent fees depending on various outcomes, in exchange for the firm pursuing an appeal to the U.S. Supreme Court of an $18.5 million judgment against Telex. *Id.* at 867–69. Telex paid the retainer of $25,000 but, after the successful resolution of the case, refused to pay a bill from the Brobeck firm for an additional $1 million. *Id.* at 867, 869. Telex contended that the "fee was so excessive as to render the [fee] contract unenforceable," but the U.S. Court of Appeals for the Ninth Circuit ultimately concluded that the fee agreement was enforceable and not unconscionable. *Id.* at 875.

63. It is worth noting that none did—no client-initiated controversy relating to any lawyer's fee existed when Judge Fallon issued his *sua sponte* order cutting fees. *See* VLC Memorandum on Fee Cap, *supra* note 60, at 5 ("No client complained of the agreed-upon fees. The Court changed the rate of the fee contracts in the [Aug. 27, 2008 Order capping fees] absent any expressed dissatisfaction or challenge to their validity by anyone.").

been reduced only if the clients prevailed in their challenge to the fee, and only after the affected lawyers had an opportunity to respond to their clients' complaints. Judge Fallon's order, in contrast, invalidated the attorneys' contracts and reduced their fees without first affording them an opportunity to defend themselves.[64] The due process violation was patent, as Judge Fallon eventually realized; several months after issuing the original fee cap order, he received briefing and heard oral arguments regarding the fee cap.[65] If the fiduciary duty (or any other ethical doctrine) were to prevent a lawyer from having a day in court on a contested contractual right, a denial of due process would occur and one would expect the relevant law, if challenged, to be struck down. It would be especially odd, and unwarranted, for any law to prevent a lawyer from obtaining appellate review of an order entered *sua sponte* without notice or a hearing, for the risk of abuse of judicial power would be especially great.[66]

At bottom, the suggestion that the fiduciary duty prevents a lawyer from enforcing a contractual payment right is deeply confused. It collides with the reality that lawyers assert contractual payment rights against clients every day. When a plaintiff's attorney receives a settlement check, the lawyer normally deducts fees and reimbursable expenses and passes the remainder on to the client. This collection of compensation is the direct assertion of the lawyer's contractual right to payment. The same is true when a lawyer being paid by the hour or on some other non-contingent basis sends a client a bill. The bill is the lawyer's demand for payment. If the practice of collecting fees from clients ran afoul of the fiduciary duty, we would have heard so by now. The cases would, for example, require lawyers to get waivers before sending bills or to advise clients to obtain independent counsel before paying. No such requirements exist; nor should they.

It is also noteworthy that although every state's ethics rules prohibit attorneys from taking actions that impair the loyalty owed their clients,[67]

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64. *See id.* at 18–19 ("The VLC learned of the Court's decision only after the Court issued its Order. Before that, the VLC did not know that the Court was considering the matter. The VLC is unaware of any notice of this issue as an agenda item or a matter otherwise to be submitted to the Court for resolution.").

65. The VLC filed a motion on December 10, 2008, challenging the August 27, 2008 order capping contingent fees, *see generally id. See also* Vioxx Fee Cap Order II, *supra* note 9, at 551. Judge Fallon heard oral arguments on April 7, 2009 on the issues raised. On August 3, 2009, he issued an opinion that largely reaffirmed his original order capping fees. *Id.*

66. There is no constitutional right to appellate review, even for individuals convicted of a crime. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956). If appellate review is available for any litigants, however, denying it to others without sufficient justification is a potential violation of the constitutional guarantees of due process and equal protection of the laws. *See id.* (holding that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," but "a State that does grant appellate review can[not] do so in a way that discriminates against some convicted defendants on account of their poverty" and the Due Process and Equal Protection Clauses protect individuals from "invidious discriminations").

67. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 (2005); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010).

those rules also permit the attorney to put her own interests ahead of those of the client in limited circumstances when a fee dispute is involved. Thus, an attorney is permitted to reveal confidential information from or about a client "[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client."[68] And a lawyer is permitted to withdraw from representing a client, even if the client will be adversely affected, if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed."[69]

Even more to the point, the direct collection of contracted-for fees and expense reimbursements by an attorney does not seem to entail a conflict of interests of the sort regulated by state equivalents to Rule 1.7 of the ABA Model Rules of Professional Conduct.[70] Under this rule, a conflict exists when a lawyer's responsibilities or interests create a significant risk that the representation of a client will be materially impaired. The collection of contractual compensation creates no such risk because it in no way limits, or even bears upon, "a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client."[71] Insofar as incentives are concerned, contingent percentage fees encourage lawyers to support actions that benefit clients because by maximizing the client's recovery, a lawyer also maximizes her own fee. Fees are regulated, of course. They must be reasonable and, when contingent on results achieved in litigation, they must be reduced to writing, signed by the client, and accompanied by a closing statement.[72] But reflecting the separation between fees and the fiduciary duty, the rule that governs fees is not a loyalty rule, and the rule that governs current client conflicts makes no mention of fees.

To date, only one appellate court has had the opportunity to address these issues in the context of a fee cap imposed *sua sponte* by a trial court. In 2000, the Texas Court of Appeals[73] in Houston reviewed a trial court

68. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(c)(5) (2005). Comment 15 to that rule elaborates:

> A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it . . . . This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary. Any disclosure by the lawyer, however, should be as protective of the client's interests as possible.

Id. at cmt. 15.

69. *See, e.g.*, *id.* R. 1.15(b)(5). Comment 7 to that rule underscores the position that a "lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees." *Id.* at cmt. 7.

70. *See, e.g.*, *id.* R. 1.06.

71. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (2010).

72. *See, e.g.*, *id.* R. 1.5; TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04 (2005).

73. *In re* Polybutylene Plumbing Litig., 23 S.W.3d 428 (Tex. Ct. App. 2000), *rev'g sub nom.* Adkins v. Hoechst Celanese Corp., No. 92-24674, 1996 WL 34442697 (D. Tex. Nov. 18, 1996).

decision[74] that capped the contractual attorneys' fees in a mass tort property damage settlement at 20% for cases that had not been tried.[75] The appeals court framed the question presented as "whether, *in light of the absence of a class action*, a trial judge can properly modify otherwise perfectly legal fee contracts because the judge concludes it is not 'fair' for the attorneys to receive the percentage of each recovery that was agreed upon in advance with each client."[76] The court overturned the fee cap, holding that "the general rule in Texas honoring the sanctity of contracts applies in this case."[77] En route to that determination, the appeals court observed that there had been no claim in the trial court by any client or anyone else

> that the *individual* attorney fee agreements, viewed separately, were improper, illegal, fraudulent, excessive, or out-of-the-ordinary. There was no claim [that the plaintiffs' lawyers] had breached a fiduciary duty, nor that any plaintiff was a minor or an incompetent who needed special protection from the court. The complaint in the trial court was that, in light of the number of plaintiffs involved in the settlement, [the plaintiffs' lawyers were] simply getting too much money, in the aggregate.[78]

For present purposes, the most interesting part of the appeals court's decision was its failure to express any concern that the plaintiffs' attorneys might have breached any fiduciary or other ethical obligation to their clients by appealing the trial court's imposition of fee caps. Perhaps because it was so eager to overturn the fee caps imposed by the trial court, the appeals court merely noted in the first footnote of its decision, by way of clarification and without apparent concern, that

> [w]hile the "named appellants" are the persons who were plaintiffs below, the "real appellants" in interest are the attorneys for the plaintiffs. Further, while the named appellees are [the defendants below], they are not affected by the outcome of this appeal in any way. The "true appellees" are those of the plaintiffs who have a financial interest in the outcome of this appeal (who have not settled the attorneys' fee issue and signed releases).[79]

The lawyers in the VLC were licensed in Texas and their retainer agreements with their clients were subject to Texas law. Following the Texas Court of Appeals' decision in *In re Polybutylene Plumbing Litigation*, one might therefore have thought that, under Texas law, the VLC's decision to assert its members' contractual rights to payment did not create an interest conflict. Judge Fallon, however, held otherwise in the

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74. *Adkins*, 1996 WL 34442697, *rev'd sub nom. In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428.

75. *Id.* Professor Silver consulted on the subject of attorneys' fees with the special master appointed by the trial court judge.

76. *In re Polybutylene Plumbing Litig.*, 23 S.W.3d at 436 (emphasis in original).

77. *Id.* at 439. Although the appeals court acknowledged that the Texas state courts have "inherent" powers to regulate the practice of law, the court held that these inherent powers "do not include the authority to make substantive rulings on issues such as the enforceability or validity of contracts." *Id.* at 438.

78. *Id.* at 436 (emphasis in original).

79. *Id.* at 432 n.1.

Vioxx litigation, without citing or discussing *In re Polybutylene*. When the VLC asked him to reconsider his order cutting their fees, Judge Fallon entered another *sua sponte* order in which he wrote as follows:

> Because any additional attorneys' fees will come directly from the claimants' settlement awards and will result in less recovery for the Vioxx claimants, the VLC attorneys' interests on this particular issue are potentially in conflict with the interests of their clients. It is thus appropriate for the Vioxx claimants to have their fee interests represented by independent counsel.[80]

Judge Fallon then appointed the TCLC as counsel for the VLC's clients.

The order disqualifying the VLC from representing its clients' fee interests is curious. First, it cites a potential conflict, not an actual one. The usual view is that a potential conflict exists when there is a possibility that interests will collide, while an actual conflict exists when possibility becomes reality.[81] Thus, the literature speaks of potential conflicts "ripen[ing] into" actual ones.[82] Given that the VLC had already demanded reconsideration of the court's order, only an actual conflict could have existed, if there was any conflict at all. What further "ripening" was left to occur? The usual view is also that clients can waive potential conflicts. This is why lawyers with potential conflicts often continue to represent their clients. If Judge Fallon thought a potential conflict existed, he should have given the lawyers in the VLC an opportunity to obtain informed conflict waivers from their clients instead of disqualifying the lawyers across the board.

If one assumes that Judge Fallon meant to find the existence of an actual conflict rather than a potential one, a second mystery arises. When holding that a conflict existed, Judge Fallon cited no authority. If a conflict (potential or actual) arises when a lawyer asserts a contractual right to payment, supporting authority should be abundant because lawyers collect fees every day. Yet, in the order disqualifying the VLC, Judge Fallon cited *nothing*. We identified a possible basis for this omission in our discussion above: conflicts do not arise when lawyers collect (or seek to collect) contractual fees because fee collection does not limit or interfere with a lawyer's ability to represent a client.

Judge Fallon may have been led astray by his desire to appoint someone to oppose the VLC. Because he raised the issue of fees *sua sponte*, the VLC's motion to reconsider his order did not set the stage for adversarial litigation. A judge who initiates an investigation into the reasonableness of an attorney's fee without a complaint from a client "casts [himself] in the

80. Vioxx Disqualification Order, *supra* note 9, at *1–2.

81. *See, e.g.*, Bruce S. Ross, *Ethical Issues in Practice: Important Fiduciary Litigation*, A.L.I.-A.B.A. EST. PLAN. COURSE MATERIALS J., Aug. 2010, at 5, 18; James Q. Walker, *Ethics in Business Negotiations, Conflicts of Interest, and Advance Waivers*, *in* STAYING OUT OF TROUBLE: WHAT EVERY ATTORNEY MUST KNOW ABOUT ETHICS 337 (Practicing L. Inst. 2008).

82. Ross, *supra* note 81, at 18.

role of a prosecutor."[83] He "assume[s] the role that the [allegedly overcharged clients'] lawyer would have played had they sued [the attorney]," as Judge Richard A. Posner has observed.[84] The fee controversy in Vioxx thus pitted Judge Fallon against the VLC, an alignment likely to create an appearance of judicial partiality. Wanting to turn the prosecutor's job over to someone else, Judge Fallon may have seized upon the idea of disqualifying the VLC and appointing the TCLC.

When ordering that the plaintiffs' attorneys' fees be capped, Judge Fallon explicitly followed the path blazed by Judge Weinstein in the *Zyprexa* MDL[85] and also tread by Judge Frank in the *Guidant* MDL.[86] By disqualifying the VLC, however, Judge Fallon set out on his own. The *sua sponte* decisions by Judges Weinstein and Frank to cut lawyers' fees in the *Zyprexa* and *Guidant* MDLs also provoked opposition, but in neither instance did the court disqualify the dissenting lawyers or *sua sponte* appoint new counsel to represent the dissenting lawyers' clients on the issue of attorneys' fees.[87] Nor did Texas state court trial Judge Russell T. Lloyd, who capped attorneys' fees in the polybutylene plumbing litigation, take the further step of disqualifying the attorneys who (successfully) appealed the fee cuts.[88]

The question is thus squarely framed: Did Judge Fallon err by disqualifying the VLC or did the other judges err by failing to find that the dissenting lawyers had a conflict on the issue of attorneys' fees in those consolidations? The question is also urgent. Just as the actions of Judges Weinstein and Frank in *Zyprexa* and *Guidant*, respectively, served as models for Judge Fallon in *Vioxx*, judges in future MDLs are likely to follow Judge Fallon's lead.

In our view, there was no conflict of interests requiring Judge Fallon to disqualify the VLC. In challenging the fee caps, the affected attorneys were

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83. United States v. Vague, 697 F.2d 805, 809 (7th Cir. 1983).

84. *Id.* at 807 (holding that a federal district judge exceeded his authority by compelling a criminal defense attorney to return part of the previously paid contractual fee).

85. *See* Zyprexa Fee Cap Order, *supra* note 51, at 490–91.

86. Judge Frank issued a series of fee-related orders in Guidant. *See* Guidant Fee Cap Order I, *supra* note 51, at *17–20; Order Regarding Requests for Motions to Reconsider the Court's March 7, 2008 Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees, *In re* Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708 (DWF/AJB) (D. Minn. Mar. 28, 2008); Guidant Fee Cap Order II, *supra* note 51; *see also* Report and Recommendation of Special Masters, *In re* Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708, 2008 WL 3896018 (D. Minn. June 30, 2008).

87. *See In re* Zyprexa Prods. Liab. Litig., 594 F.3d 113, 119 (2d Cir. 2010) (rejecting request for relief from orders capping fees and requiring contributions to common benefit fee award); Guidant Fee Cap Order II, *supra* note 51, at *3 (reporting that the court received thirteen letters requesting permission to file motions to reconsider the court's order capping fees at twenty percent).

88. Adkins v. Hoechst Celanese Corp., No. 92-24674, 1996 WL 34442697 (D. Tex. Nov. 18, 1996), *rev'd sub nom. In re* Polybutylene Plumbing Litig., 23 S.W.3d 428 (Tex. App. 2000). Judge Lloyd's order reducing the plaintiffs' attorneys' fees and expense reimbursements was reversed on appeal. In re *Polybutylene Plumbing Litig.*, 23 S.W.3d at 442.

not opposing their clients. They disagreed with Judge Fallon, not with their clients. Moreover, when responding to Judge Fallon's order, which infringed upon their contractual rights, the members of the VLC were obviously speaking for themselves and not on behalf of their clients. They were responding to Judge Fallon's charge that they would violate their professional responsibilities by collecting their contracted-for fees. To see that the clients were not involved in the dispute between Judge Fallon and the VLC, one need only realize that, had Judge Fallon changed his mind and allowed the lawyers to collect their fees in full, the clients would have been free to challenge the reasonableness of the fees (and all other aspects of their attorneys' conduct) in a separate proceeding.

Fundamentally, Judge Fallon's decision to appoint replacement counsel for the clients was unwarranted because the court is *supposed* to be the prosecutor when it exercises its inherent power to regulate attorneys. For example, when a judge holds a hearing following the *sua sponte* issuance of a contempt order, the court does not engage a new lawyer to argue its side of the dispute. The judge becomes the prosecutor and makes the record supporting the punishment.[89] When issuing his *sua sponte* order cutting fees, Judge Fallon claimed to be exercising his inherent power.[90] He should therefore have retained the position of prosecutor instead of recasting the matter as a dispute between the VLC and its clients. There was no such dispute, until Judge Fallon acted in a manner that may have been calculated to create one. There was simply Judge Fallon's belief that he had the power and the responsibility to reduce all lawyers' fees.

Judge Fallon's decision to appoint separate counsel also raised a host of serious questions he never addressed. What was the source of his power to saddle the VLC's clients with new lawyers? It is one thing to disqualify a lawyer, but it is quite another to appoint a replacement. What authority did the new lawyers have to speak for the clients, given that the clients never conferred any? Could the clients have refused representation by the TCLC? By asserting that the clients opposed paying the VLC their contracted-for fees, was the TCLC putting words into their mouths, given that none had actually complained?[91] Did the clients have the option of refusing representation by the TCLC, and if they did, should the court-ordered notices they received have made that clear? If the VLC had prevailed in its

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89. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.155 (2004) (describing procedure for imposing sanctions).

90. *See* Vioxx Fee Cap Order I, *supra* note 9, at 612 ("[T]he Court finds that the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness.").

91. The possibility that clients might support the payment of their attorneys' full contractual fee is a documented reality in similar cases, as is evident from the testimony of 9/11 worker Joseph Greco in the WTC Disaster Site Litigation, where he said:

> [the attorneys] and many other members of their staff have been there for my family and myself since day one. They are constantly calling me for [sic] see how I'm feeling and if I need anything. The compassion, friendship, and hard work that they have shown is priceless. . . . They deserve their fee for all their hard work, time, and risk they have spent on the case.

March 19, 2010 Hellerstein Hearing Transcript, *supra* note 51, at 9.

effort to overturn the order cutting fees on appeal, would the clients have been precluded from attacking the reasonableness of the VLC's fees in a later proceeding? If the TCLC had lost, could the clients have sued it for malpractice? If the clients had wanted to attack the VLC attorneys or their contractual fees on other grounds, such as malpractice, breach of fiduciary duty, or unconscionability, were they obligated to bring those claims in Judge Fallon's court?

One could extend the list of unanswered questions, but the point should already be clear. By framing the dispute as one between the clients and the VLC instead of as the dispute it actually was—between the court and the VLC—Judge Fallon invented a new power and put ordinary procedural arrangements to uses for which they are not suited. One might have hoped that matters would have been straightened out on appeal, but because the fee dispute was settled, one will never know. The record of appellate review of judicial rulings in MDLs affords little cause for optimism, in any event.[92] Circuit courts have given trial judges enormous freedom to manage MDLs as they wish.

B. Venue Selection

Another controversial fee-related issue that contingent-fee plaintiffs' lawyers increasingly confront involves venue selection. After a client has retained the attorney at a fee that is a specified percentage of any eventual recovery, the prosecution of the client's claims will require the attorney and client to make a number of decisions. Some of these decisions will involve the "objectives" or "general methods" of the representation and will therefore be matters over which the client is to have the final say.[93] Other decisions will involve the "means" by which those objectives might be

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92. *See, e.g.*, Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 118–19 (2010) (observing that there "appears to be no reported case in which a disappointed lawyer appealed an unfavorable appointment decision from an MDL judge, let alone one in which an appointment order by an MDL judge was reversed" and noting that lawyers in MDLs "refrain from appealing [adverse decisions] partly because they do not wish to alienate MDL trial judges, who have considerable power to make life unpleasant for them").

93. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2010) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(a) (2005) ("[A] lawyer shall abide by a client's decisions . . . concerning the objectives and general methods of representation . . . ."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (2010) (stating that the client has "the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. . . . With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02 cmt. 1 (2005) ("Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation. Within those limits, a client also has a right to consult with the lawyer about the general methods to be used in pursuing those objectives.").

achieved, including “technical and legal tactics”—matters for which the lawyer has primary responsibility.[94] Although the attorney may exercise “very broad discretion”[95] with regard to this category of decisions, an obligation to “reasonably consult” with the client exists,[96] and the attorney must also “promptly comply with [the client’s] reasonable requests for information.”[97]

Chief among the decisions to be made regarding “technical and legal tactics” and the “means” by which the objectives of the representation are to be achieved are the decisions where and when to file the client’s lawsuit. Given the goal of maximizing the client’s gross recovery, the attorney can be expected to consider a number of factors in deciding where among the available options to file the lawsuit,[98] including: which venue’s substantive laws are most favorable to the plaintiff; which venue is most likely to offer a plaintiff-friendly trial judge, jury, or both; which venue already has a record of favorable discovery rulings or favorable verdicts in similar cases; and which venue is most likely to afford the client the earliest trial date. The decision of *when* to file the client’s case will typically be less complex, but will also involve consideration of multiple factors, including the statute of limitations in the jurisdiction in which the case is most likely to be filed, whether sufficient information about the client’s case has been obtained that

94. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2010) (“Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.02 cmt. 1 (2005) (“The lawyer should assume responsibility for the means by which the client’s objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client’s wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.”). *But see* MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) (2010) (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished . . . .”).

95. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.02 cmt. 1 (2005).

96. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) & cmt. 3 (2010); *see also id.* cmt. 5 (“[A] lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.03 cmt. 2 (2005) (same).

97. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(4) (2010); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.03(a) (2005).

98. The options for where to file a lawsuit may include the choice of what state, as well as whether to file in federal or state court. All of those options are limited by the relevant laws and court rules that will look to certain facts of the case, such as the location of the defendant, the amount in controversy, and whether there is “diversity.” For discussion of the strategic use of venue selection in litigation, see Russell J. Weintraub, *How Are You Going To Keep Them Down on the Farm After They’ve Seen the Conflict of Laws?*, 27 U. TOL. L. REV. 681, 681 (1996) (contending that venue selection “is a weapon for winning cases that otherwise could not be won”).

would support a valid cause of action, and whether the litigation of similar cases to date has proceeded along a positive path.[99]

In addition to all of the above, there is a more controversial variable that may affect a contingent-fee plaintiff's attorney's decision where to file a client's case: whether the court rules,[100] ethics rules,[101] or other applicable laws[102] in a jurisdiction impose a cap on attorney's fees below the amount

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99. Under some circumstances, an attorney might delay filing a client's case as a strategic decision if there is no concern about the statute of limitations running in the near future. The attorney may be waiting to see how similar cases are faring in various venues with regard to discovery rulings and verdicts before deciding where to file the case. The attorney's discovery to date may suggest that a client's case is relatively weak, and the attorney may delay filing that particular case in order to: prevent the case from becoming an unfavorable "bellwether" case or early trial case for the larger, mass tort litigation; keep expenses low; or make it easier and less costly to terminate the representation in the future if the attorney determines that the case does not merit further prosecution and/or cannot easily be included in a group or "inventory" settlement with the defendant.

100. For example, a New Jersey court rule, titled "Contingent Fees," states in relevant part:

> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims . . . , an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
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> (1) 33 1/3% on the first $500,000 recovered;
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> (2) 30% on the next $500,000 recovered;
>
> (3) 25% on the next $500,000 recovered;
>
> (4) 20% on the next $500,000 recovered; and
>
> (5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and
>
> (6) where the amount recovered is for the benefit of a client who was a minor or mentally incapacitated when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.
>
> (d) The permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client . . . .
>
> . . .
>
> (f) If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determining of a reasonable fee in light of all the circumstances. This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee.

N.J. CT. R. 1:21-7; *see also* MICH. GEN. CT. R. 8.121 (limiting contingent fees in personal injury or wrongful death suits to 33 1/3%); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.20 (2011) (sliding scale limiting contingent fees in cases involving personal injury, wrongful death, certain negligence claims, or malpractice claims other than medical malpractice claims to 50% of the first $1,000 recovered, 40% of the next $2,000 recovered, 35% of the next $22,000 recovered, and 25% on any amount over $25,000 of the sum recovered); Leonard C. Arnold, Ltd. v. N. Trust Co., 506 N.E.2d 1279, 1284 (Ill. 1987) (upholding against various constitutional and statutory challenges a local court rule limiting attorney fees to 25% of recovery in settlements of personal injury actions involving minors).

101. *See, e.g.*, FLA. BAR REG. R. 4-1.5(f)(4)(B)(i)(b) (limiting contingent fees in personal injury, products liability, and property damage suits to 40% of any recovery up to $1 million; 30% of that portion of the recovery between $1 million and $2 million; and 20% of that portion of the recovery over $2 million).

102. *See, e.g.*, CAL. BUS. & PROF. CODE § 6146(a) (West 2010) (limiting contingent fees in medical malpractice suits to 40% of the first $50,000 recovered; 33 1/3% of the next $50,000; 25% of the next $500,000; and 15% of any amount over $600,000); CONN. GEN.

set forth in the attorney-client contract. These fee caps can significantly reduce a contingent-fee attorney's compensation from the contractual amount, as the following example involving the New Jersey court rule on contingent fees shows. Consider an attorney whose client has contracted to provide the attorney a fee of 40% of any recovery, with litigation expenses to come out of the client's share of the proceeds.[103] If the attorney were to obtain a gross recovery of $2 million in settlement for the client's claim, after incurring $15,000 in reimbursable litigation costs, the attorney would receive $815,000 under the contract ($15,000 + (.40 x $2,000,000)). Under the New Jersey court rule, however, the attorney would receive only $553,667 for the same recovery ($15,000 + (.33 x $500,000) + (.30 x $500,000) + (.25 x $500,000) + (.20 x $485,000)). In this instance, the New Jersey fee caps cost the attorney $261,333 in fees.

Given the substantial sums at stake, especially in high value cases, one would expect contingent-fee attorneys strongly to prefer to file cases in jurisdictions without fee caps, other things being equal. Only if the attorney believes that a client's gross recovery is likely to be *substantially* greater in a jurisdiction with a fee cap than in one without a cap, would the attorney be expected to prefer to prosecute a claim in the jurisdiction with fee caps. Using the example discussed above, an attorney subject to the New Jersey fee caps would need to obtain a recovery at least 65% larger—$3,306,665 versus $2,000,000—in order to receive the same fee that he was entitled to under the terms of the attorney-client contract in a non-fee-cap jurisdiction.[104]

Of course, under the example above, the client might prefer the fee cap jurisdiction to paying the contractual 40% fee, other things being equal. Unless the cap reduces the recovery by weakening the lawyer's incentive to work hard on the client's behalf, the $261,333 savings in attorneys' fees under the example's application of the New Jersey fee caps is a direct

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STAT. ANN. § 52-251c(b) (West 2010) (sliding scale limiting contingent fees in personal injury, wrongful death, or property damage suits to 33 1/3% of the first $300,000; 25% of the next $300,000; 20% of the next $300,000; 15% of the next $300,000; and 10% of any amount exceeding $1,200,000); TENN. CODE ANN. § 29-26-120 (West 2011) (limiting contingent fees in medical malpractice cases to 33 1/3% of all damages awarded the claimant); WIS. STAT. ANN. § 655.013(1m) (West 2010) (sliding scale limiting contingent fees in medical malpractice cases to 33 1/3% of the first $1,000,000 recovered, and 20% of any amount in excess of $1,000,000 recovered, with the fee for the first $1,000,000 recovered limited to 25% "if liability is stipulated within 180 days after the date of filing of the original complaint and not later than 60 days before the first day of trial"); *see also* Zyprexa Fee Cap Order, *supra* note 51, at 494–96 (discussing various rules and statutes); Vioxx Fee Cap Order I, *supra* note 9, at 615.

103. These precise terms are, in fact, frequently seen in attorney-client contracts in mass tort litigation in recent years. See various anonymized attorney-client agreements (on file with Prof. Baker).

104. These numbers assume all of the facts presented above, including a 40% contractual fee. These numbers also critically assume that the portion of the recovery in excess of $2,000,000 (after expenses), which is subject to paragraph (f) of the New Jersey rule, would be determined by the Assignment Judge to be subject to a fee of no less than 20%. *See* N.J. CT. R. 1:21-7(c), (f).

transfer to the client.[105] And even if the recovery does fall, the client may still prefer the fee cap state because the reduction in fees may more than offset the reduced recovery.

From the above, it appears that when a jurisdiction imposes a cap on the contingent fees that attorneys may receive, a conflict is created between such an attorney and his client if the latter has previously contracted to pay the attorney a larger percentage fee than that permitted under the cap. Other things being equal,[106] the client can be presumed to prefer to pay the attorney a smaller fee and, therefore, to prefer to prosecute his claim in the fee cap jurisdiction, while the attorney can be similarly presumed to prefer the larger fee available in a jurisdiction without fee caps.

Is it then a breach of the fiduciary duty owed the client if the attorney does not file the client's case in the fee-cap jurisdiction, assuming it is an available venue? If so, is the attorney further obligated to file the client's case in the jurisdiction with the most severe cap on fees, if more than one fee-cap jurisdiction is an option?

We do not believe so. An attorney retained under a standard contingent fee agreement does not represent—that is, does not act for—the client on the matter of fees. To the contrary, by setting the fee in advance, the agreement (1) encourages the lawyer to maximize the client's recovery by removing fees from further consideration, and (2) establishes that, on the subject of fees, the lawyer will advance his own interests, not the client's. An implied obligation to minimize the fee burden, whether by filing in a fee-cap jurisdiction or other means, would make hash of the retainer agreement and pose serious problems for the attorney. For example, an attorney can always reduce the cost of legal services for a client by cutting the fee voluntarily. Once one decides that an attorney owes a client a fiduciary duty on the matter of fees, voluntary fee reductions seem to be required, and attorneys' contractual rights lose their importance.

Even if one agrees that a lawyer has no fiduciary obligation to file a lawsuit in a fee-cap jurisdiction, one may still believe that an attorney should disclose the existence and size of caps to the client and let the client choose the venue in which the case will be filed. Under existing law, "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests."[107] Does this require the attorney to discuss with the client the impact that venue choice may have on the attorney's fees? Although we expect many readers to answer affirmatively, we are inclined toward the opposite view.

105. On the potential of fee caps to reduce lawyers' effort levels and clients' recoveries, see generally Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Michael McKee et al., *Contingent Fees, Moral Hazard, and Attorney Rents: A Laboratory Experiment*, 36 J. LEGAL STUD. 253, 254 (2007); Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549 (2001).

106. As we explain in further detail below, other things are not likely to be equal. *See infra* text accompanying note 109.

107. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5 (2010); *see supra* note 96.

A preliminary question is whether attorneys ordinarily obtain input from clients when choosing litigation venues. Our experience with mass tort litigation does not cause us to think they do, but we are not aware of any relevant empirical studies. If venue choice is not a matter on which attorneys ordinarily consult with clients, then the belief that attorneys must communicate fee-related information when selecting forums would establish a new communication requirement.

More directly, the assertion that lawyers must tell clients about fee caps casts lawyers in the role of purveyors of price-related information to clients. This is not a role that, to our knowledge, lawyers or other agents usually play. For example, Lawyer A may know that Lawyer B charges lower contingent percentage fees, but we know of no legal requirement that Lawyer A disclose this information to a potential client when negotiating the terms of his retention. Nor, to our knowledge, are real estate agents, other sales agents, or other fiduciaries required to tell clients that cheaper service providers can be found down the street.[108] Fiduciaries need only describe their own charges accurately. This enables clients to comparison shop on their own.

Notwithstanding the analysis above, the conflict of interest rules might obligate the attorney to provide fee-cap information to the client, or might otherwise constrain the attorney's fee-related decisions, in certain situations. For example, suppose that, ignoring fee-related considerations, a client would benefit by having a lawsuit filed in State A rather than State B because State A's laws allow punitive damages while State B's laws do not. Now suppose that State A limits lawyers' contingent fees, but State B does not. Self-interest might lead the client's lawyer to choose State B, thereby harming the client but preserving the contracted-for fee. In this context, it seems clear that the client is entitled to have the attorney pick State A—i.e., the forum that is best for the client on the merits—because the lawyer clearly acts on the client's behalf when filing a lawsuit in a particular forum. The existing ethics rules governing conflicts of interest would prevent the attorney from choosing State B.[109] The principles we propose yield the same result. Both the client and the attorney expect the attorney to act in the client's best interests on all matters not contractually excluded from the scope of the representation. In other words, an attorney who wants to avoid filing cases in jurisdictions otherwise advantageous to clients which also cap fees must include language in the retainer agreement conferring a right upon the attorney to protect his own interests when choosing the forum.

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108. *See supra* note 10.

109. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2010) ("[A] lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(b)(2) (2005) ("[A] lawyer shall not represent a person if the representation of that person . . . reasonably appears to be or become adversely limited . . . by the lawyer's or law firm's own interests.").

Our point is simply that when State B is at least as good as State A on the merits, the lawyer has no duty to take State A's fee-cap into account when deciding where to file the case. Once fees are provided for contractually, they are excluded from the scope of the representation. Consequently, the lawyer cannot have a fiduciary duty to protect the client's fee-related interests. The client cannot reasonably expect the attorney to pursue the client's claim in State A when its laws: (a) offer no clear benefit to the client over those of State B on issues apart from attorneys' fees, and (b) cap the fees that the attorney can charge at an amount below that agreed to in the attorney-client retainer agreement.

In the situation we have described, it might well be prudent for a lawyer to discuss the matter of forum choice with the client, even assuming that the lawyer has no obligation to do so. To see why, imagine that the attorney filed the client's suit in State B, the client lost at trial, and the client subsequently sued the lawyer for malpractice. The client could argue that the lawyer chose State B to protect his fee, not because the lawyer judged State B to be at least as favorable, or possibly better, for the client as State A on the merits. In other words, the client could argue that the lawyer's desire for a higher fee distorted the lawyer's judgment and caused the lawyer to act to the client's detriment on a matter within the scope of the representation. In retrospect, the choice of State B will seem to have been a poor one—the client having lost on the merits there—and the lawyer will be at a disadvantage in the malpractice suit. Better for the lawyer to have obtained the client's informed consent in advance than to be in this situation, whether or not a conflict is determined to exist.

C. Using Settlement Negotiations with Defendants to Enhance Attorneys' Financial Gain

We have explored in Parts II.A and II.B the contours of two different scenarios under which we believe a contingent-fee attorney may pursue his own fee interests without breaching a fiduciary obligation to the client. In this part, we examine one set of circumstances under which an attorney's self-interested actions regarding his fees would run afoul of the principles that we set out in Part I.

Corporate defendants are increasingly concerned to provide in personal injury settlements for the resolution of any governmental liens on individual plaintiffs' settlement funds, especially liens held by Medicare. The applicable statute and regulations expose settling defendants to substantial penalties if these liens are left unresolved.[110] For this reason, settlement agreements in personal injury mass tort cases often include lengthy and detailed requirements regarding lien resolution.[111] Settlement agreements

110. Defendants, as "primary payers," can be fined as much as twice the amount owed to the agency if Medicare's reimbursement claim is not satisfied in connection with a personal injury settlement. *See, e.g.*, 42 U.S.C. § 1395y(b)(2)(B)(iii) (2006); 42 C.F.R. § 411.24(g)–(i) (2010).

111. *See, e.g.*, Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto §§ 12.1.1–3, at 44–45 (Nov. 9, 2007) [hereinafter Vioxx

also typically require mass tort plaintiffs to indemnify the defendant against the payment of any additional monies determined to be owed to a governmental entity, and to identify any governmental authorities "known to them to hold or assert a statutory lien" with respect to the settlement funds.[112]

Lien resolution can be time-consuming and complex. Governmental payers are often slow to respond with statements of the amounts to be reimbursed. And because only a portion of the governmental payer's lifetime expenditures on behalf of an individual are typically related to the settlement, identifying the particular liens to be reimbursed from the settlement funds at issue often involves negotiations between the individual (or his/her agent) and the governmental entity. As a result, an occupation known as a Lien Resolution Administrator (LRA) now exists.[113] As the name implies, LRAs specialize in dealing with lienholders. Because LRAs charge for this service, it is important to know who is responsible for paying them.

Settlement agreements sometimes contain statements or provisions relating to liability for the LRA's charges. Before discussing them, however, some background information is required. In particular, one must know who—the defendant, the plaintiff, or the plaintiffs' attorney—would bear the cost of resolving third-party liens if no LRA were hired. As between the plaintiff and the defendant, there is no default rule. The parties must allocate the expense.[114] But as between the plaintiff and the plaintiff's

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Master Settlement Agreement], *available at* http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf. The lien-resolution requirements set out in mass tort settlement agreements in recent years typically include commitments by plaintiffs' counsel that they: (1) will conduct a "reasonable investigation" into the existence of any liens of such governmental authorities "resulting from or arising out of" the plaintiff's injuries alleged to have been caused by the defendant and/or its product; (2) will ensure that any such liens are satisfied from the plaintiff's settlement proceeds; (3) will confirm with the Centers for Medicare & Medicaid Services whether a Medicare Set Aside (MSA) must be established and funded from the plaintiff's settlement proceeds; (4) will not release any settlement funds to the client until they either (a) have written confirmation that the client is not subject to any governmental liens or MSA, or (b) have written confirmation of the amount of any potentially applicable lien and/or MSA and withhold that amount from the settlement funds released to the client; (5) will provide the defendant a Certificate of Compliance that formally acknowledges satisfaction and discharge of any governmental liens and the funding of any MSA relating to the client's settlement proceeds; and (6) will indemnify the defendant if the governmental authority contends, after the release of the settlement funds to the claimant, that additional monies are owed it in connection with a lien or MSA involving those settlement funds. In addition, these settlement agreements often include similar requirements regarding "other liens," which are commonly defined as liens held by third-party payors other than "Government Authority Third Party Providers/Payors." *See, e.g.*, *id.* §§ 12.1.1, 12.1.3, 12.1.5.

112. *See, e.g.*, *id.* § 12.1.

113. *See, e.g.*, *id.* §§ 12.1, 17.1.49.

114. Depending on the relevant jurisdiction's default rule governing the allocation of this expense as between the plaintiff's attorney and the client, however, it may be problematic if the defendant agrees to bear this expense. *See infra* note 116 and accompanying text. Consider a situation in which the Ohio Ethics Opinion would govern. *See* Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2009-9 [hereinafter Ohio Ethics Opinion 2009-9]. If the defendant is only interested in paying $1,000,000 total in settlement,

attorney, the few relevant advisory ethics opinions have held that, with rare exception, the plaintiffs' lawyers must provide lien resolution services (directly or indirectly) and may not charge the client extra for them.[115] When these ethics opinions govern, contingent-fee attorneys who choose to outsource their lien resolution responsibilities to an LRA may pass the expense on to their clients only under specified, stringent circumstances.[116]

When viewed in the context of this default rule, statements in a settlement agreement regarding who will pay the fees and expenses of an LRA raise intriguing questions about the plaintiffs' lawyers' fiduciary duties. By itself, a statement in the settlement agreement that the defendant shall not be responsible for the fees or expenses of the LRA is unproblematic. The defendant has an obvious interest in keeping the total cost of the settlement as low as possible. Consequently, the defendant may decline to pay the expenses of lien resolution while also requiring that any relevant liens be properly resolved.

What if a group settlement agreement specifies that an LRA's fees will be paid from the total "Settlement Sum"? If interpreted to mean that the LRA's fees are to be paid "off the top" of the gross settlement amount, this provision would result in all settling clients sharing in the cost of the LRA in proportion to their gross settlement amounts, and without regard to whether a particular client had any qualifying liens to be resolved. Admittedly, some advisory opinions permit separate charges to the clients

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for example, an agreement under which the defendant pays $900,000 in gross settlements and pays $100,000 in LRA fees arguably benefits the plaintiffs' attorneys at the expense of the clients relative to an agreement that paid $1,000,000 total in gross settlements and left the LRA fees to be paid pursuant to the default rule set out in the Ohio Ethics Opinion.

115. *See* Maryland State Bar Ass'n Comm. on Ethics, Ethics Docket 01-01 [hereinafter Md. Ethics Opinion 01-01]; Maryland State Bar Ass'n Comm. on Ethics, Ethics Docket 02-02 [hereinafter Md. Ethics Opinion 02-02]; NYCLA Prof'l Ethics Comm., Ethics Op. 739 (July 10, 2008) [hereinafter NYC Ethics Opinion 739]; Ohio Ethics Opinion 2009-9, *supra* note 114.

116. The consensus of the two most recent ethics opinions is that fees for outsourced lien resolution services may properly be charged against the net proceeds of a contingent fee personal injury client *only* if *all* of the following conditions are met:

> (i) The original retainer agreement with the client provides that the attorney may engage an outside firm for lien resolution and that the fee for that service will be charged as a disbursement.
>
> (ii) A valid lien against the individual client's settlement proceeds is determined to exist.
>
> (iii) The total of (a) the fee charged by the lien resolution firm plus (b) the lien amount paid by the client is less than the original, pre-negotiated lien amount, resulting in a documented, net financial benefit to the individual client.
>
> (iv) The amount charged to the client for the lien resolution service is the actual amount charged by the provider of that service and is reasonable.

See Ohio Ethics Opinion 2009-9, *supra* note 114 at 3; NYC Ethics Opinion 739, *supra* note 115, at 4–7. It is not clear that either of the Maryland ethics opinions would permit fees for outsourced lien resolution services to be charged to the clients even under these circumstances. *See* Md. Ethics Opinion 02-02, *supra* note 115; Md. Ethics Opinion 01-01, *supra* note 115. We are not aware of any applicable ethics opinion of a state bar or ABA committee that states a view contrary to those set forth in the Maryland, New York County, and Ohio ethics opinions.

for LRA fees when certain conditions are met.[117] In a group settlement of any size, however, these conditions are unlikely to be met by all participating claimants. For example, some claimants may have qualifying liens that require resolution by the LRA, but others may not. Some claimants may have signed retainer agreements with their attorneys that permit LRA fees to be taken "off the top" but some may not have.[118] Consequently, a blanket settlement provision requiring that LRA fees be defrayed by all settling claimants is likely to be objectionable.

By negotiating a settlement agreement that requires at least some clients to pay LRA fees that the plaintiffs' attorneys seem to be obligated to pay themselves under the default rule, do the plaintiffs' attorneys breach a fiduciary duty to those clients?[119] To be sure, the provision regarding LRA fees effectively increased the plaintiffs' attorneys' revenue from the overall settlement, and did so at the expense of their clients. But under the analysis of this Article, that fact alone is not determinative. We argued in Part II.A that it is *not* a breach of an attorney's fiduciary obligations to a client to challenge a court's *sua sponte* order reducing the attorney's contractual fee, even though a successful challenge would benefit the attorney at the expense of the client. We similarly contended in Part II.B that a contingent-fee attorney's fiduciary obligations do not mandate, other things being equal, that the attorney file the client's case in the jurisdiction with court rules that provide the client the greatest reduction in the attorney's contractual fee.

Is the conflict between the clients and their attorney that is created by the settlement agreement provision regarding the payment of LRA fees distinguishable from the potential attorney-client conflicts discussed in Parts II.A and II.B? We believe that it is. For us, the critical question is whether the potential conflict involved an increase in the client's total attorneys' fees and expenses *above* that agreed to in the client's original retainer agreement with the attorney. The scenarios discussed in Parts II.A and II.B involved potential reductions in attorneys' fees *below* those agreed to when the client originally retained the attorney. The controversial

117. *See supra* note 116.

118. In most group settlements, the LRA is retained solely to resolve liens held by governmental authority third-party payors, such as Medicare, Medicaid, the U.S. Department of Veterans' Affairs, the U.S. Department of Defense, TRICARE, and the Indian Health Services. *See, e.g.*, Vioxx Master Settlement Agreement, *supra* note 111, at §§ 12.1.2, 17.1.34. In most group settlements, a substantial portion of the covered claimants will not have liens from any of these entities. Any liens held by private health insurers are typically addressed in the settlement agreement solely though a promise by the settling client, and sometimes also the plaintiff's attorney, to independently resolve any such liens and to indemnify the defendant against any residual liability. *See, e.g.*, *id.* § 12.1.5.

119. Such a provision in a settlement agreement would be of questionable enforceability to the extent that it would result in the payment of attorneys' fees and/or expenses by the client that are considered excessive or unethical. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(a), (c) (2010); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(a), (b), (d) (2005). For purposes of this Article, however, we can put to one side the question of whether, in light of the default rule, such a provision in the settlement agreement would be enforceable if challenged.

actions taken by the plaintiffs' attorneys in those contexts, even if successful, would not result in revenue to the attorneys in excess of those specified in the original retainer agreement; they would simply ensure that the attorneys received that contractual amount. Language in the settlement agreement specifying that LRA fees be paid from the total "Settlement Sum," however, if interpreted to mean that the LRA's fees are to be paid "off the top" of the gross settlement amount, would increase the revenue to the plaintiffs' attorneys above the amount to which they would be entitled under the original contract with the client or under the default rule. In addition to receiving the contractual fees plus the contractual expense reimbursements, this language would have the attorneys also receive reimbursement from their clients for a substantial portion of the LRA fees, revenue to which the attorneys are not entitled under either the original retainer agreement or the likely default rule.[120]

It is further useful to consider how language regarding the payment of LRA fees that is favorable to the plaintiffs' attorneys might come to be included in a settlement agreement. One can only speculate about the underlying facts in any given situation, given the confidentiality of settlement negotiations. Nonetheless, as previously mentioned, it is not surprising that the defendant would want to make explicit that it would be paying no part of the LRA fees. Equally surely, however, the defendant has no interest in whether the claimants, their counsel, or some combination of the two will be paying those fees. How then might language that is favorable to the plaintiffs' attorneys regarding the payment of LRA fees come to be included in a settlement agreement? One possibility is that the favorable language is provided by the defendant, as part of a clumsy attempt simply to protect itself from any responsibility for those fees, but without regard to the implications for the plaintiffs' attorneys of the precise language provided.[121]

Another possibility is that the plaintiffs' attorneys suggest the language, using their control of settlement negotiations with the defendant to attempt to contract around the likelihood that payment of the LRA's fees are the responsibility of the attorneys and not of their clients. But, of course, the defendant could not be expected to be a zealous bargaining agent on behalf of the clients against their own attorneys on this issue, since the defendant

120. We term this the "likely" default rule because only three jurisdictions have explicitly considered the issue. *See supra* notes 115–16 and accompanying text. The fact that the three ethics opinions to date are substantially consistent in their holdings makes it more likely, in our view, that the remaining jurisdictions would follow their lead on this issue.

121. Under this scenario, the plaintiffs' attorneys could not be accused of using their settlement negotiations with the defendant to secure an improper benefit for themselves at the expense of their clients, since the plaintiffs' attorneys did not propose the language to the defendant. Any breach of fiduciary duty on the part of the plaintiffs' attorneys would arguably arise subsequently if they sought to pass the LRA fees on to their clients in violation of the applicable default rule. Again, the defendant should be entirely indifferent as to whether the plaintiffs or the plaintiffs' attorneys ultimately pay the LRA fees so long as the defendant remains free from any responsibility to pay the fees.

simply has no reason to care whether the clients or their counsel are ultimately responsible for paying the LRA's fees.

An analogous situation has been discussed extensively in the literature on settlement bargaining over class counsel's fees in class actions. When a defendant controls the amount class counsel is paid, the defendant can offer "red-carpet treatment on fees" in return for favorable terms elsewhere.[122] In other words, the defendant can trade higher fees for lower relief for the class. Class counsel is willing to play along because class counsel receives the fee, not the relief. Courts and commentators have highlighted this conflict repeatedly.[123] Professor John C. Coffee has framed it as a problem of "structural collusion" in which class counsel and a defendant naturally settle on terms that are good for the negotiators but bad for the class.[124]

Structural collusion of a similar sort would occur if plaintiffs' attorneys attempted to use settlement negotiations to "contract around" the fee and expense provisions in their retainer agreements with their clients. The plaintiffs' attorneys want the increased revenue. Because putting some (or all) of the responsibility for the LRA's fees on the plaintiffs, rather than their attorneys, costs the defendant nothing, the defendant is presumably happy to offer the plaintiffs' attorneys "red-carpet treatment on LRA fees" in return for other things, such as a smaller settlement fund, a later funding date, or a higher participation threshold.[125] An exchange that is mutually

122. Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991); *see also In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 728 (3d Cir. 2001).

123. Multiple judicial decisions have condemned the conflict. *See, e.g.*, Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1327 (9th Cir. 1999) ("A client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight."). Academic commentary likewise abounds. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 (1986) ("Often, the plaintiff's attorneys and the defendants can settle on a basis that is adverse to the interests of the plaintiffs. At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees."); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 42–43 (2002) (discussing the various forms sweetheart deals can take in class actions and mass tort cases); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145 (2001) (describing class action practice as "a world in which lawyers make fabulous fees for achieving very little," while "defendant-corporations make sweetheart deals to dispose of serious liability at bargain-basement rates"); Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1016 (2008) ("Self-interested class counsel are willing to settle on the cheap in exchange for generous attorneys' fees."); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 933 (1996) (observing that class counsel can "entice defendants to reduce their total payments by providing counsel with generous fees but affording inadequate compensation to the class").

124. John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 647–48 (1987) (describing how opportunities for structural collusion arise in class actions); Coffee, Jr., *supra* note 123, at 718.

125. The defendant might be less happy to give the plaintiffs' attorneys the self-serving language regarding LRA fees if that language were likely both to be held unenforceable and to render the entire settlement agreement unenforceable. However, mass tort settlement agreements typically include a provision that provides that the remainder of the agreement will be enforceable even if any provision is determined to be "invalid, illegal, or

advantageous for the negotiators occurs naturally. When secrecy makes it difficult for non-participants to monitor negotiations, as typically is true in mass tort settlements, the conflict is especially "pronounced."[126] Only persons not at the bargaining table are harmed, and in the context of mass tort settlements, those persons typically include the plaintiffs.

It is important to note that if plaintiffs' attorneys use their control of settlement negotiations with the defendant to attempt to contract around the likelihood that payment of the LRA's fees are the responsibility of the attorneys and not of their clients, they potentially cost their clients more than the amount of those fees. Although the defendant does not independently care whether the plaintiffs' attorneys or their clients pay the LRA's fees and might eventually agree to whatever the plaintiffs' attorneys request on this issue, we also assume that the defendant would rationally withhold its consent until offered a concession. Because the negotiations occur in secret, one can only speculate on what, if anything, the claimants in such circumstances might give up in order for their attorneys to secure the defendant's consent to language that would provide the plaintiffs' attorneys revenue in excess of that provided in the attorney-client retainer agreements.[127] It is certain, however, that by expressing their desire for the defendant's help, the plaintiffs' attorneys give the defendant greater leverage in the settlement negotiations. Presumably, that leverage will be employed.

In sum, there is no reason for issues involving the allocation of the gross settlement proceeds between the plaintiffs and their attorneys to be included in the settlement negotiations between the plaintiffs' attorneys and the defendant. Matters of interest only to claimants and their lawyers should be addressed in negotiations in which only they are involved. The focus of the defendant in settlement negotiations should be on their liability to the claimants and other matters in which the defendant has a legitimate interest, such as the scope of the release. Similarly, the plaintiffs' lawyers should enter into settlement negotiations with a single goal: getting the most money possible for their clients. By maximizing the total recovery,

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unenforceable in any jurisdiction." And such a "severability" provision obviously gives a defendant much less reason to be concerned about the enforceability of the provision regarding the payment of LRA fees.

It should also be noted that if language regarding LRA fees in a settlement agreement is unenforceable insofar as that language would increase the plaintiffs' attorneys' revenue beyond that permitted by the client's contract with the attorney or permitted under the likely default rule, plaintiffs' attorneys have less incentive to seek (or sign off on) such language. Of course, that incentive may be diminished further if financial penalties, in addition to the foregone revenue increase, would result from a successful challenge to the provision. In at least some jurisdictions, such penalties are available when an attorney is found to have breached a fiduciary duty to a client. *See, e.g.*, Burrow v. Arce, 997 S.W.2d 229, 232 (Tex. 1999). In addition, of course, the attorney faces negative publicity and a likely loss of good will in the event of such a challenge, whether or not it is ultimately successful.

126. *In re* Hager, 812 A.2d 904, 912 (D.C. 2002).

127. If a client were to sue the plaintiffs' attorneys for breach of fiduciary duty with regard to the LRA fees language in the settlement agreement, we would expect the client to be able to learn the origin of that language in discovery.

contingent-fee lawyers also maximize their fee. The harmony of interest between the lawyer and the client is substantial. The lawyers' fees and expense reimbursements also fall out automatically. When the defendant pays the agreed sum, the lawyer receives the expense reimbursements and percentage fee agreed to in the engagement contract. When plaintiffs' lawyers invite, or permit, the defendant to be involved in matters of interest only to the claimants and their lawyers, they inevitably and unnecessarily provide the defendant an opportunity to play those attorneys off against their own clients and thereby to undermine the adequacy of the plaintiffs' representation.

CONCLUSION

In this Article we have undertaken a preliminary exploration of the boundary that separates matters to which lawyers' fiduciary duties apply from other matters to which they do not. By examining three recent puzzles that arise in connection with the representation of plaintiffs by lawyers who charge contingent fees, we have sought to identify a principled basis for distinguishing an attorney's self-interested conduct that violates the fiduciary duty from similar conduct that is a proper assertion of a contractual payment right. We have proposed that one begin by examining the reasonable expectations of clients and attorneys, and that the attorney-client retainer agreement therefore trumps the common law fiduciary duty on matters to which the agreement properly applies. Many questions remain, however, including how to decide whether an action that enriches a lawyer connects in an appropriate way to an enumerated contract right and, more generally, how far lawyers can go when using contractual provisions to carve out areas in which they may consider their own interests. We hope that the tentative thoughts set out in this Article might persuade others of the importance of the issues involved, and encourage further research and discussion.