



The President's Forum "CONTINGENCY FEE SHARK"

By Tim Gresback

In one of my first civil jury trials in Coeur d'Alene, an insurance defense lawyer called me a "contingency fee shark" during closing argument. I did not respond at the time ten years ago, but I will now.

I often ask myself if the contingency fee is in the public interest—or just my self-interest. I am willing to adopt a fair new civil compensation system, but how would it work? If we abandon the contingency fee, who will decide if resources should be poured into a case to prove it? From where would those resources come?

The contingency fee is well established in our law. Recently the Fourth Circuit Court of Appeals in *In Re: Abrams & Abrams*, Opinion No. 09-1283 (May 18, 2010), rejected a district judge's attempt to nullify the spirit of a contingency fee contract. In *Abrams* a legal team obtained an \$18 million personal injury settlement for Mark Pellegrin, who was catastrophically disabled when a drunk driver ran over him. Mark's father and guardian advocated that the 1/3 contingency fee was fair and fully earned by the legal team. The district judge, by contrast, tried to slash the fee to \$300 per hour.

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We are often confronted by judges similarly hostile to the contingency fee. As an organization we must educate our judiciary with the Fourth Circuit's fundamental premise: the victim of wrongful conduct usually cannot afford to hire an attorney. As the *Abrams* Court stated: "Sadly, a plaintiff sometimes has little to offer a lawyer other than his personal plight." The Fourth Circuit went on to say that "contingency fees are an acknowledged feature of our legal landscape, approved by legislative and judicial bodies alike, that help secure for the impecunious access both to counsel and to court."

Judges hostile to contingency fees do not really understand what we do. We forget to incessantly point out the risks we take—or the money we spend—along the litigation highway. Instead, my guess is that many judges whose law practice was not like ours look at the bottom line and say: "This lawyer will make more money on this case than I did in a whole year of hard private practice. The case is easy. The liability is obvious and the damages profound. It is jackpot justice for the lawyer. The system is unjust and this is not fair."

Those hostile to the contingency fee, however, are hardly eager to come to our financial rescue when a jury finds for the defense in a close case. Opponents criticize our wins as easy but ignore our losses. Besides, when we lose, critics can simply quip: "You should never have taken the case in the first place."

Those eager to slash a contingency fee ignore a fundamental factor: risk. Until you have lived with the financial risk of litigation in the pit of your stomach—until you've mortgaged your home to fund the litigation machine—it is probably hard to understand. Almost all lawyers work hard. However, we often toil for a year (or much more) without real income. Psychologically, this risk eats at us. We can usually handle it, but I am particularly offended by those who have never walked in my shoes but conveniently explain what an easy walk I just completed. If critics want to slash contingency fees they must propose a better alternative: I've looked, but have not found one. If the answer for some is to decrease our top-end on successful cases, then fairness demands that our costs and time on the bottom-end get covered on unsuccessful cases. We cannot have fair top-end reform without simultaneous bottom-end reform.

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I am not suggesting that every signed contingency fee is immune from legitimate criticism or modification. We often complain about adhesion contracts from insurance companies. Our contingency fee contracts, however, are likewise adhesion contracts. Our best lawyers reduce their fee if the case turns out to be extremely easy. For example, a lawyer overreaches when taking a third of a \$100,000 policy on a severe injury, clear liability car crash case. In the vast majority of cases, unfortunately, we have no concrete idea if it will be "easy" until the case is over. An unpredictable element of risk usually looms until the check clears. Call me a shark if you must, but acknowledge that the contingency fee keeps the courthouse doors open.