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Ethics and the Reasonableness of Contingency Fees: A Survey of State and Federal Law Addressing the Reasonableness of Costs as They Relate to Contingency Fee Arrangements

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Comments

ETHICS AND THE REASONABLENESS OF CONTINGENCY FEES: A survey of state and federal law addressing the reasonableness of costs as they relate to contingency fee arrangements

INTRODUCTION

Benjamin Franklin once wrote, "God works wonders now and then. Behold! a lawyer, an honest man."[1] Although this statement was written in the eighteenth century, the tenor of the statement still accurately reflects public opinion toward the legal profession. A recent ABA poll shows that a large percentage of Americans view attorneys as unethical, uncompassionate, and greedy.[2] Complaints of fee disputes, lack of client relations and communication problems are the most common grievances claimed by the public.[3] While lawyers debate ways to address these problems and still maintain firm viability and availability of legal services, public opinion is being fueled by reports that lawyers make far too much money.[4] A balance must be found between the attorney's fee and the client's needs. The cost of adverse public opinion to the legal profession is enormous, not only in terms of the impact on the practicing lawyer, but on the respect for the profession as a whole.[5]

One area which frequently comes under attack is lawyers' fees, and in particular, contingency fee agreements.[6] Accusations of unreasonable-

1. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 9 (Doubleday, Doran & Company, Inc. 1928).

2. Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60.

3. *Id.* at 62.

4. *Id.* at 63.

5. *Id.*

6. Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813 (1989).

ness are frequently directed towards contingency fee agreements.[7] One of the most common complaints about contingent fees is that such agreements result in compensation that is disproportionate to the amount of work done by the attorney.[8] Extensive commentary exists concerning whether the practice of using contingency fees in the United States is ethical and whether it truly provides equal access to the courts.[9] In early American law, contingency fee agreements were not allowed because they were thought to be champertous, and thus improper.[10] However, the practice of using contingency fee agreements is now accepted throughout the United States.[11]

As the use of contingency fee agreements has grown, so has the propensity for courts to review such agreements and discipline attorneys for abuses.[12] These court decisions do not, however, answer some of the difficult questions underlying contingency fee agreements: What should the attorney's percentage encompass under a contingency fee agreement? Are paralegal expenses, legal assistant expenses, or investigator expenses covered by attorney's fees, or are they reimbursable costs which the client should bear? The problem with court decisions addressing contingency fees is that they are largely subjective[13] and do not provide adequate guidance for developing proper billing practices under a contingency fee agreement.

This comment examines and consolidates state and federal opinions concerning contingency fee questions. This comment first provides a general background of contingency fees and discusses the fiduciary and ethical obligations arising from the attorney client relationship, and how these duties bear upon contingency fee agreements. Next, it addresses generally the issue of what costs may be properly billed out to clients under contingency fee agreements and specifically whether fees for

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7. *Id. See, e.g.*, National Association of Regional Medical Programs, Inc. v. Weinburger, 396 F.Supp. 842, 848 (D.D.C. 1975) (citing Kiser v. Miller, 364 F.Supp. 1311, 1315 (D.D.C. 1973), modified on other grounds, *sub nom.* Kiser v. Huge, 517 F.2d 127. (D.C. Cir. 1975) (en banc)).

8. *Id.* at 825.

9. John F. Grady, *Some Ethical Questions About Percentage Fees*, 2 LITIG. NO. 4, Summer 1976, at 20; Philip H. Corboy, *Contingency Fees: The Key to the Courthouse*, 2 LITIG. NO. 4, Summer 1976, at 27. *See also*, Jay, *supra* note 6, at 813 (arguing that "[e]limination of percentage contingencies by regulation would be justified in a wide range of cases" because of the propensity for violation of the fiduciary relationship).

10. ABA Standing Comm. on Ethics and Professional Responsibility, Informal Op. 86-1521 (1986) (offering alternatives to contingent fees).

11. *Id.*

12. Jay, *supra* note 6, at 827. *See also* Lester I. Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 39 (1989).

13. *In re* Swartz, 686 P.2d 1236 (Ariz. 1984).

paralegals and investigators are properly billed as costs under contingency fee agreements. Because Wyoming, like many states, has no specific law addressing these questions, this comment explores the available decisions with emphasis on how they pertain to Wyoming. Finally, this comment compares costs under fee-shifting statutes with costs in other situations and analyzes what expenses should be characterized as costs under contingency fee agreements.

BACKGROUND

The contingent fee is, in essence, a financing device enabling a client to assert and prosecute a claim he or she would otherwise be unable to pursue.[14] The contingent fee agreement limits the client's exposure to loss, but such agreements also limit the client's potential gain.[15] Contingency fee agreements are typically used by plaintiff's lawyers in civil cases,[16] although they may be used in a variety of other situations. Aside from the specific prohibitions within the Model Rules of Professional Conduct [Model Rules] and the Model Code of Professional Responsibility [Model Code],[17] there are few restrictions bearing upon the kinds of cases in which they may be used.[18] Nevertheless, many requirements must be met before a contingency fee agreement is valid.

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14. Brickman, *supra* note 12, at 43 n.59.

15. *Id.*

16. 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING, § 1.5:401, at 118 (Supp. 1992).

17. The 1989 MODEL RULES OF PROFESSIONAL CONDUCT, [hereinafter MODEL RULES], and the 1980 MODEL CODE OF PROFESSIONAL RESPONSIBILITY, [hereinafter MODEL CODE] are the model ethical codes for attorneys promulgated by the American Bar Association. The ethical codes do not carry the force of law. However, they are the standards for imposing attorney discipline within the legal profession, and all states have adopted some version of these codes. Although most states use a version similar to the MODEL RULES, many states still have codes patterned after the MODEL CODE. Therefore, in this comment, references will be given to both ethical codes whenever possible.

18. 1 HAZARD & HODES, *supra* note 16, at 113. The MODEL RULES state:

> A lawyer shall not enter into an arrangement for, charge, or collect:
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> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
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> (2) a contingent fee for representing a defendant in a criminal case.

MODEL RULE 1.5(d).

The MODEL CODE states: "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee from representing a defendant in a criminal case." MODEL CODE DR 2-106; "[I]n criminal cases the rule is stricter because of the danger of corrupting justice. The second part of18.12 § 542 of the Restatement [of Contracts] reads: 'A bargain to conduct a criminal case . . . in consideration of a promise of a fee contingent on success is illegal . . . .'" DR 2-106(C) n.90 (citation omitted).

First, the Model Rules require that contingency fee arrangements be in writing and explain how the fee is to be calculated.[19] Second, a fee contract must meet the usual requirements of contract law as well as the special rules of § 29A of Restatement (Third) of the Law Governing Lawyers [Restatement].[20] Third, contingency fee agreements are always required to comply with the provisions of the law of agency and the ethical codes concerning fiduciary duty.[21] Even if a fee agreement meets all the above restrictions, it will be unenforceable if it provides for an unreasonably large fee.[22]

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19. MODEL RULE 1.5(c) provides guidance for drafting contingency fee agreements:

> A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including *[1] the percentage or percentages that shall accrue to the lawyer in the event of settlement, [2] trial or [3] appeal, [4] litigation and other expenses to be deducted from the recovery and [5] whether such expenses are to be deducted before or after the contingency fee is calculated.* Upon conclusion of a contingent fee matter the lawyer shall provide the client with written statement stating the outcome of the matter and if there is a recovery showing the remittance to the client and the method of its determination.

MODEL RULE 1.5(c) (emphasis added).

MODEL CODE Canon 13 states: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

20. RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 50, at 241 (Tentative Draft No. 4, 1991) [hereinafter RESTATEMENT DRAFT NO. 4] (citing RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 29A); The requirements stated in RESTATEMENT § 29A are:

> (1) A contract between a lawyer and client concerning the basis or rate of the lawyer's compensation or other matters involving the client-lawyer relationship may be enforced by either party if the contract meets other applicable requirements, except that:
>
> (a) If the contract is made after the lawyer has been retained and when obtaining a different lawyer would significantly inconvenience the client but before the lawyer has finished providing services, the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client; and
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> (b) If the contract is made after the lawyer has finished providing services, the client may avoid it if the client was not informed of facts needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the contract.
>
> (2) A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.

RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 29A, at 118 (Tentative Draft No. 5, 1992) [hereinafter RESTATEMENT DRAFT NO. 5].

Note that references are made throughout this comment to the RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS, tentative drafts four and five. These drafts have not been adopted by the American Law Institute, and do not represent the position of the Institute on any of the issues with which they deal. However, the Restatement provides a guidepost for determining the current status of many of the issues within this comment, and will be used in that context.

Action taken by members of the ALI with respect to either of the drafts may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each annual meeting.

21. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 50, at 241.

22. The MODEL RULES and the MODEL CODE, along with all state rules of professional con-

The question of what constitutes an excessive fee is particularly troublesome.[23] The Model Code states that "a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[24] The Model Rules are less definitive, merely stating that a lawyer's fee must be reasonable.[25]

The disciplinary rules apply equally to excessive contractual and contingency fees, and all states have a provision against charging excessive fees in their rules of professional conduct.[26] Attorneys who charge excessive fees are subject to discipline by the court of jurisdiction and sanctions by the Bar of jurisdiction.[27] Measuring the reasonableness of compensation is difficult when an attorney assumes a risky case on a contingency basis. Contingent fee agreements, by their very nature, shift a great deal of risk onto the representing attorney; if the case fails, the attorney receives no compensation whatsoever.[28] Questions of whether an attorney has charged a clearly exorbitant fee and what is the appropriate sanction for such conduct are not easily answered since every disciplinary proceeding concerning excessive fees must be determined on the particular facts of the case in question.[29] The inconsistent decisions assessing fee agreements make the process of determining whether the agreements are proper a particularly vexatious one.

Wyoming has adopted guidelines for using contingency fee agreements,[30] and many states have similar provisions.[31] However, these guide-

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duct, prohibit attorneys from charging excessive fees. MODEL CODE DR 2-106(A); MODEL RULE 1.5(a).

23. *In re* Swartz, 686 P.2d 1236 (Ariz. 1984).

24. MODEL CODE DR 2-106(A).

25. MODEL RULE 1.5(a).

26. It is important to note that some states take a somewhat different approach to regulating attorney's fees than the MODEL CODE or the MODEL RULES. However, the ethical obligations of attorneys to clients under fee agreements transcend the practices of all states, and thus the variances in enforceability are not important for purposes of this comment.

27. *See, e.g.*, The Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 115 (W. Va. 1986); Gagnon v. Shoblom, 565 N.E.2d 775, 777 (Mass. 1991). *See also* Valerie Schulz, *Lawyers' Claims for Compensation*, 5 GEO. J. L. ETHICS 157 (1991).

28. Jay, *supra* note 6, at 815.

29. *In re* Swartz, 686 P.2d 1236 (Ariz. 1984).

30. RULES GOVERNING CONTINGENT FEES FOR MEMBERS OF THE WYOMING STATE BAR.

31. Several states have court rules governing contingency fee agreements that parallel the Wyoming Rules. *See, e.g.*, COLORADO STATE RULES GOVERNING CONTINGENT FEES Ch. 23.3 (1990); NEW YORK RULES OF COURT § 806.13 (1992); NEW JERSEY RULES OF GENERAL APPLICATION 1:21-7 (1992); MASSACHUSETTS SUPREME JUDICIAL COURT RULES 3:05 (1993).

Many other states have statutes that deal with isolated areas of contingency fee agreements. *See, e.g.*, ILL. REV. STAT. ch. 705, para. 505/26-1 (Smith-Hurd 1993) (maximum contingent fees and exceptions); IOWA CODE § 147.138 (1993) (regulation of contingency fees in medical malpractice

lines are generally vague and fail to address many of the intricacies of contingency fee agreements. Therefore, a close look at the attorney-client relationship, and the fiduciary and ethical duties of attorneys under contingency fee agreements must be made to determine the proper use of contingency fees. The following sections discuss how an attorney-client relationship is formed, the specific fiduciary and ethical duties that flow from such a relationship, and the application of these duties to attorneys in contingency fee agreements.

The Attorney-Client Relationship

The creation of the attorney-client relationship is an event that imposes numerous ethical and fiduciary duties on an attorney.[32] What comprises an attorney-client relationship is often difficult to determine.[33] There are no specific provisions within the Model Rules or the Model Code which set out elements enumerating when an attorney-client relationship exists. The only direct reference to the creation of the attorney-client relationship is contained in the preamble to the Model Rules.[34] While the relationship is not specifically addressed within the rules themselves, it appears that the attorney-client relationship anticipated by the Model Rules is "one based on consultation, with ultimate decision-making power allocated to client or lawyer depending on the nature of the issue."[35]

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cases); ME. REV. STAT. ANN. tit. 24 § 2961 (West 1993) (maximum percentages in medical malpractice awards); N.H. REV. STAT. ANN. §§ 507-C:8, 508:4-e (1991 & supp. 1992) (attorney must advise client of alternative fee arrangements; at settlement all costs must be approved by court); N.Y. JUD. § 474-a (McKinney 1993) (maximum percentages; computation); OHIO REV. CODE ANN. § 4705.15 (Anderson 1992); OKLA. STAT. ANN. tit. 5 § 7 (West 1993) (contingency fee agreement cannot exceed 50%); OR. REV. STAT. § 9.400 (1992) (contingency fee agreement shall be in writing, shall explain terms, and shall contain provision allowing client to rescind within 24 hours of signing); TEX. GOV'T CODE ANN. § 82.065 (contingent fee must be in writing).

32. *See, e.g.*, RESTATEMENT DRAFT NO. 5, *supra* note 20, ch. 2 Introductory Note at 85 ("The lawyer is subject to duties of care, loyalty, confidentiality, and disclosure, duties enforceable by the client and through disciplinary sanctions). *See also* RESTATEMENT DRAFT NO. 5, *supra* note 20, § 28 and cmt. b.

33. Ronald I. Friedman, *The Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209 (1986).

34. The preamble to the MODEL RULES states:

> [F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality . . . , that may attach when the lawyer agrees to consider whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

MODEL CODE, Preamble.

35. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.3, at 157 (1986). *See also* Model Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representa-

The approaches utilized in evaluating the existence of an attorney-client relationship are varied. Some courts have held that an attorney-client relationship is formed when an attorney and a client[36] enter into a contract for legal services.[37] These courts apply the law of contracts.[38] Other jurisdictions have held that an attorney-client relationship exists whenever a client seeks advice and the attorney renders such advice.[39] Regardless of what approach is utilized, the expectation of the parties governs.[40]

The Restatement has outlined more specific guidelines for determining when an attorney-client relationship is formed.[41] Section 26 states:

> A relationship of client and lawyer arises when:
> (1) A person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and
> (2) (a) The lawyer manifests to the person consent to do so, or
> (b) fails to manifest lack of consent to do so, when the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services, or
> (c) a tribunal with power to do so appoints the lawyer to provide services.[42]

These criteria are based on a traditional view of attorney-client relations,[43] and the provision assumes the relationship is a consensual one.[44] This assumption exists because the client's consent is generally required before

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tion . . . and shall consult with the client as to the means by which they are to be pursued.") The MODEL CODE has no comparable provision.

36. A "client" within the context of an attorney-client relationship is generally defined as "one who employs and retains an attorney or counselor to manage or defend a suit or action to which he is a party, or to advise him about some legal matter." Toulmin v. Becker, 124 N.E.2d 778, 783 (Ohio Ct. App. 1954).

37. Friedman, *supra* note 33, at 214 (citing State Bar v. Jones, 281 So. 2d 267 (1973)).

38. *Id.* at 214.

39. Committee on Professional Ethics & Conduct of the Iowa State Bar Association v. Wunschel, 461 N.W.2d 840, 845 (Iowa 1990).

40. Hecht v. Superior Court, 237 Cal. Rptr. 528, 531 (1987) ("[I]t is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship."). The court reviewed the conduct of the parties, using a fact-based analysis.

41. RESTATEMENT DRAFT NO. 5, *supra* note 20, § 26.

42. *Id.*

43. RESTATEMENT DRAFT NO. 5, *supra* note 20, § 26 cmt. c.

44. *Id.*

the lawyer may represent the client.[45] Intent that the lawyer act as a representative to the client may be inferred from a variety of situations giving rise to an attorney-client relationship.

However, the existence or non-existence of compensation has no bearing on whether an attorney-client relationship arises.[46] The relationship has been held to exist although no compensation has been discussed or paid between the attorney and the client.[47] Although the compensation need not be specifically discussed between attorney and client, any fee agreement that arises, whether express or implied, must be reasonable in order to be valid.[48] "The basic principle in interpreting a contract between a client and lawyer is that the contract is to be construed as a reasonable client, considering the contract in the circumstances in which it was made, would have construed it."[49] Thus, every aspect of the contract must meet the reasonableness test.[50]

The query into reasonableness is often a difficult one because in fee arrangement situations the client is invariably at a disadvantage.[51] This impairment is derived from the simple fact that clients are typically not as sophisticated in bargaining for services as lawyers are.[52] The disparity be-

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45. *Id.*

46. Adger v. State, 584 P.2d 1056, 1059 (Wyo. 1978). The Wyoming Supreme Court held that where an attorney intended to withhold representation of the defendant who was appealing a conviction of assault with deadly weapon, attorney-client relationship had been formed even though attorney had never made a formal appearance for the defendant, or even formally agreed to represent her. Payment was not a requisite condition to the relationship, as the relationship could be implied where the advice and help of a lawyer was sought and received. *Id.*

47. Hecht, *supra* note 40, at 565. An attorney-client relationship was formed even though the plaintiff had never paid, or been requested to pay, any fees. This was because "the payment of attorney fees does not itself determine the attorney-client relationship, but is only one indicia." *Id.* (quoting Laskey, Haas, Cohler & Munter v. Superior Court, 218 Cal. Rptr. 205 (1985)). *See, e.g.*, Friedman, *supra* note 33, at 209. ("One thing which does seem clear is that lack of compensation is wholly irrelevant to the issue."). For a list of cases demonstrating the proposition see *Id.*, at n.15. *See also*, Adger v. State, 584 P.2d 1056 (Wyo. 1978).

48. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 51.

49. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 50 cmt. d. The Comment emphasizes that the principle that attorney-client contracts should be construed against the attorney "recognizes that lawyers usually draft client-lawyer agreements, are usually more familiar than clients with contact law and legal representation, and owe a fiduciary duty to their clients." *Id.* at 244.

50. The many ways the concept of reasonableness affects contingency fee agreements will be discussed throughout this comment. Reasonableness is the constant factor in any analysis of fee agreements.

51. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 cmt. d at 206.

52. Lynn E. Busath, Note, *The Contingent Fee: Disciplinary Rule, Ethical Consideration, or Free Competition,?* 1979 UTAH L. REV. 547, 551 n.27 (1979) (citing Christensen, *Advertising by Lawyers*, 1978 UTAH L. REV. 619 (1978)). Some commentators attribute the lack of information concerning legal fees to the restrictions on lawyer advertising. The contention is that these restrictions inhibit the client's ability to obtain information about legal services and common fees charged for legal services. *Id.*

tween attorneys and clients places attorneys in a superior position at the outset of the agreement. This position is contrary to the very duties that are inherent the attorney-client relationship, especially the duty of loyalty.

The attorney-client relationship in the United States is founded on total loyalty to the client and the client's interests.[53] An attorney's loyalty is tested when negotiating and entering into fee arrangements with clients. Attorneys are involved in an unavoidable conflict of interest in fee arrangements—the conflict between providing the client with services at a reasonable fee and ascertaining compensation from the client.[54] Moreover, "a lawyer must always counsel the client as to the fee agreement that is most suitable to the client, even if such an agreement would not maximize the attorney's economic position."[55] Attorney-client agreements are construed with the disparity between lawyer and client in mind.[56]

Contracts involving such an inherent conflict of interest are interpreted against the drafter in accordance with contract principles.[57] The attorney (drafter) has an obligation to assure the client the opportunity to choose which method of payment is most responsive to the client's needs.[58] "The client should be fully informed of all relevant facts and the basis of the fee charges, especially in contingent fee arrangements."[59]

The duties and obligations discussed within the preceding sections are derived from the variety of relationships embodied within the term "attorney-client relationship".[60] Duties arise from the agency relationship between lawyer and client, from the contractual relationship, and from the ethical codes. When dealing with fee arrangements, however, the two duties that are the most important in assessing what is reasonable are the fiduciary duties derived from the agency relationship and the ethical duties derived from these principles and codified within the Model Rules and the Model Code.

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53. WOLFRAM, *supra* note 35, § 4.1 at 146.

54. *See, e.g.*, MODEL RULE 1.7(b) and 1.7(b) cmt 5.

55. Jay, *supra* note 6, at 819.

56. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 cmt. d, at 206 (citing RESTATEMENT (SECOND) OF CONTRACTS § 208 (1976)). *See also* RESTATEMENT DRAFT NO. 5, *supra* note 20, § 29A(2).

57. Shaw v. Manufacturers Hanover Trust Company, 499 N.E.2d 864 (N.Y. App. 1986). Oregon State Bar Association Board of Governors, Ethical Op. 199-124.

58. MODEL RULE 5.1 cmt. 3. RULE 5.1 states that "[w]hen there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications." *Id.*

59. *Shaw*, 499 N.E.2d 864, 866 (1986).

60. *See supra* note 32; *see also* Friedman, *supra* note 33 .

1. Fiduciary Duty

Attorneys are under fiduciary obligations to their clients.[61] A lawyer has "the utmost duty of fidelity to the client and the client's interests, in effect an unalloyed duty of loyalty."[62] Lawyers are agents of the client, and thus their actions are governed by the law of agency as derived from the law of contract.[63] As agents, lawyers are bound by specific duties which require them to look out for the best interests of their clients. The duties owed to clients are even greater than those owed under the general law of contracts.[64] These obligations direct attorneys to represent their clients zealously,[65] to operate fairly and in good faith,[66] and to keep their clients informed of all matters affecting their case.[67]

In addition to these fiduciary duties,[68] attorneys have an obligation

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61. This comment gives only a brief synopsis of the fiduciary duty owed by an attorney to his or her client. For a complete discussion of this fiduciary duty *see* Brickman, *supra* note 12.

62. L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, at 697 (1981).

63. *Id.* at 704.

64. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 cmt. b, at 207. The RESTATEMENT (SECOND) OF AGENCY states:

> A person is not ordinarily subject to a fiduciary duty in making terms as to compensation with a prospective principal. If, however, as in the case of attorney and client, the creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, it may be found that a fiduciary relation exists prior to the employment and, if so, the agent is under a duty to deal fairly with the principal in arranging the terms of the employment.

RESTATEMENT (SECOND) OF AGENCY § 390 cmt. e (1957). The policy behind this rule is to "[p]rotect clients against unfair contracts and contractual constructions." RESTATEMENT DRAFT NO. 5, *supra* note 20, § 29A cmt. b.

65. *See* MODEL RULE 1.3. cmt. 1 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). *See also* MODEL RULE 1.7, cmt. 1 ("Loyalty is an essential element in the lawyer's relationship to a client."). The MODEL CODE 6-101(A)(3) requires that a lawyer not "[n]eglect a legal matter entrusted to him."

66. *See* ABA Informal Op. 86-1521 (1986) *supra* note 10, (citing the RESTATEMENT (SECOND) OF AGENCY § 390 cmt. e (1957)); *see also supra* notes 53-55 and accompanying text.

67. *See* MODEL RULE 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."). MODEL RULE 1.4 has no direct counterpart in the MODEL CODE. However, DR 6-101(A)(3) provides that a lawyer shall not "[n]eglect a legal matter entrusted to him." MODEL CODE DR 6-101(A)(3).

See also RESTATEMENT DRAFT NO. 5, *supra* note 20, ch. 2 Introductory Note at 85 ("The lawyer is subject to duties of care, loyalty, confidentiality, and disclosure . . . .").

68. These duties include the duty to operate in good faith, the duty of loyalty, and the duty to operate diligently on behalf of the client. These are the basic duties that arise under a fiduciary relationship. See for example, THE RESTATEMENT (SECOND) OF AGENCY § 387 (1984), and MODEL RULES 1.1, 1.3, 1.4, 1.7. The RESTATEMENT DRAFT NO. 5, *supra* note 20, § 28 supports this proposition as well:

> To the extent consistent with the lawyer's legal duties and subject to the other provisions of this Restatement, a lawyer must:

not to charge clients an exorbitant or unreasonable fee.[69] A violation of this fiduciary duty is illegal[70] and also violates an attorney's ethical obligations.[71] An attorney is entitled to no more than a reasonable fee, no matter what fee is specified in the contract.[72] An attorney, as a fiduciary, cannot bind his client to pay greater compensation for his services than the attorney would have the right to demand if no contract had been made.[73]

The crux of these principles is that attorneys have a fiduciary duty, derived from their relationships with their clients, to operate fairly and reasonably in the advancement of clients' interests. The contract for services itself does not alone create the fiduciary obligation: the client's reliance on an attorney in a professional capacity imposes such obligations.[74] Thus, an attorney under contract is bound to act in a manner that is *more* than reasonable. An attorney is bound to actively look after the best interests of the client. From this obligation flows two main duties concerning fees. The first is to assure that the fee agreement is reasonable as a whole.[75] The second is to assure that the actual billing under the fee agreement is reasonable.[76]

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(1) In matters covered by the representation, act in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after disclosure and consultation;

(2) Act in the matter with reasonable competence and diligence;

(3) Safeguard the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ adversely to the client powers arising from the client-lawyer relationship; and

(4) Fulfill any valid contractual obligation to the client.

RESTATEMENT DRAFT NO. 5, *supra* note 20, § 28, at 108.

69. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 ("[A] lawyer may not charge a fee that is greater than is reasonable in the circumstances or that is unlawful.").

70. Many jurisdictions have rules or statutes regulating the percentage of a contingent fee, *see supra* note 31. Violations of these laws are also violations of MODEL CODE DR 2-106 and MODEL RULE 1.5; *See also* RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 cmt. c.

71. *See* MODEL RULE 1.5(a) and MODEL CODE DR 2-106, *supra* note 18. Note that the MODEL RULES and the MODEL CODE do not carry the force of substantive law, and while sanctions for violation may imposed by the Bar of jurisdiction legal liability cannot be imposed for a violation of these codes. However, "[c]ourts have frequently referred to and applied both the Model Code and the Model Rules to determine whether an attorney has committed malpractice and breached his obligations to his client, the court, or the opposing party; to these courts, violation of those guidelines do represent, at a minimum, evidence of negligence." Honorable Abraham J. Gafni, *The Model Rules-A Practitioner's Guide to Avoiding Malpractice*, 61 TEMP. L. REV. 1045, 1047 (1988).

72. Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973) *aff'd in part and rev'd in part sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

73. *Id.*

74. Brickman, *supra* note 12, at 48.

75. Jay, *supra* note 6, at 818.

76. *Id.*

Contingent fee arrangements create complex problems concerning the maintenance of these two fiduciary responsibilities: What percentage of recovery is reasonable compensation? What types of costs and expenses are reasonable under contingency fee agreements? How may equal bargaining power between the attorney and the client be assured? These issues, addressed throughout this comment, hinge on the reasonableness of the agreement.[77]

Reasonableness is interpreted in the eyes of the client: the client's reasonable expectation governs.[78] The validity of the contract depends on whether the client knew and understood the agreement, and how a reasonable client would have construed the agreement.[79]

The reasonableness of a contingent fee is subject to court review: violations of fiduciary duty are also violations of civil law.[80] When a court finds a contingent fee unethical or unreasonable, the attorney will be subject to disciplinary sanctions by the Bar Association of jurisdiction,[81] and the client may have legal recourse as well.[82] While no set standards exist, a key element in ascertaining the reasonableness of a fee arrangement is whether it serves the best interests of the client.[83]

The principles within the Model Rules and the Model Code emphasize the fiduciary duties of lawyers. Much of the law of professional responsibility is a codification of fiduciary doctrine.[84] The ethical duties within the codes that prevent lawyers from charging an excessive fee extend directly from the fiduciary responsibility of lawyers to their clients.[85]

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77. There is a presumption when a client enters into a contingency fee agreement that is clearly excessive that the client did not understand the agreement, and that the attorney did not fulfill his or her obligation to explain the alternatives to the client. *See* Brickman, *supra* note 12, at 51 n.88 (listing cases from various jurisdictions supporting this principle).

78. *See supra* note 20 and accompanying text, and note 49 and accompanying text.

79. *See* RESTATEMENT DRAFT NO. 5, *supra* note 20, § 29A(2) and accompanying text, and *supra* note 49 and accompanying text.

80. *See, e.g., In re* Agent Orange Prod. Liability Litigations, 611 F. Supp. 1296 (E.D.N.Y. 1985), *modified* 818 F.2d 226 (2d Cir. 1987), *cert denied*, 484 U.S. 1004 (1988); Rosquist v. Soo Line R.R., 692 F.2d 1107 (7th Cir. 1982); Gagnon v. Shoblom, 565 N.E.2d 775 (Mass. 1991); United States v. Vague, 521 F.Supp 147 (N.D. Ill. 1981), *rev'd* 697 F.2d 805 (7th Cir. 1983).

81. *Id.*

82. *Id.*

83. Jay, *supra* note 6, at 818.

84. Brickman, *supra* note 12, at 44 n.65.

85. *Id.* at 70. *See also*, ABA Standing Comm. on Ethics and Professional Responsibility Formal Op. 86-1521 (1986), *supra* note 10.

2. Ethical Duties

The purpose of the codes of legal ethics is to provide guidelines for certain fiduciary and ethical duties of lawyers in the representation of clients.[86] The Model Rules and the Model Code outline the ethical guidelines to be considered in determining whether a fee is excessive.[87] These guidelines apply to contingency fee agreements which are recognized and validated by the rules.[88]

As with any other aspect of the attorney-client relationship, the key to determining whether a contingency fee agreement is ethical is in ascertaining its reasonableness.[89] What constitutes a reasonable fee, however, is subject to many interpretations. It is clear that charging a contingent fee grossly disproportionate to any realistic risk of nonrecovery equates to charging a clearly excessive or unreasonable fee.[90] Furthermore, assessing billing costs that are not within the reasonable expectation of the client is the equivalent of charging an unreasonable fee.[91] Many commentators believe that above all, a contingent fee agreement must involve some

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86. Patterson, *supra* note 62, at 722.

87. MODEL RULE 1.5 and MODEL CODE DR 2-106 state that an attorney's fee should be reasonable. The factors to determine reasonableness are listed in both codes as follows:

(1) the time and labor required, the novelty and difficultyof the questions involved, and the skill requisite to performthe legal service properly;
(2) the likelihood, if apparent to the client, that theacceptance of the particular employment will preclude otheremployment by the lawyer;
(3) the fees customarily charged in the locality for similarservices;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by thecircumstances;
(6) the nature and length of the professional relationshipwith the client;
(7) the experience, reputation, and the ability of the lawyeror lawyers performing the services; and
(8) whether the fee is fixed or contingent.

MODEL RULE 1.5; MODEL CODE DR 2-106

These requirements indicate that the agreement must not only be reasonable on its face, but also that the actual billing under the agreement itself be reasonable as well. *See supra* notes 75-76 and accompanying text.

88. MODEL RULE 1.5; MODEL CODE EC 2-20.

89. Jay, *supra* note 6, at 818.

90. Brickman, *supra* note 12, at 70-71.

91. This proposition follows from the requirement of MODEL RULE 1.5(c) that a contingency fee agreement should state the amount of litigation and other expenses that will be deducted from the recovery. *See supra* note 19 and accompanying text. Failure to inform the client of these expenses is a violation of the MODEL RULE, as is assessing such expenses without the client's consent.

In situations where it is unclear whether the client was informed, or if there is a discrepancy of any kind within the contract, the agreement will be construed in the eyes of the client. *See, e.g.*, RESTATEMENT DRAFT NO. 5, *supra* note 20, § 29A. Additionally, the attorney will have the burden of persuading the trier of fact that the terms of the agreement were enforceable and reasonable. *See, e.g.*, RESTATEMENT DRAFT NO. 4, *supra* note 20, § 54.

element of risk to be reasonable.[92] The Rules Governing Contingent Fees for Members of the Wyoming State Bar state only that the amount of costs incurred or advanced by the attorney in representing the client should be a factor used to determine the reasonableness of an attorney's fee.[93]

While the Model Rules and the Model Codes provide some guidance, each situation is different and requires a unique analysis. The determination of whether a fee is excessive is subjective and varies from court to court, depending on the particularities of the case at hand.[94] Although each case hinges on reasonableness, the courts interpret this term in their own manner, providing no clear definition of the concept.[95]

Recovery of Costs from Client

Typically, under a contingent fee agreement, the client remains responsible for the costs and expenses of litigation, regardless of the outcome.[96] A lawyer may, however, pay court costs and expenses of litigation on behalf of the client, and require that the client reimburse the lawyer at the conclusion of the representation.[97] Part of the ethical and fiduciary duties of an attorney to avoid charging an excessive fee is the duty not to require reimbursement for unreasonable expenses.[98] The attorney is under an obligation to insure these expenses are kept to a minimum, are not duplicative, or excessive.[99]

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92. Jay, *supra* note 6, at 835 and n.64 ("'[C]ontingent fees are permitted only if the representation involves a significant degree of risk.'") (citing WOLFRAM, MODERN LEGAL ETHICS at 532, and American Bar Association, Annotated Model Rules of Professional Conduct at 55 (1984)) ("A contingent fee agreement may be unreasonable if employed in a simple case presenting no real difficulty."); *see also* Grady, *supra* note 9, at 24-25 (discussing whether mere uncertainty about the amount of compensation justifies a large percentage).

Courts have struck down contingency fee contracts in which the fee was completely unrelated to effort and no risk was involved. Anderson v. Kenelly, 547 P.2d 260 (Colo. App. 1975).

93. RULES GOVERNING CONTINGENT FEES FOR MEMBERS OF THE WYOMING STATE BAR, RULE 5.

94. *See, e.g.*, Schultz, *supra* note 27, at 159.

95. *Id.* at 157 (demonstrating the inconsistencies in opinions concerning the reasonableness of percentages in contingency fee agreements).

96. Jay, *supra* note 6, at 814.

97. MODE RULE 1.8(e). Note that the lawyer is not *required* to demand reimbursement from the client in every situation. This comment addresses what expenses the lawyer may properly request reimbursement for under a contingency fee agreement when such expenses are reimbursed by the client.

98. *See* MODEL RULE 1.5(c) *supra* note 19.

99. This duty follows from the duty not to charge an excessive fee. *See* MODEL CODE DR 2-106(A) *supra* note 19 ("A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."). The policy behind this rule is to prevent an attorney from obtaining a financial interest in the litigation, which is a violation of the ethical rules. Model Rule 1.8(j) states that:

What constitutes costs and expenses for which a client is responsible has not been fully determined.[100] The Wyoming Rules of Professional Conduct [Wyoming Rules] track the Model Rules, which merely state that, "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation . . . ."[101] The Model Code is more forthright:

> In representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, *including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence*, provided the client remains ultimately liable for such expenses.[102]

The Model Rules and the Wyoming Rules are not nearly as expansive as the Model Code. This makes it unclear whether paralegal, investigator, and other office overhead are considered costs in a fee agreement situation in Wyoming. Other states following the narrower rule face a similar problem.

Some states differentiate between costs which are expenses of litigation (also referred to as out-of-pocket costs), and those which are expenses of office overhead. Usually, out-of pocket costs are recoverable by the attorney while overhead expenses are not.[103] Secretaries' salaries and

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> [A] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.

Note that MODEL CODE DR 5-103 is substantially identical to MODEL RULE 1.8(j).

100. One of the most difficult hurdles to overcome in determining what are considered costs under a fee agreement is in deciphering the terminology in the law. Often when courts discuss *costs* they mean this term to include court costs as well as incidental expenses of litigation. However, in other instances the term will mean only court costs. Courts often use the terms *expenses*, *fees*, and *overhead* interchangeably, which makes analysis of the concepts confusing and muddled.

For purposes of this comment, the following definitions will apply: *Attorney's fees* refer to an attorney's billable time. Items of office expense are considered *overhead* which is usually factored into the standard fee. *Costs* include that which the court will tax to the losing party. The term costs generally includes court costs, witness fees and sometimes deposition fees. The term *expenses* will be used to include all expenditures actually made by the litigant in pursuing the action. These definitions are adapted from those used under federal fee shifting statutes. *See infra* text accompanying notes 162-169.

101. MODEL RULE 1.8(e)(1); WYOMING RULES OF PROFESSIONAL CONDUCT 1.8(e)(1) [hereinafter WYOMING RULES].

102. MODEL CODE DR 5-103(B) (emphasis added).

103. *In re* Estate of Muccini, 460 N.Y.S. 2d 680. (citing Spence v. Bide, 108 N.Y.S. 593)

other types of routine office expenses are generally considered overhead which are reflected through an attorney's fee.[104]

In some cases it is unclear what constitutes overhead. The Restatement Governing Lawyers states that "a lawyer may not recover from a client payment in addition to the agreed fee for such items of office expense as secretarial costs and word processing."[105] Although paraprofessional fees are not specifically enumerated within this definition, many states have included paralegal expenses, investigator expenses, and research expenses in the category of overhead costs. These decisions have precluded separate recovery from the client for these fees.

The Florida Bar Association defined overhead under the Florida rule, which tracks the Model Code, as those expenses the attorney would "routinely incur without reference to a particular matter for a particular client."[106] The Bar Association held that legal research and similar services performed by salaried nonlawyer personnel could properly be itemized and billed out, regardless of whether the paraprofessional was a salaried employee or a private contractor.[107] The Florida Bar Association also indicated that in charging for such expenses, a lawyer is not *required* to separately itemize the work of nonlawyer personnel. Instead, time for such services may be included as an element considered in arriving at the lawyer's fee in the same manner as the lawyer's normal and usual overhead is treated.[108]

A Texas court has held that an attorney's fee includes "rent, utilities, printing equipment, travel, cleaning, Bar Association dues, and every other category of expense that makes it possible to practice law in the modern world."[109] The court went on to say that expenses of support staff may be included in the above fee.[110] The court clarified that while support staff expenses may be itemized separately on the bill as nonlawyer expenses, such services should still be considered part of the attorney's fee.[111]

(out-of pocket disbursements made by an attorney, other than normal operating overhead costs, may be refunded to the attorney out of the gross proceeds of an action).

104. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 50 cmt. e.

105. *Id.*

106. Florida State Bar Ass'n Comm. on Professional Ethics, Ethics Op. 76-33, 76-38 (1977).

107. *Id.*

108. *Id.* (citing ABA Informal Op. 1333 (1975)).

109. R.N. Stine v. Marathon Oil Co., 753 F.Supp. 202, 205 (S.D. Tex. 1990).

110. *Id.*

111. *Id.*

A Louisiana court reasoned that where an attorney-client agreement provides for reimbursement of expenses, expenditures are not reimbursable unless they require an actual outlay of cash by the attorney.[112] Thus, if the expense in question is one that the attorney bore on his own before the client retained the attorney, it is not a cost for which the attorney may be reimbursed.[113]

Other courts do not specifically differentiate between types of costs and expenses but consistently exclude reimbursement for all expenses except "court costs" under contingency fee agreements. These states use a narrow interpretation of out-of pocket expenses, holding that when dealing with contingency fee arrangements, deductions for costs should only be allowed for the "pursuance of litigation". In Montana, for example, attorneys are not entitled to compensation for expenditures which do not affect "institution and prosecution of litigation."[114] The Montana Supreme Court interpreted this to preclude reimbursement for phone calls, gas expenses, travelling expenses, and credit card expenses.[115]

A Utah court has held that the authority of an attorney to incur expenses on behalf of a client is limited to expenses that are reasonable and necessary or incidental to the legitimate services performed by the attorney.[116] These include "filing fees, costs of printing briefs, costs of preparing transcripts of testimony, witness fees, costs of serving process and similar expenses."[117] The Utah court felt travelling

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112. Henican, James & Cleveland v. Strate, 348 So. 2d 689 (La. App. 1977). *See also* Coon v. Landry, 408 So. 2d 262 (La. 1981) (holding that where contingency fee agreement did not specify that client was to assume costs of litigation, and where attorney failed to properly explain to client that these costs would be billed, attorney was precluded from recovering against client for such costs).

113. *Id.* at 693. The court was referring specifically to copying expenses. Because the attorney already owned the copy machine and rented the space to accommodate it before the agreement was entered into, the client was not responsible for the costs of copying. *Id.*

114. Gross v. Holzworth, 440 P.2d 765, 770 (Mont. 1968). The court held that "[c]learly expenditures made by the appellant and the respondent which did not affect the institution and prosecution of litigation would not be awardable under the [contingency fee] contract." Because appellant failed to establish that most of the expenses in controversy were covered by the contingency fee agreement, appellant was not allowed to recover. *Id.*

115. *Id.* The court referred to these expenses as "purely personal expenses," and stated that they were "unrelated to any litigation." *Id.*

116. Skeen v. Peterson, 196 P.2d 708 (Utah 1948). The court also held that authority to incur expenses does not extend to allow an attorney to engage associate counsel at his client's expense, following a similar decision by the Second Circuit. In *Manzo v. Dullea*, the court held that fees for associate counsel could not be billed as costs, but had to be paid from the attorney's fees. Manzo v. Dullea, 96 F.2d 135 (2d Cir. 1938).

117. *Skeen*, 196 P.2d 708, 713 (Utah 1948). Note how the court has intermingled the terms costs, fees and expenses, creating unnecessary confusion within this opinion. *See* discussion *supra*

expenses, long distance expenses, and similar matters were only compensable some of the time.[118] Where such expenses are necessary or highly desirable, the client should pay them. However, if a less expensive means of accomplishing the task exists, this should be employed by the attorney.[119] Should the lawyer fail to utilize a less expensive form of the expense, then the lawyer is responsible for such expenses.[120]

Tennessee and Massachusetts courts have also held, in very early decisions, that attorneys are only entitled to recover court costs as expenses and are not allowed to recover incidental expenses.[121] What these court costs entail is still undefined in these states.

The diversity of approaches to defining costs under a contingency fee agreement makes ascertaining whether it is proper to charge paraprofessional or investigator fees as costs difficult. The decisions vary from state to state, and there is not a conclusive answer. The following section analyzes several different states' approaches to the problem of recovering paralegals and legal assistant fees in a contingency fee situation.

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note 100.

118. *Id.*

119. *Id.*

120. *Id.* The court explained that "[t]here may be many cases where it is absolutely necessary or highly desirable that an attorney incur travelling expenses, in order to serve properly the interests of his client, and in such cases the client should pay those expenses." *Id.* at 813. The court concluded that the decision of whether or not an expense was reasonable and whether or not it was necessary or proper, was "a question of fact, which should be determined by the jury or by the court sitting as trier of the facts." *Id.* Therefore the court remanded the case, leaving the question of whether the attorney's travelling expenses were compensable to the jury. *Id.*

121. Sanders v. Riddick, 156 S.W. 464, 465 (Tenn. 1913); Zuckernik v. Jordan Marsh Co., 194 N. E. 892 (Mass. 1935). In *Sanders* the Tennessee Supreme Court held that attorneys operating under a contingency fee agreement could not recover for hotel or railroad expenses incurred in attending appellate court. Because the attorneys had agreed to include the appeal as part of the fixed percentage, the court felt the attorneys had no right to recover expenses from the client for travel. The court stated:

> "The fee being on a basis fixed in advance, and to be earned by the performance of the nominated services by the attorneys, they are burdened with any expense incident to being at the place the services were to be performed. The contract contemplated that the fee should cover all services which were necessarily incidental to the proper conduct of the case and the attendance of the attorneys at that end."

Id. at 465.

In *Zuckernik*, the Massachusetts Supreme Court held that where there was an oral agreement between the client and the attorney, and reimbursement outside of "court costs" had never been discussed, the attorney was not entitled to recover traveling expenses, expenses of obtaining deeds of real estate, nor for advances to attorneys in other cities in cases which attorney could not handle personally. *Id.*

3. Paralegals and Legal Assistants

The legal community needs paralegal assistants[122] because their services defer the high cost of legal services.[123] Much of the repetitive tasks that need to be performed in the legal profession may be done by paraprofessionals instead of attorneys.[124] Services such as research, drafting pleadings and legal documents, tax work, title searches, and estate planning may be handled inexpensively and efficiently by paralegals or legal assistants, resulting in a lower cost to the client.[125] The Model Code authorizes delegation to legal assistants, so long as the work performed by legal assistants is properly supervised and is merged into the lawyer's own completed product.[126] While delegation may be proper, it is unclear whether these services should be billed out as costs under a contingency fee agreement or whether they should be absorbed as attorney's fees.

The ABA Committee on Ethics and Professional Responsibility declared in an informal opinion that these expenses were properly

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122. The American Bar Association's Standing Committee on Legal Assistants defined legal assistants/paralegals in a 1986 Official Policy Statement:

> A legal assistant is a person, qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

Continental v. Brockbank, 733 P.2d 1120 (Ariz. App. 1986).

123. Judith Gayle Wells, Comment, *The Revitalization of the Legal Profession through Paralegalism,* 30 BAYLOR L. REV. 841 (1978).

124. *Id.* at 842.

125. *Id.* at 842.

126. MODEL CODE EC 3-6 states:

> A Lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegations is proper if the lawyer maintains a direct relationship wit his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently.

MODEL CODE EC 3-6. Footnote three of EC 3-6 points out the ABA's statement in Opinion 316:

> A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen, or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings a part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client.

Id. (quoting ABA Formal Ethics Op. 316 (1967)).

The Comment to MODEL RULE 5.3 recognizes that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services." MODEL RULE 5.3.

considered part of office overhead.[127] The opinion also stated that if the charges were separately stated to the client, the client should be informed of the "legal limitations upon the personnel involved."[128]

The United States Supreme Court has not yet decided whether paralegal and legal assistants' expenses are considered costs or are included in attorney's fees under a contingency fee agreement. The Court purposefully refrained from answering that question in *Blanchard v. Bergeron*.[129] However, many state courts have held that such expenses are properly classified as attorney's fees and cannot be considered costs.

The California Supreme Court decided in 1938 that "[t]he charge . . . for [the attorneys'] services . . . must obviously be held to cover anything paid by them to their office assistants or others employed by them to perform work of a legal nature."[130] Another California court recently reinforced this position, holding that neither paralegal nor word processor expenses could be considered costs: those expenses must be absorbed by the attorney's fees.[131] The court reasoned that "[p]aralegals should be treated just like associates or other salaried professionals. Their compensation is included in the percentage fee."[132] Paralegal expenses are "items which the court believes should be absorbed as normal overhead in a percentage fee case."[133]

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127. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1333 (1975) (separate billing for services of law clerk).

128. *Id.* The opinion also stressed the importance of taking care to avoid the appearance of the unauthorized practice of law when employing such legal assistants. The client should be made aware that legal assistants are not lawyers. *Id.*

Additionally, legal assistants should be educated in avoiding the appearance of the unauthorized practice of law. Legal assistants must be properly supervised. *See* MODEL RULE 5.3, and *see also* 5.5, cmt. ("Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.").

129. 489 U.S. 87 (1989). In *Blanchard*, the Fifth Circuit held that paralegal and legal assistant fees were considered as a part of attorneys fees under a contingent fee agreement. *Id.* On appeal, the United States Supreme Court reversed the decision on other grounds and expressly declined to address the question of paralegal fees. *Id.*

130. Johnson v. California Interurban Motor Transport Ass'n, 74 P.2d 1073 at 1082 (Cal. 1938). This decision dealt with a retainer fee arrangement and not a contingency fee arrangement, but it shows California agrees that the cost of legal support staff should usually be borne by the attorney and not by the client.

131. Morganstein v. Esber, 768 F.Supp. 725 (C.D. Cal. 1991).

132. *Id.* at 726.

133. *Id.* at 726-727. Note that in this situation the court was dealing specifically with a *fee award*. However, the court's language indicates that this rule has specific application to all contingency fee situations within the court's jurisdiction.

The Restatement, however, states that paralegal expenses may be reimbursable in situations where a client is aware that these will be deducted from the outset.[134] Moreover, the Restatement notes that it is a general practice to bill out for paralegals as well as other hired consultants and expenses, and usually these are properly billable as costs.[135] Nonetheless, the Restatement cautions that in some circumstances the attorney may be obligated to pay such expenses.[136] Where an expense is unwarranted or unnecessary, the attorney will always be required to bear the burden of paying the expense.[137]

The Arizona Supreme Court, like the U.S. Supreme Court, has decided not to answer the question of how paralegal expenses should be characterized.[138] In the case of *In re Ireland*, the court held that separate billing for secretaries is unethical under ABA Code DR 2-106.[139] However, the propriety of separate billing for paralegals was an issue the court declined to address.[140] In reference to paralegal expenses, the court merely stated, "[i]t would be the better practice to have client agreement before such charges are billed."[141]

In summary, many authorities consider paralegal and legal assistant expenses to be included in attorney's fees and therefore, not reimbursable as costs. However, neither Wyoming nor the Tenth Circuit have addressed whether expenses for paralegals and other assistants may be properly billed as costs under a contingency fee agreement or whether they are included in the attorney's fee. It is unclear whether Wyoming courts would choose to interpret their contingency fee rules liberally or strictly.

4. Investigators

The language of EC-306 and the wording of the Model Code make clear that the use of investigators is a common practice in the legal profession, and one that is accepted by the ABA.[142] As with paralegals and other paraprofessionals, the status of investigators for billing purposes varies from state to state, and no conclusive position

134. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 50 cmt. e, at 245.
135. *Id.*
136. *Id.*
137. *Id.*
138. *In re* Ireland, 706 P.2d 352, 356 n.4 (Ariz. 1985).
139. *Id.* MODEL CODE DR 2-106 prohibits the use of excessive fees.
140. *In re* Ireland, 706 P.2d at 355.
141. *Id.* at 356 n.4.
142. *See supra* note 126.

exists as to whether a client should be responsible for these expenses under a contingency fee agreement. This is true notwithstanding an informal opinion from the ABA Committee on Ethics and Professional Responsibility declaring that investigator fees *may* be charged to the client as costs.[143]

New York is one state that precludes reimbursement for investigative expenses. In 1937, New York declared that expenses for investigators are not expenses for which an attorney may be reimbursed.[144] Such expenses were held to be a necessary and ordinary part or adjunct of a properly equipped lawyer's office.[145] The court concluded that investigator expenses are not compensable because investigator services are "as much a necessary part of the duties which the attorney agreed to perform as are the typewriting of pleadings."[146] New York courts have since adhered to this rule, allowing investigator expenses to be calculated as costs only when the investigator delivered subpoenas.[147] In the New York court's eyes, the deliverance of subpoenas is an expense incidental to litigation and thus should be considered a cost.[148]

The Florida State Bar Association Committee on Professional Ethics has held just the opposite. The Committee held that such expenses are not part of general office overhead and that separate billing to the client for these fees is not unethical.[149] The Committee did suggest, however, that disputes may arise between attorney and client where the attorney employs salaried employees to perform services that are commonly performed by private contractors, such as investi-

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143. The ABA Committee on Ethics and Professional Responsibility has held:

> Under this Canon [34], it was held in our Committee's Formal Opinion 272 that it is entirely ethical for a firm of lawyers to employ an accountant on a salary basis . . . The same would be true of an investigator. Certainly there would be no impropriety in the lawyer employing a lay investigator on a salary or on a fixed per diem or hourly rate, and "where such employment is authorized by the client the layman's charge may be collected by the lawyer from he client as an item of expense." (citation omitted).

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 858 (1965).

144. *In Re* Lessig, 1 N.Y.S.2d 566 (N.Y. Sur. Ct. 1937).

145. *Id.*

146. *Id.* at 568.

147. Levy v. State, 420 N.Y.S.2d 154 (N.Y. Ct. Cl. 1979). Here, the court declared it the policy of the court to deny attorneys renumerations for disbursements expended upon duties which he has the primary responsibility of performing himself. In this case, the act of having a private investigator sit with the attorney at trial was an act for which the court felt there was no purpose for an investigator, and thus denied costs. *Id.*

148. *Id.*

149. Florida State Bar Ass'n Comm. on Professional Ethics, Ethics Op. 76-33, 76-38 (1977).

gators.[150] The Committee warned that the potential for disagreement between lawyer and client in these situations is high:

> [W]here the lawyer enters into a contingent fee arrangement with the client and then separately itemizes charges to the client for the time of nonlawyer personnel who are full-time employees of the lawyer the arrangement may be susceptible of interpretation as involving charging the client for such nonlawyer services and at the same time, in fact or effect, duplicating the charges by including the salaries of such personnel as overhead and an element of the lawyer's own fee . . . .[151]

Nonetheless, the Committee held that these services are compensable whether performed by salaried employees or by independent contractors, so long as the client is not deceived concerning the charges or the limitations on the personnel performing the services.

Louisiana has held that investigator services should be deducted as costs under Louisiana's contingency fee statute.[152] The court justified its decision because investigator services are specifically enumerated as "reimbursable" costs within the Louisiana statute.[153] Florida, Illinois, and the District of Columbia have adopted ethical rules which similarly classify investigative expenses as costs an attorney may advance to a client.[154] In most state statutes and rules, including the Wyoming rules, however, investigator expenses are not specified as costs or as a part of attorney's fees.[155] The Wyoming rule neither allows nor prohibits charging investigator services as costs.[156] As with

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150. *Id.*

151. *Id.* at 3.

152. Solar v. Griffin, 554 So. 2d 1324 (La. 1980). Louisiana statute 37:218 grants an attorney who has a written contract an interest any recovery obtained in a contingency fee case. *Id.* (citing LA. REV. STAT. ANN. § 37:218 (West 1993); *See also* Calk v. Highland Coast. & Mfg., 376 So. 2d 495 (1979) (holding that the fee an attorney is entitled to under 37:218 includes: the agreed-upon contingency fee; taxable court costs advanced by attorney; and attorney's necessary and reasonable expenses in pursuance of litigation, including those for investigation and travel).

153. The court held:

> "[u]nder La.R.S. 37:218, an attorney who has a written contract affording him an interest in his client's claim has a privilege to the extent of his fee, which includes the agreed-upon contingency fee, taxable court costs advanced by the attorney, and the attorney's necessary and reasonable expenses in pursuance of the litigation, such as those for investigation and travel."

554 So.2d 1324, 1326 (La. 1980).

154. FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR5-102; ILLINOIS RULES OF PROFESSIONAL CONDUCT 1.8; DISTRICT OF COLUMBIA BAR RULES OF PROFESSIONAL CONDUCT 1.8. These rules are adopted directly from MODEL CODE DR 5-103(B). *See supra* text accompanying note 102.

155. WYOMING RULE 1.8. *See supra* note 101.

156. Both the MODEL RULES and the WYOMING RULES provide: "A lawyer shall not provide

paralegals, how to characterize investigator expenses in Wyoming is unclear.

Awarding of Costs Under Federal Fee Shifting Statutes

In the United States the general rule is that all parties involved in litigation bear their own costs.[157] Judge-made exceptions and congressional and legislative exceptions exist to this rule.[158] These exceptions allow awards of attorney fees under various fee shifting statutes.[159] The purpose supporting such exceptions is to provide an incentive for the private enforcement of Congressional statutory policy.[160] The Supreme Court's holdings govern the computation of fee awards under all fee shifting statutes unless express statutory language distinguishes how the fee is to be determined.[161]

While the wording of federal fee shifting statues varies, most allow recovery for attorney's fees and separate recovery for costs.[162] Some also allow separate recovery for expenses.[163] These terms are distinctly defined. Attorney's fees refer to an attorney's billable time,[164] and items of office overhead are factored into the standard fee.[165] Costs generally include that which the court will tax to the

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financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation . . . ." MODEL RULE 1.8(e)(1); WYOMING RULE OF PROFESSIONAL CONDUCT 1.8(e)(1).

157. MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES, ¶ 1.02[1], at 109 (1992). Note that Alaska does not follow the rule that each participant in litigation must bear their own expenses.

158. John F.Virgo, Comment, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1574-1575 n.58 (1993).

159. *Id.* Two hundred federal statutes, and almost 200 state statutes exist that provide for shifting of attorney's fees. Thus, some contend that the statutory provisions are more a part of the American system, than the exception to it. *Id.* (citing DERFNER & WOLF, *supra* note 157, Table of Statutes, TS-1 to TS-36 (listing nearly 200 federal statutes that provide for attorney's fees)). *See also* Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, Winter 1984, at 328-45 (listing almost 2000 state statutes).

160. SENATE COMM. ON THE JUDICIARY, CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT, S. REP. NO. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S.C.C.A.N. 5908, 5910 [hereinafter S. REP. NO. 1011] ("[f]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain.").

161. Blum v. Witco Chem Corp., 829 F.2d 367, 379 n.10 (3d Cir. 1987); Spell v. McDaniel, 824 F.2d 1380, 1404 n.22 (4th Cir. 1987). *See also* Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party.").

162. Stanley Hammer, Comment, *Recovery of Computer-Assisted Research Charges in Federal Courts: Putting some byte in Federal Fee and Cost Shifting Statutes*, 9 AM. J. TRIAL ADVOC. 265 (Fall 1985).

163. *Id.*

164. *Id.* at 267.

165. *Id.*

losing party.[166] The term "costs" generally includes court costs, witness fees and sometimes deposition fees.[167] Expenses include all expenditures actually made by the litigant in pursuing the action.[168] Expenses are not ordinarily recoverable as costs absent a fee and cost shifting statute.[169]

Requests for fee awards in fee shifting cases have resulted in significant litigation concerning attorneys fees, costs and expenses. Although the Supreme Court looks upon fee litigation with disfavor,[170] questions concerning what constitutes office overhead and awardable costs and when they are compensable are often the subject of litigation.[171]

Like all other forms of attorney's fees, an award of attorney's fees under a fee-shifting statute must be reasonable.[172] This is true regardless of whether the award includes costs or expenses. A reasonable attorney's fee has been defined in fee shifting situations as one that is "adequate to attract competent counsel, but which does not produce windfalls to attorneys."[173] This approach has resulted in varying fee awards, especially because parties do not have to win every aspect of their case in order to be awarded attorneys fees: "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."[174]

In determining fee awards that are "adequate to attract competent counsel," courts utilize three approaches under the fee-shifting statutes. These approaches include: 1) the lodestar approach;[175] 2) an

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166. *Id.*

167. *Id.*

168. *Id.* at 268. *See also* discussion *supra* note 100 discussing terminology used by courts in fee agreements.

169. Dickerson v. Pritchard, 551 F.Supp. 306 (W.D. Ark. 1982), *aff'd* 706 F.2d 256 (8th Cir. 1983).

170. Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983); *See also* Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984).

171. *See* cases cited *supra* note 170.

172. S. REP. NO. 1011, *supra* note 160.

173. *Id.* at 5913.

174. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). This principle was expressly approved by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). *See also* Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782 (1989).

175. The lodestar method is an objective approach to computing fee awards under fee-shifting statutes. When using this method, the court determines the amount of the attorney's fee award by doing basic multiplication of the market rate for the attorney's time by the hours devoted to the case. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This approach was developed by the Third Circuit in 1973. *See* Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp. 487

approach based on the subjective factors of *Johnson v. Georgia Highway Express*;[176] or 3) most commonly, a combination of both of those approaches.

The combination approach was initially promoted by the Senate Judiciary Committee in its report on the Civil Rights statutes.[177] The report implicitly advocated that *both* the lodestar approach and the *Johnson* subjective factors approach be utilized to make up for deficiencies in the two methods.[178] When interpreting this report, the Supreme Court of the United States subsequently developed a rule that integrated the two approaches. In *Hensley v. Eckerhart*,[179] the Supreme Court enunciated that the lodestar approach should be the starting point for computation of all fee awards under federal fee shifting statutes[180] and that the amount should subsequently be increased or decreased by considering the *Johnson* factors not contained within the initial lodestar computation.[181]

F.2d 161 (3d Cir. 1973), *vacated* 540 F.2d 102 (3d Cir. 1976). Many courts use this approach, or a variation of the approach, as the starting point in computing a reasonable attorney's fee award. DERFNER & WOLF, *supra* note 157, ¶175.5.02[1].

176. 488 F.2d 714 (5th Cir. 1974). When awarding fees under a statute, courts often weigh the list of factors approved by the ABA or a list similar thereto. For a detailed list of these factors, see *supra* note 87.

The most often cited list of factors was set out by the Fifth Circuit in *Johnson*. These factors include:

(1) The time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal serviceproperly;
(4) the preclusion of other employment by the attorney dueto acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client orcircumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation and ability of theattorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationshipwith the client;
(12) awards in similar cases.

Id. at 717-719.

This approach includes using the time-rate lodestar, but adjusting the rate according to the other factors listed in *Johnson*. However, this subjective approach is often criticized for producing divergent, unpredictable and unjust awards, for being unwieldly to apply, and for making appellate review difficult. *See Lindy Brothers*, 487 F.2d 161 (3d Cir. 1973).

177. S. REP. NO. 1011, *supra* note 160.

178. *Id.*

179. 461 U.S. 424 (1983).

180. *Id.*

181. *Id. See, e.g.*, Blum v. Stenson, 465 U.S. 886, 897 (1984) (providing general guidance on the use of upward adjustments). The court in *Blum* also used limiting language by stating only that "there may some circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high," and by

At the same time, however, the Supreme Court admonished that attorneys must make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission.[182] The Court emphasized that although virtually all tasks are compensable, not all will necessarily be compensated.[183] Nonetheless, the courts of appeals have consistently held a broad range of non-legal activities compensable when awarding attorney's fees pursuant to a fee shifting statute. In *Bartholomew v. Watson*, the Ninth Circuit allowed fees for time spent in state court proceedings in which the plaintiffs were unsuccessful.[184] In *Davis v. City and County of San Francisco*, the Ninth Circuit endorsed an award of fees for time spent in press conferences and other public relations work that contributed directly and substantially to the attainment of plaintiff's litigation goals.[185] Many other activities have been found to be compensable as well. These include: time spent prior to the filing of a lawsuit;[186] travel time;[187] time spent in conference with other lawyers and time spent organizing and reorganizing the case file;[188] services rendered unsuccessfully at trial, where appeal is successful;[189] appellate time;[190] post-judgment time spent on compliance matters or on monitoring;[191] time spent preparing fee application, negotiating

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pointing out that the hours-times rates lodestar is ordinarily "presumed to be the reasonable fee when the applicant for a fee has carried out his burden of showing that the claimed rate and number of hours are reasonable." *Id.*

182. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

183. *Id.*

184. Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982). This time was compensable because the state court proceedings were instituted by agreement of the parties under the *Pullman* abstention doctrine, and because the state forum might have eliminated the need for federal court resolution.

185. Davis v. City and County of San Francisco, 984 F.2d 345 (9th Cir. 1993).

186. Dowdell v. Apopka, Florida, 698 F.2d 1188-1192 (11th Cir. 1993).

187. Rose Confections Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987); Craik v. Minnesota State Univ. Bd., 738 F.2d 348 (8th Cir. 1984); Henry v. Webermeier, 738 F.2d 188 (7th Cir. 1984); Danny Kresky Enter. Corp. v. Magid, 716 F.2d 215 (3d Cir. 1983).

188. Blum v. Witco Chem Corp., 829 F.2d 367 (3d Cir. 1987).

189. NAACP, West Region v. Richmond, 743 F.2d 1346 (9th Cir. 1984).

190. Hutto v. Finney, 437 U.S. 678 (1978); Perkins v. Standard Oil Co., 399 U.S. 222 (1970); *see also, e.g.*, Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989); Toussaint v. McCarthy, 826 F.2d 901 (9th Cir. 1987); Crooker v. United States Parole Commission, 776 F.2d 366 (1st Cir. 1985); Van Ootegham v. Gray, 774 F.2d 1332 (5th Cir. 1985); NAACP, Western Region v. Richmond, 743 F.2d 1346 (9th Cir. 1984); Craik v. Minnesota State University Bd., 738 F.2d 348 (8th Cir. 1984).

191. Duran v. Carruthers, 885 F.2d 1492 (10th Cir. 1989); Keith v. Volpe, 833 F.2d 850 (9th Cir. 1987); Brewster v. Dukakis, 786 F.2d 16 (1st Cir. 1986); Turner v. Orr, 785 F.2d 1498 (11th Cir. 1986), *cert denied*, 478 U.S.1020 (1986); Adams v. Mathis, 752 F.2d 553 (11th Cir. 1985); Will M. v. Hunt, 732 F.2d 383 (4th Cir. 1984); Burke v. Guiney, 700 F.2d 767 (1st Cir. 1983); Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980), *cert denied*, 154 U.S. 1063 (1981); Northcross v. Board of education of Memphis, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

fees, and litigating fees;[192] and time spent collecting a fee award or a fee settlement.[193]

Although federal courts have held virtually every service an attorney performs compensable under fee shifting statutes, some state and federal courts refuse to compensate the same services when performed by a paralegal.[194] The United States Supreme Court has held that under the Civil Rights Fee Shifting Statutes, taxing opposing parties for paralegal and law clerk fees as part of an attorney's fee award is proper.[195] Fees for services such as these are to be evaluated and awarded according to community standards just as the attorney's fees are.[196] The Court limited the holding, however, by stating that services of a clerical nature are not compensable under fee shifting statutes, as they are considered overhead which should be absorbed by the attorney's fee.[197]

The Supreme Court decision in *Jenkins*, followed a long history of such awards in state courts.[198] Although states are divided on the issue, many state courts have allowed fee awards for paralegals both as a component of attorneys fees and separate from attorney's fees.[199] The Wyoming Supreme Court

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192. *See generally*, Durrett v. Cohen, 790 F.2d 360 (3d Cir. 1986); Noxell Corp. v. Firehouse No. I Bar-B-Que Restaurant, 771 F.2d 521 (D.C.Cir. 1985); *In re* Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985); Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), *cert denied*, 472 U.S. 1021 (1985); Pawlak v. Greenawalt, 713 F.2d 972 (3d Cir. 1983); Shadis v. Beal, 703 F.2d 71 (3d Cir. 1983).

193. Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982).

194. *See, e.g.*, Bill Rivers Trailers, Inc. v. Miller, 489 So. 2d 1139 (Fla. App. 1986); Smith v. United States, 735 F.Supp. 136 (Ill. 1990); Johnson v. Naugle, 557 N.E. 2d 1339 (Ind. App. 1990); Walter Jones, Jr. v. Armstrong Cork Co., 630 F.2d 324 (5th Cir. 1980).

195. Missouri v. Jenkins, 491 U.S. 274 (1989). *Missouri v. Jenkins* held that under 42 USC 1988, fee requests are permitted for paralegals and legal assistants. "Clearly, 'a reasonable attorney's fee' as used in § 1988 cannot have been meant to compensate only work performed personally by members of the Bar. Rather, that term must refer to a reasonable fee for an attorney's work product, and thus must take into account the work not only of attorneys, but also the work of paralegals and the like." *Id.* Note that while it appears that the majority of courts are choosing to follow this decision, some courts, such as the Indiana Supreme Court, have explicitly refused to follow this holding. *See, e.g., Johnson*, 557 N.E.2d at 1345.

196. *Missouri*, 491 U.S. at 286. The court stated that:

> [t]he prevailing 'market rate' for attorney time is not independent of the manner in which paralegal time is accounted for. Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost.' Similarly, the fee awarded would be too high if the court accepted separate billing for paralegal hours in a market where that was not the custom.

Missouri, 491 U.S. at 286.

197. *Id.*

198. Merle L. Isgett, *The Role of the Legal Assistant: What Constitutes the Unauthorized Practice of Law*, (423 PLI Lit. and Admin. Practice Course Handbook Series No.7, 1991) (providing an extensive discussion of illustrative cases).

199. *See* cases cited *supra* note 198. See for example, *Atlantic Richfield v. State*, where the

has provided little guidance as to its views on what constitutes costs and expenses in awarding fees. The court usually approves costs if they are reasonable and necessary to litigation.[200] In the past this has included expenses of witness fees for discovery, depositions and trial, expert witness expenses, deposition expenses, subpoena expenses, reporting expenses, photographs and visual aids, and survey expenses.[201] Clearly, Wyoming will need to take into consideration the Supreme Court's decision in *Missouri v. Jenkins* when awarding fees in the future. However, it is unknown when the Wyoming Supreme Court will be afforded the opportunity to decide this matter.

Application to Wyoming

The concept of "costs and expenses" has not been defined by any court regarding either Wyoming Rule 1.8(e)(1) or Model Rule 1.8(e). Nor has the Wyoming Supreme Court indicated its attitude towards classifying either paralegal/legal assistant fees or investigator fees as costs or attorney's fees under a contingency fee agreement.

Apparently, even in *awarding* costs, confusion exists as to what costs entail under the various Wyoming statutes and rules.[202] In *Hashimoto v. Marathon Pipeline*, the Wyoming Supreme Court stated:

Alaska Supreme Court held that paralegal and computer research expenses are costs rather than part of the attorney's fees. The court held that pursuant to Alaska Rule of Civil Procedure 79(b) these expense should be allowed as costs because they are necessarily incurred in the course of litigation. 723 P.2d 1249, 1253 (Alaska 1986).

200. Hashimoto v. Marathon Pipeline Co., 767 P.2d 158 (Wyo. 1989); Weaver v. Mitchel, 715 P.2d 1361 (Wyo. 1986); State v. Diereger, 708 P.2d 1 (Wyo. 1985); Duffy v. Brown, 708 P.2d 433 (Wyo. 1985); Roberts Construction Co. v. Vondriska, 547 P.2d 1171 (Wyo 1976). For a more detailed list of Wyoming cases touching on awardable costs, see *Hashimoto*, 167 P.2d at 169.

201. *See* cases cited *supra* note 200.

202. WYO. STAT. § 1-14-124 provides: "[C]osts shall be allowed to the plaintiff upon a judgment in his favor in an action for the recovery of money only or for the recovery of specific real or personal property, unless otherwise provided by law. WYO. STAT. § 1-14-124 (1988). WYO. STAT. § 1-4-126(a) provides in part: "[I]n other actions the court may award costs and apportion them between the parties on the same or adverse sides as it deems right and equitable." WYO. STAT. § 1-14-126(a) (1988 & Supp. 1993)

WYO STAT. § 1-14-126(b) sets forth the criteria for determining a reasonable fee. WYO STAT § 1-14-126 (1988 & Supp. 1993). These are the same criteria as are listed in MODEL RULE 1.5, and MODEL CODE DR2-106 *supra* note 87.

Wyoming Rule of Civil Procedure 54(d) provides: "[E]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State of Wyoming, its officers or agencies, shall be imposed only to the extent permitted by law." WYO. R. CIV. P. 54(d) (1964).

See also Coulthard v. Cossairt, 803 P.2d 86 (Wyo. 1990) where the Wyoming Supreme Court held that Wyoming courts are allowed broad discretion in awarding costs under Wyoming Statute 1-14-126 and Wyoming Rule of Civil Procedure 54(d), so long as expenditures are "reasonably required for trial preparation." *Id.* at 93 (citing *Hashimoto*, 767 P.2d 158 (Wyo. 1989)).

> [A] demanding need exists for this court and the statutory rules advisory committee to develop a specific and determinate rule for ascertainment of costs which is amply justified by precedent and authority. Whether litigative costs should be awarded is a proper province for legislation. What those costs include, although not necessarily beyond the authority of the legislature are certainly found to be a authorized responsibility of the rule making function of the supreme court in its administrative responsibility for the justice delivery system pursuant to Wyo. Const. art 5. In the absence of a rule or statute, the process will continue to be confused and irregular.[203]

This need extends equally to the Rules Governing Contingent Fees for Members of the Wyoming State Bar. These rules should be modified to specifically define the terms attorney fees, costs, and expenses. This will clarify what may be properly billed under contingency fee agreements.

As the law stands, there are no set definitions, and the rules are subject to various interpretations.[204] A great deal of confusion now exists as to how legal fees, costs and expenses should be characterized. Professor Wolfram believes that costs under the Model Rule should include at least as much as, but perhaps no more than, is listed in DR-5-103(B).[205] Under Wolfram's interpretation, Wyoming Rule 1.8(e)(1) could be construed to include paralegal and investigator expenses as reimbursable costs. Nonetheless, case law exists suggesting an alternative meaning of the rule, and Wyoming courts are at liberty to adopt whichever interpretation they see fit.

ANALYSIS

The multitude of differing opinions concerning contingency fee agreements make questions regarding such agreements difficult to answer. The questions posed in the introductory paragraphs of this comment were: What should the attorney's percentage encompass under a contingency fee agreement, and are paralegal fees, legal assistant fees, investigator fees, or other staff's fees covered by attorney's fees, or are they reimbursable costs which the client should bear? While these questions have no definitive answer, tools are available to lawyers for determining whether it is ethical to bill out these services under a contingency fee agreement.

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203. 767 P.2d 158, 169 n.16 (Wyo. 1989).

204. *See, e.g.*, Richard C. Reed, *It's Time To Think About Billing*, 13 No. 6 LEGAL ECON. 28, Sept. 1987, at 32 (comparing differing approaches to awarding paralegal fees).

205. WOLFRAM, *supra* note 35, at 507 and n.80.

Specific Application of Ethical and Fiduciary Duties to Attorneys in Fee Agreement Situations

Fee agreements must always be analyzed in terms of the ethical and fiduciary duties that are derived from the attorney-client relationship. The measuring standard of whether an agreement is ethical is whether it is reasonable.[206] To assure reasonableness, one of the first steps an attorney should take is to make sure the agreement is in writing and that it satisfies all the elements of Model Rule 1.5.[207] The attorney should ask whether the agreement specifies: (1) The percentage of the recovery that goes to the lawyer in the event of settlement; (2) The percentage of the recovery that goes to the lawyer if the case is tried to conclusion; (3) The percentage of the recovery that goes to the lawyer if the case is appealed; (4) The [costs and] expenses to be deducted from the recovery; and (5) Whether [costs and] expenses are to be deducted from the recovery before or after the lawyer's percentage is calculated.[208]

Further, the attorney must be certain to fulfill all duties of good faith and fair dealing. The attorney must be aware of the disparate bargaining positions between attorney and client.[209] This chasm between attorney and client may impose a severe handicap on the client, making it difficult for the client to negotiate a fee agreement within his or her own best interests. Clients may not understand the magnitude of the costs they may be liable for should they agree to pay all paraprofessional fees in addition to the attorney's percentage. Often clients accept whatever agreement an attorney suggests merely because it seems to be the "going rate," and thus they do not realize that they are being overcharged.[210] Attorneys should recognize when unequal bargaining power exists between themselves and the client, and address the relative lack of knowledge on behalf of the client. This duty will vary depending on the sophistication of the client.

The client's expectation is the key to determining whether a fee agreement is reasonable.[211] It is important that the client enter into the agreement with full knowledge of the costs and expenses for which he or she may be liable. The client should also be made aware that other fee arrangements may be more beneficial and less expensive.[212] An attorney has an ethical obligation

206. ABA Informal Op. 86-1521 (1986). ("Rule 1.59(a) requires that a lawyer's fee be 'reasonable', and DR-2-106(A) of the Mode Code requires that the lawyer not charge an "illegal or clearly excessive fee.").

207. *See supra* text accompanying note 19.

208. *Id.*

209. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 cmt. b.

210. Jay, *supra* note 6, at 828.

211. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 50 cmt. d, at 244. *See also supra* note 49 and accompanying text.

212. MODEL RULE 1.5, cmt. 3 ("When there is doubt whether a contingent fee is consistent

to assure that the client is aware of all alternatives before choosing to be billed for such costs.[213] The uncertainty in courts' interpretations coupled with the fact that ambiguous fee agreements are construed against the attorney[214] makes it advisable to inform the client well in advance if any services are billed out separately.[215]

Finally, an attorney should review the agreement at the conclusion of the representation to assure the compensation is reasonable.[216] The fees should be adjusted taking into consideration the specific circumstances of each particular case. These factors should then be carefully weighed against the factors listed in Model Rule 1.5 and Model Code DR 2-106.[217]

In every part of the fee agreement, attorneys should be mindful that violations of any of the above ethical or fiduciary duties under the attorney-client relationship are unethical and may be illegal. A court or a Bar Association may sanction an attorney for over-charging a client under the Model Rules and the Model Code, especially if the client is unsophisticated and does not comprehend common market rates for legal services.[218] Violations of fiduciary duty, on the other hand, are violations of the law, and lawyers may be sued for malpractice and required to reimburse the client for the amount overcharged if they are found to have charged an excessive fee.[219] In extreme

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with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.").

213. *In re* Ireland, 706 P.2d 352 (Ariz. 1985).

214. *See supra* notes 49, 20. *See also* Oregon State Bar Association Board of Governors, Ethics Op. 1991-124 (1991).

215. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 50 cmt. b. *See also supra* note 141 and accompanying text.

216. MODEL RULE 1.5(c) requires that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

When reviewing the agreement, attorneys should consider the factors that tribunals often look at in determining whether a fee is reasonable. For example, the sophistication of the client, the opportunity to seek other counsel, whether the lawyer adequately explained the fee agreement and the costs thereunder should be examined. For a more detailed list, *see* RESTATEMENT DRAFT NO. 4, *supra* note 20, § 46 cmt. d, at 209-210.

217. *See supra* note 87 and accompanying text.

218. RESTATEMENT DRAFT NO. 4, *supra* note 20, § 49 states:

> [A] lawyer engaging in clear serious violation of duty to a client may forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the extent of the violation, its wilfulness, any threatened or actual harm to the client, and the adequacy of other remedies.

RESTATEMENT DRAFT NO. 4 *supra* note 20, § 49, at 231.

Other sanctions for violation of the ethical code may include disbarment, suspension, reprimand, reimbursement, restitution, or probation. For a general survey of how these sanctions are used, *see* Kathleen Blanchard and Bonnie Howe, *SURVEY, Attorney Sanctions: General Principles*, 3 GEO. J. L. ETHICS 57 (1989).

219. Blanchard & Howe, *supra* note 214, at 62 n.46 (1989), (citing *In re* Millard, 295 N.W.2d

situations, the attorney may receive no compensation for his or her services whatsoever.[220]

A multitude of responsibilities accompany every attorney-client relationship. Attorney's must be ever mindful that they are under a fiduciary duty of fair dealing when arranging fee agreements and collecting fees.[221] When determining the propriety of billing for paralegal and investigator expenses under a contingency fee agreement, satisfaction of the duties discussed herein may prevent charging an unreasonable fee. Awareness of attorney obligations in fee agreements deters the attorney from committing professional misconduct and possibly violating the law. The client, in turn, is protected from being overcharged.

Paralegal & Investigator Expenses

As long as no state provisions prohibit billing of paralegal or investigator expenses, these services are probably billable to the client if the client is made aware at the outset that such expenses are commonly billed.[222] A justifiable argument may be made that these expenses are not overhead. Many modern law offices are not equipped with an investigator and some do not have a paralegal on staff. In fact, a recent survey has shown that 78.5% of Wyoming attorneys do not use paralegals.[223] Clearly, these services are, in many practices, an expense above and beyond normal office overhead.

Where it is unclear whether certain expenses may be billed to the client, such services should be analyzed in reference to whether they are charges for office overhead such as secretaries fees, or whether they are charges for unusual or extraordinary services above and beyond those usually employed by the attorney.[224] If a contingent fee agreement allows the attorney to be reimbursed for every cost incurred by him in the process of litigation apart from the flat percentage also recovered, an unconscionably excessive fee is likely to result.

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352 (1980); Frazer v. State Bar of California, 737 P.2d 1338 (1987); Fla. Bar v. Seldin, 526 So. 2d 41 (Fla. 1988)).

220. RESTATEMENT DRAFT NO.4, *supra* note 20, § 49.

221. *See supra* note 53 and supporting text.

222. *See supra* note 127, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1333, (1975) (separate billing for services of law clerk). *See also supra* note 143, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 858 (1965).

223. *1993 Member Survey*, 16 WYOMING LAWYER No. 5, Oct. 1993, at 20. Note that only 72.3% of Wyoming's practicing lawyers responded to the survey.

224. *See* Florida State Bar Ass'n Comm. on Professional Ethics, Ethics Op. 76-33, 76-38 (1977).

However, complete preclusion from recovery of these expenses is not a viable solution either. These expenses may be necessary to successful representation. Additionally, paraprofessional services may make the cost of legal services more cost effective for the client. Disallowance of recovery for these services in all situations would be short sighted and possibly detrimental to clients.

Undoubtedly, in jurisdictions such as New York, where billing of paralegal or investigator costs has been prohibited, attorneys should refrain from this practice. However in jurisdictions, such as Wyoming, where there is no indication as to whether billing of these costs under a contingency fee agreement is permissible, the practice may be used so long as care is taken to avoid violation of the attorney's ethical and fiduciary duties to the client.

Dilemmas

Paralegals and investigators provide vital functions to the legal community. Without these services, the job of lawyers would be much more difficult and the cost of legal services much more expensive. "Increased use of legal assistants permit[s] the utilization of highly developed skills to aid the lawyer, while freeing the lawyer from tasks others could do as well (or better!)."[225] The problem, then, may not be in billing out for such expenses, but in the structure of contingency fee agreements as a whole. If the purpose of such support staff is to 1) make the lawyer's job easier, and 2) to make the expense of legal services more cost effective to the client, then the decision to bill out for these services should be made in terms of the percentage the client is already being charged and in terms of the nature of the services being performed for the client.

If the client is already being charged a high contingency fee and is then billed separately for the additional costs of paraprofessionals, the cost of the legal services is made no less expensive by the use of such paraprofessionals. If the lawyer performs these duties, they are not billable but fall under the agreed upon contingency. Thus, in some circumstances billing for these services may result in overcompensation for lawyers.

Another incongruency in the analysis of what may properly be assessed as costs exists in the federal courts' and the U.S. Supreme Court's treatment of the issue. While the Supreme Court has not determined how to characterize these fees under fee agreements, the Court has accepted certain definitions of attorney's fees, costs and expenses for fee awards

225. Reed, *supra* note 204, at 30.

under federal statutes.[226] Yet, neither the Supreme Court nor the lower courts use the terms consistently: the definitions are intermixed.[227] The federal courts' opinions sometimes include paralegal fees as a component of attorney's fees, and sometimes as extraneous expenses.[228] Both the terminology and the results of the Supreme Court and federal court decisions are inconsistent. No requirement exists requiring that state or federal courts adhere to any particular rule when defining costs under a contingency fee agreement. This means that courts are free to establish their own definitions of attorney's fees, costs, and expenses.

Courts should exercise the opportunity to establish clear definitions of these terms. Concise and clear definitions are necessary to guide practitioners in fee agreement situations. This would serve to clarify the proper use of fee agreements by attorneys.

When defining these terms, courts may recognize the strong policy statements made by the United States Supreme Court in *Missouri v. Jenkins*[229] and similar policies announced by many state courts.[230] These state courts unanimously uphold the policy of compensating valuable support services of paraprofessionals.[231] This shows a growing recognition and support for these services. With this tide of opinions may come a growing awareness of the need for compensation for paralegal, investigator and other services under fee agreements in states that have commonly disallowed such compensation.

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226. Hammer, *supra* note 156, at 267 and nn.9-12.

227. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274 (1989) The Court explained:

> The Courts of Appeals have taken a variety of positions on this issue. Most permit separate billing of paralegal time. *See, e.g.*, Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 54 n.7 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (1988) (en banc); Jacobs v. Mancuso, 825 F.2d 559, 563 and n.6 (1st Cir. 1987)(collecting cases); Spanish Action Committee of Chicago v. Chicago, 811 F.2d 1129, 1138 (7th Cir. 1987); Ramos v. Lamm, 713 F.2d 546, 558-559 (10th Cir. 1983); Richardson v. Byrd, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied sub nom.* Dallas County Commissioners Court v. Richardson, 464 U.S. 1009 (1983). *See also* Riverside v. Rivera, 477 U.S. 561, 566 n.2 (1986) (noting lower court approval of hourly rate for law clerks). Some courts, on the other hand, have considered paralegal work "out-of-pocket expense," recoverable only at cost to the attorney. *See, e.g.*, Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, (1980); Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated*, 461 U.S. 952 (1983). At least one Court of Appeals has refused to permit any recovery of paralegal expense apart from the attorney's hourly fee. Abrams v. Baylor College of Medicine, 805 F.2d 528, 535 (5th Cir. 1986).

Id. at 284 n. 7. *See also* discussion *supra* note 100.

228. 491 U.S. 274 (1989).

229. *Id.*

230. *See supra* note 198.

231. *Id.*

In states where paraprofessional and investigator expenses are allowed, or where the problem has not been addressed, the lawyer must once again rely on the test of reasonableness to determine whether the agreement is ethical and legal. The contingency fee agreement should be analyzed as a whole, with the expectations of the client in mind.[232]

Possible Solutions

The final question is, should Wyoming and other states that have no case law or statutes governing billing practices under contingency fee agreements, promulgate more specific regulations to prevent excessive fees under contingency fee agreements? Broad guidelines which include specific definitions of the terms costs, expenses, overhead, and attorney's fees should be enacted. Additionally, guidelines designed for prevention of charging excessive fees under contingency fee agreements should be established. However, as long as the ethical and fiduciary duties are not violated, no reason exists to prevent attorneys from charging the client paraprofessional or investigator expenses.[233] Moreover, rigid prohibitions on charging clients for these services may encourage abuse of contingency fee agreements. Attorneys may feel it necessary to charge higher percentages in contingency fee agreements to cover the costs of such services.

While the circumstances surrounding each case are so diverse that it would be impracticable to attempt to formulate rules that would fit every situation, this does not preclude some requirements from being put in place. At a minimum, attorneys should be required to inform clients in advance if they will be charged for extraneous expenses such as paralegal or investigator services. Attorneys should also be encouraged to evaluate the cost of representation both before setting the percentage and after the representation is complete, in accordance with the requirements of Model Rule 1.5(d) to assure the client is not over charged.[234] As with attorneys fees, paraprofessional and investigator expenses should be reviewed carefully to assure they are not duplicative or excessive. Attorneys should be aware that in some situations they have an obligation to reduce their percentage at the end of representation to avoid charging an excessive fee. Where paraprofessional fees are billed separately, the attorney should recognize that the duty to reduce the percentage may become even greater because of the danger of over-compensation.

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232. *See supra* note 49, and accompanying text.

233. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1333 (1975) (separate billing for services of law clerk). *See also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 858 (1965).

234. *See supra* note 87 and accompanying text.

CONCLUSION

Although some commentators may continue to argue that contingency fee agreements result in excessive compensation for attorneys, the necessity for such agreements cannot be denied. The prevalence of contingency fee agreements will continue to grow. Inevitably, legal controversies concerning the use of these agreements will continue to grow as well. This is especially true given the onslaught of bad publicity attorney's have faced in recent times.

To avoid embroilment in legal disputes concerning fee agreements, attorneys should be mindful of the ethical and fiduciary duties inherent in the attorney-client relationship. These duties are codified within the ethical codes, and are also governed by agency and contract law. Attorneys should take care to uphold these ethical and fiduciary obligations as violations are unethical and may also be illegal.

One of the duties to which attorneys are bound is the duty not to charge an excessive fee. This includes not billing out for unreasonable costs. Whether charging for paralegal and investigator fees when operating under a contingency fee agreement constitutes an excessive fee is unclear. Decisions addressing the problems of what costs are proper under contingency fee agreements are both confusing and vague.

Because there is little guidance in the decisions that address costs under fee agreements, it is often difficult to determine what constitutes a reasonable cost when billing under such agreements. Presumably, however, paralegal and investigator costs may be billed in most instances as long as steps are taken to protect clients in disparate bargaining positions. When determining what services to bill out under a contingency fee agreement, the attorney should consider and follow the provisions of the Model Rules and the Restatement in addition to following applicable state law.

State courts and federal courts are approving the payment of paralegal expenses when *awarding* fees under fee shifting statutes. The courts' recognition that paraprofessional services are important services deserving compensation may soon lead to more enlightened views concerning whether these are proper charges under a fee agreement.

Decisions concerning investigator expenses are also unclear. However, the language of the Model Code, and some state rules indicate that these expenses were intended to be included in the definition of costs which may be advanced to clients. These expenses, like paralegal expens-

es, should be analyzed in light of the surrounding circumstances and the relative worth of the particular service to the client.

As with every other aspect of fee agreements, the propriety of billing for paralegal and investigator services balances on the concept of reasonableness. The reasonableness of charging for paraprofessional or investigator expenses will vary depending on the circumstances of the case. In every situation, however, fairness to the client is paramount and should be the deciding factor in whether to charge the client for such services.

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