Research Note

FEE ARRANGEMENTS AND NEGOTIATION

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This research note examines the relationship between fee arrangements and negotiation in civil litigation. Data collected by the Civil Litigation Research Project suggests a strong tendency for lawyers working on a contingent fee basis to focus their negotiation on monetary goals. While this finding should not be surprising, it has significant implications for recent discussions of negotiation and settlement.

I. INTRODUCTION

A recent article (Kritzer *et al.*, 1985) provides solid empirical evidence that the much-discussed linkage between fee arrangements and lawyer effort (Clermont and Currivan, 1978; Franklin *et al.*, 1961; Johnson, 1980–81; MacKinnon, 1964; Rosenthal, 1974; Schwartz and Mitchell, 1970; See, 1984) does in fact exist, although in a somewhat more complex form than theoretical and empirical analyses had suggested. There is no reason that the impact of fee arrangement should be limited to the amount of time lawyers devote to cases. In this research note, I will show that fee arrangement has important implications for the settlement process, an area of the civil justice system that has recently been a proposed target for reform (Rosenberg *et al.*, 1981; Bedlin and Nejelski, 1984).

My central argument is that discussions of the settlement process, and particularly of manipulations of that process, must consider the interests of *all* involved in litigation. Regular par-

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ticipants in litigation are well aware of this point. In my series of interviews with corporate lawyers and their clients in Toronto regarding the impact of fees and fee shifting (Kritzer, 1984c), a number of respondents mentioned the importance of taking into account the interest of the opposing lawyer. For example, a litigation partner in a firm with one hundred lawyers said, "If you can satisfy the lawyer [with regard to his fee], you'll be a lot closer to settlement." A lawyer for a large retailer similarly stated that to achieve settlement, "you need to provide an incentive for the [opposing] lawyer." Yet despite the evidence that litigation lawyers do not selflessly ignore their own interests, little attention has been paid to how these interests affect settlement and negotiation.

I am not suggesting that lawyers engage in questionable actions for financial gain. The argument is more subtle: Lawyers, like all of us, when forced to make a choice for which there is no definitive answer, will tend to select the option that is in their own interest. In other words, the financial incentives of their work will often influence the decisions, and it is not coincidental that they will personally benefit from these choices. Thus, although the plaintiffs' bar may truly believe that the contingent fee is the poor man's key to the courthouse door, this belief is shaped by the fact that the key to the courthouse also brings clients—and therefore a livelihood—to the plaintiffs' lawyers. Elsewhere (Kritzer, 1984b) I have pointed out that the relationship between lawyers and clients is shaped by professional, personal, and business considerations, the last, at their most basic, meaning income (and income streams). But what is the significance of this type of analysis for settlement and negotiation?

Several recent bits of evidence suggest ways in which the settlement-related behavior of lawyers is affected by fee considerations. Recently, the *National Law Journal* (August 19, 1985: 4) reported on a problem arising from modifications in the schedule of fees paid to court-appointed counsel in criminal cases before courts in Detroit and Wayne County (these modifications were ordered by the chief judges of the courts involved). A lawyer's daily fee for trial work was reduced from $300 to $150, while the fee paid for appearing in court with a client entering a guilty plea was simultaneously increased from $100 to $150. One of the judges reportedly said that he was concerned about a significant increase in the number of bench trials in his court, which he attributed to lawyers foregoing guilty pleas in favor of unnecessary trials that brought an easy $300 fee. A spokesperson for one of the bar groups opposed to the

new fee schedule conceded that some lawyers did "go to trial when a guilty plea might be more appropriate," but attributed this at least partly to aspects of the county prosecutor's policy vis-à-vis plea bargaining.

The *National Law Journal* (July 8, 1985) also recently published a long feature on fee awards (i.e., the process by which judges set fees in certain types of cases, such as class actions, in which the judge serves as a guardian of the interests of the members of the class who are not present in court). One element of the current controversy over fee awards focuses on the bases by which such awards are set. One approach is a simple extension of the percentage, or contingent, fee now used in most cases involving individual plaintiffs. The problem with this approach, particularly in large class actions, is that such fees might yield windfall payments to lawyers for work not performed. On the other hand, these sums do encourage lawyers to seek the best settlement possible. The alternate method of fee calculation, which has come to be the standard in federal court, is the so-called lodestar system in which the lawyer is compensated with an hourly rate, perhaps adjusted by some multiplier to reflect the quality of the work or the element of risk involved. However, this approach is typically criticized for creating an incentive for plaintiffs' lawyers to delay settlement and to pad their time by engaging in "unnecessary" pretrial maneuvering. This is particularly a problem in class action or mass tort cases (e.g., in the Agent Orange litigation), in which there is no real possibility for significant plaintiff input into the decisions of their lawyers.

II. THE SEARCH FOR BETTER APPROACHES TO NEGOTIATION

In the last few years there has been increasing attention on the means of improving the negotiation process. The most prominent work in this area is by the Harvard Project on Negotiation, including such well-received books as those by Fisher and Ury (1981) and Raiffa (1982) and the recently begun *Negotiation Journal* (1985). Work that is more directed to the legal sphere in general and the litigation (or dispute-resolving) sphere in particular includes Williams's (1983) examination of negotiator "effectiveness" and Menkel-Meadow's recent (1984) argument that lawyers should move from an "adversary" (zero sum or distributive) mode of bargaining toward a "problem-solving" (positive sum or integrative) mode of negotiation.

None of this literature takes into account one of the central

facts of everyday litigation in the United States: that some lawyers work on an hourly fee basis while others work on a contingent or percentage fee basis. While contingent fees are most often thought of in regard to personal injury cases, they are in fact widely used in most cases in which the plaintiff is an individual, the major exception being domestic relations. Under a contingent fee, the lawyer is paid a portion of the recovery (plus expenses), and the recovery is often sent directly to the lawyer (who then extracts her fee and expenses, passing the balance on to the client) or jointly to the lawyer and the client. My argument is that the contingency arrangement has very important implications for the lawyer-negotiator.

In my introduction, I alluded to the theoretical argument that contingent fee lawyers in cases with modest amounts at stake have an incentive to arrive quickly at a settlement, even if that settlement is not the best for the client. Whether this means that the fee arrangement directly affects the amount of time the lawyer spends on settlement negotiations (although I could in fact find no systematic difference in time spent on such activities between hourly and contingent fee lawyers), the same theoretical considerations apply to the content of the actual negotiation. Specifically, since the contingent fee lawyer is to receive a share of the ultimate recovery, she has an incentive to see to it that the recovery can in fact be shared. Menkel-Meadow (1984: 772–773) provides an example that illustrates this argument:

> Ms. Brown buys a car from Mr. Snead, a used car salesman. After a short period of time the car ceases to function, despite repeated attempts by Ms. Brown to have the car repaired. Ms. Brown, therefore, sues Mr. Snead for rescission of the sales contract, claiming misrepresentation in the sale of the car or, in the alternative, breach of warranty, with consequential damages including lost income from the loss of a job due to repeated lateness and absences as a result of the malfunctioning car. Mr. Snead counterclaims for the balance due on the car [plus attorneys fees as permitted under the sales contract], claiming that the warranty period has ended and the dealership was given insufficient time in which to cure any possible defects.

As Menkel-Meadow points out, although the lawsuit is over concerns that can be relatively easily monetized, the parties both really want more than just dollars and cents: Ms. Brown wants reliable transportation and her job; Mr. Snead wants to retain his profit on this sale and for Ms. Brown (and her friends) to buy cars from him in the future. One can easily im-

agine an outcome that satisfies both parties yet differs from the typical damages-oriented lawsuit: Mr. Snead provides Ms. Brown with another car from his large inventory and gives her an extended warranty on that car in compensation for her difficulties; he can then repair the car he originally sold to Ms. Brown and sell it to another customer.

However, what would happen if a contingent fee lawyer entered the Brown-Snead case? If that lawyer is a graduate of UCLA Law School and has taken a course in negotiation from Professor Menkel-Meadow, she could see a variety of ways of settling the case without directly exchanging money. However, she is in the law business to make a living and thus will recognize that Ms. Brown cannot pay a lawyer on an hourly basis and that a lawyer cannot take one-third of a car as a percentage payment. It is highly instructive that the example of Ms. Brown and Mr. Snead is based on a hypothetical case developed by the Legal Services Corporation, Office of Program Support, for training legal services attorneys (Menkel-Meadow, 1984: 772n). A contingent fee lawyer who sought nonmonetary resolutions of her clients' cases, even if those resolutions were better from the clients' perspective, would soon go out of business unless some alternate payment method were available for such settlements (e.g., fee shifting, whereby the defendant pays the plaintiff's attorney for his time, or a central fund, created by "taxing" contingent fees, from which the lawyer could receive compensation).

III. ANALYSIS

In actual cases, are contingent fee lawyers more concerned with money during their negotiations than are lawyers paid on an hourly fee or some other basis (such as flat fees or salaries)? In its survey of lawyers, the Civil Litigation Research Project (CLRP) obtained information on up to three offers or demands directed at resolving the case (see the Appendix for a brief description of the research design and the data). Using only the data on what the respondent offered or demanded (i.e., ignoring the offers or demands of the opposing party), I classified the content of negotiation as "monetary" (when the demand was for either a specific or nonspecific sum of money), "nonmonetary" (when the demand or offer was not explicitly monetary),[1] or "mixed" (when there was a combination of monetary and nonmonetary demands or offers). This third category includes

[1] See Kritzer (1985: Table 6) for details on the nonmonetary demands and offers.

Table 1. Negotiation Content by Fee Arrangement (All Respondents)*

Fee	Monetary	Nonmonetary	Mixed	*N*
Hourly	51%	19%	29%	547
Contingent	77%	3%	20%	349
Other	44%	28%	28%	109

* chi-square = 90.55; $p < .001$

Table 2. Negotiation Content by Fee Arrangement (Only Respondents Who Monetized Stakes)*

Fee	Monetary	Nonmonetary	Mixed	*N*
Hourly	63%	5%	32%	370
Contingent	78%	1%	21%	300
Other	62%	8%	30%	60

* chi-square = 27.04; $p < .001$

situations in which an individual demand or offer contained both monetary and nonmonetary elements and those in which the demands or offers changed in nature from one exchange to another.

Table 1, which reports the content of the negotiations as reported by respondents, clearly shows the overriding importance of money in the demands of the contingent fee lawyer: Only 3 percent of the contingent fee lawyers reported making demands that contained no monetary element (and one must wonder how those lawyers expected to be paid) compared to 19 percent of the hourly fee lawyers; 77 percent of the demands of contingent fee lawyers were entirely monetary compared to 51 percent for the hourly fee lawyers. There is no doubt that an element of self-fulfilling prophecy is operating here, since contingent fee lawyers will normally refuse cases that are not amenable to a monetary recovery. Still, in Table 2, which shows only those cases in which the lawyer-respondent was able to express stakes in clearly monetary terms, the basic relationship remains clear, although it is somewhat muted because the negotiations of the lawyers paid on other than a contingency basis are more monetary in their orientation than those cases shown in Table 1.

IV. CONCLUSION

This brief analysis provides further evidence of the impact of economic incentives on lawyer behavior. Although lawyers are professionals who are concerned with the needs and inter-

ests of their clients, their behavior is nonetheless influenced (note the use of *influenced* rather than *determined*) by the forces of economic rationality or necessity or both, and this influence is felt as well in the lawyers' means of negotiating. If we want lawyers to consider actively what Menkel-Meadow calls the problem-solving approaches to negotiation, we must ensure that their livelihood is not dependent upon adversary approaches to negotiation. There is an interesting parallel here to certain issues that have arisen in regard to discovery. Brazil (1978) pointed out that civil discovery is substantially based on a nonadversarial image of a litigation process that is inherently adversarial; he further suggested that as long as the trial lawyer relies upon a reputation as a strong advocate for his or her client's interest as a means of attracting and holding clients, it would be difficult for the discovery process to conform more closely to the ideal that was behind its widespread introduction in the 1930s. Some mechanism might indeed eliminate the economic incentives that tend to push lawyers away from an adversarial, money-oriented stance in negotiation, but the issues that such mechanisms raise are both practically and politically troubling. Given the stridency of physicians' opposition to socialized medicine, the intensity of the bar's opposition to a proposal for socializing the practice of law can only be imagined.

APPENDIX

The data presented above were collected by the CLRP in a survey of 1,382 lawyers representing parties in 1,649 randomly sampled court cases drawn from seven state and five federal courts in five federal judicial districts around the country (Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina, and New Mexico); all of the cases were terminated during calendar year 1978. The sample was limited to cases involving a claim of at least one thousand dollars or some significant nonmonetary demand; certain types of cases (e.g., prisoner petitions and certain kinds of labor law issues were excluded from the sample, and one type, domestic relations, was included in a limited fashion (see Kritzer, 1980-81: 512). Each of the 1,382 lawyers was interviewed by telephone about the specific case selected for the sample; the interviews averaged one hour in length. Additional details on the CLRP and the data it collected can be found in Trubek *et al.* (1983a, 1983b), Kritzer (1980–81, 1984a, 1985), and Kritzer *et al.* (1984).

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