AN ALTERNATIVE TO THE CONTINGENT FEE?
AN ASSESSMENT OF THE INCENTIVE EFFECTS OF
THE ENGLISH CONDITIONAL FEE ARRANGEMENT

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INTRODUCTION

In the United States today, many injured persons can afford an
attorney only by hiring one on a contingency fee basis.  An attorney
who accepts a case on such a basis agrees to take no money directly
from his client, but rather takes a percentage share of the judgment if
the client wins. Should an injured person take the alternative, which is

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1 See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 5-7 (1980), available at
http://www.abanet.org/cpr/ethics/mcpr.pdf (“Although a contingent fee arrangement gives a
lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible
in civil cases because it may be the only means by which a layman can obtain the services of a
lawyer of his choice.”) (footnotes omitted); F. B. MACKINNON, CONTINGENT FEES FOR LEGAL
SERVICES 4 (1964) (“If contingent fees were to be eliminated in this country . . . it [would] be
necessary to arrange the financing of most civil litigation in some other fashion . . . .”), HERBERT
M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE
UNITED STATES 253 (2004); Kevin C. McMunigal, Comment, Multi-Disciplinary Practice and
Conflict of Interest, 52 CASE W. RES. L. REV. 995, 1003 (2002). MacKinnon speculates that the
United States' lack of aversion to the contingent fee may derive from an American view that
lawyers should be compensated for their services. See MACKINNON, supra, at 14-15.

MacKinnon contrasts this American view with the English system outlawing contingent fees,
which arose from the early English thinking that the lawyer should not be paid at all. See id. at
10. See generally Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning

2 See, e.g., KRITZER, supra note 1, at 9-10 (noting, however, that the contingent fee need not
be based on a strict percentage); MACKINNON, supra note 1, at 4. The contingent fee is usually a
strict percentage of a plaintiff’s winnings. KRITZER, supra note 1, at 9-10. Even where it is not,
it is based at least in part on that percentage. Id. This Note will assume that the contingent fee is
a strict percentage. Note, however, that strictly speaking the definition of the contingent fee in
the United Kingdom broadly includes any fee arrangement in which an attorney has a financial
interest in the outcome of his case. See ADRIAN A. S. ZUCKERMAN, CIVIL PROCEDURE 910-11
(2003). Thus, for example, the following arrangement in England would be described as a
contingent fee arrangement: an attorney refuses any fee unless his client wins, and if the client
to hire an attorney on an hourly fee basis, he may find himself unable to pay if he loses his case. By allowing him to hire an attorney without the worry that he could find himself unable to pay, contingent fees democratize the courts. Accordingly, the bulk of personal injury litigation in the United States today is conducted on a contingency fee basis.

Contingent fees have been widely criticized, however. Among the criticisms are that they give windfalls to victorious lawyers, encourage lawsuits because of the possibility of such windfalls, promote what amounts to no-risk blackmail by plaintiffs against wealthy entities, and diminish standards within the legal profession. The existence of these criticisms urges the examination of other, alternate no-win, no-fee arrangements. Such fee structures would, like the contingent fee, alleviate a plaintiff’s risk that, should he lose a case, he would be unable to pay his attorney. The recently created conditional fee in Great Britain is one such structure. Under this fee arrangement, a client pays his attorney a greater than average fee if he wins in exchange for no fee if he loses. The current rule, which now allows attorneys to use this fee arrangement in most civil cases, was enacted in 1998.

See supra note 1.

See, e.g., MACKINNON, supra note 1, at 5 (“[I]t is argued that giving the lawyer the right to finance litigation tends to motivate him to stir up lawsuits . . . .”); Lester Brickman, On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes are Principally Determined by Lawyers’ Rates of Return, 15 CARDOZO L. REV. 1755, 1757 (1994) (arguing that plaintiffs’ lawyers’ financial incentives play a dominant role in the increased expansion of tort liability).

See, e.g., MACKINNON, supra note 1, at 4. The basic objection to the contingent fee is the adverse effect it possibly may have on the performance of the bar’s professional responsibilities . . . . The major arguments against contingent fees are that the gamble on the outcome introduces a speculative attitude toward law practice which is inconsistent with the detachment essential to a profession and that, because of the contingency, there is an emphasis on winning which tends to reduce the lawyer’s self-restraint in negotiation and trial advocacy, thereby endangering the effective operation of the adversary system of judicial administration.

See discussion infra Parts I.A-B.
One virtue of the American-style contingent fee, in which an attorney receives a fixed percentage, e.g. 33%, of his client’s winnings, is that it creates an apparent alignment of interests between attorney and client. That is, because his fee is a fixed percentage of his client’s winnings, the attorney maximizes his fee by seeking the best award for his client. This contrasts with the hourly fee, in which the client’s return is unrelated to the attorney’s fee. Yet as a number of authors have shown, the contingent fee also creates a misalignment of interests such that an attorney may choose to “shirk”—that is, work less than his client would otherwise wish. This misalignment results from the fact that, while an attorney can maximize his overall fee by maximizing his client’s return, he does so at the cost of his averaged per-hour fee, which can be maximized by working fewer hours.

This Note will show that, if the English conditional fee structure were used in the United States, it would alleviate the attorney’s risk of shirking. However, it would create a new set of incentives for the attorney to act against his client’s interests—incentives that are arguably worse than those created by the contingent fee and distinctly worse than those created by the hourly fee. In demonstrating this result, this Note will use techniques similar to those that other authors have used to analyze the contingent fee. Part I describes the British conditional fee

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10 See Zuckerman, supra note 2, at 911.

11 Kerry Underwood, No Win, No Fee, No Worries: Conditional and Contingency Fees Explained 2 (Revised Reprint 1999).


13 That is, the attorney’s fee depends ultimately on the number of hours he works, not on the amount he recovers for his client. For more on the incentives inherent in the hourly fee, see infra Part III.B.

14 See, e.g., Geoffrey P. Miller, Some Agency Problems in Settlement, 16 J. LEGAL STUD. 189 (1987); Alon Harel & Alex Stein, Auctioning for Loyalty: Selection and Monitoring of Class Counsel, 22 YALE L. & POL’Y REV. 69 (2004); see also sources cited infra note 75. The misalignment of interests between lawyer and attorney is also known as an agency problem. See Miller, supra, at 189-93; Harel & Stein, supra, at 69, 76.

15 See infra Part III.

16 The United States uses the “American Rule” under which a client pays his own attorney’s fees. This contrasts with the “English Rule,” under which the losing party pays the winner’s attorney’s fees. See Herbert M. Kritzer, The English Rule, A.B.A. J., Nov. 1992, at 54, 55.

17 See supra note 14 and infra note 75.
system. Part II describes the amount a plaintiff should expect to recover from a lawsuit. Because of the close relationship between a plaintiff’s recovery, his attorney’s payment, and the decisions whether and when to settle, Part II discusses settlement theory. It also presents assumptions regarding the relationship between the plaintiff’s recovery and the attorney’s efforts in securing it. Part III describes the incentive effects of the American-style contingent and hourly fees. Part IV then analyzes attorneys’ incentives under the conditional fee arrangement and the ways in which these incentives affect attorneys’ relationships with their clients. The Conclusion compares the incentive effects of the conditional fee with those of the hourly and American-style contingent fee structures, based on the analysis conducted in Part IV.

I. THE CONDITIONAL FEE ARRANGEMENT

A. Introduction to the Conditional Fee Arrangement

Within the past decade and a half, the United Kingdom has allowed plaintiffs to enter into what is known as a conditional fee arrangement (CFA), under which an attorney will typically charge either no fee or a reduced fee in exchange for receiving a larger than normal, pre-stated fee in the event that his client wins.18

Until recently, England prohibited attorney’s fees that depended on the outcome of cases as contrary to public policy.19 The prohibition persisted due to a widespread belief that a lawyer with too much stake in the outcome of a case may yield to the temptation either to prolong the case rather than settle—if the case might have settled20—or else to act improperly in order to secure success.21 The prohibition extended not only to cases in which an attorney recovers some percentage of the client’s winnings (as is common in the United States22), but also to two

18 See infra notes 27, 32 and accompanying text.
19 See, e.g., ZUCKERMAN, supra note 2, at 910; Michael Zander, Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingent Fees?, 52 DEPAUL L. REV. 259, 259-60 (noting that while the prosecution of attorneys for champerty—i.e., the taking of a share of the spoils of litigation—fell into disuse by 1966, champertous agreements were deemed “unlawful as contrary to public policy”). For more information on why Britain had outlawed such fee arrangements, see infra Part I.
20 Awwad v. Geraghty & Co. (A Firm), [2001] EWCA (QB) 570, 575-76 (Eng.) (“The background to the debate [surrounding contingent fees] has been . . . a historically widespread perception that if the lawyer has too much at stake in the success of the litigation then he may yield to the temptation to prolong litigation which could have settled or to a temptation to act improperly in order to secure success . . . .”).
21 Id.
22 Id.; ZUCKERMAN, supra note 2, at 910.
other types of scenarios. Under the first of these prohibited arrangements, known in England as the “conditional normal fee,” an attorney is paid his normal hourly fee, but only in the event that his client wins.\textsuperscript{23} Under the second, commonly known as a “conditional fee”—the subject of this Note—an attorney receives nothing if his client loses.\textsuperscript{24} However, unlike in the “conditional normal fee,” an attorney working under a conditional fee agreement receives a higher-than-normal hourly fee in the event his client wins.\textsuperscript{25} Until recently, any agreement that fell into any of these three categories was unenforceable.\textsuperscript{26}

The passage of the Courts and Legal Services Act 1990 (CLSA 1990), allowing attorneys to charge on a conditional fee basis,\textsuperscript{27} reflected the government’s desire to provide an alternative to public funding of legal aid as a means of providing legal services to people otherwise unable to afford legal services.\textsuperscript{28} The key provision allowing conditional fees is CLSA 1990 section 58(3), which says that a conditional fee agreement “shall not be unenforceable by reason only of its being a conditional fee agreement.”\textsuperscript{29} CFAs are not permitted in cases unless specifically authorized by statute.\textsuperscript{30} A lawyer who charges a conditional fee may charge an increased fee above the amount that he would normally charge.\textsuperscript{31} This increased fee, commonly called an “uplift” or “success fee,” is calculated as a fixed percentage of his fees over and above his normal charges if his client wins.\textsuperscript{32} For example, if

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\item \textsuperscript{23} Awwad, [2001] EWCA (QB) 570, 576; ZUCKERMAN, supra note 2, at 910.
\item \textsuperscript{24} Awwad, [2001] EWCA (QB) 570, 576; see infra notes 27, 32.
\item \textsuperscript{25} Awwad, [2001] EWCA (QB) 570, 576.
\item \textsuperscript{26} ZUCKERMAN, supra note 2, at 910.
\item \textsuperscript{27} Courts and Legal Services Act, 1990, c. 41, § 58 (Eng.), available at http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900041_en_1.htm [hereinafter CLSA 1990]. The key provision allowing conditional fees is CLSA 1990 section 58(3), which says “a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement.” Id. § 58(3); see also ZUCKERMAN, supra note 2, at 911. For the assertion that CLSA 1990 made the conditional fee lawful, see UNDERWOOD, supra note 11, at 14.
\item \textsuperscript{28} See Callery v. Gray (No. 1), [2002] UKHL 28, [1] (Eng.). The Callery court noted that in addition to being expensive, Legal Aid, the name for England’s scheme, provided lawyer services to people below a certain threshold income but refused those services to people just above that threshold.
\item \textsuperscript{29} CLSA 1990 § 58(3).
\item \textsuperscript{30} See ZUCKERMAN, supra note 2, at 911.
\item \textsuperscript{31} CLSA 1990 § 58(2).
\item \textsuperscript{32} Id. § 58(2). CLSA 1990 section 58(1) defines a conditional fee agreement as an agreement that “provides for that person’s fees and expenses, or any part of them, to be payable only in specified circumstances.” Id. § 58(1)(b). Section 58 then specifies that “[w]here a conditional fee agreement provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not a conditional fee agreement, it shall specify the percentage by which that amount is to be increased.” Id. § 58(2). For example, suppose a lawyer would normally charge $100 per hour, and the specified
an attorney who normally charges $200 per hour says that he will charge an uplift of 25%, his uplift will be $50 and his total fee $250. The lawyer’s uplift must in turn reflect the size of the risk he undertakes,\textsuperscript{33} and cannot exceed 100% of the attorney’s normal hourly fees.\textsuperscript{34} If his client loses, the attorney charges either nothing or a drastically reduced fee.\textsuperscript{35}

B. An Example: Halloran v. Delaney

\textit{Halloran v. Delaney}\textsuperscript{36} is a 2002 English case which is illustrative of the conditional fee; it describes both the details of a particular conditional fee arrangement and limits on how much uplift an attorney may charge. The plaintiff in \textit{Halloran} had been injured in a traffic accident\textsuperscript{37} and sought recovery of his insurance premiums and attorney’s fees from the defendant.\textsuperscript{38} The plaintiff’s contract with his attorney stated the following: “[w]hatever happens you have to pay our disbursements”\textsuperscript{39}—“disbursements” being the common name for court circumstance is the lawyer’s success in winning money for his client. Section 58(2) says that, if the lawyer wins money for his client, the lawyer’s increase in fees must be a specified percentage under section 58(2), e.g., 25%, of his normal $100 hourly fee. The lawyer’s resulting fee would then be $125. If the lawyer gets no money for his client, the specified condition would not be met, and thus under section 58(1)(a) the client would need to pay either no fee or a partial fee.

\textsuperscript{33} Two rules in particular limit the amount of uplift an attorney can charge: Cost Practice Direction (CPD) sections 11.7 & 11.8. CPD section 11.7 directs that when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the agreement.

Halloran v. Delaney, [2002] EWCA (Civ) 1258, [11] (Eng.). CPD section 11.8 likewise reads (1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:

- (a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur . . . .

\textit{Id.}\textsuperscript{34}

\textsuperscript{35} \textit{See id.} at 907, 911 (“Conditional fee agreements are also known as no-win-no-fee agreements, but . . . this last description is not necessarily accurate. . . . [T]he client may, depending on the terms of their agreement, be liable for the solicitor’s disbursements.”). Note that while conditional fees allow a losing plaintiff not to pay the fees for his own attorney, England’s loser-pays scheme nonetheless requires him to pay his opponent’s costs. Plaintiffs therefore have an incentive to enroll in what is known as after-the-event (ATE) insurance. For a description of the relationship between the conditional fee arrangement and ATE insurance, see Robin C.A. White & Rachel Atkinson, \textit{Personal Injury Litigation, Conditional Fees and After-the-Event Insurance}, 19 C.J.Q. 118 (2000).

\textsuperscript{36} [2002] EWCA (Civ) 1258 (Eng.).

\textsuperscript{37} \textit{Id.} at [3].

\textsuperscript{38} \textit{Id.} at [1], [3], [8].

\textsuperscript{39} \textit{Id.} at [3].
fees, medical reports, and other miscellaneous costs that are not part of the attorney’s hourly fee.\textsuperscript{40} “In addition: If you win your claim, you pay our basic charge and a success fee.”\textsuperscript{41} The “basic charge” refers to the attorney’s standard—i.e. non-conditional hourly fee.\textsuperscript{42} The contract also stipulated that the success fee would be 40\% of the basic charges.\textsuperscript{43} The claim then settled, and the plaintiff sought to recover from the defendant the success fee he paid his attorney.\textsuperscript{44}

While the case states neither the attorney’s standard hourly fee nor the size of the other miscellaneous costs, the description still suffices to identify several important features of how the fee works. Pretend, for the sake of understanding the Halloran contract, that the attorney’s standard fee was £100, that the attorney worked only five hours, and that the miscellaneous costs totaled £220. First, note that the contract has stipulated that the plaintiff pay his attorney the miscellaneous costs of £220 whether the plaintiff wins money or not, since these costs are payable “[w]hatever happens.”\textsuperscript{45} Second, note that the client must pay if—and only if—the attorney “succeeds,” and that in the event of success the client pays not only an hourly fee of £100 but also an hourly uplift of £40, thus totaling an effective hourly charge of £140. The plaintiff’s total bill in the event of success would then be (5 hours x £140 per hour) plus £220, or £920. Third, note that the plaintiff owed a success fee to his attorney even though the claim never went to court.\textsuperscript{46} This last fact suggests that the critical trigger to whether a success fee is owed is not whether the plaintiff wins at trial but, instead, whether the plaintiff received money from the defendant, either through trial or settlement.\textsuperscript{47}

In addition to describing the conditional fee, Halloran also shows limits on the uplift an attorney may charge. England has a loser-pays system, wherein the losing side in a civil action pays the winner’s legal

\textsuperscript{40} Law Society of England and Wales, No Win, No Fee Arrangements, http://www.lawsociety.org.uk/choosingandusing/payingforservices/nowinnofee.law (last visited Mar. 13, 2006). The Law Society is the rough equivalent in England and Wales of the American Bar Association. Like the ABA, the Law Society sets ethical and other professional standards for solicitors and lobbies on their behalf. See id.

\textsuperscript{41} Halloran, [2002] EWCA (Civ) 1258, [3].

\textsuperscript{42} Law Society of England and Wales, supra note 40. For more information about the Law Society, see supra note 40.

\textsuperscript{43} Halloran, [2002] EWCA (Civ) 1258, [3].

\textsuperscript{44} Id. at [5]. For more on England’s loser-pays system, see infra this Part.

\textsuperscript{45} Halloran, [2002] EWCA (Civ) 1258, [3].

\textsuperscript{46} Id. at [5].

\textsuperscript{47} Cf. UNDERWOOD, supra note 11, at 71 (“‘Success’ is defined as a money settlement or order in favour of the Plaintiff even if heavily discounted for reasons relating to liability or contributory negligence . . . .”); id. at 10 (“What do ‘success’ and ‘win’ mean [for purposes of charging a success fee]? That we succeed in getting money for you.”).
fees. In Halloran, the dispute at issue involved whether the defendant needed to reimburse the plaintiff for 100% of the success fees which the plaintiff owed to his attorney. Because the proceeding was a “costs only” proceeding, a type of case that almost always results in victory for the plaintiff, the defendant disputed the success fee. The court, relying upon provisions in the Cost Practice Direction (CPD), concluded that the 40% uplift was too high.

The key provisions in the Cost Practice Direction that the court cited were as follows:

11.7 [W]hen the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

11.8 (1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:

(a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur;
(b) the legal representatives’ liability for any disbursements;
(c) what other methods of financing the costs were available to the receiving party.

The court said that these provisions “prevent excessive claims for success fees in cases which settle without the need for proceedings when it was clear, or ought to have been clear from the outset, that the risk of having to commence proceedings was minimal.”

48 See Kritzer, supra note 16, at 55.
49 Halloran, [2002] EWCA (Civ) 1258, [1]-[2], [5]-[6]. In Halloran, the defendant was required to pay the plaintiff’s attorney’s fees even though the case settled. Id. Halloran is not unique in this regard. For another example of a case that settled in which the paying party owed the plaintiff’s attorney’s fees, see Callery v. Gray (No. 1), [2002] UKHL 28, [2], [5] (Eng.) (noting that under the new funding regime introduced by the Legal Services Act of 1990 and the Access to Justice Act 1999, plaintiffs can shift attorneys fees, including uplift in conditional fee cases, not only to insurers and losing defendants but also to defendants who settle).
50 See Halloran, [2002] EWCA (Civ) 1258, [1], [24]-[25] (“[A] success fee is charged to compensate the lawyer for the risk he runs in pursuing the claim without the right to recover his costs from his client... Mr. Ralls said that there was no such risk to the lawyer in costs only proceedings.”).
51 Halloran, [2002] EWCA (Civ) 1258, [2].
52 See supra note 33.
54 Halloran, [2002] EWCA (Civ) 1258, [1] (citing Costs Practice Direction 11.8). For more about the Costs Practice Direction, see supra note 53.
While the court allowed the plaintiff to recover much of the uplift,\textsuperscript{56} noting that one might reasonably have anticipated some risk of non-recovery even in a costs-only proceeding,\textsuperscript{57} it stated its opinion that in future cases, a success fee in simple claims such as the one in this case should typically be around 5\%.\textsuperscript{58}

C. Creating a Mathematical Model for the Conditional Fee

As stated in the introduction, the structure of the contingency fee itself—i.e., the fact that an attorney gets paid a percentage of his client’s winnings—creates an agency problem, that is, a misalignment between the attorney’s interests and his client’s interests.\textsuperscript{59} In order to determine whether similar incentive effects exist when using the conditional fee, one must first determine what, exactly, the structure of the conditional fee is.

Our initial model is that a client pays a cost, $C$, whether he wins or loses. Then, if he wins, he pays the attorney’s fee for services, which is equal to a higher-than-normal hourly charge multiplied by the number of hours, $h$, the attorney has worked. This higher-than-normal hourly charge can be described as his normal hourly charge, $F$, plus an uplift, $u$, where $u$ is a fraction of $F$. The total amount the client pays, then, is $(u + F)h + C$ if the client wins, and $C$ if the client loses.

As Halloran shows, however, this model is incomplete: both Halloran and CPD 11.8 indicate that the uplift, $u$, should bear a relationship with the degree of risk that the client will lose and that the attorney therefore will not receive payment.\textsuperscript{60} The greater the risk of non-payment, the larger the uplift an attorney may charge. In Section IV, this Note will describe in greater detail what the relationship

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\textsuperscript{56} Id. at [32].

\textsuperscript{57} See, e.g., text accompanying supra note 53; Halloran, [2002] EWCA (Civ) 1258, [31] (“While we would not suggest that any great degree of risk is involved, we would reject [the defendant’s attorney’s] submission that even at the present time there is no risk in costs only proceedings for which a lawyer acting under a CFA is entitled to seek protection . . . .”); id. at [30] (noting that shortly before the plaintiff in Halloran entered into his fee arrangement with his attorney, “there was a good deal of uncertainty about a number of matters relating to the recoverability of costs (including ATE insurance premiums) in a case like this”); id. at [32]:

For the reasons we have given we consider that [the trial judge] was right to conclude that the CFA covered the costs only proceedings. Because of the prevailing uncertainties at the time this particular CFA was made, we cannot say that she was wrong to hold that an uplift of 20% was reasonable.

\textsuperscript{58} Id. at [36].

\textsuperscript{59} See supra note 14.

\textsuperscript{60} See supra note 33 and text accompanying notes 49-50; see also Zuckerman, supra note 2, at 886-94 (describing the proportionality requirements of the uplift).
between $u$ and the degree of risk is. For now it suffices simply to note that the relationship exists.

II. Plaintiff’s Expectancy, Settlement, and the Role of the Attorney

A. Plaintiff’s Expectancy and Settlement Theory

According to classic settlement theory, a necessary condition for a plaintiff and defendant to settle is that the plaintiff’s minimum offer—that is, the smallest amount of money that could entice the plaintiff to drop his suit—be smaller than the defendant’s maximum offer.

Assuming that the plaintiff and the defendant have effective control over whether they settle, the plaintiff’s minimum offer will equal the amount of money he expects to win should he go to trial. This amount, which this Note will call “plaintiff’s expectancy,” factors in not only the amount of money the plaintiff expects to win in the event of a court victory but also his chances of winning and how much he will need to pay in the way of expenses, such as attorney’s fees and court costs.

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61 For a relatively simple description of classic settlement theory, see Miller, supra note 14, at 191-93; Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 MICH. L. REV. 107, 111-14 (1994). Note that the model presented here assumes that $pJ$, i.e., the probability of plaintiff’s victory $p$ multiplied by the size of his award, $J$, should he win, is the same for the plaintiff and the defendant. In practice, plaintiffs and defendants may have differing views of the likelihood of their victory and the size of the plaintiff’s award. For a more in depth examination of settlement theory, see Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. ECON. LITERATURE 1067 (1989) (reviewing literature describing the dynamics of settlement); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (5th ed. 1998); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399 (1973); William M. Landes, An Economic Analysis of the Courts, 14 J. LAW & ECON. 61 (1971); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984).

62 See Miller, supra note 14, at 191 (“A necessary condition for the settlement of a lawsuit is that the plaintiff’s minimum offer . . . be smaller than the defendant’s maximum offer.”).

63 The person who has “effective control” over a case—that is, either the plaintiff on the one hand or his attorney on the other—controls whether to accept a given settlement offer from the defendant. While in theory the plaintiff always controls whether and when he settles, see MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1983), in practice the plaintiff’s willingness to settle may depend on the information his attorney provides regarding the value and strength of the plaintiff’s case. See Miller, supra note 14, at 200 (describing attorney control as the sole power to accept or reject settlement offers).

64 The justification for this assertion is that, for any offer below this minimum, the plaintiff would be better off going to trial. See Miller, supra note 14, at 191 (“The plaintiff’s minimum offer is the benefit that the plaintiff expects from going to trial—sometimes referred to as ‘plaintiff’s gain from trial’—since, for any lower settlement figure, plaintiff would be better off going to trial than settling.”).
Mathematically stated, the plaintiff’s expectancy is \( pJ - C \), where \( p \) represents the chances the plaintiff will win his case, \( J \) describes the amount of money he would receive as a judgment if he wins, and \( C \) represents the sum total of his expenses.\(^{66}\)

As an example, suppose that a plaintiff injured in a car accident thinks that he has a 50% chance of winning a case in which he is suing for $300,000. Suppose also that, by the time his trial is finished, the plaintiff will owe his attorney $50,000 in fees plus another $5,000 for paperwork and $10,000 for witnesses. Suppose finally that he will have paid an additional $400 in court fees and other miscellaneous costs. These expenses total $65,400. The plaintiff’s net expectancy, then, is $150,000 - $65,400, or $84,600. He has a 50% chance of receiving $234,600\(^{67}\) and a 50% chance of losing $65,400. The expectancy amount, $84,600, is the average of his potential gain and his potential loss. Were the plaintiff’s estimation of his chances of victory higher—say, 80%—then his expectancy would be \((0.8 \times 300,000 = 240,000)\) minus $65,400, which equals $174,600.

If the plaintiff pays his attorney a contingent fee, the plaintiff’s costs, \( C \), will vary depending on whether he wins or loses. If the attorney has agreed to pay the costs of all witnesses, paperwork, and court costs, \( C \)\(^{68}\) will equal a fraction \( f \) of whatever amount the plaintiff wins, \( pJ \). In other words, \( C \) will equal \( fpJ \).\(^{69}\) In this case, the plaintiff’s expectancy would be \( pJ - fpJ \), or \( pJ(1 - f) \).\(^{70}\) Thus, for example, if the attorney’s contingency fee is 33 1/3%, the plaintiff expects to win $300,000 in the event of victory, and the plaintiff thinks that his chances of winning are 80%, the plaintiff’s expectancy will be \((0.8 \times 300,000 = 240,000) \times (1 - 1/3 = 2/3)\), which is $160,000. The plaintiff’s costs,

\[ \text{See id.; Avery Katz, The Effect of Frivolous Lawsuits on the Settlement of Litigation, 10 INT’L REV. L. & ECON. 3, 7-9 (1990). What this Note has called “plaintiff’s expectancy,” Miller calls “plaintiff’s gain from trial” and describes as } pJ - F, \text{ where } P \text{ is the probability of victory, } J \text{ is the size of the expected judgment, and } F \text{ is plaintiff’s expected future attorney’s fees. See Miller, supra note 14. Katz describes the same as } wA - t - c, \text{ where } w \text{ represents the likelihood of finding liability (i.e., the chance of victory at trial); } A \text{ represents the extent of plaintiff’s injury (equivalent to } J \text{); and } t \text{ and } c \text{ describe the costs of trial and filing fees, respectively—both of which can be described generically as the cost of going to trial.} \]

\[ \text{See Harel & Stein, supra note 14, at 82. The expected gain from the plaintiff class is } PR(1 - f), \text{ where } P \text{ is the probability of a court victory, } R \text{ is the likely size of the judgment award, and } f \text{ is the attorney’s percentage fee. If } PR \text{ describes the probability that the plaintiff will win, and } R \text{ the likely size of the judgment, then the gross amount the plaintiff will expect to receive—i.e., before costs—is } PR. \text{ If the plaintiff pockets } PR(1 - f), \text{ then by implication the plaintiff’s costs, } C, \text{ will be } fPR. \text{ Id. Miller arrives at the same conclusion, using } P \text{ as the probability of court victory, } J \text{ as the likely size of the plaintiff’s award should he win, and } S \text{ as the contingency percentage. See Miller, supra note 14, at 198-99.} \]

\[ \text{See supra note 69.} \]
meanwhile, will go directly to the attorney in the form of a lump sum of $80,000,\textsuperscript{71} out of which the attorney will pay all witness, court, and other expenses.\textsuperscript{72}

Classic economic settlement theory says that a plaintiff will rationally settle for an amount equal to or greater than his expectancy—i.e., the size of his judgment, multiplied by his chances of winning, minus the amount of money he will need to pay his attorney.\textsuperscript{73} Put in algebraic terms, if $J$ represents the probable size of the plaintiff’s judgment award should he win, $p$ represents the plaintiff’s chances of winning that award, and $C$ represents the amount of money he will need to pay his attorney plus any other costs he may incur, such as trial costs, then the plaintiff will be willing to settle for an amount equal to $pJ - C.\textsuperscript{74}

\textsuperscript{71} $80,000 = 1/3 \times \$240,000.$
\textsuperscript{72} As for the defendant’s willingness to settle, his offer will equal the amount of money he expects to lose by the end of trial. See Harel & Stein, supra note 14, at 82-83. This amount, which can be called “defendant’s expected loss,” will, like the plaintiff’s expectancy, factor his chances of losing, the amount of money he expects to pay in the form of a judgment should he lose, and any costs he will have incurred by the end of trial. Id. Like the plaintiff, the defendant will have his own beliefs regarding (1) the amount of money he will lose, $J$, in the event of an unfavorable judgment; (2) his chances of losing, $p$; and (3) the costs, $C$, he will have incurred by the time the trial is complete. See id. The defendant’s expected loss can be represented by the equation $pJ + C$. Id.

In order for there to be a rational incentive for both sides to settle, the plaintiff’s beliefs about what he will win from trial, i.e., the plaintiff’s expectancy, must be less than the defendant’s expected loss, i.e., what the defendant believes about his chances of losing, the amount of his loss, and how much he will pay. See id.; Miller, supra note 14, at 191. In some instances, either the plaintiff may have too optimistic an expectancy or the defendant has an overly optimistic belief about his expected loss. If, however, both sides have the same views regarding the likelihood and size of a judgment, $pJ$, both sides have an incentive to settle.

Suppose, now, that a case is in progress—that is, it is at some moment, $t$, after the litigation has started but before the trial has reached a final judgment. Suppose also, for simplicity’s sake, that the plaintiff and defendant incur expenses at an equal rate and that, by the conclusion of the trial, both the plaintiff and the defendant will have incurred costs totaling $C$. Suppose finally that as of time $t$, both the plaintiff and the defendant have already spent $C_1$, and that the amount that they each have yet to spend is $C_2$—that is, that $C - C_1 = C_2$. If this is the case, then the plaintiff will settle for any amount greater than $pJ + C_2$. See Harel & Stein, supra note 14, at 82-83; Miller, supra note 14, at 198 n.33. Harel and Stein note that the expected loss for the defendant is $PR + C$, where $C$ represents the class attorney’s opportunity costs. Harel & Stein, supra note 14, at 82. Miller uses the same definition for $C$. Miller, supra note 14, at 198 (defining $C$ as including opportunity costs). Miller then states that $C$ includes only future calculations, since the costs that the attorney has previously incurred are sunk costs. Id. at 198 n.33.

If the case settles early, $C_2$ will approximate the plaintiff’s and defendant’s total costs. The difference between the plaintiff’s expectancy and the defendant’s expected loss is $C_2 + C$. Harel & Stein, supra note 14, at 83 (noting that the settlement range where class members control their action is $2C$, and calling this range the “normal settlement condition”). This difference, i.e., all amounts above the plaintiff’s expectancy but below the defendant’s expected loss, is known as the “settlement range,” within which both the defendant and the plaintiff have an incentive to settle rather than go to trial. Id.

\textsuperscript{73} See supra notes 63-66 and accompanying text.
\textsuperscript{74} See Miller, supra note 14, at 191. Similarly, the defendant will be willing to settle for an
B. Assumptions About the Relationship Between Plaintiff’s Recovery in Settlement and his Attorney’s Efforts

In order to analyze the incentive effects of different fee arrangements, this Note will make several assumptions. First, the amount of money the plaintiff will receive in a settlement depends on how much time his attorney expends on his behalf. Second, the plaintiff’s attorney must work a minimum amount of time before the defendant will make a settlement offer; however, once plaintiff’s counsel has worked that requisite amount of time, each additional hour he expends will increase the defendant’s settlement offer by an incrementally smaller amount. Third, the amount of increase in the size of defendant’s offer per additional hour of effort plaintiff’s counsel expends will approach zero as the defendant’s offer approaches his maximum.

This Note will also assume, fourth, that the plaintiff’s attorney can ascertain, before taking the case, the amount of money that the plaintiff would receive should he win at trial.

Figure 1, in the next Section, pictorially describes the relationship between the hours the plaintiff’s attorney expends and the amount of money he can win for his client in the form of a settlement offer from the defendant.
III. INCENTIVE EFFECTS OF THE CONTINGENT AND HOURLY FEE STRUCTURES

This Note asks what incentives the conditional fee creates for an attorney to act for or against his client’s behalf in deciding whether and when to settle. It also seeks to compare the conditional fee’s incentive effects with those of the contingent and hourly fee structures. In order to compare the plaintiff’s interests with those of his attorney, this Note must ask what the plaintiff’s interests are under each type of fee contract and what his attorney’s interests are under the same contract. Parts III and IV will therefore divide their analyses of each fee structure into two components: plaintiff control and attorney control. “Plaintiff control” asks what the plaintiff’s interests are; similarly, “attorney control” examines his attorney’s interests.

The issue of who controls settlement is relevant because, frequently, consumers have little knowledge of the value of their own claims.81 Furthermore, even if they do, they may not understand what their chances of winning are.82 It follows that if a plaintiff does not know what \( p_j \) is, he cannot assess whether a given settlement offer meets his expectancy of winning at trial.83 The problem of an

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81 See Brickman, supra note 5, at 77.
82 See id. (noting that consumers of attorney services often have little knowledge of the amount of risk that their lawyer is assuming by taking on their case).
83 See text accompanying supra note 65.
attorney who can induce an untimely settlement is especially relevant in
class action cases. 84 In such cases, the attorney frequently has actual
control over his case. 85 The attorney in such cases will have not only
the incentive to settle early but also the ability to do so. 86

The key question to ask in each “attorney control” analysis is not
whether the attorney and client interests align per se, but whether the
attorney has an incentive to act contrary to the plaintiff’s interests. The
less incentive the attorney has to act against his client, the more strongly
other factors, such as the attorney’s reputation and relationship with his
customers, play into his decisionmaking. Each such section will thus
conclude with a summary of the attorney’s incentives and whether these
incentives encourage him to act against his client.

A. The Contingent Fee

1. Plaintiff Control

Suppose that \( p \) represents the probability that a plaintiff will win; \( J \)
is the dollar amount of the judgment if the plaintiff wins; \( f \) is the
percentage fee that the attorney would take; \( C \) represents the costs the
plaintiff will pay; and \( S \) represents the dollar value of the settlement that
the plaintiff and defendant agree upon. 87 As mentioned earlier, 88 the
plaintiff’s expectancy in a contingency fee case is \( pJ - fpJ \), or \( pJ(1 - f) \). 89
According to settlement theory, the plaintiff will not rationally settle for
an amount \( S \) that is lower than the plaintiff’s expectancy. 90 Therefore

84 Harel & Stein, supra note 14, at 81.
85 Id. at 81-82.
86 The defendant will be more than willing to strike a collusive bargain with a class attorney
who intends to settle for a low amount, since it means that the defendant will pay less. Id. at 84-
85. Although a court would need to approve a low settlement amount, it is often difficult for
class members to contest the amount, since they typically know less about the facts of the case
than the defendant and the class counsel. See id. at 85.
87 Miller describes the plaintiff’s chances of victory as \( P \); the size of his expected judgment as
\( J \); the plaintiff’s expected future attorney’s fees as \( F \); and the dollar value of settlement as \( R \).Miller, supra note 14, at 215. Similarly, Harel and Stein describe the probability that the plaintiff
will win as \( P \); the size of plaintiff’s recovery as \( R \); and the attorney’s percentage fee as \( f \). Harel &
Stein, supra note 14, at 82. \( C \), which this Note has used to describe the plaintiff’s costs, should
not be confused with Miller’s and Harel and Stein’s “\( C \),” which they use to describe the
attorney’s opportunity costs. See Miller, supra note 14, at 215; Harel & Stein, supra note 14, at
82. This Note will incorporate the notion of opportunity cost in Part IV, when it distinguishes
between attorneys who have a steady stream of work and attorneys who do not. The reason this
Note defines \( C \) differently is to allow for an easier apples-to-apples comparison between the
conditional fee and the contingent and hourly fee structures.
88 See discussion supra Part II.B.
89 Miller, supra note 14, at 199; Harel & Stein, supra note 14, at 82.
90 Miller, supra note 14, at 197, 199; see supra notes 64-67 and accompanying text.
the lowest amount for which the plaintiff would rationally settle would be an amount $S$ that would allow the plaintiff to receive a net dollar figure of $pJ(1 - f)$. In a contingent fee arrangement, the costs $C$ that the plaintiff will incur if he settles are a percentage, $f$, of the size of the settlement, $S$. In other words, the plaintiff’s costs $C$ will equal $Sf$. The plaintiff will then retain $S(1 - f)$. Thus the plaintiff will rationally settle for any amount $S$ such that $S(1 - f)$ is equal to or greater than $pJ(1 - f)$. Solving for $S$ leads to the result that $S$ must be greater than or equal to $pJ$. If the plaintiff settles for this amount, his attorney will receive an amount equal to $pJf$.

For example, suppose that if the plaintiff wins his case he will receive $300,000. Also suppose that he has a 60% chance of winning and that his attorney will take 33 1/3% of the amount awarded. The plaintiff’s expectancy will be $pJ(1 - f)$, which in this case is $120,000. In order for the plaintiff to net that amount, he will need to settle for $180,000, from which he will pay his attorney 33 1/3% of that, or $60,000.

2. Attorney Control

In a standard contingent fee contract, an attorney will need to pay his costs using a portion of his overall fee. For example, suppose the attorney expects a 33% take of his client’s winnings, the client settles for $100,000, and the attorney’s miscellaneous costs—i.e., non-hourly costs such as paperwork and witnesses—are $8,000. The client will typically pay his attorney $33,000, rather than $33,000 plus an extra $8,000. This is true whether the case settles or goes to trial. Thus,
if the case settles, the attorney will net $fS - C1$, where $C1$ represents the attorney’s miscellaneous costs up to the moment of settlement.\textsuperscript{102} If the case goes to trial and the attorney must spend an additional amount equal to $C2$, the attorney will net an amount equal to $fJ - (C1 + C2)$ if he wins and will lose $(C1 + C2)$ if he loses.\textsuperscript{103} The attorney’s expectancy from going to trial, then, is $fpJ - (C1 + C2)$. Thus, if the attorney has effective control over his client’s case, he will rationally settle for any amount $S$ such that $fS - C1 = fpJ - C1 - C2$, or $S = pJ - (C2/f)$.\textsuperscript{104} If the attorney settles for this amount, he will get $f$ percent of that amount, while his client will receive an amount equal to $(pJ - (C2/f))(1 - f)$.

To illustrate this, suppose that we use the same example that was used to identify the plaintiff’s minimum offer: the plaintiff has a 60\% chance, $p$, of winning a case in which his likely judgment award, $J$, is $300,000. Assume also that his attorney is working on a contingency fee, $f$, of 33 1/3\%. Finally, assume that the attorney’s miscellaneous, reimbursable costs $C$ by the trial’s completion would total $15,000, that the attorney has already spent $5,000 (i.e., $C1$) of that, and that the attorney has yet to spend $10,000. If this is the case, then the attorney’s expectancy from going to trial will equal $60,000 - $15,000, or $45,000. The attorney would therefore rationally settle for any $S$ that would allow him to receive that amount. In this case, $S$ would need to equal $pJ - (C2/f) = $180,000 - $30,000 = $150,000. If the attorney settles for this amount, he will get 1/3 of it, or $50,000. After he pays his costs thus far of $5,000, he will net $45,000, which is the same as his expectancy.

As is seen by comparing this example with the example in which the plaintiff controls the case, the minimum amount of money for which an attorney will rationally settle is lower than the minimum amount for which his client will rationally settle by an amount equal to $(C2/f)$.

If the attorney sacrifices income by working on the present case—that is, if he has a steady stream of income such that he could start work immediately on another case were he to drop the present one—he has a significant interest in settling early. This Note has made two relevant assumptions regarding an attorney’s effectiveness during settlement: (1) that each successive hour of the lawyer’s time will produce an incrementally smaller increase in the size of the defendant’s settlement

\textsuperscript{102} See text accompanying supra notes 99-101. For this Note’s definition of $C1$, see supra note 72 and infra note 119.

\textsuperscript{103} This is because the attorney pays costs whether he wins or loses.

\textsuperscript{104} Miller, supra note 14, at 200.
offer, and (2) that there exists a maximum settlement offer beyond which the defendant will not go. In addition to spending money on costs, C, a lawyer with a steady stream of income foregoes income, X, by working on the present case.

**Figure 2: Lawyer’s Net Take Where Opportunity Costs are Zero**

![Graph showing lawyer's net take where opportunity costs are zero](image)

**Figure 3: Lawyer’s Net Take Compared With Opportunity Costs**

![Graph showing lawyer's net take compared with opportunity costs](image)

Figure 3, which is based on these assumptions, represents the relationship between an attorney’s time and the amount of money he
will secure for his client, as well as his own net income\textsuperscript{105} and the opportunity costs he will incur by working on the present case.

Figure 3 illustrates why the contingent fee attorney who maintains control over his client’s case will rationally choose to settle for an amount that is lower than what his client might choose to settle for. For each successive hour that the attorney works, he receives a marginally smaller return such that at any hour beyond time \(Q\), it makes sense for him to settle. It is true that his net take increases if he continues to work on the present case even after time \(Q\). However, his net take increases at a faster rate if he drops the present case at time \(Q\) and begins working on a new one on an hourly fee basis.\textsuperscript{106} His client, meanwhile, would prefer that the attorney work as long as possible on the case, since the client has no incentive to limit his attorney’s hours. Therefore the attorney has an incentive to settle much earlier than his client would have him settle.

An attorney without a steady stream of work—that is, with no opportunity costs—would also have an interest in settling before his client would otherwise choose, as is illustrated by Figure 2. However, this interest would be much weaker. Let’s assume, for instance, that our attorney expends money at a constant rate, \(C/h\), and that by the end of the trial—if he goes to trial—he will have worked 250 hours. Assuming total reimbursable costs \(C\) of $15,000, his per-hour costs would be $15,000 divided by 250, or $60 per hour. As shown in Figure 2, the size of the settlement at time \(Q\), when the attorney maximizes his net return, approaches the largest size he could achieve for his client. Thus, even though he has an interest in settling before his client would want to settle, this interest works significantly less against his client than when he has a steady stream of income.

\textsuperscript{105} Net income equals his income minus those costs that he could be reimbursed for were he to work on an hourly fee.

\textsuperscript{106} See Schwartz & Mitchell, supra note 75, at 1128-36. The model Schwartz and Mitchell present shows a graph and a chart describing what an attorney would earn on an hourly fee basis and on a contingent fee basis. See id. at 1130, 1132. They then describe the profit-maximizing lawyer’s behavior in a contingent fee case. Id. at 1135-36. Based on their model, if an attorney’s standard hourly rate is $40, he will continue work on a contingent fee case until hour 9—that is, as soon as his increase in fee for each additional hour worked on a contingent fee basis becomes less than his standard hourly fee. The reason is that the lawyer’s increased fee of $35 at hour 9 will not justify the $40 he foregoes by not working on another case. Id. at 1135. Figure 3 assumes that the lawyer’s hourly rate is $200 and that his per hour reimbursable expenses are $60.
B. The Hourly Fee

1. Plaintiff Control

In the standard hourly fee contract, the plaintiff’s expectancy will be \( pJ - Fh - C \), where \( F \) represents his attorney’s hourly fee, and \( C \) and \( h \) his expected miscellaneous costs and number of hours his attorney will likely work, respectively, should plaintiff go to trial.\(^{107}\) The plaintiff will rationally settle for any amount \( S \) such that the amount he receives after he pays his attorney will equal or exceed his expectancy.\(^{108}\)

Assume then that by time \( t \) his attorney has already worked \( h_1 \) hours and has already incurred \( C_1 \) in miscellaneous costs. Assume also that the hours and costs that have yet to be incurred are \( h_2 \) and \( C_2 \), respectively, such that \( h_1 + h_2 = h \), and \( C_1 + C_2 = C \). One can extrapolate that at any time \( t \) at which the plaintiff might choose to settle for an amount \( S \), he will need to expend \( Fh_1 + C_1 \) from that total in order to cover his attorney’s fees and other costs.\(^{109}\) In other words, his net gain from settlement will be \( S - Fh_1 - C_1 \). Thus in order for the attorney’s net gain from settlement to equal or exceed his expectancy, \( S - Fh_1 - C_1 \) must equal or exceed \( pJ - Fh - C \), which can be rewritten as \( pJ - Fh_1 - Fh_2 - C_1 - C_2 \). This means that \( S \) must equal or exceed \( pJ - Fh_2 - C_2 \). If the plaintiff settles for this amount, his attorney will receive \( Fh_1 \) for his services.

Suppose, for instance, that the plaintiff’s chances of winning a case are 60% and the size of the likely judgment is $300,000. Also suppose that his attorney charges $200 per hour and that he will eventually work 250 hours and incur $15,000 in reimbursable costs. Suppose finally that he has already worked 100 hours and has expended $5,000 in costs. In order for a settlement to give the plaintiff his expectancy, \( S \) must equal \( pJ \) minus the future attorney’s fees and costs he will incur. These fees and costs amount to $30,000 and $10,000 respectively. \( S \) must consequently equal $140,000 in order for the plaintiff to net his

\(^{107}\) Cf. Katz, supra note 65, at 7-9; Miller, supra note 14, at 202. Miller describes plaintiff’s gain from trial as \( pJ - F \), where \( F \) is the future attorney’s fees. He assumes that the attorney will pay all costs. See Miller, supra note 14, at 198 n.35. Katz, meanwhile, separates the plaintiff’s miscellaneous (i.e., non-hourly) costs into those which the plaintiff must spend initially to bring his suit, \( c \), and all other costs, which, when added to his attorney’s fees, total \( t \). For a comparison between Katz’s symbols and those of this Note, see supra note 65.

\(^{108}\) Cf. Miller, supra note 14, at 202 (“When plaintiff controls the settlement decision, it will be rational for plaintiff to settle when plaintiff’s gain from settlement equals plaintiff’s gain from trial.”); Katz, supra note 65, at 8 (stating that an injured plaintiff would accept a settlement if and only if it were at least as great as his expected gain from trial).

\(^{109}\) The conclusion, as well as the other conclusions in this paragraph, come from substituting \( h_1 \) for \( h \), \( C_1 \) for \( C \), etc. in the equation \( pJ - Fh - C \).
expectancy of $115,000. This settlement figure is necessary in order for him to pay his attorney’s fees and costs of $25,000.

2. Attorney Control

The attorney’s expectancy in an hourly fee case, meanwhile, is \( F_h \), since this is how much money he would stand to gain should he go to trial. Assume the same example as before: as of time \( t \), the attorney has already worked \( h_1 \) hours and has already incurred \( C_1 \) in miscellaneous costs, and that by the end of the case he will incur an additional \( C_2 \) costs and work \( h_2 \) more hours, such that \( h_1 + h_2 = h \), and \( C_1 + C_2 = C \). If the plaintiff settles at time \( t \), the attorney will receive hourly fees totaling \( F_h \).\(^{110}\) He will also have an additional \( h_2 \) hours to work on another project.

If the present case were the only one the attorney had to work on, the attorney would have no interest in ever settling, since by settling he would forfeit hourly fees totaling \( F_h \). Suppose, however, that the attorney has a steady stream of income. In that case, he would again forfeit hourly fees totaling \( F_h \) from the present client. However, if he charges his other clients the same hourly rate \( F \), he can bill those other clients a total of \( F_h \) during the time that he might otherwise have spent on the present case. Therefore, the attorney who has a steady stream of income would neither gain nor lose by settling at any time.\(^ {111}\)

The attorney’s indifference towards settling or going to trial means that he has no direct financial interest in behaving for or against his client. This in turn means that any other factors that might affect his thinking have no financial interest to compete against. Assuming that these other factors—such as reputation or a desire to do a good job—encourage him to act on his client’s behalf, the attorney’s financial indifference will tend to promote these other motives.

\(^{110}\) See supra note 109.

\(^{111}\) Miller arrives at essentially the same conclusion but characterizes it differently. For him, the attorney’s gain from trial is \( F - C \), where \( F \) represents future attorney’s fees and costs—the same as \( F_h + C_2 \) in this Note—and \( C \) represents not only miscellaneous future costs, which this Note describes as \( C_2 \), but also future opportunity costs, which represent the earning potential of the attorney’s time should he pursue other activities. If the attorney has a steady stream of work, he can earn \( F_h \) during that time; if he has no other cases, he will earn nothing. Thus Miller’s equation \( F - C \) can be described, in terms of this Note, as \( F_h + C_2 - C_2 - X \), where \( X \), which represents the attorney’s gain through the alternate uses of his time, falls somewhere between \( F_h \) and 0, depending on how much other work he has. For Miller’s definition of \( F \), see Miller, supra note 14, at 202. For his definition of \( C \), see id. at 198. For his conclusion that the attorney’s gain from settlement is zero and his gain from going to trial is \( F - C \), and for his assertion that an attorney in an hourly fee case will usually earn more by working on the present case than from alternative uses of his time, see id. at 203.
With this background, this Note will now analyze the conditional fee.

IV. ANALYSIS OF THE CONDITIONAL FEE

A. Analysis of Standard Conditional Fee

First, assume that the plaintiff will pay costs $C$ regardless of whether he wins or loses.\textsuperscript{112} Under the standard conditional fee, if the plaintiff wins at trial, he will win $J$, from which he must pay the attorney $(u + F)h + C$.\textsuperscript{113} In other words, if the plaintiff wins, the net amount he will receive is $J - (u + F)h - C$. If the plaintiff loses at trial, he will still need to pay $C$, since these represent fixed costs.\textsuperscript{114} If $p$ represents the probability that the plaintiff will win and $(100 - p)$ represents the probability that he will lose, then the plaintiff has $p$ chance of netting $J - (u + F)h - C$ and has a $(1 - p)$ chance of paying out $C$.

The plaintiff’s expectancy can be found by taking the average—weighted based on his chances of winning or losing—of the net amount the plaintiff would expect to receive if he wins at trial, $J - (u + F)h - C$, and his net loss, $C$, if he loses.\textsuperscript{115} The weighted average is calculated by the following formula:

\[
((\text{chance of event 1}) \times (\text{money from event 1})) + ((\text{chance of event 2}) \times (\text{money from event 2})) + ((\text{chance of event 3}) \times (\text{money from event 3})) + (\text{etc. . .})\] \textsuperscript{116}

\textsuperscript{112} Miscellaneous costs, which this Note has represented as $C$, comprise court fees, the cost of witnesses and paperwork, and all other costs that are not based on the attorney’s hourly fee. Some of these costs, such as court fees, the client may pay directly. The client may pay other costs indirectly through his attorney. For example, his attorney, rather than he, may pay for witnesses and then charge these costs to the client as reimbursables. Either way, the plaintiff pays for these costs.

\textsuperscript{113} Recall that $u$ represents the uplift. \textit{See supra} Part I.C. For a derivation of $u$’s numerical value, see discussion \textit{infra} this Part.

\textsuperscript{114} \textit{See ZUCKERMAN, supra} note 2, at 911 (“Conditional fee agreements are also known as no-win-no-fee agreements, but . . . this last description is not necessarily accurate. . . . [T]he client may, depending on the terms of their agreement, be liable for the solicitor’s disbursements.”).

\textsuperscript{115} An example of a weighted average: if a person has a 10% chance of winning $100 in a lottery and a 90% chance of winning nothing, his weighted average winnings would be $10.

\textsuperscript{116} See A. ALBERT KLF, ARITHMETIC REFRESHER 190-91 (1964).
In the present case, the weighted average of the plaintiff’s net return is

\[ p(J - (u + F)h - C) - C(1 - p) \]

The resulting amount is

\[ pJ - p(u + F)h - C \]

This amount, then, is the plaintiff’s expectancy—i.e., the amount of money that he would expect to win at trial—factoring in his chances of winning.\(^\text{117}\)

Suppose, for example, that \( J \) is $300,000, \( p \) is 60%, \( F \) is $200, \( u \) is $50 (i.e., 25% of \( F \)), \( h \) is 250 hours, and \( C \) is $15,000. If the plaintiff wins his case, he will win $300,000, from which he will pay his attorney \((F + u)h + C\), or $77,500. If he loses, he will pay only \( C \), or $15,000. Therefore, he has a 60% chance of winning $222,500 and a 40% chance of losing $15,000. His weighted average expectancy in this case would equal \((0.6 \times 222,500) - (0.4 \times 15,000)\), or $127,500. The equation \( pJ - p(u + F)h - C \) yields the same result: $180,000 - \((0.6 \times 250 \times 250)\) - $15,000, or $127,500.

1. Plaintiff Control

Because the plaintiff’s expectancy is \( pJ - p(u + F)h - C \), the plaintiff will rationally settle for any figure \( S \) that allows him to net that amount. In other words, the amount that the plaintiff will settle for, \( S \), needs to be larger than his expectancy by an amount that is equal to the amount that he will pay his attorney.\(^\text{118}\)

If the plaintiff’s attorney has already worked \( h1 \) hours up to this point and the plaintiff has so far incurred costs totaling \( C1 \), then the money the plaintiff will owe up to this point is \((u + F)h1 + C1\).\(^\text{119}\)

The gross amount he will rationally settle for will be

\[ pJ - p(u + F)h - C + (u + F)h1 + C1 \]

\(^{117}\) See supra Part III.A.

\(^{118}\) Note that \( S \) does not need to incorporate plaintiff’s miscellaneous costs, \( C \), since under the standard conditional fee arrangement, the plaintiff expects to pay \( C \) regardless. See supra note 56; this Part.

\(^{119}\) \( h1 \) refers to the number of hours the plaintiff’s attorney has already expended; \( C1 \) refers to miscellaneous costs already incurred.
which equals $pJ - p(u + F)h - C2^{120} + (u + F)h1$. From this, the plaintiff will receive his expectancy of $pJ - p(u + F)h - C$, while his attorney will receive $(u + F)h1^{121}$.

For example, assume that $p$ is 60%; $J$, $300,000; u$, 25%, or $50; F$, $200 per hour; h$, 250 hours; and $C$, $15,000. Assume also that the attorney has already worked 100 hours and has expended $5,000. In order for the plaintiff to get his expectancy of $127,500, he will need to settle for $180,000 - (0.6 \times 250 \times 250) - 10,000 + (250 \times 100)$, which equals $180,000 - 37,500 - 10,000 + 25,000 = 157,500. From this he will owe his attorney $25,000 and pay costs of $5,000, leaving him with $127,500.

2. Attorney Control

This Note has stated that $u$ must be proportional to the risk that the attorney will not be paid.\textsuperscript{122} Since the \textit{Halloran} model of the conditional fee assumes that the attorney will receive an uplift if the case settles, a new term, $s$, must be introduced to describe the probability that the case will settle in order to determine what $u$ is. As with $p$, this Note will assume that $s$ can be ascertained when the plaintiff and attorney enter into their fee arrangement.\textsuperscript{123} Under this presumption, $u$ bears an inverse relationship to $p$ and $s$ such that if $p$ and $s$ increase, $u$ decreases.

Borrowing from an earlier example, assume that the value of the plaintiff’s claim, $J$, is $300,000, that the case has a 70% chance, $s$, of settling, and that if the case goes to trial, the plaintiff has a 60% chance of winning.

The chance that an attorney working under a conditional fee will be paid is the chance that the case will settle, $s$, plus the chance, $p$, that the case will succeed if it does not settle $(1 - s)$. In other words, the

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\textsuperscript{120} C2 refers to the \textit{future} miscellaneous costs that the plaintiff will incur if he goes to trial. The amount C2 equals the total amount of money he will spend at trial, $C$, minus the amount of miscellaneous costs he has already incurred, i.e., $C1$. See \textit{supra} notes 72, 111 and text accompanying note 66.

\textsuperscript{121} This amount represents what the attorney will receive from his hourly billing.

\textsuperscript{122} See \textit{supra} Parts I.B-C.

\textsuperscript{123} See \textit{supra} note 83. The assumption is necessary to avoid a situation in which an attorney charges a significant uplift, such as 60%, in a case that has a 90% chance of settling. Even if such a case had very little chance of winning, the attorney would have a 90% chance of receiving 160% of his normal fee. An attorney who claimed that he had no idea that the case would probably settle would, in effect, be allowed to reap a windfall uplift due to his ignorance about the case’s chances of settling. See \textit{supra} Part I.B.
probability that he will receive payment is \( s + p(1 - s) \).\(^ {124} \) In the present case, this chance equals 0.7 + (0.6 x 0.3), or 70% + 18% = 88%. Similarly, the likelihood that the attorney will not get paid is 100% minus that amount, or 12%.

If the case goes to trial, the attorney will receive \((u + F)h\) if his client wins and nothing if he loses. If the probability that his client will win is \( p \), then the attorney’s expectancy if the case goes to trial is \( p(u + F)h \). However, there is only a 30% (i.e., 100% - \( s \)) chance that the case will go to trial. The attorney’s overall expectancy, then, is \( s(u + F)h + p(1 - s)(u + F)h \), which equals \( sh(u + F) + ph(u + F) - psh(u + F) \), or \( h(u + F)(s + p - sp) \).

To put this equation in more concrete terms, assume again that the attorney’s normal hourly fee \( F \)—i.e., the fee he would have accepted had he not arranged a conditional fee contract—is $200. Also assume that the attorney estimates that he will need to work 250 hours in order to win. If \( u \) is designed to offset the attorney’s risk, then in the present example the attorney should have an overall expectancy of \( Fh \), or $50,000. In other words, \( u \) should be a number such that \( s(u + F)h + p(1 - s)(u + F)h = Fh \). Solving for \( u \) results in the following formula:

\[
u = F(1 - (s + p - sp))/(s + p - sp)\]

In the present example, \( s + p - sp = 0.7 + 0.6 - (0.7 x 0.6) = 1.3 - 0.42 = 0.88 = 88\% \).

Thus \( u = $200 x (1 - 0.88)/0.88 = $200 x 0.12/0.88 = $200 x 0.136 \approx $27.27 \). In other words, in a case that has a 70% of settling and a 60% chance of winning if it goes to trial, the attorney would need to charge a fee of $227.27 per hour in order to compensate for the 12% chance that he will receive no payment for his labor. Under this scenario, the attorney’s overall expectancy will still be $50,000 for 250 hours of work because of the risk of nonpayment. This is shown by finding the weighted average,

\[
((\text{chance of event 1}) \times (\text{money from event 1})) + ((\text{chance of event 2}) \times (\text{money from event 2}))
\]

\(^{124} \) See, e.g., WILLIAM KNEALE, PROBABILITY AND INDUCTION 125-26 (1952); ELMER B. MODE, ELEMENTS OF PROBABILITY AND STATISTICS 40-41 (1966). While it is tempting to understand these sources as indicating that the probability of either settling, \( s \), or winning, \( p \), is \( s + p - sp \) (which seems equivalent to Mode’s \( P(A \cup B) = P(A) + P(B) - P(A \cap B) \), where \( s = P(A) \) and \( p = P(B) \) that would be deceptive since there is no chance that plaintiff will win and settle. Rather, using Mode, supra, the chance that plaintiff settles, \( P(A) \), would be \( s \); the chance that plaintiff goes to trial, \( P(B) \), would be \( 1 - s \); and the chance that plaintiff wins at trial would be \( p(1 - s) \). Thus a better understanding is that \( P(A) = s; P(B) = p(1 - s) \); and \( P(A \cap B) = 0 \).
event 2) x (money from event 2)) + ((chance of event 3) x (money from event 3)) + (etc. . .)\textsuperscript{125}

from which is derived an overall expectancy of (0.88 x $227.27 x 250) + (0.12 x $0 x 250) \approx $50,000 + $0 = $50,000.

At this point, two opposite assumptions need to be addressed. The first is that the attorney has a steady stream of work such that if he drops the present case, he will be able to assume another case from which he will enjoy his standard hourly fee. The second is that the attorney does not have a steady stream of work and thus cannot assume another case if the present one ends.

i. Attorney Does Not Have a Steady Stream of Work

Assume that at time \( t \), when the attorney has already worked \( h_1 \) hours, he has a choice between settling or going to trial. If he settles now, he can guarantee payment of \((u + F)h_1\). If he would need to spend an additional \( h_2 \) hours in order to go to trial, and he then wins at trial, he will get paid an additional \((u + F)h_2\). However, if he loses, he risks non-payment not only for the \( h_2 \) additional hours he works but also for the \( h_1 \) hours he has already worked.

Assume, for instance, that our attorney has worked 100 hours already and that completing the case through trial would require an additional 150 hours. Recall that his standard fee, \( F \), is $200 per hour, his uplift, \( u \), is $27 per hour, and his chance of winning, \( p \), is 60%. If he settles now, he will definitely receive a fee of $22,700. If he goes to trial, he has a 60% chance of winning an additional $34,050,\textsuperscript{126} but he also has a 40% chance of losing the $22,700 he has already earned. On average, then, he will earn only $11,350\textsuperscript{127} extra for 150 hours of work, or roughly $76 per hour.

The attorney’s incentive to go to trial decreases as he works more hours. As the attorney expends more hours, his expected future earnings, equal to \((u + F)h_2\), decrease since his future hours decrease. Meanwhile, the payment he can guarantee if he settles right now, \((u + F)h_1\), increases because \( h_1 \) increases. As the amount he risks losing increases and the amount he stands to gain decreases, his incentive to risk an unfavorable judgment decreases substantially. Thus if he has worked 200 hours already, he can guarantee receiving payment of $45,400. If he has only 50 hours worth of work left, he has a 60%

\textsuperscript{125} See supra note 120 and accompanying text.
\textsuperscript{126} $227 per hour multiplied by 150 hours is $34,050.
\textsuperscript{127} ($34,050 x 60\%) + (-$22,700 x 40\%) = $20,430 - $9,080 = $11,350. See supra note 120 and accompanying text.
chance of winning an additional $11,350\textsuperscript{128} and a 40% chance of losing
$45,400. On average, then, he would lose $11,350.\textsuperscript{129}

In theory, then, if an attorney had total control over a case, he
would never rationally agree to go to trial. In practice, these examples
demonstrate that an attorney working under a conditional fee contract
has a strong incentive to work as long as possible. On the one hand, his
fee arrangement, which provides him with the same hourly fee if he
settles or wins at trial, creates a substantial risk of non-payment if he
goes to trial. On the other hand, this same fee arrangement guarantees
him an uplift if he settles. The more hours he works, the more incentive
he has to settle.\textsuperscript{130}

Thus, for an attorney who lacks a steady stream of work, the
conditional fee creates a perverse incentive: the more he works on
behalf of his client, the less incentive he has to go to trial.

\textbf{ii. Attorney Has a Steady Stream of Work}

Suppose for the moment that we are dealing with an attorney
working on a strict hourly fee basis; he has worked 100 hours already
and expects to work 150 more, and he is paid $200 per hour. Suppose
also that at that moment, his client tells him that he (the client) wants to
accept the defendant’s settlement proposal and that he (the client) no
longer needs the attorney’s services. If that attorney has other cases in
his pipeline, he will pocket his already-earned $20,000 and will then
switch to another case, for which he will earn $200 per hour. While the
attorney has lost his chance to work on the case of the client who has
just settled, he has gained the chance to work for another client. The
attorney’s net gain is thus zero; that is, the attorney would not care
whether his now former client settled or went to trial; he is indifferent.

Now suppose that a client approaches the attorney with a case that,
like the case that has just been terminated, requires 250 hours of work at
$200 per hour, except that in this case the client requests a conditional
fee arrangement. Suppose also that the attorney determines that the
case has a 70% chance of settling and, if it does not settle, a 60%

\textsuperscript{128} $11,350 is $227 per hour multiplied by 50 hours.

\textsuperscript{129} $(11,350 \times 60\%) + (-45,400 \times 40\%) = 6,810 - 18,160 = -11,350.$

\textsuperscript{130} Once the attorney has worked $h1$ hours, he can guarantee a payment of $(u + F)h1$. The
attorney takes a risk of total nonpayment of $(1 - p)$ if he goes to trial—that is, not only will he
make no additional money, but he will also lose the money he has already earned. However, if he
wins, he will get an additional fee of $(u + F)h2$. Thus, his expectancy at the moment of choosing
whether to settle at time $h1$ or go to trial is the average of these two, or
$p(u + F)h2 + (1 - p)(u + F)h1$. As $h1$ increases, $h2$, which is $h - h1$, decreases; thus
$p(u + F)h2 + (1 - p)(u + F)h1$ decreases.
likelihood of winning at trial. Note that, as determined earlier in this Section, this means that the attorney has an 88% chance of receiving a fee. Suppose finally, for the reasons already described in this Section, the attorney charges an uplift of $27, bringing his total hourly fee to $227 if he wins. If so, his total expectancy as of the moment the attorney begins work on the case, when examined on a per-hour basis, is nonetheless only $200 if the attorney expects to take the case to trial.\textsuperscript{131} This is so because the attorney’s higher hourly fee is offset by the risk of nonpayment. In other words, regardless of whether the attorney takes his next case—i.e. a case on which he has not yet commenced work—on an hourly fee basis or on a conditional fee, his per-hour expectancy remains the same.

Now suppose, however, that the attorney has already commenced work on this conditional fee case and that he has expended $h_1$ hours. At this point, the attorney can guarantee a payment of $(u + F)h_1$ if the case settles at that instant, just as he would if he had no steady stream of work. Again, the attorney takes a risk of total nonpayment of $(1 - p)$ if he goes to trial. Likewise, if he wins, he will get an additional fee of $(u + F)h_2$. Unlike the lawyer without a steady stream of work, however, the lawyer with a steady stream of work must factor in the amount of gain he can expect should he accept another case. Since his per-hour expectancy on a new case is $F$, his expectancy for work on which he could expend $h_2$ hours—i.e., the number of hours that he would otherwise expend towards the present case—is $Fh_2$. Thus, for the lawyer to rationally prefer remaining on the present case, his ongoing expectancy for the present case must be greater than $Fh_2$.

Recall that his ongoing expectancy for the present case at time $h_1$—i.e., his expectancy if he chooses to work through trial—is the weighted average of his income if he wins and his income if he loses. Solving for the weighted average produces an ongoing expectancy of

$$p(u + F)h_2 - (1 - p)(u + F)h_1$$

which equals

$$ph_2(u + F) - h_1(u + F) + ph_1(u + F),$$

or

$$(ph_2 - h_1 + ph_1)(u + F).$$

\textsuperscript{131} $200 is 88% of $227.

\textsuperscript{132} See supra note 120 and accompanying text.
Thus, for the attorney to prefer to continue to work on the present case, 
\((ph2 - h1 + ph1)(u + F)\) must be greater than \(Fh2\).

To concretize this scenario, let us suppose, as this Note has done so far, that a plaintiff’s likely judgment in the event of a court victory, \(J\), is $300,000; that \(p\) is 0.6; that \(s\), the likelihood of settlement, is 0.7; that \(u\) is $27; that \(F\) is $200; that the attorney would expend a total of 250 hours through trial; and that he has already worked 100 of those 250 hours. The attorney’s future expectancy should he go to trial is \(((0.6 \times 150) - 100 + (0.6 \times 100)) \times 227\). That amount is 50 x $227, or $11,350. Meanwhile, the attorney’s future expectancy for the same 150 hours if he settles this instant is \(Fh2\), which is $200 x 150, or $30,000—almost three times his expectancy on the present case. The reason that the attorney’s ongoing expectancy is so low if he remains on the present case is that it factors not only the risk that he will receive nothing at trial but also that he will not get paid for the work he has already done. As stated earlier, the attorney working under a conditional fee has a strong incentive to refuse to go to trial if he lacks a steady stream of work, and this disincentive to go to trial increases as he expends more times on the case. The present analysis leads to the conclusion that the same disincentive exists even if he has a steady stream of other cases.

Moreover, for every additional hour the attorney spends trying to settle, he will earn a fee of \((u + F)\), whereas his hourly expectancy should he settle now rather than either go to trial or settle later is equal to his hourly expectancy from other cases, \(F\). This leads to the further conclusion that the conditional fee creates an incentive for the attorney to settle later rather than earlier.

Putting these conclusions in parallel yields the following:

1) Per-hour amount the attorney should expect should he continue to attempt to settle: \((u + F)\);
2) Per-hour amount he should expect should he work on a new case: \(F\);
3) Per-hour amount he should expect should he go to trial:

\[
(u + F)(ph2 - h1 + ph1)/h2
\]

which equals

\[
(u + F)(ph2 - (1 - p)h1)/h2.
\]

These results lead to the conclusion that the attorney will prefer to work on settling the present case over (1) going to trial and (2) working

\[133 \text{See supra Part IV.A.2.i.}\]
on another case. They also demonstrate that, as between going to trial and working on a new case, he would prefer the latter.

CONCLUSION: ASSESSING THE CONDITIONAL FEE AGAINST THE CONTINGENT AND HOURLY FEES

As with the hourly fee, an attorney working on a conditional fee basis has no incentive to stop working if he does not have a steady stream of work. The attorney working on an American-style contingent fee basis also has no incentive to stop work if he lacks a steady stream of work. However, because the contingent fee attorney is paid based on his return for his client and not by the hour, his client largely benefits from his attorney’s additional work; the attorney’s incentive to cease work occurs only when his office and other miscellaneous costs begin to exceed his marginal returns from his labor, by which time he has come close to achieving the plaintiff’s maximum recovery. In the case of the conditional fee, as in the case of the hourly fee, the attorney’s additional work hurts his client once he has reached a point at which his hourly fee exceeds the marginal increases in the settlement amount that he can secure. Thus, if a client hires an attorney who has no other work to pursue, his attorney’s interests will most align with his own if the attorney is hired on a contingent, as opposed to hourly or conditional, fee basis.

If an attorney has a steady stream of work, his client’s interests with respect to the hourly and contingent fees are reversed—the attorney’s interests are better aligned with his client’s if the attorney is hired on an hourly as opposed to a contingent fee basis. This is because the hourly fee arrangement makes the attorney indifferent as to whether he settles in favor of his client. This indifference, in turn, means that other motivations, such as reputation, a desire to do good, and a desire to please the client, no longer have a perverse financial interest against which to compete.

Yet if the attorney has a steady stream of work and is hired on a conditional fee basis, the attorney’s interests are still unaligned with those of his client. Unlike the attorney working on an hourly fee basis, the conditional fee attorney has an incentive to work a greater amount of hours than is in his client’s best interests, even if he has the option of settling early and working on another case. This situation exists because the hourly fee he would receive for the present case if he settles would exceed his hourly-based expectancy should he begin another case. This is true even when the attorney’s next case is also a conditional fee case, because the attorney’s per-hour expectancy on a
conditional fee case is, in principle, the same as his per-hour expectancy on a standard hourly fee case.

Moreover, the conditional fee arrangement also creates an unusually strong perverse incentive to settle as opposed to going to trial. This is because if the client settles, the attorney can anticipate an unusually high hourly fee—that is, one that includes an uplift. If the case goes to trial, on the other hand, the attorney risks losing not only any future expected fees but also the fees he has already incurred. The incentive is perverse because the more hours the attorney works, the less incentive he has to go to trial.

In sum, then, under the American system wherein each party pays his own attorney’s fees, the conditional fee structure creates the worst of all possible worlds. Unlike the contingent fee and the hourly fee, the conditional fee creates significant agency problems both when the lawyer has a steady stream of work and when he lacks such a steady stream. Both the contingent fee and the conditional fee create significant agency problems when the attorney has a steady stream of work to which he could otherwise turn. However, this misalignment of interests is substantially mitigated when the attorney working under the contingent fee lacks a steady stream of work. For the attorney working on a conditional fee basis without a steady stream, though, the misalignment is especially pronounced.

As compared to a standard hourly fee, moreover, the conditional fee is distinctly worse. The conditional fee creates a greater misalignment of interests than the hourly fee does when the attorney lacks a steady stream of work. When the attorney has a steady stream of work, that misalignment remains under the conditional fee, while it disappears under a standard hourly fee. Finally, unlike both the contingent fee and the standard hourly fee structures, the conditional fee creates an incentive for the attorney to work as many hours as possible and a simultaneous incentive for that attorney to avoid going to trial. As the attorney works more hours, his incentive to avoid trial increases. While the conditional fee arrangement solves the contingent fee’s problem of encouraging an attorney to work too little, the conditional fee creates new, and seemingly more substantial, agency problems.