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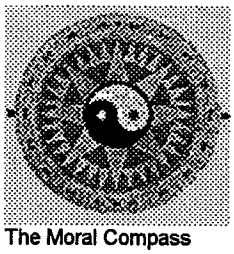

The Moral Compass

A Fistful of Fees

The hired gun is due what he's been promised - but no more

By Richard Zitrin and Carol M. Langford

It is morning. The stranger rides into town on a horse as black as a moonless night, a woolen poncho concealing the gunbelts strapped across his chest. He says nothing to the poor, worried townsfolk who crowd the streets to catch a glimpse of him. Everyone knows why he is here. He has been asked to do the impossible, though no one dares ask how. The odds are long, and his price is high: If he prevails, his bounty will be taken from the spoils he recovers from those who have ravaged and pillaged the town for years....

We are hardly the first to compare contingency fee lawyers to hired guns. At their best, these lawyers boast skills and special talents needed by many but possessed by only a few. The gunfighters are willing to risk their lives -- the lawyers to risk their livelihoods -- by taking on seemingly hopeless causes on the chance they may leave the arena with a sack of gold.

But how much reward should these gunslingers get? Are they entitled to whatever their clients are willing to pay, even if the clients agree out of sheer desperation? What if the hired gun looks to the vanquished for payment? What are even the best attorney's skills worth, and when does a fee stop being compensation for services performed and become the product of unabashed greed?

Hon. H. Lee Sarokin compares contingency fees to the carnival wager: the barker offers $100 to anyone who can climb to the top of a greased pole and puncture a balloon. Those who climb halfway

up are not entitled to $50 for the time and effort they devoted. They get nothing at all. There is no qualified success, no payment for failure, no matter how gallant the try or how close the effort came to the ultimate goal. Only total victory results in the prize.

But the other part of the bargain may be equally extreme. The barker can't get away with paying those who succeed merely for the time they took. The bargain calls for more -- a substantial payment, measured by the difficulty of success and the skill required to achieve it. No payment for failure, no matter how close. But for those rare souls who succeed, they, like the gunfighter, are entitled to the spoils of victory.

Judge Sarokin did not lightly come to this conclusion. He had a unique vantage point, as the New Jersey federal judge who presided over the first two trials against tobacco companies a decade ago. He watched tobacco lawyers stonewall on discovery, finally concluding that "the tobacco industry may be the king of concealment and disinformation." Even after his appointed special master uncovered smoking-gun evidence against the industry, the tobacco interests appealed, getting discovery disclosures reversed and the judge thrown off the cases in the process. As for the plaintiffs' lawyers -- those who took their best shot at cleaning up the town -- it was a gallant try, but they wound up with nothing.

So Judge Sarokin reasoned that to the ultimate victors -- those who through massive litigation by individual states ultimately drove Big Tobacco from town -- belong the spoils. We agree. Without the states importing high-powered legal talent -- lawyers lured by the vision of a great pot of gold -- there may have been no spoils to share. Significantly, these lawyers' paydays were exactly what their contingency fee contracts called for. The states -- like the townsfolk who hired the gunfighter -- knew what their deal was when they made it. With hindsight, one could call these fee contracts bargains with the devil. But those that bargained got what they paid for.

The analogy between the contingency fee lawyer and the hired gun goes only so far, of course.

First, while some may disagree, lawyers are not generally killers; Big Tobacco may have retreated to the hills outside of town, but it's not dead. Second, lawyers still have fiduciary duties to their clients. Judge Sarokin suggests that while the tobacco litigation fee contracts are valid, those lawyers excessively enriched should consider making some reasonable adjustments to their fees on their own accord. Many, in fact, have done just that.

Third, it's clear that not every contingency case involves a foe as daunting and difficult to challenge as the tobacco industry. Where a huge and unexpected settlement occurs in a more ordinary case, there may be a duty for the lawyer to reduce a fee so out of proportion that it becomes unconscionable. Still, the default proposition is -- and should be -- that if the contingency fee contract calls for a particular sum, the lawyer is entitled to that payment.

Three keys are related to this proposition. First is the informed consent of the client -- not just consent but *informed* consent. Second is the sophistication of the client, which often affects how well that client is informed. Third is the lawyer's objective evaluation of the difficulty of the task -- an evaluation that must be shared with the client. There's a far cry between attorneys general agreeing to pay a hired gun to rid their states of Big Tobacco, and a group of naive townspeople who think they face terrorists when they're really just a bunch of rowdies. Where plaintiffs have few resources and victory is all but certain, the conscionability of a fee should be tied to the degree of difficulty of the enterprise -- just as it is for the "impossible" jobs.

This sharing separates the best contingency lawyers from gunslingers. Not only do they share information, but they share, rather than take, the spoils of victory -- so that both lawyer and client truly benefit.

The other extreme? Lawyers who train their guns on their own client. In a recent sidebar to the Orange County bankruptcy litigation, the Southern California firm of Hennigan, Mercer & Bennett did exactly that. Hennigan agreed with

the County's court-appointed litigation representative to charge an hourly fee, which it raised three times between its July 1996 agreement and the final resolution of litigation in 1999. In that time, Hennigan billed *and was paid* over $26 million at its so-called "benchmark" hourly rates. Three times, the firm had asked the Orange County representative to share in the spoils of victory with a contingency fee, but the representative steadfastly refused. Still, the firm's fee contract included this self-serving language: "It is our firm's practice to charge our clients for services rendered based upon not only the total number of hours charged at benchmark billing rates, but also upon such other factors...." These factors included everything from the complexity of the case and the skill of the lawyering to firm lawyers working "after normal business hours and the extent [of] risk in being paid."

And who got to decide how much of the spoils of victory the law firm would receive? "When our representation is ended, the firm will determine the amount of the total fees and will send the Representative a final statement."

Theoretically, this language called for a raising or *lowering* of the firm's benchmark rate. Not surprisingly, however, Hennigan decided that it was entitled to more -- in fact, an additional fee of over $48 million, making its total fee almost three times its benchmark bill. Having been refused a contingency fee by its client, Hennigan sought its piece of the pie indirectly, using a "lodestar" multiplier -- a method previously reserved for "private attorney general" cases and other fee-shifting statutes where the multiplier is paid by the vanquished party.

Federal judge Gary L. Taylor was enraged by the Hennigan firm's audacity: "The lawyers had gotten a career-defining dream case, and while the issues were novel [and] the stakes were high," it was also true that "the work was steady, ... all expenses were paid, ... all fees were promptly paid in full [and] there was no risk of delay or non-payment...."

Taylor saved his most vitriolic criticism for this claim by the law firm in its fees motion against its

own client: "If lawyers in cases like these are paid only their `straight hourly rates', they have less reason to maximize results for clients or to expedite resolution." Taylor called the idea that a lawyer is justified doing less than one's best for a client "a flawed and cynical philosophy," ... a "repugnant" concept "contrary to a lawyer's oath and duty."

Flawed and cynical as this view might be, it is unfortunately all too prevalent in a profession that, after all, is supposed to adhere to ethical standards higher than those used by the average gunslinger. The Hennigan firm, not satisfied to be well paid for its time and efforts, sought to plunder its own client's spoils. But too many lawyers would agree that when the client's spoils are so large -- Orange County recovered about $865 million of its $1.6 billion losses -- somehow the hired guns are entitled to a bigger share, whether they contracted for it or not.

To us, the most incredible part of this story is that Judge Taylor -- after excoriating the lawyers for failing to recognize their duties and pointing out that their efforts involved virtually no risk and "legal results [that] were mixed" -- nevertheless awarded the firm $3 million over its benchmark fees. To be sure, he rejected the vast majority of the firm's claims. But by validating the fee contract and even paying the firm a sweetener, he tacitly gave credence to the idea that lawyers are not so different from gunfighters after all -- and that when the townspeople make a deal with the devil, the devil will get his due.

The town was more peaceful, but still poor. The threat to the village was gone. But most of the plunder stolen from the town had left with the stranger. Also gone was the protection that lasted only as long as the stranger was in town. He rode off to fight other battles, unconcerned that the townspeople remained to face the next threat alone.

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