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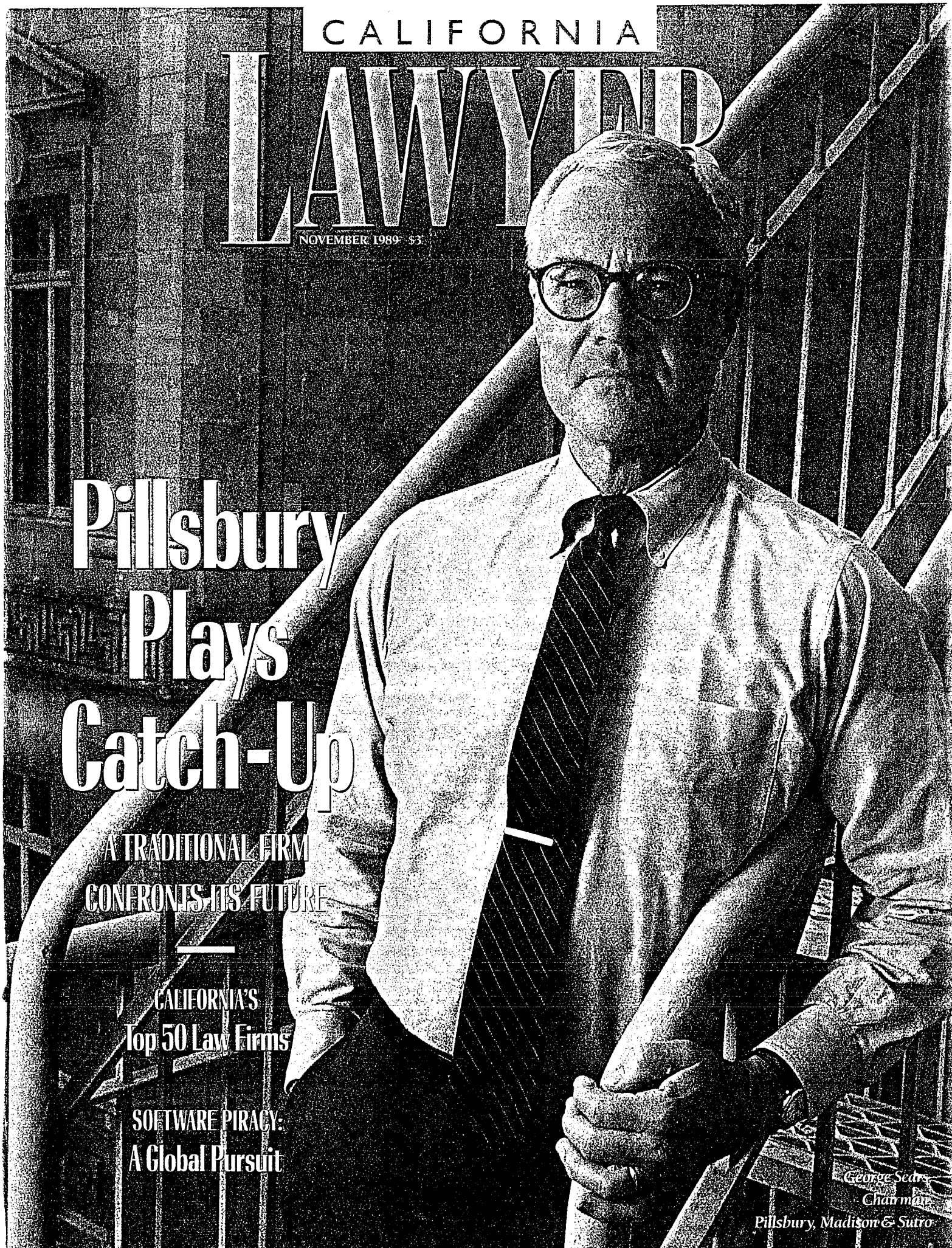

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When Fees Are Unethical

BY RICHARD A. ZITRIN

ABBY PERKINS, A YOUNG lawyer who's been passed over for partner, decides to go out on her own. She struggles financially; she's behind on her rent and hasn't paid her secretary in two weeks. When the defense offers to settle a contingency fee case, she's tempted to take the first offer.

Abby asks her friend Stuart Markowitz, a partner at her former firm, to help evaluate the case. Markowitz tells her she's settling for too little, but she recommends the offer to her client anyway. Only after her client refuses to settle and fires her does Abby realize she's acted unethically. She's allowed her own financial problems to interfere with the interests of her client.

If this story sounds familiar, it's because you saw it on last season's *L.A. Law*. But real lawyers know that, as the California Supreme Court put it in *Maxwell v Superior Court* (1982) 30 C3d 606, "Almost any fee arrangement between attorney and client may give rise to a 'conflict.' " This doesn't mean attorneys should stop getting paid. It simply means lawyers must always consider the effect their fees have on their clients.

There has been considerable commentary, as well as legislation and litigation, concerning the potential for conflicts of interest in certain fee situations. For example, Business and Professions Code section 6147(a)(2) specifically recognizes that the manner in which a lawyer computes contingency fees and costs affects the amount of the client's recovery.

Kreiger v Bulpitt (1953) 40 C2d 97, limits contingency fees in domestic cases. Rule 1.5(d)(2) of the American Bar Association Model Rules of Professional Conduct forbids contingent fees in criminal cases, partly because a lawyer who is paid more for acquittal might be disinclined to advise a guilty plea that is in the client's best interest.

The dilemma of attorneys being paid by insurers while representing insureds has generated a great deal of comment. See *San Diego Federal Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, and CC §2860. So has the problem of lawyers negotiating fees at the same time they seek a settlement for their clients. *Evans v Jeff D.* (1986) 475 US 717.

But many potential conflicts have been subject to very little comment. The court in *Maxwell* mentioned three:

- Either the attorney or the client in a contingency fee arrangement "needs a quick settlement while the other . . . would be better served by pressing on."
- A lawyer receiving a flat fee may have an incentive "to dispose of the case as quickly as possible, to the client's disadvantage."
- An attorney paid by the hour might be tempted to "drag the case on" without real benefit to the client.

CONTINGENCY FEES aren't just necessary, they're desirable. They increase access to the courts for those who can't otherwise afford it.

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Lawyers' fees can conflict with clients' interests

Theoretically an identity of interest exists between attorney and client in a contingency fee case: The higher the recovery, the larger the fee. But most plaintiffs attorneys know that a lawyer can make far more money per hour by turning cases over quickly than by doing the preparation necessary to maximize recovery for each client. "The vagaries of a contingency fee practice don't always lend themselves to even cash flow," says Oakland plaintiffs litigator David W. Rudy.

Early disposition may be best for some clients, such as an accident victim with relatively minor injuries. But in more complex contingency fee cases, the responsible plaintiffs attorney will usually need to conduct discovery before fully evaluating the case.

How a specific case should be litigated always involves judgment calls and matters of strategy difficult to second-guess. But the client must come first. "You simply make your judgments based on the client's best interests. That's just part of the job," says Rudy.

Sometimes it is in the client's interest to settle. A San Francisco sole practitioner recalls winning a multimillion-dollar verdict, then being ready to litigate the appeal against the defendant's offer to settle for about 50 percent of the verdict. "I was sure we were going to prevail, and I couldn't help thinking I could retire on the fee I'd receive," says the lawyer.

Then he realized that his client, who was destitute, would do very well with the amount offered in settlement and would remain impoverished during the years of appeal. "I was looking at the appeal from my economic perspective, not my client's. When I put myself in my client's shoes, I had to resolve the case."

On the other side is the defense lawyer, who generally bills at an hourly rate. The longer the case goes on, and the more work done, the larger the fee.

"I try to make our work as efficient as possible," says Peter E. Romo, a partner in the San Francisco office of Adams, Duque & Hazeltine. That means ongoing communication with clients and a balancing of the need for discovery against the opportunity for quick case resolution. "Early client communication can get the experienced litigator in the right settlement ballpark early," says Romo.

Defense lawyers also find that their client's concerns often go beyond financial considerations. A lawyer always deals with people, whether they're individuals or corporate representatives, and "my clients have principles too; they have emotions," Romo says.

Principles can get in the way of a

settlement that makes economic sense, as when a defendant refuses to settle because it would seem an admission of wrongdoing. It's then, notes Romo, the ethical defense lawyer takes the size of his fee into consideration by advising the client of the likely costs.

Sometimes the lawyer should ask if it's ethical to represent the client at all when the vast majority of the recovery will be spent on hourly fees even if the client wins. "I think it's important to be right up front with my client," says Ronald S. Smith of Beverly Hills. "I ask, 'Do you want to give Ron Smith $7,500 to pursue a $10,000 claim?' "

Similarly, the cost of hiring a lawyer may not always be justified in criminal cases. Smith, who was a deputy district attorney for five years, questions whether it is fair to charge a drunk driving defendant $1,500 just to walk him through a standard guilty plea.

He prefers to review the police report first, for little or no fee, to determine if the client has a defense. "Then I tell them what the practical consequences are and suggest they can go to court on their own."

Most criminal law practitioners in California's major metropolitan areas charge flat fees for representing criminal defendants. However, because it's often impossible to determine how much work a case will require—in particular, whether it will actually go to trial—this fee structure gives the lawyer three uncomfortable choices: assume the case will go to trial and charge a larger sum, to the detriment of the client; assume it will not, to the lawyer's potential financial detriment; or split the difference, which may average out over time but doesn't serve the needs of either the client or the lawyer in any particular case.

James Larson, of the San Francisco criminal defense firm of Larson & Weinberg, no longer sets his fees this way. He says it is fairer to charge one fee for preparation until trial—work that almost always must be done—and a second fee for the trial itself. Larson's clients don't pay for trials that never take place, and Larson has eliminated the conflict that might tempt him to encourage a questionable guilty plea.

Unfortunately, other problems may arise with this type of fee structure. Criminal clients often don't have the funds to pay the entire fee in advance and may be unable on the eve of trial to pay the trial fee. Larson says courts sometimes look favorably on his request to be appointed and paid by the court if an incarcerated client is indigent. Otherwise, he says, "My job is to try the case anyway, with or without the rest of the fee."

SURPRISINGLY, NOWHERE DO the California Rules of Professional Conduct say that legal fees can cause a conflict of interest. Rule 3-300 says a lawyer "shall not . . . knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client." But the "discussion" appended to this rule explains that it was not intended to apply to most fee agreements.

California Business and Professions Code sections 6147 and 6148 now require that most fee agreements between attorneys and noncorporate clients be in writing, and that they include basic provisions regarding rates and the nature of legal services. But these provisions may lead to the erroneous conclusion that the mere written recitation of a fee agreement resolves all potential conflicts of interest regarding those fees.

The ABA's Model Rules of Professional Conduct, while not formally adopted in California, are more helpful. The comments under rule 1.7 say, "The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." And a comment to rule 1.5 reminds lawyers to ensure their fees are "consistent with the client's best interest" and warns them never to "exploit a fee arrangement."

The clearest words yet may be those of the U.S. Supreme Court in *Evans v Jeff D.* The court permitted a settlement in a civil rights action that required the plaintiff's attorney to waive his fee. While this result is harsh, Justice John Paul Stevens's description of a lawyer's ethical obligations sounds like hornbook law: The lawyer "must not allow his own interests, financial or otherwise, to influence his professional advice." Thus a lawyer should "evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee."

Charging a fee is an intrinsic and necessary part of the practice of law. When care is taken to avoid any adverse consequences to the client, a lawyer can provide the best possible representation without worrying about compensation.

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