

A NO WIN SITUATION

I have an important message for trial lawyers everywhere. Believe it or not, the public hates us. And we may be starting to act as if we hate ourselves.

I am not exactly sure when it became unethical to enter into a valid contingent fee agreement and obtain an extraordinarily high award for a client. But that appears to be a fact in the eyes of the public. It may even be that the greater the result achieved, the higher the peril for the successful attorney.

Tremendous damages recovered for a client on a contingent fee basis obviously result in tremendous fees. That's math. But nobody cares about the math until after the extraordinary result is achieved. Then the application of the agreed upon percentage is brandished about as prima facie evidence of lawyer greed. But only in the extraordinarily high recovery cases. If the results are average, there appear to be no ethical concerns with the fee agreement.

Certainly no client has contested a contingent fee agreement as being unfair to the lawyer in the event of a defense verdict. I haven't seen that story in the press. It's the old rock and a hard place scenario. The perception remains that if we win, it was because the client deserved the recovery. If we lose, we did something wrong.

Edward J. Mardovich died in the World Trade Center on September 11. He left his wife, Laura Mardovich, (now Balemian), and children. Ms. Balemian retained Attorney Thomas Troiano on a 30% contingent fee, to represent her and her children in securing recovery for the loss of her husband. In doing so, Mr. Troiano agreed to pursue claims against a multitude of defendants, including Osama bin Laden, the Taliban regime of Afghanistan, New York City, as well as "any other legal, governmental, quasi-governmental or non-profit agency responsible for the September 11, 2001 crash or recoverable claims resulting after the September 11, 2001 destruction of the World Trade Center". A tough gig, to be sure.

In the year prior to presenting Ms. Balemian's case before the September 11th Victim Compensation Fund, Troiano exhaustively prepared in order to present his case and to determine an appropriate award for his client. As part of his preparation, he monitored the fund's activities throughout the year, he communicated with other attorneys who had also presented similar cases, and he retained an economist to provide a report as to Mr. Mardovich's future earning capacity.

The Fund had originally awarded Ms. Balemian a presumptive award of \$1.1 million based upon its estimation of her losses in the amount of \$3,931,497.00, less her insurance recovery of \$2,844,256. However, based upon his preparation and research, Troiano urged his client to contest the award. And so they did.

Troiano won the contest, obtaining an award of \$6,656,151.00. As such, he successfully secured over six times the original award for his client, increasing her recovery by \$5,556,151.00. A pretty good job, some would say, particularly considering that "lesser" attorneys achieved results that

paled in comparison, as argued by Troiano's attorney.

Ms. Balemian, knowing that the Fund provided pro bono or even reduced fee rates through participating attorneys, nevertheless decided to remain with Mr. Troiano, upon his fee terms, with her eyes wide open. In hindsight, a choice well made.

However, Kenneth R. Feinberg, special master overseeing the fund's distributions, has recently called Attorney Troiano's fee "shocking and unconscionable". And believe it or not, his sentiments have been echoed by other attorneys. Although no one disputes that Mr. Troiano did a great job, his fee is now also being contested by Mardovich's estate as being excessive and not in the best interests of Mardovich's children.

Would Mardovich's Estate have contested Mr. Troiano's one third fee if Ms. Balemian had chosen to rest on the \$1.1 million originally awarded? Would that have been more in line with Ms. Balemian's children's best interests? The Estate would have been left with \$770,000.00, instead of \$4+ million. Was it the fee agreement that was "shocking and unconscionable", or was it the number of zeroes in the fee? If the fee agreement was unconscionable after Mr. Troiano achieved his fantastic result, why wasn't it unconscionable before? If Mr. Troiano had, by some twist of fate, recovered nothing or very little for his client despite his efforts, would anyone bemoan his sad fate to the Probate Court or the media? Because his fee would have been 30% of nothing, or 30% of very little.

Contingent fee agreements, like the phrase "Let's kill all the lawyers", are greatly misunderstood. When a lawyer wins, he/she is pilloried for profiting from a tragedy. When a lawyer loses, no one thinks twice about taking advantage of the lawyer's largesse in accepting all of the risk.

Imagine if lawyers decided to declare contingent fee agreements unconscionable. A client seeking recovery would have to pay a retainer and all of his/her costs. If the client lost, the fees would be non-refundable. All the risk would be with the client. A contingent fee agreement would probably look pretty darn conscionable at that stage of the game.

What other profession provides services on a contingent fee? Have you ever been to a doctor who has agreed to accept you as a patient, cover all of your meds and testing, and then ask for payment only if you are cured? How about a car dealership? Ever have a salesman offer to give you a car for three years, and wait for payment at the end of the term, and then only if you are satisfied?

Mr. Feinberg argues that there was no risk involved in Ms. Balemian's claim, since everyone was assured of some kind of settlement from the Fund. However, if it were that simple, why didn't the Fund award Ms. Balemian the \$6+ million dollars in the first place?

Leo V. Boyle, as president of ATLA in the aftermath of 9/11, called to lawyers to help the victims of the tragedy, and by doing so, he paved the way for pro bono projects throughout the country to come to the aid of the victims. However, this endeavor was not established to promote the public

image of lawyers. It was established to assist the victims of a terrible tragedy, and it succeeded. To now use these pro bono projects as a sword against lawyers who have chosen to accept these cases on a more conventional one-third basis, is unfair.

And so, in the end, maybe it is true that no good deed goes unpunished. Trial lawyers are not remembered for the millions of dollars obtained for 9/11 victims. We are not remembered for the risks that we take everyday when we accept a case on a contingency, with the very real possibility of working for years without ever receiving a penny. We aren't applauded when we obtain redress for a client who has been harmed by a product or a negligent driver. What we are remembered for is the unconscionable act of requesting the agreed upon payment for a job well done.

As lawyers, we have been programmed not to expect pats on the back or expressions of appreciation. But we should never be programmed to apologize for our successes, to be ashamed to accept payment for our services, or to be embarrassed by our achievements