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Common Good's Radical Proposal to Alter the Contingency Fee System Should be Rejected.

Common Good, a self-described “bipartisan initiative to overhaul America’s lawsuit culture,” has proposed changing the ethics rules governing attorneys who charge contingent fees in 13 states to require plaintiffs’ lawyers to provide defendants in personal injury cases with substantial information about their clients’ claims early in the process. If a defendant makes an early settlement offer that the plaintiff accepts, the plaintiff’s lawyers must limit their fees to an amount well below the typical amount charged in such cases, a limitation that also applies if the plaintiff’s lawyers fail to provide the required information at the outset. Petitions to amend the applicable ethics rules to effectuate these changes are pending in Alabama, Arizona, California, Colorado, Maryland, Mississippi, New Jersey, New York, Ohio, Oklahoma, Texas, Utah, and Virginia.

The Common Good proposal purports to encourage early settlements, in order to reduce the costs to all parties involved, but it is plagued by three major flaws: The proposal has one-way discovery requirements that benefit defendants at the expense of claimants; it limits plaintiffs’ attorneys to an hourly rate that does not take into account the risks in all contingency fee cases; and the proposal is a sweeping change to the current system that may have unintended and unforeseen consequences.

Public Citizen is a non-profit consumer organization with more than 125,000 members. As explained on our website, www.citizen.org, we have devoted substantial resources to increasing the availability and affordability of legal services and to assure that our civil justice system functions in a way that enables victims of injustice to have their day in court. For the reasons set forth below, the Common Good proposal is unwise and unworkable and should therefore be rejected as contrary to the best interests of consumers of legal services.

I. Description of the Common Good Proposal

A. The Theory Underlying the Early Settlement Proposal

The essence of Common Good’s early settlement proposal is to limit the size of attorneys’ fees in cases where a recovery is very likely to the lesser of an hourly rate or 10% of the recovery. The proposal is designed to encourage parties to reach early settlement to prevent plaintiffs’ attorneys from taking a high percentage of awards that they did little work to obtain and similarly to prevent defendants and their attorneys from dragging out a case that they know eventually will settle.

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The proposal gives the defendant a brief window in which to offer to settle the case at significantly lower transaction costs for all involved. In theory, the defendant has an incentive to make a reasonable settlement offer because the defendant knows that, if it does not do so right away, any future offer will have to include the cost of plaintiff's attorneys' higher contingency fee to make it worthwhile for the plaintiff to accept. Again, in theory, the defendant will also factor in its savings in attorneys' fees when making a settlement offer. The plaintiff has an incentive to accept such an offer because if the case is litigated, the plaintiff will pay 33% of any award to her attorneys, rather than the maximum of 10% if an early settlement offer is accepted under the Common Good proposal.

For example, under the current system, an individual injured in an automobile accident hires a lawyer on a contingent fee basis. The lawyer litigates the case and eventually achieves an award of \$15,000 for the client. Under the standard 33% contingency fee, the plaintiff's lawyer is paid \$5,000 and the client takes home \$10,000. The defendant has paid \$15,000 plus fees to his attorneys of \$3,000, for a total cost to defendant of \$18,000.¹

Under the proposed system, the plaintiff would notify the defendant of her claim and the basis for considering the defendant liable. If the defendant offered to settle the case for \$13,000, everyone but the lawyers would be better off than under the present system. After paying 10% in attorneys' fees, the plaintiff would take home \$11,700, instead of \$10,000, for a gain of \$1,700 (plus the value of having the money sooner). The defendant would pay only \$13,000, for a saving of \$5,000 (minus the benefit of holding onto the money for a longer time). Even plaintiff's counsel might be better off, because the amount she earns per hour might be higher if her client accepts an early settlement requiring little work, and she now has time to take on more clients than under the old system. Whether defense counsel would be worse off would depend on, among other things, whether the attorneys had other work to fill in for the settled matter.

Common Good claims that this proposal will bring contingency fees back in line with the "reasonableness" requirement in each State's version of Rule 1.5 of the ABA's Model Rules of Professional Conduct. In cases where an early settlement offer is accepted, and the lawyer did not contribute significant time or labor, the fee should take those facts into account. Because a contingent fee is supposed to be based, in large part, on the degree of risk (contingency) involved, that percentage should be sharply reduced where the risk of non-recovery at the outset of litigation is minimal. As one author of the proposal has put it, where there is no contingency, there should be little or no contingency fee.

B. The Mechanics of the Proposal

The proposal applies to all "personal injury matters," defined as matters concerning bodily injury, sickness, or death. This includes automobile accident cases, where both sides generally have comparable access to information about who is at fault, and medical malpractice and product liability claims, where the defendant normally has far greater access to information on liability issues. Under the proposal, the plaintiffs' lawyer may submit a "notice of injury" to the

¹ For simplicity, we have assumed no costs. That might be true if settlement occurred very early, but not once a complaint has been filed. If there were costs incurred, that would change the numbers, but the principles would remain the same.

defendant. The notice need not suggest an amount for which the plaintiff would settle the case, but it must include (1) the identity of the plaintiff; (2) the time and place of the injury; (3) the nature of the injury; (4) the extent of the damage caused by the alleged injury; and (5) the reasons that the plaintiff believes the defendant is liable for the injury.

The proponents' comments to the proposed changes in various states' rules state that it is "misconduct to charge a contingency fee if a lawyer conceals material information the lawyer believes . . . bears a substantial relationship to the injury alleged or the notice of injury provided." Those comments also state that a claimant's notice must provide the other side with the name, address, age, marital status, and occupation of the injured person; the names and address of all known witnesses; copies of photographs relating to the claimant's injury; a description of the injury, including the names and addresses of physicians who provided medical care, and medical records relating to the injury; and documentation as to medical expenses, wages lost, and other damages. Thus, the comments specify that significantly more information be provided by the claimant in the notice of injury than is suggested by the text of the proposed rule change. Indeed, the required information in the text of the rule is more than a lawyer would be required to include in a properly filed complaint, and the comments are much more demanding than even the initial disclosure requirements of Federal Rule of Civil Procedure 26(a)(1), which applies to all parties, and which has been criticized as burdensome.

The notice of injury is intended to encourage the defendant to make an early settlement offer. If the plaintiff accepts the offer, the plaintiff's lawyer is limited to an hourly fee similar to that charged in non-contingency matters, and it must not exceed 10% of the first \$100,000, plus 5% of the recovery in excess of \$100,000. Thus, 10% is the ceiling on the lawyer's fee, and not a standard percentage for early settlements.

The defendant is not required to give an early settlement offer, and the plaintiff is not required to accept such an offer. Nor is the claimant's attorney legally or ethically required to submit a notice of injury. However, if the claimant's attorney does not submit the notice of injury, the attorney is limited to charging a fee that would be calculated on the same basis as a fee where an early settlement offer was accepted; an hourly fee that cannot exceed 10% of the first \$100,000 plus 5% of any award in excess of \$100,000, no matter how long the litigation lasts. This limit on fees effectively requires all attorneys to submit a notice of injury and to do so early in the litigation to avoid the possibility of being limited to an hourly fee after investing considerable time in a risky case.

Recognizing that there may be cases in which these limited fees are unreasonably low in light of the complexity of the case and the time expended in litigating it, the proposal allows the plaintiff's lawyer to seek an exception from these limits from the court. The proposal does not specify how it will be enforced, although presumably most attorneys will not violate a clear limit on their fees. If a lawyer does not follow the rule, the usual discipline process will be available to enforce it.

II. Flaws in the Common Good Proposal

The major omission from the Common Good proposal is its failure to recognize that the contingency fee system is what makes it possible for so many Americans who suffer injustice to have their day in court, in contrast to most other countries where only those who can afford to pay a lawyer, even if they do not prevail, are able to go to court and seek redress for wrongdoing against them. This proposal would make major changes in the contingency fee system, and for that reason it bears a heavy burden of showing that its changes would help and not hurt the consumer. Unfortunately, the proponents offer no evidence to support their claims, and the proposal itself contains multiple opportunities for depriving victims of injustice of an opportunity to recover their losses.

The stated goal of the proposal is uncontroversial. It is widely accepted that contingency fees should vary depending on the riskiness and complexity of the individual case; indeed, that is what ethical rules currently require (even though almost universally honored in the breach). Likewise, it is undisputed that both parties would benefit if defendant's counsel had incentives to settle early, for a reasonable amount, rather than drag out litigation to increase their billable hours.

However, as described in greater detail below, the proposal should be rejected for three reasons. First, the proposal places all the burdens and all the penalties on plaintiffs and their counsel, giving the defendant a considerable advantage in settlement negotiations. Second, the proposal fails to take account of the risks borne by plaintiff's attorneys who provide uncompensated services if they lose. Third, the proposal calls for sweeping regulatory changes to personal injury litigation that may have unintended and unforeseen consequences.

A. The Proposal Establishes One-Way Discovery that Benefits Defendants at the Expense of Claimants.

A major flaw in the proposal is that it provides defendants with valuable information about plaintiffs' claims while defendants do not have to give any information in return, or even make a settlement offer. The text of the proposal requires the submission of a substantial amount of detailed information about the plaintiff's claim. However, the comments accompanying various proposed state rule changes require that the plaintiff provide a great deal more, including photographs, medical records and other supporting documentation, and the names of all potential witnesses. Yet the defendant is not required to provide any information to the plaintiff about liability or even explain why it does not accept plaintiff's damages claim. It can choose to make a settlement offer or not, and it may convey as little information as it chooses. As the ABA Standing Committee on Ethics and Professional Responsibility recognized when analyzing a similar proposal, this information imbalance puts the defendant at an obvious advantage in settlement negotiations. *See* ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 94-389 at 11-12.

For example, the defendant's counsel might know that evidence exists suggesting that plaintiff's injuries are even more significant than plaintiff has realized (e.g., through exposure to hazardous substances that lead to future illnesses), or that this case is not an isolated instance, but one of many which put the defendant on notice of a serious problem. If the defendant learns from the

notice of injury letter that the plaintiff's counsel is unaware of this evidence, defendant will offer a lower settlement than it would have otherwise. In short, the proposal's one-way discovery mechanism allows defendants to have the benefit of substantial information about the plaintiffs' claims, and, most significantly, information about what the plaintiffs *do not* know, without having to provide any information to justify the size of any settlement offer they decide to make.

Finally, the proposal is flawed because the fee restrictions fall entirely on the plaintiff, and not the defendant. It is the plaintiff's attorneys whose fees are limited if they do not submit a notice of injury letter on behalf of their clients, and it is the plaintiff's attorneys whose fees are limited if an offer is made and accepted. Defendants and their attorneys suffer no penalties under this proposal, despite the proposal's acknowledgment that defendants, as much as plaintiffs, can delay settlement.

B. Limiting Plaintiffs' Attorneys to an Hourly Rate in Early Settlement Cases Does not Take into Account the Risks Borne by Those Attorneys.

Another significant flaw in the Common Good proposal is that it limits the fees for plaintiffs' attorneys to a reasonable hourly rate if an early settlement offer is accepted, rather than permitting plaintiffs' attorneys to take a reduced percentage fee. Limiting the plaintiff's attorney to an hourly fee mistakenly assumes that the plaintiff's counsel has shouldered *no* risk in an early settlement offer case. True, a case in which an early settlement offer is made and accepted is likely one in which there was little risk of non-recovery. However, by definition, any case in which a lawyer invests time without guaranteed payment involves some risk of non-recovery. At the start of any case, the lawyer will have to gather enough information to present the notice of injury to the defendant and evaluate any settlement offer. This time and effort should be compensated at something above a reasonable hourly rate to take account of the fact that there is some risk in every case. Attorneys who are paid an hourly fee *always* expect to be paid, regardless of the outcome. Because plaintiffs' attorneys do not have such a guarantee, they should be permitted to charge a fee above an hourly rate to compensate them for the risk of non-recovery.

In addition, even when there is almost no risk of non-recovery, a fee arrangement contingent on the amount recovered may be in the best interest of the client because it will give his attorney an additional incentive to fight for as large a recovery for his client as possible. For almost all cases there is a range of possible recoveries. The amount ultimately paid out may vary depending, in part, on the lawyers' knowledge, skill, and experience, not just the time expended. Thus, the client may best be served by a contingency fee arrangement that ties the lawyer's fee to the amount recovered. *See* ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 94-389.

Moreover, requiring plaintiffs' attorneys to keep track of their hours, even for a short period at the start of litigation, will be extremely burdensome for plaintiffs' attorneys who are not accustomed to keeping their hours. Recording time in six-minute increments is a major change of practice for most contingency fee attorneys. They would be required to establish separate billing records for these cases, using computer programs, time sheets, and phone records to monitor their time on the litigation, at least until it is clear that no early settlement will be reached.

Because, as we have shown, there is no legitimate basis for limiting these attorneys to an hourly fee, the added burden of keeping time records is a further reason to reject this proposal.

C. The Proposal Is a Sweeping Change to the Current System that May Have Unintended and Unforeseen Consequences.

A final flaw to the Common Good proposal is its breadth. The proposal applies to *all* personal injury cases, not just those in which liability and damages are straightforward, or those in which both sides have comparable access to the facts on the key issues. Such a proposal is highly inappropriate for product liability and medical malpractice cases, where questions about liability and damages are complicated and require investigation through discovery, with defendants generally having a substantial information advantage over claimants. The proponents actually suggest that it would work best in automobile accident cases, where both sides know the relevant facts and the issue is more about damages than liability. *See* Memorandum in Support of Petition for Amendment of Sec. 1200.11 of 22 NYCPR Part 1200 at 4.

Moreover, the proposals' proponents seek to have it established as a permanent rule change in all the states, for all personal injury cases. It is folly to ask a State to make such a radical change in its contingency fee system with no empirical evidence showing that the change would produce the desired result and no means for monitoring the results of such a massive human experiment. Our civil justice system is too important to too many people to be the subject of this kind of experimentation.

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