Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?

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"O'er lawyers' fingers, who straight dream on fees."\(^1\)
"Then 'ris like the breath of an unfee'd lawyer."\(^2\)
"[M]ost lawyers will prefer to leave no stone unturned, provided, of course, they can charge by the stone."\(^3\)
"Billing by the hour is fine, provided I get to define what constitutes the hour."\(^4\)

I. Introduction

Lawyers’ fees and lawyers’ billing practices are the subject of much commentary, humorous and otherwise. Given that the size and nature of lawyers’ fees are of great importance to lawyers, to their clients, and to the larger public, this comes as no surprise. In this Article, I review the empirical literature that provides evidence of the impact of legal fees and fee regulation, both on lawyers and on their clients. My assumption is that impacts on clients and impacts on lawyers are one and the same, and any distinction between the two is primarily due to the lens through which one is looking.

I focus on two particular topics: how fees are computed and who actually pays the fees. There are many questions one could ask about the impact of legal fees, even limited to these two broad topics. The empirical literature, however, is quite thin, which substantially limits what we actually know based on systematic research.

In introducing the core sets of research, I will also make selective reference to theoretical analyses of fee arrangement issues. These theoretical perspectives typically draw on the tools of economic analysis, starting from the standard economic assumption of rational decisionmaking. The analyses then examine the expected behavior of an economically rational actor.

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1. William Shakespeare, Romeo and Juliet act 1, sc. 4.
2. William Shakespeare, King Lear act 1, sc. 4.
4. Source unknown.
II. The Organizing Dimensions

A. Methods of Computing Legal Fees

Lawyers are nothing if not creative, and this creativity manifests itself in the many different ways lawyers have devised for calculating their fees. The vast array of fee calculations can be grouped into six general types of computation:

- fixed fees where the lawyer specifies a fee in advance, typically for routine work where the tasks are well defined and predictable;
- time-based fees where the lawyer tracks his or her time and calculates the fee by multiplying the time by some hourly rate;
- task-based fees where the lawyer charges fixed amounts for subtasks—writing a letter, making a telephone call, etc.—much like a physician who charges by procedure or an auto mechanic who relies upon the book rate to specify the time for various tasks;
- statutory, or other law-based, fee schedules typically tied in some way to the value of the transaction or the amount in controversy;
- commission-based fee arrangements in which the lawyer’s fee is based on some percentage of the amount recovered or the value of the matter being handled (in probate work, for example, the fee is often computed based on the value of the estate); and
- value-based fee systems, in which the lawyer makes a judgment about what the work and result were “worth” to the client and sets the fee accordingly (what the client is willing to pay may of course exert some influence on the fee ultimately charged).

Missing from the above list are the “no-win, no-pay” fee, the “contingency fee,” the “conditional fee,” and the “lodestar fee.” Except for the commission-based fee, which, in contentious work, is by nature a contingency fee, these are not methods of calculation. A lawyer can incorporate an increase or reduction based on outcome into any of the first three methods of calculation. Success bonuses and failure discounts are inherent in the last two arrangements. I will discuss the contingency element of fee calculation as a subtopic of fee computation.

B. Who Pays for Legal Services

The question of who pays the lawyer’s fee, or alternatively, who covers the cost of the lawyer’s services, is more straightforward. There are essentially four “pure” options:

- the user of legal services pays the fee out of the user’s own resources;
- the opposing party pays the fee;
- some third party pays the fee or otherwise covers the cost of the lawyer’s services; or
• the lawyer performs the work at no fee (i.e., the lawyer covers the cost of the lawyer’s services).

The first of these, “private payment,” takes on three forms:

• paying a private-practice lawyer using resources in hand;
• paying a private-practice lawyer using funds recovered from an opposing party (e.g., some proportion of a recovery); and
• paying the salary of a lawyer employed by the user of legal services.

The second system, in which the opposing party pays the fee, occurs in three situations:

• where there is a general fee-shifting rule, which is the case in most countries other than the United States;
• when a specific statute requires the losing party to pay the winner’s fees, as is the case for a limited number of claims in the United States; or
• when a pre-existing contractual agreement provides for the recovery of legal fees.

Third-party payment can also take one of several forms:

• an “insurer” pays the fee of a private-practice lawyer;
• the government or “legal aid fund” pays the fee of a private-practice lawyer; or
• the services are provided by a salaried lawyer working for a legal services agency, which can be either privately funded or publicly funded.

The final form of “payment” is no payment at all. I do not include in this category contingency fee arrangements in which the lawyer is paid only for a successful result. Rather, I refer to legal services undertaken without an expectation of receiving a fee (pro bono).

While most instances of representation use only one of the four pure forms of fee payment, it is possible to combine the forms in various ways. In fee-shifting regimes, it is quite common for the loser to pay only part of the winner’s legal expense, with the winner paying the balance. Many lawyers perform what might be called “de facto pro bono” when they write off, or reduce, fees charged to private clients because the client cannot pay the lawyer’s customary fee. For organizational consumers of legal services, there may be many instances when the legal work is shared by in-house legal staff, which is on salary, and outside counsel charging fees according to some alternative plan.
III. Who Pays

A. Fee Shifting

Fee shifting refers to the requirement that the losing party in litigation pay some or all of the winning party’s legal expenses, including lawyers’ fees. The principal purpose of a fee-shifting regime is to make winning parties whole.

In the common law world, there are two general approaches to fee shifting: the “English Rule,” which shifts some or all of the winner’s costs of legal representation to the loser, and the “American Rule,” which does not shift fees, leaving each side responsible for its own lawyers’ fees regardless of who wins. Outside the United States, some form of the English Rule is the norm. In the United States, with the exception of the state of Alaska, the American Rule applies unless explicitly abrogated by statute or unless there is a pre-dispute contract providing for some form of fee shifting. In civil law countries, such as those on the European continent, fee shifting is the norm in litigation.

Most of the statutes that abrogate the American Rule in the United States introduce a “one-way” fee-shifting regime, whereby a successful plaintiff may recover some or all of its attorneys’ fees from the losing defendant, but a winning defendant cannot recover attorneys’ fees from the losing plaintiff. The best known of these one-way fee-shifting provisions is the Equal Access to Justice Act, which allows a prevailing nongovernmental party to recover some of its legal expenses in a variety of actions involving federal agencies. A number of states have enacted similar statutes.

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B. Theoretical Analyses

The impact of fee shifting has been the subject of extensive theoretical work by law and economics scholars. These scholars have considered the impact of fee shifting on:

- the filing of frivolous lawsuits;  
- decisions to settle rather than go to trial;  
- the impact of settlement-related fee-shifting rules, such as Federal Rule of Civil Procedure 68 (payment into court);  
- the overall volume of litigation; 

11. For broad discussions of the theoretical predictions of the effects of fee shifting, see Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, LAW & CONTEMP. PROBS., Winter 1984, at 139; Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. ECON. LITERATURE 1067 (1989); Neil Rickman, The Economics of Cost-shifting Rules, in REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' (A.A.S. Zuckerman & Ross Cranston eds., 1995); Ronald Braeutigam et al., An Economic Analysis of Alternative Fee Shifting Systems, LAW & CONTEMP. PROBS., Winter 1984, at 173. A variety of articles that deal with various possible consequences of fee shifting can be found in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (David A. Anderson ed., 1996).


• the number of injury-producing events,\textsuperscript{16}
• the development of the law.\textsuperscript{17}

There is surprisingly little agreement among those who have undertaken these theoretical analyses. Some analysts argue that fee shifting should increase the likelihood of settlement,\textsuperscript{18} while others argue that it will increase the likelihood of cases going to trial.\textsuperscript{19} Some argue that fee shifting will decrease the number of cases filed,\textsuperscript{20} while others argue that the numbers of cases will increase.\textsuperscript{21} This second difference reflects, in part, the consideration of different types of cases. For example, a strong modest-value case is more likely to be filed than a weak case. Avery Katz nicely summarizes the uncertainty:

[T]he current state of economic knowledge does not enable us reliably to predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate. The reason for this agnostic conclusion is straightforward. Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place. . . . The combination of all these external effects are too complicated to be remedied by a simple rule of “loser pays.” Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others.\textsuperscript{22}

As I will show in the following discussion, the empirical literature confirms that the effects of fee shifting are complex and difficult to ascertain.

C. The Empirical Literature

In contrast to the extensive theoretical research on the question of fee shifting, there has been relatively little empirical research on the actual


\textsuperscript{18} See, e.g., Joshua P. Davis, Toward a Jurisprudence of Trial and Settlement: Allocating Attorneys' Fees by Amending Federal Rule of Civil Procedure 68, 48 ALA. L. REV. 65, 65–69 (1996) (arguing that requiring the loser to pay if he had earlier rejected a settlement offer would increase the likelihood of settlement).

\textsuperscript{19} See, e.g., Shavell, supra note 13; POSNER, supra note 13.

\textsuperscript{20} See, e.g., Conard, supra note 15, at 281.

\textsuperscript{21} See, e.g., Shavell, supra note 13.

\textsuperscript{22} Avery Wiener Katz, Indemnity of Legal Fees, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64–65 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).
impact of fee shifting on lawyers, litigants, and litigation. In significant part, there are few studies of the impact of fee shifting because few legal systems have fee-shifting regimes, and it is therefore difficult to assess their impact in a rigorous fashion. Cross-national studies, such as a study comparing the United States (generally governed by the American Rule) and Canada (generally governed by the English Rule), are problematic because of other substantive legal differences between the countries. With this in mind, there are three general types of studies that have been conducted:

- statistical studies comparing groups differentially affected by fee-shifting rules or comparing patterns before and after changes to fee-shifting rules;
- simulation studies involving experiments in which the fee-shifting rules can be manipulated; and
- impressionistic studies within a particular system where key actors are asked to assess the impact of fee shifting.

D. Statistical Studies

1. The Florida Medical Malpractice Study.—The most interesting statistical study of fee shifting has taken advantage of the adoption and subsequent repeal of fee shifting in medical malpractice cases in Florida from 1980 to 1985. In a pair of articles, Edward Snyder and James Hughes employ data for cases disposed of before, during, and after the period in which the English Rule governed attorneys’ fees in Florida medical malpractice cases. In the first article, the authors employ data for 10,325 cases disposed of in the periods from 1975 to 1978 and from October 1985 to June 1988. In the second article, the sample increases to 16,404 cases by extension of the study period through September 1990. Fifty-eight percent of the first group of cases and forty-five percent of the second were governed by the English Rule. The authors employ sophisticated statistical methods to analyze this large data set and, based on that analysis, come to the following conclusions about the impact of the English Rule:

- Medical malpractice claimants are more likely to drop claims under the English Rule. The authors interpret this result as indicating that weak claims are less likely to be pursued.24


• Those claims that are pursued are more likely to be litigated than settled when the English Rule governs attorneys’ fees. The authors interpret this finding as reflecting optimistic litigants who anticipate recovering attorneys’ fees.25

• Those cases that do go to trial are more likely to result in plaintiff verdicts, probably reflecting that weak cases are less likely to be pursued and that the expectation of recovering attorneys’ fees increases the value of the case.26

• Plaintiffs obtain larger settlements under the English Rule, which is consistent with the argument that the value of strong cases increases under the English Rule.27

• The average defense cost is higher under the English Rule.28

Overall, they conclude that the English Rule encourages some plaintiffs (those with strong cases) to pursue their claims while discouraging others (those with weak cases). The result is to reduce the frequency of low-merit claims.29 However, it was the Florida Medical Association, which had backed the adoption of the English Rule, that ultimately sought its repeal, partly because of early cases awarding the full contingency fee percentage to the plaintiff as the fee shift, and partly because the defendants came to realize the difficulty in collecting the shifted fee when the plaintiff had no resources from which to pay it.30

2. The Alaska Rule 82 Study.—The only other statistical study of the effect of fee shifting in the United States was conducted in Alaska—the only state to use a form of the English Rule routinely.31 Specifically, Alaska’s Civil Rule 8232 entitles a prevailing party in a civil lawsuit to partial compensation for that party’s attorney’s fees from the loser. The primary category of cases excluded from the provision is domestic relations cases.33 Cases where

25. Actually, in their first analysis of the data, the authors come to the opposite conclusion. See id. at 378 (stating that “the English rule increases the probability that claims will be dropped”).


27. See id. at 243.

28. See id. at 244.

29. See id. at 248–49 (arguing that “the English Rule likely reduces the frequency of low-merit claims and lessens the overall probability of litigation”).

30. See Snyder & Hughes, The English Rule, supra note 23, at 356. Snyder and Hughes note that the Florida Supreme Court ultimately ruled in Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (1983), that a successful plaintiff was not entitled to recover the full contingency fee from the defendant.


32. ALASKA CIV. R. 82 (2002).

33. See ALASKA’S ENGLISH RULE, supra note 31, at 2.
attorneys' fees are governed by contract are also excluded.34 Prevailing parties who pay their attorneys on a percentage basis are entitled to recover attorneys' fees in the amount of twenty percent of the first $25,000 of a judgment after a contested trial, plus ten percent of any judgment over the first $25,000. The percentage is reduced in cases without a contested trial.35 Prevailing parties not paying on a percentage basis are entitled to thirty percent of actual "reasonable" fees after a contested trial and twenty percent otherwise.36

In 1994, the Alaska Judicial Council undertook a study of how Rule 82 was working in Alaska and what impact it was having.37 The study looked at case filings, case records, and responses of attorneys to a survey.38 The authors of the study were unable to draw strong conclusions about whether fee shifting affected rates of filings in Alaska compared to other states without fee shifting.39 Overall, the rate of tort filings in Alaska seemed similar to other jurisdictions, perhaps a little lower. In Anchorage, there did seem to be a higher rate of tort cases going to trial, but the authors were not willing to attribute this to fee shifting.40 One surprising finding was that fee awards were made in only about one-half of the state cases surveyed and one-quarter of the federal diversity cases where they were authorized by Rule 82.41 A partial explanation for this infrequency might have been the existence of post-judgment settlements in which the prevailing party agreed to forego a fee award in return for the losing party's agreement not to file an appeal. A second surprise was that only a small portion of fee awards came in tort cases.42 Perhaps less surprising, given that we know that most cases seek relatively modest judgments,43 is that the size of fee awards was relatively modest: the median in state court was $2,240, thirty-nine percent were under $1,000, and only twenty-seven percent exceeded $5,000.44

34. ALASKA CIV. R. 82(c) (2002).
35. ALASKA CIV. R. 82(b) (2002).
37. See ALASKA'S ENGLISH RULE, supra note 31.
38. Id. at 4. A blank form of the survey used in this study can be found in Appendix B of ALASKA'S ENGLISH RULE.
39. Id. ALASKA'S ENGLISH RULE, supra note 31, at 138 (finding that the rule "seldom plays a significant role in civil litigation").
40. Id. at 69–70.
41. Id. at 73–74.
42. Id. at 95.
43. See Carol J. DeFrances & Marika F.X. Litinas, Civil Trial Cases and Verdicts in Large Counties, 1996, in BUREAU JUST. STAT. BULL., Sept. 1999, at 1, 6 (reporting that during 1996 the "median amount awarded to plaintiff winners for all trial cases was $33,000"). This sum is modest in comparison to the 16% of claims in which the plaintiffs were awarded damages in excess of $250,000 and the 6% of claims receiving over $1 million. Id. at 6.
44. ALASKA'S ENGLISH RULE, supra note 31, at 95. These figures are from a sample of cases drawn from case files. Id. at 91. When attorneys were asked to report on fee awards in their cases,
Of more interest are the possible effects of Rule 82 on case filing, settlement, and litigation strategy. Unlike the Florida study, there were no data available for comparison. Instead, the authors explored these questions by interviewing attorneys and judges, which essentially provided information on the perceptions of these actors. Based on the interviews, the authors reported that only thirty-five percent of the attorneys could recall even a single instance in which Rule 82 played a significant role in a prospective client's decision not to file a suit or assert a claim.\(^{45}\) One reason for this small impact is that many individual plaintiffs are judgment proof and would not be able to pay a Rule 82 award. Any concern about fee-shifting rules came from clients who would be able to pay such an award.\(^{46}\) In other words, those potential plaintiffs with assets sufficient to satisfy a fee award were more likely to evidence risk aversion because they had something to lose. Individuals of modest means and corporations of substantial means were not fazed by the rule. To the extent that there was a perceived effect, it was most clearly associated with weaker or more subjective claims.\(^{47}\)

About one-third of the attorneys reported that Rule 82 affected their litigation strategy. This effect was typically strongest in the choice between federal or state court, post-trial strategy, or formal settlement offers which under Alaska Rule 68 could modify the fee-shifting burden.\(^{48}\) Each attorney was asked to describe two recent cases, and then asked whether Rule 82 affected their settlement strategy in either of the cases. Only thirty-seven percent reported an impact on their settlement strategy. Rule 82 was viewed as increasing the value of a case when the defendant’s liability was clear and the dispute was over valuation rather than liability. In the words of one defense attorney, “It’s just an extra ten percent added to the amount my client will pay in the end.”\(^{49}\) In four cases described by defense attorneys, Rule 82 increased the settlement value beyond the face value of the insurance policy limit.\(^{50}\) One plaintiffs’ attorney recalled several specific situations where clients “with assets” who had good claims settled for less than the claims were worth due to concerns about a Rule 82 award.\(^{51}\) Some attorneys felt that Rule 82 provided an incentive to settle earlier.\(^{52}\) In strong cases, it reduces the incentive of the defense to drag the case out, particularly when the damages are significant. Additionally, defense lawyers reported that a

\(^{45}\) Id. at 101.

\(^{46}\) Id.

\(^{47}\) Id. at 103.

\(^{48}\) Id. at 106–07.

\(^{49}\) Id. at 110–11.

\(^{50}\) Id. at 111.

\(^{51}\) Id. at 112.

\(^{52}\) Id.
threat of a Rule 82 award was a good device to get a plaintiff with a weak case to accept an early settlement offer. Finally, the lawyers reported a number of cases in which an appeal was forgone in return for a waiver of attorneys’ fees.

One problem with assessing these findings is the absence of a reliable basis for comparison. There are, however, some comparisons internal to the study that do generate confidence in some of the findings. In particular, the attorneys surveyed often drew comparisons between individuals with and without significant assets and between relatively strong or relatively weak claims. To the extent that these factors distinguished the cases, the effects on things such as case value or willingness to settle described by the surveyed attorneys are consistent with the study’s results. For the other findings, such as forum selection or post-trial settlement, the significance of the purported effects is less clear.

3. Federal Cases.—Two statistical studies have included an examination of the impact of fee shifting in federal cases. One study looked at eighteen different types of cases (with “type of case” defined in terms of the Administrative Office’s standard case coding scheme) involving disputes over contracts, real property, personal-injury torts, and property rights. The authors of the study selected a sample of cases involving only monetary remedies filed during the 1979 to 1981 fiscal years for which it was possible to determine unambiguously whether the case had settled or been resolved by trial. The dependent variables of interest were whether the case settled or went to trial, and for those cases that settled, the “settlement demand.” The authors included a variable indicating whether the case was governed by the “British rule” or the American Rule. The authors found no statistically discernible evidence that the fee-shifting regime influenced either the likelihood of settlement or the settlement demand. However, the authors never identify the cases governed by the “British rule” or the basis for this determination (i.e., whether the parties have agreed by contract to fee shifting). Perhaps the lack of discernible influence results from inaccurate designation of cases as governed by a fee-shifting rule. It is also possible

53. Id. at 112–13.
54. Id. at 113.
55. See id. at 137–44 (explaining that the rule rarely played a significant role in civil litigation, that it affected less wealthy parties more than wealthy ones, and that a majority of Alaska attorneys liked the rule).
57. Id. at 192.
58. Id. at 192–93.
59. Id.
60. Id. at 193 tbl.1.
that too few cases in the data set involved a possible fee shift for an effect to be statistically measurable.

The second study of federal cases focused on constitutional tort litigation involving governmental defendants.61 These cases are subject to a one-way fee-shifting rule.62 This study looked at cases in three federal districts: the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia.63 The authors tried to assess the impact of fee shifting by examining patterns in filing rates and trial rates, comparing constitutional torts to other cases for periods both before and after the passage of the Civil Rights Attorney Fee Award Act in 1976.64 Based on this trend data, the authors find no clear evidence that the availability of fee awards led to an increase in the number of cases filed.65 They do find evidence that a higher proportion of cases were litigated after fee awards were made available, but the evidence also indicates that the rate of success for litigated cases actually declined.66 This indicates that the availability of fee awards did not increase the willingness of litigants and lawyers to try strong modest cases; rather, it suggests that plaintiffs probably changed their bargaining behavior in a way that resulted in fewer settlements.

4. Studies of Federal Rules of Civil Procedure Rule 11.—The 1983 version of the Federal Rules of Civil Procedure contained an important fee-shifting element. Rule 11 provided that lawyers who filed cases or motions that did not meet a minimum standard of support or justification could be sanctioned by the court.67 The sanction was commonly calculated as a function of the cost incurred by the opposing party to respond to the defective case or motion, and this amount was payable to the opposing party. This version of Rule 11 was very controversial68 and was eventually modified in 1993 to eliminate the fee-shifting component.69 Part of the controversy concerned the rule’s impact on lawyers’ willingness to accept certain types of

62. See supra text accompanying note 7.
63. Schwab & Eisenberg, Constitutional Tort Litigation, supra note 61, at 720-21.
65. Schwab & Eisenberg, Constitutional Tort Litigation, supra note 61, at 760.
66. Id. at 760-61.
cases. Opponents of the rule argued that it had a chilling effect on lawyers who represented plaintiffs in discrimination or civil rights cases because of the difficulties of proof in such cases and because, it was argued, lawyers in these cases were particularly vulnerable to the hostility of some judges to discrimination claims. While no empirical studies of the case screening and selection practices of various types of lawyers exist, one study of the imposition of Rule 11 sanctions did find support for the argument that civil rights plaintiffs' lawyers faced a greater risk of sanctions. A survey of lawyers found a variety of specific reported effects of Rule 11. These included:

- declining one or more cases;
- discouraging clients from pursuing a case or defense;
- not filing particular claims, papers, or motions; and
- engaging in extra review.

Whether these effects should be attributed to concerns about a fee effect (i.e., a fee shift from one side's lawyer to the other side) or to concerns unrelated to fees, such as reputation (i.e., not wanting to be "sanctioned") cannot be distilled from the analysis.

5. Two English Studies.—The only other statistical studies of fee-shifting effects were both conducted by researchers in England, one by Timothy Swanson and one by Paul Fenn, during the 1980s. Swanson's study focuses on the impact of the repeat player in English litigation and considers 220 case histories of civil tort disputes filed with the High Court of England. Swanson's study indicates that the likelihood that the defendant

70. See Carl Tobias, Civil Rights Plaintiffs and the Proposed Revision of Rule 11, 77 IOWA L. REV. 1775 (1992) [hereinafter Tobias, Civil Rights Plaintiffs] (claiming that Rule 11 has curbed the enthusiasm of some civil rights attorneys); Carl Tobias, Environmental Litigation and Rule 11, 33 WM. & MARY L. REV. 429 (1992) (noting that the rule has led some attorneys to advise clients to abandon valid claims).

71. See Tobias, Civil Rights Plaintiffs, supra note 70.


76. Kritzer, Let's Make a Deal, supra note 75, at 93.
will make an initial offer decreases as the plaintiff's level of risk increases.77 Risk to the plaintiff is measured by how the plaintiff is funded and whether the plaintiff is at risk for having to pay the other side's costs (as well as, at least in theory, the plaintiff's own costs) if the plaintiff loses the case.78 This analysis draws on the fact that, as I discuss in more detail in a later section of this Article, many plaintiffs are backed by their unions (even in non-work-related cases) and, in that situation, the union assumes the risk of having to pay the other side's fee. Many other plaintiffs have, or at least used to have, legal aid, which puts them, at most, partially at risk for the other side's costs. Most of the remaining plaintiffs are "privately funded," meaning that they are fully at risk. Swanson finds that the likelihood of an offer of settlement being made is greatest when the plaintiff is union-supported (offers in ninety percent of such cases), least when the plaintiff privately funds the litigation and is thus fully at risk (offers in fifty-three percent of such cases), and somewhere in between when the plaintiff receives legal aid and is thus only partially at risk (offers in sixty-six percent of such cases).79 Even stronger support for Swanson's argument comes from the fact that the figures are more or less unchanged in subsequent stages of the bargaining process. That is, if the plaintiff refuses the first offer, the likelihood of receiving a second offer is virtually the same as the likelihood of receiving a first offer. This remains true for third offers if the plaintiff refuses a second offer.80

Fenn's analysis is similar to Swanson's in its focus on the likelihood that an insurance company defendant will make an offer. Fenn relies upon 224 cases collected as part of a large compensation study conducted by a team at the Centre for Socio-Legal Studies at Oxford. Fenn uses probit analysis to examine the effect of a number of variables on the estimated probability that an offer will be made.81 He also looks at the factors affecting the decision by the plaintiff to reject that offer (which Fenn presumes is indicative of the offer falling below the plaintiff's minimum ask).82 One of his results shows that the likelihood of an offer is a function of the way the solicitor representing the plaintiff is being paid.83 The likelihood of at least one settlement offer, controlling for damages, appears to be least if the plaintiff is unrepresented (eighty-eight percent). It then goes up in increments, first if the plaintiff has retained a solicitor at his or her own expense (ninety-six percent), next if the solicitor is retained by a trade union

77. Id. at 94.
78. Id. at 63–66, 161 n.31.
79. Id. at 94.
80. Id.
81. Id. at 95–97.
82. Id. at 96–97.
83. Id. at 97.
An offer will most likely be made if the solicitor has obtained legal aid on behalf of the plaintiff (ninety-nine percent). These findings are generally consistent with Swanson's analysis described above, though the last two categories are reversed. One major difference, however, is that offers of settlement appear to be more frequent in Fenn's data set than in Swanson's. This probably reflects the fact that Swanson's analysis included only those cases where a formal legal action had been filed and had led to substantial conflict.

Taken together, these studies indicate that in a fee-shifting regime, a repeat-player insurance company has an enhanced advantage vis-à-vis a one-shot plaintiff. If the plaintiff can be protected in some way from the risks of paying the other side's fee, the defendant will be more willing to make a settlement offer. When the plaintiff is fully at risk, the defendant can refuse to make an offer in the hope that the plaintiff will withdraw the claim rather than run the risk of a cost award.85

E. Laboratory Experiments

"Laboratory" experiments typically involve having a group of people—lawyers, students, or others—consider a hypothetical case.86 The researcher varies key features of the case or the rules to see what effect those features have on how the research subjects deal with the case. At least three such studies exist that are relevant to fee shifting.

Coursey and Stanley designed an experiment intended to mimic key features of litigation bargaining.87 Pairs of students were given one hundred tokens, each worth two cents ($0.02), to bargain over. In other words, in each game a total of $2.00 was at stake.88 If the students reached an agreement as to how to divide the pot within five minutes, the parties kept

84. Id.
85. The situation in England has changed radically with the introduction of conditional fees, the creation of after-the-event insurance for legal expenses, and, most recently, the adoption of rules that make success fees and the costs of after-the-event insurance recoverable from a losing party. For a brief discussion of the developments, see generally Richard Moorhead, Conditional Fee Agreements, Legal Aid and Access to Justice, 33 U.B.C. L. REV. 471 (2000).
86. Laboratory experiments are one type of simulation. A second type of simulation, which I do not view as "empirical," in the sense I use that term, refers to simulation models in which various parameters are applied to mathematical models of the litigation process to see what results those models predict. See generally Katz, supra note 15; Haus, supra note 13; Philip L. Hersh, Indemnity, Settlement, and Litigation: Comment and Extension, 19 J. LEGAL STUD. 235 (1990); Donohue, supra note 13, at 195; Hylton, supra note 16; Keith N. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 VAND. L. REV. 1069 (1993); James W. Hughes & Geoffrey R. Woglom, Risk Aversion and the Allocation of Legal Costs, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 167 (David A. Anderson ed., 1996).
88. Id. at 167.
their agreed shares.\textsuperscript{89} If no agreement was reached, a division was imposed on the players, with that division being randomly drawn from a distribution that had been made known to the students in advance of the game.\textsuperscript{90} In games played without fee shifting (the American Rule), each side was charged twenty tokens if a division was imposed. In games with fee shifting (the English Rule), whichever side received less than half of the allocation was charged fifty tokens while the side with more than half was not charged.\textsuperscript{91} Two different distributions were used for the imposed outcome, one based on a fifty-fifty split and the other centered around a seventy-thirty split (with the players knowing which side was favored).\textsuperscript{92} Four pairs of students repeated the game ten times with the students randomly paired for each play, thus producing a total of forty trials.\textsuperscript{93} Coursey and Stanley found that the English Rule produced more settlements (97.5\% and 72.0\% for the two distributions, respectively) than did the American Rule (60.0\% and 62.5\%), suggesting that the higher risk of paying the opponent’s costs under the English Rule encouraged settlement.\textsuperscript{94} In terms of settlement amounts, the rule regarding fee shifting did not seem to have any effect when the fifty-fifty distribution was used.\textsuperscript{95} When the seventy-thirty distribution was used, the player on the thirty percent side was more disadvantaged under the English Rule than under the American Rule.\textsuperscript{96} This suggests that parties with stronger cases are advantaged more under the English Rule than under the American Rule.

Two studies have examined the potential impact of attorney fee shifting in the context of settlement offers under Rule 68.\textsuperscript{97} Under the existing version of Rule 68, which is something like what used to be called “payment into court” in the English system, parties can put the opposing party at risk for certain costs by making a formal settlement offer. These costs do not include attorneys’ fees. Both studies examined the impact of adding attorneys’ fees to what can be recovered under Rule 68. The approach of both studies involved a simulation where the recoverability of attorney fees was varied.

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\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 168.
\textsuperscript{93} Id. at 167.
\textsuperscript{94} Id. at 169–76.
\textsuperscript{95} Id.
\textsuperscript{96} Id.

\textsuperscript{97} These studies are summarized in Thomas D. Rowe, Jr. & David A. Anderson, \textit{Empirical Research on the Success of Settlement Devices, in Dispute Resolution: Bridging the Settlement Gap} (David A. Anderson ed., 1996).
and pencil format,\textsuperscript{98} while the other involved a mixture of advanced law students and practitioners in a computerized simulation.\textsuperscript{99} The form of statistical analysis differed for the two studies, reflecting the complexity of the sample design, but the conclusions were similar: incorporating an attorney fee shift into a formalized offer of settlement such as Rule 68 increased the maximum amount that defendants were willing to pay and decreased the minimum amount that plaintiffs were willing to accept. The result should be an increase in settlements due to the increased likelihood that a zone of overlap would exist between what the defendant would pay and the plaintiff would accept.

\textbf{F. A Nonstatistical Study}

A final study, which relied upon open-ended interviews rather than statistical analyses of actual cases, involved fee shifting in Ontario, Canada. In 1982, I conducted a series of interviews with corporate lawyers and corporate officials in and around Toronto. A key theme of the interviews was the perceived impact of fee shifting.\textsuperscript{100} Respondents differentiated the impacts of fee shifting along two dimensions: the size of the case (small versus large) and the type of litigant (individual versus corporation). Simply put, for corporations, fee shifting was part of the business calculation in deciding whether to bring a case and when to settle a case. In very large cases, the issue of fees was clearly secondary to the larger stakes involved, and as cases got smaller, the fees and fee shift became an increasingly important consideration.\textsuperscript{101} According to respondents, the net effect of fee shifting was to encourage settlement when the corporation was a defendant and to discourage bringing a suit, particularly when there were doubts about the case, when the corporation was a plaintiff. For individuals, my respondents saw effects of fee shifting as straightforward in that “fee shifting serves to discourage persons from pursuing cases they otherwise might litigate or to encourage them to accept settlements that are smaller than they might be able to get at trial.”\textsuperscript{102} While not expressed in these terms, it was clear that the respondents saw individual litigants as tending to be risk averse. Some lawyers qualified this concern by noting that, for many individuals, the threat of having to pay the other side’s costs really has no teeth because those


\textsuperscript{100} Herbert M. Kritzer, Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario, LAW & CONTEMP. PROBS., Winter 1984, at 125 [hereinafter Kritzer, Fee Arrangements and Fee Shifting].

\textsuperscript{101} Id. at 133, 135.

\textsuperscript{102} Id. at 136.
individuals have no assets out of which to pay those costs. As succinctly stated by one respondent, "Litigation is the sport of the very rich or very poor."103

Importantly, the impacts described by my respondents accrue to the potential litigants rather than to the lawyers representing those litigants. One of the system's possible effects on lawyers, according to the lawyers interviewed, is a practice among personal injury plaintiffs' lawyers to forego any fees they were entitled to in unsuccessful cases.104 This practice is based in part on the assumption that their clients would have enough trouble paying the opposing party's costs and would have nothing available to pay their own lawyer.

The Ontario interviews raised one other very important point regarding fee shifting: how fee shifts are handled in settlement. In England, the settling defendant typically agrees to pay the plaintiff's costs at the "party and party" rate105 with the option of asking to have the costs "assessed" (meaning having the costs claim reviewed by an officer of the court).106 However, it appears that in other settings the question of costs is either not explicitly part of the settlement (as is the case in Alaska, except perhaps in post-trial settlements where costs are given up in return for dropping an appeal) or is essentially a part of the negotiation. The latter appears to be the pattern in Ontario. In the interviews I conducted in 1982, I was told that the question of costs in settlement is treated as part of the settlement package, with some litigators believing that it is best to include an explicit "costs" component in the settlement and others finding it best to simply cite a single settlement figure and leave it to the lawyer and the client to resolve the question of fees. At least one person I interviewed, who typically worked on the defense side, indicated that for many cases the first question to be resolved in achieving a settlement was the costs issue so that the plaintiff's lawyer would be assured of receiving his or her fee. Essentially, this person suggested that if you could satisfy the lawyer's own interest you could settle the case. To what degree this suggestion is accurate, or how widespread this view is, I could not determine.

G. Fee Shifting and Political/Policy Litigation

Fee shifting can have specific policy implications for politically motivated litigation. Charles Epp has forcefully argued that a key factor in the rise of certain types of cases onto the agendas of supreme courts in several countries around the world is the support available for interest groups.

103. Id. at 137.
104. Id. at 130–31.
105. Id. at 128–29.
106. Until recently, this option was referred to as having the costs "taxed." Id. at 128.
and their lawyers to bring such cases. Fee shifting is an important source of such support. In the United States, there are a number of legal provisions at both the state and federal level that allow for successful parties to recover attorneys’ fees in a “one-way” regime. Certain types of parties, such as plaintiffs in civil rights cases and parties challenging federal administrative action, can recover fees if they prevail while their opponents are not given this right. The evidence that the availability of fee awards has influenced the willingness of lawyers to bring cases of significant policy import takes the form of broad patterns rather than analysis of specific decisions, but the documented patterns do support the existence of such an effect. Furthermore, the interest expressed by lawyers in statutes and court decisions that affect the recoverability and computation of fees confirms that lawyers themselves believe that fee recovery does make a difference. Finally, it must be noted that two-way fee-shifting systems may also encourage policy-based litigation, particularly if there are mechanisms that provide at least some protection against the risks faced by certain groups that might bring such cases.

H. Third-Party Payment

Fee shifting is only one way by which a party may avoid legal fees; another significant means is third-party payment. Third-party payment arises through two mechanisms: legal insurance (either through a benefit provided through employment or membership of some sort, or through an individual


108. See Olson, supra note 10, at 550 (“In the United States, more fee-shifting statutes are one-way shifts, usually pro-plaintiff, under which a prevailing plaintiff can collect costs from a losing defendant, but a prevailing defendant cannot collect from a losing plaintiff.”); Mezey & Olson, supra note 9, at 14 (noting the prevalence of “one-way” rules in America).


110. One key issue for these lawyers is whether the computation of the fee should take into account the contingency factor (i.e., that the lawyers will not be paid if the case is not successful). See John Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 YALE L.J. 473, 473-75 (1981) (arguing that contingency bonuses should be set by legislatures). Generally, the Supreme Court has tended to frown upon any consideration of contingency and has endorsed statutory provisions that set hourly rates substantially below the market rate. See City of Burlington v. Dague, 505 U.S. 557 (1992); Pierce v. Underwood, 487 U.S. 532 (1988); Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 483 U.S. 711 (1987). While it does not deal with “political” litigation, a currently pending Supreme Court case, Gisbrecht v. Barnhart, No. 01-131, available at http://www.supremecourts.gov/docket/01-131.htm, deals explicitly with whether fees in Social Security cases should be computed on a fixed hourly rate, at least for certain cases, or on a percentage basis. The key issue in the case is compensation for risk (and how much risk the lawyers handling such cases actually face).

insurance purchase) or legal aid (i.e., need-based programs provided either through government funding or charitable funding).

The best piece of empirical research on the impact of third-party payment is probably Hazel Genn’s study of bargaining in personal injury cases in England. This study involved extensive interviews with solicitors during the mid-1980s. At that time, no-win, no-pay fees were formally banned in England, and after-the-event insurance for the risk of having to pay the other side’s costs had not yet been developed. There were in practice at least four different funding mechanisms in England: privately funded litigation, legally aided litigation, union-funded litigation, and private-insurance-funded litigation. In addition to dictating how the litigant’s own lawyer was to be paid, these systems had (and still have) implications for how fee shifting operated in practice.

When litigation was privately funded, both parties were “actually” at risk for the costs of the litigation. I put the word “actually” in quotation marks because, in reality, solicitors representing a private individual of modest means may have difficulty collecting fees if the client’s case is unsuccessful (at least when fees have not been paid “on account” as the case progresses). Moreover, Genn found evidence of what amounted to an informal contingency fee; that is, solicitors may take cases knowing that they will, in all probability, be unable to collect their fee from the client if they are not successful. Regardless of whether solicitors assume they will not be paid if they lose the case, or whether they simply recognize the difficulties in collecting, both practical and interpersonal, there is a substantial incentive for solicitors to achieve settlements, thus having their fees paid by the defendants. Settlement permits the lawyer to avoid the problems that might arise regarding payment of attorneys’ fees.

Genn’s analysis suggests that solicitors working on a privately funded basis tend to be less than aggressive negotiators, particularly those solicitors who do not specialize in personal injury work. These solicitors are likely to view the settlement process as a cooperative enterprise rather than as a conflictual one, and Genn suggests that claims inspectors (equivalent to claims adjusters in the United States) for insurance companies are ready and willing to take advantage of this kind of solicitor when the opportunity presents itself. Genn argues that, given the insurance company’s natural desire to maximize profits by minimizing amounts paid in settlement, a

112. HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS (1987) [hereinafter GENN, HARD BARGAINING]. This discussion of Genn’s study draws upon material in KRITZER, LET’S MAKE A DEAL, supra note 75, at 105–10.
113. See GENN, HARD BARGAINING, supra note 112, at 85.
114. See id. at 109–10. Lawyers in Ontario, where contingency fees are not permitted, reported similar practices. See KRITZER, Fee Arrangements and Fee Shifting, supra note 100, at 130–31.
115. See GENN, HARD BARGAINING, supra note 112, at 105–11.
solicitor who approaches negotiations expecting a cooperative attitude by the claims inspector is asking to be taken advantage of.\textsuperscript{116}

There are two pieces of evidence that tend to support the view that privately funded cases settle without a lot of give and take, or without getting particularly close to the door of the courthouse. First, Harris and his colleagues report that almost two-thirds of the claimants who settle out of court (and virtually all claims are settled rather than tried) accept the very first offer that is made, typically on the advice of their solicitor.\textsuperscript{117} Unfortunately, these data are not broken down by method of funding, but Genn estimates that over half of the litigation at that time was privately funded, permitting the inference that a significant portion of the cases settling on the first offer involved private funding.\textsuperscript{118} Second, and more specific to the question of private funding, Genn found that the barristers she interviewed “were of the opinion that it was very rare for a plaintiff to be privately funded.”\textsuperscript{119} This suggests that even though half of the personal injury claimants were privately funded, only a small fraction of their claims progressed to the point at which a barrister was actually briefed by the solicitor.\textsuperscript{120} This can only mean that privately funded claimants have a high likelihood of either settling relatively early or abandoning their claims altogether.

At least through the 1980s, the incentives for solicitors in legal aid cases were very different.\textsuperscript{121} Solicitors were under an ethical obligation to alert clients to their possible eligibility for government-funded legal aid, but once a client received assistance from legal aid, it imposed costs on the solicitor. The first cost consisted of delay and administrative overhead. At various junctures in a case, it was necessary for the solicitor to obtain the approval of those responsible for legal aid before proceeding, and the solicitor was required to make a full report of the case to the legal aid authorities when the case was concluded.\textsuperscript{122} The second cost was in terms of reduced fees. While a defendant was still obligated to pay the legal fees of a prevailing plaintiff, a legally aided plaintiff’s fees were paid into the legal aid fund, and legal aid paid the solicitor directly. The fees paid by legal aid tended to be lower than

\textsuperscript{116} Id. at 132.
\textsuperscript{117} DONALD HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 94 (John C. Bull et al. eds., 1984) [hereinafter HARRIS ET AL., COMPENSATION FOR INJURY].
\textsuperscript{118} GENN, HARD BARGAINING, supra note 112, at 110.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Note that many cases, particularly most personal injury cases, covered by legal aid when Genn was writing are no longer eligible for legal aid, and are handled through the English form of a no-win, no-pay fee. See Hugh Gravelle & Michael Waterson, No Win, No Fee: Some Economics of Contingent Legal Fees, 103 ECON. J. 1205 (1993). Because there are still some types of injury cases that legal aid will fund, I have put this discussion in a mixture of past and present tense.
\textsuperscript{122} See GENN, HARD BARGAINING, supra note 112, at 88.
those that the solicitor might have expected if the case were funded privately. At the time Genn wrote, solicitors were expected to give the legal aid fund what amounts to a ten percent discount, and for some (perhaps many) solicitors, the schedule of fees paid by the fund was somewhat lower than they could expect to charge a private client.123

There was one exception to the expectation that the legally aided client’s solicitor accept payment from the legal aid fund with the required ten percent reduction. If the case was settled before the initiation of a court action, the ten percent reduction did not apply, but the solicitor still had to be paid by the fund rather than directly by the opposing party.124 Assuming that a solicitor had other work that paid more than the reduced legal aid fees to fill his time, it was to his or her advantage to settle a legally aided case without initiating a formal legal action.

Another aspect of the rules regarding legal aid can put pressure on the other side (i.e., the defendant) to settle where it might otherwise be prepared to fight a smaller case. When a legally aided litigant loses a case against an opponent with substantial financial resources (e.g., an insurance company), the prevailing party is not permitted to recover its costs either from the losing party or from the legal aid fund, which effectively removes cost-based threats that certain defendants could otherwise use as bargaining chips.125 While the reduced legal aid fees create an incentive to settle for solicitors who have more remunerative work available, solicitors in marginal practices might be very happy to accept the level of fees that legal aid offers. Moreover, those solicitors need have no concerns about being paid if the case is ultimately unsuccessful. Thus, if a settlement is not arrived at easily, a solicitor in this position has little to lose by pursuing it as far as necessary. Hence, it is not surprising that barristers handling personal injury work find that legally aided clients comprise a larger proportion of their caseload than is true for solicitors.126

The third form of financing of personal injury litigation is through the trade unions. Historically, one benefit offered by trade unions in England was the assurance that if a member were injured on the job, the union would fight to see that he or she received compensation for that injury.127 What this has meant is that for workplace injuries (and for members of some unions, injuries suffered outside the work setting), the trade union would retain a solicitor for the member and cover any costs associated with the case. For

123. Id. at 89. Note that legal aid’s policy on what it will pay in terms of fees has undergone massive change in the years since Genn did her research. Current eligibility guidelines are available at http://www.legalservices.gov.uk (last visited May 18, 2002).
124. See Genn, Hard Bargaining, supra note 112, at 94 tbl.5.3.
125. Id. at 90–91.
126. See id. at 110.
127. Id. at 85.
example, if the member’s case was unsuccessful, the union would pay both the fees of the member’s solicitor and the other side’s cost. Thus, a solicitor retained by a trade union need not have any concern about being paid and need not worry about the client’s fears about losing and having to pay the opponent’s fees. As a result, union solicitors can refuse offers that others might accept without too much concern about the costs and risks of having to go to trial if necessary. In Genn’s analysis, it is the union solicitor, well-insulated both from concerns about being paid and from client fears about losing and having to pay costs, who is consistently the most successful advocate.  

In the 1980s, the fourth form of financing, legal insurance, was available to a small number of injury victims. At that time a variety of plans were available, particularly in connection to injuries arising from motor vehicle accidents. For as little as £5 a year, motorists could obtain coverage up to £25,000, for both their own legal fees and for costs that they might have to pay if they lost a court action. This removed the disincentives associated with fee shifting—the potential plaintiff no longer needed to worry about the downside risk of losing and having to pay both lawyers—and made potential litigants much more willing to contact a solicitor in the first place.

A conversation that I had in 1987 with a small-town solicitor who handled cases for one of these insurance plans made it very clear that the presence of the insurance affected the way that he handled cases:

I do a lot of motor claims and the DAS [legal insurance program] makes a difference in how I pursue them. Because insurance companies are very, very slow to handle claims, and where I have a client who is privately paying, I will write half a dozen letters to the insurance company virtually begging them to get on with it, and threatening to sue, but not doing it because I need to say to the client, “Bring me in £45 for the plaint fee,” and he doesn’t want to. Whereas when I’ve got the DAS, I give the insurers 14 days in which to get going, and if they don’t I’ll just put it straight into court. It’s a lot faster procedure, and it’s all because of finance. Clients are happy to go ahead when they are not looking at the bill.

This solicitor went on to illustrate the impact of the insurance by referring to a specific case he was handling at the time of interview:

This man has instructed me to pursue it. I’ve actually written to [the legal insurance plan] to get their authority to pursue it because we are under instruction to do so. And they wrote back to me and sort of said, “Well, if you think there is a good chance of success then go

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128. See id. at 53, 67, 85 (stating that union solicitors have expertise and access to evidence beyond that of most plaintiffs’ attorneys).
129. See KRIETZER, LET’S MAKE A DEAL, supra note 75, at 109.
130. Id. at 109–10.
ahead.” I wrote back again and said, “I’ve already told you I don’t think there’s a good chance. Please confirm.” And I fully expect them coming back and refusing it, because this bloke has nothing to lose, really, other than that cost [the other side’s expenses] which I don’t think he’d get stuck with. If he was privately paying, it wouldn’t have got this far. No way. Because I would have said, “Right, you’ve got less than a fifty-fifty chance, and it’s going to cost you X pounds to try it,” and he wouldn’t pursue it.  

While this specific example does not explicitly illustrate the impact of the legal insurance plan upon the willingness of solicitors to advise clients to reject initial, unsatisfactory offers, it certainly does suggest that solicitors who do not need to worry about either their own fees or clients’ fears about costs are in a different situation than solicitors with privately funded clients.

IV. How Are Fees Computed

The second major dimension of fee arrangement is the mechanism for computing the fee. As with any payment system, the computation of a price affects the incentives of both the buyer and the seller. This impact is most apparent in contrasting the incentives created by fees computed on a time-expended basis and those computed on a fixed-price basis. On a “one-off” case basis (i.e., ignoring other uses of the seller’s time and long-run considerations regarding future business), the hourly fee computation creates an incentive for the seller to maximize the time devoted to the case and an incentive for the buyer to minimize time. In other words, the seller wants to sell as much as possible and the buyer wants to buy as little as necessary. In contrast, the fixed price or fixed fee arrangement creates an incentive for the seller to minimize the time devoted to the case while the buyer wants the seller to put in whatever amount of time produces the best possible result.

The other two common types of fee computation are prepayment and percentage or commission. I use the term “prepayment” to refer broadly to situations where the lawyer works on a salaried basis and the client does not have to pay on a fee-for-service basis. This method effectively captures the various forms of legal aid where the lawyer is a salaried employee of the legal services agency as well as insurance-based systems where the lawyer is paid on a “per capita” basis (i.e., payment is on the number of insureds serviced rather than on a service-provided basis). The percentage fee arises in both transactional and litigation work. In the latter, it is what is commonly referred to as a contingency fee in the United States: if no recovery is obtained, the fee works out to be zero. The incentives for the prepaid system are much like those of the fixed-fee system: the client wants as much as he or she can get and the lawyer wants to provide as little as necessary. The

131. Id. at 110.
incentives for the percentage fee are more complex because they depend heavily on the amount upon which the percentage is to be based. If additional effort will increase the base amount, the lawyer may have an incentive to put in more time. Whether or not this is the case will depend upon the lawyer's opportunity cost (i.e., what other fee-generating uses the lawyer has for his or her time). Where the opportunity cost is high and the effect of additional effort on the base amount is modest, a conflict will arise between the lawyer, who will not want to put in additional time because the marginal return is not worth the marginal effort, and the client, for whom any marginal gain is a plus.

The potential conflict between lawyers and clients arising due to fee arrangements is an agency problem. The nature of the incentives have been discussed extensively on a theoretical basis, often specifically in connection with settlement processes. The actual empirical research base assessing the theoretical arguments, however, is relatively small.

One of the first empirical studies that looked at the incentives created by contingency fees was Douglas Rosenthal's analysis of personal injury cases. Based on interviews with litigants and lawyers, he concluded that lawyers tended to slight the relatively routine personal injury cases in his sample. He argued that clients needed to monitor their lawyers very

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135. Id. at 106 ("Cutting corners—case preparation falling short of the treatise standards—is inevitable in all but the fittest cases.").
closely and demand that lawyers put in the work necessary to obtain good results. 136 One problem with Rosenthal's analysis was that it did not have a good basis of comparison. For relatively modest cases, it is unlikely that clients would want lawyers to put in significant effort if the client was paying on an hourly basis because the costs would rapidly devour any recoveries that might be obtained. The real question is whether a lawyer paid on an hourly fee basis would actually put in more time than the contingency fee lawyer, assuming reasonable client monitoring of what the lawyer was doing.

This specific question was partially examined by myself and others using data from a large study of litigation in the United States circa 1980-1981. 137 Using regression methods that employed an array of control variables, we estimated regression models predicting the amount of time devoted by a lawyer to samples of cases handled on an hourly fee basis and handled on a percentage-fee basis. 138 The results suggested that contingency fee lawyers in smaller cases did devote less time than hourly fee lawyers. 139 This difference was statistically discernible only for cases involving $6,000 or less, but it might exist for cases involving up to $30,000. 140 While no differences were statistically significant above $30,000, if there were differences in effort it was that the contingency fee lawyer put in more time than hourly fee lawyers. 141 This same analysis found that fee arrangements did not directly impact the amount of time that lawyers devoted to cases as much as they influenced the way that other factors influenced the amount of time. In my book, The Justice Broker, I summarized this effect as follows:

[F]ee arrangement has a substantial impact on the process by which lawyers allocate time to cases. Contingent fee lawyers appear to be highly sensitive to the potential productivity of their time and they are less affected by craft-oriented factors. This effect can be seen most clearly in two variables: commitment to craft and response to opposing party's briefs. The contingent fee lawyer does spend time in response to the opposing side's briefs, but that response involves half as much time per brief as the response of hourly fee lawyers. While the hourly fee lawyer is strongly influenced by commitment to craft, the contingent fee lawyer does not appear to be so influenced. On the other hand, the level of effort of contingent fee lawyers goes up at a faster rate as the level of stakes increases than it does for the hourly

136. Id. at 14-15, 154.
137. Herbert M. Kritzer et al., The Impact of Fee Arrangement on Lawyer Effort, 19 LAW & SOC'Y REV. 251, 256 (1985).
138. Id. at 256-57.
139. Id. at 267.
140. Id. at 267 fig.2, 268.
141. Id. at 267. The same basic analysis can be found in Herbert M. Kritzer, The Justice Broker: Lawyers and Ordinary Litigation 118-20 (1990) [hereinafter Kritzer, The Justice Broker].
fee lawyer. The contingent fee lawyer appears sensitive to the potential return to be achieved from a case, which is closely related to the stakes. The hourly fee lawyer’s return from a case is not as tied up with the stakes, and other types of considerations (e.g., the client’s goals, the nature of the forum, etc.) have a greater influence. This broad comparison suggests that the contingent fee lawyer’s behavior in terms of the amount of resources put into the case is controlled primarily by the exigencies of the case; those factors also influence the hourly fee lawyer’s behavior but are modified in important ways by other considerations. Given that the contingent fee lawyer’s return on the investment in a case is directly determined by the case’s characteristics and the processing of the case that leads to an eventual outcome, it is not surprising that other factors have relatively little impact.\footnote{142}

A second way in which fee computation influences lawyers’ behavior is in the content of the negotiation. If lawyers are being paid on a commission or percentage basis (i.e., out of the proceeds of a recovery), lawyers will focus on money in the negotiation process. It is not surprising then that percentage fee lawyers, when they describe exchanges of offers and demands, report that those demands focus on money.\footnote{143} Rarely (in one to three percent of cases) do percentage fee lawyers report that money is not part of a demand or offer, and in over three-quarters of the cases, the demands and offers are entirely in terms of money.\footnote{144} Lawyers being paid on an hourly fee basis, on the other hand, are less likely to report offers and demands expressed exclusively in terms of money and more likely to report the nonmonetary content of offers and demands.\footnote{145}

More broadly, one might hypothesize that the fee arrangement affects the content of lawyers’ work. One might expect that hourly fee lawyers would be inclined to devote more time to things like legal research and writing briefs—activities that could build up hours. Contingency fee lawyers might be expected to devote more time to getting the case settled. However, the one analysis that looked at this question found no evidence supporting differences in work content that was related to the fee arrangement.\footnote{146}

One area where the difference in incentives between hourly- and percentage-fee arrangements has been extensively discussed in the United States is in connection with class-action litigation, in which the lawyer’s fee may be computed on an hourly basis (a “lodestar”) or on a percentage

\footnotesize{\begin{itemize}
\item \footnote{142} Kritzer, The Justice Broker, supra note 141, at 117.
\item \footnote{143} Id. at 125.
\item \footnote{144} Id.
\item \footnote{145} Id. at 123–25; Herbert M. Kritzer, Fee Arrangements and Negotiation: A Research Note, 21 Law & Soc’y Rev. 341, 346 (1987).
\item \footnote{146} See Kritzer, The Justice Broker, supra note 141, at 121–23.
\end{itemize}}
basis. Both of these are forms of contingency fees because the lodestar is paid only if the suit is successful and includes a risk multiplier. The issue is fairly straightforward: the hourly fee gives lawyers an incentive to drag out cases in order to increase the hours for which they will be compensated, at least to the extent that the lawyers believe a judge making the eventual fee award will allow. In class actions, the percentage fee creates a potential incentive for a relatively quick settlement that may not be in the class’s best interest. In class actions, the fees, regardless of how computed, are set by the court and paid out of the “common fund” (i.e., the settlement). The availability of such fees encourages law firms to seek clients to bring such cases. Given that lawyers initiate many of these lawsuits, the potential reputational constraints that mitigate problematic incentives for routine contingency practices may not operate in the context of large class action cases. But the presence of the alleged effects can be supported only anecdotally, and it may not be clear that there is in fact that much difference in the fees obtained by lawyers. One could imagine a study of institutional plaintiffs in class-action litigation to determine on what basis those plaintiffs chose or supported the choice of a particular law firm as lead counsel.

A final question related to the incentives associated with hourly fees concerns the ability of the purchaser of legal services to obtain an hourly rate below that which a lawyer might be able to get for other work. I say “might” because if a lawyer could definitely get other work, the lawyer would be unlikely to take a case at below-market rates. One area where lawyers are sometimes forced to accept below-market rates is in criminal defense cases.


150. See id. at 535 n.147 (describing the plaintiff as the attorney’s “key to the courthouse”). See also Janet Cooper Alexander, Contingent Fees and Class Actions, 47 DEPAUL L. REV. 347, 350 (1998) (describing how class actions and contingent fees are sometimes criticized as giving lawyers “incentives for bringing unmeritorious claims”).

151. See discussion infra subsection IV.A.

152. The best empirical study of fees in class action litigation examines the factors that predict the fee that is awarded, but the study can only speculate about the impact of alternative fee calculations. See William J. Lynk, The Courts and the Plaintiff’s Bar: Awarding the Attorney’s Fee in Class-Action Litigation, 23 J. LEGAL STUD. 185 (1994).
where courts may appoint counsel for indigent defendants and essentially force a lawyer to accept the appointment even though the compensation falls substantially below what the lawyer earns for other work. Even if lawyers volunteer to accept such appointments, there may be consequences to accepting hourly rates below the prevailing market rate. While one can find many anecdotal or journalistic discussions of the consequences of such practices (many of these discussions are in the context of death penalty defense), I know of no systematic empirical research providing evidence of their impact on lawyer behavior. It might reasonably be expected that the lawyer would have an incentive to minimize the time commitment to such below-market work in order to minimize any losses from turning away work that was paid at market rates.

High-volume purchasers of routine legal services may also be able to obtain discounted rates from private-practice lawyers. A good example is routine insurance defense work. While I know of no empirical work showing the impacts of bulk purchasing and discounted rates, plaintiffs' lawyers perceive such practices as creating incentives for defense lawyers to "churn" files in order to be sure that cases generate adequate fees. Whether "churning" actually occurs is hard to determine (no lawyer is going to admit to that practice or other types of practices that might be ethically questionable), but I have been told by defense lawyers that clients paying "wholesale" rates (i.e., insurers) will not get the same kinds of breaks on bills that may be given to clients paying "retail." One lawyer reported that, if he has to travel out of town on a matter for an insurance company client, he will bill portal-to-portal at the full rate where he might use a lower rate for travel time (or not bill at all for that time) with a client paying a higher hourly rate. Similarly, this lawyer indicated he might discount time that proved to be unproductive (i.e., a deposition that failed to yield any useful information) for the noninsurance client while not discounting in the same situation for an insurance company client.

A. Mitigating Case-by-Case Incentives

Most analyses of the impact of fee-arrangement-generated incentive structures examine the incentives on a case-by-case basis. The only typical

155. On the issues created by insurers' tight control over billing by their outside lawyers, see Charles Silver, Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers, 4 CONN. INS. L.J. 205 (1998).
156. This information is based on informal conversations with several lawyers during the preparation of this Article.
recognition that lawyers do not have only one case at a time is the incorporation of the idea of opportunity cost, whereby the analysis takes into account the alternative uses of the lawyer's time. An important mitigating factor, seldom discussed, is that lawyers are concerned not only with the income generated by a particular case, but with a stream of income. For lawyers with an ongoing representation of a client in a series of matters, this means that hourly fee lawyers must reign in the temptation to overwork a case. If the client senses that the bills are too high relative to what the case is worth or relative to the client's assessment of what should have been required to deal with the case, the client may decide to shift its future business to another firm. In the interviews that I conducted with corporate lawyers and corporate officials in Toronto, this concern for maintaining the continuing relationship, and the impact of that concern on billing-related issues, was mentioned repeatedly.\footnote{157} This does not mean that the concern about fees and how they are computed is not a significant issue for corporate lawyers and their clients, but rather that the search for alternative billing relationships that best align the interests of the lawyers and their corporate clients seems to be an ongoing, and probably never-ending, struggle.\footnote{158}

My own recent work on contingency fee practice in the United States shows how these long-run concerns restrained the incentive of a lawyer being paid on a percentage basis to turn small cases over too quickly. Lawyers depend heavily on their reputations, both among other lawyers and among potential clients, for a flow of clients. A lawyer who garners a reputation for settling cases in ways that do not benefit clients may encounter problems in obtaining future clients, particularly clients with good cases. Lawyers want clients to go away satisfied with the results the lawyer achieves and to stay satisfied—satisfied clients tend to be the best advertisement. If clients later learn from conversations with friends that the result the lawyer achieved was not very good, the lawyer's long-run interest will be harmed.\footnote{159} For many, and perhaps most lawyers, the effect of these long-term reputational concerns


\footnote{159} See Herbert M. Kritzer, Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship, 23 LAW & SOC. INQUIRY 795, 814 (1998); Herbert M. Kritzer & Jayantha K. Krishnan, Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling, 21 LAW & POL'Y 347, 366 (1999); Johnson, Lawyer's Choice, supra note 133, at 591.
is to provide an economic check on the worst of the perverse incentives of the contingency fee.\textsuperscript{160}

B. Fixed Fees

While the incentives for fixed fees are fairly clear-cut (turn the work out with maximum efficiency), there is almost no empirical research examining whether this is in fact what happens. The one study that addresses this is a study of high volume "franchise" law firms. In that study, Van Hoy interviewed lawyers in such firms and spent time observing the work process in the firm.\textsuperscript{161} He found both a focus on efficiency and an emphasis on providing standardized products that could often be turned out by non-professional staff.\textsuperscript{162} Often, the primary role of the lawyer in the firm was not so much producing the work as selling the firm's standardized services to the client who came in the door.\textsuperscript{163} The more work that could be done by staff, the more profitable the practice.

Fixed fees are often used in divorce practice, particularly with clients of very limited means.\textsuperscript{164} The impact of such fees is to push lawyers away from the formal tools of litigation and toward emphasizing informal negotiation to minimize the amount of time required to handle a case.\textsuperscript{165} Lawyers working with clients of limited means are also more likely to offload work onto the clients themselves as a way of minimizing their time commitment.\textsuperscript{166} Lawyers doing this work also feel pressure to maintain a high caseload in order to generate an adequate stream of fees.\textsuperscript{167} One frequent impact of the limited time lawyers are able to put in on an individual case is a perception

\textsuperscript{160} Of course, economic incentives are not the only influence on lawyer behavior. Concerns about professional craft and professional ethics also put a brake on self-dealing. See Johnson, \textit{Lawyer's Choice}, supra note 133, at 591.


\textsuperscript{162} See also Carroll Seron, \textit{Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice, in LAWYERS' IDEAL/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 63, 68–72 (Robert L. Nelson et al., eds., 1992). While I have seen no empirical research on the subject, I expect that a similar pattern could be found for traditional conveyancing work by English solicitors. Much, if not most, of the actual work of conveyancing could be done by specially trained "nonqualified" (i.e., nonprofessional) staff.

\textsuperscript{163} Van Hoy, \textit{Selling and Processing Legal Services, supra} note 161, at 703–05.

\textsuperscript{164} Id. at 725.

\textsuperscript{165} See Linda J. Ravdin & Kelly J. Capps, \textit{Alternative Pricing of Legal Services in a Domestic Relations Practice: Choices and Ethical Considerations}, FAM. L.Q., Summer 1999, at 394–97 (discussing the use of fixed fees in a family law context).

\textsuperscript{166} See \textit{id}.

\textsuperscript{167} Id.
by the client that the lawyer is inattentive. In a real sense, this perception is accurate, because the lawyer is minimizing the attention devoted to cases whenever possible.

While my focus has been largely on lawyer behavior in civil litigation, another area where the issue of fixed fees has come up is in the area of criminal defense. Many routine cases in criminal defense are handled on a fixed fee basis, particularly where there is an understanding between lawyer and client that the case will not go to trial. In fact, one of the problems for criminal defense lawyers is that there is often relatively little they can do for their clients other than help them through the process of pleading guilty and being sentenced. Lawyers know that they need to get paid before the case comes to an end because the client has little incentive to pay after the lawyer has done what little the lawyer can do on behalf of the client. However, whether the way that criminal defense attorneys are paid makes any difference in the way that they handle cases is far from clear from the existing empirical research. One study examined two measures of outcome (whether the attorney obtained a charge reduction and an indicator of sentence severity) in nine medium-sized counties in three states. That study found that whether the attorney was privately retained (which I would presume was mostly on an fixed-fee basis) or publicly paid (varying by county with some salaried attorneys, some on fixed fee, and some on a contract basis) had little or no impact on case outcomes.

C. No-Win, No-Pay Fees

While many people equate contingency fees with American-style percentage fees, there are other types of no-win, no-pay fees (or from the

168. See id.
169. See id.
171. See Abraham Blumberg, The Practice of Law as a Confidence Game: Organizational Cooption of the Profession, 1 Law & Soc’y Rev. 15 (1967).
172. See id. at 27–29 (discussing generally the difficulty criminal defense lawyers face with respect to fee collection).
174. See id.; see also James Eisenstein & Herbert Jacob, Felony Justice: An Organizational Analysis of Criminal Courts 285 (1977). These are by no means the only studies that look at the impact of the type of attorney. However, the studies have the advantage of considering a combined total of twelve different communities (three large cities in one and nine medium-size communities in the other), with separate analyses carried out for each of those communities. See Paul Wicke, Criminal Lawyers: An Endangered Species 202–04 (1978) for a summary of several other studies showing similar results.
175. While percentage fees are best known in the United States, there are other countries that employ such fee arrangements. Two examples are Greece and the Dominican Republic. Regarding Greece, see Eleni Skordaki & Danielle Walker, Regulating and Charging for Legal Services: An International Comparison 57 (1994); regarding the Dominican Republic,
lawyer’s perspective, no-win, no-payment fees). The most common such fee arrangement is one where the fee is computed in the same way that it would be on a non-contingency basis, but is payable only if the lawyer succeeds on behalf of the client. See Stella Yarrow & Pamela Abrams, Nothing to Lose? Clients' Experiences of Using Conditional Fees 112–13 (1999). The best explanation of the difference in success is not in terms of experience or expertise but in terms of incentives. The nonlawyers typically worked on a salaried basis for social service organizations, while the lawyers typically worked on a contingency fee basis whereby they were paid only if the appeal was successful. Moreover, the nature of the system was such that lawyers could not typically negotiate a compromise settlement.


177. Id.


179. See Samuel R. Gross & Kent D. Syvenud, Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 1, 53 (1996) (noting that an attorney may want to try a case in order to "establish himself as a winner, or at least as someone who will fight to the expensive end," even though such a strategy may go against his client's interest); MacKinnon, Contingent Fees, supra note 133, at 74–76.


181. Id.

182. Id.
for their clients—either they won the case or they lost it. In this situation, the interests of lawyers and clients coincided, and it worked to the clients’ benefit.

Putting the lawyer at risk provides strong incentives to screen cases. In certain types of cases, such as medical malpractice, lawyers turn away the vast majority of cases that potential clients bring. More generally, a survey of contingency fee lawyers in Wisconsin found that they turned away roughly half the cases that were presented to them, and that this figure rose to eighty to ninety percent for lawyers who aggressively sought out cases using media advertising. The lawyers indicated that most of the cases declined had problems with liability. While the folklore of the legal profession is that lawyers routinely advise clients not to pursue a matter, there is no evidence of the frequency with which lawyers billing on an hourly or fixed-fee basis turn away clients presenting matters within the lawyer’s usual area of practice.

The other side of this coin is that contingency fees can create incentives to take cases that a lawyer would not otherwise take or that a litigant would not otherwise bring. Analyses of the returns from contingency fee practice show that in a large proportion of cases, lawyers actually make substantially less on a per hour basis than they would from work for which they could charge prevailing hourly rates. The median case for most lawyers produces a return at best marginally better than the prevailing hourly rate.

183. Id.

184. Id.


186. Herbert M. Krizter, Contingency Fee Lawyers as Gatekeepers in the Civil Justice System, 81 JUDICATURE 22 (1997). A study of plaintiffs’ lawyers in Texas found a roughly similar level of screening, with lawyers reporting accepting around a third of cases during the period covered by the Wisconsin survey (but also reporting a drop to accepting only about a quarter of cases by the end of the decade). See Stephen Daniels & Joanne Martin, It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas, 80 TEXAS L. REV. 1781 (2002).


188. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 37, 75 (1994).


For most lawyers handling contingency fee work, the real profits come from a very small segment of cases.\textsuperscript{191} While a few lawyers and law firms can "cherry pick" cases so that their case portfolio is largely composed of high-profit cases, most lawyers need to take a range of cases to establish a network of referral sources (former clients and other lawyers) that will bring in the occasional high-profit case.\textsuperscript{192} One lawyer who turned over as many as 200 cases a year told me that two-thirds of his gross fees (and hence his "profits") came from perhaps a dozen cases each year; the other cases essentially covered his overhead. This lawyer took large numbers of cases primarily to keep his name out in the community. From my own observations of contingency fee lawyers at work, I would also surmise that knowing which cases will be profitable and which will be money losers is not something a lawyer knows up front. The actual damages and the investment that will be required to obtain a recovery cannot be known with any certainty until well into a case.\textsuperscript{193}

In the early 1990s, Stock and Wise examined the contingency fees charged by a national sample of lawyers who belonged to the Association of Trial Lawyers of America (ATLA).\textsuperscript{194} They argue that the degree of risk that lawyers handling cases on a contingency fee basis are willing to accept depends upon the magnitude of the risk and the lawyer’s ability to diversify risk across a portfolio of cases.\textsuperscript{195} The ability to diversify risk is in turn a function of the size of the lawyer’s firm and the resources available to the firm.\textsuperscript{196} They also argue that risk increases with case size, not necessarily in terms of the likelihood of winning and losing, but in terms of the amount at stake for the lawyer (i.e., the amount of time the lawyer will have to devote to the case).\textsuperscript{197} Looking at a sample of large antitrust and securities cases, they show that the risk multipliers increase as the amount at stake

\footnotesize{\textsuperscript{191} Kritzer, The Wages of Risk, supra note 189, at 298.}
\footnotesize{\textsuperscript{192} Id. at 298–305.}
\footnotesize{\textsuperscript{193} A somewhat related issue, about which I know of no empirical work, is the impact of referring cases to other lawyers in return for a portion of the fee that the receiving lawyer eventually earns. While "referral fees" are often debated as raising ethical questions for lawyers, there are good reasons that such fees might work to the benefit of the client as well the referring lawyer. See Bruce L. Hay, The Economics of Lawyer Referrals (Cir. for Law, Econ., and Bus., Harvard Univ., Discussion Paper No. 203, Oct 1996).}
\footnotesize{\textsuperscript{194} James H. Stock & David A. Wise, Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results, 16 CLASS ACTION REP. 584 (1993).}
\footnotesize{\textsuperscript{195} Id. at 590–91.}
\footnotesize{\textsuperscript{196} Id. at 597–98.}
\footnotesize{\textsuperscript{197} Id. at 594.}
increases. They conclude that "[f]irms will bear risk if they are compensated for the risk, [and that] [m]ore risk requires greater compensation."  

D. Salaried Lawyers

While the situation of salaried lawyers has been the subject of empirical study, the existing research has little to say about the impact of a salaried position on lawyer behavior. Salaried lawyers often find themselves in situations of extremely heavy demands for their time, either because of heavy caseloads or because of the pressures of a partnership track in a large law firm. In a sense, these demands reflect the incentives of those who hire and pay these salaried lawyers. From the perspective of the employer, the marginal cost of the time of lawyers already on staff is essentially zero except for the opportunity cost of that time. Faced with heavy time demands, lawyers who are neither paid by the hour nor generate fees by the hour want to categorize and process cases with dispatch and minimize what they see as unproductive uses of their time, such as extensive interaction with clients.

There is one very interesting theoretical analysis of the implications of this kind of salaried fee arrangement for the incentives of the lawyer to devote time to a case. What this analysis shows is that for the lawyer working in a salaried setting, there is an important distinction drawn between an effort calculation that focuses solely on the instant case and a calculation that considers the benefit of the same effort distributed across an entire caseload. Particularly in settings where a lawyer is handling a set of similar cases, spending more time than is strictly rational from the perspective of the individual case can yield benefits to other cases that makes that investment a rational choice. This benefit may come in the form of establishing precedents through a test case. The consequences of winning an important test case can produce a substantial benefit for a large group of potential clients who may not need to become clients because of the changes wrought by the test case. While one might think of this effect primarily in terms of lawyers in legal services or legal aid practices, it also makes a lot of sense for

198. Id. at 598–99.
199. Stock & Wise, supra note 194, at 601.
203. See Johnson, Lawyer's Choice, supra note 133, at 600–02.
204. Id.
a lawyer working as an inside counsel handling employment-related issues. In this situation, the goal may be to establish a reputation as a means of deterring certain types of cases in the future, as well as that of trying to win a favorable precedential decision.\footnote{205} While this argument makes intuitive sense, I know of no empirical research that examines the issue. There is systematic evidence that insurers can lower their claims processing costs by using in-house lawyers,\footnote{206} but whether this lower cost is the result of incentive effects, simple caseload demands, systematic differences in cases handled by inside and outside counsel, or simply lower per hour costs is not clear.

E. Ethical Failings Related to Fee Arrangement

Legal fees create incentives for lawyers to misbehave. Surprisingly, we know little about the frequency of such misbehavior. Authors have discussed the ethical issues raised by various fee arrangements,\footnote{207} but these closely track the incentive issues previously discussed. Where authors have discussed examples, or purported examples, of unethical behavior related to fees, the discussions have been largely anecdotal.\footnote{208} What little we know from systematic empirical research tends to link unethical behavior not to any particular fee arrangement but to issues such as marginality of practice, client pressures, practice context (i.e., what courts or agencies a lawyer

\footnote{205} Generally, the desire to “play for rules” can modify the impact of standard incentive calculations. \textit{See} Marc Galanter, \textit{Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change}, 9 LAW & SOC’Y REV. 95, 101–02 (1974) (discussing the types of litigants that would especially value favorable precedents); Catherine Albiston, \textit{The Rule of Law and the Litigation Process: The Paradox of Losing by Winning}, 33 LAW & SOC’Y REV. 869 (1999). This effect is not limited to salaried lawyers. Individual fee-for-service lawyers may themselves choose to “play for rules.” While for hourly fee lawyers this requires a willing or blind client, the contingency fee lawyer may be relatively free to pursue rules-oriented outcomes. An opponent of the contingency fee lawyer might, however, put cross-pressures on the lawyer by offering to drop an appeal in return for a payment, which the contingency fee lawyer’s risk-averse client may be very tempted to accept.

\footnote{206} Studies by the Insurance Services Office of cases arising from commercial liability policies show that the cost of inside counsel as a proportion of the paid loss may be as little as about 50% of the cost of outside counsel. \textit{See} INSURANCE SERVICES OFFICE, CLOSED CLAIM SURVEY FOR COMMERCIAL GENERAL LIABILITY: SURVEY RESULTS, 1995, 16 (1996); \textit{see also} INSURANCE SERVICES OFFICE, CLOSED CLAIM SURVEY FOR COMMERCIAL GENERAL LIABILITY: SURVEY RESULTS, 1997, 18 (1998) (showing savings in the range of only 21% to 34%).

\footnote{207} \textit{See generally} MACKINNON, CONTINGENT FEES, \textit{supra} note 133; Stewart Jay, \textit{The Dilemmas of Attorney Contingent Fees}, 2 GEO. J. LEGAL ETHICS 813 (1989); Ross, \textit{supra} note 132; William G. Ross, \textit{The Honest Hour: The Ethics of Time-Based Billing by Attorneys} (1996); William G. Ross, \textit{Kicking the Unethical Billing Habit}, 50 RUTGERS L. REV. 2199 (1998); SOCIETY OF ADVANCED LEGAL STUDIES, ETHICS OF CONDITIONAL FEE ARRANGEMENTS, \textit{supra} note 178.

\footnote{208} \textit{See, e.g.,} Lerman, \textit{supra} note 132; Lisa G. Lerman, \textit{Scenes From a Law Firm}, 50 RUTGERS L. REV. 2153 (1998); Brickman, \textit{Contingent Fees, supra} note 190.
practices before), and the social context of a particular law firm.\textsuperscript{209} Thus, there is no empirical evidence that any type of fee arrangement increases the likelihood of unethical behavior, although the specific nature of unethical conduct most likely does vary depending on the type of payment structure.

V. Conclusions: Do Fee Arrangements Account for Broad Cross-National Differences in Litigation Patterns?

The discussion throughout this Article has focused largely on the micro-level effects of fee arrangements on lawyers and their clients. In closing, it is worthwhile to consider briefly what macro-level effects can be attributed to fee arrangement. The common-sense answer is that fee arrangement has significant effect. The United States is often held up as an example of a highly litigious country, and this characterization is attributed in large part to the impact of fee arrangements. In interviews I conducted in Canada, respondents were quick to identify the absence of contingency fees as explaining their belief that litigation was less common in Canada.\textsuperscript{210} During the debate over adopting the conditional-fee form of contingency fees in England, critics pointed to the United States as evidence of the negative impact such arrangements would have—one English expatriate warned against putting “an American hamburger stand into the middle of St. Paul’s Cathedral.”\textsuperscript{211} Others attribute differences in litigiousness to the incentives and disincentives created by fee shifting or the lack thereof.\textsuperscript{212} Of course, one can also see the combination of the absence of contingency fees and the presence of fee shifting as a kind of “double whammy.”

There are two problems in assessing the truth of the proposition that fee arrangement affects broad patterns of litigiousness, including the aggressiveness with which lawyers seek out cases. First, it is difficult to find good data comparing litigation patterns across countries.\textsuperscript{213} Second, even if


\textsuperscript{210} See Kritzer, Fee Arrangements and Fee Shifting, supra note 100, at 129–30.


\textsuperscript{212} See Garry D. Watson et al., Civil Litigation: Cases and Materials 419 (1991) (“This effect [of discouraging litigation] is one which has been sanctioned and perpetuated by [Canada’s] legal system as desirable in that it tends to encourage people to settle their claims amicably, or at least without resort to the courts.”).

\textsuperscript{213} See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4,
one finds data that allows comparison, sorting out the factors that might account for differences is by no means straightforward.

On the litigiousness issue itself, patterns are not as clear as the popular perception might suggest. In his study of law and disputes in Morocco, Lawrence Rosen observed that "one seldom meets an American who has been involved in an actual lawsuit and almost no Moroccan who has not."214 My own comparative work on propensity to sue suggests that broad statements about differences in propensity have to be conditioned by the type of issue involved.215 While it may be the case that persons in the United States are more likely to bring claims and suits for personal injury, Britons may be equally likely to seek redress for consumer problems and perhaps more likely to pursue claims related to employment and rental residences.216 Finally, the most comprehensive effort to compile cross-national data on litigation rates (see Figure 1)217 shows that the United States is not the most litigious nation, nor is the United States all that different from England and Wales. Moreover, the availability of percentage fees, such as the American contingency fee, does not clearly lead to higher levels of litigation. If this were the case, one would expect to find Greece, where percentage fees are available, to be roughly as litigious as the United States. Furthermore, if the presence of fee shifting discourages litigation, it is hard to account for the higher litigation rates in Germany, Sweden, and Austria compared to the United States.218

51 (1983) ("Local differences in recording practices, differences in the jurisdiction of courts and other tribunals, and differences in what is recorded as a case all add to differences in substantive law, making comparison of litigation across societies extremely treacherous.").


218. On the rules governing fee shifting in these countries, see Pfennigstorfer, The European Experience, supra note 6, at 44–65. One explanation for the high litigation rate in Germany is fee-related: the wide use of legal expense insurance. See Basil S. Markesinis, Litigation-Mania in England, Germany and the USA: Are We So Very Different, 102 STUDI SENESI 372, 392 (1990). However it is not clear whether legal expense insurance preceded or followed a high level of litigation. Legal insurance is also widely available in Sweden as is legal aid. But "[n]either legal
Figure 1.

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It is almost certainly the case that lawyers in the United States are more entrepreneurial than are lawyers in England, but is this because of the availability of percentage fees in the United States, or does it reflect broader patterns of economic and legal culture? The English legal profession has
traditionally not been as economically motivated as the American profession.\textsuperscript{220} Professionalism for lawyers in England has been much more entwined with social status than with economic status.\textsuperscript{221} The legal profession in England has not been aggressive in trying to open new areas of practice.\textsuperscript{222} It might be that the solicitors' profession was able to earn such a comfortable living throughout much of the early 19th and 20th centuries from its conveyancing monopoly that it simply did not feel a need to seek out other income sources.\textsuperscript{223} It is certainly worth noting that the longstanding opposition of solicitors to any form of no-win, no-pay fee first began to subside after the demise of the conveyancing monopoly.\textsuperscript{224} Attributing cross-national differences in patterns of professional behavior entirely to the presence or absence of specific fee rules is highly questionable.

In the end, both at the macro and micro level, we are hard pressed to find strong differences in behavioral patterns that can be tied to fee arrangements. This does not mean that fee arrangements do not matter; rather, it is indicative of the complexity of the effects of fee arrangements. The various effects tend to cross-cut in significant ways. The result is often that clear evidence of effects is difficult to find.


\textsuperscript{220} See Michael Burrae, \textit{From a Gentlemen’s to a Public Profession: Status and Politics in the History of English Solicitors}, 3 Int’l J. Legal Prof. 46–47 (1996) (noting that the English legal profession has shown indifference towards developing a market for its services).

\textsuperscript{221} See id. at 49–51.


\textsuperscript{223} See id.
