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CONSUMER PROTECTION IN THE LEGAL MARKETPLACE:  
A LEGAL CONSUMER'S BILL OF RIGHTS IS NEEDED

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LOYOLA UNIVERSITY CHICAGO

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## ***FEATURE ARTICLE***

### **Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights Is Needed**

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## I. Introduction

Anyone with a television or a Yellow Pages directory has seen the advertisements: "CALL NOW FOR YOUR FREE CONSULTATION . . . NO FEE IF NO RECOVERY."<sup>1</sup> Regardless of the advertising medium, the message is the same: *FREE*. Personal injury attorneys stress this message because it attracts business.<sup>2</sup> It seduces the uninformed to believe they may be getting something for nothing, and suggests to the vulnerable that a lawsuit may be the ticket to solving their financial problems.

As with other "free" offers, however, the contingency fee system has fine print.<sup>3</sup> Ironically, personal injury lawyers generally have no legal obligation to explain most of these terms to potential clients. The result is that consumers may not have all the information they need to make an educated decision when choosing either an attorney or a payment plan for legal fees.<sup>4</sup> For example, most consumers do not know the value of a claim, how much work and skill will be needed for the attorney to pursue it, or its chance of success. Consequently, consumers may be overcharged for legal services.

The problems facing consumers of legal services are made worse by certain lawyers' and agents' aggressive solicitation practices. Consumers are sometimes pressured to sign contingency fee agreements after an accident or an unexpected traumatic loss — at times when they are in no condition to make a rational decision. In most situations, the law imposes no "cooling off" period after a tragedy. Some personal injury lawyers and their agents take unfair advantage of these situations by pressuring vulnerable, ill-prepared victims to retain them for extravagant fees.

<sup>1</sup> VERIZON SUPERPAGES, YELLOW PAGES, Wash. D.C., at 735 (2001).

<sup>2</sup> Former United States Supreme Court Chief Justice Warren Burger observed that "advertising gimmicks—such as 'first consultation free' and the like—. . . are frequently employed to entice law-abiding citizens to exploit the legal system for personal profit." Warren E. Burger, *Rule of Law: The ABA Has Fallen Down on the Job*, WALL ST. J., Aug. 10, 1994, at A9.

<sup>3</sup> For example, clients may not appreciate that they may be responsible for costly expenses, including expert witness fees, and the lawyer's costs for travel, long distance telephone calls, photocopying, facsimile transmission, and the like.

<sup>4</sup> See William P. Lightfoot, Letter to the Editor, *Discuss Fees Up Front*, TRIAL, Jan. 1995, at 88 (noting that "many clients [of personal injury lawyers] are inexperienced about the issue of attorney fees.").

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This article proposes a market-based solution to the problems facing ordinary legal service consumers. It calls for states to adopt a "Legal Consumer's Bill of Rights" that identifies basic rights for every individual in America who may need a lawyer's services on a contingency fee basis.<sup>5</sup> It then discusses model legislation developed in this area by the American Legislative Exchange Council ("ALEC"), the nation's largest bipartisan membership association of state legislators.<sup>6</sup>

## II. The Contingency Fee System and the Ordinary Consumer

Contingency fees play an important role in the American legal system. Without them, many people of low or moderate incomes could not afford to bring legitimate claims. The purpose of this article is not to attack the contingency fee system, or to advocate for the abolishment or capping of such fees, but to call for adequate safeguards to ensure that it protects those it is supposed to serve.

The ordinary consumer is usually not a sophisticated shopper for legal services. Unlike corporate defendants, who are informed consumers of legal services and may meaningfully bargain for favorable billing rates with their strong "purchasing power," most personal injury victims and their families have no experience using the legal system and probably will not be repeat customers. In contingency fee cases, a lawyer will weigh the value of the claim, the time involved, and the chances of recovery before deciding whether to accept a case and the fee she will charge. Yet, plaintiffs are forced to decide whether to accept a fee agreement without any objective information regarding these key variables. Most injured consumers lack the knowledge needed to negotiate a fee that is reasonable and fair for their claim's individual circumstances. Indeed, the average potential client's lack of knowledge about the legal process may be

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<sup>5</sup> Similar requirements now exist in Florida, Illinois, and New York. *See* FLA. STAT. ANN. BAR RULE 4-1.5 (2001) (lawyers who are retained on a contingency fee basis must provide their clients with a Statement of Client's Rights for Contingency Fees); 750 ILL. COMP. STAT. ANN. 5/508 (West 2001) (requiring divorce lawyers to include a Statement of Client's Rights and Responsibilities in every engagement agreement they sign); N.Y. CT. RULES § 1210.1 (2001) (requiring lawyers to post a Statement of Client's Rights in their offices).

<sup>6</sup> *See infra* Appendix.

compounded by the need to recover damages quickly, such as to cover hospital bills or lost wages. This inequality of bargaining power is intensified because legal consumers are often pressed to make decisions regarding legal services when they are in an emotionally vulnerable state, such as after they have been injured or a family member has suffered serious harm.

#### A. Consumers Lack Basic Fee Information

The usual market forces of supply and demand do not work as they should in the contingency fee context because most consumers lack the background and experience to decide whether the fee arrangement presented to them is fair and reasonable under the circumstances. Consequently, attorney fees often have little or no relationship to the actual work or risk involved in a case.<sup>7</sup> In fact, many attorneys charge the same percentage fee for all of their cases, regardless of the "contingency" involved or the amount of time that will be spent on the case.<sup>8</sup> As former Harvard President and Law School Dean Derek Bok observed:

Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most

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<sup>7</sup> Lawyers who rely on contingency fees often suggest that they should be allowed to receive a "windfall" profit in one case because they may not recover in other cases. This argument ignores the fact that attorneys rarely agree to take cases on a contingency fee basis that are unlikely to produce a fee. Moreover, this line of reasoning is unfair to the most severely injured individuals. An injured consumer should not have to pay a high fee to subsidize an attorney's activity in an entirely different case involving a different individual. Each fee should be based on the factual situation and potential recovery in that case.

<sup>8</sup> See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 74 (1989). One would also expect that contingency fees have fallen in the past thirty years because tort law has shifted substantially in favor of plaintiffs. Since 1965, many rules that traditionally defeated or reduced a tort claim in most states have been eliminated, including the assumption of risk defense, contributory negligence as a complete defense, "guest statutes" for passengers in automobiles, immunity from suit for states and cities except for gross recklessness, limits on wrongful death to actual expenses, requirements to prove a manufacturer was negligent with respect to manufacturing flaws in its product, and liability rules that limited recovery of punitive damages to intentional acts. Yet, the average contingency fee does not appear to have fallen in proportion to the lower contingency that now exists in many cases.

instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.<sup>9</sup>

According to one New York attorney, “[s]o engrained and unexamined is the notion of the one-third contingency fee that it has taken on the character of natural law.”<sup>10</sup> The result is that consumers may pay too much for legal services and lawyers become the unintended, primary beneficiaries of the legal system.

Attorneys often charge their clients unreasonable fees based on contingency arrangements when there is no attorney risk involved, little time spent on the client’s case, or both. For instance, in a recent Connecticut case, an attorney demanded a one-third fee on a \$100,000 life insurance policy payment pursuant to a contingency fee agreement even though the insurance company never resisted payment and the attorney spent no more than 25 hours on the case.<sup>11</sup> The client, a Hartford police officer, did not know what an appropriate fee would be under the circumstances, but had second thoughts after paying the bill.<sup>12</sup> The court described the situation as follows:

[The Attorney] never provided [the client] with a detailed bill showing the work that was done and the time that he spent, despite [the client’s] requests. At trial, [the attorney] was evasive about how much time he spent to collect the [insurance] policy. He stated that he met with [the client], corresponded and spoke with [the client, the insurance company, and the insurance agent], did some document review and did one to two days of research in the law library. He finally conceded during his testimony that he

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<sup>9</sup> DEREK BOK, *THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA* 140 (1993).

<sup>10</sup> Harold Reynolds, *Rot at the Bottom*, N.Y.L.J., Oct. 25, 1999, at 2 (advocating that New York’s Appellate Division require lawyers to execute and file under oath forms stating that liability and recovery in each case in which the lawyer will receive a contingency fee are not virtually certain and that they submitted to the client a statement of his rights in respect to the contingency fee agreement for his or her signature).

<sup>11</sup> *Rohan v. Rosenblatt*, 25 Conn. L. Rptr. 287, 1999 WL 643501, at \*1-2 (Conn. Sup. Ct. 1999).

<sup>12</sup> *See id.* at \*2.

did not do "a lot of work" on this case and that he did not spend more than twenty-five hours on the matter.<sup>13</sup>

Rather than provide his client with an honest evaluation of the time and risk required, the attorney misled the client into believing that his claim would require "horrendous" litigation and pressed his client to pay the fee because the attorney needed to remodel his law office.<sup>14</sup>

In another case, the Supreme Court of Tennessee found that a one-third contingency fee charged by an attorney in a probate matter was clearly excessive when "the only genuine contingency involved was how large a disbursement [the client] would ultimately receive by operation of law."<sup>15</sup> As in the case of the Hartford police officer, the probate court recognized that "[i]t is quite possible that [the client] did not fully understand the matter and had no idea what other attorneys in the area would charge for similar services to obtain his legal share of his wife's estate. . . ."<sup>16</sup> In this case, the attorney would have earned the hourly equivalent of \$950 when other attorneys in the locality customarily charged \$150 per hour for similar services.<sup>17</sup>

The Iowa Supreme Court suspended an attorney for six months after he attempted to assess a fee of 33 percent of his client's workers' compensation recovery.<sup>18</sup> This fee would have amounted to over \$37,000 for only 20 hours of work on a recovery that was in no

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<sup>13</sup> Rohan, 1999 WL 643501, at \*2.

<sup>14</sup> See *id.* at \*1. In a similar case, the Supreme Court of Appeals of West Virginia permitted an attorney to retain a one-third contingency fee of \$8,333.33 from a \$25,000 insurance payment resulting from a car accident when there was no risk involved. See *Bass v. Coltelli-Rose*, 536 S.E.2d 494 (W. Va. 2000). A dissenting judge found that where the insurance company had not disputed the contract or the medical expenses incurred by the client and the only service provided by the attorney was the sending of several letters requesting payment, the fee was clearly excessive and potentially unethical. See *id.* at 736-37 (Scott, J., dissenting). This client would have clearly benefited had he known of his option to negotiate an hourly rate.

<sup>15</sup> *White v. McBride*, 937 S.W.2d 796, 799 (Tenn. 1996) (quoting the probate court decision).

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* at 801.

<sup>18</sup> See *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Hoffman*, 572 N.W.2d 904 (Iowa 1997).

way due to the attorney's efforts.<sup>19</sup>

Likewise, the Court of Appeals of Maryland suspended an attorney who pressured firefighters severely injured in the line of duty to sign contingency fee contracts reaching seventy-five percent of recovery.<sup>20</sup> The trial court judge stated that "the firefighters trusted the [attorney] and depended on him to look out for their interests. They expected he would advise them of their legal rights and obligations."<sup>21</sup> Instead, the court found that the attorney "did not simply fail to advise his clients of their potential rights; he gave them an evaluation of their legal and practical position which was incorrect."<sup>22</sup> There are many other cases of such contingency fee abuse.<sup>23</sup>

These cases illustrate how attorneys may gouge consumers by charging unjustifiable legal fees. It is certain that many similar cases never reach the courts, disciplinary authorities, or the press because most legal services consumers are unaware of what constitutes a reasonable legal fee; they may have no idea how much time an attorney will put into their case. These unfair fees have an adverse societal effect, too. An aggrieved consumer who is dissatisfied with the legal system may be hesitant to return to that system in search of a remedy. Moreover, legal consumers are unlikely to have sufficient knowledge of the legal system to dispute a fee.

Cases in which attorneys charge excessive contingency fees underscore the necessity for a strong and effective remedy to the problem of contingency fee abuse. As Professor Lester Brickman, a

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<sup>19</sup> *See id.* at 908-09.

<sup>20</sup> *See* Attorney Grievance Comm'n v. Korotki, 569 A.2d 1224 (Md. 1990).

<sup>21</sup> *Id.* at 1231.

<sup>22</sup> *Id.* at 1236.

<sup>23</sup> *See, e.g., In re Shaw*, 775 A.2d 1123 (D.C. 2001) (per curiam) (recognizing a violation of the District of Columbia's ethical rules when an attorney took \$800 of a \$2500 uncontested insurance personal injury protection payment); Attorney Grievance Comm'n v. Kemp, 496 A.2d 672, 675-79 (Md. 1985) (ruling that an attorney may not charge more than a minimal fee for processing an uncontested personal injury protection claim). One particularly disgraceful example occurred in 1996 when a comatose client's estate was not left with enough money following settlement of her medical malpractice claim to pay for her funeral while her lawyers walked away with \$2.4 million in fees. *See* Tricia Renaud, *Bar Goes After Savannah Duo's Fee and Maybe Their Licenses*, FULTON COUNTY DAILY REP., Jan. 5, 1998, at 1.



noted expert on contingency fees and legal ethics at the Benjamin N. Cardozo School of Law, explained:

Lawyers have erected toll booths across the courthouse steps, exacting not a fee for passage but a percentage of all business transacted upon traversal. . . . Contingent fee setting today operates in a milieu substantially devoid of fiduciary oversight. Overcharging clients is routine and typically unquestioned, especially when the client is unaware of the degree to which it has occurred. So pervasive are these abuses that one may legitimately describe the current regulatory scheme as rotten.<sup>24</sup>

### B. Solicitation of Victims and Their Families

Not only do legal consumers lack the information necessary to make a reasoned decision on a fee agreement, they are often "recruited" or asked to make such choices when they are in an emotionally vulnerable state.<sup>25</sup> Examples abound:

- In June of 2001, a personal injury lawyer in Bloomington, Indiana, wrote to every police and sheriff's department in the state, asking them to begin automatically faxing him copies of each and every traffic accident report, and to provide him with immediate access to information so that he could solicit potential clients.<sup>26</sup>
- A Connecticut court in 1999 found that a plaintiff's lawyer had pressured a client into entering a one-third contingency fee agreement while the plaintiff "was distraught over his wife's death and under the care of a psychologist [and] worried about paying the funeral bill and saving his house from foreclosure."<sup>27</sup>
- In 1987, a man posing as a Roman Catholic priest, Father John

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<sup>24</sup> Brickman, *supra* note 8, at 127-28.

<sup>25</sup> Some firms use paid "runners" to recruit new clients. In Louisiana, some runners have received payments totaling over \$450,000 per year. See Bruce Schultz, "Runners" Fill Legal Coffers, *Negative Image of Lawyers*, THE ADVOCATE (Baton Rouge, La.), Nov. 20, 2000, at 1A.

<sup>26</sup> See John Masson, *Lawyer's Troll for Accident Reports Raises Brows*, INDIANAPOLIS STAR, June 4, 2001, at A1.

<sup>27</sup> Rohan, 1999 WL 643501, at \*1.

Irish, appeared at the scene of a commercial airline crash to console the families of the victims.<sup>28</sup> Father Irish did not “offer Mass or give a priestly blessing.”<sup>29</sup> Instead, he “hugged crying mothers and talked with grieving fathers of God’s rewards in the hereafter . . . . Then he would hand them the business card of [a] Florida attorney . . . , urge them to call the lawyer, and disappear.”<sup>30</sup>

- After the worst school bus accident in Texas history, the media reported “hordes of lawyers bidding on clients offering grief-stricken families trailers, vans, and new homes if they would sign contingency fee contracts.”<sup>31</sup>
- Witnesses reported seeing lawyers’ business cards passed around, and the injured being videotaped as they were removed on stretchers, after a two commuter trains collided in Gary, Indiana.<sup>32</sup>
- After a passenger train derailment in Alabama, a Louisiana attorney reportedly signed up a Mexican train passenger, who spoke no English, at his hospital bedside.<sup>33</sup>
- After a department store roof collapsed in south Texas, “some lawyers’ representatives posed as Red Cross workers, helping dig out victims and signing them up at the same time.”<sup>34</sup>
- After an early morning explosion of a Louisiana oil refinery, reports claimed that a number of lawyers were roaming the neighborhoods in “Lincolns and limousines” in an effort to solicit clients.<sup>35</sup>

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<sup>28</sup> See Christopher Scanlan, *Preying on Disasters – Priest-Imposter Sought After Detroit Crash*, ST. PETERSBURG TIMES, Sept. 19, 1987, at A1.

<sup>29</sup> *Id.*

<sup>30</sup> Matt Beer, “*Priest*” at Crash Site Recommends Lawyer, NAT’L L.J., Oct. 5, 1987, at 3.

<sup>31</sup> Robert Stowe England, *Congress, Nader, and the Ambulance Chasers*, AM. SPECTATOR, Sept. 1990, at 18.

<sup>32</sup> See William Grady *et al.*, *Injury Lawyer’s Ad Stirs Ire in Indiana*, CHI. TRIB., Jan. 26, 1993, at C3.

<sup>33</sup> See Garry Mitchell, *Bar Scrutinizing Lawyer Ads, Solicitations*, MOBILE PRESS REGISTER, Dec. 18, 1993, at A1.

<sup>34</sup> Wayne E. Green, *Bar Groups Take on Ambulance-Chasers*, WALL ST. J., Sept. 28, 1988, at 28.

<sup>35</sup> Andrew Blum, *ATLA Tries Again on Solicitation*, NAT’L L.J., July 25,

- After the tragic Dupont Plaza Hotel fire in San Juan, Puerto Rico, a member of the Puerto Rican Bar Association likened the presence of American lawyers to that of "vultures," while a hospitalized victim complained that lawyers solicited her in the hospital.<sup>36</sup> One attorney on the scene said he saw many attorneys soliciting families of victims and victims themselves both at the scene and at hospitals.<sup>37</sup>

Although one would expect lawyers not to approach people when they are grieving for a loved one or are seriously injured themselves, Congress, after careful factual hearings, recognized that some bad apples have spoiled the bunch.<sup>38</sup> Congress and President Clinton addressed the need for such protection following airline crash disasters by enacting the Aviation Disaster Family Assistance Act of 1996 ("ADFAA").<sup>39</sup> The ADFAA prohibits lawyers and insurance company representatives from soliciting airline crash victims and their families for 45 days.<sup>40</sup> This affords airline crash victims the opportunity to make legal representation decisions after the initial emotional duress period has tapered off, and the victims are more capable of making more informed decisions. More recently, the U.S. House of Representatives passed the Rail Passenger Disaster Assistance Act of 2001 to prohibit attorneys from contacting injured persons within 45 days of a rail accident.<sup>41</sup> States should expand this protection to those who have suffered from other unfortunate events, such as car accidents or workplace injuries, who are no less

1988, at 3.

<sup>36</sup> Eric S. Roth, *Confronting Solicitation of Mass Disaster Victims*, 2 GEO. J. LEGAL ETHICS 967, 973 (1989).

<sup>37</sup> *Id.*

<sup>38</sup> Andrew Blum, *Lawyers Start Mapping Pam Am Crash Tactics*, NAT'L L.J., Jan. 9, 1989, at 3.

<sup>39</sup> Aviation Disaster Family Assistance Act of 1996, PUB. L. NO. 104-264, 110 STAT. 3213 (codified at 49 U.S.C. § 1136 (2001)).

<sup>40</sup> *Id.* When enacted in 1996, the ADFAA limited unsolicited contacts by lawyers and insurance company representatives with airline crash victims and their families for 30 days. In 2000, Congress extended the prohibition on solicitation of air crash victims to 45 days. See PUB. L. NO. 106-181, § 401(a)(1), 114 STAT. 129 (codified at 49 U.S.C. § 1136(g)(2) (2001)).

<sup>41</sup> Rail Passenger Disaster Assistance Act of 2001, H.R. 554, 107th Cong. § 1138(g)(2) (2001). The bill was referred to the Senate Committee on Commerce, Science, and Transportation. The Senate Committee took no action on the bill.

vulnerable or deserving of protection than the victim of airplane or train crashes.

### III. Legal Consumers Need Greater Protection

There is an inherent conflict between lawyers and their clients when entering into fee agreements. Currently, contingency fees are regulated by the legal profession's ethics rules.<sup>42</sup> These rules are inadequate and are not enforced on any systematic basis. In practice, they either serve to inspire ethical behavior or exist for public relations purposes.<sup>43</sup> Greater protections are necessary to provide legal consumers with the information they need to make informed decisions that are based upon actual knowledge of the lawyer they are hiring, and a firm understanding her fee arrangement.

#### A. Full Disclosure Will Lessen the Inherent Conflict Between Personal Injury Lawyers and Their Clients

An attorney who enters into a contingency fee agreement with a client has, in effect, purchased a portion of the client's cause of action, and charged a premium to underwrite the risk of losing the case. In return for being granted one-third to one-half of the claim, the lawyer agrees to perform legal services without any initial charge and, in some cases, to advance out-of-pocket costs.

The interests of a lawyer who has purchased a share of her client's cause of action will inevitably clash with the client's own interests. In his book, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, Manhattan Institute scholar Walter Olson posits that once a lawyer invests time and money into a lawsuit, she has a personal stake in the outcome of the litigation and the client is no longer solely in control.<sup>44</sup> As a result, the scope, duration, and ultimate goal of the lawsuit often shift. Clients will generally have but a single interest: to maximize the financial returns

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<sup>42</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002).

<sup>43</sup> See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 544 (1994) ("Both conservative economists and Marxist analysts view much of the profession's regulation of itself . . . as designed to enhance the incomes and status of lawyers.").

<sup>44</sup> See WALTER OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 41-43 (1991).

from their lawsuits. A contingency fee lawyer, on the other hand, may have an interest in settling a case for less money if such a settlement would save the attorney from expending more hours on the case. Conversely, if a contingency fee lawyer has already prepared a case for trial, she may have a long-term interest in declining a settlement because of a possible jury verdict, even though the settlement may be more favorable to the client than going to trial.

### B. State Ethics Rules Not Enough

The legal profession has attempted to address this conflict of interest by adopting attorney conduct regulating ethics rules. These rules, however, are notoriously vague, allowing lawyers to navigate through them, and rarely result in more than a slap on the wrist for an offending attorney.<sup>45</sup> As former United States Supreme Court Chief Justice Burger and many others have recognized, state ethics rules are widely ignored and rarely enforced.<sup>46</sup>

Most states adhere to either the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules") or the ABA's predecessor code to the Model Rules, the Model Code of Professional Responsibility ("Model Code").<sup>47</sup> Rule 1.5 of the Model

<sup>45</sup> See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648 (1981) (noting that "study after study has shown that the current rules are not enforced.").

<sup>46</sup> See Warren E. Burger, *The ABA Has Fallen Down on the Job*, WALL ST. J., Aug. 10, 1994, at A9; see also MANHATTAN INST., CENTER FOR LEGAL POLICY, EXCESSIVE LEGAL FEES: PROTECTING UNSOPHISTICATED CONSUMERS, CLASS ACTION MEMBERS, AND TAXPAYERS ii-vi (2001), at [http://www.manhattan-institute.org/MICS\\_3.pdf](http://www.manhattan-institute.org/MICS_3.pdf) (last visited Nov. 8, 2002) (in which the various scholars participating in a conference on protection of legal consumers agree on the lack of enforcement of state ethics rules governing attorney fees).

<sup>47</sup> MODEL RULES OF PROF'L CONDUCT (2002); MODEL CODE OF PROF'L RESPONSIBILITY (1980). Most state rules governing contingency fees are based on Rule 1.5 of the Model Rules. See, e.g., ARK. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.5 (2002); ARIZ. RULES OF PROF'L CONDUCT R. 1.5 (1998); COLO. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.5 (2002); D.C. RULES OF PROF'L CONDUCT (2002); FLA. RULES OF PROF'L CONDUCT R. 1.5 (2002); ILL. RULES OF PROF'L CONDUCT R. 1.5 (2002); LA. RULES OF PROF'L CONDUCT R. 1.5 (2002); MD. LAWYER'S RULES OF PROF'L CONDUCT R. 1.5 (2002); MICH. RULES OF PROF'L CONDUCT R. 1.5 (2002); N.J. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.5 (2002); PA. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.5 (2002); R.I. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.5 (2002); S.C. RULES OF PROF'L CONDUCT R. 1.5 (2002); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.4

Rules states that a fee should be "reasonable" and lists several factors to assist in determining the "reasonableness" of a fee.<sup>48</sup> Disciplinary Rule 2-106(A) of the Model Code simply states, "[a] Lawyer shall not . . . charge . . . an . . . excessive fee."<sup>49</sup> Neither set of rules provides any meaningful limit on legal fees. These rules would work well, except that legal services consumers are not given the fundamental facts and information to determine whether a particular fee is indeed reasonable under the circumstances.

The Model Code does not explicitly require contingency fee arrangements to be in writing, either. The ABA, however, recently acted to fix a similar flaw in the Model Rules. At its recent mid-year meeting, the ABA House of Delegates amended Rule 1.5 to explicitly state that contingency fees are subject to the reasonableness requirement of other fees.<sup>50</sup> The House of Delegates also required that contingency fee agreements not only be in writing, but that the client signs such agreements.<sup>51</sup> Finally, the House of Delegates required attorneys to notify their clients of any expense for which the client must pay in the event that there is no recovery.<sup>52</sup>

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(2002). A few states, such as New York and Ohio, continue to follow the Model Code. *See* N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 2-106(D) (2002); OHIO. DISCIPLINARY CODE OF PROF'L RESPONSIBILITY EC 2-19 and DR 5-103(A)(2) (2002).

<sup>48</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2002) [hereinafter "MODEL R."]. These factors include: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the result obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." *Id.*

<sup>49</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(A) (1980).

<sup>50</sup> *See* AM. BAR ASS'N, ETHICS 2000 COMM'N, REPORT 401 (compare report as submitted to the House of Delegates to the report passed on Feb. 5, 2002), at <http://www.abanet.org/cpr/ethics2k.html> (last visited Nov. 8, 2002).

<sup>51</sup> *See* MODEL R. 1.5(c). The House of Delegates rejected, by a vote of 129-108, a recommendation that all fee agreements over \$500 be confirmed in writing to the client. *See* Mark Hansen, *Hot Off the Press*, 88 A.B.A. J. 37, 38 (June 2002). This decision demonstrates the bar's continued reluctance to disclose fee information to clients or to provide meaningful protections for legal consumers.

<sup>52</sup> *See* MODEL R. 1.5(c).

While these revisions are a step in the right direction, ethics rules still do not provide sufficient protection for legal service consumers. Model Rule 1.5 on its face may seem to protect a client's interests, but its protections do not reach far enough and its enforcement relies on the profession's ability to police itself. The Model Rule requires only that a lawyer provide written notification to the client regarding the percentage of any recovery that will accrue to the lawyer, any expenses that will be deducted before or after the contingency fee, the outcome of the matter and, if there is a recovery, a calculation showing the remittance to the client and the method of its determination.<sup>53</sup> The Model Rule does not require attorneys to give an estimate of the number of hours to be spent on the case, the level of risk involved, or alternative fee arrangements during fee negotiations. Likewise, after the matter has closed, the Model Rule does not require attorneys to provide clients with an accounting of the time spent handling their claims, or to inform clients of their options if they are unsatisfied with the lawyer's services or feel that they have been overcharged.

Furthermore, the Model Rules give accident victims scant protection against high-pressure solicitations by lawyers and their agents. Model Rule 7.3 generally prohibits lawyers from soliciting potential clients through in-person contact or by telephone "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."<sup>54</sup> The vague wording of this provision provides lawyers with a large loophole to solicit clients immediately after an accident, including solicitation by mail. Moreover, the spirit, if not the very substance, of the Rule is routinely flaunted.<sup>55</sup> As one commentator recently observed, "it stains credulity to contend that the solicitation of plaintiffs by lawyers is not more prevalent now than ever."<sup>56</sup>

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<sup>53</sup> See MODEL R. 1.5(c). Rule 1.5(c) states in part: "A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer. . . , and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated . . . the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." *Id.*

<sup>54</sup> MODEL R. 7.3(a).

<sup>55</sup> See *supra* nn. 26-37 and accompanying text.

<sup>56</sup> Robert R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 HARV. J.L. & PUB. POL'Y 953, 960 (2002) (discussing

Finally, the ethics rules do not help a client who feels that she has overpaid for the service received. Attorneys are under no obligation to disclose to a client the procedure for disputing legal fees. Unsatisfied clients are therefore left in the awkward position of navigating the legal system again to determine their options for disputing a fee.

#### **IV. Proposal: A Legal Consumer's Bill of Rights**

The purpose of consumer protection regulation is to aid those who have been thrust into positions of unequal bargaining power. Most of the major federal consumer protection statutes, such as the Truth in Lending Act<sup>57</sup> and the Magnuson-Moss Warranty-FTC Improvement Act<sup>58</sup> are based on evidence that consumers lack important information. For the same reason, state and federal consumer protection statutes include provisions for mandatory disclosure of key information by sellers.

For example, under federal law, funeral directors must disclose the specific costs of caskets, flowers, and other items to bereaved family members.<sup>59</sup> Similarly, used car dealers must disclose vehicle information.<sup>60</sup> Federal legislators have provided safeguards in these areas because the marketplace alone did not provide equity of bargaining power.

A similar lack of consumer information prevails with respect

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the lack of enforcement of ethics rules prohibiting solicitation by lawyers and exorbitant legal fees).

<sup>57</sup> 15 U.S.C. § 1604 (2002) (mandatory disclosure of credit terms); *see also* 12 C.F.R. § 226.5 (2002) (Regulation Z) (implementing 15 U.S.C. § 1604).

<sup>58</sup> 15 U.S.C. § 2302 (2002) (mandatory disclosure of warranty terms).

<sup>59</sup> *See* Funeral Industries Practice Rule, 16 C.F.R. § 453.2 (2002).

<sup>60</sup> *See* Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455.1(b) (2002) (prohibiting the misrepresentation of the mechanical condition of a used vehicle and requiring used car salesmen to disclose warranty information to consumers prior to sale); Odometer Disclosure Requirement, 49 C.F.R. § 580 *et seq.* (2002) (requiring transferor of motor vehicle to provide a written disclosure of odometer mileage and its accuracy in order to protect purchasers who rely on odometer readings in selecting used cars). Other federal consumer protection statutes requiring disclosure of information include the Fair Credit Reporting Act, 15 U.S.C. §§ 1681g, 1681h (2002) and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1705 (2002).



to contingency fees.<sup>61</sup> It is striking that consumers are given more information about the contents of a jar of peanut butter than about the purchase of a service that may cost tens of thousands of dollars.<sup>62</sup> Not surprisingly, most Americans agree that consumer protection laws are necessary in the contingency fee era. A 1997 poll conducted by Public Opinion Strategies concluded that eighty-three percent of registered voters believe that lawyers should be subject to the same disclosure laws as other businesses in dealing with consumers.<sup>63</sup> This poll suggests that legalese has created a fog around the public's actual knowledge of attorney disclosure rules.

The American Legislative Exchange Council ("ALEC") has developed model legislation – a Legal Consumer's Bill of Rights Act – to protect ordinary consumers against predatory fee practices by high pressure lawyers and their agents.<sup>64</sup> The ALEC model bill has its genesis in a proposal developed by HALT, a national nonprofit, nonpartisan public interest group of more than 50,000 members.<sup>65</sup> At the federal level, President Bush has endorsed a "Client's Bill of Rights" to allow federal courts to hear challenges to attorneys' fees, and require attorneys to disclose their ethical obligation to charge reasonable fees and the potential range of those

<sup>61</sup> Richard Vuemick, Legal Policy Director of Citizens Action, a group which represents three million members in thirty-four states, has said that it is necessary to begin "empowering the consumer with better disclosure of fees and the fee structure," "better explanation of bills and their contents" by personal injury lawyers, and "sanctioning attorneys who do not act in the best interests of their clients." *Examining Certain Contingency Fee Abuses and Their Effect on the Tort System: Before the Senate Judiciary Comm.*, 104th Cong. (Nov. 7, 1995) (statement of Richard Vuemick, Legal Policy Director, Citizens Action).

<sup>62</sup> See 21 C.F.R. § 101 *et seq.* (2002) (requiring uniform labeling of all packaged food products with ingredients and specific nutritional information).

<sup>63</sup> See *National Survey Finds Public Wants Stronger Consumer Protections Against Lawsuit Abuse*, Am. Tort Reform Ass'n Release (Sept. 11, 1997).

<sup>64</sup> Legal Consumer's Bill of Rights legislation has been introduced in a number of states. See Legal Consumer's Protection Act, A.B. No. 2939, 2001-2002 Sess. (Cal. 2002); Legal Consumer's Bill of Rights Act, S.B. 994, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002); Legal Consumer's Bill of Rights, H.B. 1817, 1st Sess., 48th Legis. (Okla. 2001); Legal Consumer's Bill of Rights, H.B. 2420, 2001 Sess. (Kan. 2001).

<sup>65</sup> See Legal Consumer Bill of Rights Proposal, at <http://www.halt.org/BOR/borhome.cfm> (last visited Nov. 8, 2002). See generally Michael Higgins, *Getting Out the Word: Legal Consumer Group Wants Lawyers to Distribute Client Bill of Rights*, 84 A.B.A. J. 22 (Sept. 1998).

fees.<sup>66</sup>

ALEC's model act protects legal consumers by requiring attorneys to provide a statement of clients' rights and lawyers' responsibilities.<sup>67</sup> This would include a written explanation of the fee agreement and alternative billing options, as well as an "up front" estimate of the probability of success, the likely recovery, hours of work to be expended, and all expenses that may be incurred.<sup>68</sup> In this regard, lawyers would be required to convey the same types of information to prospective clients as funeral directors, auto mechanics, and many other service providers. This would simply require a lawyer to articulate to the client the same internal calculations the lawyer must make when deciding to take the client's case.<sup>69</sup>

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<sup>66</sup> See Scott S. Greenberger, *Bush Aims at Federal Tort Reform*, AUSTIN AM.-STATESMAN, Feb. 10, 2000, at A7; Ron Hutcheson & Tish Wells, *Bush Has Four Years to Put Promises to Test*, MILWAUKEE J. SENT., Dec. 17, 2000, at 10A. In August 2001, the Washington Legal Foundation, a non-profit public interest law and policy center, filed a petition with the Federal Trade Commission ("FTC") requesting that the FTC commence trade regulation proceedings under § 18(a)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. § 57a(1)(B), in order to regulate contingency fee agreements between attorneys and their clients. See PETITION OF THE WASHINGTON LEGAL FOUNDATION TO THE FEDERAL TRADE COMMISSION CONCERNING COMMENCING TRADE REGULATION RULE PROCEEDINGS UNDER § 18(A)(1)(B) OF THE FEDERAL TRADE COMMISSION ACT TO REGULATE CONTINGENCY FEE AGREEMENTS ENTERED INTO BY ATTORNEYS (Aug. 14, 2001) (on file with authors). The petition requested that the FTC require attorneys to provide consumers with a "Statement of Client's Rights and Lawyer's Responsibilities." *Id.* at 35-36. In June 2002, the FTC took action in this area by publishing a guide to educated consumers on their rights when selecting an attorney and entering a fee agreement, as well as their options if they are unsatisfied with the service they received or feel that their lawyer charged an excessive fee. See Fed. Trade Comm'n, Bureau of Consumer Protection, Office of Consumer & Business Education, *FTC Facts for Consumers: Need a Lawyer? Judge for Yourself* (2002), at <http://www.ftc.gov/bcp/online/pubs/services/lawyer.htm> (last visited Nov. 8, 2002).

<sup>67</sup> See *infra* Appendix, § 3(b).

<sup>68</sup> See *id.* §3(c).

<sup>69</sup> According to two surveys, trial lawyers turn away approximately 80 to 90 percent of the potential medical malpractice clients who seek representation. See *Examining Certain Contingency Fee Abuses and Their Effect on the Tort System: Before the Senate Judiciary Comm.*, 104th Cong. (Nov. 7, 1995) (statement of Herbert M. Kritzer, Professor of Political Science and Law, University of

In addition, the model legislation would require all attorneys to keep accurate time records and, at the conclusion of the case, provide their clients with detailed information regarding the amount of time spent on the case and any fees and expenses to be charged.<sup>70</sup> The attorney also would need to disclose his or her actual hourly rate, calculated by dividing the total fee by the number of hours spent on the case.<sup>71</sup> This information would enable the client or a court to determine the reasonableness of the fee.

ALEC's model legislation also would require lawyers to inform their clients of their right to request an objective review of the reasonableness of a contingent fee.<sup>72</sup> This functional equivalent of a "Legal Better Business Bureau" would provide clients who believe they have been overcharged with the information necessary to challenge the bill. The challenge would go through the current mechanism for fee disputes between lawyers and clients, such as a court or bar committee, and would be based on factors such as whether liability was contested, whether the amount of damages was clear, and how much time the lawyer actually spent on the case. Informing clients of their right to an objective review of the fee charged would provide an important safeguard to keep fees fair and ensure that more of the recovery will go to injured persons rather than to their lawyers in low-risk, easy-to-win cases.

The model bill is consonant with the policy behind the Aviation Disaster Family Assistance Act of 1996. It would impose a cooling off period after an accident, prohibiting lawyers and their agents from making unsolicited contacts with injured consumers and their families for forty-five days.<sup>73</sup> To be balanced, the model

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Wisconsin-Madison). These studies are confirmed by reference to the advertisements contained in the back of the Association of Trial Lawyers of America's monthly publication, TRIAL. One firm that evaluates potential cases for personal injury attorneys has advertised: "85% of cases aren't worth taking (Can you tell which ones?)." The advertisement suggests that the consultant can help attorneys pick those cases that are "worth taking." TRIAL, Apr. 1996, at 83. Another case evaluation service has boasted: "The odds are 5:1 in your favor for cases [the firm] evaluates as meritorious. Since 1978, gross client recovery exceeds \$27,000,000." *Id.* Legal consumers should have access to such case evaluation information.

<sup>70</sup> See *infra* Appendix, § 3(f).

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* § 3(e).

<sup>73</sup> See *id.* § 3(a).

legislation also would prohibit unsolicited contacts by insurance company representatives during the same time period, so that consumers could not be induced to settle potential claims without guidance from counsel. ALEC's model bill would not stop an injured person from seeking legal advice when she is ready retain counsel or prevent an attorney from speaking with a client who has contacted him.

## V. Debunking Potential Myths

Although many personal injury attorneys may already provide their clients with much of the information required by ALEC's Model Legal Consumer's Bill of Rights proposal, plaintiffs' lawyers and plaintiffs' lawyers organizations may be expected to oppose the legislation. They may believe that legislation addressing the few "bad apples" is unnecessary, or they may resent the minimal record-keeping and disclosure requirements that the proposal would mandate. The general public is not likely to find either reason to be particularly justifiable. Indeed, some opponents simply may misrepresent the proposal for other reasons.

For example, in commenting on the introduction of the Legal Consumer's Bill of Rights at the federal level,<sup>74</sup> one opponent declared that the proposal is "basically to discourage people from seeking legal counsel when they've been injured and discourage lawyers from taking cases for these people."<sup>75</sup> It is misguided, however, to suggest that advising legal consumers of their rights in dealing with an attorney will discourage injured persons from making use of the legal process. ALEC's disclosure requirement is designed to make the contingency fee system more understandable to the average person needing the services of a personal injury lawyer. The proposal will enable injured consumers and their families make

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<sup>74</sup> Senator Mitch McConnell from Kentucky recently introduced a proposal similar to ALEC's Legal Consumer's Bill of Rights as an amendment to the Public Company Accounting Reform and Investor Protection Act of 2002. See Public Accounting Reform and Investor Protection Act of 2002, S. Amdt. 4200, 107th Cong. (2002) (amending S.B. 2673). The Senate voted to table the amendment. See 148 CONG. REC. S6620-01 (daily ed. July 11, 2002).

<sup>75</sup> Pamela Barnett, *The Friday Buzz: Move Over Patients; There is a New Bill of Rights in Town*, CONGRESS DAILY, June 28, 2002 (quoting an undisclosed source "close to the Association of Trial Lawyers of America," the industry group representing the plaintiffs' personal injury bar).

informed decisions when choosing an attorney, better understand the merits of their case and determine whether or not they are being overcharged for legal services. Such information will make it more likely that an injured person will use the legal system to his or her advantage rather than scare them away from litigation.

Another potential argument, that a Legal Consumer's Bill of Rights will discourage lawyers from taking cases, similarly lacks merit. ALEC's model proposal would require lawyers to provide information to potential clients about the risk and amount of work likely to be involved in their case and a final statement of the actual work performed. Defense lawyers and others who charge on an hourly basis already routinely record their "billable hours" and provide such statements to their clients. There has never been a cry from defense lawyers that ordinary record-keeping practices discourage them from taking cases. Similarly, this process will not deter personal injury lawyers from helping their clients. It would simply extend good record-keeping practices to lawyers operating under contingency fee agreements. While logging hours does indeed impose a new obligation on contingency fee attorneys, and some may oppose the proposal for this reason, such disclosure provides a basic safeguard for the client. The client's interest should be paramount over the lawyer's interest. Finally, some may oppose the Legal Consumer's Bill of Rights as "a backdoor effort to take away people's legal rights, with an incredibly phony name."<sup>76</sup> This rhetoric, frequently employed by trial lawyers when they feel that their livelihood is threatened by tort reform, would be better saved for a proposal that actually limits a plaintiff's "right to sue."<sup>77</sup>

## VI. Conclusion

The gap in bargaining power between personal injury lawyers and their prospective clients, combined with the financial and emotional duress that often accompanies a loss, are classic and persuasive reasons for strong consumer protection in the marketplace

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<sup>76</sup> *Id.*

<sup>77</sup> Philip K. Howard, *There is No 'Right to Sue,'* WALL. ST. J., July 31, 2002, at A14. The same argument was made against a proposal, now law for three decades, to set a sliding scale for contingency fees in the State of New Jersey. See N.J. RULES OF CT. R. 1:21-7 (2002). There have been no reports of a shortage of services of contingency fee lawyers in that state at any time since the sliding-scale proposal became law.

for personal injury legal services. Current ethics rules do not provide an effective or adequate safeguard against contingency fee abuse. Relying on the legal profession to protect the consumer from the conduct of the legal profession is fundamentally flawed; it works about as well as having a landlord committee protect the interests of tenants. ALEC's Model Legal Consumer's Bill of Rights Act would address these problems by empowering ordinary consumers to become "smarter shoppers" in the market for legal services. The model bill would alert consumers to the potential for contingency fee abuse and provide them with the basic information necessary to make an informed decision when hiring an attorney on a contingency fee basis. It provides a market-based solution to the problem of contingency fee abuse because there would still be no cap or other limits on how much an attorney may charge other than a reasonableness standard. States should enact the ALEC model legislation to protect consumers who need contingency fee legal representation. Without such legislation in place, many more personal injury victims will fall prey to overly aggressive and fast-talking lawyers who pressure them to enter into unfair fee agreements. Such arrangements defeat the ethical purpose upon which the legal profession is based, and must be subject to regulation.

## **Appendix: American Legislative Exchange Council, Legal Consumer's Bill of Rights Act**

### **SEC. 1. TITLE.**

This Act shall be called and may be cited as the "Legal Consumer's Bill of Rights Act."

### **SEC. 2. PURPOSE.**

For the average person, the legal process is confusing and expensive. The often-complex path to justice is strewn with undisclosed costs, and may be further complicated by the abuse of contingent fees by some attorneys who are more concerned with pocketing a quick dollar than with giving their clients the attention and service they deserve. When used properly, the contingent fee system provides access to courts for people of low or moderate incomes. When abused, the contingent fee system costs some plaintiffs far too much in fees, leaves some with no representation for valid claims, and results in excess costs being passed onto the public. Consumers are often uninformed of the basics about a contingent fee, such as the costs and fee structures, the likelihood of success on their claim, the amount of time and effort an attorney will have to invest in the case, or other important details.

The purposes of this Act are to provide a "Legal Consumer's Bill of Rights" that identifies basic rights for every injured person in this State who may need the services of a personal injury lawyer; promote the free flow of information between injured consumers and personal injury lawyers; and lessen economic burdens on the public. By requiring consumers to be given more information about legal services, the Act will increase the efficiency of the market for legal services and lessen the current imbalance of information between personal injury lawyers and their clients. Consumers will become empowered to be smarter shoppers for legal services.

### **SEC. 3. LEGAL CONSUMER'S BILL OF RIGHTS.**

(a) No unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an

attorney, representative of an attorney, or insurance company to an individual injured in an accident, or to a relative of an individual involved in an accident, before the 45th day following the date of the accident.

(b) An attorney who is retained by a claimant on a contingent fee basis shall, at the initial meeting, disclose to the claimant the claimant's right to receive a written statement of the information described in paragraphs (c) through (e) of this subsection, and disclose the claimant's rights set forth in paragraphs (f) and (g) of this subsection.

(c) An attorney retained by a claimant on a contingent fee basis shall, within a reasonable time not later than 30 days after the initial meeting, disclose in a written statement to the claimant —

(1) the estimated number of hours of the attorney's services that will be spent handling the claim through settlement and/or trial;

(2)

(i) the attorney's contingent fee for services regarding the claim and any conditions, limitations, restrictions, or other qualifications on that fee the attorney deems appropriate,

(ii) the amount of any costs or expenses that the client must bear; and,

(iii) all other fee agreements to be made concerning the claim, including the amount to be paid to any co-counsel associated with the case and/or any agreement to refer the client to another attorney in exchange for a referral fee.

(d) An attorney retained by a claimant on a contingent fee basis must keep accurate records of the time spent on the claimant's case and, during the pendency of the claim, must give monthly reports to the claimant on time spent, work performed and progress in the case.

(e) A claimant has the right to request an objective review of a contingent fee by a court or a bar association committee to assure that the fee is reasonable and fair in the circumstances, based on such factors as whether liability was contested, whether the amount of damages was clear, and how much actual time a lawyer reasonably spent on the case.

(f) An attorney retained by a claimant on a contingent fee basis shall, within a reasonable time not later than 30 days after the claim is finally settled or adjudicated, disclose in a written statement to the claimant —

(1) the actual number of hours of the attorney's services spent in connection with the claim;



(2) the total amount of the contingent fee for the attorney's services in connection with the claim;

(3) the actual fee per hour of the attorney's services in connection with the claim, determined by dividing the total contingent fee by the actual number of hours of the attorney's services; and

(4) the claimant's right to request an objective review of a contingent fee by a court or a bar association committee to assure that the fee is reasonable and fair in the circumstances, including the address and telephone number for such court or bar association committee.

(g) An attorney who fails to disclose to a claimant any information required by this Act shall be liable to such claimant in an amount determined by a court. An attorney who intentionally fails to disclose to a claimant any information required by this Act shall additionally be liable for exemplary damages. A claimant to whom an attorney fails to disclose information required by this Act may bring a civil action for damages against his or her attorney in the court in which the claim was or could have been brought.

(h) The provisions of this Act shall be in addition to and not in lieu of any other available remedies or penalties, including any ethics rules applicable to attorneys that provide additional protections for legal consumers.

#### SEC. 4. DEFINITIONS.

(a) As used in this Act,

(1) "attorney" means any natural person, professional law association, corporation, or partnership authorized under applicable State law to practice law;

(2) "attorney's services" means the professional advice or counseling of or representation by an attorney, but does not include other assistance incurred, directly or indirectly, in connection with an attorney's services, such as administrative or secretarial assistance, overhead, travel expenses, witness fees, or preparation by a person other than the attorney of any study, analysis, report, or test;

(3) "claim" means a civil action for wrongful death or personal injury brought in a court in this State;

(4) "claimant" means any natural person who brings a claim, and, if such a claim is brought on behalf of the claimant's estate, the term shall include the claimant's personal representative; if such a claim is brought on behalf of a minor or incompetent, the term shall include the claimant's parent, guardian, or personal

representative. The term does not include an artificial organization or legal entity, such as a firm, corporation, association, company, partnership, society, joint venture, or governmental body;

(5) "contingent fee" means the cost or price of an attorney's services determined by applying a specified percentage, which may be a firm fixed percentage, a graduated or sliding percentage, or any combination thereof, to the amount of the settlement or judgment obtained in a claim;

(6) "initial meeting" means the first conference or discussion between the claimant and the attorney, whether by telephone or in person, of the details, facts or basis of a claim;

(7) "retain" means the act of a claimant in engaging an attorney's services, whether by express agreement or impliedly by seeking and obtaining the attorney's services.

#### **SEC. 5. EFFECTIVE DATE.**

The provisions of this Act shall take effect on the date of enactment and shall apply to all civil actions filed after such date.