

# CONTINGENT FEE LOBBYING: INFLAMING AVARICE OR FACILITATING CONSTITUTIONAL RIGHTS?

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## I. INTRODUCTION

The First Amendment of the Constitution guarantees the right “to petition the government for a redress of grievances.” More and more, when citizens petition the government, they do so by hiring professional lobbyists. And sometimes these lobbyists are paid under a contingent fee arrangement.

Outside-the-beltway ideas about lobbyists and Congress have never been very positive, and have suffered significant setbacks in the wake of events like Jack Abramoff’s guilty pleas, Tom DeLay’s criminal indictments, Robert Ney’s guilty plea, and Randy “Duke” Cunningham’s prison term. Although lobbying generally has seldom been viewed in a positive light, one form of lobbying – although not implicated in the recent scandals – has been particularly maligned: lobbying under a contingent fee contract, where the lobbyist is compensated based on the results obtained through the lobbying effort.

Advocates on both sides of the contingent fee lobbying issue can make persuasive arguments for their positions. Those in favor of permitting lobbyists to work under contingent fee arrangements argue that the contingent fee can provide access to effective representation before Congress and agencies for those with fewer financial resources,<sup>1</sup> that contingent fee

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<sup>1</sup> Stacie L. Fatka & Jason Miles Levien, *Protecting the Right to Petition: Why A Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 559 (1998). Fatka and Levien argue that not having access to a professional lobbyist can shut a citizen or group of citizens out of the political process.

The daily schedules of congressional members and their staffs are filled with meetings attended by professional lobbyists who have established personal relationships with policymakers. The problem with this system is not that there are too many lobbyists, but that the skilled lobbyists are linked only to the large and powerful business and social issue groups that can afford them. Thus the voices of individual citizens,

lobbying is constitutionally protected by the First Amendment right to petition the government, that a contingent fee for lobbying is no more dangerous or corruptive than the contingent fees regularly collected for representation of clients in litigation, and that a more accurate and prudent check on improper or corrupt behavior by lobbyists would be a facts-and-circumstances analysis of any particular lobbying contract.<sup>2</sup>

Opponents of the use of a contingent fee arrangement for lobbying argue that contingent fees have a strong tendency to tempt lobbyists to use corrupt means and improper influences to achieve their goals, whether or not any illegitimate methods are actually used,<sup>3</sup> and that use of those means will turn legislators from the consideration of the public weal that should be their primary consideration. Opponents also argue that all the evils arising from the use of a contingent fee in a litigation setting apply to the use of the contingent fee for lobbying, that avoiding corruption or the appearance of corruption in public policy is a substantial government interest justifying a ban on contingent fee compensation, and that the use of the contingent fee for lobbying will result in increased costs to the taxpayer.<sup>4</sup>

Some federal lobbyists have the mistaken perception that contingent fee lobbying is forbidden,<sup>5</sup> while others actively lobby Congress under contingent fee contracts.<sup>6</sup> There are

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minorities, and under-funded causes are shut out of political discourse because they cannot be heard without the intermediary of a professional lobbyist.

*Id.* at 567-68.

<sup>2</sup> *See, e.g.,* Stroemer v. Van Orsdel, 74 Neb. 132 (1906).

<sup>3</sup> "Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased." *Burke v. Child*, 88 U.S. 623, 625 (1875). *See* 51 AM. JUR. 2d *Lobbying* § 4 (contingent fee agreements for lobbying "furnish the strongest incentive to the exertion of corrupting and sinister influences to the end that the desired legislation may be secured. . .").

<sup>4</sup> *See, e.g.,* Meredith A. Capps, Note, "*Gouging the Government*": *Why a Federal Contingency Fee Lobbying Prohibition is Consistent with First Amendment Freedoms*, 58 Vand. L. Rev. 1885 (2005) and T.R. Goldman, *Contingent Fees: Why the Bad Rap?*, INFLUENCEONLINE (May 30, 2001) ("You are arguing for the appropriation of dollars not in relation to an identified need, but so you can make more money. If an institution of higher learning needs \$10 million for some facility and you go argue for \$15 million because you'll get more money, then that's really at the expense of the federal taxpayer.") (quoting the comments of a former appropriations staffer).

<sup>5</sup> *See, e.g.,* T.R. Goldman, *Contingent Fees: Why the Bad Rap?*, INFLUENCEONLINE (May 30, 2001).

certain state bans on contingent fee lobbying,<sup>7</sup> and there are also specific bans on the use of contingent fees in certain circumstances in the federal government.<sup>8</sup> However, there is no blanket prohibition on lobbying the Congress or the executive branch under a contingent fee lobbying agreement.<sup>9</sup> The perception that federal contingent fee lobbying is prohibited (or, to be more accurate, that a lobbying contract with contingent fee compensation is unenforceable in court) is driven in large part by language excerpted – and, as is argued below, taken out of context – from late 19<sup>th</sup> and early 20<sup>th</sup> century Supreme Court opinions.

In this article we examine not only the history surrounding and law applicable to contingent fee lobbying, but also whether – even if legal – it should be considered ethical. Concluding that contingent fee lobbying should not be condemned on its face by virtue of a potential tendency to corrupt governmental processes, we propose a disclosure remedy that would curb this tendency while preserving the possible benefits of this form of lobbying compensation.

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<sup>6</sup> *See id.* (describing the contingent fee contracts that some lobbyists use).

<sup>7</sup> These state bans are discussed *infra* at n.70.

<sup>8</sup> First, the Byrd Amendment states:

None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with [the award of the contract, the making of the grant or loan, the entering into of the cooperative agreement, or any change to any of those items].

31 U.S.C. § 1352. The Byrd Amendment is discussed in more detail *infra* at n.69.

Second, the Foreign Agents Registration Act instructs that the registered agent of any foreign principal may not be compensated “contingent in whole or in part upon the success of any political activities carried on by such agent.” 22 U.S.C. § 618(h). “Political activities” are defined as any activity that a person “intends to ... prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government of the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States.” *Id.* § 611(o).

<sup>9</sup> In fact, federal legislators have tried to enact such a ban at various times. *See* S. 2733, 100<sup>th</sup> Cong. (1988); S. 91, 101<sup>st</sup> Cong. (1989); Amendment No. 2553 to the National Defense Authorization Act for Fiscal Year 1991 (1990); S. 170, 102<sup>nd</sup> Cong. (1991); Amendment No. 492 to S.1241 (1991); S. 44, 103<sup>rd</sup> Cong. (1993); H.R. 4108, 103<sup>rd</sup> Cong. (1994); and S. 53, 104<sup>th</sup> Cong. (1995).

## II. THE SUPREME COURT AND CONTINGENT FEE LOBBYING

Generally, the early Supreme Court opinions that mention contingent fee lobbying are cited solely to support a ban on contingent fee lobbying. However, these early cases addressing contingent fee lobbying did so within the larger context of condemning lobbying generally. At the time that the Supreme Court was considering the issue, lobbying under any kind of compensation arrangement was considered a corrupt activity; contingent fee lobbying, therefore, was simply a variation on a theme, albeit a variation that would make the evil practice of lobbying even more corrupt.<sup>10</sup> The historical context of these old cases and the nature of lobbying as it existed at that time explain much about the Court's interpretations.<sup>11</sup>

Although pressure groups had been a part of the fabric of American politics since before the Revolution, the growth of the industrial state after the Civil War led to a "hundredfold" increase in the practice of lobbying the federal government.<sup>12</sup> Lobbying and all the activities surrounding it, in its early days, were utterly unregulated.<sup>13</sup> Many early lobbyists, and their congressional counterparts as well, appeared to have no compunction about trading votes for dollars or using other illicit means to reach their goals; at times, these means included payment of a contingent fee.<sup>14</sup> So reviled was the lobbyist that "many states had criminalized the act of lobbying by the end of the nineteenth century."<sup>15</sup> The Supreme Court's only pronouncements on contingent fee lobbying were written against this backdrop.

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<sup>10</sup> Some of these cases dealt with lobbyists paid on a contingent basis attempting to win contracts from the government; that is, the lobbyists were lobbying the executive branch, not the legislative branch. However, the Supreme Court repeatedly remarked that these two activities were largely equivalent for purposes of the relevant analysis. *See, e.g.*, *Providence Tool Co. v. Norris*, 69 U.S. 45, 56 (1864).

<sup>11</sup> For a brief synopsis of the traditional view of the caselaw, *see* 51 AM. JUR. 2d Lobbying §§ 2, 4.

<sup>12</sup> *See generally* Karl Schriftgiesser, *THE LOBBYISTS: THE ART AND SCIENCE OF INFLUENCING LAWMAKERS* 7 (1951).

<sup>13</sup> *Id.* at 8-15.

<sup>14</sup> *Id.*

<sup>15</sup> *Fatka & Levien* at 569.

## A. The Supreme Court Cases

The first Supreme Court ruling on contingent fee lobbying, *Marshall v. Baltimore and Ohio Railroad Co.*,<sup>16</sup> held that “all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, [are] void by the policy of the law.”<sup>17</sup> The rationale for the Court’s condemnation has become the linchpin of subsequent objections to contingent fee lobbying – that a lobbyist will be tempted to use any means necessary, including improper or illicit means, to achieve his goals when his own compensation is on the line:

Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are “proper means”; and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or “careless” members in favor of his bill.<sup>18</sup>

Despite this strong language, the Court’s primary concern in *Marshall* was not with a contingent fee, but with the lobbyist’s concealment of the true purpose in his dealings with the legislature. The lobbyist acknowledged that, although he would employ “no improper means or appliances,” he would keep his agency before the Virginia legislature secret “because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make.”<sup>19</sup> The Court’s condemnation was unequivocal:

Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. . . .  
The use of such means and such agents will . . . produce universal

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<sup>16</sup> 57 U.S. 314 (1853).

<sup>17</sup> *Id.* at 336.

<sup>18</sup> *Id.* at 335.

<sup>19</sup> *Id.* at 318.

corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome – ‘*omne Romae venale*.’<sup>20</sup>

In short, because the Court was appalled at the prospect that a secret or improper influence working upon the members of the legislature would corrupt public policy, the Court also predictably felt that a contingent fee contract would tempt an advocate to use just such methods to achieve his ends.

In the Supreme Court’s next visit to this issue, *Providence Tool Co. v. Norris*,<sup>21</sup> the Court also condemned contingent fee lobbying, but, again, only within its broader condemnation of the evils of receiving compensation for lobbying in general, regardless of the form of compensation. Norris had been hired to use his influence with the War Department to secure for Providence Tool contracts for procuring muskets. In refusing to enforce the contract, the Court stated broadly that

all agreements for pecuniary considerations to control the business operations of the Government . . . or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution.<sup>22</sup>

More narrowly, about contingent fee contracts in particular, the Court stated that “Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.”<sup>23</sup> Continuing the structural theme established in *Marshall*, in *Providence Tool Co.* the Court noted that something bad was occurring – that being

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<sup>20</sup> *Id.* at 335.

<sup>21</sup> 69 U.S. 45 (1864).

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

<sup>23</sup> *Id.* at 55.

lobbying itself – and that contingent fee compensation for the lobbying only served to make matters worse.

In its most famous opinion on contingent fee lobbying, *Trist v. Child*,<sup>24</sup> as in *Providence Tool Co.*, the Court, employing the same structural argument, condemned lobbying itself as illegitimate and went on to criticize the use of a contingent fee arrangement for exacerbating the already-illegitimate means contemplated by the agreement. Trist had contracted with Child, an attorney, to obtain passage of a private act for a contingent fee. The Court found the lobbying contract void because it violated public policy.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy.<sup>25</sup>

However, the Supreme Court also acknowledged that certain forms of agent representation before legislative bodies *would* be legitimate:

We entertain no doubt that. . . an agreement express or implied for *purely professional services* is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. . . . But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.<sup>26</sup>

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<sup>24</sup> 88 U.S. 441 (1874).

<sup>25</sup> *Id.* at 451.

<sup>26</sup> *Id.* at 450 (emphasis added).

Finally, in *Hazelton v. Sheckels*,<sup>27</sup> the Supreme Court's most recent (1906) statement on contingent fee lobbying, the Court replays the theme that lobbying is inherently bad and that use of a contingent fee exacerbates an already-corrupt situation: "In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward."<sup>28</sup>

Thus in *Marshall, Providence Tool Co., Trist*, and *Hazelton*, the Supreme Court equated "lobbying" and "lobby agent" with the secret, venal, and corrupt use of personal influence – rather than reason, public policy, and factual information – to sway legislators. Lobbying is only made worse by contingent compensation. In *Trist*, however, the Court introduced a new twist to the argument: professional representation before a legislature or agency involving the use of professional skills and relying on reason may be conducted precisely because it is *not* the same as lobbying. With this twist, the seeds of the evolution of lobbying from evil to respectable were sown. In later Court opinions, the meaning of the word "lobbying" was extended to include the professional services discussed in *Trist*, and the word began to lose its wholly pejorative connotation.

The Court relaxed its condemnation of lobbying in its 1927 opinion in *Steele v. Drummond*.<sup>29</sup> There the Court upheld an agreement (not involving a contingent fee) to obtain passage of ordinances, stating that "Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated."<sup>30</sup> The Court distinguished *Providence Tool Co., Trist, Hazelton*, and similar cases not with reference to the issue of contingent fees, but with the comment: "The claims there were under contracts requiring or contemplating the

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<sup>27</sup> 202 U.S. 71, 78 (1906).

<sup>28</sup> *Id.* at 79.

<sup>29</sup> 275 U.S. 199 (1927).

<sup>30</sup> *Id.* at 205.



obtaining of legislative or executive action as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means.”<sup>31</sup> Because there was nothing in the record to indicate that promoting enactment of the ordinances involved anything other than “the best standards of duty to the public,”<sup>32</sup> the Court found the agreement enforceable. Lower courts, including the Fifth Circuit Court of Appeals in one of the most recent federal decisions on the subject – a 1971 case involving enforcement of a lobbying agreement, though not a contingent fee one – have tended to follow this conclusion. The Fifth Circuit distinguished “use of personal or political influence”<sup>33</sup> from “appeal to the judgment of the official on the merits of the case”<sup>34</sup>; where the latter is in evidence, the lobbying contract will be enforced.

## **B. Evolution of Lobbying and the Case Law**

The conclusion to be drawn from a close examination of the Supreme Court’s caselaw is clear: the underlying target of the Court’s condemnation was not contingent fee representation, but lobbying generally. During the 20<sup>th</sup> century, however, the lobbying landscape changed from one that had routinely embodied secret and corrupting influences, if not outright bribery and blackmail, to one that relied more and more on open and generally accepted means of advocacy.

The difference between the old “all-lobbying-is-bad” mentality and the more modern view of lobbying was brought into sharp focus by a 1950 Senate report on the “5-percenters.”<sup>35</sup> According to this report, there had been “increasing evidence of the growth of an unsavory fraternity of individuals who represented to businessmen that they could affect Government

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<sup>31</sup> *Id.* at 205-06.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Troutman v. Southern Ry. Co.*, 441 F.2d 586 (5<sup>th</sup> Cir. 1971).

<sup>35</sup> *The 5-Percenter Investigation*, Interim Report submitted to the Comm. on Expenditures in the Executive Depts., S. REP. NO. 81-1231, at 1 (1950).

decisions by pressure or influence.”<sup>36</sup> The term used to describe this “unsavory fraternity” was “5-percenter” because members were employed on a contingent basis and received a fee amounting to five percent or more of any contract they succeeded in obtaining.<sup>37</sup> It was not uncommon for the 5-percenter to have more than one client competing for the same contract so that he was virtually assured of receiving some compensation when the contract was awarded.<sup>38</sup> The Senate Report posited that the service sold by these 5-percenters was unsavory collusion with government officials.

It is the aim of the 5-percenter to convince his client that because of his special influence he can accomplish his client’s objective. This influence is usually based upon the 5-percenter’s alleged personal friendship with Government officials or upon political ties with those who might be able to exert influence in forming or guiding governmental policies.”<sup>39</sup>

The report pointed out certain characteristics of the 5-percenter.<sup>40</sup> The 5-percenter:

- Emphasizes whom he knows and attempts to create the impression that to be successful in dealing with the Government you must know the right people.
- Discusses in some detail how he succeeded in other cases in defeating his client’s competitors by knowing just where to exert the proper pressure.
- Applies the social technique to the problem to impress the client, i.e. over lunch or dinner.
- Charges an exorbitant fee.

The emphasis here is on the 5-percenter’s lack of substantive knowledge of the topic, not on the contingent nature of the compensation; he is selling “influence,” not “professional services.” Merely identifying these characteristics distinguishes the 5-percenter from the bona fide professional agents with which Congress was also familiar. Rather than all lobbyists' being members of a reviled class, by 1950, even when discussing the worst of the bunch, Congress (at

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<sup>36</sup> *The 5-Percenter Investigation*, Interim Report submitted to the Comm. on Expenditures in the Executive Depts., S. REP. NO. 81-1231, at 1 (1950).

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.* at 5.

least by implication) recognized that there was a class of lobbyists whose activities were legitimate and professional.

As lobbying evolved, lower courts tended to ignore pronouncements in the earlier cases rejecting as improper all forms of “lobbying.” Rather, lower courts – and the Supreme Court itself, in cases like *Steele* – tended to hold that contracts for professional advocacy services before the legislature or agencies were legitimate. Advocacy in the course of rendering those legitimate, professional services soon was also called “lobbying.”

During the same timeframe, a few state and lower federal courts were faced with the lawsuits involving contingent fee lobbying.<sup>41</sup> These courts tended to cite the Supreme Court precedent discussed above solely for the proposition that *contingent fee* lobbying was against public policy and hence forbidden. In observing that there was a discrepancy between the old cases that condemned lobbying generally and the newer cases that condemned contingent fee lobbying (but not lobbying writ large), one contemporary commentator wrote:

It is questionable if there is any functional basis for the distinction between the two types of lobbying contracts. It is more likely that courts denouncing lobbyists have thought in terms of the corrupt practices of the old lobby, while courts recognizing the less reprehensible lobbying of more recent times as a legitimate occupation have sought a ground for differentiation in the fact of contingent compensation.<sup>42</sup>

Once lobbying had evolved into a more recognized and respected profession,<sup>43</sup> the Supreme Court could limit its condemnation to the use of improper influence in lobbying, rather

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<sup>41</sup> See, e.g., *Luff v. Luff*, 267 F.2d 643 (D.C. Cir. 1959); *Gesellschaft v. Brown*, 78 F.2d 410 (D.C. Cir. 1935); *Noonan v. Gilbert*, 68 F.2d 775 (D.C. Cir. 1934); *Hogston v. Bell*, 112 N.E. 883 (Ind. 1916); *Hyland v. Oregon Hassam Paving Co.*, 144 P. 1160 (Or. 1914); *Crichfield v. Bermudez Asphalt Paving Co.*, 51 N.E. 552 (Ill. 1898); *Chippewa Valley & S. Ry. Co. v. Chicago, St. P, M & O Ry. Co.*, 44 N.W. 17 (Wis. 1889).

<sup>42</sup> *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L. J. 315 (1947) (citations omitted).

<sup>43</sup> This evolution was, at least in part, fostered by the 1946 Federal Regulation of Lobbying Act that required disclosure of lobbying activities before the U.S. Congress and thus, through at least an attempt at introducing transparency into the process, helped legitimize lobbying.

than lobbying itself.<sup>44</sup> However, the Supreme Court never returned to the corollary issue of contingent fee lobbying, leaving intact the language repeated by later courts in the course of those courts' considerations of contingent fee lobbying. This, of course, begs the question: contingent fee lobbying had originally been condemned by the Supreme Court as an intensifying and worsening offshoot of an already vile practice – lobbying. If lobbying itself is no longer reprehensible and inevitably nefarious, then should its contingent fee offshoot still be condemned under the old caselaw? The answer to this question may be illuminated by an example drawn from federal treatment of a similar issue: the covenant against contingent fees in government contracting.

The same shift in the perception of lobbying – the recognition that some lobbying is not only useful, but necessary – is a theme that echoed throughout the development and evolution of the Covenant Against Contingent Fees in the federal procurement arena. An examination of that history aids analysis of the appropriate treatment of contingent fee contracts for lobbying in other arenas.

### **III. FEDERAL PROCUREMENT COVENANT AGAINST CONTINGENT FEES**

Certain federal laws restrict the use of contingent fee arrangements for the procurement of government contracts for goods and services.<sup>45</sup> Today, the general federal procurement statute requires a “suitable warranty” that, with some exceptions, contingent fees or commissions have not been used to secure any contract other than one awarded based on sealed-bid procedures.

The full provision reads:

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<sup>44</sup> Other commentators who have examined the Court's decisions closely have come to the same conclusion. *See, e.g.,* John W. Townsend & Lloyd Fletcher, Jr., *Contingent Fees in Procurement of Government Contracts*, 11 *Geo. Wash. L. Rev.* 37 (1942-43); [author unknown] *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 *YALE L. J.* 315 (1947).

<sup>45</sup> *See* 41 U.S.C. § 254(a); 10 U.S.C. § 2306(b); 31 U.S.C. § 1352 (Byrd Amendment prohibiting the recipients of federal grants, contracts, loans, or cooperative agreements from using federally appropriated funds to pay any person to influence or attempt to influence any executive or legislative branch official ); 48 C.F.R. § 3.400 *et seq.*; 48 C.F.R. § 52.203-5; 32 CFR §§ 1-500 *et seq.*; and 41 CFR §§ 101.500 *et seq.*

Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.<sup>46</sup>

The Federal Acquisition Regulation requires the contracting officer to insert a standard “Covenant Against Contingent Fees” in solicitations and contracts, fulfilling the statutory requirement for a “suitable warranty.”<sup>47</sup> The term “contingent fee” is defined in the Federal Acquisition Regulation as including “any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.”<sup>48</sup> The penalties for violation of the Covenant Against Contingent Fees may include rejection of a proposal if before the award, annulment of the contract or recovery of the fee if after the award, initiation of a suspension or debarment action, or even criminal referral to the Department of Justice.<sup>49</sup> This statutory instruction prohibiting contingent fees appears very straightforward – but its history and the General Services Administration’s current implementing regulations demonstrate that it is anything but.

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<sup>46</sup> 41 U.S.C. § 254(a) (2003). Very similar language is found in the military procurement statute, 10 U.S.C. § 2306(b) (2003). Cases interpreting the elements of this provision are explored in 60 A.L.R. Fed. 263 (2003).

<sup>47</sup> *Id.* §§ 3.401 and 3.404. The full text of the currently applicable Covenant Against Contingent Fees is found at 48 C.F.R. § 52.203-5 (2003).

<sup>48</sup> 48 C.F.R. § 3.401 (2003).

<sup>49</sup> *Id.* § 3.405.

## A. History of the Covenant

The history<sup>50</sup> of this Covenant Against Contingent Fees dates back to 1918, when Attorney General J.W. Gregory issued a series of press releases calling attention to certain Supreme Court decisions<sup>51</sup> and declaring that the “no contract no fee arrangement suggests an attempt to use sinister and corrupt means.”<sup>52</sup> Shortly thereafter, the Attorney General sent a letter out to the heads of all executive agencies setting forth the language of a covenant prohibiting, without exception, contingent fee arrangements for obtaining government contracts. However, much of the regular and ongoing business of procurement for the War Department at the time was performed by agents or agencies working on a commission basis – practices that would be forbidden under the broadly drafted Covenant Against Contingent Fees proposed by the Attorney General. Because these “sales agencies and commission brokers” were well-established concerns and considered essential to the ongoing business of wartime procurement, many executive agencies, including the War Department, protested the breadth of the Covenant.

Eventually, President Wilson himself adjudicated the executive branch dispute over the breadth of the Covenant, stating in a letter to the Secretary of War that “our single object [in proposing the Covenant Against Contingent Fees] was to prevent the contingent fee based upon no real service whatever” and suggesting that the covenant be reworded to reflect that the “ordinary trade practices” used for procurement should not be affected by the covenant.<sup>53</sup> The President’s position was repeated and more clearly emphasized in a cablegram sent from the Paris peace conferences: “I understood some time ago, that it was concluded that those covenants

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<sup>50</sup> This discussion of the contingent fee in government contracting draws heavily from a comprehensive law review article: Barron & Munves, *The Government Versus the Five-Percenters: Analysis of Regulations Governing Contingent Fees in Government Contracts*, 25 GEO. WASH. L. REV. 127 (1956). For an earlier, more abbreviated discussion of the same historical events, see John W. Townsend & Lloyd Fletcher, Jr., *Contingent Fees in Procurement of Government Contracts*, 11 GEO. WASH. L. REV. 37, 42, 43 (1942-1943).

<sup>51</sup> *Id.* at 129.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 131.

should not invalidate contracts obtained through bona fide commercial representatives or agencies by an established business process everywhere recognized.”<sup>54</sup> After the President’s communications, the Covenant Against Contingent Fees was modified to exempt goods sold “through a bona fide commercial representative employed by the contractor in the regular course of his business . . . and whose compensation is paid . . . by commissions.”<sup>55</sup>

Some version of this Covenant Against Contingent Fees, incorporating the exception for bona fide agencies or commercial representatives, continued to be incorporated into the government’s standard contract form without controversy until the advent of intense government procurement activity during World War II, a time of heightened scrutiny for procurement practices. The House of Representatives approved a bill that prohibiting “the payment of contingent fees for services in connection with the procurement of government contracts”; that bill did not contain the exemption that had been the subject of so much high-level attention during the earlier discussions. In a reprise of 1919 – except in the Congress rather than in the Executive branch – the proposal was sidetracked in large part because of the breadth of its proposed ban on contingent fee compensation.<sup>56</sup>

In one WWII-era law review article discussing the Covenant Against Contingent Fees, the authors surveyed the Supreme Court caselaw addressing procurement of government contracts under a contingent fee arrangement, including *Marshall, Tool Co.*, *Trist*, and *Hazelton*.<sup>57</sup> The authors noted that

while in each case [where the contract was held invalid] a contingent fee agreement was involved, the decisions were not based on the mere fact that the compensation was contingent. The

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<sup>54</sup> *Id.* at 131-32.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> John W. Townsend & Lloyd Fletcher, Jr., *Contingent Fees in Procurement of Government Contracts*, 11 *Geo. Wash. L. Rev.* 37 (1942-43).

basic ground of the Court’s opinion in each instance was the fact that the *methods* to be employed by the agent were of a character which the law cannot sanction. The contracts would have been held illegal even though the compensation was not contingent.<sup>58</sup>

Further, “the Supreme Court itself has been careful to limit the principle to situations involving the use of *corrupt influence*, and equally careful to point out that the rule does not apply to agreements to pay ordinary fees or commissions to *bona fide* agents.”<sup>59</sup> As summarized by the authors, “under the rule established by these [Supreme Court] decisions, it becomes apparent that in each case it is necessary to determine the *question of fact* as to whether the agent was to employ sinister influence or was to use the well-recognized and legitimate methods of a salesman to demonstrate the merits of his principal’s goods.”<sup>60</sup> In conclusion, the authors state:

It would seem that the element of contingency of the agent’s fee upon the results obtained is not the fundamental evil to be corrected, since it does not of itself bring about undesirable results. It is submitted that other and more direct means could be found to deal with the situation. . . .<sup>61</sup>

## **B. First Statutory Enactment and Subsequent Regulations**

The first statutory enactment of the Covenant occurred in the Armed Services Procurement Act of 1947, with a second enactment in the Federal Property and Administrative Services Act of 1949.<sup>62</sup> Both of these enactments included an exemption for “bona fide employees” and “bona fide established commercial or selling agencies.”<sup>63</sup>

Although both statutory enactments included the exemptions, there was still some confusion among both the regulators and the contracting community regarding the breadth of the statutory exemptions. To address these confusions and misconceptions, as well as to ensure that

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<sup>58</sup> *Id.* at 42.

<sup>59</sup> *Id.* at 43.

<sup>60</sup> *Id.* at 51.

<sup>61</sup> *Id.* at 56.

<sup>62</sup> *Id.* at 137.

<sup>63</sup> *Id.*



the Covenant would apply government-wide, the General Services Administration published General Services Administration General Regulation No. 12,<sup>64</sup> which interpreted the language in the statutory exemption.<sup>65</sup>

In crafting these regulations, the regulators examined the early Supreme Court caselaw on lobbying and contingent fee lobbying, and arrived at a position they considered coherent with that body of caselaw. As one commentator noted about the resulting regulations:

The Regulation was designed and intended to establish or clarify policy, resolve conflicting views and clear up numerous popular misconceptions on the subject. In large part, the Regulation serves merely to clarify the scope and meaning of the covenant's prohibition and the prohibition's exceptions, in keeping with their historical purpose and development. It also has the effect, however, of establishing criteria differing from earlier views as expressed in some court decisions and administrative interpretations.<sup>66</sup>

### C. Modern Regulations

The regulations that were developed in the 1950s continue in effect, largely unchanged, today. The current Federal Acquisition Regulation<sup>67</sup> defines the key terms in the Covenant<sup>68</sup>:

- *Bona fide agency* means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.
- *Bona fide employee* means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.
- *Contingent fee* means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

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<sup>64</sup> 41 CFR § 1-1.500 (Supp. 1956), issued Dec. 29, 1952. See Barron & Munves, *supra* note 17, at 141.

<sup>65</sup> See Barron & Munves at 142.

<sup>66</sup> *Id.* at 141.

<sup>67</sup> The Defense Acquisition Regulations include parallel provisions.

<sup>68</sup> 48 CFR §§ 3.401 and 52.203-5.

- *Improper influence* means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

The definitions of these key terms of the Covenant that are set forth in the regulations permit a “bona fide” agency or employee, defined as agencies or employees that do not exert or claim to exert “improper influence,” to receive contingent compensation. Therefore, despite the statutory language that seems to create a blanket prohibition against any contingent compensation, the regulators determined – after a detailed analysis of the Supreme Court case law – that a *de facto* “professional services” exception to the prohibition was appropriate in the procurement context.<sup>69</sup>

#### **IV. “CORRUPTING TENDENCY” RATIONALE VERSUS “FACTS AND CIRCUMSTANCES” ANALYSIS**

In both the Supreme Court’s caselaw on contingent fee lobbying and the seminal 1919 dispute regarding contingent fees in government contracting, we see the strains of two competing philosophies on contingent fee compensation for lobbying. On one side, some argue that contingent fee lobbying should be banned because such a fee arrangement creates an incentive for an agent to use improper means to achieve his end. We call this philosophy of condemning the practice of contingent fee compensation because of the fee structure’s tendency to induce the agent to use corrupt means the “tendency” rationale. On the other side, some argue that if there is no improper influence contemplated or employed by the agent – that is, if the lobbyist makes merit-based arguments and engages in professional services rather than influence peddling – then the form of compensation is largely irrelevant. We refer to this approach, entailing examining the

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<sup>69</sup> Note that the Byrd Amendment prohibits the use of appropriated funds to lobby for any award of a federal contract, thus preventing payment for the contingent costs from any amounts paid under the contract. The Byrd Amendment’s proscription applies to federal contracts, grants, loans, and cooperative agreements. The Byrd Amendment does not prevent payment to a lobbyist from funds available to the contractor other than those paid by the federal government. In theory, an entity could pay for contract lobbying on a contingent basis so long as the payment were made from funds that had not been received from the government. The Byrd Amendment would, in that case, require disclosure through the filing of a declaration. 31 U.S.C. § 1352(b) (2003).

facts of a particular situation to determine whether improper means have been contemplated or employed, the “facts and circumstances” analysis.

In 1919, in government contracting, the Attorney General employed the tendency rationale, insisting that the use of a contingent fee in procurement provides an agent with a strong incentive to use improper and corrupt methods to achieve the agent’s ends. Therefore, the Attorney General hoped that prohibition of contingent fee contracting would facilitate prevention of corrupt methods. The executive agencies that had existing professional relationships with agents compensated on a commission basis protested that the same objective – prevention of the use of improper influence – could be accomplished more readily by a facts and circumstances evaluation of whether improper influence had been used to procure a contract, including an analysis of whether the agent was professional and experienced and whether the agent’s compensation was reasonable. Today’s Covenant Against Contingent Fees statute embodies the tendency rationale, but the regulations implementing that statute reflect the government’s adoption of the facts and circumstances analysis as more appropriate to federal procurement.

This philosophical divergence between the tendency rationale and the facts and circumstances approach has carried over to state legislation and caselaw discussing contingent fee contracts for lobbying outside of the federal procurement context.

Many states have enacted legislative bans on contingent fee lobbying.<sup>70</sup> Conversely, other states appear specifically to permit lobbying on a contingent fee basis – in West Virginia,

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<sup>70</sup> These are Alabama, Ala. Code § 36-25-23 (1973), Alaska, Alaska Stat. § 24.45.121 (1976), Arizona, Ariz. Rev. Stat. § 41-1233 (1974), California, Cal. Gov’t Code § 86205 (1974), Colorado, Colo. Rev. Stat. § 24-6-308 (1973), Connecticut, Conn. Gen. Stat. § 1-97 (1977), Florida, Fla. Stat. ch. 11-047 and ,112.3217 (1993), Georgia, Ga. Code Ann. § 28-7-3 (1911), Hawaii, Haw. Rev. Stat. § 97-5 (1975), Idaho, Idaho Code § 67-6621 (1974), Illinois, 25 Ill. Comp. Stat 170/8 (1969), Indiana, Ind. Code § 2-7-5-5 (1981), Kansas, Kan. Stat. Ann. § 46-267 (1974), Kentucky, Ky. Rev. Stat. Ann. § 6.811(9) (1993), Maine, Me. Rev. Stat. Ann. tit. 3, § 318 (1975), Maryland, Md. Code Ann. State Gov’t § 15-713 (1995), Massachusetts, Mass. Gen. Laws ch. 3, § 42 (1973), Michigan, Mich. Comp. Laws § 4.421 (1978), Minnesota, Minn. Stat. § 10A.06 (1974), Mississippi, Miss. Code Ann. § 5-8-13 (1994), Nebraska, Neb. Rev. Stat. § 49-1492 (1976), Nevada, Nev. Rev. Stat. 218.942 (1975), New Mexico, N.M. Stat. Ann. § 2-11-8

Tennessee, and New Jersey, the statutes regulating lobbying expressly state that any contingent fee being charged by the lobbyist must be part of the disclosure requirement.<sup>71</sup>

In addition to legislation, the state courts have been more active than their federal counterparts in reviewing controversies involving lobbying under a contingent fee contract. A review of the available caselaw reveals that there is a split in the states regarding whether the tendency rationale or the facts and circumstances analysis determines the ultimate enforceability of the contingent fee contract.<sup>72</sup>

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(1977), New York, N.Y. Legis. Law § 1-k (1999) (repeal effective 12/31/2007), North Carolina, N.C. Gen. Stat. § 120-47.5 (1975), North Dakota, N.D. Cent. Code § 54-05.1-06 (1975), Ohio, Ohio Rev. Code Ann. § 101.77 (1976), Oklahoma, Okla. Stat. tit. 21, § 334 (1978), Oregon, Or. Rev. Stat. § 171.756 (1973), Pennsylvania, 65 Pa. Cons. Stat. § 1307 (1961), Rhode Island, R.I. Gen. Laws § 22-10-12 (1956), South Carolina, S.C. Code Ann. § 2-17-110 (1976), South Dakota, S.D. Codified Laws § 2-12-6 (1939), Texas, Tex. Gov't Code Ann. § 305.022 (1973), Utah, Utah Code Ann. § 36-11-301 (1953), Vermont, Vt. Stat. Ann. tit. 2, § 266 (1989), Virginia, Va. Code Ann. § 2.2-432 (2001), Washington, Wash. Rev. Code § 42.17.230 (1973), and Wisconsin, Wis. Stat. § 13.625 (1977).

Pennsylvania's statute was invalidated on grounds that the statute unconstitutionally interfered with the judicial branch's governance of the practice of law in the state, *Gmerek v. State Ethics Comm'n*, 807 A.2d 812 (Pa. 2002), but a subsequent rules change by the state supreme court authorized regulation of lawyer lobbyists. Pa. Rules of Prof'l Conduct § 1.19.

<sup>71</sup> See W. Va. Code § 6B-3-2(a)(4) (1989) ("The registration statement shall contain . . . [a] statement as to whether . . . the registrant's compensation . . . is or will be contingent upon the success of his or her lobbying activity"); Tenn. Code Ann. § 3-6-105(c) (1975) ("[I]f a lobbyist is engaged by any new employer for a fee, fixed or contingent, . . . the lobbyist shall file [a supplemental registration report]"); N.J. Stat. Ann. § 52:13C-21 (1971) (Any person acting as a "legislative agent" must file a notice of representation, which must include "a full and particular description of any agreement . . . to which his compensation, or any portion thereof, is or will be contingent upon the success of any attempt to influence legislation or regulation."). In Delaware, up to one-half of a lobbyist's total compensation may be contingent. Del. Code Ann. tit. 29, § 5834 (1994).

<sup>72</sup> Interestingly, where there is Supreme Court or federal precedent cited for the decision, both "tendency" and "facts and circumstances" outcomes can often be traced back to the same Supreme Court precedent cited above.

Indiana,<sup>73</sup> Massachusetts,<sup>74</sup> Oklahoma,<sup>75</sup> and Illinois<sup>76</sup> are among the states that have adopted the tendency rationale when addressing the enforceability of contingent fee lobbying contracts by. Other state courts – including Nebraska,<sup>77</sup> Tennessee,<sup>78</sup> Georgia,<sup>79</sup> Minnesota,<sup>80</sup> and

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<sup>73</sup> In *Hogston v. Bell*, 112 N.E. 883 (Ind. 1916), the defendant entered into a contingency fee contract with the plaintiff, a lawyer, to resolve litigation surrounding his brother's will. The will called for the donation of money to the state board of charities. In resolving the litigation, the plaintiff was required to lobby the legislature for legislation that would allow the state board of charities to be sued. In deciding the case, the court adopted the "tendency" rationale, noting that the court should not inquire into the facts and circumstances, including the motives of the parties, to ascertain whether fraud or undue influence were contemplated during the formation of the contract.

<sup>74</sup> In *Adams v. East Boston Co.*, 127 N.E. 628 (Mass. 1920), the defendants contracted with the plaintiff to dispose of marsh land in Boston to be converted in docks. After the plaintiffs could not find a private purchaser, they lobbied the government for a taking of the land. The plaintiff's fee was 15% of any proceeds from the sale. Adopting the "tendency" rationale, the Massachusetts court held the contract unenforceable, noting that it is of no consequence that there was no injury or actual harm to the public interest.

<sup>75</sup> In *Chambers v. Coates*, 55 P.2d 986 (Okla. 1936), the defendant hired the plaintiff, an attorney, to procure a change in a city ordinance. The contract provided for a \$30,000 contingency fee if the ordinance were passed and further stipulated that the plaintiff should exercise any personal influence over his friends or acquaintances in the procurement of favorable action. Adopting the "tendency" rationale, the court noted that contingent fee contracts tend to lead secret, improper, and corrupt influences, to the injury of the public and held that such contracts were void without reference to the question whether improper means are contemplated or used in their execution.

<sup>76</sup> In *Rome v. Upton*, 648 N.E.2d 1085 (Ill. Ct. App. 1995), the defendant hired the plaintiff to procure the necessary approval from federal and state authorities for a housing project. The plaintiff had to respond to all inquiries, provide additional documentation, clarifications, and attend all meetings related to the application for approval. The plaintiff was to receive 5 percent of public financing plus a flat fee for his work. After the application was approved, the defendant refused to pay the plaintiff for his work claiming it was lobbying and void for public policy reasons. Citing the Illinois statutory ban on contingent fee lobbying, the court held that these contracts are void for public policy reasons because they have a tendency to encourage improper means to influence the legislature. The court explicitly rejected all arguments by the defendant that the contract did not contemplate the use of improper means, noting that the "tendency" rationale applies regardless of the factual circumstances.

<sup>77</sup> In *Stroemer v. Van Orsdel*, 103 N.W. 1053 (Neb. 1905), the defendant hired the plaintiff to lobby on his behalf to the federal government and the Indians on the defendant's position with regard to the sale of certain land. The plaintiff, an attorney, was supposed to receive a percentage of the reduction in any fees owed by the client to the government and the Indians. The plaintiff was successful in convincing Congress to pass legislation, but the defendant refused to pay the contingency fee and the plaintiff sued. The court adopted a facts and circumstances test to determine the actual motives behind the contract, the contemplated means, and whether the contract was really one for professional services. Ultimately, the court held the contract valid because the lawyer only made arguments based on the merits before the committees on Indian Affairs and he did not use personal influence with any of the members to secure passage of the legislation.

<sup>78</sup> In *Stansell v. Roach*, 246 S.W. 520 (Tenn. 1923), Stansell was hired to lobby Congress to compensate contractors for losses sustained during the construction of a federal government during World War I. Stansell agreed to work for 10% of the congressional appropriations. There was nothing in the agreement that Stansell was to engage in any improper conduct or use personal influence to obtain the required appropriation; rather, he would do nothing more than use the merits of the case to appeal to Congress. The court laid down a rule of law that would uphold any contracts that did not use unlawful means to accomplish the contract's objective, nothing that the courts should not condemn lobbying contracts that attempt to secure legislation for a legitimate purpose and in a legitimate manner.

<sup>79</sup> In *Cary v. Neel*, 189 S.E. 575 (Ga. Ct. App. 1936), the owners of a sand gravel quarry entered into an agreement with a lobbyist to promote the sale of gravel for use in state paving projects. The lobbyist was to receive 5 cents per ton of gravel sold. The quarry owners refused to pay and the lobbyist brought suit against them. The court determined that a contract should not be invalidated simply because it contained a contingency fee lobbying clause. Rather, to invalidate a contingent fee contract, the court should look to facts and circumstances to determine whether

Rhode Island<sup>81</sup> – have rejected either implicitly or explicitly the tendency rationale and adopted instead the facts and circumstances approach in evaluating whether a contract for contingent fee lobbying should be enforced. In Alabama, despite the legislature’s enactment of an explicit ban on contingent fee lobbying, the state court found that the facts and circumstances of the lobbying at issue can override the tendency rationale embodied in the statutory ban, much as the federal procurement regulations cabined the unqualified statutory “Covenant Against Contingent Fees.”<sup>82</sup>

Notably, in all of the cases adopting a facts and circumstances analysis, the courts cite no improper influence either contemplated or exercised by the hired lobbyists. Conversely, in many of the cases adopting a tendency rationale, improper influences or non-merit-based arguments were either contemplated by the contract or employed by the lobbyist.

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the contract itself was against public interest or contemplated the use of improper means to influence the state government or legislature.

<sup>80</sup> In *Hollister v. Ulvi*, 271 N.W. 493 (Minn. 1937), the defendant hired plaintiffs, a law firm, to represent him before a Congressional committee charged with awarding damages in a forest fire caused by the railroad, with a contingent fee contract awarding plaintiffs 10% of the defendant’s recovery. The plaintiffs persuaded the committee to pass individual legislation awarding the defendant greater damages from the fire. The defendant claimed that the contract was void because it amounted to contingent fee lobbying. The court held that contingent fee contracts are not automatically invalid as long as they attempt to secure legislation for legitimate purposes and in a legitimate manner.

<sup>81</sup> In *City of Warwick v. Boeng Corporation*, 472 A.2d 1214 (R.I. 1984), Boeng Corporation wanted to sell a building to the state, but the City of Warwick had to first approve any land transaction in the City. The City did not want the land sold because the state would not have to pay property taxes. Boeng entered into an agreement with the city by which Boeng would make a lump sum tax payment upon sale of the property if the mayor supported and the city council approved the sale. It was argued that this agreement was void because it contained a contingent payment to the city if they approved the legislation. The court held that contingent fee contracts are not automatically invalid; rather the court will look at the surrounding circumstances to determine if the contract promoted the public interests and contemplated impropriety. Here, the court looked at the factual circumstances and determined that the purpose behind the contract (to ensure that the City would receive tax money that it was losing after the building was sold to the state) was within the public interest and the contingent arrangement was such that payment did not improperly influence the mayor or the city officials. Therefore, the contract was enforceable.

<sup>82</sup> Chandler was a lobbyist hired by the Lamar County Board of Education to seek additional revenue from “any and all sources,” including the state. Chandler agreed to be paid a portion of any money recovered by the school board as his fee. In *Chandler v. Lamar County Bd. of Education*, 528 So.2d 309 (Ala. 1988), the court held a lobbying contract with contingent fee compensation enforceable because there was no evidence of illegal lobbying of the legislature nor was there was evidence that Chandler obtained the money using illegal lobbying activities. The court came to this conclusion of enforceability despite Alabama’s general prohibition of contingent fee lobbying (Ala. Code 36-25-18) on the rationale that the courts should look at the circumstances surrounding a contingent fee lobbying contract to determine if the contract contemplates impropriety. Citing early Alabama precedent grounded in the “tendency” rationale, the *Chandler* court concluded that if a lobbying contract does not contemplate impropriety and is irreproachable by other means it will be enforced despite being a contingent fee contract.

Which philosophy, then, should be the preferred approach to federal contingent fee lobbying? Should courts invalidate all contingent fee lobbying contracts under the tendency rationale, presuming that these compensation arrangements have the tendency to corrupt and are thus always to be condemned as against public policy? Or, should courts examine the facts and circumstances of each contingent fee lobbying arrangement to determine whether improper influence or other nefarious means were contemplated or used? The Supreme Court precedents are old and subject to multiple interpretations; the state courts are divided. The clearest answer to this question emerges through an analysis of the Supreme Court's more recent First Amendment jurisprudence.

## V. SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE

The First Amendment of the Constitution guarantees the right “to petition the government for a redress of grievances.”<sup>83</sup> In *United States v. Harriss*, the Supreme Court rendered the 1946 Federal Regulation of Lobbying Act constitutional by narrowing its applicability to those persons attempting to influence Congress through direct communication with members of Congress.<sup>84</sup> The Court also addressed the First Amendment implications of regulated lobbying, stating, “[t]hus construed, [the provisions at issue] also do not violate the freedoms guaranteed by the First Amendment – freedom to speak, publish, and petition the Government.”<sup>85</sup> The Court reached this conclusion only after discussion of whether Congress had exercised its power of self-protection “in a manner restricted to its appropriate end” – the clear implication being that, if the means were too extreme, any restriction on lobbying would be considered a violation of the First Amendment freedoms to speak and to petition the government.<sup>86</sup>

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<sup>83</sup> U.S. Const. amend. I.

<sup>84</sup> 347 U.S. 612, 620 (1954).

<sup>85</sup> Id. at 625.

<sup>86</sup> Id. at 625-26.

Since this first acknowledgement of the constitutional basis for lobbying in *Harriss*, the Supreme Court has developed a branch of First Amendment jurisprudence striking down various restraints on political speech.<sup>87</sup>

Would a limitation on the method of compensation for federal lobbyists in the form of a ban on contingent fees violate this protected First Amendment right to petition? The Supreme Court's First Amendment jurisprudence on the topic of political speech only began to develop long after the Court's most recent pronouncements on contingent fee lobbying.<sup>88</sup> This First

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<sup>87</sup> See, e.g., Fatka and Levien at 571.

<sup>88</sup> Note that, in the interim, courts in three states have heard challenges to state contingent fee prohibitions on First Amendment grounds, and some have discussed the early Supreme Court precedent. The Montana court held the prohibition unconstitutional. *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300 (Mont. 1981). The court stated:

In the past, contingent fee agreements for lobbying services were seen as inviting and inducing improper solicitations of Congress. [citing *Hazelton*] A contingent fee agreement was considered strong evidence that the parties anticipated that improper means would be used. . . . We surmise that this was the public policy behind the original inclusion of [this section] in the Lobbying Act. . . . [However,] the blanket prohibition against contingent compensation of lobbyists . . . is overbroad because it precludes contingent fee agreements that are properly motivated as well as those that are improperly motivated. [The prohibition] thereby violates the right to petition the government included in the First Amendment to the United States Constitution. . . . We find that [the prohibition] unduly infringes the rights of those who, while contemplating neither illegal nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official.

*Id.* at 308.

The Kentucky court held the prohibition constitutional. *Associated Indus. of Ky. v. Kentucky*, 912 S.W.2d 947 (Ky.1995). The court stated:

The provisions of KRS 6.811(9) and KRS 11A.236(1) which determine it to be a Class D felony for a person to engage any person to lobby in exchange for compensation that is contingent in any way upon the passage, modification, or the defeat of any legislation; or, for any person to accept any engagement to lobby in exchange for compensation that is contingent in any way upon the passage, modification, or defeat of any legislation are upheld as constitutional. Such acts as enumerated above are against public policy and are void. See *Wood v. McCann*, 36 Ky. (Dana VI) 366 (1838); *Hazelton v. Sheckels*, 202 U.S. 71, 26 S.Ct. 567, 50 L.Ed. 939 (1906). These statutes are neither overly broad nor are they violative of the appellant's freedom of association and right to petition under the Kentucky Constitution or the United States Constitution.

*Id.* at 951.

The Circuit Court of Appeals upheld the prohibition as constitutional, albeit reluctantly, discussing in dicta that the court's reluctance was due to the changes in Supreme Court First Amendment jurisprudence. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11<sup>th</sup> Cir. 1996). The court stated:

Florida points out that in cases decided well before the articulation of 'exactng scrutiny,' the Supreme Court specifically held that contracts to lobby for a legislative result, with the fee contingent on a favorable legislative outcome, were void *ab initio* as against public policy. [citing *Hazelton* and *Providence Tool Co.*] The League does not contest the applicability of these older decisions to this case. And, we are persuaded that these decisions permit a legislature to prohibit contingent compensation. The League, however, suggested at argument that the extensive, interim developments of First Amendment law establish conclusively that the Supreme Court today would strike a contingency-fee ban on lobbying. This prediction



Amendment jurisprudence, briefly described below, dictates that the facts and circumstances analysis would militate against unjustified encroachment on the constitutional right to petition the government.<sup>89</sup>

In *Buckley v. Valeo*,<sup>90</sup> the Supreme Court struck down certain expenditure limitations on the basis that those limitations “impose[d] direct and substantial restraints on the quantity of political speech.”<sup>91</sup> *Buckley* solidified the concept that the constitutionality of restrictions interfering with political expression “turns on whether the governmental interests advanced in [the restrictions’] support satisfy . . . exacting scrutiny.”<sup>92</sup> The Court found that independent expenditures did not “pose the same dangers” of corruption as did contributions and that, additionally, the proposed restriction did not provide an adequate response to what danger of corruption did exist.<sup>93</sup> Therefore, the Court held,

the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, [but] it heavily burdens core First Amendment expression. For the First Amendment right to speak one's mind on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussion. Advocacy of the election or defeat of candidates for federal office is *no less entitled to protection under the First Amendment than* the discussion of political policy generally or *advocacy of the passage or defeat of legislation*.<sup>94</sup>

In *Village of Schaumburg v. Citizens for a Better Environment*,<sup>95</sup> the Supreme Court declared unconstitutional an ordinance prohibiting in-person solicitation of contributions by

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may be accurate, but we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.

*Id.* at 462.

<sup>89</sup> *But see* Meredith A. Capps, Note, “Gouging the Government”: Why a Federal Contingency Fee Lobbying Prohibition is Consistent with First Amendment Freedoms, 58 Vand. L. Rev. 1885 (2005).

<sup>90</sup> 424 U.S. 1 (1976).

<sup>91</sup> *Id.* at 39.

<sup>92</sup> *Id.* at 45.

<sup>93</sup> *Id.* at 46.

<sup>94</sup> *Id.* at 47-48 (citations omitted; emphasis added).

<sup>95</sup> 444 U.S. 620 (1980).

charitable organizations that did not use at least 75% of their receipts for charitable purposes, holding that the governmental interest in preventing fraud, although substantial, was only peripherally promoted by the ordinance and “could be sufficiently served by measures less destructive of First Amendment interests.”<sup>96</sup> The Court suggested some alternatives to an overbroad restriction on free expression:

Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. Efforts to promote disclosure of the finances of charitable organization also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.<sup>97</sup>

In *Meyer v. Grant*,<sup>98</sup> the Supreme Court declared unconstitutional a Colorado statute that prohibited paying people to circulate petitions for placing initiatives on a ballot. The Court held that the circulation of an initiative petition involved political speech and that a prohibition against paying circulators to circulate such a petition violated the First Amendment because, “like the campaign expenditure limitations struck down in *Buckley*, the Colorado statute imposes a direct restriction which necessarily reduces the quantity of expression.”<sup>99</sup>

The Court analyzed the case under the *Buckley* “exacting scrutiny” standard applicable to limitations on political expression. Colorado defended the prohibition on paid petition circulators, in part, by stating that the restriction was necessary to “protect[] the integrity of the initiative process by eliminating a temptation to pad petitions.”<sup>100</sup> As in *Village of Schaumburg*, the Court determined that the restriction was not narrowly tailored to meet the governmental interest in preventing the padding of petitions and that other measures were available to serve the government’s interest that would not unduly restrict political speech protected by the First

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<sup>96</sup> *Id.* at 636.

<sup>97</sup> *Id.* at 637-38.

<sup>98</sup> 486 U.S. 414 (1988).

<sup>99</sup> *Id.* at 419.

<sup>100</sup> *Id.*

Amendment. “[T]he State has failed to demonstrate that it is necessary to burden appellee’s ability to communicate their message in order to meet its concerns.”<sup>101</sup> Finally, the Court expressed its skepticism regarding the logic behind the prohibition:

[W]e are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot. Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures. . . . These provisions seem adequate to the task of minimizing the risk of improper conduct. . . .<sup>102</sup>

The Supreme Court in *Riley v. National Federation of the Blind of North Carolina*<sup>103</sup> held unconstitutional a North Carolina statute prohibiting professional fundraisers from retaining an “unreasonable” or “excessive” fee. Stating that “a speaker is no less a speaker because he or she is paid to speak,”<sup>104</sup> the Court determined that the statute could not withstand exacting scrutiny.

Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser’s fee is not narrowly tailored to the State’s interest in preventing fraud.<sup>105</sup>

The Court stated that “the prevention of fraud was only ‘peripherally promoted by the [restriction at issue] and could be sufficiently served by measures less destructive of First Amendment issues’”<sup>106</sup> The Court acknowledged that the prevention of fraud was a legitimate governmental interest, but noted that fraud must be prevented within the constraints of the First Amendment.

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<sup>101</sup> *Id.* at 426.

<sup>102</sup> *Id.* Note that a near-identical statement could be made about lobbyists: that other provisions of law deal expressly with the potential danger that lobbyists might be tempted to use corrupt means.

<sup>103</sup> 487 U.S. 781 (1988).

<sup>104</sup> *Id.* at 801.

<sup>105</sup> *Id.* at 789.

<sup>106</sup> *Id.* at 788 (citing *Village of Schaumburg*).

In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded . . . If [the State’s antifraud law] is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.<sup>107</sup>

*Buckley*,<sup>108</sup> *Village of Schaumburg*,<sup>109</sup> *Meyer*,<sup>110</sup> and *Riley*<sup>111</sup> thus lay the foundation for viewing with deep suspicion a restriction on citizens’ abilities to hire an advocate to engage in protected political speech. Beginning with the themes from *Buckley* – that core political speech, including “advocacy of the defeat or passage of legislation,” must be subject to exacting scrutiny and that preventing corruption or the appearance of corruption is not always an adequate government interest to meet the demands of exacting scrutiny – these cases support the argument that a ban on contingent fee lobbying, particularly a ban that is grounded in the tendency rationale, may be unconstitutional. *Village of Schaumburg*, *Meyer*, and *Riley* all emphasize that the possibility of fraudulent, misrepresentative, improper, or corrupt practices related to the speech at issue are not reason enough to constrain the speech. Where there are alternative means for discovering and correcting fraudulent practices – through use of disclosure laws and criminal prosecutions, for example – use of a restriction on political speech to achieve the same ends will likely not survive the exacting scrutiny standard.<sup>112</sup>

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<sup>107</sup> *Id.* at 795.

<sup>108</sup> 424 U.S. 1 (1976) (Court struck down certain campaign expenditure limitations that “impose direct and substantial restraints on the quantity of political speech”).

<sup>109</sup> *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (Court declared unconstitutional an ordinance prohibiting in-person solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for charitable purposes).

<sup>110</sup> 486 U.S. 414 (1988) (Court declared unconstitutional a Colorado statute prohibiting paying people to circulate petitions for placing initiatives on a ballot).

<sup>111</sup> 487 U.S. 781 (1988) (Court held unconstitutional a North Carolina statute prohibiting professional fundraisers from retaining an “unreasonable” or “excessive” fee).

<sup>112</sup> Some commentators have argued that the Supreme Court’s decision in *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), may indicate the Court’s inclination to equate access to legislators with “undue influence or the appearance of it.” T.R. Goldman, *Endgame: High Court Picture of Lobbying Isn’t Pretty*, INFLUENCE, Jan. 7, 2004, at 15 (referencing Justice Kennedy’s *McConnell* dissent in arguing that the Court’s next target could be to regulate the fees paid to lobbyists). If the Court begins to regard access itself as the key indicator of undue influence or

The Supreme Court’s jurisprudence in *Buckley* and these other cases strongly supports the conclusion that the Court would not follow its own precedent from the early cases condemning contingent fee lobbying contracts on public policy grounds. The modern Court’s reasoning might proceed as follows:

- The First Amendment guarantees the right to petition the government.<sup>113</sup> An infringement on that right should be addressed under *Buckley*’s exacting scrutiny standard, with an examination of the compelling state interest underlying the infringement. In the contingent fee lobbying context, the articulated compelling state interest has been the prevention of corruption in the political process. However, the reasoning behind this compelling state interest stems from an outdated view of lobbying.
- The state interest in preventing corruption “remains vital,” but the kinds of corruption that need to be prevented have changed.<sup>114</sup> Through the mid-20<sup>th</sup> century, any form of lobbying was considered corrupt, and contingent fees exacerbated the corrupt tendencies of lobbying. Now, however, lobbying is essential to the federal legislative process. Professional lobbyists are more effective advocates than inexperienced citizens in 21<sup>st</sup> century America and are sometimes the only effective advocates.<sup>115</sup>
- The professionalization of lobbying is not the only change affecting the analysis. The Lobbying Disclosure Act and other modern lobbying regulations have been widely

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corruption, there could be several implications. First, as Goldman argues, there may be a push to regulate the compensation of lobbyists. Second, the Court may find that more or differently styled incursions on freedoms of speech and petition are justified by the government’s interest in the prevention of corruption, if corruption can be implied from the mere fact of access. And third, if both “regular” lobbying and contingent fee lobbying begin to be regulated on the basis of their potential for corruption, the Court could be forced to revisit the constitutional status of lobbying itself.

<sup>113</sup> See U.S. Const. amend. I. See also *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) (“[T]o a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”).

<sup>114</sup> Some argue that the modern perception of corruption stems at least in part from the impression that only the rich have access to Congress – that they have “purchased” access – via highly compensated lobbyists. Fatka & Levien, *supra* note 3, at 584-86 (“[A] ban on contingency fees has the perverse effect of creating a more exclusive system where only the wealthy are able to exercise their right to petition the government by employing a lobbyist . . . In fact, rather than protecting the system from corruption, a ban on contingency fees may have the opposite effect.”).

<sup>115</sup> See, e.g., Fatka & Levien, *supra* note 3, at 567-68:

Professional lobbyists are better able to influence legislation than non-lobbyists for several reasons. First, they have already formed relationships with government officials and their staffs. Second, many lobbyists are former legislative branch employees who have high levels of expertise regarding the legislative process and knowledge of the specific subject matters that congressional committees address. In fact, members of Congress have even relied on the expertise of lobbyists to draft legislation. Third, professional lobbyists have the time and resources to follow a bill through the legislative process, whereas most citizens do not have this capability. Therefore, hiring a professional lobbyist is the most effective means of communicating with lawmakers. The lobbyist serves as a link between congressional policymakers and citizens, thereby helping those groups and individuals that have the ability to pay voice their concerns in an organized and effective manner.

See also *id.* at 565 (“Today, if citizens wish to make their voice heard by their legislator, they must exercise their petition right by employing a lobbyist.”).

adopted; these clearly represent a less burdensome impact on the First Amendment protected practice of lobbying than an outright ban on a particular method of compensation.

- Furthermore, the federal government itself, in the Federal Acquisition Regulation and the Defense Acquisition Regulation, has come to the same conclusion – that it is more reasonable to protect against corruption by examining the facts and circumstances of each instance than to forbid, without exception, the use of a contingent fee in federal procurement contracts.

Rather than a ban based on the tendency rationale, the modern Court would be more likely to adopt a facts and circumstances analysis, instructing lower courts to examine whether improper means were actually used or contemplated in any particular contingent fee lobbying situation.

Given this change in First Amendment jurisprudence, a contingent fee lobbying ban may not pass strict scrutiny – meaning that the existing state statutes banning contingent fee lobbying contracts may be vulnerable. To justify those state bans, some might argue that there are other methods, besides hiring a lobbyist, to petition the government. However, that a potentially less effective (or “more burdensome”) route for petitioning the government exists does not justify an undue burdening of First Amendment expression.<sup>116</sup> If a statutory ban prevents a person from exercising the opportunity to petition the government in the most effective manner, a state statutory ban could be found unconstitutional.

In summary, while a ban on contingent fee lobbying may possibly deter some corruption, it would be just as likely to infringe on legitimate speech.<sup>117</sup> Therefore, a ban on contingent fee

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<sup>116</sup> Meyer v. Grant, 486 U.S. 414, 424 (1988) (citations omitted):

That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado’s prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open ‘more burdensome’ avenues of communication does not relieve its burden on First Amendment expression. The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.

<sup>117</sup> This constitutional argument for contingent fee lobbying is more readily apparent in certain contexts. The argument does not work as well when no money is generated from passage of the bill and, therefore, the contingent fee may not increase access to the political system – for example, lobbying for or against a civil rights bill. However, contingent fee lobbying is still lobbying. If there is a first amendment right to lobby, then contingent fee lobbying should be included within the larger right.

lobbying – a ban based purely on the mode of compensation for hired political speech – would be overbroad. The Supreme Court’s recent First Amendment cases, despite early precedents, support this conclusion. However, even if contingent fee lobbying contracts are legally permissible, is it an ethical practice for lobbyists and their clients to use them?

## **VI. THE ETHICS OF CONTINGENT FEE LOBBYING**

The American League of Lobbyists Code of Ethics makes no statement regarding the use of contingent fees in lobbying.<sup>118</sup> And, while lobbying is, in various law review articles and compilations, included among examples of activities for which lawyers cannot ethically receive contingent fees,<sup>119</sup> the only prohibitions on contingent fees that appear in either the ABA Model Rules of Professional Conduct or the ABA Model Code of Professional Responsibility are restrictions on their use in domestic relations and criminal matters.<sup>120</sup> With no guidance from these usual sources, it is particularly important to take seriously the objections of the tendency rationale and weigh how legitimate is the argument that lobbying under a contingent fee creates the tendency to corrupt behavior, and that, consequently, prohibiting a contingent fee would avert this tendency and avoid corruption.

The perceptions of lobbying and lobbyists outside Washington, DC, unfortunately, appear to echo the 19th century Supreme Court view that lobbying is by its nature scandal-ridden and corrupt. Clearly, there continue to be modern lobbying scandals, involving lobbyists like

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<sup>118</sup> ALL Code of Ethics, Art. VI, Compensation and Engagement Terms, available at <http://www.alldc.org/ethicscode.htm>.

<sup>119</sup> See, e.g., Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 503 (1991).

<sup>120</sup> ABA Model Code of Professional Responsibility, EC 2-20; ABA Model Rules of Professional Conduct, Rule 1.5(d). Some have argued that, in any event, the ABA guidance is inadequate for legislative lawyers. See Michelle Grant, Note, *Legislative Lawyers and the Model Rules*, 14 GEO. J. LEGAL ETHICS 823 (2001). The Model Code does state that contingent fees should generally not be charged except to clients who are unable to pay a reasonable fixed fee, although the Code also acknowledges that there will be times and circumstances in which a contingent fee for someone who can pay a fixed fee is appropriate – it may make sense to use this measure in gauging whether any individual client should be charged a contingent fee for lobbying services; however, it does not answer the question whether a contingent fee should be charged for lobbying services at all. ABA Model Code of Professional Responsibility, EC 2-20.

Jack Abramoff and congressmen like Randy “Duke” Cunningham and Robert Ney. However, these men – and others caught up in most of the recent lobbying scandals – engaged in behavior that is illegal, not just unethical. Jack Abramoff, for example, pled guilty to conspiracy, fraud, and tax evasion; the conspiracy count includes conspiracy to violate the federal laws governing bribery of public officials.<sup>121</sup> No ban on contingent fee lobbying contracts would have prevented that kind of illegal behavior. If lobbying under a contingent fee contract involves conduct that is illegal, then there are already laws in place to address that improper conduct; banning the form of compensation would accomplish little additional deterrence. (There is no evidence that Mr. Abramoff received contingent fees for his lobbying activities, but if he had, we cannot imagine that they would have had any additional corrupting influence.)

This is not to deprecate as unfounded the dangers described by the tendency rationale. Although contingent fee lobbying should not (and probably may not, under First Amendment jurisprudence) be banned completely, it is certainly subject to abuse, and surely more subject to abuse than lobbying that is compensated by other means. It is easy to see, for example, how a contingent fee could lead a lobbyist to hide an undisclosed conflict of interest, could motivate unscrupulous conduct, and could have the potential to further undermine the public’s confidence in both lobbying and the legislative process generally.

As to the first example, consider the lobbyist who has two clients seeking amendments to the tax code or endeavoring to obtain earmarks in a single appropriations bill. If the lobbyist's compensation arrangement with one client is a retainer or based upon hourly billing and with the other entails a bonus or contingency, it is not difficult to hazard a guess regarding whose cause

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<sup>121</sup> See *United States v. Abramoff*, Plea Agreement (D.D.C. Jan. 3, 2006), available at <http://fl1.findlaw.com/news.findlaw.com/wp/docs/abramoff/usabrmff10306plea.pdf>.



would be most vigorously pleaded if she has but one chip to expend with the key committee chairman.

As to the second example, human nature suggests that corners are more likely to be cut if the runner has a substantial financial stake in winning the race. Lobbying activities do not take place on the record in a courtroom, where contingent fee litigation plays out; they occur mostly out of public sight. So where the stakes are large, the potential that a huge reward might motivate a lobbyist's corner-cutting cannot be denied.

Finally, there is simply an unseemly aspect to the notion that a lobbyist is to be paid in exchange for obtaining a public (legislated) benefit for a private client. Public trust, if not public funds, are at issue, and the quid-pro-quo aspect of the contingent payment (the client will pay money to the lobbyist if and only if the lobbyist can deliver the amendment or legislation) simply does not pass the public's concept of how our government ought to work.

The solution for these problems, however, is not to outlaw contingent fee lobbying. We have confidence that the tendency to corrupt can be reasonably countered by subjecting contingent fee lobbying to greater disclosure and scrutiny. As with many potential lobbying abuses, the best disinfectant is sunlight.

We propose that the Lobbying Disclosure Act be amended to require the specific disclosure of any contingent fee lobbying contract at the time the agreement is entered into.<sup>122</sup> There is no such requirement today.

Guidance issued pursuant to the Lobbying Disclosure Act proposes that a lobbyist retained on a contingent fee basis must register under the LDA, but the registration form no

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<sup>122</sup> See note 71 supra for state laws expressly requiring disclosure of contingent fee lobbying arrangements. There is some parallel for this disclosure requirement in the litigation context. At least one jurisdiction permits contingent fees in certain domestic relations cases so long as “the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court.” Tenn. Sup. Ct. Rules, Rule 8, Rules of Professional Conduct, RPC 1.5(d)(1).

where includes even the option of declaring that a contingent fee is implicated in the engagement of the lobbyist.<sup>123</sup> And, while the LDA requires a registered lobbyist to report compensation after it has been received by the lobbyist, that the compensation was received under a contingent fee arrangement is not reported on the semiannual reporting forms.<sup>124</sup>

This amendment should require that a separate field be established in every lobbying registration filing to be completed if the lobbyist is engaged under a contingent fee contract or other bonus compensation agreement. The information disclosed should include the existence of the arrangement; the amount, percentage, or other compensation to be paid on the condition of attaining the contingency; and the subject matter and legislative action on which the contingency is based.

With such a comprehensive disclosure requirement, and with the media and many watchdog groups in Washington that would devour and publicize this kind of information,<sup>125</sup> even an unscrupulous lobbyist would hesitate before signing a contingent fee agreement that could potentially be seen as encouraging corrupt behavior. This kind of disclosure could also add a heightened level of transparency to at least one aspect of the congressional earmarking process, which has been subject to strong condemnation for providing a fertile breeding ground for both congressional and lobbyist corruption. A lobbyist who is willing to sustain widespread public scrutiny and potential criticism for a contingent fee lobbying agreement is unlikely also to be cutting corners on the racetrack

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<sup>123</sup> The Guidance continues that "law other than the LDA governs whether a firm may be retained on a contingent-fee basis." U.S. Senate: Legislation and Records Home, Lobbying Disclosure Act Guidance § 5, *available at* [http://www.senate.gov/legislative/common/briefing/lobby\\_disc\\_briefing.htm](http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm).

<sup>124</sup> Section 5(b) of the LDA, 2 U.S.C. § 1604(b), requires the lobbyist to disclose a good faith estimate of the total amount of all lobbying-related income, subject to generous rounding conventions, received from the client during the semiannual reporting period.

<sup>125</sup> Many non-governmental organizations, news organizations, bloggers, and others comb through lobbyist registrations and congressional actions, looking for just this kind of information so that the information can be publicized. *See, e.g.*, the Center for Responsive Politics, <http://www.opensecrets.org/lobbyists/index.asp>; Council for Citizens Against Government Waste, <http://councilfor.cagw.org/>.

If lobbyists are necessary to success in advocating for federal executive or legislative action, and if the kind of disclosure we propose removes or at least severely reduces the corrupting tendency of contingent fee lobbying, is there a potential benefit from to be obtained from removing the stigma from these arrangements? Stated another way, could contingent fee lobbying expand the prospect for obtaining effective professional advocacy for those who might not otherwise be able to afford Washington's high-priced lobbyists? If professional lobbying is necessary to doing business in Washington, then access to a professional lobbyist should not be limited to those who are capable of paying hefty retainers or high hourly rates. More widespread use of fully disclosed contingent fees for lobbying compensation could, simply stated, give individuals, organizations, small businesses, and local governments an effective tool to be used in pursuit of professional, reason-based, and cost-effective persuasion of federal lawmakers.