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Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient

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MEDICAL MALPRACTICE AND CONTINGENCY FEE CONTROLS: IS THE PRESCRIPTION CURING THE CRISIS OR KILLING THE PATIENT?

I. INTRODUCTION

In 1975, the California Legislature enacted a statute limiting the contingency fees that attorneys could charge medical malpractice victims in tort actions brought against health care providers.[1] The statute was one of a number of legislative alterations in medical malpractice litigation[2] prompted by a perceived "crisis" affecting the health care delivery system in the state.[3] Meeting in special session, the legislature passed the

1. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985). The statute provides that:

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.

(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).

Id.

2. In addition to the contingency fee limits, the Medical Injury Compensation Reform Act of 1975, Cal. A.B. lxx, 1975-76 2d Ex. Sess., ch. 1, 2 Cal. Stat. 3949 (1975) [hereinafter cited as MICRA], also imposed comprehensive changes in the health care field in three general areas: medical quality assurance, medical malpractice insurance and medical malpractice litigation. The major provisions governing medical malpractice litigation include: (1) elimination of the collateral source rule, CAL. CIV. CODE § 3333.1 (West Supp. 1985); (2) limitation on recovery for non-economic losses to a maximum of $250,000, CAL. CIV. CODE § 3333.2(b) (West Supp. 1985); (3) changes in the statute of limitations for actions for professional negligence against health care providers, CAL. CIV. PROC. CODE § 340.5 (West 1982); (4) requirement of notice to health care providers of intention to file suit, CAL. CIV. PROC. CODE § 364 (West 1982); (5) requirement that awards for future damages in excess of $50,000 must, on request by the defendant, be paid periodically rather than made in a lump sum payment, CAL. CIV. PROC. CODE § 667.7 (West 1980); and (6) provisions governing arbitration clauses in contracts for medical services, CAL. CIV. PROC. CODE § 1295(a) (West 1982).

3. The situation was termed a "crisis" in California in a report by the state's Auditor General which concluded that: (1) few insurance companies were providing medical malpractice insurance in California; (2) the insurance industry was facing a net loss of approximately $400,000,000 for coverage provided during the period 1960 through 1974; (3) premiums paid by doctors in California in 1976 were projected to increase about five times from the amount paid in 1974; and (4) premiums paid by California doctors had not kept pace with increasing claim costs over the previous 15 years. JOINT LEGISLATIVE AUDIT COMMITTEE, OFFICE OF

controversial reform measures amidst heated debate among doctors, lawyers and insurance companies.[4]

Carrying the bitter debate to the courts, opponents immediately launched constitutional challenges to every major provision embodied in the Medical Injury Compensation Reform Act (MICRA). Their ten year legal battle ended when the California Supreme Court narrowly upheld each of the Act's provisions in a series of four cases.[5] The decisions re-

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THE AUDITOR GENERAL, CALIFORNIA LEGISLATURE: THE MEDICAL MALPRACTICE INSURANCE CRISIS IN CALIFORNIA 1, 4-5 (1975) [hereinafter cited as AUDITOR GENERAL'S REPORT].

In 1965 there were at least 17 companies writing malpractice insurance in California. In December of 1975 there were only three, with one carrier "making every effort to withdraw from the medical malpractice market." *Id.* at 13. In January of 1975, Pacific Indemnity and Star Insurance Companies notified the 2000 doctors they insured in southern California that their coverage would not be renewed. Meanwhile, Argonaut Insurance, which provided insurance to 4000 doctors in northern California, increased its premiums by 380%. Keene, *California's Medical Malpractice Crisis*, in A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 27 (1976). At the same time, a work slowdown was proposed by Los Angeles County doctors following a proposed insurance rate hike of 486%. *When Doctors Rebel Against Higher Insurance Costs*, U.S. NEWS & WORLD REP., Jan. 19, 1976, at 36.

The problem had also become one of national concern. By October of 1975 at least 39 states had commissioned studies of the medical malpractice crisis and 22 states had revised civil practice laws to remedy the problem. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 761 n.14 (1977). *See also*, T. LOMBARDI, JR., MEDICAL MALPRACTICE INSURANCE: A LEGISLATOR'S VIEW 118-19 (1978) (chart of state reforms); Chapman & White, *Are the New State Malpractice Laws Working to Protect You?*, 8 LEGAL ASPECTS OF MEDICAL PRACTICE, May, 1980, at 40, 42-46.

4. *See generally* Keene, *supra* note 3, at 27. Keene, a California state senator, was the principal author of the California legislation. In his article, Senator Keene described the battle waged before the legislature by these various interests. *Id.* at 31-33.

5. The four decisions beginning in July of 1984 include: (1) American Bank & Trust Co. v. Community Hospital, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (upholding CAL. CIV. PROC. CODE § 667.7 (West 1980), governing periodic payments of future damage awards); (2) Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984) (upholding CAL. CIV. CODE § 3333.1 (West Supp. 1985), prohibiting recovery of benefits by collateral sources from medical malpractice defendants); (3) Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77, *modified*, 38 Cal. 3d 620a (1985) (upholding CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985), establishing contingency fee limitations in actions against health care providers); and (4) Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (upholding CAL. CIV. CODE § 3333.1 (West Supp. 1985), permitting introduction of evidence of benefits received by plaintiffs from collateral sources and CAL. CIV. CODE § 3333.2 (West Supp. 1985) limiting plaintiffs' recovery of damages for non-economic losses in medical malpractice actions to $250,000).

Three of the four cases were decided by 4-3 votes. Justice Otto Kaus wrote the majority opinion in each case and was joined by Justice Broussard and Grodin in all four. Justice Reynoso joined the majority in the *Barme* case, which was decided by a 5-2 vote. Newly appointed Justice Malcolm Lucas joined the majority in the last three cases, *Roa*, *Barme* and *Fein*. Chief Justice Bird and Justice Mosk dissented in all four cases and were joined by a judicial council appointee in all but the *Barme* case.

The court had initially indicated its intention to strike down MICRA. In March of 1983,

flect a conservative shift by a majority of the court away from its historically active role in creating or upholding individual rights and set a new benchmark for the scope of judicial review in California.

In addition, one issue of special significance emerged for the first time from the court's review of the Act's contingency fee limits in *Roa v. Lodi Medical Group, Inc.*[6] In a lengthy dissent, Chief Justice Bird contended that a limit on attorney fees infringes litigants' free speech rights and, consequently, violates the first amendment. Her view raises new questions about the validity of such controls and the limits of legislative power to regulate attorney fees.

This Note will explore the implications of the *Roa* case: both the majority's standard for judicial review in California, and the dissent's signal for expanded recognition of individual first amendment freedoms. Additionally, this Note will consider the application of statutory contingency fee limits to all tort actions, and whether the *Roa* decision supports such an extension.

II. LEGISLATIVE HISTORY OF SECTION 6146

The medical malpractice insurance crisis erupted in the early 1970's when insurance premiums rose dramatically and insurance companies, apparently faced with huge losses, withdrew from the medical malpractice field into more profitable lines of business.[7] This prompted legislative scrutiny on a national and local level, as well as debates in the insurance, medical and legal professions concerning the cause and cure for this crisis. In 1974, a California Assembly Select Committee began investigating the roots of the problem and sought recommendations for measures to bring insurance premiums back in line.[8]

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the court reached its first of two decisions in the *American Bank* case, holding by a 4-3 vote that the periodic payment provision was invalid. 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983), *rev'd*, 36 Cal. 3d 359, 633 P.2d 670, 204 Cal. Rptr. 671 (1984) (original opinion ordered depublished). The majority opinion, written by Justice Mosk, concluded that the act had failed to meet its purpose of holding down medical costs and that, therefore, the provision was an unconstitutional denial of equal protection because it was based on false legislative assumptions. 660 P.2d at 840-41, 190 Cal. Rptr. at 382-83. Following the rehearing, the court reversed its decision. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

6. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77, *modified*, 38 Cal. 3d 620a (1985), *appeal dismissed*, 53 U.S.L.W. 3344 (Nov. 18, 1985). At the time of publication of this article, the modification of the *Roa* opinion appears in a separate volume of the *California Reports* Advance Sheets. When the bound edition of Volume 37 is published, the modification will be inserted directly in the text and will not appear separately. Pages appearing after the inserted text will be adjusted accordingly. As a result, the page references in this Note may be slightly affected.

7. *See supra* note 3.

8. The California Assembly Select Committee on Medical Malpractice held its first hear-

Concerns about contingency fees and their effect on insurance premiums were raised during these legislative hearings.[9] While contingency fees are recognized as a means for the poor to gain access to the courts,[10] some witnesses suggested that they indirectly lead to higher premiums because they are a factor in high jury verdicts and encourage attorneys to initiate unjustified litigation.[11] Thus, contingency fee limitations were

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ing in Los Angeles on November 12, 1973. Further hearings were conducted on December 20, 1973, November 8, 1974 and February 8, 18 and 21, 1975. *See, e.g., California Assembly Select Committee Hearing on Medical Malpractice, Nov. 12, 1973*, 1973-74 Reg. Sess. (1973); *California Assembly Select Committee Hearing on Medical Malpractice, Feb. 8, 1975*, 1975-76 Reg. Sess. (1975) [hereinafter these hearings will be cited collectively as *Select Committee Hearings* along with the appropriate hearing date]. The Committee made factual findings concerning the increase in malpractice claims (40% rise in nine years), increases in insurance rates (400% between 1968-70) and the reasons for those increases. CALIFORNIA ASSEMBLY SELECT COMMITTEE ON MEDICAL MALPRACTICE, PRELIMINARY REPORT 3-6 (1974) [hereinafter cited as SELECT COMMITTEE PRELIMINARY REPORT]. It concluded that "[t]he principal reason for the increase of medical malpractice claims is that more patients are electing to sue today than ever before," and that this " 'legal rights explosion' " resulted from the fact that "[a] greater number of plaintiff's lawyers have become experts in medical malpractice." *Id.* at 3-4. The committee found, however, that "there is little evidence that a large number of non-meritorious medical malpractice nuisance suits have been filed." *Id.* at 5.

A study commissioned by the California Legislature concluded that the crisis resulted from the restricted availability of malpractice insurance, the lack of policing of physicians by the state's Board of Medical Examiners, the failure of the Department of Insurance to police the insurance industry and to assure that malpractice insurance rates and reserves were adequate and the unregulated investment practices of the insurance industry which had resulted in a severe strain on the industry's financial solvency. AUDITOR GENERAL'S REPORT, *supra* note 3, at 2-4.

9. *See Select Committee Hearings* (Nov. 8, 1974), *supra* note 8, at 12-13; *Select Committee Hearings* (Feb. 18, 1975), *supra* note 8, at 17, 84-98, 102-05; *Select Committee Hearings* (Feb. 21, 1975), *supra* note 8, at 80-82, 101, 154-56.

10. One commentator has stated that "[t]he contingent fee makes it possible for anyone in our society to get the best lawyer. The client need not be a rich man. He need only have a good case." Kreindler, *The Contingent Fee: Whose Interests Are Actually Being Served?*, 14 FORUM 406 (1979). The contingent fee encourages efficiency and has led to the development of the lawyer as an agent for desirable social change, with an incentive to make the law better and recovery more adequate. *Id. See also* F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 5 (1964).

11. *See Select Committee Hearings* (Feb. 18, 1975), *supra* note 8, at 145-46 (testimony of Assemblyman Leroy Greene); *Select Committee Hearings* (Feb. 21, 1975), *supra* note 8, at 75-76, 81 (testimony of Kay Eberhard, Vice President of Signal Imperial Insurance Co.); *Id.* at 101 (testimony of Dr. Sanford Rothenberg, President, Los Angeles County Medical Association).

In general, contingency fees have been said to create a conflict of interest between the attorney and client, encourage solicitation and nuisance suits, prevent settlements and lead to increased litigation costs and unreasonable attorney fees. *See* F. MACKINNON, *supra* note 10, at 4-5; Comment, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 942 (1979); Comment, *Physicians Counterattack*, 45 FORDHAM L. REV. 1003, 1082 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1443.

proposed by various legislative and administrative committees as one means of guaranteeing the availability of medical malpractice insurance.[12]

Critics of the proposed fee limits claimed that lower contingency fees would have little, if any effect on insurance premiums,[13] and would serve only to discourage attorneys from handling even meritorious medical malpractice cases.[14] Lower insurance rates, they contended, would result from such controls only because meritorious plaintiffs would be unfairly denied the ability to sue.[15] Further, several reports pointed out that contingency fees actually protect physicians from groundless suits since attorneys screen out unpromising cases.[16]

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12. *See* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE xx (1973) (summary of recommendations) [hereinafter cited as HEW REPORT]; SELECT COMMITTEE PRELIMINARY REPORT, *supra* note 8, at 69.

13. The Auditor General's Report concluded that "[u]nless the amount of medical malpractice settlements continue to increase in the future *there will be little if any effect* on medical malpractice rates as a result of limitations imposed on attorney contingency fees." AUDITOR GENERAL'S REPORT, *supra* note 3, at 30 (emphasis added). The California Insurance Commissioner projected the premium savings from lower contingency fees in medical malpractice cases at one to three percent, while savings from the overall MICRA package of reforms were estimated at anywhere from 17% to 33%. AB lxx Premium Savings Estimated by the Insurance Commissioner (Aug. 5, 1975), *reprinted in* Sulnick, *Medical Malpractice Reform Act (1975): The Failure of AB lxx to Deal with Medical Malpractice—A Constitutional Tragedy*, 15 CAL. TRIAL LAW J. 17, 59-60 n.104 (1976). Jurors, in fact, may not legally consider attorney fees in reaching a verdict and to do so may be grounds for a mistrial. *See* Krouse v. Graham, 19 Cal. 3d 59, 81, 562 P.2d 1022, 1034, 137 Cal. Rptr. 863, 875 (1977).

14. *See Select Committee Hearings* (Feb. 18, 1975), *supra* note 8, at 85-87 (testimony of Arne Werchick, representing Cal. Trial Lawyers Ass'n); Comment, *supra* note 11, 52 S. CAL. L. REV. at 944. One commentator has stated:

> Since many of these legislative changes limit the amount of the lawyer's fee only where recovery is substantial, they should have little, if any, effect on the prosecution of smaller nuisance claims. Moreover, such legislation may have the adverse effect of discouraging the prosecution of meritorious malpractice suits especially where the patients' monetary recovery appears to be limited.

Comment, *supra* note 11, 45 FORDHAM L. REV. at 1082. In particular, it was argued the legislation would "hinder claims by seriously injured poor patients whose ability to sue is dependent upon the contingency fee arrangement without which they could not afford counsel." Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 671 (1976).

15. HEW REPORT, *supra* note 12, at 114 app. *See also* Sulnick, *supra* note 13, 15 CAL. TRIAL LAW J. at 25 ("It is clear that the regulation of attorney fees is meant by The Act to function as a means of reducing the number of malpractice suits, which, in turn, is supposed to aid in the stabilization, if not reduction, of medical malpractice insurance premiums."); Comment, *supra* note 11, 45 FORDHAM L. REV. at 1012, 1082 n.519; Comment, *supra* note 11, 52 S. CAL. L. REV. at 944 n.696; Comment, *supra* note 14, 50 TUL. L. REV. at 671.

16. The Assembly Select Committee on Medical Malpractice, for example, reported a 95% rejection rate of potential medical malpractice cases by attorneys. SELECT COMMITTEE PRELIMINARY REPORT, *supra* note 8, at 43. A federal study concluded that medical malprac-

On May 19, 1975, Governor Edmund G. Brown, Jr. called the California Legislature into an extraordinary session to deal with the medical malpractice crisis. In his proclamation, the Governor articulated his reasons for the unusual procedure:

> The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals. The longer term consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens.
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> In my judgment, no lasting solution is possible without sacrifice and fundamental reform. It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.[17]

The Governor requested a series of reforms including establishment of reasonable limits on contingency fees charged by attorneys.[18] In response, the legislature enacted the Medical Injury Compensation Reform Act (MICRA), which included Business and Professions Code section 6146.[19] California thus joined eighteen other states in responding to the medical malpractice insurance crisis by enacting some type of contingency fee control.[20] By doing so, the legislature departed from a long-

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tice attorneys accept only one out of four possible cases, and reject 41% of those cases because of a lack of perceived liability. Dietz, Baird & Berul, *The Medical Malpractice Legal System*, in HEW REPORT, *supra* note 8, at 97 app. The Dietz study concluded that there was a

> high degree of concern by members of the plaintiffs' bar with obtaining a medical opinion before accepting a case and the high degree of unsolicited response and concern as to the client's motives or good faith. Both suggest that the plaintiff's bar is professionally discharging its responsibility to society and to the medical profession in screening medical malpractice claims.

Id. at 100 app.

17. 13 CAL. ASSEM. J., 1975-76 2d Ex. Sess. 2 (May 19, 1975) [hereinafter cited as 13 CAL. ASSEM. J.]. For a discussion of the causes of this crisis, see *supra* note 3.

18. 13 CAL. ASSEM. J., *supra* note 17, at 3. The Governor also called for a reconstitution of the Board of Medical Examiners, expansion of the Board's disciplinary authority, development of a system to correct maldistribution of medical care, establishment of a Medical Peace Corps., regulation of hospital rates, use of voluntary binding arbitration, elimination of collateral source recovery and investigation of insurance rates. *Id.* at 2-3.

19. Medical Injury Compensation Reform Act, ch. 1 § 24.2, 1975-76 2d Ex. Sess., 2 CAL. STAT. 3949, 3967-68 (1975) (approved by Governor Sept. 23, 1975, operative Dec. 12, 1975). For text of CAL. BUS. & PROF. CODE § 6146 see *supra* note 1.

20. Four of these states, Delaware, New Hampshire, New York and Pennsylvania, enacted contingency fee sliding scales similar to California's. *See* DEL. CODE ANN. tit. 18, § 6865

standing tradition permitting parties to set the amount of an attorney's compensation among themselves,[21] and placed California among the few

(Supp. 1984); N.H. REV. STAT. ANN. § 507-C:8 (1983); N.Y. JUD. LAW § 474-a (McKinney 1983); PA. STAT. ANN. tit. 40, § 1301.604 (Purdon Supp. 1985). The various fee scales would have permitted attorney fees in the *Roa* case from a low of $90,000 in Delaware, $113,600 in New Hampshire, $115,000 in Pennsylvania, to a high of $166,666 in New York. The Delaware and Pennsylvania statutes have provisions allowing medical malpractice plaintiffs and their attorneys to select a mutually agreeable per diem fee as an alternative to the sliding scale, while New Hampshire plaintiffs could agree to pay a fee based on the reasonable value of the attorney's services at the conclusion of the action. The New York and New Hampshire statutes permit attorneys to apply to the court for a larger fee at the close of the action if the increase is justified by extraordinary circumstances. Both the New Hampshire and Pennsylvania statutes have been held unconstitutional, while the Delaware statute was upheld by a federal district court sitting in a diversity case. *See* Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Heller v. Frankston, 76 Pa. Commw. 294, 464 A.2d 581 (1983), *aff'd*, 504 Pa. 528, 475 A.2d 1291 (1984); DeFillipo v. Beck, 520 F. Supp. 1009 (D. Del. 1981).

A few of the remaining states regulate contingency fees in medical malpractice cases by establishing a maximum fee limit. *See* OR. REV. STAT. § 752.150 (1983); TENN. CODE ANN. § 29-26-120 (1980). A similar Idaho statute, IDAHO CODE § 39:4213 (1977), was repealed in 1981. In addition, Indiana, which provides a patient compensation fund out of which damages over $100,000 are paid, limits attorney fees from any award paid out of the fund to 15% but gives a patient the right to elect to pay for attorney services on a per diem basis at the time of employment. IND. CODE § 16-9.5-5-1 (1983). This statute was upheld by the Indiana Supreme Court in Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585 (1980).

The remainder of the states chose to avoid setting any fee limit but require judicial approval of fees in individual cases. *See* ARIZ. REV. STAT. ANN. § 12-568 (1982); FLA. STAT. ANN. § 768.56 (West Supp. 1985); HAWAII REV. STAT. § 671-2 (Supp. 1984); IOWA CODE § 147.138 (1985); KAN. STAT. ANN. § 7-121b (1982); MD. CTS. & JUD. PROC. CODE ANN. § 3-2a-07 (1984); NEB. REV. STAT. § 44-2834 (1984); WASH. REV. CODE ANN. § 7.70.070 (Supp. 1985); WIS. STAT. § 655.013 (1983-84). Both the Maryland and Nebraska statutes have survived constitutional challenges. *See* Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

Federal legislation has recently been introduced to establish a contingency fee scale in all medical malpractice actions. H.R. 2659, 99th Cong., 1st Sess., (1985).

21. Attorney fees in California are governed by § 1021 of the Code of Civil Procedure which states that: "Except as attorney fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." CAL. CIV. PROC. CODE § 1021 (West 1980) (enacted in 1872).

A promise to pay a contingent fee must be made by an express contract. *See* 7 CAL. JUR. 3d, *Attorneys at Law* § 252 (1973) (and supporting cases). Generally, contingency fees must be reasonable, and an attorney cannot recover a fee so excessive that it appears unreasonable. A fee is unconscionable "when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community." RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 2-107 (1980). Among the factors to be considered in determining the reasonableness of a fee are the following:

(1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The amount involved and the results obtained.

states to successfully regulate contingency fees in personal injury litigation by imposing a sliding fee scale.[22]

III. FACTS OF THE CASE

Roa v. Lodi Medical Group, Inc. involved a direct constitutional challenge to California's contingency fee statute. The plaintiffs, Frank and Yvonne Roa, brought suit on behalf of their minor son against a medical group, a doctor and a hospital for injuries he received during birth. After a $500,000 settlement was reached between the Roas, the medical group and the doctor, the plaintiffs petitioned the court for approval of the settlement and payment of a $90,798.00 fee out of the proceeds to their attorneys.[23] The fee represented the maximum amount allowable for a $500,000 judgment under section 6146 of the California Business and Professions Code.[24] However, the Roas later filed a second petition requesting payment of twenty-five percent of the total judgment

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(4) The time limitations imposed by the client or by the circumstances.
(5) The nature and length of the professional relationship with the client.
(6) The experience, reputation and ability of the lawyer or lawyers performing the services.
(7) Whether the fee is fixed or contingent.
(8) The time and labor required.
(9) The informed consent of the client to the fee agreement.

Id. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1)-(2) (1983). In California, contingent fees of up to 50% have been upheld as reasonable. Estate of Raphael v. Greene, 103 Cal. App. 2d 792, 230 P.2d 436 (1951). However, a contingent fee agreement under which an attorney was to receive a 70% share has been held unconscionable and unenforceable. Jackson v. Campbell, 215 Cal. 103, 8 P.2d 845 (1932).

22. Both New York and New Jersey have rules governing contingency fees in all personal injury litigation. *See* N.Y. CT. R. § 603.7(e) (McKinney 1984); N.J. CT. R. Rule 1:21-7(c) (West 1984) (originally enacted in 1976). Both rules have been held constitutional. *See* Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491, *modified*, 6 N.Y.2d 983, 161 N.E.2d 736, 191 N.Y.S.2d 951 (1959), *appeal dismissed*, 361 U.S. 374 (1960); American Trial Lawyers Ass'n v. New Jersey, 126 N.J. Super. 577, 316 A.2d 19, *aff'd*, 66 N.J. 258, 330 A.2d 350 (1974). The Florida Supreme Court held that a similar sliding fee scale proposed for all personal injury actions by the Florida State Bar was unconstitutional. *In re* Florida Bar, 349 So.2d 630, 631 n.2 (1977).

23. 37 Cal. 3d 920, 924, 695 P.2d 164, 165, 211 Cal. Rptr. 77, 78. Section 3500(b) of the California Probate Code requires judicial approval of a settlement involving a minor. CAL. PROB. CODE § 3500(b) (West 1981). Section 3601 of that code provides that upon judicial approval of such a settlement, "the court shall make a further order authorizing and directing that . . . attorney fees, as the court shall approve . . . shall be paid from the money . . . to be paid . . . [to] the minor." CAL. PROB. CODE § 3601 (West 1981).

24. Under § 6146, the $90,798.00 fee breaks down approximately as follows: $20,000 fee for the first $50,000; approximately $16,000 for the next $50,000; $25,000 for the next $100,000; and $30,000 for the remaining $300,000. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985). For text of this statute, see *supra* note 1. These figures are not exact because the Roas did not provide an exact itemization of the fee.

to their attorneys.[25] At the hearing on the second petition, the Roas testified that they were aware of the statutory limitations on attorney fees, but that they believed their attorneys were "entitled" to the greater amount.[26] The trial court awarded the lower amount, finding that although the twenty-five percent would have been a "fair and reasonable" amount, the statutory limits prevented the higher award.[27]

The plaintiffs' attorneys appealed on the Roas' behalf, contending that the statute violates the federal and state equal protection clauses, the due process clause and the doctrine of separation of powers. A unanimous appellate court disagreed, finding the statute constitutional.[28] A sharply divided California Supreme Court affirmed the lower court ruling by a vote of four to three. The United States Supreme Court, with two dissents, refused to hear the Roas' appeal.[29]

IV. THE COURT'S REASONING

Roa v. Lodi Medical Group, Inc. principally involved a facial challenge to the constitutionality of the attorney fee limits embodied in section 6146. In their due process arguments, the plaintiffs alleged that the statute prevents or inhibits plaintiffs from retaining counsel of their choice because the fee limits are so low they will discourage attorneys from handling malpractice claims.[30] In addition, the sliding scale nature of the fee schedule creates a conflict of interest between an attorney and client by reducing the attorney's incentive to push for a higher recov-

25. A fee of 25% would have totaled $125,000, an increase in payment to the attorneys of approximately $35,000.

26. 37 Cal. 3d at 924, 695 P.2d at 165-66, 211 Cal. Rptr. at 78-79.

27. *Id.*, 695 P.2d at 166, 211 Cal. Rptr. at 79.

28. 129 Cal. App. 3d 318, 181 Cal. Rptr. 44 (1982) (opinion by Reynoso, J., ordered depublished). The appellate court noted the strange procedural posture of the case, pointing out that although the attorneys' interest in their fee was adverse to their clients' interests, the same attorneys were pursuing the appeal, purportedly on behalf of the clients. 181 Cal. Rptr. at 46 n.1.

The California Supreme Court held, however, that although the attorneys may well have had standing to appeal from the order setting their fees, it did not necessarily follow that the plaintiffs themselves were not entitled to appeal. According to the court, the plaintiffs could have considered themselves aggrieved because if the statutory limits remained in place, their attorneys would have less of an incentive to pursue additional recovery against the remaining defendants. 37 Cal. 3d at 925 n.4, 695 P.2d at 166 n.4, 211 Cal. Rptr. at 79 n.4. The court did not decide whether, as a matter of professional ethics, the potential conflict of interest required separate representation of the attorneys and their clients. *Id.*

29. Roa v. Lodi Medical Group, Inc., 53 U.S.L.W. 3344 (Nov. 18, 1985) (appeal dismissed for lack of a substantial federal question; Justices Brennan and White would note probable jurisdiction).

30. Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 925, 927-28, 695 P.2d 164, 166, 168, 211 Cal. Rptr. 77, 79, 81 (1985).

ery.[31] The plaintiffs also attacked the statute as a violation of their substantive due process right to contract on the grounds that the limits prevent a plaintiff from bargaining with an attorney to set an appropriate fee.[32]

While the Roas were clearly precluded from claiming that the statute had deprived them of the ability to *obtain* counsel, they did contend that the sliding scale nature of the fee limits created a potential conflict of interest because their attorneys continued to represent them against the nonsettling defendants. Therefore, the Roas claimed, because the statute potentially limited their attorneys to a fee of only ten percent of any remaining recovery, the attorneys would lack an incentive to fully prosecute the case, thus causing the Roas harm.[33]

A. The Majority Opinion

The court in *Roa v. Lodi Medical Group, Inc.* acknowledged that the federal and state constitutions "embraced" a due process right to retain counsel in civil cases,[34] but reasoned that legislative regulation of attorney fees is well established and generally not "constitutionally suspect" or the subject of "strict" judicial scrutiny.[35] In reaching this conclusion, the majority placed particular emphasis and reliance on *Calhoun v. Massie*,[36] a 1920 United States Supreme Court decision that upheld a federal law limiting contingency fees to twenty percent in claims against the federal government.[37] Additionally, because the plaintiffs had made no em-

31. *Id.* at 928, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.

32. Appellant's Petition for a Hearing by the California Supreme Court at 17, Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985); Cal. Trial Lawyers Ass'n, Amici Curiae Brief in Support of Plaintiffs-Appellants at 19, Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

33. *See supra* note 28.

34. 37 Cal. 3d 920, 926, 695 P.2d 164, 166, 211 Cal. Rptr. 77, 79 (1985) (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Mendoza v. Small Claims Court, 49 Cal. 2d 668, 673, 321 P.2d 9, 12 (1958)).

35. *Id.* at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

36. 253 U.S. 170 (1920).

37. *Id.* at 173. In *Calhoun*, an attorney raised a due process challenge to the act, contending that it deprived him of rights to liberty and property protected by the fifth amendment. The attorney had prosecuted a successful claim against the federal government for plaintiff Massie, for a loss arising out of the Civil War. Prior to agreeing to represent Massie, Calhoun secured a fee arrangement whereby Massie agreed to pay him 50% of any amount collected. Calhoun won a $1900 judgment for Massie, payment of which required congressional approval. In the Omnibus Claims Act of 1915, Congress appropriated money for payment of 1115 claims, including Massie's. However, the claims bill required that " '[i]t shall be unlawful for any . . . attorney . . . to . . . collect, withhold or receive any sum which in the aggregate exceeds twenty percentum of the amount of any item appropriated in this bill.' " *Id.* at 172 (quoting the Omnibus Claims Act of March 4, 1915, ch. 140, 38 Stat. 962). Payment of 20%

pirical showing that the statute deprived plaintiffs of the ability to retain counsel[38] or that it created a particularly severe conflict of interest problem,[39] the court concluded that the statutory scheme did not constitute a deprivation of due process.[40]

The Roas' equal protection challenge was similarly dismissed by the court.[41] The plaintiffs had argued that the statute arbitrarily singles out poor medical malpractice victims and irrationally regulates plaintiffs' but not defendants' attorney fees. Claiming that the importance of the rights affected required a high level of protection, the plaintiffs urged the court to strictly scrutinize the statute and the legislative goals which led to its enactment. However, finding that no suspect classifications[42] or funda-

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of Massie's claim was made to Calhoun by the government. The attorney then attempted to collect an additional 30% from Massie by bringing suit in state court. After his claim was denied, Calhoun sought a writ of certiorari by the Supreme Court under the fifth amendment for deprivation of his liberty and property. *Id.* at 173.

38. 37 Cal. 3d at 928, 930, 695 P.2d at 168, 169, 211 Cal. Rptr. at 81, 82.

39. *Id.* at 929, 695 P.2d at 169, 211 Cal. Rptr. at 82. The court concluded that although § 6146 may affect the settings in which the attorney's and client's interests diverge, the statute does not create the basic conflict of interest problem inherent in all contingency fee agreements. *See supra* note 11.

40. 37 Cal. 3d at 929, 695 P.2d at 169, 211 Cal. Rptr. at 82.

41. The fourteenth amendment provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The clause guarantees equality under the same conditions and among persons similarly situated. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 993 (1978). As the Supreme Court recently stated:

> The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the states. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill.

Plyler v. Doe, 457 U.S. 202, 216 (1982). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn is rationally related to a legitimate state interest. Vance v. Bradley, 440 U.S. 93, 97 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam). However, where "suspect classifications" are drawn by a statute, *see infra* note 42, the Court applies a strict scrutiny analysis, which shifts the burden and requires the state to show a compelling purpose justifying the statute. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

42. The United States Supreme Court has found that suspect classifications include race, illegitimacy and religious preference. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam). The Court has denied that classifications based on age or wealth are suspect or otherwise require a strict level of scrutiny. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (age); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, (1973) (wealth). However, classifications based on gender or illegitimacy are subject to a somewhat heightened review and must be shown to be substantially related to an important state interest. Craig v. Boren, 429 U.S. 190 (1976) (gender); Mills v. Habluetzel, 456 U.S. 91 (1982) (illegitimacy). Further, the Court has stated that suspect groups include those

> that have historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. . . . Legislation imposing special disabilities upon groups disfavored by virtue of circum-

mental rights[43] were involved, the court applied a "rational basis" test to the statute, which predictably survived this minimal level of review.[44]

The *Roa* court relied on two of its earlier MICRA decisions, *American Bank and Trust Co. v. Community Hospital*[45] and *Barme v. Wood*,[46] to determine whether a rational basis existed for the Act's attorney fee provision.[47] In both cases, the court had found that the legislative purpose of the Act was to reduce the cost of medical malpractice insurance and thereby (1) induce hospitals and doctors to resume providing medical care to all segments of society and (2) guarantee that insurance would be available as compensation for patients injured through medical malpractice.[48]

The attorney fee provision was rationally related to the foregoing objectives, the *Roa* court concluded, because the statute would encourage plaintiffs to accept lower settlements and would deter attorneys from in-

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stances beyond their control suggests the kind of class or caste treatment that the Fourteenth Amendment was designed to abolish.

Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

The California Supreme Court has found that sex and poverty are additional suspect classifications prohibited by the California constitution. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (classifications based on sex held unconstitutional); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (classifications based on wealth, combined with a denial of the fundamental right of education, constituted equal protection violation), *cert. denied*, 432 U.S. 907 (1977); Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (statutory restrictions on poor women's rights to obtain abortion held unconstitutional denial of equal protection).

43. The equal protection clause also protects individuals from statutory schemes which establish classifications that infringe on constitutionally guaranteed fundamental interests. Plyler v. Doe, 457 U.S. 202, 216-17 (1982). If a fundamental interest is involved, the state must demonstrate that its classification has been precisely tailored to serve a compelling government interest. *Id.* The Supreme Court has found that express or implied fundamental rights under the United States Constitution include: the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to marry and procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); and the rights of free speech and assembly guaranteed by the first amendment, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). The California Supreme Court has found that rights guaranteed by the state constitution are also fundamental. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951). Both the United States and California Supreme Courts have impliedly rejected the view that the right to sue in tort is fundamental. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

44. *Roa*, 37 Cal. 3d at 931, 695 P.2d at 170, 211 Cal. Rptr. at 83.

45. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

46. 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984).

47. *Roa*, 37 Cal. 3d at 930, 695 P.2d at 170, 211 Cal. Rptr. at 83.

48. *Id.*

stituting frivolous suits.[49] The court also found that because other MICRA provisions reduce malpractice victims' recoveries, the attorney fee limits were necessary to protect their awards from further depletion by high contingency fees.[50] Thus, because of this special need, the legislature could have rationally chosen to regulate plaintiff but not defense attorney fees.[51] The court rejected the plaintiffs' contention that the fee scale itself was arbitrary and discriminated against more severely injured plaintiffs. It concluded that the legislature could have reasonably determined that the sliding scale approach produces more equitable fees and prevents windfalls to attorneys representing the very seriously injured.[52]

Quickly disposing of the plaintiffs' final challenge, the court summarily dismissed the contention that the regulation of attorney fees was a matter left solely to the judicial branch. The court concluded that California authority "expressly" permits legislative action to set reasonable fees and that section 6146, therefore, does not violate the California Constitution's separation of powers provision.[53]

B. The Dissenting Opinion

Chief Justice Bird's dissent sharply contrasts with the tone and conclusions of the majority opinion. The Chief Justice strenuously argued that section 6146 impinges upon medical malpractice victims' first amendment rights to petition the government for redress of grievances and imposes fee limits based upon the *content* of the views they wish to present to the court. The controls were therefore subject to strict judicial scrutiny, and must fail because they lack a "compelling" purpose.[54] Challenging the majority's questionable presumption of the facts, the Chief Justice also concluded that the fee limits significantly interfere with the right of malpractice victims to obtain attorneys of their choice and sharply exacerbate the conflict of interest between plaintiffs and their attorneys.[55] As a result, the statute is violative of the due process clause because it is not *sufficiently* related to the purposes it was enacted to achieve.[56]

Concluding that the statute also violates the equal protection clause

49. *Id.* at 931, 695 P.2d at 170-71, 211 Cal. Rptr. at 83-84.
50. *Id.* at 932, 695 P.2d at 171, 211 Cal. Rptr. at 84.
51. *Id.*
52. *Id.* at 933, 695 P.2d at 172, 211 Cal. Rptr. at 84-85.
53. *Id.*
54. *Id.* at 942, 695 P.2d at 178, 211 Cal. Rptr. at 91 (Bird, C.J., dissenting).
55. *Id.* (Bird, C.J., dissenting).
56. *Id.* at 944, 695 P.2d at 180, 211 Cal. Rptr. at 93 (Bird, C.J., dissenting) (emphasis added).

because it selectively burdens a suspect group,[57] Chief Justice Bird not only criticized the majority for failing to apply a high level of judicial scrutiny, but also argued that section 6146 should not have withstood "*any meaningful level* of judicial review."[58] Continuing a debate that began in *American Bank and Trust Co. v. Community Hospital*,[59] the first MICRA case, the Chief Justice accused the majority of misapplying the "rational basis" test in its review of the Act's provisions. According to Chief Justice Bird, the California Constitution requires that legislative classifications bear a "substantial and rational" relation to a legitimate state purpose.[60] The court must decide whether a legislative goal is *realistically* conceivable and must conduct a " 'serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.' "[61] Section 6146 does not meet this test because the relationship between plaintiffs' attorney fees and insurance premiums is speculative and indirect.[62] If the fee control was intended instead to limit frivolous suits, the Chief Justice reasoned, then the regulation is not consistent with the narrow reach of MICRA because frivolous suits occur in all types of litigation and may in fact be less likely in the medical malpractice area.[63]

The Chief Justice dismissed the view that the legislature intended to protect malpractice victims from further reduction of their recoveries, pointing out that the statute did nothing to ensure that plaintiffs would be able to obtain attorneys at the lower fees or that they would actually retain a higher percentage of their recoveries.[64] Accordingly, Chief Justice Bird reasoned, the restrictions on the malpractice victim's ability to hire an attorney could not be reconciled with any of MICRA's asserted purposes and were thus violative of equal protection guarantees.[65]

IV. ANALYSIS OF THE DECISION

The *Roa v. Lodi Medical Group, Inc.* majority's decision to apply a rational basis test to section 6146 perpetuates a debate among members

57. *Id.* at 949, 695 P.2d at 183, 211 Cal. Rptr. at 96 (Bird, C.J., dissenting).

58. *Id.* (Bird, C.J., dissenting) (emphasis added).

59. See *infra* notes 265-76 and accompanying text for a discussion of this debate.

60. *Id.* (Bird, C.J., dissenting).

61. *Id.*, 695 P.2d at 183-84, 211 Cal. Rptr. at 96-97 (Bird, C.J., dissenting) (emphasis in original) (quoting Newland v. Board of Governors, 19 Cal. 3d 705, 711, 566 P.2d 254, 258, 139 Cal. Rptr. 620, 624 (1977)).

62. *Id.* at 952-53, 695 P.2d at 186, 211 Cal. Rptr. at 99 (Bird, C.J., dissenting).

63. *Id.* at 951, 695 P.2d at 185, 211 Cal. Rptr. at 98 (Bird, C.J., dissenting).

64. *Id.* (Bird, C.J., dissenting).

65. *Id.* at 952, 695 P.2d at 185-86, 211 Cal. Rptr. at 99 (Bird, C.J., dissenting).

of the California Supreme Court concerning the appropriate level of deference to be accorded legislative enactments. In addition, the majority's treatment of the first amendment issues raises more questions than answers, particularly in light of several recent United States Supreme Court first amendment decisions. This Note will explore whether the first amendment does indeed protect a litigant's selection and payment of an attorney, and if so, what level of protection the Constitution demands. Second, this Note will discuss the due process and equal protection issues raised by contingency fee limits and the majority and dissent's contrary approaches to the rational basis test in both areas. Finally, this Note will consider the implications of the *Roa* opinion with respect to both its establishment of a new benchmark of judicial scrutiny and its reliability as precedent for further legislative control of attorney fees.

A. The First Amendment—Contingency Fees as a Form of Speech

1. The litigant's right to select an advocate

In practical terms, attorney fees represent the payment of money in return for professional services. While such a transaction at its most elementary level is merely a private commercial agreement, similar to hiring an architect to design a building, the primary objective of most legal employment is the effective advocacy of an idea or position. That objective casts first amendment overtones to the issue of attorney fee regulation.

Both attorney advertisements and solicitation of clients have been found to constitute forms of speech.[66] Regulation of both practices, however, has been justified on the ground that they constitute speech of a more commercial nature, particularly where the attorney's primary goal is monetary remuneration.[67] However, where the goal of legal employment has been to pursue a client's civil or political rights, attorneys' attempts to obtain clients have been given the highest level of protection under the first amendment.[68]

Payment of attorney fees is the reverse side of this transaction. Fees are determined or paid once an attorney has been found and a client desires that attorney's representation in a particular matter. The first question, then, is whether the payment of attorney fees should also be afforded first amendment protection, and if so, how much. Should an attorney be considered the means by which a client's views are expressed, like a newspaper advertisment or megaphone? If the answer is yes, the

66. *See infra* notes 84-113 and accompanying text.
67. *See infra* notes 136-49 and accompanying text.
68. *See infra* notes 142-46 and accompanying text.

second question concerns the appropriate level of first amendment protection. Should judicial scrutiny be less stringent if the client's objective is personal economic well-being or redress of a private wrong, rather than attainment of a political or civil right shared by other citizens?

The United States Supreme Court has recently addressed the first question. While its initial response appears to be negative, an analysis of the Court's reasoning reveals that it has chosen, for now, to avoid the question. In *Walters v. National Association of Radiation Survivors*,[69] the Court upheld a 120 year old law prohibiting the payment by veterans of more than $10 to attorneys handling their claims for Veterans' Administration benefits.[70] A federal district court judge had enjoined the enforcement of the statute pending a constitutional challenge by various aggrieved veterans who claimed that they had been unable to find an attorney because of the limitation.[71] The district court's ruling focused on both the veterans' due process and first amendment claims and articulated a cohesive first amendment rationale[72] that was subsequently adopted and expanded by California's Chief Justice Bird in her *Roa v. Lodi Medical Group, Inc.* dissent.[73]

Reversing the district court in a six to three decision, the Supreme Court narrowly framed the question as one of due process and upheld the limitation based upon the view that the veterans' claim system was designed by Congress to be a simple administrative and nonadversarial forum favoring the claimants.[74] The Court defined the first amendment issue as the claimants' right to pay someone to speak for them which, if limited, would deny them access to the courts. Since such access is also a due process right, the Court reasoned that it was inseparable from the plaintiffs' first amendment claims and had not been infringed because the claimants had only been denied the right to an attorney in the nonadver-

69. 105 S. Ct. 3180 (1985).

70. 38 U.S.C. § 3404(c)(2) imposes a $10 limit on the fee that may be paid to an attorney or agent who represents a veteran seeking benefits from the Veterans' Administration for death or disability connected with military service. 38 U.S.C. § 3404(c)(2) (1982). Section 3405 provides criminal penalties for any person who charges fees in excess of the limitation. 38 U.S.C. § 3405 (1982). Section 3404 has been on the books for more than 120 years. *Walters*, 105 S. Ct. at 3189.

71. National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302 (N.D. Cal. 1984), *rev'd*, 105 S. Ct. 3180 (1985).

72. 589 F. Supp. at 1314-27.

73. 37 Cal. 3d 920, 938-39, 695 P.2d 164, 175-76, 211 Cal. Rptr. 77, 88-89 (Bird, C.J., dissenting).

74. *Walters*, 105 S. Ct. at 3183-84 ("[T]he process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country. . . . The process is designed to function throughout with a high degree of informality and solicitude for the claimant.").

sarial claims process, not the courts.[75] The exclusion of attorneys from the claims process was not a violation of the veterans' due process rights, the Court reasoned, because meaningful alternatives for presenting a claim without the aid of an attorney were available.[76]

As pointed out by Justice Stevens in dissent, however, the Court ignored the veterans' independent first amendment rights of association and speech.[77] The majority opinion did not directly address or reject the district court's first amendment reasoning. Although the majority acknowledged that the first amendment may protect a client's right to an attorney in a judicial context, when no meaningful alternative to attorneys is available, its decision does not resolve the issue raised in *Roa*: whether, under the first amendment, a litigant has an *unrestricted* right to employment of counsel in an *adversarial* courtroom setting.[78]

2. The right to petition the courts

The rights of free speech guaranteed by the first and fourteenth amendments of the United States Constitution and article 1, section 3 of the California Constitution, expressly include the right to "petition the

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75. *Id.* at 3197.

76. *Id.* "[V]arious veterans organizations across the country make available trained service agents, free of charge, to assist claimants in developing and presenting their claims." *Id.* at 3184.

77. *Id.* at 3215 (Stevens, J., dissenting) ("[W]e are not considering a procedural right that would involve any cost to the Government. We are concerned with the individual's right to spend his own money to obtain the advice and assistance of independent counsel in advancing his claim against the Government. . . . [I]n civil disputes with the Government, I believe that right is . . . protected by the Due Process Clause of the Fifth Amendment *and* the First Amendment." (emphasis added)).

78. *See infra* note 116. The majority found that the nature of the underlying interest at stake was "determinative of the right to employ counsel." *Walters*, 105 S. Ct. at 3196. Thus, the Court found dispositive the fact that the property interest at stake only involved supplemental Veterans' Administration benefits not granted on the basis of need. *Id.* The Court distinguished Goldberg v. Kelly, 397 U.S. 254 (1970) which held that attorney representation was essential to protect eligible recipients from denial of welfare benefits and "the very means by which to live." *Id.* at 264. The Court likened the *Walters* case to Mathews v. Eldridge, 424 U.S. 319 (1976), where it held that no evidentiary hearing was required prior to temporary deprivation of social security benefits. *Walters*, 105 S. Ct. at 3196.

The *Roa* plaintiffs claim that the liberty interest at stake in their case, the right to be made whole and to "obtain judicial relief for unjustified intrusions on personal security," warrants the right to employ an attorney. *See* Appellants' Jurisdictional Statement to the Supreme Court of the United States at 27, Roa v. Lodi Medical Group, Inc. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985) (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)). The appellants also rely on Marbury v. Madison in support of their claim: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) 49, 58 (1803), *cited in* Appellant's Jurisdictional Statement to the Supreme Court of the United States at 27, Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

government for redress of grievances."[79] This right of petition encompasses a right of access to the courts to resolve civil disputes between private parties and, specifically, to obtain monetary compensation.[80] Economic activity essential to the effective exercise of these rights may be restricted *only* where necessary to serve a compelling government interest.[81] Therefore, if payment of attorney fees is essential in the judicial arena to the effective exercise of an individual's right to petition the courts for redress, statutory limits on such expenditures must be strictly scrutinized.[82] Additionally, attorney fee limits, such as section 6146, which only regulate fees paid by medical malpractice plaintiffs, may run afoul of the constitutional ban on content discrimination and should, therefore, be subject to a "particularly vigorous scrutiny."[83]

The first amendment argument advanced by Chief Justice Bird in *Roa* and Justice Stevens in *Walters* hinges upon an analogy between expenditure of funds to express views in the political arena and expenditure of funds to resolve claims in the judicial context. It rests upon the assumption that a suit between private citizens in civil court falls within the protected ambit of the right to petition for redress of grievances. If the cases relied upon by both Justices support these assumptions, then a strict scrutiny analysis must be applied to statutes regulating contingency fees. Accordingly, unless a "compelling" government purpose exists for limiting attorney fees paid by medical malpractice plaintiffs, such statutes should be declared unconstitutional.

The premise that the constitutional right to petition the government

79. The first amendment provides that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. Additionally, the California Constitution provides that: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." CAL. CONST. art. 1, § 3.

80. *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972); United Transp. Union v. Michigan Bar, 401 U.S. 576, 578-79 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 8 (1964); City of Long Beach v. Bozek, 31 Cal. 3d 527, 532-34, 645 P.2d 137, 183 Cal. Rptr. 86 (1982), *vacated on other grounds*, 459 U.S. 1095 (1983); Payne v. Superior Court, 17 Cal. 3d 908, 914, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

81. *Roa*, 37 Cal. 3d at 937, 695 P.2d at 175, 211 Cal. Rptr. at 88 (Bird, C.J., dissenting) (citing Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981); Buckley v. Valeo, 424 U.S. 1, 51-54 (1976)). *See also* FEC v. National Conservative Political Action Comm., 105 S. Ct. 1459, 1467-68 (1985).

82. *Roa*, 37 Cal. 3d at 939, 695 P.2d at 176-77, 211 Cal. Rptr. at 89 (Bird, C.J., dissenting).

83. *Id.* at 940, 695 P.2d at 177, 211 Cal. Rptr. at 90 (Bird, C.J., dissenting) (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Environmental Planning & Information Council v. Superior Court, 36 Cal. 3d 188, 680 P.2d 1086, 203 Cal. Rptr. 127 (1984)).

encompasses civil suits between private parties is well founded. In a series of decisions, the United States Supreme Court has gradually removed restrictions governing the referral and employment of attorneys in civil cases on the basis that such regulations infringe upon this right.

Beginning with *NAACP v. Button*,[84] the Supreme Court recognized that private litigation is a form of political expression. In *Button*, the Court struck down a Virginia statute prohibiting the solicitation by attorneys of any legal or professional business.[85] The NAACP had been assisting individuals in preparing and prosecuting civil rights litigation and had channeled individuals with such claims to various civil rights attorneys.[86] After the Virginia courts had held that the NAACP's activities fell within the prohibitions of the statute, the NAACP sued to prevent enforcement of the provisions.[87] Holding that the first amendment protects vigorous advocacy against government intrusion, the Court declared the statute unconstitutional because it posed a grave "danger of smothering all discussion looking to the eventual institution of litigation."[88] The Court rejected the state's contention that its well established interest in regulating the legal profession and preventing illegal practices justified the statute.[89] The Court found no showing "of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent."[90]

The Supreme Court has not limited this view to cases involving civil or political rights and has continued to strike down statutes which limit the means by which individuals obtain attorneys to represent them in civil lawsuits. In *Brotherhood of Railroad Trainmen v. Virginia*,[91] the Court dismissed an injunction obtained by the Virginia State Bar which had prevented the Brotherhood from assisting railroad workers and their families in preparing legal claims resulting from job related injuries. The union had referred individuals to attorneys it believed were competent to

84. 371 U.S. 415, 429-30 (1963).

85. Chapter 33 of the Virginia Acts of Assembly, ex. sess. 1956, broadened Virginia statutes defining attorney malpractice to include acceptance of employment or compensation from any person or organization not a party to a judicial proceeding. It also made it unlawful for any such person or organization to solicit business for an attorney. *Button*, 371 U.S. at 426-27 (citing 1956 Va. Acts of Assembly, ch. 33).

86. 371 U.S. at 419-22.

87. *Id.* at 426 (quoting NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1960)).

88. *Id.* at 434.

89. *Id.* at 439. The state contended that the statute was necessary to prevent the illegal practices of barratry, maintenance and champerty. *Id.*

90. *Id.* at 443.

91. 377 U.S. 1 (1964).

handle such claims.[92] The Court held that the first amendment guarantees of free speech, petition and assembly protected the workers' right to consult with attorneys and the union's right to recommend lawyers to handle their claims.[93] Although the Court acknowledged that the state had broad powers to regulate the practice of law, it held that states could not, by invoking that power, "infringe in any way the right of individuals . . . to be fairly represented in lawsuits authorized by Congress."[94] Laymen, the Court stated, cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, and associating to help one another enforce their rights could not be condemned as a threat to legal ethics.[95] Accordingly, the Court held, "[t]he state can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means *to bar them from resorting to the courts to vindicate their legal rights.*"[96] Further, as in *Button*, the Court concluded that the state had failed to show any appreciable public interest in preventing the challenged activity.[97]

Following the *Trainmen* decision, the Court upheld a union's right to hire an attorney to represent its members in connection with workers compensation claims. In *United Mine Workers v. Illinois Bar Association*,[98] the state bar association had sought an injunction against the union's activity as an unauthorized practice of law.[99] The Illinois Supreme Court upheld the injunction, concluding that *Button* only governed litigation involving political expression, that *Trainmen* only protected consultation and advice, and that neither decision permitted a union to actually hire and pay an attorney fees on behalf of its members.[100] The Supreme Court reversed, holding that its decisions in *Button* and *Trainmen* were controlling, and that first amendment protection extended beyond speech and assembly characterized as political to speech involving private rights.[101] In addition, as with both previous decisions, the Court again found that the state had offered no compelling reason for prohibiting the challenged activity.[102] The Court noted that the dangers of baseless litigation and conflicts of interest had been raised

92. *Id.* at 2.
93. *Id.* at 6.
94. *Id.* at 7.
95. *Id.*
96. *Id.* (emphasis added).
97. *Id.* at 8.
98. 389 U.S. 217 (1967).
99. *Id.* at 218.
100. *Id.* at 221.
101. *Id.* at 223.
102. *Id.* at 224.

in both *Button* and *Trainmen*, but that in both cases, as here, those dangers were far too remote and speculative to justify the broad prohibitions.[103]

The Court addressed these questions again in *United Transportation Union v. Michigan Bar*,[104] when it upheld the right of a union to recommend selected attorneys to its members and to secure a commitment from those attorneys that the maximum fee charged would not exceed twenty-five percent of any recovery. The state bar had sought an injunction against the union, primarily to eliminate the fee restriction. An injunction was granted by the state courts prohibiting the union from, among other things, "controlling, directly or indirectly, the fees charged . . . by any lawyer."[105] The Supreme Court reversed, concluding that the basic right to group legal action allows a cooperative union of workers to protect its members from excessive fees at the hands of inadequate counsel.[106] It explained that the common thread, beginning with *Button* and running through this series of cases, was that "collective activity undertaken to obtain *meaningful access to the courts* is a fundamental right within the protection of the First Amendment."[107] That right would be a hollow promise, the Court concluded, if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.[108]

Finally, in *Bates v. State Bar of Arizona*,[109] the Court held that the free speech principle underlying the NAACP and union attorney solicitation cases extended to *individual efforts* to obtain legal assistance. The *Bates* case raised the issue of the constitutionality of an American Bar Association prohibition against lawyer advertisement.[110] The Bar's disciplinary rule had been applied to an attorney who sought to publicize his rates and services. In striking down the ban and holding that truthful, nonmisleading advertising by lawyers was a protected form of speech,[111] the Court emphasized the need for such avertisement to enable consumers to obtain representation. The Court particularly noted that legal services were being underutilized and that although advertising might

103. *Id.* at 223.

104. 401 U.S. 576 (1970).

105. *Id.* at 579 n.4.

106. *Id.* at 585. See *infra* note 115 and accompanying text for further discussion concerning the *United Transportation Union* holding.

107. *Id.* (emphasis added).

108. *Id.* at 585-86.

109. 433 U.S. 350 (1977).

110. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982).

111. 433 U.S. at 383-84.

increase the use of judicial machinery, "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."[112] The Court stated that its underlying concern was that "the aggrieved receive information regarding their legal rights and the means of effectuating them,"[113] a concern which applies to aggrieved individuals with at least as much force as it does to groups.[114] The *Bates* decision recognized that the right to consult an attorney is not limited solely to the *associational* aspects of the first amendment, but includes the individual's right to obtain an attorney's representation in the judicial system.

These decisions establish that the *means* by which a litigant obtains access to the courts is as much protected by the first amendment as the speech in the courtroom itself. Despite governmental interests that historically supported state regulation of attorneys, the Supreme Court in each case considered whether the right to petition the courts was in any way impacted. Specifically, in *United Transportation Union*, the Court implicitly recognized that the amount an attorney may be paid is one function of judicial access within the scope of first amendment freedoms.[115] Although that case did uphold a fee limit, the restriction was imposed by *private* agreement, not government action, with the result that access was improved, not restricted. Thus, any law, such as section 6146 of the California Business and Professions Code, which impacts the individual's selection and payment of an advocate must be evaluated in light of these special first amendment concerns.

3. The contingency fee's role in the selection and advocacy process

In addition to the right of access to the courts and rights of association protected by these decisions, the first amendment also incorporates a right to choose a particular spokesperson to present one's claims.[116] The

112. *Id.* at 376.

113. *Id.* at 376 n.32.

114. *Id.*

115. While *United Transportation Union* involved a limit on attorney fees to prevent abuse, that limit was made by private agreement between the attorneys and the union on behalf of its members. 401 U.S. at 577. The union's use of its numerical strength to bargain for low rates in order to ensure its members affordable attorneys was an associational right protected by the first amendment, according to the Court. If the union had found any difficulty in obtaining qualified attorneys at that rate, it presumably would not have been prevented from bargaining for a new rate. Further, if the individual members of the union were dissatisfied with the attorneys to whom they were referred, or wished to retain an attorney at a higher rate, they presumably would not have been prevented from taking such action.

116. *See* Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757, 2766 (1985) (Brennan, J., concurring) ("A fundamental premise of the adversary system is that individuals have the

exercise of that right is intimately connected with the payment of attorney fees and has independent first amendment significance, particularly in the adversarial judicial context.[117] The Supreme Court's decisions in *Buckley v. Valeo*[118] and *Secretary of State of Maryland v. Joseph H. Munson Co.*[119] compel such a result.

a. expenditure of money in connection with first amendment activities

In *Buckley v. Valeo*,[120] the Supreme Court expressly considered whether the use of money in connection with speech activities is a form of communication protected by the first amendment. The *Buckley* Court addressed the constitutionality of a provision of the 1971 Federal Election Campaign Act which prohibited independent expenditures of more than $1000 in political campaigns.[121] In holding that such expenditures were a protected form of speech, the Court stated that it had "never suggested that the dependence of a communication on the expenditure of money operates . . . to reduce the exacting scrutiny required by the First Amendment."[122] A restriction on the amount of money an individual can spend necessarily reduces the quantity of expression, because "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[123] The expenditure limits imposed "direct and substantial" restraints on political speech[124] that, according to the

right to retain the attorney of their choice to represent their interests in judicial proceedings."); *id.* at 2767 (Stevens, J., dissenting) ("Everyone must agree that the litigant's freedom to choose his own lawyer in a civil case is a fundamental right.").

117. The Supreme Court has initially ignored this separate issue, concluding in *Walters* that the interest affected was of due process, not first amendment origin. Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3190, 3197 (1985). Although the *Walters* majority acknowledged the *Mine Workers* line of decisions, it distinguished these cases, concluding that they addressed only a first amendment right to associate collectively for the common good, rather than a first amendment right of access to the courts separate from any due process claim. *Id.* at 3196. The interest at stake in *Walters* was articulated as an "individual interest in best prosecuting a claim," which is "inseparable from [the claimants'] due process claims." *Id.* at 3196-97. The key issue, according to the Court, was whether the claimants had "meaningful access." Thus, even if a first amendment interest attached to the claimants' right to pay a surrogate speaker, it would do so only in the absence of a " 'meaningful' alternative." *Id.* As a result, since the Court had previously determined under its due process analysis that the Veterans' Administration claimants did not need attorneys in order to present their claims, it concluded that the plaintiffs' first amendment claim had "no independent significance." *Id.*

118. 424 U.S. 1 (1975) (plurality opinion).

119. 104 S. Ct. 2839 (1984).

120. 424 U.S. 1 (1975) (plurality opinion).

121. Pub. L. No. 93-443, § 101(e)(1), 88 Stat. 1263, 1265 (1974), *repealed by* Pub. L. No. 94-283, tit. 2 § 201(a), 90 Stat. 496 (1976).

122. *Buckley*, 424 U.S. at 16.

123. *Id.* at 19.

124. *Id.* at 39.

Court, "fail[ed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."[125]

As Chief Justice Bird pointed out in *Roa*, the expenditure of money for attorney fees is no less essential to the exercise of first amendment rights.[126] The ability to pay an attorney to present views to the court is analogous to paying a newspaper or television station to broadcast political messages to the public.[127] Clearly, one could not obtain the same result in either case without monetary access to the conduit through which views are transmitted to their intended audience. Just as political parties seek highly paid spokespersons for their causes, a client selects an attorney based upon the nature and focus of the message he or she wishes to communicate to a particular audience. Thus, if individuals are prevented from obtaining the spokesperson of their choice, who they believe can most effectively advocate their position, then they are not being given the "meaningful access" that the constitution demands.

The Supreme Court's recent decision in *Secretary of State v. Joseph H. Munson Co.*,[128] even more directly establishes that limits on the expenditure of money, even for nonpolitical advocacy, are incompatible with the first amendment. In *Munson*, a Maryland statute prohibited charitable organizations from paying professional fund raisers more than twenty-five percent of any amount generated by fund raising activities.[129] Munson, a professional fund raising company, challenged the act as an unconstitutional infringement of the first amendment rights of speech and assembly.[130] The Court agreed and struck down the provision.

The Court first found that the first amendment protects solicitation

125. *Id.* at 47-48. The Court further held that the governmental interest in equalizing the relative ability of individuals to influence the outcome of elections did not justify the limitation on express advocacy. *Id.* at 48. According to the Court, "[t]he First Amendment's protection against government abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. *See also* FEC v. National Conservative Political Action Comm., 105 S. Ct. 1459 (1985) (*Buckley* relied upon to strike down a limitation on expenditures by political action committees). The Court stated, "allowing for the presentation of views while forbidding the expenditure of more than $1000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 1467.

126. 37 Cal. 3d at 938, 695 P.2d at 175, 211 Cal. Rptr. at 88 (Bird, C.J., dissenting).

127. Although it could be argued that individuals may represent themselves in court, most courts have recognized that counsel may be necessary to effectively advocate a position. *See* Goldberg v. Kelley, 397 U.S. 254, 270 (1970) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.") (quoting Powell v. Alabama, 289 U.S. 45, 68-69 (1932)).

128. 104 S. Ct. 2839 (1984).

129. MD. ANN. CODE art. 41, § 103D (1982), *reprinted in Munson*, 104 S. Ct. at 2844 n.2.

130. Although Munson was not a charity and did not claim that its own first amendment rights had been infringed, the Court concluded that it had standing as a sufficiently injured

of funds by private charitable organizations because such activity is intertwined with speech "seeking support for particular causes or for particular views on economic, political, or social issues."[131] Thus, even though the state had a legitimate interest in preventing fraud and the misdirection of funds from an organization's charitable purposes, limiting the amount charities could spend to hire fund raisers was an inappropriate means of correcting such abuses. The Court found the Maryland limitation fatally flawed because it was based on the mistaken premise that a charity's high solicitation expenses and fund raising fees were an accurate measure of fraud.[132] Because the statute would preclude legitimate solicitation activity that resulted in high costs without directly preventing a misdirection of funds, the Court held that the statute was an impermissible direct restriction on protected free speech.[133] Further, although the statute included a waiver provision that allowed the state to issue a permit on a showing that the limitation would effectively prevent a charitable organization from raising funds,[134] the Court refused to uphold the statute because groups choosing to pay high costs to advocate their views would still be impermissibly denied access to solicitation permits.[135]

Percentage limitations on attorney fees embodied in section 6146 of the California Business and Professions Code and similar statutes are directly comparable to the fund raising percentage limitation in *Munson*. The attorney fee limits prevent a client from agreeing to pay more than a specified statutory percentage, just as the limit in *Munson* prevented a charitable group from paying more than a specified percentage as a fee for professional fund raising assistance. While the fund raising limit was designed to prevent fraud on the part of the charitable group, it also acted to hold down purportedly unreasonable professional fees, thereby

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third party because the ordinance had prevented it from obtaining contracts from charitable organizations. *Munson*, 104 S. Ct. at 2848.

131. *Id.* at 2849 (quoting Village of Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 632 (1980)). In *Schaumburg*, the Court struck down an ordinance that required charitable organizations to obtain permits to solicit door-to-door. A charity could obtain a permit only if it proved that it directly used at least 75% of its solicitations for charitable purposes. The ordinance was based on the belief that any group using more than 25% of its funds for administrative purposes was not a "charitable organization," and thus any such enterprise representing itself as a charity was fraudulent. The Court found that although the Village had a legitimate interest in preventing fraud, those interests could be served by measures less intrusive than a direct prohibition on solicitation. Thus, under the first amendment, the limitation was invalid because it was insufficiently related to the governmental interests asserted to justify its interference with protected speech. 444 U.S. at 637-39.

132. *Munson*, 104 S. Ct. at 2852.

133. *Id.* at 2853.

134. *Id.* at 2850.

135. *Id.* at 2850-51, 2853.

freeing more funds for the charitable goals of the group. Similarly, the attorney fee limit is purportedly aimed in part at preventing unreasonable fees and giving clients a greater share of the recovery.

In *Munson* the Supreme Court found that the fund raising limit might prevent some groups from undertaking fund raising activities because they would be unable to keep their costs below the twenty-five percent limit. The argument propounded by the plaintiffs in *Roa* raised the very same point. They contended that contingency fee limits might prevent them from advocating their position in a court because the restrictions would make it impossible for them to obtain an attorney to represent them. Only by paying a fee greater than permitted under the statute would they have been able to exercise fully their protected first amendment activities. While the Maryland statute directly prevented solicitation activity by refusing permits to groups unable to meet the statutory limitation, the indirect prohibition induced by the percentage fee limits in *Roa* produces the same result.

b. the level of first amendment protection: does the client's goal make a difference?

A distinguishing feature between the *Munson* and *Roa* cases is the first amendment activity undertaken by the plaintiffs in each. In *Munson*, the charitable groups sought to spread their political, economic or social views to the public by way of solicitation. Medical malpractice victims, in contrast, seek to present their individual cases to a court and seek redress for their injuries. This second form of speech, some might argue, is less deserving of first amendment protection as it is more akin to commercial speech.

Speech which merely proposes a commercial transaction and which involves primarily economic interests contains elements deserving of some, albeit less demanding, first amendment protection.[136] Commercial speech has been found to enlighten public decision-making and contribute to the free flow of information on matters of general public interest.[137] However, because commercial speech is thought to be more easily verifiable and durable than, for example, political commentary, regulation has been permitted with respect to time, place and manner and to prohibit deceptive or misleading advertisements.[138] As the Supreme

136. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

137. *Id.* at 764-65.

138. *Id.* at 771-72. The Court stated that:

There are commonsense differences between speech that does "no more than propose

Court stated in *Ohralik v. Ohio State Bar Association*,[139] "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[140]

Ohralik and its companion case, *In re Primus*,[141] involved the first amendment right of lawyers to solicit clients. In *Primus*, an ACLU attorney was reprimanded for improperly attempting to retain a client in an illegal sterilization case by writing her a letter offering free representation.[142] The attorney in *Ohralik*, embarked on an in-person solicitation of a personal injury victim in a manner commonly referred to as "ambulance chasing."[143] Ohralik was reprimanded for violating attorney disciplinary rules prohibiting such solicitation.[144]

The Supreme Court evaluated the type of speech in both cases, concluding that the communication in *Primus* was of a more political nature and not primarily aimed at pecuniary gain for the attorney.[145] As a result, the Court reviewed the effect of the disciplinary rule with the highest level of scrutiny applicable to political and associational first amendment rights.[146] In contrast, the Court in *Ohralik* characterized the attorney's conduct as serving primarily to advance his own personal profit and concluded that it was therefore subject to regulation as commercial speech.[147] Under a lower level of scrutiny, the ban on in-person solicitation was found to be an appropriate regulation designed to protect individuals from overreaching and to maintain the high standards of the legal profession.[148] According to the Court, "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with

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> a commercial transaction," . . . and other varieties. . . . [These differences] suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example may be more easily verifiable . . . than . . . news reporting or political commentary. . . . Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Id. at 771 n.24 (citations omitted).

139. 436 U.S. 447 (1978).

140. *Id.* at 456.

141. 436 U.S. 412 (1978).

142. *Id.* at 416-17.

143. 436 U.S. at 449-52, 467.

144. *Id.* at 453.

145. 436 U.S. at 422.

146. *Id.* at 428-29. The Court found that the attorney's conduct was protected by its decision in NAACP v. Button, 371 U.S. 415 (1963). *See supra* notes 84-90.

147. *Ohralik*, 436 U.S. at 455. According to the Court, "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny." *Id.* at 457.

148. *Id.* at 460-61.

First Amendment concerns."[149]

These decisions, on the surface, seem to indicate that transactions concerning legal representation deserve a lower level of first amendment protection and are subject to reasonable regulation unless the object of the employment is pursuit of civil or political rights. As a result, because suits for redress of injuries by medical malpractice victims are essentially private concerns, and attorneys accept such employment for monetary gain, regulations such as section 6146 of the California Business and Professions Code would seem acceptable. However, such a result ignores the basic difference in the regulations imposed on lawyer solicitation and advertising as compared to limits on attorney fees.

The disciplinary rules attacked in *Primus* and *Ohralik* were directed at attorney overreaching and did not in any manner affect the right of the client to make an independent selection of an attorney or to hire an advocate for an agreed upon fee. Further, the attorney advertising and solicitation rules merely make it *easier* for the client to make a knowing and independent selection of an attorney, without undue influence or pressure. Attorney fee limits such as section 6146, however, go further by limiting the client's choice of counsel, contrary to decisions of the Supreme Court supporting *greater* access to attorneys.[150] Prevention of overreaching by attorneys is merely a fortuitous result of the statute.[151]

The selection of an advocate to present one's views in the civil justice system carries with it more significant first amendment concerns than the right to receive or present commercial advertising information. State interference with the selection process poses a greater danger of inhibition of speech that may be bound up with a particular political or social perspective. More is at stake than simply a businessman's profits. The goals of the individual malpractice plaintiff extend beyond personal compensation. Private litigation, in fact, exists as a supplement to public licensing and quality control procedures. Particularly in times of budgetary restraint, it is simply unrealistic to believe that public regulatory agencies can adequately police professions or induce product manufacturers to ensure public safety.[152] A lawsuit against a physician would

149. *Id.* at 459.

150. As Justice Stevens stated in his *Walters* dissent, the Court has "necessarily assumed that the individual's right to ask for, and to receive, legal advice from the lawyer of his choice was fully protected by the First Amendment." 105 S. Ct. at 3214 n.16 (Stevens, J., dissenting).

151. *See Munson*, 104 S. Ct. at 2852-53 ("That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous.").

152. *See Select Committee Hearings* (Nov. 8, 1974), *supra* note 8, at 21. As pointed out in the MICRA hearings, for example, one doctor who was accused of performing hundreds of

have a deterrent effect similar to a public agency investigation of a patient's complaint against a doctor. Punitive damage awards in product liability lawsuits, for example, perform an important public function by causing manufacturers to design and promote safer products and to remove from the market dangerously unsafe products.[153]

The type or amount of compensation the attorney receives should not affect the client's right to bring such lawsuits, nor prevent these suits from being afforded a higher level of protection than ordinary commercial speech under the first amendment. Laws such as section 6146 which restrict the amount a client may pay his or her attorney, and which may ultimately inhibit a client's right to sue, therefore, should be strictly scrutinized.

4. The *Roa* majority's circumvention of the first amendment

Although the *Roa* majority acknowledged what it called the dissent's "creative" first amendment argument, it relegated its discussion to a footnote and raised three criticisms which it contended prevented the application of such constitutional protection to the California statute.[154] The logical extension of the dissent's argument, the court asserted, would preclude a state from imposing *any* limitation on attorney fees, no matter how unreasonable those fees may be. The court also argued that regulation of the use of contingency fees in connection with the pursuit of first amendment activities historically has been permitted. Finally, it contended that the record in the case provided no factual basis to support a claim that section 6146 prevents the free exercise of medical malpractice

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unnecessary surgeries remained undetected by licensing authorities until a multimillion dollar lawsuit by his patients brought him to public attention. *Select Committee Hearings* (Dec. 20, 1973), *supra* note 8, at 23, 27-32, 41-42.

Despite the fact that medical malpractice victims have been alleged to number from 136,000 to 310,000, a recent report by Ralph Nader revealed that only 563 cases of serious disciplinary action against doctors occurred nationwide in 1983. Parachini, *Study Questions Emphasis in Medical Malpractice*, L.A. Times, Sept. 20, 1985, § V (View), at 1, col. 5. The same report also concluded that the states most affected by the insurance crisis also recorded the lowest rates of physician discipline. The implication raised by this correlation is that "premiums may be driven up not by greed by lawyers and patients or defects in the court system but because medical boards are still failing to detect and put out of business doctors whose ineptitude hikes rates for all physicians." *Id.* at 1, col. 5 to 18, col. 1.

153. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348, 383 (1981). "Punitive damages . . . remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable." *Id.*

154. *Roa*, 37 Cal. 3d at 927 n.5, 695 P.2d at 167 n.5, 211 Cal. Rptr. at 80 n.5.

plaintiffs' first amendment rights.[155] None of these arguments, however, dispel the notion that first amendment rights are infringed by attorney fee limits or, correspondingly, that a strict level of scrutiny should be applied to such regulations.

The *Roa* majority's conclusion that *every* regulation of attorney fees would run afoul of the first amendment is unsupported by the court's reasoning. While many existing fee regulations would probably not survive such an analysis, the outcome in all cases is by no means certain. For example, a New York court rule established in the 1950's which regulates contingency fees in all personal injury litigation might pass constitutional muster even under a strict scrutiny test. The rule was adopted after reports exposed that more than sixty percent of the contingency fee agreements in one judicial department provided a fee of more than fifty percent to the lawyer.[156] Although the New York rule reduces the attorney's recovery depending on the size of the verdict, it also provides that application for greater compensation can be made to the court if the parties establish that a higher fee under certain circumstances is warranted.[157] Under a first amendment analysis, this rule might be upheld if the government's need to control the well documented fee abuses outweighs the rule's high degree of intrusion into the litigant's decision making process.

However, although the impact of the New York rule may be less severe than the California statute because it permits some variation from the limitations, it may still violate the first amendment because it prevents a fully informed plaintiff from consenting to payment of a higher fee without court approval. Laws which permit such a knowing and informed consent would probably survive a first amendment analysis because they would not infringe upon the client's decision. In addition, regulations which adopt a reasonableness standard, in contrast to strict limits, might also be acceptable, particularly if the factors for determining the fee include the availability of counsel and the difficulty of the case.[158]

The majority's second argument, that regulation of contingency fees in connection with the exercise of first amendment rights has historically been permitted, contradicts its conclusion that contingency fees *are not* a

155. *Id.*

156. N.Y. CT. R. § 603.7(e) (McKinney 1984).

157. *See* Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, *modified*, 161 N.E.2d 736 (1959), *appeal dismissed*, 361 U.S. 374 (1960).

158. See *supra* note 20 for list of medical malpractice statutes with such ameliorating factors.

form of speech protected by the first amendment. The majority supports its reasoning by drawing an analogy between section 6146 and a California statute that completely prohibits the acceptance of contingency fees by legislative lobbyists, including attorneys, in connection with the passage or defeat of legislation.[159] However, while first amendment rights are implicated by this prohibition, the purpose of a contingent fee for legislative action is fundamentally different from the use of such fees in connection with litigation. Lobbyists are not generally attempting to obtain a monetary recovery for their clients, but are seeking to influence the passage or defeat of legislation.[160] Moreover, contingent fees *have been allowed* in "quasi-judicial" legislative or administrative actions where the aim of the employment is to persuade such bodies to pay tort obligations.[161] Further, unlike litigants, persons employing lobbyists for political or legislative advocacy are not dependent upon the success of the lobbyists' efforts to pay their representative's fees. Although contingent fees are banned by the statute, the *amount* a lobbyist can be paid is not itself subject to regulation. The ban on contingent fees in legislative actions also does not selectively burden any particular group in the political process, but applies equally across the board to all viewpoints, while section 6146 only burdens medical malpractice plaintiffs.[162]

The plaintiffs' lack of factual support for their claims provided the final basis for the *Roa* majority's rejection of their first amendment claims.[163] But this reasoning again is faulty. When challenging statutes that affect the exercise of first amendment rights, there is no requirement that litigants present factual documentation; they must only show that their claims are more than "merely theoretical."[164] The *Roa* plaintiffs raised more than theoretical claims that section 6146 inhibits the free exercise of first amendment rights.

Evidence presented to the court establishes that medical malpractice

159. *Roa*, 37 Cal. 3d at 927 n.5, 695 P.2d at 167 n.5, 211 Cal. Rptr. at 80 n.5 (citing CAL. GOV'T CODE § 86205(f) (West 1976)). That section provides that "No lobbyist shall . . . [a]ccept or agree to accept any payment in any way contingent upon the defeat, enactment or outcome of any proposed legislative or administrative action." CAL. GOV'T CODE § 86205(f) (West 1976).

160. *Roa*, 37 Cal. 3d at 937 n.6, 695 P.2d at 174-75 n.6, 211 Cal. Rptr. at 87-88 n.6 (Bird, C.J., dissenting).

161. Hollister v. Ulvi, 199 Minn. 269, 271 N.W. 493 (1937). *See also* Comment, *The Contingent Fee: Disciplinary Rule, Ethical Consideration or Free Competition?*, 1979 UTAH L. REV. 547, 549.

162. *Roa*, 37 Cal. 3d at 937 n.6, 695 P.2d at 174 n.6, 211 Cal. Rptr. at 87 n.6 (Bird, C.J., dissenting).

163. *Id.* at 927 n.5, 695 P.2d at 167 n.5, 211 Cal. Rptr. at 80 n.5.

164. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

cases are extremely difficult to prove, require expensive expert witnesses, demand a great deal of research and exhaust a tremendous amount of an attorney's time.[165] Further, the risk of zero recovery is higher than in other tort cases.[166] Thus, the fact that the statute only limits medical malpractice plaintiff fees, does not permit a higher fee in special circumstances and dramatically reduces an attorney's potential recovery, leads to the conclusion that established and experienced attorneys will refuse to handle medical malpractice cases.[167] By limiting only plaintiffs' attorney fees, the statute permits defendants to spend unlimited amounts to hire counsel to fight such cases while limiting the ability of plaintiffs to obtain equally effective attorneys at premium rates.[168] Therefore, the high probability that section 6146 interferes with the selection of counsel by malpractice plaintiffs should have prompted the court to invalidate the statute under a first amendment analysis despite the lack of empirical evidence that large numbers of attorneys are refusing to handle such cases.

5. Section 6146 does not serve a compelling purpose

Under a first amendment analysis, section 6146 would not survive a strict scrutiny test for several reasons. Under such a test, the government would be required to establish a compelling purpose for restriction of contingency fees.[169] The express purpose of the legislature in enacting

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165. Keene, *supra* note 3, at 29-30.

166. *See* AUDITOR GENERAL'S REPORT, *supra* note 3, at 28 (50% of medical malpractice cases are disposed of with no recovery); AMERICAN MEDICAL ASS'N SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80S: REPORT 2, at 6 (Nov. 1984) (approximately three out of four claims against physicians closed without payment) [hereinafter cited as AMA REPORT 2].

167. Declarations of several prominent plaintiff's attorneys substantiating this claim were submitted to the California Supreme Court in the *Roa* plaintiff's petition for rehearing. Appellants' Petition for Rehearing in the Supreme Court of the State of California, at app. A, Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985) (declarations of D. Harney, R. Ritter, R. Aldrich, J. Denove, S. Desimone & K. Davidson).

168. As one court has noted, "in the administration of justice a measure of equality in ability of counsel representing the litigants is a great aid in arriving at a just solution of the issues involved." Cline v. Warrenberg, 109 Colo. 497, 501, 126 P.2d 1030, 1031 (1942).

169. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 581-2 (1978):

> [R]egulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas. In such cases, the first amendment . . . requires a "thumb" on the scale to assure that the balance struck . . . properly reflects the central position of free expression in the constitutional scheme.

As described by Professor Tribe, this balancing test requires that a court conduct a weighing of the extent to which communicative activity is inhibited and, on the other hand, the values, interests or rights served by enforcing the inhibition. *Id.* § 12-20, at 682-83. Two factors must be considered in determining the level of justification required of the government:

section 6146 was to control doctors' insurance premiums; the statute was not formulated in response to any documented or widespread problem of unreasonable attorney fees.[170]

While reduction of insurance premiums may be a legitimate state interest, contingency fee controls only marginally address this goal. Recent factual evidence makes clear that attorney fee limits have not aided in reducing health care costs or malpractice premiums, nor discouraged the bringing of frivolous suits. The American Medical Association recently conceded that "[t]he expected reduction in the number and severity of professional liability suits against physicians and hospitals never happened," and that "limiting attorney fees may not reduce the number or severity of suits."[171]

In addition, although the statute may have been designed to protect malpractice victims from unreasonable fees, it actually causes some plaintiffs to pay higher attorney fees. Prior to the enactment of section 6146, plaintiffs customarily paid a lower fee if their cases settled prior to trial. The statute, however, makes no such distinction. As a result, a plaintiff whose case settles without litigation may pay a higher fee under section 6146.[172]

Finally, the state's paternalistic interest in protecting its citizens does not justify an infringement on the exercise of their first amendment rights. As Chief Justice Bird stated, "[i]t is entirely inappropriate for the state to 'protect' an individual by suppressing his or her exercise of a First Amendment right."[173] Justice Stevens made a similar point in his *Walters* dissent. He explained that "[i]t is rather misleading to imply that a rejection of the *Lochner* holding is an endorsement of rational paternalism as a legitimate legislative goal."[174]

While fee controls prevent an attorney from charging more than the

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(1) the degree to which any inhibition falls unevenly upon various groups (i.e. the poor); and (2) the degree to which the inhibition operates to shut down places that have traditionally been associated with the public exchange of ideas. *Id.* § 12-20, at 683-84. Where these two factors are present, the government's burden of justification is at its highest. *Id.* Thus, because section 6146 imposes a heavier burden on the poor and restricts access to a public forum, the government has a particularly heavy burden of justification.

170. Although protection of plaintiffs from high fees was one of the stated purposes, it was not the primary purpose of the statute. *See supra* notes 10-12 and accompanying text.

171. AMA REPORT 2, *supra* note 166, at 13, 18. Another study showed that "[l]imits on contingent fees show some sign of reducing severity and total claim costs, but the significance level is low." P. DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS 31 (1983).

172. *Roa*, 37 Cal. 3d at 945, 695 P.2d at 181, 211 Cal. Rptr. at 94 (Bird, C.J., dissenting).

173. *Id.* at 941, 695 P.2d at 177, 211 Cal. Rptr. at 90 (Bird, C.J., dissenting).

174. Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3214 (1985) (Stevens, J., dissenting) (citing Lochner v. New York, 198 U.S. 45 (1905)).

mandatory limits, they also prevent knowledgeable individuals from deciding to pay a higher fee to advance their interests.[175] If the plaintiff is prohibited from using money to choose the conduit by which his views will be presented to the court, he is being denied meaningful access to those courts. The cases relied upon by the majority do not in any way address this concern. The sole realistic justification articulated by the court, to protect claimants "from extortion or improvident bargains,"[176] is a rationale stemming from cases which were decided prior to any United States Supreme Court consideration of a constitutional right to petition the courts.[177] By relying on this line of reasoning, the majority ignores the more recent principle that laws which actually affect the exercise of first amendment freedoms cannot be sustained merely because they deal with some evil within the state's legislative competence.[178] Thus, because the evils of unreasonable contingency fees are merely speculative and remote, statutes that prevent citizens from paying fees they consider necessary to obtain desired representation would not withstand first amendment scrutiny.

B. Due Process

1. The right to counsel in civil cases

Although the *Roa v. Lodi Medical Group, Inc.* court refused to recognize the implication of a first amendment right in the application of section 6146, it did acknowledge that plaintiffs have a constitutionally protected due process right to counsel in civil cases.[179] But while both

175. Section 6147 of the California Business and Professions Code requires that all plaintiffs be advised in advance of the statutory fee limits. CAL. BUS. & PROF. CODE § 6147 (West Supp. 1985). Section 6146 of that code provides that if a recovery is made, the plaintiff will retain a specified percentage. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985). However, if as a result of the fee limits, a plaintiff must settle for an attorney less able to present his case, then the chances of recovery might be reduced. Thus, a plaintiff may decide that a higher fee would allow him to obtain a better lawyer and might bring with it a greater likelihood of success. *See also* Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3214 (1985) (Stevens, J., dissenting) ("[T]he attorney fee limit purports to protect the veteran who has little or no need for protection and it actually denies him assistance in cases in which the help of his own lawyer may be of critical importance.").

176. *Roa*, 37 Cal. 3d at 926, 695 P.2d at 167, 211 Cal. Rptr. at 80 (quoting Calhoun v. Massie, 253 U.S. 170, 173-74 (1920)).

177. *Id.* at 939, 695 P.2d at 176, 211 Cal. Rptr. at 89 (Bird, C.J., dissenting).

178. *Id.* at 939 n.8, 695 P.2d at 176 n.8, 211 Cal. Rptr. at 89 n.8. As stated by the United States Supreme Court in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* at 843.

179. 37 Cal. 3d 920, 925-26, 695 P.2d 164, 166, 211 Cal. Rptr. 77, 79 (1983) (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Mendoza v. Small Claims Court, 49 Cal. 2d 668, 673, 321 P.2d 9, 12 (1958)).

the majority and the dissent agreed that a rational basis test was the appropriate standard of review, the opinions offer conflicting views of whether the provisions of section 6146 were sufficiently related to proper legislative objectives to avoid violating due process guarantees.[180] The majority concluded that section 6146 did not "in any way" abrogate the right to retain counsel.[181] In contrast, the dissent contended that section 6146 "significantly" interferes with that right and thus violates due process because it is not "sufficiently" related to the purposes it was enacted to achieve.[182] These contrary conclusions stem from selective oversight of controlling authority or factual evidence in both opinions and a differing perspective of the limits of judicial review under the rational basis test.

a. the Roa *majority's rational basis test*

The majority pointed to several state regulations and cases to support its premise that legislative ceilings on attorney fees are generally valid and not subject to strict judicial scrutiny.[183] Yet, even in its application of a rational basis test, the majority's critique falls far below the minimum arguably necessary for the statute to pass constitutional muster and instead, ignores glaring inconsistencies between the legislation's goals and the means chosen to arrive at them. Further, the majority made no attempt to reconcile differences in the various statutes it cited with the provisions of section 6146. Nor did it articulate why the ration-

180. The fifth amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Article I, § 1 of the California Constitution provides that: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

The *Roa* majority held that under due process guarantees, "legislative ceilings on attorney fees are in no respect 'constitutionally suspect' or subject to 'strict' judicial scrutiny." 37 Cal. 3d at 927, 695 P.2d at 167, 211 Cal. Rptr. at 80. While the court did not expressly articulate the standard of review it was applying, in *American Bank & Trust Co. v. Community Hospital* it held that "[s]o long as [a] measure is rationally related to a legitimate state interest, policy determinations as to the need for, and desirability of, the enactment are for the Legislature." 36 Cal. 3d 359, 369, 683 P.2d 670, 676, 204 Cal. Rptr. 671, 677 (1984). According to the *Roa* dissent, under a rational basis test, due process requires that legislation be " 'reasonable and proper,' not 'arbitrary and oppressive.' " 37 Cal. 3d at 942, 695 P.2d at 178, 211 Cal. Rptr. at 91 (Bird, C.J., dissenting).

181. *Roa*, 37 Cal. 3d at 926, 695 P.2d at 166, 211 Cal. Rptr. at 79.

182. *Id.* at 944, 695 P.2d at 180, 211 Cal. Rptr. at 93 (Bird, C.J., dissenting).

183. *Id.* at 927, 695 P.2d at 167, 211 Cal. Rptr. at 80.

ale supporting those limits extended to the significantly more restrictive provisions of section 6146. The majority also failed to explain why the due process issues raised in *Roa* were resolved by the cases on which it relied.

i. statutory comparisons

The majority improperly relied on statutes that differ markedly with section 6146. For example, the New York and New Jersey contingency fee scales each contain express authorization for judicial approval of a higher fee in extraordinary circumstances.[184] Both also regulate fees in all tort cases, not just medical malpractice actions, making personal injury attorneys unable to avoid the restrictions by refusing to take certain cases. The Nebraska medical malpractice attorney fee statute does not specifically set *any* limit, but instead requires judicial approval of fees in individual cases.[185] Although the Delaware statute establishes a sliding contingency fee scale similar to section 6146, it contains a provision permitting the parties to agree on a mutually satisfactory per diem fee as an alternative.[186] The more flexible approach taken by each of these regulations may significantly ameliorate the potential difficulties faced by California medical malpractice plaintiffs governed by the unwavering limitations of section 6146.

The California statutes governing attorney fees in workers' compensation and probate proceedings cited by the majority[187] are also distinguishable. The workers' compensation statute, for example, does not expressly set fee limits but instead permits reasonable attorney fees according to guidelines established by a state board.[188] Injured plaintiffs bringing such claims are not required to prove negligence, and the parties

184. Section 603.7(e)(4) of the New York Court Rules provides that: "In the event that . . . plaintiff's attorney believes in good faith that [the fee schedule], because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made [to the court]." N.Y. CT. R. § 603.7(e)(4) (McKinney 1984). Rule 1:21-7(f) of the New Jersey Court Rules provides that: "If at the conclusion of a matter an attorney considers the fee permitted . . . to be inadequate, an application on written notice to the client may be made to the [court] for hearing and determining of a reasonable fee in light of all the circumstances." N.J. CT. R. Rule 1:21-7(f) (West 1984).

185. NEB. REV. STAT. § 44-2834 (1984).

186. DEL. CODE ANN. tit. 18, § 6865 (Supp. 1984).

187. 37 Cal. 3d at 926, 695 P.2d at 166, 211 Cal. Rptr. at 79-80.

188. Contingency fees in workers' compensation cases, where the claimant's recovery is statutorily limited, are not fixed by statute but must be reasonable. CAL. LAB. CODE § 4906 (West 1971). Fee guidelines are established by the Workers' Compensation Appeals Board. A fee of 9-12% of the permanent disability, death benefit or compromise and release awarded is considered reasonable by the Board. 2 S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW PRACTICE § 17.10, at 649 (3d ed. 1985).

appear before an appeals board rather than a court. The cases are therefore less risky and more like the nonadversarial Veterans' Administration claims system discussed in *Walters v. National Association of Radiation Survivors.*[189] Probate attorneys are compensated according to the amount of work performed and may receive additional fees for extraordinary services.[190] Attorneys will earn a fee unless they perform no work on behalf of an estate. And again, probate courts perform primarily procedural duties regarding the administration of estates, unlike the courts that oversee civil litigation. Fee restrictions are therefore unlikely to discourage attorneys from accepting either type of case since the risk of zero recovery by the attorney is very small.[191]

Although certain federal restrictions do impose fixed contingent fee limits in cases against the government, the purpose of those controls differs from other statutory fee limits. Under the historical doctrine of sovereign immunity, such claims may only be brought in limited circumstances, subject to congressional approval and control.[192]

ii. misplaced reliance on early twentieth century precedent

Several early twentieth century cases upholding the validity of attorney fee limits in pension actions brought by war veterans and their families were heavily relied on by the *Roa* majority.[193] The facts and holdings of these cases, however, are inconsistent with the due process claims raised by the Roas. Each case involved attempts by *attorneys* to obtain higher fees from their former clients. The due process claims were raised not by the clients, but by the attorneys, who argued that the fee limits prevented them from obtaining higher fees which their clients had previously agreed to pay. None of the cases involved a client's claim that the fee restrictions violated their due process right to retain an attorney.

189. 105 S. Ct. 3180 (1985). *See supra* notes 69-78 and accompanying text.

190. Attorney fees for conducting ordinary probate proceedings must be set at a fixed percentage according to the size of the estate with further amounts as the court may deem reasonable for extraordinary services. CAL. PROB. CODE §§ 910-911 (West 1981). Such fees may not be a percentage of the value of assets recovered for the estate. *In re* McDonald's Estate, 37 Cal. App. 2d 521, 99 P.2d 1115 (1940). California courts have held that probate attorney fee schedules do not violate due process guarantees because "[p]resumably, the public's interest is served where those bereaved are insulated from negotiating over a lawyer's fee during the traumatic postdeath period." Estate of Effron, 117 Cal. App. 3d 915, 925-26, 173 Cal. Rptr. 93, 99 (1981).

191. *Roa*, 37 Cal. 3d at 942, 695 P.2d at 178-79, 211 Cal. Rptr. at 91-92 (Bird, C.J., dissenting).

192. *See* Calhoun v. Massie, 253 U.S. 170, 173 (1920).

193. 37 Cal. 3d at 926-27, 695 P.2d at 167, 211 Cal. Rptr. at 80 (citing Yeiser v. Dysart, 267 U.S. 540 (1925); Margolin v. United States, 269 U.S. 93 (1925); Calhoun v. Massie, 253 U.S. 170 (1920); Frisbie v. United States, 157 U.S. 160 (1895)).

For example, in *Frisbie v. United States*,[194] an attorney challenged a congressional act prohibiting payment of more than ten dollars to attorneys presenting claims for government pensions. The attorney was indicted for a violation of the act after apparently receiving a higher fee for handling the claim of a soldier's widow. The Court rejected the attorney's contention that the act unconstitutionally violated his due process and contract rights.[195] Similarly, in *Calhoun v. Massie*,[196] an attorney attempted to recoup a fifty percent fee from a client after successfully obtaining a recovery from the government. The attorney and client had signed a contingency fee agreement for fifty percent; Congress approved full payment of the claim but limited the attorney fee to twenty percent. The Supreme Court rejected the attorney's claim that the restriction denied him property without due process.[197]

Legislative documentation supporting these early regulations reveals the *Roa* court's misplaced reliance on these decisions. For example, the Supreme Court's decision in *Hines v. Lowrey*,[198] discussed the substantive evils that Congress sought to prevent during the early twentieth century when it regulated attorney fees. In 1919, the Secretary of the Treasury who was responsible for overseeing the Veteran's Benefit Program testified that:

> Unscrupulous attorneys and claims agents are circularizing prospective claimants . . . [and] [i]n some instances their breakneck rush for employment has led them to the length of crucifying the wives and mothers of those in the service by false announcements that their husbands or sons have already fallen. . . .[199]

New York enacted the first contingency fee scale in response to similarly well documented abuses by lawyers in that state. In upholding the rule, the court noted that more than sixty percent of the 150,000 contingent fee agreements filed with the courts each year provided for an attorney fee of fifty percent or more.[200]

These cases illustrate the dramatic abuses that legislatures and courts have attempted to address in the past. In contrast, the lack of such evidence has prompted other courts to reject fee controls. The Flor-

194. 157 U.S. 160 (1895).
195. *Id.* at 165-66.
196. 253 U.S. 170 (1920).
197. *Id.* at 172-73.
198. 305 U.S. 85 (1938).
199. *Id.* at 88 n.5 (quoting H.R. REP. No. 471, 65th Cong., 2nd Sess. (1918)).
200. Gair v. Peck, 6 N.Y.2d 97, 102, 160 N.E.2d 43, 52 (1959), *modified*, 6 N.Y.2d 983, 161 N.E.2d 736, *appeal dismissed*, 361 U.S. 374 (1960).

ida Supreme Court refused to adopt a contingency fee scale in tort cases because a need for imposing such limits was not demonstrated.[201] While recognizing that a small segment of the legal profession did engage in overreaching and abuse, the court reasoned that a fee scale would not prevent such abuses and that strict enforcement of existing rules and standards would be a more effective means of dealing with "miscreant" members of the profession.[202]

iii. unwarranted acceptance of legislative factual determinations

Lack of factual support also undermines the majority's contention that section 6146 addresses the legislative goal of reducing malpractice insurance premiums by encouraging smaller settlements and preventing frivolous suits. Settlements would be lower, according to this rationale, because plaintiffs could get the same net recovery by paying lower attorney fees.[203] This assumes of course that a plaintiff's settlement demand is inflated to take into consideration the net return after deduction of costs and attorney fees. While economically this reasoning makes sense, it ignores the realities of the imperfect world in which settlements are reached. If taken to its logical extreme, this rationale would conclude that limiting an attorney fee to one dollar would dramatically reduce litigation costs and settlement expenses, and enable the client to retain the maximum share of any recovery. In a perfect world, victims would not need to spend any money at all for an attorney in order to obtain compensation for their injuries. But, for many malpractice victims, the opportunity to obtain any settlement comes only with the selection of capable attorneys who have successfully prosecuted medical malpractice cases and earned a reputation commanding respect from the defense. Without such representation, plaintiffs would never be in a position to begin negotiating a settlement, let alone to obtain adequate compensation for their injuries. By inhibiting access to reputable attorneys, costs to defendants and their insurers might be reduced, but at what price?

Further, most malpractice cases are settled for less than $100,000, and within this range section 6146 does not dramatically reduce the contingency fee percentage.[204] Thus, while the fee limits will have a greater

201. *In re* Florida Bar, 349 So. 2d 630 (Fla. 1977) (per curiam). The fee scale was proposed by the state bar as an amendment to the state's disciplinary rules and was challenged as unconstitutional by the Academy of Florida Trial Lawyers. *Id.* at 631. Such amendments are within the jurisdiction of the state's supreme court. *Id.* at 630.

202. *Id.* at 635.

203. *Roa*, 37 Cal. 3d at 931, 695 P.2d at 170, 211 Cal. Rptr. at 83.

204. The average paid loss by physician owned malpractice insurance companies in 1983 was $72,243. AMERICAN MEDICAL ASS'N SPECIAL TASK FORCE ON PROFESSIONAL LIABIL-

impact on large settlements, and correspondingly will make it more difficult for severely injured victims to obtain attorneys, attorney fee savings from smaller settlements will have little impact on the overall settlement payouts by insurers.[205]

Second, the court infers from the high number of defense verdicts in medical malpractice cases that a particularly burdensome number of such suits are frivolous and generate unnecessary legal expenses for doctors and their insurers.[206] Again, the facts contradict this conclusion. Studies show that the higher risk of loss in medical malpractice cases forces attorneys to be *more* selective in choosing potential cases.[207] Moreover, discouragement of frivolous suits by prejudging the likelihood of meritorious claims is an arbitrary and improper exercise of legislative power.[208] As the United States Supreme Court recently stated in *Zauderer v. Supreme Court of Ohio*,[209] although discouragement of frivolous suits may be a legitimate state interest, *"[a] state is not entitled to prejudge the merits of its citizens' claims."*[210] The Court rejected the argument that a state has a right to prohibit certain types of lawyer advertisements because of its desire to prevent lawyers from stirring up litigation. "[W]e cannot endorse the proposition," the Court stated, "that a lawsuit, as such, is an evil."[211] While some citizens may file lawsuits which ultimately are found to be meritless, states may only impose sanctions after the fact and may not attempt to prevent any litigant from bringing a potentially valid claim.[212]

Several other inconsistencies in section 6146 result in the failure of

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ITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80S: REPORT 1, at 17 (Oct. 1984) [hereinafter cited as AMA REPORT 1]. Attorney fees for settlements under $100,000 pursuant to § 6146 are 40% of the first $50,000 and 33% of the next $50,000. *See supra* note 1. Fee agreements for settlements without trial in other fields of personal injury litigation, absent statutory limits, are commonly between 30-40%.

205. The million dollar awards commonly reported by various sources are for jury verdicts, not settlements. *See* Middleton, *The Medical Malpractice War*, Nat'l Law J., Aug. 27, 1984, at 9, col. 1 (chart of verdicts from 1973-83). Statistics breaking down settlement values by range of payout are generally not provided by insurers.

206. *Roa*, 37 Cal. 3d at 932, 695 P.2d at 170-71, 211 Cal. Rptr. at 83-84. Typically, only one out of every three medical malpractice cases taken to trial concludes with a judgment for the plaintiff. AUDITOR GENERAL'S REPORT, *supra* note 3, at 28. In 1983, only 32% of the verdicts reached in medical malpractice cases were in favor of the plaintiffs. AMA REPORT 1, *supra* note 204, at 21.

207. *Roa*, 37 Cal. 3d at 947, 695 P.2d at 182, 211 Cal. Rptr. at 95 (Bird, C.J., dissenting). *See also supra* note 16.

208. 37 Cal. 3d at 947, 695 P.2d at 182, 211 Cal. Rptr. at 95 (Bird, C.J., dissenting).

209. 105 S. Ct. 2265 (1985).

210. *Id.* at 2279 n.12 (emphasis added).

211. *Id.* at 2278.

212. *Id.* at 2279 n.12.

the statute to further the legislative goals of either reducing insurance premiums or protecting plaintiffs. For instance, defense attorney fees were pointedly left unregulated by the statute. But because such fees are paid directly by malpractice insurers, defense fee limits would have a far greater potential for reducing premiums.[213] Fee limits also could have been considered as a means of ensuring greater compensation for plaintiffs and preventing windfalls to attorneys who represent severely injured victims. But the legislature did not provide any means of ensuring that plaintiffs could obtain adequate legal services at the rates specified or that they would actually retain a higher percentage of their recoveries.[214]

b. The Roa *dissent—is lack of empirical evidence insurmountable?*

The fundamental difficulty with the dissent's reasoning—and the Roas' due process claims in general—is the lack of empirical support for the contention that the contingency fee limits actually deprive medical malpractice victims of the ability to obtain counsel. Some state courts have accepted the hypothesis that contingency fee limits, particularly those comparable to section 6146, will invariably have such an adverse effect. The New Hampshire Supreme Court, for example, reasoned that a contingency fee scale "inevitably will make such cases less attractive to the plaintiff bar," and consequently will "at least somewhat deter the litigation of legitimate causes of action."[215] The *Roa* court refused to reach the same conclusion despite being presented with a similar set of facts, reasoning instead that without an empirical showing that the limits actually prevent plaintiffs from obtaining counsel, it could not strike down the statute.[216] Because the fee levels appeared to the majority to be "quite generous," it concluded that "*[u]nder the circumstances*, we . . . cannot hold that the amount of fees permitted renders the statute uncon-

213. *Roa*, 37 Cal. 3d at 951, 695 P.2d at 185, 211 Cal. Rptr. at 98 (Bird, C.J., dissenting).

214. *Id.* at 952, 695 P.2d at 185, 211 Cal. Rptr. at 98 (Bird, C.J., dissenting).

215. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). In holding the New Hampshire statute unconstitutional, the court concluded that because of the importance of the affected rights, the legislature could not deprive victims of those rights without a greater showing that the regulation fit more closely with the goals of the medical malpractice act. *Id.* at 945, 424 A.2d at 839.

216. *Roa*, 37 Cal. 3d at 927-28, 695 P.2d at 168, 211 Cal. Rptr. at 81. The majority rejected the plaintiffs' claims that the fee levels were so low that medical malpractice victims are unable to retain attorneys: "The adequacy of the fees permitted by the statute is in large measure an empirical matter, and plaintiffs have made no showing to support their factual claim." *Id.* at 928, 695 P.2d at 168, 211 Cal. Rptr. at 81. The court also dismissed the argument that because § 6146 only regulates medical malpractice attorney fees, it would drive the most competent attorneys out of the field. "Once again," the court stated, "plaintiffs have failed to make any showing to support the factual premise of their contention." *Id.* at 930, 695 P.2d at 169, 211 Cal. Rptr. at 82.

stitutional on its face."[217]

The *Roa* plaintiffs claimed, however, that just because the victims of section 6146 may not be individually identifiable and can be known to exist only as a statistical group, the courts may not disregard the potential for denial of access or destruction of their claims.[218] The Roas analogized this statistical probability to the hypothetical due process claims raised by prospective nuclear accident victims in *Duke Power Co. v. Carolina Environmental Study Group*.[219] In *Duke Power*, the plaintiffs challenged a federal statute which limited the potential recovery of damages by victims of nuclear accidents.[220] Because no such accident had yet occurred, the real impact of the Act could not be determined. However, the Court did not feel restrained by this circumstance and proceeded to evaluate the hypothetical due process claims. The probability that some medical malpractice victims will be unable to obtain attorneys as a result of the fee limits requires a similarly serious inquiry into the legislative purpose and effect of the statute.

The *Roa* court's factual conclusion that section 6146 does not deprive injured medical malpractice victims of the opportunity to obtain an attorney leaves the decision vulnerable to attack. The majority opinion's language suggests that the court might reevaluate its position if presented with factual evidence that malpractice victims are unable to obtain repre-

217. *Id.* at 928, 695 P.2d at 168-69, 211 Cal. Rptr. at 81 (emphasis added). In addition to pointing out the perceived factual weaknesses in the plaintiff's case, the court went further and offered its own determination of the adequacy of the statute's fee levels. The court conducted a comparison of other statutory fee provisions and concluded that "section 6146's limits are in fact quite generous." *Id.* at 928, 695 P.2d at 168, 211 Cal. Rptr. at 81 (citing Federal Tort Claims Act, 28 U.S.C. § 2678 (1982) (limits fees in claims against government to 25% after court action or 20% prior to court action); Veterans' Benefit Act, 38 U.S.C. § 3404 (1982) (limits fees for handling claims to $10); Social Security Act, 42 U.S.C. § 406(b)(1) (1982) (limits fees for handling claims for benefits to 25%); N.J. Ct. R. Rule 1.21-7 (West 1984) (establishing a sliding contingency fee scale)). The majority suggested that under each provision, the Roas' attorney fees would have been lower. However, other than the veterans' provision, only the original New Jersey schedule would have provided a lower fee. In fact, under its newly increased limits, the New Jersey rule would have permitted an additional $50,000 in fees for the Roas' attorneys. *See supra* note 22. The *Roa* majority subsequently modified its opinion to reflect the higher New Jersey limits, although it continued to assert the view that the California fee limits were not unreasonable in comparison. 38 Cal. 3d 620a (1985) (see *supra* note 6 for explanation of modification). The other federal statutes would have permitted fees of more than $100,000 in the *Roa* case. 37 Cal. 3d at 943 n.10, 695 P.2d at 179 n.10, 211 Cal. Rptr. at 92 n.10 (Bird, C.J., dissenting).

218. Appellant's Jurisdictional Statement to the United States Supreme Court at 21, Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

219. 438 U.S. 59 (1968) (upholding Price-Anderson Act, 42 U.S.C. § 2210 (1982) eliminating causes of action of nuclear accident victims for damages in excess of $560 million over due process denial of property claims).

220. *Id.* at 67-68.

sentation. A potential plaintiff that could document such a result might succeed where the Roas failed.

Other courts, particularly in the medical malpractice arena, have struck down statutes on due process grounds that were initially upheld as constitutional. For example, in *Aldana v. Holub*,[221] the Florida Supreme Court reversed an earlier decision upholding the state's medical malpractice act when presented with factual evidence that the provisions were *in effect*, depriving malpractice plaintiffs of access to the courts.[222] Similarly, the Pennsylvania Supreme Court struck down that state's Health Care Services Malpractice Act on due process grounds in *Mattos v. Thompson*,[223] despite its previous decision that the statute complied with the basic elements of due process.[224]

If the California Supreme Court is presented with empirical evidence that the fee limits are so low they actually deprive medical malpractice victims of counsel, it might determine that section 6146 is unreasonable, constituting a denial of due process.[225] Because the Roas' appeal was primarily a facial attack on the statute, the door has been left open for an appropriately aggrieved party to raise a due process challenge to section 6146 as applied.

2. Procedural due process and access to the courts

Whether limitations on the right of access to the courts affront separate first amendment and due process rights poses a difficult conceptual problem. In the framework of statutory attorney fee limits, the problem can best be approached by viewing the two interests affected as independent, though intertwined. First, as previously discussed, litigants have a first amendment right to select a spokesperson to advocate their interests in court, whether those interests are political, social or economic. Sec-

221. 381 So. 2d 231 (Fla. 1980).

222. In Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), the Florida Supreme Court upheld a statute requiring submission of medical malpractice claims to mediation panels over objections that the provisions deprived plaintiffs of access to the courts. Four years later, in *Aldana*, the court declared that the medical mediation act was unconstitutional because "the act in its operation has proven arbitrary and capricious." 381 So. 2d at 235.

223. 491 Pa. 385, 421 A.2d 190 (1980).

224. In Parker v. Children's Hospital of Philadelphia, 483 Pa. 106, 128-30, 394 A.2d 932, 943-44 (1978), the court upheld the Act's arbitration system. However, the *Mattos* court, upon review of the empirical evidence, concluded that "the lengthy delay occasioned by the arbitration system . . . does in fact burden the right of a jury trial . . . [making] the right practically unavailable." 491 Pa. at 391, 421 A.2d at 195.

225. As stated by the Colorado Supreme Court, "[t]o arbitrarily deny a claimant the right of competent legal representation, by fixing unreasonably low remuneration for services rendered by attorneys, is a serious matter, and may amount to a denial of due process." Cline v. Warrenberg, 109 Colo. 497, 500, 126 P.2d 1030, 1031 (1942).

ond, if fee limitations prevent a litigant from presenting a claim in the civil judicial system, then procedural due process issues arise. The focus of this inquiry is whether adequate alternatives for resolution of the litigant's grievance are available and whether a state must permit unhampered access to its courts regardless of the nature of the controversy or right being asserted.

On two occasions, the United States Supreme Court has addressed the question of a civil litigant's right of access to the courts. In both cases the Court considered the type of controversy the potential litigant sought to resolve, the nature of the limitation and the extent of available alternative dispute resolution mechanisms. In *Boddie v. Connecticut*,[226] welfare recipients seeking a divorce challenged the state's mandatory court filing fees and costs, contending that they were denied access to the courts because of their inability to pay the fees. Remarking that it had "seldom been asked to view access to the courts as an element of due process," the Supreme Court determined that the lack of any alternative to the state's judicial machinery for dissolution of marriage mandated free access under the due process clause, despite legitimate state interests in preventing frivolous litigation and controlling the allocation of resources.[227] According to the Court, due process requires that, "absent a countervailing state interest of overriding significance, persons forced to settle their claims through the judicial process must be given a meaningful opportunity to be heard."[228]

In its next opportunity to address the judicial access question, the Court refused to extend the *Boddie* holding beyond divorce proceedings. In *United States v. Kras*,[229] the sharply divided members of the Court rejected, by a five to four vote, a debtor's due process challenge to bankruptcy filing fees. Distinguishing *Boddie*, the majority reasoned that in contrast to divorce, bankruptcy is not the only method available to a

226. 401 U.S. 371 (1971).

227. *Id.* at 375-77. The Court reasoned that due process protections are traditionally viewed as safeguards for a defendant because at the point when the plaintiff invokes the power of a court, the judicial proceeding is "the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." *Id.* at 376.

228. *Id.* at 377. The Court, however, limited its holding to divorce cases, stating:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for . . . in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter.

Id. at 382-83.

229. 409 U.S. 434 (1973).

debtor for adjustment of his legal relationship with his creditors. "However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors."[230] Thus, the government's role with respect to a private commercial relationship, the Court stated, is "qualitatively and quantitatively different from its role in the establishment, enforcement, and dissolution of marriage."[231] Moreover, the Court reasoned, the right to obtain a divorce is protected by the first amendment freedom of association guarantees, while protection of the debtor is merely a legislatively created benefit.[232] Therefore, the Court concluded, a rational justification for imposing certain limits on the use of the bankruptcy system was sufficient to avoid due process concerns.[233]

In dissent, Justice Marshall argued that the role of the courts in *Boddie* and *Kras* could not be distinguished. "What is involved is the importance of access to the courts, either to remove an obligation that other branches of the government stand ready to enforce, . . . or to determine claims of right . . . ."[234] When a person raises a claim of right or entitlement under the laws, the only forum in our legal system empowered to determine that claim, according to Justice Marshall, is a court.[235]

Although a tort victim's common law right to sue for damages is not constitutionally guaranteed,[236] contingent fee controls restrict access to the courts for determination of that person's rights. Private settlements of such disputes may in fact be possible without litigation. However, unlike bankruptcy protection, the right to prosecute civil damage claims and resort to civil courts for arbitration of such disputes has been histori-

230. *Id.* at 445.

231. *Id.* at 445-46.

232. *Id.* at 444-45.

233. *Id.* at 446-47. Development of discharge in bankruptcy, according to the Court, " 'represents an independent . . . public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse.' " *Id.* at 447 (quoting J. MACLACHLAN, BANKRUPTCY 88 (1956)). "[T]his obviously is a legislatively created benefit, not a constitutional one, . . . [and] [t]he mere fact that Congress has delegated to the . . . Court[s] supervision over the proceedings . . . does not convert a statutory benefit into a constitutional right of access to a court." *Id.* at 447.

234. *Id.* at 462 n.4 (Marshall, J., dissenting).

235. *Id.* at 462 (Marshall, J., dissenting). "The legal system is, of course, not so pervasive as to preclude private resolution of disputes. But private settlements do not determine the validity of claims of right." *Id.* at 463 (Marshall, J., dissenting).

236. *See* Silver v. Silver, 280 U.S. 117, 122 (1929) ("[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by common law, to attain a permissible legislative object."); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978) (" 'A person has no property, no vested interest, in any rule of the common law. [citations omitted] . . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.' ").

cally recognized.[237] Further, neither *Kras* nor *Boddie* considered a separate first amendment right of access to the courts. Under a first amendment analysis, that right could only be limited for a compelling purpose.

3. Substantive due process—the right to contract

One issue not directly addressed by either the majority or dissent in *Roa* concerns whether attorney fee limits infringe upon the constitutionally protected freedom to contract. The right to contract is an element of personal liberty protected by both state and federal due process clauses[238] and the contract clause of the Constitution.[239] The due process clauses protect the liberty and formation elements of a contract, while the contract clause secures the interests and expectations created by private contracts.[240] Early legislation setting wages or limiting work hours was generally held invalid as a violation of an employee's right to contract under the federal due process clause.[241] But during the 1930's the courts disavowed this substantive due process approach and generally upheld wage and hour laws as permissible economic regulations, despite this interference with the contract bargaining process.[242]

Although limitations on contracts for professional services also directly inhibit the contract bargaining process, such contracts are primarily economic transactions. Therefore, regulations affecting these agreements are generally reviewed with only a minimal level of judicial scrutiny.[243] Under a rational basis analysis, statutes governing economic transactions are generally presumed valid and rationally related to proper legislative goals.[244] Accordingly, those challenging such a regulation bear the burden of proving that a statute is arbitrary in order to establish a due process violation.[245]

237. *Boddie*, 401 U.S. at 375 ("It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.").

238. *See supra* note 180 and accompanying text.

239. Article I, § 10 of the United States Constitution provides that no state shall pass any "[l]aw impairing the Obligation of contracts." U.S. CONST. art. I, § 10.

240. Blum & Wellman, *Participation, Assent and Liberty in Contract Formation*, 1982 ARIZ. ST. L.J. 901, 905. *See also* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

241. *See* Lochner v. New York, 198 U.S. 45 (1905).

242. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

243. Friedman v. Rogers, 440 U.S. 1, 18 n.19 (1979) ("The Due Process Clause imposes only broad limits . . . on the exercise by a State of its authority to regulate its economic life, and particularly the conduct of the professions.").

244. Nebbia v. New York, 291 U.S. 502 (1934).

245. *Id.*

While modern courts have consistently rejected the historical substantive due process standard for judicial review of economic regulations, the California Supreme Court has in some circumstances taken a somewhat more rigorous approach in the area of freedom of contract.[246] For example, it has held that legislation infringing on the right to contract must be judged from its tendency to promote the welfare of the general public rather than that of a small percentage of citizens.[247] Further, California courts have recognized that citizens have a constitutionally protected right to contract with the attorney of their choice.[248] Because section 6146 primarily benefits doctors by purportedly lowering their insurance premiums, the court would have had a legitimate basis for applying a higher level of review in the *Roa* case. Its reluctance to do so, however, is not surprising.

In reviewing the constitutionality of sliding scale contingency fee limits, some state and federal courts have discussed the right to contract issue but have dealt inconsistently with the infringement of contractual rights which results from such regulations. While a few courts have applied a traditional rational basis test, others have imposed a stricter level of scrutiny where this issue has been raised. The results, depending on the type of test used, have been mixed.

In *American Trial Lawyers Association v. New Jersey Supreme Court*,[249] the New Jersey Supreme Court adopted an appellate court holding that a judicial rule restricting contingency fees did not unreasonably violate the constitutional right to freedom of contract.[250] In upholding the regulation, the appellate court reasoned that attorneys were not businessmen entitled to charge what the traffic would bear and had never had the right to enforce contractual provisions for more than a fair and reasonable amount.[251] The judiciary, the court concluded, was therefore free to set fee restrictions as part of its constitutional powers to regulate the practice of law.[252] Under a traditional rational basis standard of re-

246. Blum & Wellman, *supra* note 240, at 909.

247. Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 171 P.2d 21 (1946); De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225, 153 P.2d 983 (1944).

248. Maxwell v. Superior Court, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982); Estate of Bodger, 128 Cal. App. 2d 710, 276 P.2d 83 (1954) (court of appeal invalidated trial court order appointing certain attorney to represent beneficiaries on appeal, holding that order was in excess of court's jurisdiction).

249. 126 N.J. Super. 577, 316 A.2d 19, *aff'd*, 66 N.J. 258, 330 A.2d 350 (1974). The plaintiffs also brought a simultaneous federal action which was stayed pending the state court resolution of the case. 409 U.S. 467 (1973).

250. 126 N.J. Super. at 591, 316 A.2d at 27, *aff'd*, 66 N.J. at 261, 350 A.2d at 352.

251. 126 N.J. Super. at 591, 316 A.2d at 27.

252. *Id.* at 587, 316 A.2d at 24.

view, the court stated that its rules were presumptively valid, unless proven arbitrary by the challenging party.[253] Because the plaintiffs had failed to make such a showing, the court concluded that the rule was a reasonable and valid exercise of judicial power even though no empirical basis of support existed for the fee limits.[254]

The Florida Supreme Court reached the opposite result in *In re Florida Bar*,[255] a case involving the constitutionality of a sliding contingency fee scale that the state bar association proposed for application in all tort actions. Applying a strict level of scrutiny to the fee scale, the court found that the limits posed the very real possibility of infringement of the constitutional rights of its citizens to make contracts, and held that absent any demonstrable and overriding public policy, the limits were unconstitutional.[256] While the court acknowledged that the freedom to contract is subject to reasonable restraint in the interest of public welfare, it reasoned that more effective means of controlling "miscreant" members of the legal profession were available.[257] Accordingly, because the rule did not bear a substantial relation to its ostensible purpose, the court held that the proposed regulation was an impermissible violation of individual rights to contract for personal services.[258]

The New Hampshire Supreme Court also recognized that a contingency fee scale established by its legislature in response to the medical malpractice crisis unfairly burdened malpractice plaintiffs by interfering with their freedom of contract.[259] In *Carson v. Maurer*,[260] the court concluded that while the state's purpose was to contain insurance costs, the contingency fee regulation was "questionably" related to that goal because it was unlikely to have a significant effect on the size of awards.[261] Therefore, the court found that the provision violated the constitutional prohibition on interference with the right to contract.[262]

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253. *Id.* at 590, 316 A.2d at 26.

254. *Id. See also American Trial Lawyers*, 66 N.J. at 266, 330 A.2d at 354 ("We . . . concede . . . that the rule . . . was not bottomed on an evidentiary hearing, nor even on anything approaching the lengthy investigation . . . [that revealed] the abuse of the contingent fee system in New York."). Ironically, the New Jersey rule was adopted *and* reviewed by the very same court. Although the court recognized that it was exercising a "legislative" function, *id.*, no independent review of the appropriateness of the rule occurred.

255. 349 So. 2d 630 (Fla. 1977).

256. *Id.* at 634-35. *See also supra* note 201.

257. *Id.* at 634 (citing Atlantic Coastline R.R. v. Goldsboro, 232 U.S. 548 (1914)).

258. *Id.* at 633-34.

259. Carson v. Maurer, 120 N.H. 925, 945, 424 A.2d 825, 839 (1980). *See also supra* note 20.

260. 120 N.H. 925, 424 A.2d 825 (1980).

261. *Id.* at 945, 424 A.2d at 839.

262. *Id.*

These conflicting opinions cannot be reconciled on the grounds that the rights or issues involved differed or that the factual settings were in marked contrast. No empirical evidence was presented in any of the cases concerning the impact of the fee controls, nor did any of the three states impart a generally high level of contractual protection to other professionals. Although the New Jersey decision reflects the more common approach to contractual issues, it is clear that that court was more concerned with the challenge to its rule-making authority.[263] In contrast, both the New Hampshire and Florida courts expressed concern with the ultimate impact of the contractual limitations on the exercise of other important rights.[264] While these cases may not impart a new standard with respect to contract rights, they suggest that a minimal level of scrutiny is inappropriate when regulations such as contingency fee limits impact more than the simple economic result of a transaction.

C. Equal Protection

1. The court's rational basis debate

The equal protection issues in the MICRA cases involved legislative classifications that primarily distinguished medical malpractice tort victims from all other tort victims. The attorney fee provision also results in the imposition of heavier burdens on more severely injured malpractice victims and provides special benefits for defense attorneys and medical malpractice defendants.

The plaintiffs in all four MICRA cases alleged that as malpractice victims they were arbitrarily singled out to bear particularly heavy burdens as a result of ill-conceived and faulty legislative reasoning based on factually unsupported claims of a supposed "crisis." They contended that their exclusion from the political process and the importance of the rights affected required a serious judicial inquiry to determine whether the Act's provisions were substantially related to proper legislative goals.

Disagreement between members of the California Supreme Court concerning the role of the court in adjudicating the constitutional claims of individuals traditionally excluded from the legislative process surfaced throughout the four MICRA decisions.[265] Some members of the court expressed a skeptical view of the legislative process and its ability to pro-

263. *American Trial Lawyers*, 126 N.J. Super. at 577, 316 A.2d at 19. The court primarily discussed the challenge to its rule-making authority, *id.* at 583-90, 316 A.2d at 22-26, devoting only a brief analysis to the plaintiffs' right to contract and equal protection claims. *Id.* at 591-93, 316 A.2d at 27-28.

264. 349 So. 2d at 633.

265. *See supra* note 5.

tect the disenfranchised, and appeared more willing to challenge the legislative fact-finding process used to justify legislative enactments. Other members of the court advocated a more traditional role throughout the four cases, refusing to question the basis for legislative action absent the existence of a well established suspect classification or fundamental right.

As the primary proponents of the more activist approach, Justices Bird and Mosk viewed the court's role as that of an intervenor on behalf of groups not adequately represented in the legislative process. Although such groups may not form traditionally suspect classes, according to these justices they share the common indicia of a lack of ability or resources to approach and lobby the legislature. Because some individuals are unable to organize a cohesive and effective presentation of their interests, their views are overpowered in the legislative arena by stronger, more influential special interest groups. Legislative acts are potentially skewed in favor of the more powerful and better represented, therefore causing the factual premises upon which such acts are based to be unreliable. Where it appears that an affected group has been left out of the legislative process, these justices would use the rational basis test to carefully review legislative acts rather than merely rubber stamp legislative pronouncements.

An example of this approach can be seen in Chief Justice Bird's dissent in the first medical malpractice case, *American Bank & Trust Co. v. Community Hospital*.[266] The Chief Justice observed that various inherent characteristics of malpractice victims prevented them from adequately advancing their interests in the political process.[267] Malpractice victims may be physically or mentally disabled and are scattered or isolated. Membership in the group is *involuntary*. At the time MICRA was enacted, the individuals who were to make up the group were unaware of the potential harm they were to suffer. They could not defend themselves and had no incentive to engage in coalition building or lobbying.[268] In short, the group burdened was "one which legislators might single out for discriminatory treatment with few, if any, political consequences."[269]

According to the Chief Justice, the purpose of the rational basis test is to put a check on the power of the legislature in order to prevent imposition of harmful burdens on such politically defenseless groups.[270] The size and vulnerability of the burdened group, as well as the extent of the

266. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (Bird, C.J., dissenting).
267. *Id.* at 397, 683 P.2d at 695, 204 Cal. Rptr. at 696 (Bird, C.J., dissenting).
268. *Id.*
269. *Id.* at 397-98, 683 P.2d at 695, 204 Cal. Rptr. at 696 (Bird, C.J., dissenting).
270. *Id.* at 399-400, 683 P.2d at 696-97, 204 Cal. Rptr. at 697-98 (Bird, C.J., dissenting).

burden imposed, are essential to a determination of whether or not a particular enactment raises constitutional concerns. Thus, under Chief Justice Bird's view of the rational basis test, the court should have reviewed the facts supporting the enactment of MICRA to determine whether a "crisis" existed which necessitated the imposition of severe burdens on medical malpractice victims.[271] In order to invalidate discriminatory legislation under the more traditional rational basis test, the Chief Justice argued, the court would have to conclude that the legislature acted "irrationally." This type of test, taken seriously, would make the courts "lunacy commissions sitting in judgment on the mental capacity of legislators."[272]

A majority of the members of the court rejected this approach and remained deferential to legislative factual findings. They viewed their role in applying a rational basis test as limited to a determination of whether legislative findings support a proper legislative purpose. For example, in *American Bank* the majority discussed the background of the medical malpractice crisis but concluded that it was not the court's function to reweigh the facts to determine if a crisis existed.[273] Because the legislature had determined that an insurance crisis had reduced the availability of medical care and that medical malpractice victims were faced with the prospect of obtaining unenforceable judgments,[274] the *American Bank* court concluded that the legislature had a legitimate interest in enacting legislation to reduce malpractice insurance costs.[275] The resulting statutes were valid under a rational basis test because the legislature "could rationally have decided" that the statute promoted its objectives.[276]

2. The rational basis test and the Supreme Court: a standard in flux

Recent decisions by the United States Supreme Court which discuss application of a heightened rational basis test or an intermediate level of scrutiny also reflect confusion and inconsistency. In *Plyler v. Doe*,[277] the Court applied an intermediate level of scrutiny despite the absence of a traditional suspect class or burdened fundamental right, because of con-

271. *Id.* (Bird, C.J., dissenting).

272. *Id.* at 399, 683 P.2d at 696, 204 Cal. Rptr. at 697 (Bird, C.J., dissenting) (quoting F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935)).

273. *Id.* at 368-69, 683 P.2d at 675-76, 204 Cal. Rptr. at 676-77.

274. *Id.* at 371, 683 P.2d at 677-78, 204 Cal. Rptr. at 678-79.

275. *Id.* at 373, 683 P.2d at 679, 204 Cal. Rptr. at 680.

276. *Id.* at 374, 683 P.2d at 679, 204 Cal. Rptr. at 680.

277. 457 U.S. 202 (1982).

cerns the Court considered "sufficiently absolute and enduring."[278] Addressing a Texas statute that prohibited free public education to children of illegal aliens, the Court concluded that public education is not "merely some governmental 'benefit,' "[279] and reasoned that the statute unfairly discriminated against children of the illegal aliens "on the basis of a legal characteristic over which . . . [they] had no control."[280] As a result of the dramatic and lasting impact such discrimination would have on the children and the nation, the Court determined that the statute could not be considered rational unless it furthered some "substantial" goal.[281] Under this heightened level of scrutiny, the Court questioned the purposes of the statute and concluded that the state's interests were "wholly insubstantial in light of the costs involved to these children, the State and the Nation."[282]

In dissent, Chief Justice Burger vigorously argued that the equal protection clause does not preclude states from classifying persons on the basis of factors and characteristics over which they have no control: "the Equal Protection Clause . . . is not an all-encompassing 'equalizer' designed to eradicate every distinction for which persons are not 'responsible.' "[283] Although the Chief Justice found the state's decision to deny illegal alien children a free education personally repugnant, he stressed that judicial use of the equal protection clause to remedy perceived failings of the political process would deprive those processes of the ability to function.[284]

More recently, in *City of Cleburne v. Cleburne Living Center*,[285] the Court retreated from this use of intermediate equal protection scrutiny. In *Cleburne* an organization seeking to establish a residence for mentally retarded individuals was denied a zoning permit. The organization claimed that the mentally retarded, by virtue of their immutable condition and lack of political power, were a "quasi-suspect" group deserving

278. *Id.* at 218 n.16. The Court acknowledged that undocumented aliens cannot be treated as a suspect class because their presence in the country in violation of federal law is not a "constitutional irrelevancy." *Id.* at 219 n.19. Furthermore, the Court added that education is not a fundamental right which would require strict scrutiny. *Id.* at 226. Therefore, states need not justify every variation in the manner in which education is provided by proving a compelling necessity. *Id.* at 223.

279. *Id.* at 221.

280. *Id.* at 220. The Court stated that "legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Id.* at 216 n.14.

281. *Id.* at 224.

282. *Id.* at 230.

283. *Id.* at 245 (Burger, C.J., dissenting).

284. *Id.* at 253 (Burger, C.J., dissenting).

285. 105 S. Ct. 3249 (1985).

of special consideration under the equal protection clause. The Court concluded that although the mentally retarded were immutably different, the state's interest in dealing with and providing for the mentally retarded was plainly legitimate and relevant for the purposes of some forms of discrimination.[286] Although the Court rejected the use of an intermediate level of scrutiny, it nevertheless struck down the ordinance on the ground that the City's discrimination against the mentally retarded was not relevant to any of the regulation's stated purposes.[287]

These decisions indicate that a heightened level of scrutiny would not be applied by the Court to laws adversely affecting medical malpractice victims despite the fact that they share many of the immutable characteristics recognized in *Plyler*. However, the *Cleburne* Court did conduct a serious inquiry into the legislative purpose of the challenged ordinance. Under a similarly searching application of the Court's rational basis test, attorney fee limits that unequally burden medical malpractice victims might also be declared irrational. In particular, there is no legitimate basis for regulating the attorney fees paid by medical malpractice victims. The attorney fee limits do not correspond to the legislative goal of reducing insurance premiums[288] because fees paid by plaintiffs do not generally affect the size of the verdict or the costs paid by insurers.[289] Reductions in plaintiffs' attorney fees have not contributed to ending the so-called insurance crisis.[290] However, unlike other tort victims, malpractice plaintiffs' recoveries in California are substantially limited.[291] Thus, the fee limits embodied in section 6146 may help ensure that plaintiffs obtain adequate compensation. If this single justification is sufficient under the Court's recent explanation of its rational basis test, the equal protection clause would not stand as a barrier to laws imposing these limits.

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286. *Id.* at 3256.

287. *Id.* at 3260. The state asserted that the denial of the permit was necessary because of objections by neighboring property owners and protection of the home's residents from students at a nearby school or from possible floods because of the home's location in a flood plain. *Id.* at 3259-60. The Court concluded that a home of similar size for nonmentally retarded individuals would not have required a permit. This indicated that the ordinance was based on an irrational prejudice against the mentally retarded. *Id.* at 3260.

288. *See supra* notes 13-16 and accompanying text.

289. *See supra* notes 13 & 204 and accompanying text.

290. *See supra* note 171 and accompanying text.

291. Medical malpractice plaintiffs' recoveries are limited to $250,000 for non-economic damages. CAL. CIV. CODE § 3333.2 (West Supp. 1985).

3. State courts—conflicting levels of scrutiny applied to contingency fee scales

Reflecting this lack of consensus, courts in other jurisdictions have applied inconsistent equal protection analyses to contingency fee scales, particularly in medical malpractice cases. In *DiFilippo v. Beck*,[292] a United States district court held that despite an unequal burden on plaintiffs, fee limits in medical malpractice cases were rational because they would reduce malpractice insurance rates by deterring frivolous suits and saving litigation expenses.[293] Conversely, the New Hampshire Supreme Court in *Carson v. Maurer*,[294] found that state's malpractice attorney fee provision violated equal protection guarantees because it improperly singled out victims of medical negligence for harsh treatment by restricting the means by which they may sue. Although the court conceded that the right to recover for injuries was not fundamental and that none of the classifications created by the act required strict scrutiny, it concluded that the rights involved were sufficiently important to require a more vigorous analysis than allowed under the rational basis test.[295] Because the attorney fee provision had no effect on the control of health care costs, its relationship to the overall purpose of the malpractice act was "questionable" and therefore constituted a violation of equal protection guarantees.[296]

One court that has evaluated a rule establishing contingency fee limits in all tort cases on an equal protection basis rejected the application of a strict or intermediate level of scrutiny. In *American Trial Lawyers Association v. New Jersey Supreme Court*,[297] the New Jersey Supreme Court affirmed the decision of the Appellate Department of the Superior Court upholding such a regulation. The lower court held that the rule did not unfairly discriminate against plaintiffs or their attorneys by applying only to contingent fees, by singling out contingent fees in negligence cases or by excluding certain types of claims.[298] Applying a traditional rational basis test, the court found that separate treatment of contingent fee agreements in tort actions was justified because of the unique problems in attorney-client relationships and contingent fee agreements.[299]

292. 520 F. Supp. 1009 (D. Del. 1981).
293. *Id.* at 1016.
294. 120 N.H. 925, 424 A.2d 825 (1980).
295. *Id.* at 931-32, 424 A.2d at 830.
296. *Id.* at 945, 424 A.2d at 839.
297. 66 N.J. 258, 330 A.2d 350 (1974).
298. 126 N.J. Super. at 591-92, 316 A.2d at 27-28.
299. *Id.* at 592, 316 A.2d at 27.

Although the Florida Supreme Court did not expressly consider equal protection issues in *In re Florida Bar*,[300] it refused to adopt a proposed amendment to the state's Code of Professional Responsibility establishing limits on contingent fees in all tort cases because it was "not disposed to elevate economic considerations above [the] right of access to the courts."[301] The court's balancing approach to these competing policy goals suggests that it would have applied at least an intermediate level of review under an equal protection analysis.

These decisions reveal a lack of consensus by state courts concerning the appropriate standards of review of regulations limiting contingency fees. Although the statutes in question affect the same rights, some courts have been willing to bestow a higher level of importance in order to justify a more critical analysis of the legislative classifications. Others have recognized that important rights are involved and that such regulations impose discriminatory treatment on a small group, but have refused to question legislative prerogatives in dealing with "crisis" situations.

4. Equal protection and MICRA—Has the Act accomplished its goals?

The California Supreme Court could base a decision to strike down MICRA and section 6146 on a separate rationale. The court was urged in the medical malpractice cases to consider statistical information proving that the MICRA provisions had not reduced health care costs. Proponents of this approach argued that the court had, on many previous occasions, reviewed events following the enactment of a statute when considering a regulation's constitutional validity. Such a determination, for example, led to the invalidation of the historically anomalous "guest statutes" which prevented recovery by nonpaying automobile passengers for injuries inflicted by a negligent driver.[302]

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300. 349 So. 2d 630 (Fla. 1977).

301. *Id.* at 633.

302. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). The statute may have been valid when first enacted as rationally related to the legitimate state interest of protecting host drivers from the "ingratitude" of their passengers. However, the widespread availability of automobile insurance in later years eliminated the justification for the distinction between paying and non-paying passengers. *Id.* at 869, 506 P.2d at 221-22, 106 Cal. Rptr. at 398. Post-enactment information has also been considered by the California Supreme Court and United States Supreme Court when ruling on other constitutional issues. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (validity of temporary restraint of enforcement of contracts dependent upon inquiry of whether emergency still exists); Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 311, 591 P.2d 1, 9, 152 Cal. Rptr. 903, 911 (1979) (en banc) (impairment of obligation of contracts invalid because an emergency situation no longer existed).

A majority of the court did not believe that this precedent compelled them to consider the practical effect of the MICRA statutes. In *American Bank & Trust Co. v. Community Hospital*,[303] for example, the court held that the Act's constitutionality under the equal protection clause did not depend on the court's assessment of MICRA's empirical success or failure.[304] However, the court contradicted this premise by evaluating the Act in light of subsequent events. It insisted that MICRA was principally designed to lower the cost of malpractice insurance and offered evidence that insurance premiums had been reduced since the Act took effect.[305] Moreover, because constitutional challenges to the legislation had prevented full implementation of the Act's provisions, the court concluded that it could not fully determine the effectiveness of the statute.[306]

In *Barme v. Wood*,[307] the second malpractice case, the court again refused to review the effect of MICRA, despite criticism by Justice Mosk that the passage of time had vindicated his conclusion that medical and hospital costs had continued to rise in the years since the Act took effect.[308] In *Roa*, the court similarly refused to review the effectiveness of the Act's attorney fee provision despite convincing evidence that the fee limits had not contributed to a reduction in the costs borne by medical malpractice defendants.[309] Given the strong precedent for such a review, the court's refusal to consider this evidence was inappropriate. However, the court may have left the door open for a challenge to the MICRA statutes after final resolution of all of the constitutional issues and application of the laws over a longer period of time.

5. Contingency fee restrictions as classifications based on wealth

Although the California Supreme Court has previously recognized wealth as a suspect class, it refused to acknowledge in *Roa* that the attorney fee provision unfairly burdened the poor. Yet, the statute appears to fit squarely within the court's definition of this classification. In *Serrano v. Priest*,[310] the court stated that a careful examination of legislation "is

303. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).
304. *Id.* at 374, 683 P.2d at 679, 204 Cal. Rptr. at 680.
305. *Id.* at 373, 683 P.2d at 679, 204 Cal. Rptr. at 680.
306. *Id.*
307. 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984).
308. *Id.* at 182, 689 P.2d at 451, 207 Cal. Rptr. at 821 (Mosk, J., dissenting).
309. 37 Cal. 3d at 930, 695 P.2d at 170, 211 Cal. Rptr. at 83. In a recent report by the American Medical Association, the organization conceded that limiting attorney fees did not reduce the number or severity of medical malpractice suits. *See supra* note 171 and accompanying text.
310. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

especially warranted where lines are drawn on the basis of wealth . . . [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[311] In *Committee to Defend Reproductive Rights v. Myers*,[312] the court expanded this rationale, claiming that:

> [we have] been particularly critical of statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society. . . . [The] indigent poor share many characteristics of other "insular minorities" who may not be adequately protected from discriminatory treatment by the general safeguard of the legislative process.[313]

In addition, even though the United States Supreme Court has refused to apply a heightened level of scrutiny to classifications based on wealth, some members of that Court have urged this result.[314]

The *Roa* majority ignored the plaintiffs' claim that section 6146 discriminates on the basis of wealth, despite evidence that contingency fees are the sole feasible method for many plaintiffs to finance protracted and expensive malpractice litigation.[315] According to Chief Justice Bird, *"only plaintiffs of modest means are truly unable to escape [the statute's] restrictions."*[316] In contrast, "affluent plaintiffs, as well as defendants, can evade the limits by contracting for legal services on an hourly basis."[317] The absence of discussion on this issue thus makes the holding questionable under California law.

D. Implications of Roa v. Lodi Medical Group, Inc.

1. Are express waivers permissible?

The *Roa* court concluded that one of the legislative purposes of section 6146 may have been to protect plaintiffs from unreasonable fees.[318] This holding may permit victims of medical malpractice to voluntarily waive the statutory fee limits and pay a higher fee to obtain the attorney of their choice.

Under section 3513 of the California Civil Code an individual may

311. *Id.* at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610 (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966)).

312. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

313. *Id.* at 281, 625 P.2d at 796, 172 Cal. Rptr. at 883.

314. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

315. 37 Cal. 3d at 949, 695 P.2d at 183, 211 Cal. Rptr. at 96 (Bird, C.J., dissenting).

316. *Id.* (Bird, C.J., dissenting) (emphasis in original).

317. *Id.* (Bird, C.J., dissenting).

318. 37 Cal. 3d 920, 932, 695 P.2d 164, 171, 211 Cal. Rptr. 77, 84 (1985).

waive the advantage of a law intended solely for his benefit.[319] However, the statute also provides that "a law established for a *public reason* cannot be controverted by a private agreement."[320] Usually, where statutes do not grant individual benefits, but are grounded in public policy, attempts to avoid them have been found invalid.[321] The burden of determining whether a statute is for public or private benefit is placed upon the court.[322] Courts have used this discretion, for example, to permit waivers of statutes of limitation which act to bar a remedy. Typically, however, courts generally have not permitted waivers of substantive rights such as minimum wage laws, unemployment insurance, worker's compensation benefits and tenant rights.[323]

In light of this rationale, section 6146 may permit waivers of the proscribed fee limits. Although the *Roa* court suggested that one of MICRA's goals was to lower medical malpractice insurance rates, section 6146 has had an insignificant effect on that objective.[324] However, as the *Roa* court stated, the statute was also purportedly enacted to protect injured parties by lowering their attorney fees. Thus, permitting a plaintiff's voluntary waiver of fee limits in order to contract for a higher fee might be permissible under Civil Code section 3513.

Such a waiver could be compared with the case where the wife waived her right to financial support for a more favorable community property agreement.[325] The client, like the wife, is losing a certain economic benefit which the state has granted, but each in return is obtaining a benefit more to his or her liking. The client realizes this benefit through obtaining a better attorney who can offer greater certainty of recovery.

An even closer parallel is found in *Maxwell v. Superior Court*,[326] where the California Supreme Court permitted a criminal defendant with an eighth grade education to waive potential conflicts with his attorneys in order to secure their representation in his criminal trial. Maxwell was charged with four counts of robbery and ten counts of murder. He entered into a retainer agreement with counsel whereby they were to represent him in return for publication rights to his life story.[327] Despite Maxwell's knowing and voluntary waiver of serious conflicts that jeop-

319. CAL. CIV. CODE § 3513 (West 1970).
320. *Id.*
321. 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 498, at 426 (8th ed. 1973).
322. *Id.* § 494, at 422.
323. *Id.* § 498, at 426-27.
324. *See supra* note 171 and accompanying text.
325. *See* Patton v. Patton, 32 Cal. 2d 520, 196 P.2d 909 (1948).
326. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).
327. *Id.* at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179.

ardized his right to effective representation and a fair trial,[328] the trial court recused the retained counsel, over Maxwell's objections, and appointed substitute counsel.[329] The supreme court reversed, holding that although Maxwell had a constitutional right to effective counsel and the undivided loyalty of his attorneys, his right to obtain counsel of his choice was more important. Thus, a client may insist on retaining his attorneys if he knowingly and intelligently waives potentially prejudicial conflicts.[330]

In civil matters, the right to chosen counsel must be weighed heavily when considering conflicts of interest, professional ethics and judicial integrity.[331] Disciplinary rules which attempt to protect clients from potential conflicts with their attorneys are similar to fee restrictions that attempt to protect clients from making a bad bargain. The waiver of a statutory fee provision that otherwise inhibits a client's right to select an attorney raises no more serious concerns than would a waiver of a conflict of interest that may result in a client being sentenced to death. Because the attorney fee would still be subject to the state and federal rules prohibiting unconscionable fees, courts would be able to step in on an individual basis to prevent such fees. In addition, where plaintiffs clearly did not understand the ramifications of their decisions, courts could invalidate an agreement and reimpose the statutory limits. It is highly unlikely that most plaintiffs would voluntarily choose to pay a higher fee when made aware of the statutory limits. However, voluntary waivers would assist those plaintiffs who find it difficult or impossible to obtain an attorney of their choice under the restrictive limits of section 6146. Most fees would continue to fall within the prescribed limits and therefore accomplish the public policy purposes of the statute; but, plaintiffs would be ensured the opportunity to obtain the attorney of their choice.

2. Extension of controls to all contingency fees

The *Roa* decision may provide the impetus for legislative enactment

328. The contract provided that the attorneys could, if they wished: "(1) create damaging publicity to enhance exploitation value, (2) avoid mental defenses because, if successful, they might suggest petitioner's incapacity to make the contract, and (3) see him convicted and even sentenced to death for publicity value." *Id.* at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179. Such agreements are generally prohibited by attorney disciplinary rules. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-4 (1979) ("Such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to employment); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 5-101 (1980).

329. 30 Cal. 3d at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180.

330. *See generally id.* at 619, 639 P.2d at 255-56, 180 Cal. Rptr. at 184-85.

331. *Id.* at 619, 639 P.2d at 255, 180 Cal. Rptr. at 184.

of contingency fee controls in all types of litigation. Several legislative proposals have been advanced in California and other states over the past few years in an attempt to accomplish this goal.[332] The *Roa* court's reasoning appears initially to support such an extension because of its conclusion that fee limits are generally acceptable and only require a rational purpose. Further, Chief Justice Bird's dissent suggests that one of the major problems with section 6146 is the fact that it only applies to medical malpractice cases. The Chief Justice suggests that if the limits applied across the board, attorneys would be less able to avoid its provisions by turning to other fields.[333] However, the problems inherent in section 6146 would be exacerbated by an extension of such controls to all tort litigation.

The primary difficulty with these controls remains the unwarranted state interference with the litigant's selection of an advocate, a decision which is protected by the first amendment. Such an intrusion is not justified by either the state's interest in controlling costs or protecting plaintiffs. The lack of evidence that attorney fees contribute in any substantial measure to escalating insurance costs or that contingency fees are generally excessive or unreasonable, supports the contrary conclusion that the imposition of fee limits is an unreasonable exercise of legislative power which would not survive any more than minimal scrutiny. Further, although extension of fee restrictions across the board would remove some of the discriminatory classifications in section 6146, it would not eliminate the classification based on wealth.

V. CONCLUSION

Crisis management has become a standard practice of both the executive and legislative branches of government. Because of the enormity and complexity of most problems facing politicians today, these decision-makers have been forced to play a reactive rather than proactive role in addressing societal concerns. Yet, as the history of California's MICRA statute dramatizes, decision-making in a crisis induced atmosphere throws the political process out of balance. The California Legislature reacted to the pressure of a powerful constituent group faced with a serious concern by imposing burdens on a powerless group of injured victims. While the judicial branch's role has traditionally been that of a counterbalance to legislative excesses, the California Supreme Court refused to exercise this considerable power in each of the four MICRA

332. Cal. A.B. 490, 1981-82 Sess. (Feb. 12, 1981); Cal. A.B. 2505, 1985-86 Sess. (March 8, 1985); Cal. S.B. 700, 1985-86 Sess. (March 4, 1985).

333. *Roa*, 37 Cal. 3d at 943, 695 P.2d at 179, 211 Cal. Rptr. at 92 (Bird, C.J., dissenting).

cases. Whether the court's reluctance reveals a new trend or simply an aberration remains to be seen. But the court's decisions undoubtedly will give encouragement to other special interests, such as product manufacturers, landowners and local governments, in their efforts to seek similar legislative relief from high jury verdicts and insurance premiums.[334]

Two issues of significance remain unresolved by the court's decision in *Roa v. Lodi Medical Group, Inc.* The view that attorney fees are a form of speech protected by the first amendment should emerge as a controlling limitation on legislative regulation. The *Roa* majority implicitly conceded that attorney fee regulations affect first amendment rights. The court failed to conclusively establish that recognition of such rights would prevent all regulation of attorney fees. The parameters of this protection and the permissible extent and scope of regulation remain unclear.

Finally, the *Roa* majority's failure to discuss the unequal impact of contingency fee regulations on the poor suggests that the members of the court were unable to logically address this concern in reaching their result. Recognition of either issue would have required a higher level of scrutiny than the court applied in its review of section 6146. However, as this Note suggests, the full implementation of the statute and a corresponding abandonment of the medical malpractice field by plaintiff's attorneys and inability of victims to obtain representation, may force a reconsideration of the questions raised in this case.

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334. Such a "crisis" is apparently developing throughout the liability insurance field. *See* Keppel, *Liability Insurers Are Fleeing Field in Wake of Big Damage Awards*, L.A. Times, June 17, 1985, § IV (Business), at 1, col. 4.