FOR IMMEDIATE RELEASE **February 9, 1999**

FTC URGED TO REGULATE CONTINGENCY FEE AGREEMENTS

The Washington Legal Foundation (WLF) today urged the Federal Trade Commission (FTC) to crack down on abuses of the contingency fee system by attorneys. In a petition filed with the FTC, WLF argued that contingency fee practices routinely engaged in by attorneys constitute "unfair trade practices" within the meaning of the Federal Trade Commission Act.

WLF's petition argued that in a large number of cases, attorneys enter into contingency fee agreements (whereby the attorney is promised a percentage of any recovery in return for performing services without receiving an up-front payment) even when there is little or no risk of nonrecovery; i.e., when the lawyer knows from experience that the client is highly likely to recover substantial damages. Moreover, the petition contends, the terms of contingency fee agreements rarely vary based on the likelihood of recovery; virtually all such agreements provide that attorneys are entitled to receive a minimum of 1/3 of any recovery.

WLF argued that such inelasticity of contract terms can exist only because of the gross disparity in information and bargaining power between lawyers and potential clients. In the absence of legal training, clients lack the ability to evaluate the potential worth of their claims, and thus are in no position to bargain meaningfully with prospective lawyers regarding the terms of the fee agreement.

"The legal profession and state bar authorities have demonstrated their unwillingness to address the contingency fee scandal, under which lawyers are pocketing billions of dollars of their clients' funds, often for minimal work," said WLF General Counsel Daniel J. Popeo after filing the FTC petition. "The only alternative is for the FTC to come in and clean up the mess," Popeo said.

WLF asked the FTC to declare it an "unfair trade practice" for a lawyer to enter into a contingency fee agreement with a client without first taking measures to obtain a client's truly "informed consent" to the agreement. Attorneys would be required to provide clients with a written Statement of Client's Rights and Lawyer's

Responsibilities before any legal work could begin. WLF's proposal would require lawyers:

(1) to explain to prospective clients what the contingencies or risks of nonrecovery are, if any, in their particular case, and to give the client the option to pay a reasonable hourly fee;

(2) to stress that although there may in certain cases be a cap on the contingency fee percentage that an attorney may charge, there is no mandatory minimum percentage contingency fee; and that the client is entitled to negotiate a lower contingency fee than that initially offered by the lawyer;

(3) to provide for a three-day "cooling off" period during which the client is entitled to rescind the fee agreement for any reason; and

(4) to disclose all adverse consequences of litigation, including the possibility that the opposing party may file counterclaims, or that the court may require payment of the opponent's attorney fees or of other monetary sanctions.

WLF also argued that contingency fee agreements should be avoided altogether because the interests of contingency fee attorneys often conflict with those of their clients. WLF argued that the contingency fee system ought to be replaced with a system under which non-attorneys are free to purchase interests in causes of action; such a system would ensure that indigents would continue to have access to the judicial process. WLF stated that the FTC should encourage states to work toward such a system by lifting current restrictions on purchasing and selling causes of action.

WLF stated that action is necessary by the FTC because state bar authorities have demonstrated their unwillingness to address clear abuses of the contingency fee system. WLF noted that its own efforts and those of others to reform the contingency fee system at the state level have largely been ignored by the organized bar.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a substantial portion of its resources to efforts to increase accountability within the legal profession and to bring the "litigation explosion" under control. WLF filed its FTC petition as part of its SCALES project ("Stop the Collapse of America's Legal Ethics"), a nationwide movement to eliminate abuse in America's civil justice system.

* * *

For further information, contact WLF General Counsel Daniel J. Popeo, WLF Chief Counsel Richard A. Samp, or WLF Senior Counsel for Litigation Affairs R. Shawn Gunnarson at (202) 588-0302.