

12-1-2017

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### Recommended Citation

Douglas R. Richmond, *Turns of the Contingent Fee Key to the Courthouse Door*, 65 Buff. L. Rev. 915 (2017).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol65/iss5/1>

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# BUFFALO LAW REVIEW

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VOLUME 65

DECEMBER 2017

NUMBER 5

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## Turns of the Contingent Fee Key to the Courthouse Door

DOUGLAS R. RICHMOND†

### INTRODUCTION

A lawyer's fee for representing a client may be characterized as "contingent" if the lawyer's compensation depends in whole or part on the successful outcome of the matter.<sup>1</sup> Contingent fees have been a feature on the American legal landscape since the mid-nineteenth century.<sup>2</sup> Courts and proponents describe contingent fees as the "key to the courthouse door" because they enable poor plaintiffs to pursue litigation they could not afford to maintain if their lawyers charged them by the hour.<sup>3</sup>

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1. See *Wright v. Guy Yudin & Foster, LLP*, 176 So. 3d 368, 372 (Fla. Dist. Ct. App. 2015) ("A contingency fee arrangement occurs when a law firm does not bill or expect payment until and unless the contingency is achieved. Contingency fee arrangements are typically contingent upon a successful outcome."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. a (AM. LAW INST. 2000) ("A contingent-fee contract is one providing for a fee the size or payment of which is conditioned on some measure of the client's success.").

2. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 457 (1998).

3. See, e.g., *Sneed v. Sneed*, 681 P.2d 754, 756 (Okla. 1984) ("[C]ontingent fees are still the poor man's key to the courthouse door. The contingent fee system allows persons who could not otherwise afford to assert their claims to have their

Contingent fee agreements also benefit plaintiffs who would never be categorized as poor—such as members of the middle class and even people who might be labeled as wealthy by some standards—but who would still strain in many cases to afford significant legal fees absent a favorable settlement or judgment out of which the fees might be paid. Litigation is expensive no matter who you are, and an adversary can make it more costly through time-consuming discovery and motion practice. For that matter, clients who can easily afford to pay lawyers by the hour benefit from contingent fee agreements because they shift much of the risk of loss to the lawyer and allow the client to allocate the money otherwise spent on legal fees to other needs.

Contingent fees have historically been predominant in plaintiffs' personal injury and employment litigation. And, again historically, lawyers charging contingent fees have typically practiced solo or in small firms. However, neither the traditional view of the types of litigation for which lawyers charge contingent fees nor the types of lawyers or law firms charging them is reliably accurate today.

Although plaintiffs' personal injury and employment litigation are still fueled by contingent fees and many plaintiffs' lawyers practice in small firms or alone, large and mid-sized law firms now represent clients on a contingent fee basis in various matters.<sup>4</sup> Contingent fee clients may be

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day in [c]ourt.") (footnote omitted); Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG., Summer 1976, at 27, 27 (offering a historical example).

4. See David Hricik, *Dear Lawyer: If You Decide It's Not Economical to Represent Me, You Can Fire Me As Your Contingent Fee Client, but I Agree I Will Still Owe You a Fee*, 64 MERCER L. REV. 363, 364 (2012) (observing that contingent fees are now "utilized in class actions, complex commercial litigation, patent infringement suits, and other suits where the client is generally more sophisticated—no longer is the contingent fee arrangement limited to solo practitioners, small firm lawyers, and personal injury clients," and stating that today, "sophisticated clients represented by large law firms agree to representation on a contingent fee basis in business litigation."). At least one large law firm regularly represents plaintiffs in personal injury litigation on a contingent fee basis. Julie

major corporations with substantial resources, as well as individuals of far more modest means.

Today, contingent fees are commonplace in intellectual property and commercial litigation, with law firms of all sizes utilizing them. In one well-publicized case, Wiley Rein LLP, a large general practice firm in Washington, D.C., represented the plaintiff in a patent infringement action against Research in Motion Ltd., which manufactured BlackBerry devices.<sup>5</sup> The case settled for \$612.5 million, and Wiley Rein received a contingent fee of more than \$200 million.<sup>6</sup> In 2015, Chicago-based general practice firm Schiff Hardin LLP earned a contingent fee of nearly \$32 million for successfully representing The Flintkote Co. in litigation against Imperial Tobacco Canada Ltd. in connection with an asbestos settlement.<sup>7</sup> In 2016, litigation powerhouse Kirkland & Ellis LLP received a \$70 million contingent fee for its work recovering environmental remediation costs on behalf of a litigation trust created to pursue claims by the federal government and several states against two oil companies.<sup>8</sup> Also in 2016, global law firm K&L Gates LLP, which represented Carnegie Mellon University in lengthy patent litigation against Marvell Technology Group Ltd. and Marvell Semiconductor Inc., earned a \$210 million contingent fee when the case settled for \$750 million.<sup>9</sup> Houston-based Baker Botts LLP “posted a record year” in

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Triedman, *Meet the New Boss*, AM. LAW., Mar. 2016, at 57, 58 (writing about a lawyer at “very possibly the only plaintiffs [sic] personal injury group at a large U.S. law firm”). Other law firms not normally associated with plaintiffs’ personal injury or employment litigation will occasionally take cases in these areas on contingency.

5. David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 337 (2012).

6. *Id.*

7. Jennifer Henderson, *Chicago: A Big Settlement Pays Off*, AM. LAW., June 2016, at 62, 62.

8. Susan Beck, *Kirkland’s Big Bet Pays Off*, AM. LAW., Apr. 2016, at 12, 12.

9. See Julie Triedman, *Too Far, Too Fast?*, AM. LAW., May 2016, at 64, 64.

2016, with its revenue elevated by multiple contingent fee representations.<sup>10</sup> Finally, as reported in late 2016, Washington, D.C. litigation boutique Kellogg, Huber, Hansen, Todd, Evans & Figel earned a \$506.3 million contingent fee from representing the National Credit Union Administration in subprime mortgage litigation against many of the world's largest banks.<sup>11</sup>

There are at least two reasons that contingent fees have spread beyond their historical realm to practice areas such as intellectual property and commercial litigation, and are now frequently charged by law firms that have traditionally eschewed them. First, organizational clients are increasingly seeking lawyers who will represent them on a contingent fee basis. These clients believe that a contingent fee aligns the lawyer's interests with their own. Linking the lawyer's compensation to a successful outcome in a matter supposedly encourages the lawyer—who has “skin in the game”—to be more creative, efficient, and result-oriented than she might be otherwise. By insisting on a contingent fee, the client also avoids the potentially significant expense of paying hourly fees during the life of the case, as well as the budgeting challenges attributable to the uncertainty and unpredictability of litigation.

Second, large law firms are warming to contingent fee engagements because some cases are potentially much more lucrative on a contingent fee basis than they would be if the firm billed by the hour. It is also possible to structure a contingent fee agreement so that the law firm retains much of the economic benefit of a contingent fee while reducing the financial risk in the event of a disappointing result. For instance, a law firm may negotiate a hybrid fee, where the

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10. Brenda S. Jeffreys, *Revenue, Profits Soar at Baker Botts Amid Contingency Wins*, AM. LAW. (Feb. 8, 2017), <http://www.americanlawyer.com/id=1202778792945>.

11. Scott Flaherty, *\$1 Billion for Credit Union Agency's Litigation Counsel*, AM. LAW., Dec. 2016, at L6, L6.

firm charges the client a discounted hourly rate or a monthly flat fee and additionally receives a percentage of the client's total recovery, or a percentage of the client's recovery if the settlement or judgment exceeds an agreed amount.<sup>12</sup>

Contingent fees have also become a recognized form of lawyer compensation in defense practices and some other forms of dispute resolution, such as tax appeals. Here, lawyers may charge "reverse" contingent fees. In litigation, a reverse contingent fee is based on the difference between the amount a claimant seeks from the defendant-client and the amount ultimately obtained, whether by way of settlement, judgment, or other award or decision. That is, a reverse contingent fee is based on the amount of money the lawyer representing the defendant saves her client rather than the amount of money a lawyer recovers for a client, as in a traditional contingent fee arrangement.

As established, popular, or increasingly widespread as they are, contingent fees raise numerous professional responsibility issues. As more clients seek contingent fee representations and as more lawyers agree to work on contingency, a growing number of lawyers who are unfamiliar with those issues, or who lack experience navigating them, will have to develop related knowledge and

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12. See Steven Susser, *Contingency and Referral Fees for Business Disputes: A Primer*, MICH. B.J., Nov. 2011, at 35, 36 (discussing different types of hybrid contingent fee arrangements); N.Y. Comm. on Prof'l Ethics, Op. 697 (1997) ("We believe a hybrid or modified contingent fee is permissible . . . as long as the total fee is not excessive. This will usually mean that the contingency percentage will be lower than it would be if the fee were based on a pure contingency. Whether the hourly fee must also be reduced depends on whether the fee as a whole exceeds a reasonable fee."); Tex. Comm. on Prof'l Ethics, Op. 518 (1996) (recognizing the permissibility of hybrid fees, but explaining that an agreement obligating a client to pay the greater of a reasonable contingent fee or the highest fee that would be reasonable based on an hourly rate would be improper because the uncertainty of collection normally would not be considered in arriving at an hourly fee and a higher contingent fee normally would be justified due to the uncertainty of collection); see, e.g., *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*, 114 Cal. Rptr. 3d 781, 791–95 (Ct. App. 2010) (approving a hybrid fee agreement that included a reduced contingent fee and a reduced hourly rate).

expertise to practice responsibly. This need is amplified by the fact that contingent fee agreements are subject to judicial oversight.<sup>13</sup>

This Article aims to provide lawyers with broad knowledge of the professional responsibility issues lurking in contingent fee representations. It begins in Part I with a discussion of the Model Rules of Professional Conduct most commonly implicated in contingent fee representations and the circumstances giving rise to related concerns. In particular, Part I discusses clients' right to control the settlement of their cases and lawyers' inability to override or burden clients' settlement-related decisions; the reasonableness of contingent fees viewed from several angles; lawyers' alteration of fee agreements mid-representation, perhaps changing from hourly billing to a contingent fee or vice versa; and contingent fee documentation and disclosure requirements.

Part II examines the reasonableness of contingent fees in cases in which the defendant makes an early settlement offer. It focuses on cases where (a) the defendant settles before suit is filed or early in the litigation and the plaintiff's lawyer receives a contingent fee that seems disproportionate to the time spent on the matter; or (b) the plaintiff rejects an early settlement offer either before or after retaining a lawyer, and the plaintiff's lawyer charges a contingent fee based on a subsequent settlement or judgment that includes the amount of the prior offer.

Part III discusses the ground rules where a lawyer charges a contingent fee and the client is additionally entitled to recover statutory attorneys' fees as a prevailing party in litigation.

Part IV surveys public entities' ability to hire private

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13. See, e.g., *Brown v. ANPAC La. Ins. Co.*, 2013-1375, p. 1 (La. App. 4 Cir. 2/26/14); 135 So. 3d 1192, 1193; *State v. Lead Indus. Ass'n*, 951 A.2d 428, 479 (R.I. 2008).

lawyers on a contingent fee basis when acting in their sovereign capacity as *parens patriae* to pursue consumer protection, eminent domain, or public nuisance litigation, or similar actions, rather than suing as traditional plaintiffs. When a governmental plaintiff is acting as a sovereign, its lawyers are expected to act with the neutrality required of those who govern, and they must avoid abusing the government's vast power. Although defendants and their supporters protest the alleged corrupting influence of contingent fees in this context,<sup>14</sup> courts generally permit public entities to hire contingent fee counsel to prosecute *parens patriae* actions if they take precautions to ensure that a case is prosecuted impartially. Part IV analyzes those precautions and related concerns.

Part V addresses the use of reverse contingent fees in litigation. The critical inquiry in most reverse contingent fee cases is the reasonableness of the fee. The problem is calculating the amount against which the client's potential savings—and thus any fee—will be measured. In addition to exploring that issue, Part V offers lawyers practical advice on structuring reverse contingent fee agreements.

Finally, Part VI analyzes lawyers' right to compensation when they are representing a client under a contingent fee agreement and the client discharges them before the contingency occurs. It also examines lawyers' right to compensation when they withdraw from representations before earning their contingent fees.

## I. RULES OF PROFESSIONAL CONDUCT

Depending on the facts, a contingent fee representation

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14. See, e.g., MICHAEL M. MADDIGAN, U.S. CHAMBER INST. FOR LEGAL REFORM, *BIG BUCKS AND LOCAL LAWYERS* (2016), [http://www.instituteforlegalreform.com/uploads/sites/1/LocalProsecutorsPaper\\_WebPaper.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/LocalProsecutorsPaper_WebPaper.pdf) (criticizing states' use of private contingent fee counsel to pursue *parens patriae* litigation on various grounds).



may implicate a number of rules of professional conduct,<sup>15</sup> although four rules are regularly in play: Model Rule of Professional Conduct 1.2(a), which requires a lawyer to “abide by a client’s decision whether to settle a matter”;<sup>16</sup> Model Rule 1.5(a), which requires all legal fees to be reasonable;<sup>17</sup> Model Rule 1.5(b), which obligates a lawyer to communicate to the client the basis or rate of any fee to be charged, including any changes in the basis or rate of the fee;<sup>18</sup> and Model Rule 1.5(c), which requires that contingent fee representations be documented in certain ways.<sup>19</sup> If a lawyer tries to change the terms of a representation from a contingent fee to another form of compensation or vice versa, Model Rule 1.8(a), which governs business transactions with clients, is also implicated.<sup>20</sup>

#### A. *Contingent Fees and Client Control of Settlement Decisions*

A recurring complaint about contingent fees is that they create potential conflicts of interest between the lawyer and the client with respect to settlement.<sup>21</sup> For instance, the

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15. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.4(b) (AM. BAR ASS’N 2017) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); see also *Landry v. Haartz*, No. 10-P-1687, 2013 WL 2436466, at \*6 (Mass. App. Ct. June 6, 2013) (stating, in a case involving a contingent fee, that “informed decisions” within the meaning of Rule 1.4(b) “would naturally include whether to proceed with representation on the basis of a proffered fee arrangement”); Utah Ethics Advisory Comm., Op. 01-04 (2001) (“Under Rule 1.4(b), a law firm must explain its fee arrangements to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.”).

16. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2017).

17. See *id.* r. 1.5(a) (stating that a lawyer “shall not make an agreement for, charge, or collect an unreasonable fee” and listing factors to be considered in determining the reasonableness of a fee).

18. *Id.* r. 1.5(b).

19. *Id.* r. 1.5(c).

20. *Id.* r. 1.8(a).

21. See, e.g., RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE

client may want to take a difficult case to trial while the lawyer would prefer to accept a settlement offer that will assure her of a respectable fee. Alternatively, a client may want to settle a dispute for an amount the lawyer considers inadequate given her valuation of the matter and the fee she will ultimately receive if things go as she plans, so the lawyer favors continued negotiation or litigation. Regardless, Model Rule 1.2(a), which states that a lawyer “shall abide by a client’s decision whether to settle a matter,”<sup>22</sup> clearly establishes that the decision to settle is the client’s to make—not the lawyer’s.<sup>23</sup> The lawyer must defer to the client even

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LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.5-3(b), at 196 (2017–2018) (“Contingent fees by their nature raise potential conflicts of interest between the attorney and client. For example, the client may wish to settle litigation while the attorney would want to press on, or vice versa.”) (footnote omitted).

22. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2017).

23. *See, e.g.*, *Jacobsen v. Oliver*, 555 F. Supp. 2d 72, 79 (D.D.C. 2008) (stating that a clause in a contingent fee agreement requiring the lawyer’s consent to settlement violates Rule 1.2(a)); *In re Grievance Proceeding*, 171 F. Supp. 2d 81, 84 (D. Conn. 2001) (“Implicit in Rule 1.2(a)’s requirement that a lawyer ‘shall abide by a client’s decision whether to accept an offer of settlement’ is both a requirement to communicate all settlement offers to the client and a requirement that the client be permitted to decide whether to accept or not to accept any such offer.”); *In re Lewis*, 463 S.E.2d 862, 863 (Ga. 1995) (“A client who enters into a contingent fee contract with an attorney cannot relinquish the right to decide whether to accept a settlement offer.”); *In re Lansky*, 678 N.E.2d 1114, 1116 (Ind. 1997) (“By including in the fee agreement a provision by which the client gave up her right to decide whether to accept an offer of settlement, the [lawyer] violated [Indiana Rule] 1.2(a).”); *Lofton v. Fairmont Specialty Ins. Mgrs., Inc.*, 367 S.W.3d 593, 597 (Ky. 2012) (discussing Rule 1.2(a) in connection with a fee agreement that also obligated the lawyer to honor the client’s decision to settle); *Culpepper & Carroll, PLLC v. Cole*, 2005-1136, p. 3 (La. 4/4/06), 929 So. 2d 1224, 1227 (La. 2006) (calling it “clear that the decision to accept a settlement belongs to the client alone”); *Estate of St. Martin v. Hixson*, 2010-CT-00380-SCT (¶ 15), 145 So. 3d 1124, 1130 (Miss. 2014) (observing that “antisettlement” and “antitermination” clauses in a contingent fee agreement were invalid); *In re Coleman*, 295 S.W.3d 857, 864 (Mo. 2009) (asserting that “an attorney may not execute a contract that gives the attorney the sole right to settle a case”); *Davis Law Firm v. Bates*, No. 13-13-00209-CV, 2014 WL 585855, at \*3 (Tex. App. Feb. 13, 2014) (concluding that a contingent fee agreement that required the lawyer’s consent to settlement violated the Texas version of Model Rule 1.2(a) and was unenforceable); *State Bar of Nev. Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 35*, at 2 (2006) (stating that Rule 1.2(a) “means what it says: the decision

if the lawyer believes that the client is behaving unreasonably.<sup>24</sup> While the lawyer may counsel the client on the wisdom of accepting or rejecting a settlement offer, or advise the client on the pros and cons of initiating or continuing litigation versus pursuing settlement, she may not usurp the client's decision-making authority.<sup>25</sup>

Similarly, courts hold that a lawyer may not impair the client's ability to make settlement decisions by structuring the representation to allow the lawyer to withdraw, or to increase the cost of representation, if the client declines a settlement offer that the lawyer believes should have been accepted.<sup>26</sup> *Compton v. Kittleson*<sup>27</sup> is a representative case.

Nicholas Kittleson represented Danilo and Angelita Nelvis in a lawsuit against a used car dealer, Cream Puff Auto, for selling them a lemon.<sup>28</sup> Kittleson represented the Nelvises pursuant to a fee agreement which provided that he would receive one-third "of any amounts recovered from all defendants plus any award of attorney fees," but which would automatically convert to an hourly representation at the rate of \$175 per hour "if the Nelvises 'decide[d] to drop the case.'"<sup>29</sup> Although the fee agreement stated that the Nelvises had the authority to decide whether to settle, Kittleson also inserted a clause that provided: "If you agree to settle this case for an amount that will pay less than

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to settle belongs to the client, and may not be abrogated to the attorney in the retainer agreement").

24. *In re Indeglia*, 765 A.2d 444, 447 (R.I. 2001).

25. *Id.*

26. *Nehad v. Mukasey*, 535 F.3d 962, 970–71 (9th Cir. 2008); *see also* Neb. Advisory Op., Advisory Op. 95-1, at 5 (1995) (opining that "a provision giving the attorney the option between a contingent fee and an hourly fee if the client accepts a settlement offer which the lawyer deems unsatisfactory is an impermissible transfer of the authority of the client to the attorney").

27. 171 P.3d 172 (Alaska 2007).

28. *Id.* at 173.

29. *Id.* at 174 (quoting the fee agreement).

\$175.00 per hour for the time I invest, then I shall receive an amount over and above the 33% to compensate me at the rate of \$175.00 per hour before you receive your portion of the settlement.”<sup>30</sup>

Relying on Kittleson’s advice, the Nelvises rejected Cream Puff’s \$25,000 pretrial offer of judgment.<sup>31</sup> Unfortunately, they lost at trial and suffered a judgment requiring them to pay costs and attorney’s fees of nearly \$100,000.<sup>32</sup> They filed for bankruptcy protection as a result.<sup>33</sup> The bankruptcy trustee, Larry Compton, sued Kittleson for legal malpractice based on his use of “the ‘convertible fee’ agreement.”<sup>34</sup> Kittleson won summary judgment in the trial court and Compton appealed to the Alaska Supreme Court.<sup>35</sup>

The sole issue on appeal was whether the fee conversion provision in the parties’ fee agreement impermissibly burdened the Nelvises’ right to control settlement.<sup>36</sup> The *Compton* court noted that while hybrid contingent-hourly fee agreements are proper in some cases, they are not always permissible, and the agreement here certainly ran afoul of Rule 1.2(a).<sup>37</sup> As the *Compton* court reasoned:

The case at bar exemplifies the tensions created by the structure of hybrid agreements. . . . Under a pure contingent-fee agreement, the Nelvises would have recovered approximately \$15,000 from Cream Puff’s \$25,000 offer—only slightly less than the price they paid for the used car. But under the fee-conversion provision, Kittleson’s fees, when calculated at the agreement’s hourly rate, exceeded the amount of Cream Puff’s offer, leaving the Nelvises with less than nothing: under the hybrid agreement, accepting the offer would

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30. *Id.* (quoting the fee agreement).

31. *Id.* at 174–75.

32. *Id.* at 173.

33. *Id.* at 175.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 176.

have triggered the conversion from contingent to hourly fees, thus obliging the Nelvises to pay Kittleson more than \$30,000 in fees while giving them only \$25,000 to satisfy the new obligation.

The impact of this “fee surprise” is compounded by the predictable difficulty of forecasting the effects of the fee-conversion provision. Given the number of variables involved—the merit and strength of the client’s claims, the probable timing and size of a settlement offer, and the work required to achieve settlement—it seems unrealistic to expect that prospective clients like the Nelvises would be able to appreciate the risks and benefits of the disputed fee provision.<sup>38</sup>

The *Compton* court decided that the hybrid fee agreement Kittleson used in the Nelvises’ representation was prohibited by the Alaska Rules of Professional Conduct and other aspects of Alaska law because of its potential to impair a client’s exclusive right to accept an offer of judgment.<sup>39</sup> The court therefore reversed the trial court and remanded the case for entry of summary judgment in Compton’s favor.<sup>40</sup>

*Culpepper & Carroll, PLLC v. Cole*<sup>41</sup> is a more unusual Rule 1.2(a) case. There, Connie Carroll retained lawyer Bobby Culpepper to represent him in contesting his mother’s will.<sup>42</sup> Culpepper agreed to do so for a one-third contingent fee.<sup>43</sup> Culpepper negotiated a proposed settlement with the lawyer for Cole’s mother’s estate that would have provided Cole with property worth approximately \$21,000 more than he was entitled to receive under his mother’s will.<sup>44</sup> Culpepper recommended that Cole accept the settlement

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38. *Id.* at 179 (footnote omitted).

39. *Id.* at 180.

40. *Id.*

41. 2005-1136 (La. 4/4/06); 929 So. 2d 1224.

42. *Id.* at p. 1; 929 So. 2d at 1225.

43. *Id.* at p. 2; 929 So. 2d at 1226.

44. *Id.*

offer, but he declined.<sup>45</sup> Things went downhill from there. Culpepper refused to file suit in the matter and Cole fired him as his lawyer.<sup>46</sup> Cole then challenged his mother's will on a *pro se* basis, lost, and recovered nothing.<sup>47</sup>

Culpepper sued Cole for the one-third contingent fee he would have earned had Cole accepted the recommended settlement, plus interest.<sup>48</sup> Culpepper won at trial and the Louisiana Court of Appeal affirmed the trial court judgment.<sup>49</sup> The appellate court found that Culpepper and Cole had a valid contingent fee agreement, and that by not accepting the favorable settlement that Culpepper negotiated before his discharge, Cole deprived Culpepper of the contingent fee he had already earned.<sup>50</sup> Cole successfully petitioned the Louisiana Supreme Court for a writ of certiorari.<sup>51</sup>

The Louisiana Supreme Court reversed the lower appellate court, observing that while, in hindsight, Cole should have settled on the terms that Culpepper negotiated, the decision not to do so belonged to him alone.<sup>52</sup> To hold Cole liable for the contingent fee would dock him for exercising his right to reject the estate's proposed settlement.<sup>53</sup> More fundamentally, the *Culpepper & Carroll* court noted that because Culpepper recovered nothing for Cole, he could not collect a contingent fee.<sup>54</sup>

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at p. 4; 929 So. 2d at 1227.

52. *Id.* (citing Louisiana Rule 1.2(a)).

53. *Id.*

54. *Id.* at p. 5; 929 So. 2d at 1228.

In summary, lawyers may attempt to persuade clients one way or the other with respect to settlement, but they may not arrogate or unduly burden clients' authority over settlement. For example, a lawyer cannot provide in a contingent fee agreement that the client will become obligated to pay for her services at her standard hourly rate if the client rejects a settlement offer she considers reasonable,<sup>55</sup> or if the client rejects an offer that she recommends and the opponent later prevails.<sup>56</sup> The chance that a client will make a disappointing settlement decision is an inherent risk that a lawyer assumes when charging a contingent fee.

### B. *The Reasonableness of a Contingent Fee*

Contingent fees, like all other types of legal fees, must be reasonable.<sup>57</sup> This is clear from Model Rule 1.5(a), which provides that a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee."<sup>58</sup> Model Rule 1.5(a) identifies eight factors to consider when weighing the reasonableness of a lawyer's fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the

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55. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 95-24 (1995); N.Y.C.L.A. Comm. on Prof'l Ethics, Op. 736 (2006).

56. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-18 (1999).

57. MODEL RULES OF PROF'L CONDUCT r. 1.5 cmt. 3 (AM. BAR ASS'N 2017); *Town of Mamou v. Fontenot*, 2001-1622, p. 9 (La. App. 3 Cir. 5/8/02); 816 So. 2d 958, 966 (quoting *Davidson, Meaux, Sonnier, McElligott & Swift v. Brodhead*, 613 So. 2d 1038, 1041 (La. Ct. App. 1993)); *Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Turco*, 735 N.W.2d 368, 374 (Neb. 2007). In addition to applicable ethics rules, lawyers' status as fiduciaries to their clients requires them to charge reasonable fees. *See Cordell & Cordell, P.C. v. Gao*, 771 S.E.2d 196, 200-01 (Ga. Ct. App. 2015); *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 835 (Mo. Ct. App. 1995).

58. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2017).

- lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;
  - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.<sup>59</sup>

No single factor controls the reasonableness of a fee.<sup>60</sup> Not all factors are relevant in all cases.<sup>61</sup> Beyond any value that comes from facilitating possible appellate review,<sup>62</sup> a court is not obliged to engage in a factor-by-factor analysis of a disputed or requested fee.<sup>63</sup> The weight assigned to any particular factor depends on the facts of the case.<sup>64</sup> Furthermore, the Model Rule 1.5(a) factors are not exclusive.<sup>65</sup> Courts may consider other factors in appropriate cases.<sup>66</sup>

59. *Id.*

60. *Rodriguez v. Ancona*, 868 A.2d 807, 814 (Conn. App. Ct. 2005); *Snider v. Am. Family Mut. Ins. Co.*, 298 P.3d 1120, 1129 (Kan. 2013); *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 955 (Md. 2007); *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 30, 720 N.W.2d 54, 65 (N.D. 2006).

61. *Twp. of W. Orange v. 769 Assocs., LLC*, 969 A.2d 1080, 1088 (N.J. 2009); *In re Jardine*, 289 P.3d 516, 523 (Utah 2012).

62. *See Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 186 (Tenn. 2011) (“To enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case.”).

63. *Berman v. Linnane*, 748 N.E.2d 466, 469 (Mass. 2001).

64. *McCabe v. Arcidy*, 635 A.2d 446, 452 (N.H. 1993); *see also In re Malone*, 886 A.2d 181, 185 (N.J. Super. Ct. App. Div. 2005).

65. *WiFiLand, LLP v. Hudson*, 100 A.3d 450, 459 (Conn. App. Ct. 2014); *Nunn Law Office v. Rosenthal*, 905 N.E.2d 513, 520 (Ind. Ct. App. 2009); *Diamond Point Plaza Ltd. P'ship*, 929 A.2d at 955; *see also Twp. of W. Orange*, 969 A.2d at 1088; *In re Jardine*, 289 P.3d at 523.

66. *See Berman*, 748 N.E.2d at 469 (quoting an earlier case listing additional factors).



A fee must be reasonable under the circumstances regardless of the terms of the parties' fee agreement.<sup>67</sup> Clients cannot consent to unreasonable fees.<sup>68</sup> Lawyers looking to recover fees or seeking fee awards bear the burden of establishing the reasonableness of their fees.<sup>69</sup>

Model Rule 1.5(a)(8) specifically identifies as a reasonableness factor whether the fee in question is contingent.<sup>70</sup> Again, this is but one factor for a court to consider when evaluating the reasonableness of a fee. Rule 1.5(a)(8) does not preclude a court from considering other factors in evaluating the reasonableness of a contingent fee.<sup>71</sup>

### 1. The Size of the Fee as a Measure of Reasonableness

A contingent fee is not unreasonable merely because it is large.<sup>72</sup> There are good reasons for this rule. First, the ability to earn a fee greater than the lawyer might receive if she charged by the hour compensates her for assuming the risk that she will receive no fee if the case is lost, while, at the same time, largely protecting the client from out-of-pocket

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67. *Kelley Drye & Warren, LLP v. Orbusneich Med. Co. Ltd.*, BVI, No. FSTCV136020217S, 2014 WL 1814204, at \*6 (Conn. Super. Ct. Apr. 4, 2014).

68. *See In re Sinnott*, 2004 VT 16, ¶ 16, 176 Vt. 596, 845 A.2d 373, 379 (Vt. 2004) (explaining that by virtue of Rule 1.5(a), "lawyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands").

69. *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 102, 30 N.E.3d 631, 656; *Gold, Weems, Buser, Sues & Rundell v. Granger*, 2006-859, p. 8 (La.App. 3 Cir. 12/29/06); 947 So. 2d 835, 842; *Bass v. Rose*, 609 S.E.2d 848, 853 (W. Va. 2004).

70. MODEL RULES OF PROF'L CONDUCT r. 1.5(a)(8) (AM. BAR ASS'N 2017).

71. *See In re Succession of Bankston*, 2002-0548, p. 5 (La.App. 1 Cir. 2/14/03); 844 So. 2d 61, 65 (stating that "all factors set forth under Rule 1.5 must be considered" in evaluating a contingent fee's reasonableness).

72. *Att'y Grievance Comm'n of Md. v. Edib*, 4 A.3d 957, 965 (Md. 2010); *Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Turco*, 735 N.W.2d 368, 376 (Neb. 2007).

loss if the outcome is unfavorable.<sup>73</sup> Put another way, the lawyer is entitled to premium compensation for assuming what is in most cases the real risk of receiving no fee for her efforts.<sup>74</sup> Second, and relatedly, contingent fee agreements are intended to produce generous fees in successful cases to compensate the law firm for unsuccessful cases that generate no fees.<sup>75</sup> Third, the potential to earn a substantial fee compensates the lawyer for the delay between the performance of legal services and payment for them.<sup>76</sup> Accordingly, a court should not comparatively evaluate the reasonableness of a contingent fee simply by multiplying the number of hours that the lawyer spent on the matter by a reasonable hourly rate.<sup>77</sup>

*Goesel v. Boley International (H.K.) Ltd.*<sup>78</sup> is an interesting recent case on the subject of reasonableness. A little boy, Cole Goesel, injured his eye when a toy shattered.<sup>79</sup> His parents hired Williams, Bax & Saltzman, P.C. (WBS), to sue on his behalf.<sup>80</sup> The retainer agreement provided that WBS would receive one-third of any gross settlement or judgment and the Goesels would pay all litigation expenses,

73. *Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 131 A.3d 502, 508 (Pa. Super. Ct. 2016); *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 103 (Tex. App. 2011) (citing *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006)).

74. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 9.08, at 9–36 (4th ed. 2015).

75. *Siraco v. Astrue*, 806 F. Supp. 2d 272, 277 (D. Me. 2011); *Jacobsen v. Oliver*, 555 F. Supp. 2d 72, 85–86 (D.D.C. 2008).

76. Hricik, *supra* note 4, at 368.

77. *Town of Mamou v. Fontenot*, 2001-1622, p. 9 (La.App. 3 Cir. 5/8/02); 816 So. 2d 958, 966; *see, e.g., In re Abrams & Abrams, P.A.*, 605 F.3d 238, 243–49 (4th Cir. 2010) (concluding that a district court erred in reducing a 33 percent contingent fee to roughly three percent by calculating the estimated hours spent by the plaintiff's lawyers and multiplying them by an arbitrary hourly rate, rather than evaluating the reasonableness of the original fee in light of its contingency, the award involved and the results obtained, and fee awards in similar cases).

78. 806 F.3d 414 (7th Cir. 2015).

79. *Id.* at 417.

80. *Id.*

but the Goesels would pay nothing if there was no recovery.<sup>81</sup>

The ensuing litigation was intense, necessitated the employment of numerous expert witnesses, and involved extensive discovery.<sup>82</sup> The case settled on the eve of trial for \$687,500.<sup>83</sup> WBS's one-third cut of the gross settlement amount was \$229,166.67 and the case expenses totaled \$172,949.19, leaving the Goesels with \$285,384.14.<sup>84</sup> Because Cole Goesel was a minor, the district court had to approve the settlement.<sup>85</sup> Unprompted, the district court expressed unhappiness with the situation because between WBS's fee and the litigation expenses, the Goesels' "bottom line" was just over 40 percent of the total recovery.<sup>86</sup> Asserting as authority "fairness and right reason," the district court modified the parties' fee agreement so that the expenses were deducted from the settlement before WBS received its one-third share.<sup>87</sup> The district court also refused to count WBS's Westlaw charges as reimbursable litigation expenses.<sup>88</sup> As a result of this rejiggering, WBS was awarded fees of \$174,730.47 and was reimbursed \$163,308.59 for expenses, and Cole received \$349,460.94, or approximately 51 percent of the total recovery.<sup>89</sup> WBS appealed to the Seventh Circuit.<sup>90</sup>

The *Goesel* court reviewed the district court's decision for

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81. *Id.*

82. *Id.* at 417–18.

83. *Id.* at 418.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (noting that the Goesels declined to participate in the appeal and the Seventh Circuit had to appoint amicus counsel to argue in support of the district court's decision).

abuse of discretion.<sup>91</sup> Even under that highly deferential standard, the district court's decision could not stand. WBS's fee as originally agreed was objectively reasonable when compared to the prevailing market rate, whether based on a side-by-side comparison between the fee ultimately recovered and the lodestar, or compared to what the client would have been charged on a straight hourly basis.<sup>92</sup> Furthermore, WBS's original fee was reasonable when evaluated under the Rule 1.5(a) factors.<sup>93</sup> With no quantitative or qualitative grounds for objection, WBS's negotiated contingent fee could not be characterized as unreasonable.<sup>94</sup> The district court's invocation of "fairness and right reason" could not support an exercise of discretion where there was "no argument for *un* fairness or *wrong* reason."<sup>95</sup>

At bottom, the district court abused its discretion by restructuring the parties' fee agreement for no good reason.<sup>96</sup> After deciding another issue, the *Goesel* court reversed the district court's judgment and remanded the case for further proceedings consistent with the opinion.<sup>97</sup>

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91. *Id.* at 419.

92. *Id.* at 420.

93. *Id.*

94. *Id.* at 421.

95. *Id.* at 424.

96. *Id.*

97. *Id.* at 425. *Goesel* involved the reasonableness of a contingent fee in the representation of a minor, which raises an interesting question: should a court evaluate the reasonableness of a contingent fee differently when the intended beneficiary of the lawyer's services is a minor or other incompetent person? Absent an applicable statute or court rule, the short answer is no. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 185 (Tenn. 2011); *see, e.g., Goesel*, 806 F.3d at 420–22 (discussing the reasonableness of a contingent fee in connection with a personal injury case involving a child); *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 244–48 (4th Cir. 2010) (discussing the factors a court should consider in evaluating the reasonableness of a contingent fee, and applying some of them in a case involving an incompetent adult); *In re Estate of Sass*, 616 N.E.2d 702, 705 (Ill. App. Ct. 1993) (concluding that the trial judge adequately considered the

Although a contingent fee is not objectionable merely because it is large, that does not mean that a substantial fee is reasonable merely because it is contingent. A court will generally hold a contingent fee to be unreasonable if it exceeds the amount of the client's recovery.<sup>98</sup> A court may also find a contingent fee to be unreasonable where the client's recovery "was likely to be so large that the lawyer's fee would clearly exceed the sum appropriate to pay for [the] services performed and risk assumed."<sup>99</sup>

## 2. The Reasonableness of Contingent Fees in Cases of Clear Liability

Reasonableness concerns also surface in cases in which it appears from the start that the defendant's liability is clear. In such cases there is arguably no contingency on which to base a contingent fee. But appearances are deceiving and assumptions along these lines are frequently mistaken. In fact, as experienced trial lawyers and judges

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Rule 1.5(a) factors in evaluating a contingent fee in a case involving the death of a minor). *But see* *Haley v. Eighth Judicial Dist. Ct.*, 273 P.3d 855, 860 (Nev. 2012) (discussing special factors for evaluating the reasonableness of a lawyer's contingent fee in connection with the settlement of a minor's claim). While a court must mind its special responsibility to protect a minor's or other incompetent person's interests, it should still evaluate a contingent fee agreement between the lawyer and the minor's or incompetent person's guardian or next friend against the Model Rule 1.5(a) factors. *Wright*, 337 S.W.3d at 185. As in other cases, no single factor necessarily warrants special emphasis over the others. *Id.* at 186. Depending on the facts, a court may determine that some factors do or don't apply, or should be weighted differently. *Id.*

98. *See, e.g.*, *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1047 (6th Cir. 1994) (stating that a lawyer could not ethically contract with a client for a 75 percent contingent fee); *In re Martin*, 67 A.3d 1032, 1042 (D.C. 2013) ("The combination of [the lawyer's] contingency fee and the hourly fees gave [the lawyer] well over a 50% interest in the outcome of the . . . litigation in violation of Rule 1.5(a)."); *Att'y Grievance Comm'n of Md. v. Korotki*, 569 A.2d 1224, 1233 (Md. 1990) ("Without passing upon whether there can ever be circumstances justifying a contingent fee in excess of fifty percent, it is generally a violation of the rule for the attorney's stake in the result to exceed the client's stake.").

99. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. c (AM. LAW INST. 2000).

will attest, defendants “often vigorously defend and even win cases where liability seems certain,” and “a previously undiscovered fact or an unexpected change in the law can suddenly transform a case that seemed a sure winner at the outset of the representation into a certain loser.”<sup>100</sup> Beyond that, in a case where liability is certain there still may be a range of possible recoveries, with the ultimate recovery dependent upon the lawyer’s performance, such that the client benefits from a contingent fee agreement that ties the lawyer’s compensation to the amount of the recovery.<sup>101</sup> Finally, even where liability appears certain, any judgment may be hard to collect, and the client may prefer not to pay the lawyer (or may be unable to do so) until money is banked.<sup>102</sup> It is therefore the general rule that a contingent fee is not unreasonable merely because a defendant’s liability seems clear when the fee agreement is made.<sup>103</sup> Or, stated positively, a contingent fee may be reasonable where the defendant’s liability appears to be clear at the outset of the representation. But regardless of how you couch the general rule, the lawyer must explain the liability picture to the client at the inception of the representation so that the client can determine whether to agree to a contingent fee.<sup>104</sup>

Notwithstanding the general rule, a court may determine that a contingent fee is unreasonable where “there is no risk of total non-recovery.”<sup>105</sup> This is a case- and fact-

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100. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-389, at 7 (1994) (footnote omitted).

101. *Id.* at 7–8.

102. ROTUNDA & DZIENKOWSKI, *supra* note 21, § 1.5–3(f), at 205.

103. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-389, at 8 (1994) (concluding “that as a general proposition contingent fees are appropriate and ethical in situations where liability is certain and some recovery is likely”).

104. See MODEL RULES OF PROF’L CONDUCT r. 1.4(b) (AM. BAR ASS’N 2017) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

105. See, e.g., *In re Newman*, 958 N.E.2d 792, 797 (Ind. 2011) (declining to hold

specific inquiry.<sup>106</sup> The most common scenario supporting such a determination is one where the lawyer charges a contingent fee for “recovering” easily ascertainable and collectible assets, benefits, or funds the client is clearly entitled to receive.<sup>107</sup> That was the situation in *Committee on Legal Ethics of the West Virginia State Bar v. Tatterson*.<sup>108</sup>

In *Tatterson*, Nellie Herbert was the beneficiary under her son David’s group life insurance policy with Equitable.<sup>109</sup> She hired lawyer David Tatterson to assist her in collecting

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“that a contingent fee agreement is *per se* unethical whenever there is no risk of total non-recovery,” but concluding that the contingent fee in this case was unreasonable because “there was virtually no possibility that [the client] would receive nothing”).

106. See, e.g., *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 290 F. Supp. 2d 840, 853–56 (N.D. Ohio 2003) (concluding that it was unethical for lawyers to enter into contingent fee agreements with plaintiff class members after the parties had announced an outline of a settlement agreement); *Maynard Steel Casting Co. v. Sheedy*, 2008 WI App 27, ¶ 25, 307 Wis. 2d 653, 746 N.W.2d 816 (entering into a contingent fee agreement after a class action settled; the client submitted a proof of claim at the same time it executed the contingent fee agreement).

107. See, e.g., *In re Gerard*, 548 N.E.2d 1051, 1056–57 (Ill. 1989) (charging an unreasonable contingent fee for identifying and registering certificates of deposit that were safe in bank accounts under the client’s name); *Wash. Mut. Bank, FA v. Swierk*, 2015 IL App (1st) 140639-U, ¶ 19 (finding a contingent fee for the recovery of a foreclosure sale surplus unreasonable where the matter was “open and shut” and the client was undoubtedly entitled to the surplus); *Att’y Grievance Comm’n of Md. v. Kemp*, 496 A.2d 672, 678 (Md. 1985) (concluding that “because there was no dispute as to payment under [the medical payments provision of an auto insurance policy] and because the insurer made payment upon receipt of the completed benefit form and medical report, the fee charged by [the lawyers] was clearly excessive”); *Columbus Bar Ass’n v. Adusei*, 991 N.E.2d 1142, 1145 (Ohio 2013) (collecting life insurance proceeds); *White v. McBride*, 937 S.W.2d 796, 800–01 (Tenn. 1996) (involving probate litigation where the client’s interest in the estate’s assets was beyond dispute); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 illus. 1 (AM. LAW INST. 2000) (using as an illustration of an unreasonable one-third contingent fee a client’s request for assistance collecting life insurance benefits in a case in which there is no reasonable ground to dispute that the benefits are due, the insurer does not contest the claim, and the insurer pays the claim without dispute when the lawyer presents it).

108. 352 S.E.2d 107 (W. Va. 1986).

109. *Id.* at 109.

the \$61,000 in benefits she was due as a result of David's suicide.<sup>110</sup> In fact, all she needed to do to obtain the benefits was to accurately complete several forms and send them to her son's former employer, Armco, so that it could submit a claim to Equitable.<sup>111</sup> Tatterson assisted her in this process by obtaining some of the necessary forms, partially completing one of them, notarizing her signature on another, and communicating with Armco's personnel office about the claim.<sup>112</sup> He charged Ms. Hebert a contingent fee of 33 percent for "recovering" the life insurance proceeds.<sup>113</sup>

The West Virginia Supreme Court harshly criticized Tatterson for his attempts to "justify the contingent fee where there was no contingency."<sup>114</sup> It was clear "that there never was any legitimate doubt about the receipt of the life insurance proceeds."<sup>115</sup> The court concluded that Tatterson had charged a clearly excessive fee, and after reviewing his disciplinary history, disbarred him.<sup>116</sup>

### 3. When Should Courts Measure Reasonableness?

Finally, there is a recurring debate over when the reasonableness of a contingent fee should be evaluated. Should the reasonableness of a fee be evaluated only at the time the parties agreed to it, or might a contingent fee that is reasonable at the start of a matter become unreasonable through subsequent events? In other words, is it ever appropriate to evaluate the reasonableness of a contingent fee retrospectively? The clear majority rule holds that contingent fee agreements that are reasonable when made

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110. *Id.*

111. *Id.*

112. *Id.* at 109–10.

113. *Id.* at 110, 112.

114. *Id.* at 112.

115. *Id.*

116. *Id.* at 113–16.



may be rendered unreasonable by subsequent events, thus making hindsight evaluation of those fees perfectly appropriate.<sup>117</sup> In *State ex rel. Oklahoma Bar Ass'n v. Flaniken*,<sup>118</sup> however, the Oklahoma Supreme Court rejected the Oklahoma Bar Association's (OBA) hindsight analysis in a case in which the lawyer was charged with violating Rule 1.5(a) after entering into a contingent fee agreement that was unquestionably lawful at the outset of the representation.

In *Flaniken*, the OBA alleged that lawyer Robert Flaniken violated Rule 1.5(a) by charging an unreasonable contingent fee in connection with probate litigation in which he represented Peggy Hepler.<sup>119</sup> Flaniken first offered to represent Hepler on an hourly basis, plus a retainer.<sup>120</sup> Hepler rejected that proposal, but agreed to a contingent

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117. See, e.g., *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 572–73 (Colo. App. 2010) (concluding that in evaluating the reasonableness of a fee, the trial court correctly considered events that occurred after the parties entered into their contingent fee agreement); *Wash. Mut. Bank, FA v. Swierk*, 2015 IL App (1st) 140639-U, ¶ 15 (explaining that while contingent fee agreements may be valid when formed, courts must evaluate them for reasonableness later); *In re Powell*, 953 N.E.2d 1060, 1063–64 (Ind. 2011) (observing that “[e]ven if a fee agreement is reasonable under the circumstances at the time entered into, subsequent developments may render collection of the fee unreasonable,” and employing retrospective analysis); *Att’y Grievance Comm’n of Md. v. Pennington*, 733 A.2d 1029, 1036 (Md. 1999) (explaining that because fee agreements that are reasonable when made may turn out to be unreasonable in light of changed facts and circumstances, the “reasonableness of a contingent fee agreement, or one with contingent features, must be revisited after the fee is quantified or quantifiable and tested by the factors enumerated in Rule 1.5(a)”; *Rubin v. Murray*, 943 N.E.2d 949, 958–59 (Mass. App. Ct. 2011) (“Because contingency fees are negotiated at a time of significant uncertainty, and with the possibility that the client lacks true bargaining power, contingent fee agreements may be reviewed for reasonableness once the attorney’s services are completed and the outcome known.”); *In re Lawrence*, 23 N.E.3d 965, 978 (N.Y. 2014) (stating that in some cases, fee agreements “that are not unconscionable at inception may become unconscionable in hindsight.”).

118. 2004 OK 6, 85 P.3d 824 (Okla. 2004).

119. *Id.* at ¶¶ 1, 4, 8, 85 P.3d at 825.

120. *Id.* at ¶ 3, 85 P.3d at 825.

fee.<sup>121</sup> The OBA acknowledged that Flaniken's contingent fee agreement with Hepler was reasonable at the outset of the representation, but that it became unreasonable "upon reflection."<sup>122</sup> According to the OBA, "a fee should also be judged in hindsight as to whether it is reasonable in accordance with the eight factors listed in Rule 1.5(a)."<sup>123</sup> The OBA argued that the fee agreement became unreasonable when the will contest that was expected to dominate the probate case never materialized.<sup>124</sup>

The *Flaniken* court observed at the outset that it was not deciding a fee dispute and announced that it was offering no opinion on how a trial court should resolve one; this was a disciplinary case that required the OBA to establish the charges against Flaniken by clear and convincing evidence.<sup>125</sup> After lamenting a lack of helpful Oklahoma precedent,<sup>126</sup> the court rather quickly concluded that the OBA had failed to prove that Flaniken charged an unreasonable fee in violation of Rule 1.5(a).<sup>127</sup> There was no evidence of impropriety in the formation of the contingent fee agreement.<sup>128</sup> Rather, Hepler simply developed buyer's remorse after the anticipated will contest did not occur and the probate case proceeded expeditiously.<sup>129</sup> But most importantly for our purposes, the court "reject[ed] the proposed 'hindsight' test of the [OBA] where a lawyer has

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121. *Id.*

122. *Id.* at 826.

123. *Id.* at ¶ 8, 85 P.3d at 826 (footnote omitted).

124. *Id.*

125. *Id.* at ¶ 9, 85 P.3d at 827.

126. *Id.* at ¶ 11, 85 P.3d at 827 (discussing *State ex rel. Burk v. City of Okla. City*, 598 P.2d 659 (Okla. 1979), and *Oliver's Sports Ctr., Inc. v. Nat'l Std. Ins. Co.*, 615 P.2d 291 (Okla. 1980), and characterizing these cases as not particularly helpful).

127. *Id.* at ¶ 12, 85 P.3d at 827.

128. *Id.*

129. *Id.*

lawfully contracted for a percentage of the client's recovery."<sup>130</sup>

It is easy to see from its opinion how the Oklahoma Supreme Court could find that Flaniken did not violate Rule 1.5(a). The court's decision in his favor seems correct. However, the *Flaniken* court's blanket rejection of retrospective analysis of the reasonableness of a fee under Rule 1.5(a) makes no sense. Although it is true that courts should be reluctant to disturb contingent fee arrangements that were validly entered into,<sup>131</sup> and they should generally enforce contingent fee agreements as written,<sup>132</sup> there is more to the reasonableness analysis.

First, because Model Rule 1.5(a) provides that a lawyer may not "collect" an unreasonable fee, retrospective analysis of a lawyer's fee agreement is appropriate on that ground.<sup>133</sup> Second, some of the Rule 1.5(a) factors have to be analyzed in light of events that occur after a fee agreement is executed.<sup>134</sup> The "time and labor required,"<sup>135</sup> "the results obtained,"<sup>136</sup> and the "experience, reputation, and ability of the lawyer or lawyers performing the services"<sup>137</sup> all require retrospective analysis. To pick the most obvious of these, a court clearly cannot weigh the results obtained in a case before, well, there are *results*. Third, but consistent with the second point, if a court considers the amount of a contingent

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130. *Id.*

131. *In re Lawrence*, 23 N.E.3d 965, 978 (N.Y. 2014) (quoting *Lawrence v. Graubard Miller*, 901 N.E.2d 1268, 1272 n.4 (N.Y. 2008)).

132. *Rangel v. Save Mart, Inc.*, 2006-NMCA-120, ¶ 30, 140 N.M. 395, 142 P.3d 983 (quoting *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 27, 122 N.M. 103, 920 P.2d 1057).

133. *In re Doyle*, 581 N.E.2d 669, 674 (Ill. 1991).

134. *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 572 (Colo. App. 2010).

135. MODEL RULES OF PROF'L CONDUCT r. 1.5(a)(1) (AM. BAR ASS'N 2017).

136. *Id.* r. 1.5(a)(4).

137. *Id.* r. 1.5(a)(7).

fee in its evaluation of reasonableness,<sup>138</sup> retrospective analysis is mandatory because “the dollar amount yielded by contingent fee formula cannot be determined until after the fact, when the contingency has been satisfied.”<sup>139</sup> In summary, by its very terms, Model Rule 1.5(a) contemplates courts’ hindsight analysis of contingent fees.

*C. Changing Fee Agreements: Moving to or from a Contingent Fee*

Although many contingent fee controversies focus on the reasonableness of a fee either when it was originally agreed or in light of subsequent developments, difficulties also arise where a lawyer attempts to change a fee agreement during the representation. Assume, for example, that a lawyer represents a plaintiff in major commercial litigation on an hourly basis. The client asks the lawyer to restructure their fee agreement to lessen the financial burden imposed by the lawyer’s monthly invoices. The lawyer proposes a hybrid fee agreement that provides for a monthly flat fee plus a forty percent contingent fee to be paid out of any settlement or judgment. The client agrees, but when the case settles five months later, the client refuses to pay the contingent fee on the basis that it is unconscionable. What then?

Alternatively, consider a case in which a lawyer agrees to represent a client for a contingent fee of one-third of any recovery by way of settlement or judgment. When it appears that the case will be difficult to win, or that the best result for the client will be injunctive or other non-monetary relief, the lawyer insists that the client pay her by the hour rather than on contingency. Must the client agree or risk the lawyer’s withdrawal from the representation?

Model Rule 1.5(b) governs lawyers’ communications with

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138. *See id.* r. 1.5(a)(4) (identifying “the amount involved and the results obtained” as factors).

139. HAZARD ET AL., *supra* note 74, § 9.08, at 9–36.

clients concerning the basis or rate of the fees for which the client will be responsible.<sup>140</sup> It provides:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.<sup>141</sup>

Model Rule 1.5(b) is intended to ensure that the client is fully informed as to the terms of the lawyer's engagement and the client's financial responsibility.<sup>142</sup> A lawyer may violate Rule 1.5(b) by failing to communicate with a client about the basis or rate of fees even if the fees are reasonable,<sup>143</sup> although the chances of discipline in such a case are probably remote.<sup>144</sup>

Under Model Rule 1.5(b), a lawyer may change the basis or rate of the fee as long as she communicates the change to the client within a reasonable time.<sup>145</sup> Simply reflecting a change in invoices sent to a client is insufficient.<sup>146</sup> Although the language of the rule suggests that a lawyer may change a fee agreement unilaterally, that is not the case; the client,

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140. MODEL RULES OF PROF'L CONDUCT r. 1.5(b) (AM. BAR ASS'N 2017).

141. *Id.*

142. DeGraaff v. Fusco, 660 A.2d 9, 11–12 (N.J. Super. Ct. App. Div. 1995).

143. See, e.g., *In re Lauter*, 933 N.E.2d 1258, 1261–62 (Ind. 2010) (discussing lawyer's failure to communicate an additional retainer, and finding a Rule 1.5(b) violation even though there was no allegation that the fee was unreasonable).

144. See, e.g., *In re Dalton*, 2009-1288, p. 7 (La. 10/02/09); 18 So. 3d 743, 747 (reasoning that while the lawyer's change to his fee agreement contradicted a "strict reading" of Rule 1.5(b), discipline was inappropriate because the change reduced the client's fee).

145. MODEL RULES OF PROF'L CONDUCT r. 1.5(b) (AM. BAR ASS'N 2017).

146. See *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Nelissen*, 871 N.W.2d 694, 699 (Iowa 2015); *Att'y Grievance Comm'n of Md. v. Culver*, 849 A.2d 423, 445 (Md. 2004); *Bd. of Prof'l Responsibility v. Asay*, 2016 WY 47, ¶¶ 2–3, 374 P.3d 295, 297, 305 (Wyo. 2016).

naturally, must agree to the change.<sup>147</sup> If the client does not agree, she will presumably either negotiate a different fee with the lawyer or terminate the lawyer's representation.<sup>148</sup> A modified fee agreement must still satisfy the Rule 1.5(a) reasonableness requirement.<sup>149</sup>

With respect to changes in fee agreements mid-representation, however, courts' analysis seldom ends with Rule 1.5. Most courts called upon to consider the propriety of midstream changes to lawyers' fee agreements also examine ethics rules governing lawyers' business transactions with clients.<sup>150</sup> This is true even though a lawyer's entry into a contingent fee agreement with a client at the outset of a representation is not considered to be a business transaction with a client within the meaning of Model Rule 1.8(a).<sup>151</sup>

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147. Att'y Grievance Comm'n of Md. v. Gerace, 72 A.3d 567, 573, 577 (Md. 2013) (quoting the trial judge and later agreeing with his ruling).

148. Where the lawyer represents the client in consecutive matters and changes the basis or rate of the fee for the second one, the client will presumably enter into the second representation on the terms offered by the lawyer, negotiate different terms, or decline to hire the lawyer the second time. See *Weinstein v. Stuart*, No. CV020816030, 2006 WL 3041976, at \*3 (Conn. Super. Ct. Oct. 12, 2006) ("The [lawyer] sent an authorization to the defendant . . . respecting the [first] matter stating his hourly rates at \$160-185 per hour and another authorization in November 1998 respecting another matter stating his hourly rate at \$185. . . . Since Rule 1.5(b) does not require the client's consent, [the authorizations] fairly apprised defendant of [the lawyer's] hourly rate of \$185. Defendant did not object to that rate at the time.").

149. HAZARD ET AL., *supra* note 74, § 9.14, at 9–50.

150. See, e.g., *In re Corcella*, 994 N.E.2d 1127, 1128 (Ind. 2013) (discussing Rule 1.8(a)); *Cotton v. Kronenberg*, 44 P.3d 878, 884–85 (Wash. Ct. App. 2002) (applying Rule 1.8(a) in a case where the lawyer acquired an interest in the client's real property); see also, e.g., *Mayhew v. Benninghoff*, 62 Cal. Rptr. 2d 27, 30 (Ct. App. 1997) (applying California Rule 3-300).

151. See, e.g., *Premier Networks, Inc. v. Stadheim & Grear, Ltd.*, 918 N.E.2d 1117, 1121 (Ill. App. Ct. 2009) ("There is no allegation . . . that Stadheim 'entered into a business transaction' with Premier. The . . . parties *agreed to a contingent fee arrangement*. . . ."); *In re Discipline of an Att'y*, 884 N.E.2d 450, 458 (Mass. 2008) (explaining that Rule 1.8(a) "is generally concerned with business dealings between a lawyer and a client, or the lawyer's acquisition of a 'pecuniary interest' adverse to his client, that commence after the legal representation begins . . . the focus of the rule is not on a fee agreement between a lawyer and client that marks

Courts' application of Model Rule 1.8(a) to midstream fee changes in which a contingent component is added further seems contrary to a comment to Model Rule 1.8, which explains that the rule "does not apply to ordinary fee arrangements between client[s] and lawyer[s], which are governed by Rule 1.5," and limits Model Rule 1.8's reach to cases where "the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee."<sup>152</sup> Although contracts between lawyers and clients made after an attorney-client relationship is established raise concerns about the lawyer's exertion of undue influence,<sup>153</sup> contingent fees are commonplace, and they are amply regulated under Model Rule 1.5. Any disclosure or informational requirements that courts might impose on the lawyer are already covered by Model Rule 1.4(b).<sup>154</sup> Yet courts regularly invoke Rule 1.8(a) in cases where the parties revise their fee agreement to provide for a contingent fee.<sup>155</sup>

Under Model Rule 1.8(a), a lawyer cannot enter into a business transaction with a client, or acquire "an ownership,

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the creation of their lawyer-client relationship."); *Gillespie v. Hernden*, 516 S.W.3d 541, 550 (Tex. App. 2016) (stating that when the clients entered into a contingent fee agreement with the lawyer, "they contracted with him to provide legal services . . . they did not enter into a business transaction with him.") (citations omitted); *Rafel Law Grp. PLLC v. Defoor*, 308 P.3d 767, 773 (Wash. Ct. App. 2013) ("The rule does not apply to transactions entered into prior to the creation of the attorney-client relationship or those agreed upon during the relationship's formation.") (footnote omitted).

152. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS'N 2017).

153. *McNamara v. O'Donnell Haddad LLC*, 2016 IL App (2d) 150519-U, ¶ 24; No. 2-15-0519, 2016 WL 769754, at \*7 (Ill. App. Ct. Feb. 26, 2016); *In re Lawrence*, 23 N.E.3d 965, 976 (N.Y. 2014); N.Y. Comm. on Prof'l Ethics, Op. 910, at 4 (2012).

154. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2017) (imposing an explanatory requirement on lawyers).

155. See, e.g., *In re Corcella*, 994 N.E.2d at 1128 (violating Rule 1.8(a) in changing from an hourly fee to a contingent fee); *In re Hefron*, 771 N.E.2d 1157, 1162 (Ind. 2002) (violating Rule 1.8(a) by unfairly switching from an hourly fee to a contingent fee).

possessory, security, or other pecuniary interest” adverse to a client, unless:

- (1) the transaction and the terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can reasonably be understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.<sup>156</sup>

*In re Hefron*<sup>157</sup> is an illustrative Rule 1.8(a) case, although littered with incidents of blatant misconduct by the lawyer. In *In re Hefron*, lawyer William Hefron agreed to represent a client in an action to recover assets belonging to an estate on an hourly basis, but he wanted to change to a contingent fee when he learned how flush the estate likely was.<sup>158</sup> When the client—who knew nothing of the estate’s value—balked at the proposed change, Hefron threatened to withdraw.<sup>159</sup> He told the client that a contingent fee was crucial because he expected prolonged and difficult litigation.<sup>160</sup> In fact, opposing counsel had promised to deliver an accounting of the estate’s assets and volunteered to transfer the assets to the client.<sup>161</sup> After deliberating for weeks, the client agreed to pay Hefron a contingent fee of twenty-one percent of all assets recovered in the litigation, plus four percent for administering the estate as personal representative.<sup>162</sup>

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156. MODEL RULES OF PROF’L CONDUCT r. 1.8(a) (AM. BAR ASS’N 2017).

157. 771 N.E.2d at 1162–63.

158. *Id.* at 1159–60.

159. *Id.* at 1160.

160. *Id.*

161. *Id.*

162. *Id.*



Afterwards, without telling the client, and without informing the probate court that he was about to receive the accounting, Hefron obtained judicial approval of his contingent fee.<sup>163</sup> Hard on the heels of that maneuver, he obtained the estate's assets, delivered them to the client, and returned to the probate court to obtain approval of the payment of his fee—again without telling the client about any of this.<sup>164</sup>

The client ultimately fired Hefron and the probate court substantially reduced his fee.<sup>165</sup> In a subsequent disciplinary action, the Indiana Supreme Court concluded that Hefron violated Rule 1.8(a) by unfairly renegotiating his fee agreement.<sup>166</sup> The court determined that his “motivation for his renegotiation of the fee agreement was his own pecuniary gain . . . . [He] insisted on an hourly rate when recovery was not assured but coerced his client into acquiescing in a contingency fee agreement once the likelihood of a substantial recovery arose.”<sup>167</sup> The contingent fee agreement and the circumstances in which it was negotiated were unfair to the client.<sup>168</sup> Even if the fee agreement's terms had been fair, Hefron never gave the client a reasonable opportunity to seek the advice of independent counsel concerning the transaction as Rule 1.8(a) requires.<sup>169</sup> In the end, the court suspended Hefron from practice for six months.<sup>170</sup>

*In re Lawrence*<sup>171</sup> stands in sharp contrast to *In re*

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163. *Id.*

164. *Id.* at 1160–61.

165. *Id.* at 1161.

166. *Id.* at 1162.

167. *Id.* at 1163.

168. *Id.*

169. *Id.*

170. *Id.*

171. 23 N.E.3d 965 (N.Y. 2014).

*Hefron*. The *In re Lawrence* saga began in 1983, when the law firm Graubard Miller (Graubard) began representing Alice Lawrence in litigation arising out of the death of her husband, Sylvan Lawrence, a wealthy real estate developer.<sup>172</sup> Seymour Cohn, who was Mr. Lawrence's brother and business partner, was the executor of Mr. Lawrence's estate.<sup>173</sup> He refused to sell the properties in Mr. Lawrence's real estate empire.<sup>174</sup> Mrs. Lawrence consequently sued Cohn in 1983, launching years of bitter estate litigation.<sup>175</sup> As both a client and a litigant, Mrs. Lawrence was "intelligent, tough and sophisticated in business matters."<sup>176</sup> She immersed herself in the case and reviewed everything that Graubard filed.<sup>177</sup> "She demanded to be the 'senior partner' in the litigation," and kept a tight hand on Graubard's reins.<sup>178</sup> Indeed, she threatened to fire the firm when she was dissatisfied with its performance and freely disregarded her lawyers' advice.<sup>179</sup>

By late 2004, Mrs. Lawrence had paid Graubard approximately \$18 million in hourly fees in connection with the estate litigation.<sup>180</sup> The focus of the litigation at that point was accounting objections based on Cohn's alleged self-dealing while serving as executor.<sup>181</sup> When, in December 2004, Mrs. Lawrence shockingly lost her largest accounting objection, she decided to seek a new fee agreement.<sup>182</sup> She

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172. *Id.* at 969.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 970.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 971.

and Daniel Chill, her lead attorney at Graubard, discussed a possible contingent fee.<sup>183</sup> After some back and forth, they agreed on a contingent fee of forty percent of the net recovery after a deduction of up to \$1.2 million in hourly charges for calendar year 2005.<sup>184</sup>

Graubard sent Mrs. Lawrence a revised retainer agreement that included the forty percent contingent fee and 2005 hourly fee deduction.<sup>185</sup> She reviewed the document with her accountant, Jay Wallberg.<sup>186</sup> After consulting with Wallberg, she insisted on adding a paragraph to the agreement to clarify that Graubard was to continue billing hourly for one year only.<sup>187</sup> Graubard inserted the paragraph and sent her the now-final revised retainer agreement, which she signed in January 2005.<sup>188</sup>

The estate litigation unexpectedly settled in May 2005 in the middle of a hearing on some of the remaining accounting objections.<sup>189</sup> This turn of events closely followed Graubard's "smoking gun" discovery of Cohn's "egregious self-dealing" in connection with a transaction known as the Epps claim.<sup>190</sup> As a result, Cohn's estate (he died in 2003) offered more than \$100 million to settle the case.<sup>191</sup> This amount "was about twice what Graubard estimated the remaining claims to be worth; essentially, the 'smoking gun' revelation was so damaging that the Cohn estate paid a substantial premium to bring the litigation to a swift and certain conclusion."<sup>192</sup>

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 972.

190. *Id.*

191. *Id.* at 969, 972.

192. *Id.* at 972.

After the settlement was concluded, Mrs. Lawrence refused to pay Graubard the forty percent contingent fee due under the revised retainer agreement, which was around \$44 million.<sup>193</sup> In the resulting Surrogate's Court litigation, a referee determined that the revised retainer agreement "was not procedurally or substantively unconscionable when made, but became substantively unconscionable in hindsight" by virtue of its size, disproportion to the firm's efforts, and the firm's relatively low risk.<sup>194</sup> He recommended that Graubard receive a \$15.8 million fee.<sup>195</sup>

The Surrogate's Court affirmed the referee's fee recommendation, but an appellate court reversed, finding the revised retainer agreement both procedurally and substantively unconscionable.<sup>196</sup> The appellate court reasoned that the agreement was procedurally unconscionable because Graubard had not shown that Mrs. Lawrence fully grasped its terms.<sup>197</sup> With respect to substantive unconscionability, the appellate court observed that because Graubard had privately calculated Mrs. Lawrence's claims to be worth around \$47 million, it was unlikely that the firm had materially risked a substantial loss of fees from the switch to a contingent fee.<sup>198</sup> The appellate court also considered the contingent fee to be excessive in comparison to the time the firm spent on the litigation after the revised retainer agreement took effect.<sup>199</sup> The appellate court remanded the case to the Surrogate's Court to determine the fees due the firm under the original

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193. *Id.* at 973.

194. *Id.* at 974.

195. *Id.*

196. *Id.* at 974–75.

197. *Id.* at 975 (citation omitted).

198. *Id.* at 975–76 (quoting *In re Lawrence*, 965 N.Y.S.2d 495, 497–98 (App. Div. 2013), *rev'd*, 23 N.E.3d 965 (N.Y. 2014)).

199. *Id.* at 976.

hourly fee agreement, plus prejudgment interest from the date the agreement was changed.<sup>200</sup>

Graubard appealed to the New York Court of Appeals, which is New York's highest court. The *In re Lawrence* court reversed the lower appellate court.<sup>201</sup>

The *In re Lawrence* court began its analysis by recounting that courts subject fee agreements between lawyers and clients to particular scrutiny.<sup>202</sup> The lawyer bears the burden of showing that the agreement is fair and reasonable, and that the client fully understands it.<sup>203</sup> A fee agreement revised after the lawyer has begun work is studied even more rigorously, because the parties have established a confidential relationship and the lawyer's ability to exploit the client is enhanced.<sup>204</sup>

Here, the parties agreed that a forty percent contingent fee was not "automatically unconscionable."<sup>205</sup> Rather, Mrs. Lawrence's estate (she died before the appeal was heard) argued that the revised retainer agreement was void for two reasons: (1) it was procedurally unconscionable because Mrs. Lawrence "did not fully know and understand its nature;" and (2) it was substantively unconscionable because the law firm took no risk in entering into it, and in retrospect, the \$44 million contingent fee was "disproportionately excessive" given the effort Graubard devoted to the litigation.<sup>206</sup>

Determining whether the revised retainer agreement was procedurally unconscionable required the *In re Lawrence* court to examine how the parties reached the

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* (quoting *Shaw v. Mfrs. Hanover Trust Co.*, 499 N.E.2d 864, 866 (N.Y. 1986)).

204. *Id.* (citing *In re Howell*, 109 N.E. 572 (N.Y. 1915)).

205. *Id.*

206. *Id.* at 969, 976.

agreement.<sup>207</sup> The “most important factor” in this analysis was whether Mrs. Lawrence “was fully informed upon entering the agreement.”<sup>208</sup> Clearly, she was:

The . . . evidence demonstrated that [Mrs.] Lawrence fully understood the revised retainer agreement, which she herself sought. [She] was abreast of the status of the litigation because . . . she was involved in every detail of the case. She also sent the proposed agreement to Wallberg, her trusted accountant, who reviewed it, explained it to [her], and even proposed that Graubard clarify the duration of the hourly charges capped at \$1.2 million. Graubard made the changes [she] requested, and she signed the agreement four days after she received the revised version.

Contrary to the . . . estate’s assertions, the . . . calculations required to understand the 40% contingency fee are not so difficult for a layperson to comprehend, let alone a sophisticated businesswoman. Any doubt about Lawrence’s understanding . . . of the proposed fee was dispelled by Wallberg, . . . who testified that he explained to [Mrs.] Lawrence exactly what the 40% contingency fee required of her.<sup>209</sup>

As for any allegation that Graubard concealed the settlement or judgment value of the estate litigation and thus the possible contingent fee, it was apparent that when Mrs. Lawrence executed the revised fee agreement, neither she nor Graubard anticipated the eventual settlement.<sup>210</sup> They did not then know about the “smoking gun” in the form of the Epps claim that would seismically alter the estate litigation.<sup>211</sup> In short, Graubard never withheld from Mrs. Lawrence the possibility of a \$100 million recovery, as was actually achieved after the Epps claim erupted.<sup>212</sup>

With respect to the alleged substantive unconscionability of the contingent fee, the court recognized

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207. *Id.* at 976–77.

208. *Id.* at 977.

209. *Id.*

210. *Id.* at 978.

211. *Id.*

212. *Id.*

that legal fees that are reasonable at the outset of a representation may become unconscionable in retrospect if they are grossly disproportionate to the value of the services rendered.<sup>213</sup> What this really means, though, “is that ‘the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated upon him.’”<sup>214</sup> Absent incompetence on the client’s part, or deception or overreaching by the lawyer, a contingent fee agreement that is valid at inception should be enforced according to its terms.<sup>215</sup>

Here, Graubard undertook significant risk in entering into a contingency fee arrangement. . . . The risk to an attorney in any retainer agreement is that the client may terminate it at any time, “leaving the lawyer . . . only the right to recover on *quantum meruit*” . . . . This danger is amplified in the context of a client who frequently fires professionals (including attorneys), as [Mrs.] Lawrence had done in the past and threatened to do once again.

Beyond the . . . risk that Lawrence would lose interest in the case or fire Graubard, the law firm faced the prospect that this . . . litigation would drag on for . . . years . . . with the non-hourly fee as its only compensation for many hours of work. In just the five months after entering into the contingency fee arrangement, Graubard lawyers spent nearly 4,000 hours preparing for the [hearing] in May 2005, the first of the many trials that were envisaged before the case so unexpectedly settled. In sum, Graubard ran the risk that its fees would not cover costs over a period of years, and that Lawrence would fire them or . . . drop the claims. Especially given a client who frequently . . . ignored her lawyers, the law firm also took the chance that Lawrence would reject a settlement . . . that she was advised to accept, or . . . accept an offer that Graubard deemed to be unwise.

[W]e also must consider the proportionality of the value of Graubard’s services to the fee it now seeks. . . . [T]he value of Graubard’s services should not be measured merely by the time it devoted to prosecuting the claims. . . . Rather, the value of

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213. *Id.* (quoting *King v. Fox*, 851 N.E.2d 1184, 1191 (N.Y. 2006)).

214. *Id.* (quoting *Gair v. Peck*, 160 N.E.2d 43, 48 (N.Y. 1959)).

215. *Id.* (citing *In re Lawrence*, 901 N.E.2d 1268, 1272 n.4 (N.Y. 2008)).

Graubard's services (for the purpose of hindsight analysis) should be the \$111 million recovery it obtained for [Mrs.] Lawrence.<sup>216</sup>

The court appreciated Graubard's view that retrospective analysis of contingent fee agreements that were equitable when made is a perilous exercise, especially where alleged unconscionability rests solely on the perception that the fee is too high.<sup>217</sup> After all, the nature of a contingent fee is such that a lawyer, through skill, luck, or both, may quickly achieve a superior result; conversely, she may labor for years for little or no reward.<sup>218</sup> And, again, Mrs. Lawrence "was no naif."<sup>219</sup> The court consequently saw fit to honor the clear terms of the revised retainer agreement.<sup>220</sup>

After considering some additional arguments by the Lawrence estate, the court remanded the case to the Surrogate's Court to enter a decree consistent with the opinion.<sup>221</sup> The Graubard firm thus won a substantial victory.

In conclusion, lawyers and clients are generally permitted to modify contingent fee agreements.<sup>222</sup> A lawyer must proceed cautiously, however, when considering changes to a fee agreement once a representation is under way. A lawyer must communicate any proposed fee change

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216. *Id.* at 978–79 (footnotes omitted) (citations omitted).

217. *Id.* at 979 (citing *In re Smart World Tech., LLC*, 552 F.3d 228, 235 (2d Cir. 2009)).

218. *Id.* (recognizing that most cases fall somewhere along a continuum between these two extremes).

219. *Id.*

220. *Id.* (citing *Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004)).

221. *Id.* at 982.

222. See Neb. Ethics Advisory Op. for Lawyers 10-01, 2010 WL 11064775, at \*5 (Neb. Judicial Ethics Comm. 2010) ("[T]he Nebraska lawyer and his client appear to have negotiated the original contingent fee agreement and the modified contingent fee agreement by mutual consent and at arms length. The parties were free to negotiate these terms and the modifications of these terms as they wished.").



to the client clearly and in writing;<sup>223</sup> advise the client of the wisdom of consulting independent counsel concerning the proposed change;<sup>224</sup> and give the client reasonable time to seek separate counsel,<sup>225</sup> although the requirement that the client be directed to independent counsel should not attach where the client is an organization with an in-house law department. The lawyer also needs to obtain the client's written consent to the fee change.<sup>226</sup>

Lawyers cannot attempt to modify fee agreements after the events or results they believe entitle them to different compensation.<sup>227</sup> Certainly, lawyers should never modify fee agreements in circumstances that allow clients to argue that they agreed to changes under duress. For example, a lawyer should not threaten to withdraw from litigation on the eve of trial unless the client agrees to change their fee agreement.<sup>228</sup>

Of course, there are also contract law concerns when changing a fee agreement. To be enforceable, the new fee agreement must be supported by adequate consideration.<sup>229</sup>

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223. MODEL RULES OF PROF'L CONDUCT r. 1.5(b) (AM. BAR ASS'N 2017); *id.* r. 1.8(a)(1).

224. *Id.* r. 1.8(a)(2).

225. *Id.*

226. *Id.* r. 1.8(a)(3).

227. *See, e.g., In re Thayer*, 745 N.E.2d 207, 211–12 (Ind. 2001) (finding that the lawyer violated Rules 1.5(a) and 1.8(a) by increasing the percentage of his contingent fee after receiving a settlement offer that the client instructed him to accept).

228. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-458, at 2 (2011) (stating that a lawyer generally may not “threaten to withdraw if the client does not agree to increase the fee.”); *see, e.g., McConwell v. FMG of Kan. City, Inc.*, 861 P.2d 830, 842–43 (Kan. Ct. App. 1993) (discussing a lawyer's threatened withdrawal on the eve of trial in connection with successful malpractice allegations).

229. *See, e.g., Lugassy v. Indep. Fire Ins. Co.*, 636 So. 2d 1332, 1335 (Fla. 1994) (finding that there was adequate consideration for changing the parties' fee agreement to allow the lawyer to receive a statutory fee award rather than the original contingent fee); *Rowe v. Law Offices of Ben C. Brodhead, P.C.*, 735 S.E.2d

Additionally, the consideration supporting the new fee agreement must be “new and distinct’ from the consideration offered in connection with the original contract.”<sup>230</sup>

#### D. *The Writing Requirement*

Finally, Model Rule 1.5(c) requires that contingent fee agreements be in writing, be signed by the client, and include specified information:

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.<sup>231</sup>

The rule is intended to establish the parties’ obligations at the start of the representation to avoid later confusion or disagreement about the fee that is due.<sup>232</sup> A lawyer must put a contingent fee agreement in writing even if she regularly represents the client on other matters.<sup>233</sup>

If a contingent fee agreement is not in writing as Rule

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39, 43–44 (Ga. Ct. App. 2012) (holding that the lawyer furnished adequate consideration for the modification of the fee agreement).

230. *Barrett-O’Neill v. LALO, L.L.C.*, 171 F. Supp. 3d 725, 739 (S.D. Ohio 2016) (quoting *Thurston v. Ludwig*, 6 Ohio St. 1, 6 (1856)); *see also* *Chesapeake Appalachia, L.L.C. v. Hickman*, 781 S.E.2d 198, 216 (W. Va. 2015) (“Consideration is an essential element of a valid contract, and it is axiomatic that past consideration already given for a previous agreement cannot constitute valid consideration for a new agreement.”); *Lugassy*, 636 So. 2d at 1335 (stating that “general rules of contract law allow parties to alter the terms of a retainer agreement as long as new consideration is given”).

231. MODEL RULES OF PROF’L CONDUCT r. 1.5(c) (AM. BAR. ASS’N 2017).

232. *In re Fink*, 22 A.3d 461, 468 (Vt. 2011).

233. *Statewide Grievance Comm. v. Dixon*, 772 A.2d 160, 164 (Conn. App. Ct. 2001).

1.5(c) requires, courts often hold that it is unenforceable.<sup>234</sup> On the right facts, however, a court may enforce an oral contingent fee agreement, as the Arkansas Supreme Court did in *Hotel Associates, Inc. v. Rieves, Rubens & Mayton*.<sup>235</sup>

In that case, Buddy House hired Kent Rubens of the law firm of Rieves, Rubens & Mayton (RRM) to sue Holiday Inn Franchising, Inc., on behalf of his company, Hotel Associates.<sup>236</sup> Rubens had represented House for years and they were close.<sup>237</sup> As was their habit, they had no written fee agreement.<sup>238</sup> It was undisputed, however, that Hotel Associates agreed to pay Rubens a contingent fee equal to one-third of any recovery.<sup>239</sup> Rubens asked a lawyer from outside RRM, Timothy Dudley, to assist him in the matter.<sup>240</sup> Rubens and Dudley agreed to split the one-third contingent fee if the litigation succeeded.<sup>241</sup>

Rubens died after filing the lawsuit, but Dudley continued to represent Hotel Associates in the Holiday Inn litigation.<sup>242</sup> RRM dissolved in the meantime.<sup>243</sup> Dudley tried the case and won an eight-figure verdict.<sup>244</sup> Hotel Associates agreed to pay his one-sixth contingent fee, but refused to pay

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234. See, e.g., *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185–86 (Fla. 1995); *Ky. Bar Ass'n v. Womack*, 269 S.W.3d 409, 413 (Ky. 2008); *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 796 A.2d 238, 242 (N.J. 2002) (concluding that the lawyer's failure to reduce a contingent fee to writing for 33 months also violated Rule 1.5(b)).

235. 435 S.W.3d 488 (Ark. 2014).

236. *Id.* at 490.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 491.

244. *Id.*

the fee owed to RRM.<sup>245</sup> In the resulting litigation, Hotel Associates contended that RRM could not recover its claimed fee on a breach of contract theory because an oral contingent fee contract was unenforceable as against public policy as expressed in Rule 1.5(c).<sup>246</sup> RRM responded that Hotel Associates' position contradicted the principle that a violation of an ethics rule will not support a civil cause of action, and that the oral fee agreement should be enforced based on the facts.<sup>247</sup> The Arkansas Supreme Court agreed with RRM.<sup>248</sup>

While noting the Rule 1.5(c) requirement that contingent fee agreements be in writing, the *Hotel Associates* court declined "to draw a bright-line rule" because in this case the circumstances "compel[led] the enforcement of the agreement."<sup>249</sup> Indeed, the existence and the terms of the agreement were undisputed, and Hotel Associates did not contest the reasonableness of the agreed fee.<sup>250</sup> Critically, Rubens and House had a long personal and professional relationship.<sup>251</sup> Because of this relationship of mutual trust and confidence, they did not put their agreements in writing.<sup>252</sup> On "these unique facts," the oral contingent fee agreement was enforceable according to its terms.<sup>253</sup>

*Hotel Associates* is an unusual case, but other courts have held that oral contingent fee agreements are enforceable despite violating Rule 1.5(c).<sup>254</sup> Furthermore, a

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245. *Id.*

246. *Id.* at 492.

247. *Id.*

248. *Id.* at 493.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See, e.g.,* Parke v. Glover, Civ. A. No. 11-00639-KD-M, 2013 U.S. Dist.

lawyer's or law firm's right to compensation for services rendered in a case in which the contingent fee agreement violates Rule 1.5(c) is well established. Even courts holding that oral contingent fee agreements are unenforceable generally permit the lawyers to recover the value of their services in *quantum meruit*.<sup>255</sup> Similarly, a lawyer is generally entitled to recovery in *quantum meruit* where a contingent fee agreement is deficient in other respects, such as failing to specify how litigation expenses will be deducted.<sup>256</sup>

For that matter, the *Hotel Associates* holding makes perfect sense if you recall that Model Rule 1.5(c) is intended to establish the parties' respective obligations at the start of the representation to avoid later confusion or disagreement over the fee that is due.<sup>257</sup> The holding also is understandable if you think of the Rule 1.5(c) writing requirements as being intended to ensure the client's informed consent to the basis and amount of the fee rather than guiding the mechanical preparation of contingent fee agreements. Either way, because it was clear to the court that House understood the

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LEXIS 15168, at \*8–9 (S.D. Ala. Feb. 5, 2013) (interpreting Alabama law); Cozen O'Connor, PC v. Norman, No. 3:08cv1773 (MRK), 2011 WL 219666, at \*5 (D. Conn. Jan. 21, 2011) (concluding that oral contingent fee agreements are enforceable under Delaware and Pennsylvania law, and are enforceable under Connecticut law unless they relate to a personal injury, wrongful death, or property damage case).

255. See, e.g., *United States v. 36.06 Acres of Land*, 70 F. Supp. 2d 1272, 1274–76 (D.N.M. 1999) (predicting New Mexico law); *Mullens v. Hansel-Henderson*, 65 P.3d 992, 995 (Colo. 2002) (discussing a Colorado court rule); *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 186 n.4 (Fla. 1995); *Major v. OEC-Diasonics, Inc.*, 743 N.E.2d 276, 281–82 (Ind. Ct. App. 2001); *Ky. Bar Ass'n v. Womack*, 269 S.W.3d 409, 413 (Ky. 2008); *Kourouvacilis v. Am. Fed'n of State, Cty. & Mun. Emps.*, 841 N.E.2d 1273, 1275 n.3 (Mass. App. Ct. 2006); *Tobin v. Jerry*, 243 S.W.3d 437, 441 (Mo. Ct. App. 2007); *Starkey, Kelly, Blaney & White v. Est. of Nicolaysen*, 796 A.2d 238, 243 (N.J. 2002); *Robertson v. Steris Corp.*, 760 S.E.2d 313, 321 (N.C. Ct. App. 2014).

256. See, e.g., *Partee v. Compton*, 653 N.E.2d 454, 456 (Ill. App. Ct. 1995) (involving a predecessor rule).

257. *In re Fink*, 22 A.3d 461, 468 (Vt. 2011).

fee agreement and consented to it, and the fee was reasonable, it would have been pointless to invalidate the agreement for want of paperwork.

## II. THE EFFECT OF EARLY SETTLEMENT OFFERS

As we have seen, contingent fees are regularly tested for reasonableness. Critics of contingent fees and some courts are especially concerned about reasonableness in cases where (a) the defendant settles before suit is filed or early in the litigation and the plaintiff's lawyer receives a contingent fee that seems disproportionate to the time spent on the matter; or (b) the plaintiff rejects an early settlement offer either before or after retaining a lawyer, and the plaintiff's lawyer charges a contingent fee based on a subsequent settlement or judgment that includes the amount of the prior offer.

### A. *The Lawyer's Fee When the Client Settles Early*

A lawyer representing a plaintiff pursuant to a contingent fee agreement has no obligation to make or solicit a settlement offer early in a case.<sup>258</sup> If a lawyer charging a contingent fee makes an early settlement offer and the defendant accepts it, or if the defendant makes an early settlement offer and the lawyer's client accepts it, the lawyer may still collect the full fee for which she contracted.<sup>259</sup> Early settlement of a case does not alone mean that the plaintiff's lawyer did not earn her fee. For instance, the lawyer may have harnessed all of her advocacy skills to negotiate a reasonable settlement short of filing a lawsuit, the lawyer may have prepared a compelling demand letter or complaint that brought the defendant to the settlement table in short order, or the lawyer's reputation may be such that the

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258. ROTUNDA & DZIENKOWSKI, *supra* note 21, § 1.5-3(g), at 205.

259. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389, at 8 (1994).

defendant believed early settlement to be the prudent course.<sup>260</sup> By way of further example, perhaps the lawyer doggedly worked up the case before suing and as a result of her efforts generally or her discovery of a smoking gun, the defendant became motivated to settle quickly. Although every case pivots on its unique facts, in these instances it seems reasonable to presume that the lawyer has earned her contingent fee even if the anticipated litigation does not materialize or does not last as long as originally anticipated.

There may, however, be early settlement situations in which a lawyer should retreat from her contingent fee agreement and instead charge for her time spent on the matter or accept a flat fee.<sup>261</sup> For example, if a lawyer was reasonably confident that the defendant would make an acceptable settlement offer as soon as demand was made or suit was filed and extensive preparation was not required, the lawyer should perhaps agree to an hourly fee “since, from the information known to the lawyer, there was little risk of non-recovery and the lawyer’s efforts would have brought little value” to the client.<sup>262</sup> Alternatively, the lawyer might reduce her contingent fee percentage and accept a lower fee to account for the reduced risk of non-recovery and the shortened time between the performance of her services and compensation for them.<sup>263</sup>

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260. *See* Att’y Grievance Comm’n of Md. v. Ashworth, 851 A.2d 527, 534 (Md. 2004) (quoting the trial court in concluding that the lawyer charged a reasonable contingent fee in a case that settled without suit being filed).

261. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-389, at 8 (1994) (discussing early settlement offers and observing that there “may nonetheless be special situations in which a contingent fee may not be appropriate”).

262. *Id.* (footnote omitted).

263. *See id.* (stating that if a contingent fee is appropriate in connection with an early settlement, “the fee arrangement should recognize the likelihood of an early favorable result by providing for a significantly smaller percentage recovery if the anticipated offer is received and accepted than if the case must go forward through discovery, trial and appeal”) (footnote omitted).

B. *Claiming a Full Contingent Fee after the Client's Rejection of an Early Settlement Offer*

If a defendant makes an early settlement offer that the client rejects but the client ultimately prevails, the question then becomes whether the lawyer's contingent fee should be based on the total amount recovered or on the amount recovered less the amount of the early settlement offer. Consider a case in which the defendant offers to settle for \$150,000 before suit is filed. The client rejects the offer. The lawyer pursues litigation and the case eventually settles at mediation for \$600,000. Should the lawyer's one-third contingent fee be calculated based on the \$600,000 settlement, or should the lawyer receive only one-third of \$450,000? In a variation on this example, what if the defendant offered the client \$150,000 before the client retained the lawyer, such that the lawyer can claim no credit for that portion of the settlement? Finally, what if the lawyer ultimately recovers no more than the amount of the early settlement offer (in our example \$150,000), regardless of whether that offer was made before or after the client hired her?

In Formal Opinion 94-389, the ABA's Standing Committee on Ethics and Professional Responsibility concluded that a lawyer is entitled to her full contingent fee in a case in which the client rejected an early settlement offer even if the amount of the ultimate recovery does not exceed the amount of that offer.<sup>264</sup> In reaching that conclusion, the Committee recognized "the substantial time and effort that is required to take the matter to trial as well as the lawyer's assumption of the real risk that the plaintiff[ ] will lose on the merits or that any judgment at trial may be less than the early offer."<sup>265</sup> Although the Committee considered as an example a case that went to trial, the same reasoning applies

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264. *Id.* at 9.

265. *Id.*



where a case settles short of trial but after the lawyer has conducted extensive discovery, engaged in significant motion practice, and so on.

As the Committee further explained, limiting a lawyer's contingent fee in a case in which the defendant makes an early settlement offer would require adherence to faulty reasoning.<sup>266</sup> This is because the argument for limiting a lawyer's contingent fee in this context seems to assume "that by making an early [settlement] offer the defendant is conceding all liability up to that amount, thereby eradicating the possibility of non-recovery by the plaintiff."<sup>267</sup> But in fact:

[E]arly settlement offers are made for numerous reasons besides a concession of liability. And as any experienced trial lawyer knows, once an early settlement offer is rejected, the defendant and its lawyer will, in most cases, do their best to defend both against the fact of liability and the amount of damages owed. There is generally a real risk to the client and to the lawyer being paid on a contingent fee basis that such a defense will be successful. It is ethical for the lawyer to be compensated for both the time she expends to defeat any such defenses and the risk she assumes that the plaintiff will not prevail at trial or that a judgment awarded may never be collected.

The lawyer is also being compensated for the risk she assumes that the client will fire the lawyer, a right the client might exercise at any time. . . . Additionally, the lawyer is being compensated for the often lengthy delay between the time work is performed and the time a fee is received.<sup>268</sup>

As a result, it is ethically permissible for a lawyer to collect a contingent fee on the total recovery in a case that includes the amount of an early settlement offer.<sup>269</sup>

The ABA's position in Formal Opinion 94-389 drew harsh reviews from some scholars.<sup>270</sup> Professor Lester

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266. *Id.* at 9–10.

267. *Id.* at 9.

268. *Id.* at 10 (citations omitted).

269. *Id.* at 14.

270. *See, e.g.,* Lester Brickman, *ABA Regulation of Contingency Fees: Money*

Brickman, a habitual critic of contingent fees, called the opinion “a distressing display of ethical insensitivity” to lawyers’ alleged “practice of routinely overcharging contingency fee clients through use of standard contingency fees in cases without meaningful risk, that is, in cases where liability is not in issue and where a substantial reward yielding an effective fee of thousands of dollars an hour is virtually assured.”<sup>271</sup>

To be sure, the Committee’s reasoning was imperfect in some respects. For example, the rationale that a lawyer should be able to receive a contingent fee based on the total recovery where the client rejects an early settlement offer even if the eventual recovery does not exceed the amount of that offer in part because the lawyer risked the client firing her at will, overlooks the lawyer’s right to recover in *quantum meruit*.<sup>272</sup> At the same time, the Committee was correct that defendants offer to settle expediently for reasons apart from clear liability, and litigation outcomes are notoriously uncertain. A defendant’s extension of an early settlement offer assures a plaintiff and her lawyer of nothing down the road.

There is little authority to guide courts facing these issues. The courts in the two reported cases that are arguably relevant reached different conclusions.

The plaintiff in *Corcoran v. Northeast Illinois Regional Commuter Railroad Corp.*,<sup>273</sup> Mary Corcoran, was widowed when her husband Michael, a Union Pacific Railroad worker, was struck by a Metra commuter train.<sup>274</sup> She negotiated with the railroads and received a \$1.4 million settlement

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*Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247 (1996).

271. *Id.* at 298.

272. *See infra* Part VI.

273. 803 N.E.2d 87 (Ill. App. Ct. 2003).

274. *Id.* at 89.

offer.<sup>275</sup> A friend later introduced her to lawyer Joseph Dowd, who, in turn, referred her to the acclaimed Chicago plaintiffs' law firm of Corboy & Demetrio.<sup>276</sup> She signed a contingent fee agreement with Corboy & Demetrio that granted the firm 25 percent of any recovery.<sup>277</sup> The fee agreement also entitled Dowd to a referral fee equal to 40 percent of Corboy & Demetrio's fee.<sup>278</sup>

In August 1999, David Wise of Corboy & Demetrio filed a wrongful death suit against the railroads, which denied liability.<sup>279</sup> In April 2001, with little having been done in the case—Wise answered very limited written discovery from the railroads and no depositions were taken—Wise recommended that Mary accept the railroads' \$1.4 million settlement offer.<sup>280</sup> She did so and the trial court approved the settlement.<sup>281</sup>

Because it did not improve on the settlement offer that Mary negotiated on her own, Corboy & Demetrio waived its fee.<sup>282</sup> Dowd, however, sought his referral fee, which came to \$140,000.<sup>283</sup> Mary argued that Dowd was entitled to no fee because he did no work and effectively vanished after referring the case to Corboy & Demetrio.<sup>284</sup> The trial court reasoned that because Dowd's referral fee met the Illinois Rule of Professional Conduct 1.5(g) requirements for dividing fees between lawyers in different firms and Corboy & Demetrio's 25 percent contingent fee was reasonable, Dowd

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275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 89–91.

280. *Id.* at 89.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

was entitled to his \$140,000 referral fee.<sup>285</sup>

Mary appealed to the Appellate Court of Illinois, which affirmed the trial court.<sup>286</sup> The *Corcoran* court rejected Mary's argument that Dowd did not perform sufficient work to warrant \$140,000 in fees; because Dowd sought a referral fee, he did not need to prove that he had earned it by providing legal services.<sup>287</sup> The contingent fee agreement was valid.<sup>288</sup> The division of fees between Dowd and Corboy & Demetrio was permitted by Illinois Rule 1.5(g).<sup>289</sup> Furthermore, the fee agreement made no provision for the railroads' \$1.4 million settlement offer that preceded the lawyers' involvement in the case; rather, Mary simply agreed to pay Corboy & Demeterio and Dowd a combined 25 percent of the total amount recovered from the railroads.<sup>290</sup>

Mary argued that Corboy & Demetrio's 25 percent fee was unreasonable, which would have made Dowd's referral fee unreasonable, but that argument failed for a lack of evidence in the record.<sup>291</sup> Basically, because Mary's strategy in the trial court focused on proving that Dowd's fee was unreasonable, she did not develop sufficient evidence of Corboy & Demetrio's alleged lethargy.<sup>292</sup> Once the trial court concluded that Corboy & Demetrio had earned its fee, Mary was doomed by the deferential abuse of discretion standard that the *Corcoran* court applied to the trial court's finding.<sup>293</sup>

*Corcoran* is not precisely on point because the court was able to skirt the issues addressed in Formal Opinion 94-389

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285. *Id.* at 89–90.

286. *Id.* at 92.

287. *Id.* at 90.

288. *Id.* at 92.

289. *Id.* at 90.

290. *Id.* at 91.

291. *Id.*

292. *Id.*

293. *Id.*

by focusing on Dowd's pursuit of a referral fee and the inadequate record regarding Corboy & Demetrio's efforts on the plaintiff's behalf. But the record was not devoid of evidence of Corboy & Demetrio's performance. To the contrary, it revealed that between August 1999 and April 2001, Wise got Mary Corcoran appointed as special administrator of Michael's estate, filed a complaint, answered the railroads' affirmative defenses, engaged in some desultory written discovery, and recommended that Mary accept the railroads' preexisting settlement offer.<sup>294</sup> In other words, he did almost nothing. The *Corcoran* court nevertheless accepted the trial court's conclusion that Corboy & Demetrio "had filed papers needed to protect Mary's right to litigate her claim" and that this effort sufficed to make its contingent fee agreement enforceable.<sup>295</sup> It is therefore reasonable to think that the *Corcoran* court would have allowed Corboy & Demetrio to collect its 25 percent contingent fee without improving on the railroads' pre-suit settlement offer had the firm attempted to do so.

The Colorado Supreme Court took an opposing position in *People v. Egbune*.<sup>296</sup> In that case, Gezachew Ambaw was injured in an automobile accident and hired lawyer Philip Cockerille to pursue a claim against the other driver.<sup>297</sup> After extensive work, Cockerille secured a \$15,000 settlement offer from the other driver's insurer, CNA.<sup>298</sup> Ambaw rejected the offer despite Cockerille's recommendation to accept it.<sup>299</sup> Cockerille then convinced CNA to increase its offer to

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294. *Id.* at 89.

295. *Id.* at 91.

296. 58 P.3d 1168 (Colo. 1999).

297. *Id.* at 1171.

298. *Id.*

299. *Id.* After Ambaw initially declined the offer, Cockerille sent him a lengthy letter analyzing the case and recommending that he accept the offer. *Id.* Ambaw then declined the offer for a second time and increased his settlement demand. *Id.*

\$17,500.<sup>300</sup> Ambaw also rejected that offer.<sup>301</sup> Truth be told, Ambaw was up to no good: he had secretly signed a contingent fee agreement with another lawyer, Patrick Egbune, just days before.<sup>302</sup>

Ambaw fired Cockerille as his lawyer soon after rejecting CNA's \$17,500 offer.<sup>303</sup> Cockerille wrote to CNA and Egbune to assert a lien on any payment to Ambaw.<sup>304</sup>

Over the next three weeks, Egbune unsuccessfully attempted to persuade CNA to offer more than \$17,500.<sup>305</sup> When CNA refused, Ambaw accepted the \$17,500 offer.<sup>306</sup> Egbune finalized the settlement without telling Cockerille and pocketed a 35 percent contingent fee of \$6,122.<sup>307</sup> When Cockerille finally learned about the settlement from CNA, he sued CNA to enforce his lien but lost.<sup>308</sup> He still might have fared better than Egbune, who landed in disciplinary authorities' crosshairs.

A presiding disciplinary judge found that Egbune had violated Rule 1.5(a) by collecting an unreasonable fee.<sup>309</sup> As the *Egbune* court explained:

By his own admission, Egbune, over the course of a three-week period, did no more than make a few phone calls to the insurance adjuster, meet with his client, examine some medical treatment records and do some research at the law library to determine the reasonable range of settlement for claims similar to Ambaw's. . . . The amount of the ultimate settlement—\$17,500—

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300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1171–72.

305. *Id.* at 1172.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 1173–74.

which Egbune advised his client to accept, had already been offered . . . through Cockerille before Egbune began his representation. Egbune's work did not enhance the value of Ambaw's claim, nor did it expedite the receipt of the settlement proceeds. *Although Egbune may be entitled to some fee for the services he performed, a full contingent fee of 35 % cannot be reasonable when Egbune did little more than accept the offer which CNA had already extended to the client through [Cockerille].*<sup>310</sup>

The court further concluded that Egbune had violated several other ethics rules by disbursing the settlement funds despite knowing of Cockerille's lien, by not telling Cockerille of the settlement, and by potentially exposing Ambaw to liability for Cockerille's fee.<sup>311</sup> Upon a final tally, the Colorado Supreme Court suspended Egbune from practice for six months.<sup>312</sup>

*Egbune* presents a slightly different situation from those discussed in Formal Opinion 94-389 because it involved two lawyers and the early settlement offer in the case followed substantial effort by Cockerille. That said, the court's basis for criticizing Egbune's fee has to be understood as a rejection of the ABA's position.

### C. Summary and Synthesis

If a lawyer makes an early settlement offer and the defendant accepts it, or if the defendant makes an early settlement offer and the lawyer's client accepts it, the lawyer generally will be entitled to collect her full contingent fee.<sup>313</sup> It is less clear whether a lawyer should recover her full contingent fee where the defendant makes an early settlement offer that the client initially rejects but later accepts, or that the client rejects and later improves upon by

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310. *Id.* (emphasis added) (citation omitted).

311. *Id.* at 1173-75.

312. *Id.* at 1176.

313. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389, at 7-8 (1994).

way of settlement or judgment. The reasonableness of a lawyer's contingent fee in the latter two situations likely depends on the facts. A court's willingness to approve a lawyer's full contingent fee should increase as the difference between the amount of the early settlement offer and the amount of any final settlement offer or judgment increases.

To illustrate this point, compare two hypothetical cases. In Case 1, the client receives an early settlement offer of \$100,000 and rejects it, and the lawyer subsequently settles the case at mediation for \$105,000. In Case 2, the client receives an early settlement offer of \$100,000 and rejects it, and months later the lawyer negotiates a \$300,000 settlement. Allowing the lawyer to collect a contingent fee based on the total recovery seems much fairer in Case 2, where her services plainly were valuable to the client. The lawyer in Case 1 is entitled to some reward for her efforts and assumption of risk, but a court may well conclude that the lawyer should receive far less than her full contingent fee.<sup>314</sup>

### III. CONTINGENT FEES AND STATUTORY FEES: A MOSTLY COMFORTABLE COEXISTENCE

Under the so-called "American Rule", each party bears its own attorneys' fees unless a contract or statute provides otherwise.<sup>315</sup> Statutory fee-shifting is a recurring consideration for plaintiffs' lawyers, who frequently charge contingent fees in cases in which their clients may receive statutory fee awards if they prevail. For example, plaintiffs who prevail in federal civil rights and employment discrimination actions may recover their attorneys' fees as an element of costs.<sup>316</sup> Various state statutes also provide

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314. See *Egbune*, 58 P.3d at 1173-74 (expressing this view).

315. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (quoting *Hardt v. Reliance Std. Life Ins.*, 560 U.S. 242, 252-53 (2010)).

316. 42 U.S.C. §§ 1988(b), 2000e-5(k) (2006).



that successful plaintiffs may recover attorneys' fees.<sup>317</sup> The right to receive a fee award belongs to the client—not to the lawyer.<sup>318</sup> The client may negotiate, settle, or waive the right

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317. See, e.g., FLA. STAT. § 627.428(a) (2016) (“Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree . . . in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured’s or beneficiary’s attorney. . . .”); MINN. STAT. ANN. § 8.31(3)(a) (West 2016) (“[A]ny person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including . . . reasonable attorney’s fees. . . .”); N.C. GEN. STAT. § 6-21.1(a) (2016) (“In any personal injury or property damage suit, or suit against an insurance company under a policy . . . in which the insured or beneficiary is the plaintiff . . . upon findings by the court (i) that there was an unwarranted refusal by the defendant to negotiate or pay the claim which constitutes the basis of such suit, (ii) that the amount of damages recovered is twenty-five thousand dollars (\$25,000) or less, and (iii) that the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of trial, the presiding judge may . . . allow a reasonable attorneys’ fees to the . . . attorneys representing the litigant obtaining a judgment for damages in said suit . . . as a part of the court costs. The attorneys’ fees so awarded shall not exceed ten thousand dollars (\$10,000.)”); TEX. INS. CODE ANN. art. 541 § 541.152(a)(1) (West 2011) (providing for the award of “court costs and reasonable and necessary attorney’s fees” in addition to actual damages in an action alleging an unfair method of competition or an unfair or deceptive act or practice in the business of insurance); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2008) (“A person may recover reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract.”).

318. *Cambridge Tr. Co. v. Hanify & King P.C.*, 721 N.E.2d 1, 6 (Mass. 1999); *State ex rel. Okla. Bar Ass’n v. Weeks*, 1998 OK 83, ¶ 25, 969 P.2d 347, 354; *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 603 (Tex. App. 1990); *Heldreth v. Rahimian*, 637 S.E.2d 359, 368 (W. Va. 2006); *Gorton v. Hostak, Henzl & Bichler, S.C.*, 577 N.W.2d 617, 621–23 (Wis. 1998); see also *Pony v. Cty. of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006) (“Once the prevailing party exercises her right to receive fees, the attorney’s right to collect them vests, and he may then pursue them on his own. . . . Unless and until the party exercises this power, however, the attorney has no right to collect fees from the non-prevailing party, and the non-prevailing party has no duty to pay them.” (citation omitted)). *But see Flannery v. Prentice*, 28 P.3d 860, 871 (Cal. 2001) (concluding that attorneys’ fees “awarded pursuant to [the California Fair Employment and Housing Act]

to recover attorneys' fees.<sup>319</sup>

Contingent fee agreements and statutory fee awards comfortably coexist. The ground rules in cases where they meet are for the most part well-established.

If a contingent fee agreement is ambiguous or silent as to how the parties will account for a statutory fee award, courts tend to calculate the contingent fee based on the amount of the judgment exclusive of any fee award, and then credit the statutory fee award to the client as an offset against the contingent fee owed to the lawyer.<sup>320</sup> Under this approach, the lawyer should receive the greater of (1) the contingent fee calculated solely on the amount of the damage award or (2) the amount of the statutory fee.<sup>321</sup>

The lawyer and client could, of course, expressly agree that if the client prevails and is awarded attorneys' fees, the lawyer will receive the greater of the contingent fee or the fee award.<sup>322</sup> This agreement must be made before the case's judgment.<sup>323</sup>

In the odd case in which the plaintiff prevails and is awarded attorneys' fees but the court awards no damages—

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(exceeding fees already paid) belong, absent an enforceable agreement to the contrary, to the attorneys who labored to earn them").

319. *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990); *Cambridge Tr. Co.*, 721 N.E.2d at 6; Okla. Bar Ass'n Legal Ethics Counsel, Ethics Op. 325 (2009).

320. *Com. Union Ins. Co. v. Est. of Plute*, 356 So. 2d 54, 55–56 (Fla. Dist. Ct. App. 1978); *Cambridge Tr. Co.*, 721 N.E.2d at 7; *Albunio v. City of N.Y.*, 11 N.E.3d 1104, 1109–10 (N.Y. 2014) (quoting 1 ROBERT L. ROSSI, *ATTORNEYS' FEES* § 2:12, at 37–38 (3d ed. 2013)); *Ash v. Traynor*, 2000 ND 75, ¶ 9, 609 N.W.2d 96, 99; *Luna v. Gillingham*, 789 P.2d 801, 805 (Wash. Ct. App. 1990); *Heldreth*, 637 S.E.2d at 369 n.16; Okla. Bar Ass'n Legal Ethics Counsel, Ethics Op. 325 (2009).

321. *Cambridge Tr. Co.*, 721 N.E.2d at 7; *Albunio*, 11 N.E.3d at 1109–11 (quoting ROSSI, § 2:12, at 37–38); Okla. Bar Ass'n Legal Ethics Counsel, Ethics Op. 325 (2009).

322. *See, e.g., Kaufman v. MacDonald*, 557 So. 2d 572, 573 (Fla. 1990) (recognizing that this arrangement overcame Florida law holding that a statutory fee award cannot exceed the amount owed under a contingent fee agreement).

323. *Lugassy v. Indep. Fire Ins.*, 636 So. 2d 1332, 1335 (Fla. 1994).

perhaps because the plaintiff wins only injunctive relief or because the court or jury simply finds that the plaintiff was not damaged—the plaintiff should receive the attorneys' fee award and the lawyer's contingent fee should be based on that award.<sup>324</sup> Thus, if the court awarded the plaintiff \$150,000 in statutory attorneys' fees in a case in which the plaintiff was awarded no damages, and the lawyer charged a one-third contingent fee based on the client's gross recovery, the lawyer would be entitled to a fee of \$50,000. Again, this scenario assumes that the fee agreement is ambiguous or silent on the treatment of any statutory fee award.

A contingent fee agreement does not impose a cap or ceiling on the amount of statutory attorney's fees that a court may award,<sup>325</sup> or alone determine the amount or reasonableness of a fee award,<sup>326</sup> nor does a statutory fee award limit a lawyer's right to a reasonable contingent fee.<sup>327</sup> Where the parties' fee agreement is ambiguous or silent on the issue, a lawyer may not recover both her full contingent

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324. See *Stair v. Turtzo, Spry, Sbrocchi, Faul & Labarre*, 768 A.2d 299, 307–08 (Pa. 2001) (denying summary judgment to the defendant law firm and allowing the plaintiff-client to pursue the recovery of her statutory fee award less the contingent fee to which she agreed).

325. *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989); *Cambridge Tr. Co.*, 721 N.E.2d at 6; 650 N. Main Ass'n v. Frauenshuh, Inc., 885 N.W.2d 478, 495–96 (Minn. Ct. App. 2016) (quoting *Blanchard*, 489 U.S. at 96).

326. See, e.g., *Ga. Dep't of Corrs. v. Couch*, 759 S.E.2d 804, 815–16 (Ga. 2014) (explaining this principle in concluding that the trial court erred in calculating the reasonableness of the amount of fees to be awarded to an inmate-plaintiff under a Georgia statute based solely on the inmate-plaintiff's contingent fee agreement with his lawyers rather than on evidence of the hours expended, rates, or other indications regarding the value of the lawyers' professional services).

327. *Venegas v. Mitchell*, 495 U.S. 82, 89–90 (1990); *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶100, 30 N.E.3d 631, 654–55; *Cambridge Tr. Co.*, 721 N.E.2d at 6. *But see* *First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 981–83 (Fla. 2013) (recognizing the rule that absent a contrary contractual provision, a statutory fee award cannot exceed the fees due under the parties' fee agreement); *Career Concepts, Inc. v. Synergy, Inc.*, 865 N.E.2d 385, 394–95 (Ill. App. Ct. 2007) (reducing the plaintiff's fee award under a contractual fee shifting provision to the amount of the contingent fee the plaintiff's law firm was entitled to receive under its fee agreement).

fee and the full amount of a statutory fee award.<sup>328</sup> Such a combined fee would be unreasonable.<sup>329</sup> The lawyer must be content with the larger of the contingent fee or the statutory award. There is, however, authority for the proposition that a lawyer and client may agree that the lawyer is entitled to receive both her contingent fee and any statutory fee award.<sup>330</sup> If such an agreement seems overly generous to the lawyer, remember that the total fee still must be reasonable.<sup>331</sup> The client may challenge the reasonableness of the fee despite having agreed to it in the contingent fee agreement.<sup>332</sup> In fact, unless the results achieved for the client were “extremely favorable” and the matter required significant work, a lawyer’s collection of her full contingent fee plus the full statutory fee ordinarily will yield a clearly excessive fee that violates Rule 1.5(a).<sup>333</sup>

A client and lawyer may contractually agree that a contingent fee will be based on a percentage of the combined amount of the judgment in the case plus any statutory award of attorneys’ fees.<sup>334</sup> Thus, and by way of example, in a case

328. *Ash v. Traynor*, 2000 ND 75, ¶ 9, 609 N.W.2d 96, 99; *State ex rel. Okla. Bar Ass’n v. Weeks*, 1998 OK 83, ¶¶ 37–42, 969 P.2d 347, 356–57; *Heldreth v. Rahimian*, 637 S.E.2d 359, 369 (W. Va. 2006).

329. *Weeks*, 1998 OK 83, ¶¶ 42–44, 969 P.2d at 357; *Heldreth*, 637 S.E.2d at 369.

330. *See, e.g.*, *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 643 (7th Cir. 2011) (noting that “the Supreme Court has repeatedly emphasized that a plaintiff is free to contract with her attorney to pay a contingent fee in addition to assigning rights to the statutory fee”); *Quint v. A.E. Staley Mfg. Co.*, 245 F. Supp. 2d 162, 173 (D. Me. 2003) (“As regards the 25% fee coupled with the assignment of statutory fees, the arrangement [was] reasonable in light of [the lawyer’s] extensive civil rights litigation experience, the complexity of Plaintiff’s case and his success at trial.”); *Dowles v. ConAgra, Inc.*, 25 So. 3d 889, 892 (La. Ct. App. 2009).

331. *See Dowles*, 25 So. 3d at 897–99 (scrutinizing such a fee for reasonableness); MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 2017).

332. *Cambridge Tr. Co.*, 721 N.E.2d at 6–7; Okla. Bar Ass’n, Legal Ethics Counsel, Ethics Op. 325 (2009).

333. N.C. State Bar, Formal Ethics Op. 4 (2002).

334. *Cambridge Tr. Co.*, 721 N.E.2d at 6; *Untiedt v. Grand Labs., Inc.*, 552

in which the court entered a \$500,000 judgment for the client and awarded the client \$100,000 in attorneys' fees, the lawyer could receive her fee from the client's \$600,000 total recovery if her fee agreement clearly provided for that calculation. If the lawyer charged a one-third gross contingent fee, she would then collect \$200,000. The same result might follow if the fee agreement stated that the lawyer would be entitled to one-third of any "gross amount recovered" or "gross recovery" but did not mention a statutory fee award.<sup>335</sup>

Despite courts' general willingness to allow clients to knowingly enter into a variety of contingent fee agreements, the right to recover fees from an adversary can add wrinkles to the attorney-client relationship. Consider a fee agreement in which the lawyer grants herself "the option of taking either the 40% contingent fee from the gross recovery or the attorneys' fees awarded *or negotiated*."<sup>336</sup> In other words, the agreement contemplates the lawyer negotiating her fees directly with the defendant.

This provision raises serious conflict of interest concerns.<sup>337</sup> Imagine a case in which the lawyer persuades her client to accept a lower settlement than the facts of the case warrant so that the lawyer may negotiate a higher fee

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N.W.2d 571, 575 (Minn. Ct. App. 1996); *Williamson v. Belovich*, 617 N.E.2d 786, 789 (Ohio Ct. App. 1993); N.C. State Bar, Formal Ethics Op. 4 (2002); Okla. Bar Ass'n Legal Ethics Counsel, Ethics Op. 325 (2009).

335. See, e.g., *Gorton v. Hostak, Henzl & Bichler, S.C.*, 577 N.W.2d 617, 622–24 (Wis. 1998) (upholding this result over the law firm's protest that it should receive its 40 percent contingent fee plus the attorneys' fees awarded to the client).

336. I was asked about the propriety of language nearly identical to this by another lawyer, who shall remain anonymous.

337. See, e.g., *Brown v. Gen. Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983) (discussing attorneys' fees awarded under 42 U.S.C. § 1988 and stating that "[w]here an attorney and client have independent entitlements in the same action a conflict of interest is created"); *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 562–66 (Ct. App. 1994) (discussing the inherent conflict in dual settlement negotiations).

with the defendant. Next, consider a case in which the client agrees on the settlement amount that he is to receive but the defendant and lawyer cannot agree on the lawyer's fees. If the defendant will not settle absent full agreement, the client's right to settle will be thwarted.<sup>338</sup> Even if the client can persuade a court to void the fee agreement under Model Rule 1.2(a), such a strategy will complicate and prolong the litigation, perhaps spawn new litigation, potentially burden the client with additional attorneys' fees, and incurably fracture what is likely an already brittle attorney-client relationship. In the end, the most that can be said for dual negotiation provisions like this one is that, while they are not necessarily invalid or unethical, they require careful case-by-case evaluation.<sup>339</sup>

Finally, the message for lawyers is straightforward: where applicable, clearly provide for the treatment of attorneys' fee awards in contingent fee agreements. Conjunctively, lawyers must explain to clients how they will allocate statutory fees and contingent fees in cases where there is a fee award.<sup>340</sup>

#### IV. GOVERNMENT-SPONSORED CONTINGENT FEE LITIGATION

One of the more interesting contingent fee controversies in recent years has been public entities' ability to retain lawyers on a contingent fee basis to represent them in litigation against private parties. Consider the case of a municipal government in a city with a major industrial district. One of the chemical companies there stores a toxic

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338. *Brown*, 722 F.2d at 1011.

339. *See, e.g., Ramirez*, 26 Cal. Rptr. 2d at 566 (“[T]he better approach is to consider each case on its own merits. We therefore decline to find that the inherent conflict in dual negotiations necessarily invalidates any resulting settlements.”).

340. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2017) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

compound in large outdoor tanks. When one of the tanks ruptures, the compound pours into the nearby river upstream from the local water works, contaminating the city's water supply. The city wants to sue the chemical company for the contamination. Unfortunately, the city does not have the legal staff to pursue the action itself, and hiring a law firm to represent it on an hourly basis would wreck its budget. The city therefore hires a prominent plaintiff's law firm to sue the manufacturer on a contingent fee basis.

This would appear to be an ideal arrangement: the city will be able to pursue essential public nuisance litigation without incurring the huge out-of-pocket expense that would accompany a lawsuit prosecuted by lawyers who charge by the hour.<sup>341</sup> Outside counsel may also have necessary expertise that the city's lawyers do not.<sup>342</sup> In fact, courts have long accepted contingent fee representations where a governmental entity acts as a traditional plaintiff suing to recover damages for some type of injury.<sup>343</sup> The calculus changes, however, when the government acts in its sovereign capacity as *parens patriae* to pursue consumer protection, eminent domain, public nuisance, or similar litigation, rather than functioning as a traditional plaintiff.<sup>344</sup> When a

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341. As in any other case, the private lawyers' contingent fee must be reasonable under Rule 1.5(a). *State v. Hagerty*, 1998 ND 122, ¶ 29, 580 N.W.2d 139, 148.

342. *Int'l Paper Co. v. Harris Cty.*, 445 S.W.3d 379, 396 (Tex. App. 2013).

343. See, e.g., *City of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) ("This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts. . . . Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers."); see also *Cty. of Santa Clara v. Super. Ct.*, 235 P.3d 21, 33–34 (Cal. 2010) (explaining that public entities clearly may employ private counsel on a contingent fee basis when "the governmental entity's interests in the litigation are those of an ordinary party, rather than those of the public").

344. See David M. Axelrad & Lisa Perrochet, *The Supreme Court of California Rules on Santa Clara Contingency Fee Issue—Backpedals on Clancy*, 78 DEF. COUNS. J. 331, 334 (2011).

governmental plaintiff is acting as a sovereign, its lawyers are expected to be neutral in the way that a criminal prosecutor is neutral; that is, as government representatives they “must act with the impartiality required of those who govern,” and they must avoid abusing the government’s vast power.<sup>345</sup>

These arrangements are often criticized. Analogizing, no district attorney could survive paying prosecutors based on the criminal cases they won.<sup>346</sup> Similarly, a court would disqualify any prosecutor who pursued a public nuisance case for a contingent fee—the prosecutor’s financial interest in the outcome of the litigation would be intolerable.<sup>347</sup> By extension, so the argument goes, the rules should be the same when a public entity hires private lawyers to pursue what amounts to a law enforcement action for a contingent fee.<sup>348</sup> As two excellent California lawyers have argued:

The same potential for erosion of the government’s neutrality and impartiality occurs whether a contingent fee is payable to the government or the government’s agent. Either way, day-to-day litigation decisions . . . are all necessarily colored by the inescapable fact that counsel hired to litigate the case will not be paid unless there is a substantial monetary recovery. That profit motive necessarily influences the course of the litigation. Where a contingent fee is involved, therefore, there is no longer a guarantee that a public law enforcement action will be guided solely by what is best for the general welfare. There will always be a risk that decisions concerning government *parens patriae* litigation will be made in whole or in part for the sake of attorney profit rather than for the public’s benefit.

The issue is not whether an advocate can be perfectly disinterested. All advocates have an interest in winning. . . . The neutrality demanded of an attorney enforcing public rights does not require complete indifference to the outcome of the case. However, when [that] attorney has a financial stake in the outcome of that

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345. *Cty. of Santa Clara*, 235 P.3d at 29.

346. Axelrad & Perrochet, *supra* note 344, at 334.

347. *Id.*

348. *Id.*



case, the potential for the attorney to act out of self-interest rather than the public interest creates an indelible appearance of impropriety.<sup>349</sup>

Valid though these concerns may be, they are surmountable. Courts generally let public entities hire contingent fee counsel to prosecute *parens patriae* actions as long as they take certain precautions.<sup>350</sup> These precautions are thought to be necessary because lawyers prosecuting such actions, while not subject to the stringent conflict of interest rules governing criminal prosecutors' conduct, "are subject to a heightened standard of ethical conduct applicable to public officials acting in the name of the public—standards that would not be invoked in an ordinary civil case."<sup>351</sup>

First, a public entity may retain private lawyers on a contingent fee basis if "neutral, conflict-free government attorneys retain the power to control and supervise the litigation."<sup>352</sup> This means that government lawyers must make all critical discretionary decisions regarding the conduct of the litigation,<sup>353</sup> they must have veto power over all decisions made by the private lawyers,<sup>354</sup> and a senior government lawyer must be involved in all stages of the

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349. *Id.* at 334–35.

350. *See, e.g.,* *City of Chi. v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 WL 920719, at \*4–6 (N.D. Ill. Mar. 2, 2015); *Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802, 814–16 (E.D. Ky. 2012) (*Merck I*); *Cty. of Santa Clara*, 235 P.3d at 35–41; *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1242–43 (Md. 1998); *State v. Actavis Pharma, Inc.*, \_\_ A.3d \_\_, 2017 WL 2830715, at \*5 (N.H. June 30, 2017); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 477 (R.I. 2008); *Int'l Paper Co. v. Harris Cty.*, 445 S.W.3d 379, 394–97 (Tex. App. 2013); *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 634–40 (W. Va. 2013). *But see Meredith v. Ieyoub*, 700 So. 2d 478, 484 (La. 1997) ("Until the Legislature enacts a statute authorizing the Attorney General to enter into contingency fee contracts, the Contract is invalid and may not be implemented or enforced.").

351. *Cty. of Santa Clara*, 235 P.3d at 35.

352. *Id.* at 36.

353. *Id.* at 38–39.

354. *Lead Indus. Ass'n, Inc.*, 951 A.2d at 477.

litigation.<sup>355</sup>

These requirements are tempered by reason.<sup>356</sup> The private lawyers must have room to exercise their professional skills.<sup>357</sup> They must be empowered to make the routine ministerial decisions common to litigation without having to check with the government lawyers to whom they report.<sup>358</sup> As long as government lawyers are directing the litigation, making all critical decisions in the case, and reviewing the private lawyers' work before adopting or approving it, the control requirement is satisfied.<sup>359</sup> Government lawyers need not be intimately involved in all of the daily activities or decisions that power litigation to be in control of the case.<sup>360</sup> Indeed, to require government lawyers to know every detail of a case or to be involved in the nitty-gritty work in the matter would be impractical, as a Kentucky federal court explained when discussing the Kentucky Attorney General's control of the state's lawsuit against a drug manufacturer:

Lack of involvement in the legwork of a case does not prove or even imply a lack of control. The legal system would cease to function efficiently if the person with ultimate control over a case was required not only to oversee and approve all the actions taken in the matter, but also take part in every minute detail of those actions. The [Attorney General] need not be involved in the day-to-day work done in all the cases being prosecuted by his office. Indeed, it would be virtually impossible for him to do so. It is similarly illogical to require [the Assistant Attorney General serving as the lead government lawyer in the case] to take part in the in-depth work

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355. *Id.*

356. *See, e.g., Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 748 (E.D. Ky. 2013) (*Merck II*) (concluding that the Kentucky Attorney General's office satisfied the control requirement even though it was not intimately involved in all the routine work or everyday decision-making common in litigation).

357. *See id.* (declining to second guess the Attorney General's approach to managing the litigation).

358. *Lead Indus. Ass'n, Inc.*, 951 A.2d at 476 n.51.

359. *Merck II*, 947 F. Supp. 2d at 748.

360. *Id.*

that the contingency-fee counsel was hired to do. This would not only be too onerous a standard for “maintaining control over the litigation,” it would also defeat the purpose of hiring outside counsel to begin with.<sup>361</sup>

The party challenging the government’s control over the litigation—or, more precisely, its lack thereof—bears the burden of establishing that the government lawyers have abdicated their responsibilities to the private lawyers.<sup>362</sup> It is not the government’s burden to prove that it is controlling the case.<sup>363</sup> Government lawyers whose conduct is challenged are entitled to a presumption that they are fulfilling their professional responsibilities.<sup>364</sup>

Critics of contingent fees in this context contend that the control mandate cannot ensure private lawyers’ neutrality and impartiality because “the development and evaluation of facts are all necessarily influenced by the inescapable fact that private counsel with tremendous responsibility for litigating a public law enforcement action will not be paid unless there is a substantial monetary recovery.”<sup>365</sup> The private lawyers’ profit motive “necessarily influences the course of litigation in the direction of monetary solutions rather than nonmonetary or governmental solutions that may be available.”<sup>366</sup> In other words, the private lawyers’ pervasive desire to earn a contingent fee will cause them to conduct the litigation in a fashion that overrides the government lawyers’ ability or will to manage the litigation.

This argument assumes too much. To start, it appears to assume either that “nonmonetary or governmental solutions” are generally preferable to money damages, or

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361. *Id.*

362. *Id.* at 744.

363. *See id.*

364. *Id.*

365. Axelrad & Perrochet, *supra* note 344, at 343.

366. *Id.*

that the public entity does not or should not want to recover damages. If the public entity is suing for monetary damages that probably is a good sign that damages are the relief it considers appropriate. A monetary award may be the only way of making the public entity whole, and government officials may prefer a damage award over injunctive or other relief. In any event, the government officials responsible for hiring outside counsel or the senior government lawyers responsible for supervising the private attorneys, or both, surely discussed those issues with the private lawyers when they agreed on the objectives of the litigation. They also surely discussed an alternative compensation arrangement for the lawyers if injunctive or other non-monetary relief was a foreseeable outcome. The argument certainly seems to give little credit to the government lawyers responsible for the litigation, who presumably will “honor their obligation to place the interests of their client above the personal, pecuniary interest[s] of the subordinate private counsel they have hired.”<sup>367</sup> The argument gives even less credit to the private lawyers involved, who should be expected “to comport themselves with ethical integrity and to abide by all rules of professional conduct.”<sup>368</sup> In sum, the solution to concerns about actual control by government lawyers is not to abstractly brand it impracticable, but for defendants to prove that government lawyers have failed in their duty of control in appropriate cases.

Another complaint about the control requirement is that it is illusory.<sup>369</sup> After all, the government entity is hiring contingent fee counsel because it does not have the personnel or resources to prosecute the action itself.<sup>370</sup> How then can a government lawyer’s assurance that she is in control of the

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367. *Cty. of Santa Clara v. Super. Ct.*, 235 P.3d 21, 38 (Cal. 2010).

368. *Id.*

369. *See Axelrad & Perrochet*, *supra* note 344, at 337.

370. *Id.*

litigation be relied upon?<sup>371</sup> And how can suitable control be verified without intruding into the public entity's attorney-client privilege and its lawyers' work product immunity?<sup>372</sup> These are valid questions.

The claim that control cannot be assured given the public entity's inability to pursue the case itself overlooks the reality of litigation management. On a daily basis, corporations litigate matters through outside counsel supervised by in-house counsel. Corporations hire outside lawyers because they do not have the personnel or expertise to litigate the matters themselves, yet no one would suggest that the in-house lawyers cannot control the litigation. There is no reason to view affairs differently where an in-house lawyer is employed by a public entity rather than by a corporation. Again, "control" does not require an in-house lawyer's immersion in the daily conduct of the litigation.<sup>373</sup> Because it does not, a court's need to verify governmental control should not intrude into the public entity's privileged communications or its lawyers' work product.<sup>374</sup> Moreover, this claim conflates knowledge and control. This is improper because "knowledge and control are distinct concepts, and an attorney can control litigation without knowing every detail of the case."<sup>375</sup>

As for verifying the truth of a government lawyer's claim that she is controlling the litigation, there rarely should be any need for such verification. The one court that appears to have been presented with that task to date had no trouble doing so without infringing the government's attorney-client

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371. *Id.* (calling a government lawyer's assurance that she is in control of litigation "a thin reed").

372. *Id.*

373. *Merck II*, 947 F. Supp. 2d 733, 748 (E.D. Ky. 2013).

374. *See id.* at 747–48 (rejecting Merck's attempt "to graft a 'substantive' requirement onto the control-of-litigation principles outlined in *Lead Industries* and *Santa Clara*").

375. *Id.* at 745 (internal quotation marks omitted).

privilege or its outside lawyers' work product immunity.<sup>376</sup> And, at the risk of beating a dead horse, a court can at least initially rely on a government lawyer's assurance that she is in control because of her ethical obligations and her duties to her employer.<sup>377</sup>

In addition to requiring that government lawyers be in control of the litigation with the private lawyers in a subordinate role, it is also important that the government lawyers *appear* to the governmental entity's constituents and to the public at large to be in control of the litigation.<sup>378</sup> Hence, the second safeguard: the retainer agreement between the public entity and private counsel must specify the entity's right to control the litigation.<sup>379</sup> The retainer agreement must include statements assuring any reader that (1) government lawyers will control the course and conduct of the litigation; (2) government lawyers shall have veto power over all decisions made by outside counsel; and (3) a senior government lawyer will be personally involved in supervising the litigation.<sup>380</sup> These terms are minimum requirements.<sup>381</sup> They are not exclusive or exhaustive; different cases may require different or additional guidelines to ensure an appropriate level of government control.<sup>382</sup>

There is no magic language that must be included in a

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376. *See generally id.* at 744–49 (discussing the Kentucky Attorney General's control of the litigation).

377. *City of Santa Clara v. Super. Ct.*, 235 P.3d 21, 38 (Cal. 2010).

378. *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 477 (R.I. 2008).

379. *City of Santa Clara*, 235 P.3d at 40; *Lead Indus. Ass'n, Inc.*, 951 A.2d at 477.

380. *City of Santa Clara*, 235 P.3d at 40; *Lead Indus. Ass'n, Inc.*, 951 A.2d at 477.

381. *City of Santa Clara*, 235 P.3d at 40; *Lead Indus. Ass'n, Inc.*, 951 A.2d at 477.

382. *City of Santa Clara*, 235 P.3d at 40; *Lead Indus. Ass'n, Inc.*, 951 A.2d at 477 n.52.

retainer agreement to satisfy the control requirement.<sup>383</sup> Certainly, the agreement does not need to outline the respective daily duties of the government and private lawyers.<sup>384</sup>

Third, the decision to settle the litigation must be vested exclusively in the public entity.<sup>385</sup> The contingent fee agreement between the public entity and the private lawyers must specifically provide that settlement decisions “are reserved exclusively to the discretion of the public entity’s own attorneys.”<sup>386</sup> At least one court has ruled that the agreement must state that the public entity may resolve the case through non-monetary relief without the private lawyers’ consent.<sup>387</sup> The agreement must further state that a defendant may communicate directly with the lead government lawyers without first having to confer with, or obtain the permission of, the private lawyers.<sup>388</sup>

As a matter of professional responsibility, these settlement-related requirements are unnecessary. The decision to settle on any terms is the public entity’s alone to make regardless of what the contingent fee agreement says.<sup>389</sup> The defense lawyers would have the right to communicate with the government lawyers on the case without the presence or permission of the private lawyers

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383. See, e.g., *Merck II*, 947 F. Supp. 2d 733, 740–44 (E.D. Ky. 2013) (upholding the disputed contingent fee agreements); *Sherwin-Williams Co. v. City of Columbus*, No. C2-06-829, 2007 WL 2079774, at \*1–2 (S.D. Ohio July 18, 2007) (approving contingent fee agreements between two cities and outside counsel and disapproving of agreement between Toledo and outside counsel where agreement prohibited Toledo from disposing of a claim without consent of outside counsel).

384. *Merck II*, 947 F. Supp. 2d at 742.

385. *Cty. of Santa Clara*, 235 P.3d at 39.

386. *Id.*

387. *Sherwin-Williams Co.*, 2007 WL 2079774, at \*4.

388. *Cty. of Santa Clara*, 235 P.3d at 39–40 (citing ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-443 (2006)).

389. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2017).

even if the contingent fee agreement was silent on the issue.<sup>390</sup> To the extent that appearances count, however, these conditions assure concerned observers that settlement decisions will be driven by public interest rather than by the private lawyers' ambitions.

#### V. REVERSE CONTINGENT FEES

As we have seen up to this point, courts and lawyers tend to think of contingent fees in connection with the representation of plaintiffs. But lawyers may also be compensated based on a contingency when representing defendants.<sup>391</sup> These fees are described as "reverse contingent fees."<sup>392</sup> A reverse contingent fee is based on the difference between the amount a plaintiff seeks from a lawyer's client and the amount ultimately obtained from the client, whether by way of settlement or judgment.<sup>393</sup> That is, a reverse contingent fee is based on the amount of money the lawyer *saves* the client rather than the amount of money the lawyer *recovers* for the client.<sup>394</sup> Reverse contingent fees have long been charged by lawyers who handle tax appeals, where the fee is based on the difference between the amount originally assessed by the taxing authority and the hopefully lower amount ultimately determined by a court or

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390. DOUGLAS R. RICHMOND ET AL., *PROFESSIONAL RESPONSIBILITY IN LITIGATION* 275–78 (2d ed. 2016).

391. This Part is adapted from Douglas R. Richmond, *Reverse Contingent Fees in Litigation*, *IN-HOUSE DEF. Q.*, Spring 2012, at 26. All text has been updated and remains the author's original work.

392. ABA Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 93-373, at 1 (1993).

393. D.C. Bar, Legal Ethics Comm., Op. 347 (2009), <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion347.cfm>.

394. See, e.g., *Storino, Ramello & Durkin v. Rackow*, 45 N.E.3d 307, 312–13 (Ill. App. Ct. 2015) (enforcing a reverse contingent fee agreement in a case in which the lawyers persuaded a municipality to dismiss a special assessment lawsuit after several years of litigation, thereby realizing a savings for the clients).



administrative body.<sup>395</sup>

Reverse contingent fees are generally permissible.<sup>396</sup> Like traditional contingent fees, they must be reasonable, and the agreements providing for them must meet all other applicable Model Rule 1.5 requirements.<sup>397</sup>

#### A. *Determining Reasonableness*

The critical questions in most reverse contingent fee representations will relate to the reasonableness of the fee. The problem is calculating the amount against which the client's potential savings—and thus any fee—will be measured. This is a simple task in a case where the plaintiff's damages are liquidated and it therefore pleads a sum certain in its complaint or petition. There is nothing speculative about the plaintiff's damages then.<sup>398</sup> In most cases, however, the plaintiff's damages are unliquidated. Furthermore, plaintiffs frequently allege excessive damages.<sup>399</sup> Thus, the amount sought in a plaintiff's complaint or petition, or claimed in a demand letter, generally cannot alone furnish the number from which any savings will be calculated.<sup>400</sup> Furthermore, in some jurisdictions, a plaintiff is not required or is not permitted to

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395. See, e.g., *Brown & Sturm v. Frederick Rd. Ltd. P'ship*, 768 A.2d 62, 71 (Md. Ct. Spec. App. 2001).

396. ABA Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 93-373, at 1 (1993); D.C. Bar, Legal Ethics Comm., Op. 347 (2009).

397. ROTUNDA & DZIENKOWSKI, *supra* note 21, § 1.5-3(i), at 206.

398. Iowa Supreme Court Bd. Prof'l Ethics & Conduct, Op. 98-03 (1998), <http://www.iowabar.org/default.asp?page=ethics>.

399. See ABA Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 93-373, at 4 (1993) (observing that "[p]laintiff's counsel often overstate the amount to which their client is entitled, and indeed have little incentive for restraint").

400. *Id.* (opining that "the amount demanded cannot automatically be the number from which the savings . . . can reasonably be calculated"); D.C. Bar, Legal Ethics Comm., Op. 347, at 3 (2009) (asserting that "[t]he amount demanded by an adversary may not be taken alone as the basis for a reverse contingent fee").

specifically plead damages in a complaint or petition,<sup>401</sup> but must instead assert a jurisdictional amount or plead entitlement to damages that “are fair and reasonable” or that are “just and proper.”<sup>402</sup>

In short, in any case where the amount or value of the plaintiff’s claim is unspecified, the lawyer and client must negotiate a fair dollar figure to assign to the plaintiff’s claim. The selection of this number “should be the product of full disclosure by the lawyer and informed consent from the client. The lawyer may not suggest a number based upon an assessment of the matter or experience in the particular type of dispute that is not disclosed to the client.”<sup>403</sup>

It is easy to imagine a scenario in which the simplistic valuation of a plaintiff’s claim could spawn a dispute over the reasonableness of a reverse contingent fee. Assume that Company *C* engages Law Firm *L* to defend it in commercial litigation. The plaintiff’s detailed complaint concludes with a prayer for damages of \$15 million, which the defense lawyers consider plausible given the allegations. *L* agrees to accept as its fee one-third of any amount it saves *C* off the plaintiff’s prayer. *L* wins the case on summary judgment and presents *C* with a \$5 million bill. Always cost-conscious, *C* asks how much time *L* spent in winning the case. When *L* reveals that it has 1000 hours invested in the matter, *C* is upset that *L* is effectively charging \$5,000 per hour.<sup>404</sup> In response, *C* offers

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401. ABA Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 93-373, at 4 (1993).

402. See, e.g., MO. REV. STAT. § 509.050.1(2) (2015) (“If a recovery of money be demanded [in a pleading that sets forth a claim for relief], no dollar amount or figure shall be included in the demand except to determine the proper jurisdictional authority, but the prayer shall be for such damages as are fair and reasonable.”).

403. D.C. Bar, Legal Ethics Comm., Op. 347, at 3 (2009).

404. See Donald P. Butler & Roger D. Townsend, *Focusing on Litigation Results: The Role of the Case Manager*, ACC DOCKET, Mar. 2006, at 22, 24 (warning that reverse contingent fees “may result in a huge payout at the end of the day, which management may later resent”), <http://www.adjtlaw.com/assets/ACC%20>

to pay *L* its lawyers' full hourly rates for the 1000 hours spent on the case. When *L* politely insists on payment in accordance with the fee agreement, *C* weighs its options. *C* knows from working with other law firms in the city that average hourly rates for partners range between \$400 and \$600. Armed with this knowledge, *C* sends *L* a check for \$600,000, representing 1000 hours at \$600 per hour. Can *C* escape its reverse contingent fee agreement on the basis that *L*'s fee is unreasonable and the law is clear that clients cannot consent to unreasonable fees? *Wunschel Law Firm, P.C. v. Clabaugh*<sup>405</sup> suggests that the answer may be yes.

The defendant in *Wunschel*, Larry Clabaugh, was sued in an Iowa state court and asked Russell Wunschel to represent him.<sup>406</sup> Wunschel proposed a fee of \$50 per hour, secured by a \$1000 retainer.<sup>407</sup> Clabaugh asked whether an alternative fee arrangement was possible and Wunschel proposed a reverse contingent fee of one-third of any amount saved off the plaintiff's \$17,500 prayer for damages, again coupled with a \$1000 retainer.<sup>408</sup> When Clabaugh asked which fee arrangement would cost more, Wunschel hesitatingly said that the reverse contingent fee agreement might be more expensive.<sup>409</sup> Clabaugh accepted the reverse contingent fee agreement and paid the retainer.<sup>410</sup>

The case went to trial and the jury returned a \$1750 verdict against Clabaugh.<sup>411</sup> Wunschel subsequently billed Clabaugh \$4270, representing a contingent fee of \$5250

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Docket%20article%20Managing%20Litigation—Role%20of%20Case%20Manager.pdf.

405. 291 N.W.2d 331 (Iowa 1980).

406. *Id.* at 332.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

calculated as agreed, less the \$1000 retainer, plus costs of \$20.<sup>412</sup> Clabaugh refused to pay and Wunschel sued him to collect the fees and costs.<sup>413</sup> Wunschel prevailed in the trial court and Clabaugh appealed to the Iowa Supreme Court.<sup>414</sup>

The Iowa Supreme Court framed the question presented as whether it should “approve contingent attorney fee contracts for the defense of unliquidated tort damage claims in which the fee is fixed as a percentage of the difference between the amount prayed for in the petition and the amount actually awarded.”<sup>415</sup> Recognizing the question’s ethical overtones, the court requested an amicus brief from the Committee on Professional Ethics & Conduct of the Iowa State Bar Association.<sup>416</sup> The Committee saw many problems with reverse contingent fees based on the difference between the plaintiff’s prayer and any verdict in cases with unliquidated damages.<sup>417</sup> In summary:

[A] contingent fee arrangement in the defense of an unliquidated tort claim has missing the critical factor that the amount against which the percentage is taken is determined, at a later date, by an independent party or by agreement of the client. Also, the lawyer does not have to establish liability (or lack thereof) to be entitled to a fee.

The Committee therefore believes that since these critical factors are missing from a defense-contingent fee arrangement in an unliquidated tort action, that such fee is based upon *pure* speculation. A fee based *purely* upon speculation cannot be reasonable as required by [Iowa ethics rules]. The Committee is unanimous in its decision that in a tort action claiming unliquidated damages, a defense contingent fee based upon a percentage of the difference between the prayer in the plaintiff’s petition and the jury’s verdict is improper. Its decision is the same even if the actual amount of the prayer is written into the contingent fee contract (as

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412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *See id.* at 335–36 (quoting the Committee’s brief).

in the case at bar) so that the fee would not increase if the prayer is increased.<sup>418</sup>

The court adopted the Committee's position.<sup>419</sup> It agreed that a contingent fee agreement is unreasonable where the fee will be determined using factors that are logically unrelated to the value of the lawyer's services.<sup>420</sup> This was such a case.<sup>421</sup> The *Wunschel* court thus reversed the trial court and held that "a contingent fee contract for the defense of an unliquidated tort damage claim which is based upon a percentage of the difference between the prayer of the petition and the amount awarded is void."<sup>422</sup>

The court did not decide whether *Wunschel's* fee was reasonable or not; it simply held that contracts of this type were "likely to result in unreasonable fees in too many cases and thus are contrary to sound public policy."<sup>423</sup> The court further held that because the fee agreement was "not invalid because of illegality of the services but merely because on policy grounds" it could not "approve the way in which the fee was to be calculated," *Wunschel* was entitled on remand to recover a reasonable fee from Clabaugh in *quantum meruit*.<sup>424</sup>

Some lawyers might argue that the *Wunschel* court erred. The selection of any figure on which to base a reverse contingent fee is subjective. Any prediction of verdict value is to some extent speculative. Even comparisons to analogous cases based on published reports of verdicts or settlements are imperfect because such summaries cannot capture the factors necessary to truly evaluate a case. Thus, it was

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418. *Id.* at 337 (quoting the Committee's brief) (emphasis in original).

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

proper for Wunschel to calculate his fee based on the damages sought in the petition.

The trouble with that argument is the apparent lack of evidence in the record that Wunschel tried to calculate a logical basis for his fee and settled on the pleaded damages because that was the best he could do. It is therefore impossible to rule out the prospect that he knew the case was worth less than the \$17,500 set forth in the plaintiff's petition. But even if his approach was legitimate, he never explained to Clabaugh the reasoning behind his fee calculation. Clients need adequate information to participate intelligently in decisions concerning their legal affairs, including the fees they are to be charged,<sup>425</sup> and Wunschel never provided Clabaugh with such information.

*Brown & Sturm v. Frederick Road Limited Partnership*<sup>426</sup> is another illustrative case. *Brown & Sturm* centered on the conduct of two experienced Maryland lawyers, Edwin Brown and Rex Sturm.<sup>427</sup> Through their firm, they represented the children of Lawson and Cordelia King, who had bought their parents' farm and incurred massive tax liability when their parents died.<sup>428</sup> Brown & Sturm had represented the King family in connection with the sale.<sup>429</sup> In a nutshell, the children were in a pinch after the IRS assessed liability for estate and gift taxes, along with fraud and under-valuation penalties, in the amount of \$68 million.<sup>430</sup> The assessments were based on the IRS's determination that the children had purchased the farm at a price far below its fair market value of \$60 million for

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425. MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS'N 2017).

426. 768 A.2d 62 (Md. Ct. Spec. App. 2001).

427. *See id.* at 66 (explaining that at relevant times they had practiced for a combined 87 years).

428. *Id.* at 65, 67–70.

429. *Id.* at 67–70.

430. *Id.* at 69–70.

development use (its highest and best use, rather than its agricultural value).<sup>431</sup> After agreeing to represent the children “in all Tax Matters” concerning their parents’ estate,<sup>432</sup> Brown and Sturm negotiated with the children over a fee for the tax deficiency case.<sup>433</sup> The negotiations spanned months, even as the firm actively represented the children.<sup>434</sup> Finally, the firm and the children agreed that the “fee would be ten percent of any savings achieved in the tax liability and fraud and under-valuation penalties,” and five percent of any reduction in the fraud penalties, all measured from the amounts the IRS claimed.<sup>435</sup>

The tax litigation proceeded and Brown obtained three objectively reasonable appraisals of the farm, ranging from \$4.9 million to \$10.4 million.<sup>436</sup> An IRS appraiser valued the farm at around \$36.5 million.<sup>437</sup> Ultimately, the King children accepted a \$20 million valuation and the IRS waived all penalties and other claims.<sup>438</sup> The children’s liability approached \$20 million.<sup>439</sup> Brown & Sturm’s reverse contingent fee was a little over \$4.8 million.<sup>440</sup>

The King children attempted to sell the farm to a real estate developer, but a soft market thwarted their efforts.<sup>441</sup> Eventually, the tax bill, legal fees, and soft real estate market forced one of the children and the farming

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431. *Id.* (the children actually paid \$248,100 for the property).

432. *Id.* at 70.

433. *Id.* at 70–71.

434. *Id.* at 70.

435. *Id.* at 71.

436. *See id.* at 72.

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

partnership the children formed into bankruptcy.<sup>442</sup> Brown & Sturm made a claim for its fee in the bankruptcy, but the bankruptcy court disallowed it as excessive.<sup>443</sup> The firm then sued to collect its fee in a Maryland state court.<sup>444</sup> The trial court found for the children and the firm appealed.<sup>445</sup>

The Court of Special Appeals affirmed the trial court, noting that Brown & Sturm's reverse contingent fee was based on what it knew to be an obscene appraisal of the farm by the government.<sup>446</sup> The *Brown & Sturm* court agreed with the trial court that "Brown & Sturm failed to disclose to the family . . . a more realistic worst-case market value of the farm . . . and that information would have significantly reduced the amount agreed upon as a benchmark for tax liability in the retainer agreement."<sup>447</sup> In fact, Brown knew long before the parties agreed on the fee that the state and county had appraised the farm's value at \$9.75 million and \$24.8 million, respectively.<sup>448</sup>

In addition to skewering the firm on the disclosure issue, the trial court was able to conclude based on this evidence and expert testimony presented by the children that the IRS's \$60 million valuation figure that Brown & Sturm used to calculate its fee was "unreasonably high."<sup>449</sup> Indeed, no other conclusion was possible. Brown & Sturm's practice focused on land valuation, both Brown and Sturm had substantial experience in the area, and they knew from the state and county appraisals of the farm that the IRS's

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442. *Id.* at 72–73.

443. *Id.* at 73.

444. *See id.* at 65.

445. *Id.* at 65–66.

446. *See id.* at 76.

447. *Id.* at 76–77.

448. *Id.* at 68–69.

449. *Id.* at 77–78.



estimate “in the deficiency notice was unrealistic.”<sup>450</sup> Even if Brown and Sturm had not known that the IRS’s valuation was excessive, they had a duty to “research the matter carefully before holding out \$60 million as a benchmark figure.”<sup>451</sup>

Maryland courts measure the reasonableness of contingent fees at two points. First, the contingent fee agreement must be reasonable in principle when the parties enter into it.<sup>452</sup> Second, after the contingency has been met and the fee quantified, the fee must be reasonable in operation as measured by the factors in Rule 1.5(a).<sup>453</sup>

Here, the reverse contingent fee agreement was unreasonable at the outset of the representation because Brown and Sturm failed to advise the children regarding their reasonable IRS deficiency exposure.<sup>454</sup> Instead, they “based the fee agreement upon the government’s inflated claim, which in turn, unreasonably inflated the potential fee.”<sup>455</sup> As for the reasonableness of the fee in operation, suffice it to say that Brown & Sturm could not satisfy any of the Rule 1.5(a) factors.<sup>456</sup> In summary, the *Brown & Sturm* court affirmed the trial court judgment, concluding that Brown & Sturm’s reverse contingent fee “was unreasonable because it bore little relation to the time, labor, novelty and

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450. *Id.* at 78.

451. *Id.*

452. *Id.* at 79.

453. *Id.*

454. *Id.*

455. *Id.* at 80. Brown testified that he always thought the government’s valuation of the King farm was too high, that the county and state appraisals supported a far lower valuation, and that he knew the Tax Court favored compromise and generally “split the difference” between the government’s and the taxpayers’ valuations. *Id.* Sturm had once written a letter stating that he and Brown believed they could convince the Tax Court to accept a \$5 million valuation of the King farm. *Id.*

456. *Id.* at 80–81.

risk of the legal problem.”<sup>457</sup>

*Brown & Sturm* highlights the importance to lawyers of fully disclosing relevant knowledge and information when negotiating with a client over the base figure for calculating a reverse contingent fee. The case also establishes that in selecting a base figure, lawyers must undertake the analysis, investigation, or research necessary to establish the reasonableness of the figure they propose.

### B. *Recommendations for Lawyers*

If lawyers intend to propose reverse contingent fees to clients, they should take some precautions.<sup>458</sup> First, lawyers must carefully select the benchmark figure on which to base the client’s savings and thus their fee. Only in liquidated damage cases can this number be based exclusively on the damages claimed in the plaintiff’s complaint or petition.<sup>459</sup> Where the plaintiff’s damages are unliquidated, the use of the damages alleged by the plaintiff as the sole basis for the benchmark figure is improper.<sup>460</sup> The unreliability of the plaintiff’s pleaded damages—including their susceptibility to exaggeration or inflation—mandates independent evaluation by the defense lawyer in setting a reasonable benchmark.<sup>461</sup> In some cases, a lawyer may have sufficient experience and knowledge to set the benchmark. In other cases, the lawyer may have to research comparable cases to

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457. *Id.* at 81.

458. Before deciding how to calculate a reverse contingent fee, a lawyer must consider whether it is even reasonable to charge such a fee in light of the Model Rule 1.5(a) factors. MODEL RULES OF PROF’L CONDUCT r. 1.5 cmt. 3 (AM. BAR ASS’N 2017). If it is not, and the lawyer still wishes to undertake the representation, she will have to offer the client an alternative fee. ABA Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 93-373, at 6 (1993).

459. Iowa Supreme Court Bd. Prof’l Ethics & Conduct, Op. 98-03 (1998).

460. D.C. Bar, Legal Ethics Comm., Op. 347, at 2, 6 (2009).

461. See ABA Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 93-373, at 4–5 (1993); D.C. Bar, Legal Ethics Comm., Op. 347, at 2 (2009).

identify a reasonable figure. Regardless of how lawyers arrive at benchmark figures, they should fully explain their reasoning to their clients.<sup>462</sup> They should also recite their reasoning in their fee agreements.

Second, lawyers must practice full disclosure when proposing or agreeing to a reverse contingent fee.<sup>463</sup> As noted above, they should explain their reasoning for recommending or insisting upon a benchmark figure. Lawyers must also explain the percentage to be applied to the potential savings. In contrast to typical contingent fee arrangements, “there are no established norms concerning the appropriate percentages for a lawyer to” apply to reverse contingent fees.<sup>464</sup> To demonstrate the reasonableness of a particular percentage, a lawyer may wish to compare for the client the range of fees that might reasonably be charged if the lawyer bills by the hour as compared to the range of fees that a reverse contingent fee agreement might yield.<sup>465</sup>

It seems obvious that the type and amount of disclosure required will vary with the client’s sophistication. Sophisticated clients, such as corporations with in-house law departments—who often insist upon and negotiate alternative billing arrangements—generally should require less disclosure than individuals.<sup>466</sup> That said, the possibility that a sophisticated client will chafe at what it considers to be an outsized reverse contingent fee should suggest to lawyers the need to ensure that *any* client fully understands all aspects of a reverse contingent fee agreement.

## VI. THE CONSEQUENCES OF PREMATURE TERMINATION OF THE

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462. D.C. Bar, Legal Ethics Comm., Op. 347, at 3 (2009).

463. See MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2017) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

464. D.C. Bar, Legal Ethics Comm., Op. 347, at 3 (2009).

465. *Id.*

466. *Id.*

## ATTORNEY-CLIENT RELATIONSHIP IN A CONTINGENT FEE REPRESENTATION

Finally, there is the issue of lawyers' compensation in cases where the attorney-client relationship is terminated before the occurrence of the contingency on which the parties' fee agreement is based. By way of background, once a client retains a lawyer to handle a matter, the attorney-client relationship continues as long as the lawyer remains responsible for the matter because she has accepted responsibility to bring the matter to a successful conclusion.<sup>467</sup> Or, phrased a bit differently, the attorney-client relationship continues until the lawyer accomplishes the purpose for which the representation was initially formed.<sup>468</sup> But the client and the lawyer are not necessarily shackled together until the end. The client may discharge the lawyer at any time for any reason, or for no reason.<sup>469</sup> To protect the client's ability to terminate the attorney-client relationship, the law implies in every fee agreement the client's right to terminate the contract without incurring liability for breach.<sup>470</sup> On the other side of the coin, the lawyer may withdraw from the client's representation for a number of valid reasons.<sup>471</sup> In either case, the lawyer's right

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467. *Nat'l Med. Care, Inc. v. Home Med. of Am., Inc.*, No. 00-1225, 2002 WL 31068413, at \*4 (Mass. Super. Ct. Sept. 12, 2002); *see also* *Berry v. McFarland*, 278 P.3d 407, 411 (Idaho 2012) ("If the attorney agrees to undertake a specific matter, the relationship terminates when that matter has been resolved."); *W. Wagner & G. Wagner Co. v. Block*, 669 N.E.2d 272, 275-76 (Ohio Ct. App. 1995) ("It is generally held that when an attorney agrees to represent a client it is implied that he agrees to see the matter through to its conclusion.").

468. *Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389-90 (S.D.N.Y. 2010) (quoting 48 AM. JUR. 2D *Proof of Facts* § 18).

469. *Nabi v. Sells*, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 4 (AM. BAR ASS'N 2017).

470. *Golightly v. Gassner*, 2009 WL 1470342, at \*2 (Nev. Feb. 26, 2009).

471. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16(a) & (b) (AM. BAR ASS'N 2017) (listing the grounds for terminating a representation).

to compensation for her services is a concern.<sup>472</sup>

Regardless of whether the client discharges the lawyer or the lawyer withdraws from the representation, the lawyer's right to compensation for services rendered up to that point, if any, will generally lie in *quantum meruit*.<sup>473</sup> Resort to *quantum meruit* is necessary because the client's discharge of the lawyer and the lawyer's withdrawal from the representation each terminate the contingent fee contract and thus eliminate it as a basis for calculating the lawyer's compensation.<sup>474</sup> *Quantum meruit* is an equitable theory of recovery designed to prevent a party from being unjustly enriched in the absence of an agreement to pay for services rendered.<sup>475</sup> Under *quantum meruit*, a court "is literally to award the lawyer 'as much as he deserves.'"<sup>476</sup> This principle recognizes that while a client always has the right to discharge her lawyer at any time and for any reason, she does not necessarily have the right to avoid paying the fees the lawyer has earned up to that point.

Understandably, for a lawyer originally retained under

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472. If a client discharges a lawyer who is working for a contingent fee after the contingency has occurred, the attorney can rely on the fee agreement to recover her fee. *Cooper v. Ford & Sinclair, P.A.*, 888 So. 2d 683, 690 (Fla. Dist. Ct. App. 2004); Pa. Ethics Op. 94-59, 1994 WL 928037, at \*1 (Pa. Bar Ass'n Comm. Legal Ethics & Prof'l Responsibility 1994). Indeed, in that instance, the lawyer cannot recover in quantum meruit because she has a contractual basis for recovery. *McCullough v. Waterside Assocs.*, 925 A.2d 352, 356-57 (Conn. App. Ct. 2007); *Garnick & Scudder, P.C. v. Dolinsky*, 701 N.E.2d 357, 359 (Mass. App. Ct. 1998).

473. See *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶ 19, 287 P.3d 842, 847 (2012) ("Quantum meruit allows a party to recover the reasonable value of the services provided when the parties either have no express contract or have abrogated it.").

474. See *Thompson v. Buncik*, 2011 IL App (2d) 100589, ¶ 8, 961 N.E.2d 280, 283 (referring to the client's discharge of the lawyer); *Bradley v. Estate of Lester*, 355 S.W.3d 470, 472 (Ky. Ct. App. 2011) (referring to the lawyer's withdrawal).

475. *In re Gilbert*, 2015 CO 22, ¶ 21, 346 P.3d 1018, 1023; *Melat, Pressman & Higbie, L.L.P.*, 2012 CO 61, ¶ 19, 287 P.3d at 847.

476. *Thompson*, 2011 IL App (2d) 100589, ¶ 8, 961 N.E.2d at 283 (quoting *Wegner v. Arnold*, 713 N.E.2d 247, 250 (Ill. App. Ct. 1999)).

a contingent fee agreement to recover in *quantum meruit*, the client must recover in the underlying lawsuit,<sup>477</sup> and the parties' contingent fee agreement must contemplate that form of recovery.<sup>478</sup> Absent the occurrence of the contingency at the heart of the parties' fee agreement, the client received no benefit from the lawyer's services.<sup>479</sup>

A lawyer asserting a right to recover fees in *quantum meruit* bears the burden of proving the reasonable value of the services provided before her discharge or withdrawal.<sup>480</sup> A lawyer seeking *quantum meruit* damages generally must establish the number of hours she worked on the matter and her reasonable hourly rate, as well as any other evidence tending to prove the reasonable value of her services.<sup>481</sup> Thus, even though a lawyer charging a contingent fee obviously is not billing by the hour, she still should record all time spent on the matter.<sup>482</sup> Although contemporaneous time records are not *required* for lawyers to recover the reasonable value of their services in *quantum meruit*,<sup>483</sup> lawyers who do

477. *Salzman v. Reyes*, 198 So. 3d 1068, 1069 (Fla. Dist. Ct. App. 2016) (quoting *Rosenberg v. Levin*, 409 So. 2d 1016, 1021, 22 (Fla. 1982)); *Culpepper & Carroll, PLLC v. Cole*, 2005-1136, p. 5 n.4 (La. 4/6/06); 929 So. 2d 1224, 1228 n.4; *Liss v. Studeny*, 879 N.E.2d 676, 682 (Mass. 2008); *Pritchett & Burch, PLLC v. Boyd*, 609 S.E.2d 439, 444 (N.C. Ct. App. 2005); *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 629 N.E.2d 431, 436 (Ohio 1994); *Martinez v. Martinez*, 2010 OK CIV APP 141, ¶ 3, 245 P.3d 618, 619 (2010).

478. *See, e.g., In re Diviacchi*, 62 N.E.3d 38, 45 (Mass. 2016) (reasoning that the lawyer's claimed contingent fee was unreasonable under Rule 1.5(a) where the former client's recovery came from a transaction with which the lawyer did not assist and which the fee agreement did not cover).

479. *Martinez*, 2010 OK CIV APP 141, ¶ 5, 245 P.3d at 619.

480. *White v. Beelman River Terminals, Inc.*, 2016 Ill. App. (5th) 140175-U, ¶ 24, 2016 WL 2909188, at \*6 (May 17, 2016); *McCoy v. The Hershewe Law Firm, P.C.*, 366 S.W.3d 586, 597 (Mo. Ct. App. 2012); *Bass v. Rose*, 609 S.E.2d 848, 853 (W. Va. 2004).

481. *Eichholz Law Firm, P.C. v. Tate Law Grp., LLC*, 783 S.E.2d 466, 468 (Ga. Ct. App. 2016) (quoting *Overman v. All Cities Transfer Co.*, 336 S.E.2d 341, 343 (Ga. Ct. App. 1985)).

482. *Bass*, 609 S.E.2d at 853.

483. *Mardirossian & Assocs., Inc. v. Ersoff*, 62 Cal. Rptr. 3d 665, 675 (Ct. App.

not effectively document their efforts on clients' behalf risk the inability to persuade a court of the correct fee award.<sup>484</sup> A lawyer's inability to prove the reasonable value of her services is fatal to a *quantum meruit* claim.<sup>485</sup>

A lawyer's right to compensation in *quantum meruit* is not defeated by language in the contingent fee agreement to the effect of "no recovery[,] no fee."<sup>486</sup> Such provisions are meant to apply where the lawyer sees the matter through to completion but the client recovers nothing through settlement or judgment.<sup>487</sup>

*A. Lawyers' Right to Compensation When Clients Prematurely Terminate Contingent Fee Representations*

A lawyer earns a contingent fee when a judgment is recovered or a settlement is paid.<sup>488</sup> If the client terminates the attorney-client relationship sooner, for purposes of compensating the lawyer it is necessary to know whether the client fired the lawyer for cause or without cause.

There is no "bright-line" test for determining whether a client discharged a lawyer for cause.<sup>489</sup> "Cause" is not

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2007).

484. *Bass*, 609 S.E.2d at 853.

485. *McCoy*, 366 S.W.3d at 597.

486. *Capek v. Devito*, 767 A.2d 1047, 1050 (Pa. 2001).

487. *Id.*

488. *Nunn Law Office v. Rosenthal*, 905 N.E.2d 513, 519 n.9 (Ind. Ct. App. 2009). If a settlement will be paid in installments, the lawyer should collect her fee as the settlement payments are received, absent contrary language in the parties' contingent fee agreement. *In re Hailey*, 792 N.E.2d 851, 861 (Ind. 2003); *In re Stochel*, 792 N.E.2d 874, 876 (Ind. 2003); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. e (AM. LAW INST. 2000) (discussing contingent fees in connection with structured settlements). Assuming that a fee is otherwise reasonable, a lawyer may state in her contingent fee agreement that she will receive her full fee from an initial settlement payment. *McNamara v. O'Donnell Haddad LLC*, 2016 IL App (2d) 150519-U, ¶¶ 16–17, 2016 WL 769754, at \*4–5 (Feb. 26, 2016).

489. *Harrill & Sutter, PLLC v. Kosin*, 2011 Ark. 51, at 11, 378 S.W.3d 135, 142.

restricted to conduct by the lawyer that merits professional discipline or exposes the lawyer to civil liability.<sup>490</sup> It also encompasses “other conduct that would cause a reasonable client to discharge the lawyer,” such as conduct that causes the client to seriously doubt the lawyer’s competence, diligence, or willingness to communicate concerning the matter, even if the lawyer’s behavior does not harm the client.<sup>491</sup> A client’s loss of “absolute confidence” in a lawyer may satisfy the cause requirement.<sup>492</sup> As a general rule, however, a client’s dissatisfaction with a lawyer’s reasonable strategic choices is not cause for discharging the lawyer,<sup>493</sup> nor is a client’s general unhappiness with the lawyer’s services.<sup>494</sup> The determination that a client discharged a lawyer for cause must be based on an objective analysis of the lawyer’s conduct and the client’s rationale for terminating the attorney-client relationship.<sup>495</sup>

In some jurisdictions, a lawyer who is discharged for cause is entitled to recover no fee.<sup>496</sup> In other jurisdictions, a lawyer who is discharged for cause is entitled to no fee if the “cause” is “disciplinable misconduct prejudicial to the client’s

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490. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 40 cmt. c (AM. LAW INST. 2000).

491. *See id.* (referring to doubts about the lawyer’s competence as an example); *see also* *Murrey v. Shank*, C.A. No. 07C-08-137 CLS, 2011 WL 4730549, at \*3 (Del. Super. Ct. Aug. 30, 2011) (referring to Delaware ethics rules, and stating that a lawyer’s lack of diligence, failure to keep the client informed about the status of the matter, and failure to return the client’s calls would be cause for discharging the lawyer).

492. *Rose v. Welch*, 115 S.W.3d 478, 486 (Tenn. Ct. App. 2003).

493. *Steinhoff v. Bayoumi*, 32 N.Y.S.3d 776, 776 (App. Div. 2016) (quoting *Callaghan v. Callaghan*, 852 N.Y.S.2d 273, 275 (App. Div. 2008)).

494. *Doviak v. Lowe’s Home Ctrs., Inc.*, 21 N.Y.S.3d 754, 757 (App. Div. 2015) (quoting *Wiggins v. Kopko*, 962 N.Y.S.2d 776, 778 (App. Div. 2013)).

495. *Wiggins*, 962 N.Y.S.2d at 779; *Rose*, 115 S.W.3d at 487.

496. *See, e.g.*, *King & King, Chartered v. Harbert Int’l*, 503 F.3d 153, 157 (D.C. Cir. 2007) (applying District of Columbia law); *Martinez v. Mintz Law Firm, LLC*, 2016 CO 43, ¶ 39, 371 P.3d 671, 677 (en banc); *Callaghan*, 852 N.Y.S.2d at 274.



case or conduct contrary to public policy.”<sup>497</sup> In other words, only serious misconduct constitutes cause sufficient to deny the lawyer a fee altogether.<sup>498</sup> Still other courts permit a lawyer who is discharged for cause to invoke *quantum meruit* to recover the reasonable value of services provided prior to her termination.<sup>499</sup> Under the first two approaches, the existence of cause sufficient to deny the lawyer a fee is a case-specific inquiry.

When a client discharges a lawyer without cause, the lawyer is entitled to recover in *quantum meruit* for the reasonable value of her services rendered beforehand.<sup>500</sup> The

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497. *Polen v. Reynolds*, 564 N.W.2d 467, 471 (Mich. Ct. App. 1997).

498. See *Scamardella v. Illiano*, 727 A.2d 421, 430 (Md. Ct. Spec. App. 1999) (explaining that a lawyer who is discharged for serious misconduct is entitled to no compensation, but if the cause is only the client’s good faith dissatisfaction with the representation, the lawyer is entitled to reasonable compensation); *Polen*, 564 N.W.2d at 470–71 (recognizing the existence of “‘in-between’ situations in which a client terminates an attorney-client relationship for reasons that contain some justification but in which the attorney has not engaged in misconduct that makes it inappropriate to award quantum meruit recovery.”).

499. *Harrill & Sutter, PLLC*, 2011 Ark. 51, at 11, 378 S.W.3d 135, 142; *Duchrow v. Forrest*, 156 Cal. Rptr. 3d 194, 212 (Ct. App. 2013); *Campbell v. Bozeman Inv’rs of Duluth*, 1998 MT 204, ¶ 30, 964 P.2d 41, 45.

500. *Triplett v. Elliott*, 590 So. 2d 908, 910 (Ala. 1991); *Duchrow*, 156 Cal. Rptr. 3d at 212; *Murrey v. Shank*, C.A. No. 07C-08-137 CLS, 2011 WL 4730549, at \*3 (Del. Super. Ct. Aug. 30, 2011); *Fid. Warranty Servs., Inc. v. Firststate Ins. Holdings, Inc.*, 98 So. 3d 672, 675 (Fla. Dist. Ct. App. 2012); *Tolson v. Sistrunk*, 772 S.E.2d 416, 423 (Ga. Ct. App. 2015); *Thompson v. Buncik*, 2011 IL App (2d) 100589, ¶ 8, 961 N.E.2d 280, 283; *I.A.E., Inc. v. Hall*, 49 N.E.3d 138, 155–56 (Ind. Ct. App. 2015) (quoting *Galanis v. Lyons & Truitt*, 715 N.E.2d 858, 861 (Ind. 1999)); *Phil Watson, P.C. v. Peterson*, 650 N.W.2d 562, 567 (Iowa 2002); *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 220 P.3d 333, 341 (Kan. 2009); *Bank of Am., N.A. v. Prestige Imps.*, 54 N.E.3d 589, 596 (Mass. App. Ct. 2016) (quoting *In re Discipline of an Att’y*, 884 N.E.2d 450, 460 (Mass. 2008)); *McCoy v. Hershewe Law Firm, P.C.*, 366 S.W.3d 586, 597 (Mo. Ct. App. 2012); *Golightly v. Gassner*, No. 50212, 2009 WL 1470342, at \*2 (Nev. Feb. 26, 2009); *Steinhoff v. Bayoumi*, 32 N.Y.S.3d 776, 776 (App. Div. 2016); *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 730 S.E.2d 763, 766 (N.C. Ct. App. 2012); *Self & Assocs., Inc. v. Jackson*, 2011 OK CIV APP 126, ¶ 12, 269 P.3d 30, 33; *Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 2016 PA Super 2, 131 A.3d 502, 508; *Law Firm of Thomas A. Tarro v. Checrallah*, 60 A.3d 598, 602 (R.I. 2013); *Robbins v. Legacy Health Sys., Inc.*, 311 P.3d 96, 103 (Wash. Ct. App. 2013).

value of the lawyer's services is a question of fact.<sup>501</sup> The reasonable value of the lawyer's services is ordinarily calculated by multiplying the number of hours the lawyer devoted to the matter before being discharged by a reasonable hourly rate in the locality, which is a basic lodestar calculation.<sup>502</sup> But a lodestar calculation is only a starting point, because a court's goal should be to fix an award that approximates the reasonable value of the lawyer's services and that is fair to both parties.<sup>503</sup> In accomplishing this goal, a court should consider all relevant factors—including, but not limited to, those listed in Model Rule 1.5(a)—and assign them the weight it deems proper in the exercise of its discretion.<sup>504</sup> The court may take into account the eight factors listed in Rule 1.5(a) when valuing the lawyer's services under any method.<sup>505</sup> Of course, under a traditional lodestar analysis, a court may adjust the lodestar figure upward based on the Model Rule 1.5(a) factors or similar considerations.<sup>506</sup>

To make a long story short, a lawyer pursuing recovery in *quantum meruit* is not limited to the value of her time measured on an hourly basis.<sup>507</sup> A court should consider

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501. *Stueve v. Valmont Indus.*, 761 N.W.2d 544, 550 (Neb. 2009).

502. *See, e.g., Cristini v. City of Warren*, 30 F. Supp. 3d 665, 670 (E.D. Mich. 2014) (applying Michigan law).

503. *Morgan & Morgan, P.A. v. Guardianship of Kean*, 60 So. 3d 575, 577–78 (Fla. Dist. Ct. App. 2011).

504. *See In re Outsidewall Tire Litig.*, 636 F. App'x 166, 169–70 (4th Cir. 2016) (applying Virginia law); *Morgan & Morgan, P.A.*, 60 So. 3d at 577–78.

505. *See Stueve*, 761 N.W.2d at 550.

506. *See Cristini*, 30 F. Supp. 3d at 670 (quoting *Crawley v. Schick*, 211 N.W.2d 217, 222 (Mich. Ct. App. 1973)).

507. *See Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So. 2d 366, 368–69 (Fla. 1995) (stating that a court “must consider all relevant factors surrounding the professional relationship to ensure that [a quantum meruit] award is fair to both the attorney and client.”); *Biagioni v. Narrows MRI & Diagnostic Radiology, P.C.*, 6 N.Y.S.3d 588, 590 (App. Div. 2015) (recognizing that a quantum meruit award “can also be calculated as a portion of a contingent fee.”).

additional factors in deciding on an appropriate fee so that the result is fair to the lawyer and the client given the totality of the circumstances. These factors may include the contingent nature of the lawyer's fee.<sup>508</sup> A court may award a fee lower than the lawyer seeks.<sup>509</sup> A court may also award a fee higher than the lawyer requests.<sup>510</sup> However, as a general rule a lawyer may not recover more than the contingent fee she would have earned had the client not discharged her.<sup>511</sup>

### 1. The Substantial Performance Exception to *Quantum Meruit*

Although a lawyer discharged before the occurrence of the contingency on which her contingent fee agreement is based is normally limited to recovery in *quantum meruit* for the reasonable value of her legal services, courts recognize a substantial performance exception to this rule.<sup>512</sup> Under this exception, when a client discharges a lawyer after the lawyer has “substantially performed the duties owed to the client,

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508. *Consolver v. Hotze*, 395 P.3d 405, 412–13 (Kan. 2017) (stating in reaching this conclusion that other courts have described this approach as “quasi-quantum meruit”).

509. *See Int'l Materials Corp. v. Sun Corp.*, 824 S.W.2d 890, 895 (Mo. 1992) (en banc) (“An unjust enrichment quantum in a case may be nothing if the actual value to the client was none.”); *see, e.g., In re Estate of Leichman*, 2016-Ohio-4592, 66 N.E.3d 1162, at ¶ 2, ¶ 32 (limiting the lawyer's recovery to the \$500 retainer already paid).

510. *See, e.g., Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 2106 PA Super 2, 131 A.3d 502, 511 (stating that the facts compelled “more than an hours and expenses quantum meruit recovery”).

511. *Law Offices of J.E. Losavio, Jr. v. Law Firm of Michael W. McDivitt, P.C.*, 865 P.2d 934, 936 (Colo. App. 1993); *Murrey v. Shank*, C.A. No. 07C-08-137 CLS, 2011 WL 4730549, at \*4 (Del. Super. Ct. Aug. 30, 2011); *Ruby & Assocs., P.C. v. George W. Smith & Co., P.C.*, No. 297266, 2011 WL 4580594, at \*14–16 (Mich. Ct. App. Oct. 4, 2011) (per curiam); *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 629 N.E.2d 431, 436 (Ohio 1994).

512. *King & King, Chtd. v. Harbert Int'l, Inc.*, 503 F.3d 153, 156 (D.C. Cir. 2007) (applying D.C. law); *Law Firm of Thomas A. Tarro v. Checrallah*, 60 A.3d 598, 602 (R.I. 2013); *Goncharuk v. Barrong*, 133 P.3d 510, 512 (Wash. Ct. App. 2006).

and only ‘minor and relatively unimportant deviations remain to accomplish full contractual performance,’” the lawyer is entitled to receive her entire contingent fee.<sup>513</sup> However, for the lawyer to recover her entire contingent fee, that fee must still be reasonable according to the same factors that the court would apply in any other case.<sup>514</sup> An underlying question is whether the full fee is awarded as breach of contract damages on the theory that such an award is necessary for the lawyer to realize the benefit of her bargain, or whether the lawyer’s substantial performance makes the full fee a proper award calculated under *quantum meruit*, but the answer to that question is more theoretical than practical.<sup>515</sup> Whether a lawyer has substantially performed under a contingent fee agreement is a question of fact.<sup>516</sup>

## 2. Lawyers’ Use of Conversion Clauses or Termination Clauses in Contingent Fee Agreements

Recognizing clients’ right to discharge them at any time, lawyers understandably may want to protect their financial

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513. *Tarro*, 60 A.3d at 602 (quoting 7 AM. JUR. 2D *Attorneys at Law* § 281, at 326–27 (2017)); see also *Goncharuk*, 133 P.3d at 512 (explaining the substantial performance exception the same way). Fundamental contract doctrine provides that a party may sue for breach of contract where it can show that it substantially performed its contractual obligations. *RM Campbell Indus. v. Midwest Renewable Energy, LLC*, 886 N.W.2d 240, 254 (Neb. 2016) (footnotes omitted). “To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant.” *Id.*

514. *Dobbs v. DePuy Orthopedics, Inc.*, 842 F.3d 1045, 1049–50 (7th Cir. 2016) (applying Illinois law).

515. Compare *Dobbs*, 842 F.3d at 1049–50 (reasoning that a full contingent fee in a case of substantial performance is awarded under quantum meruit); with *Tarro*, 60 A.3d at 602 (explaining that awarding a full contingent fee in cases of substantial performance comports with the principle that a court may award breach of contract damages to place the injured party in as good a position as if the parties fully performed the contract, “because an attorney who has obtained a positive outcome for his or her client based on a contingent fee agreement will realize the expected benefit of the bargain only if the agreed-upon contingency fee amount is paid in full”).

516. *Goncharuk*, 133 P.3d at 512.

interests by including a “conversion clause” or “termination clause” in their contingent fee agreements. Courts and ethics authorities appear to use these terms interchangeably. A conversion or termination clause specifies how or in what amount the lawyer will be compensated if the client terminates the representation before the occurrence of the contingency on which the lawyer’s fee is based.<sup>517</sup> In the most common examples of their use, such a clause may provide that the lawyer is entitled to compensation in *quantum meruit* if the client discharges the lawyer without cause, or may specify how a *quantum meruit* award will be calculated if the client prematurely discharges the lawyer.<sup>518</sup>

An Indiana appellate court upheld what it described as a termination clause in *Four Winds, LLC v. Smith & DeBonis, LLC*.<sup>519</sup> In that case, Bank One sued Four Winds to foreclose on a loan that Four Winds used to finance the construction of an apartment complex.<sup>520</sup> Four Winds hired attorney Herbert Lasser to defend it and to prosecute

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517. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 544 F. App’x 255, 259 (5th Cir. 2013) (enforcing a conversion clause which provided that if the client discharged the lawyer, the lawyer would be entitled to a fee based on any offer of settlement outstanding, or if there was none, a reasonable fee based on the amount of time the lawyer spent on the case plus costs and interest).

518. See, e.g., Colo. Bar Ass’n, Ethics Comm., Formal Op. 100, at 4-295 (1997) (permitting conversion clauses where the client discharges the lawyer without cause or the lawyer withdraws from the representation for good cause, and further stating that the parties may define “cause”); Kan. Bar Ass’n, Ethics Advisory Ops. Comm., Op. 93-3, at 7-8 (1993) (permitting under certain circumstances the use of a conversion clause that calculates the amount of a quantum meruit award as a percentage of a settlement offer rather than a percentage of the eventual recovery); N.M. St. Bar Ethics Advisory Ops. Comm., Op. 1995-2, at 2 (1995) (opining that a contingent fee agreement may state that the lawyer is entitled to fees in quantum meruit if the client discharges the lawyer without cause, with some qualifications); Va. St. Bar Ethics Couns., Legal Ethics Op. 1812, at 2 (2005) (stating that conversion or termination clauses are permissible so long as they otherwise comply with rules of professional conduct and do not “unreasonably hamper the client’s absolute right to discharge his lawyer, with or without cause, at any point in the representation”).

519. 854 N.E.2d 70 (Ind. Ct. App. 2006).

520. *Id.* at 71.

counterclaims against Bank One and American Express, which was the receiver of the complex.<sup>521</sup> Four Winds agreed to pay Lasser a contingent fee of forty percent of the gross amount of any recovery.<sup>522</sup> Four Winds later hired another lawyer, Smith, to assist Lasser.<sup>523</sup> The three of them then entered into a new contingent fee agreement under which Smith was also to be paid a contingent fee of forty percent of the gross amount of any recovery.<sup>524</sup> The new fee agreement also provided: “if the Client discharges the Attorney, the Client agrees to compensate the Attorney for the reasonable value of the Attorney’s services rendered to the Client up to the time of the discharge based on the Attorney’s prevailing hourly charge in effect at the time of termination.”<sup>525</sup>

Four Winds eventually discharged Lasser and Smith, and a dispute erupted over their fees for the case against American Express.<sup>526</sup> Smith sued Four Winds and won a judgment of just over \$544,000 based on the termination clause in the contingent fee agreement.<sup>527</sup> Four Winds appealed, and argued that under the terms of the contingent fee agreement, Smith was owed nothing unless it recovered from American Express.<sup>528</sup> Smith replied that because Four Winds fired him before any recovery against American Express, the termination clause in the fee agreement changed his compensation from a contingent fee to an hourly rate.<sup>529</sup>

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521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.* at 71 (quoting the fee agreement).

526. *Id.* at 72.

527. *Id.* at 72–73.

528. *Id.* at 73–74.

529. *Id.* at 74.

The Indiana Court of Appeals agreed with Smith.<sup>530</sup> Under Indiana Supreme Court precedent, termination clauses that provide for a lawyer to be paid hourly in the event of a pre-contingency were “presumptively enforceable, subject to the ordinary requirement of reasonableness.”<sup>531</sup> The court rejected *Four Winds*’ argument that the termination clause unduly burdened its right to discharge its lawyers, reasoning that a client may not transform its right to discharge its lawyer without cause into a device to avoid paying legitimate legal fees.<sup>532</sup> In the *Four Winds* court’s view, “the termination clause [did] not unduly constrain [the] client from exercising its right to terminate its attorney; it require[d] the client to pay for the services already received.”<sup>533</sup>

Courts and disciplinary authorities carefully scrutinize conversion or termination clauses to ensure that they do not penalize clients for exercising their right to discharge their lawyers.<sup>534</sup> *Hoover Slovacek LLP v. Walton*<sup>535</sup> exemplifies this point.

In *Hoover Slovacek*, John Walton hired lawyer Steve Parrott of Hoover Slovacek LLP (Hoover) to recover unpaid natural gas and oil royalties in exchange for a thirty percent

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530. *Id.*

531. *Id.* (quoting *Galanis v. Lyons & Truitt*, 715 N.E.2d 858, 862 (Ind. 1999)).

532. *Id.* at 75 (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 8.22 at 8-54 to -55 (3d ed. 2003)).

533. *Id.*

534. See, e.g., *Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 2016 PA Super 2, 131 A.3d 502, 508–10 (finding that a termination clause that provided for a contingent fee in addition to quantum meruit recovery was an unenforceable penalty provision); Colo. Bar Ass’n, Ethics Comm., Formal Op. 100, at 4-293 (1997) (“A conversion clause is improper if it operates as a penalty upon termination and thereby chills the client’s exercise of [the] inherent right to discharge counsel.”); N.M. St. Bar Ethics Advisory Ops. Comm., Op. 1995-2, at 3 (1995) (“The agreement should not effectively punish a client who decides to end either the relationship or the litigation, both of which are rights of the client.”).

535. 206 S.W.3d 557 (Tex. 2006).

contingent fee for all claims on which collection was achieved through one trial.<sup>536</sup> The parties' engagement letter included this provision:

You may terminate the Firm's legal representation at any time. . . . Upon termination by You, You agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].<sup>537</sup>

The parties' relationship soured when Walton authorized Parrott to settle his claims against Bass Enterprises Production Co. (Bass) for \$8.5 million and Parrott instead made an absurd and unauthorized \$58.5 million demand on Bass.<sup>538</sup> When Bass subsequently offered to settle for \$6 million in exchange for certain concessions from Walton, Parrott pressured Walton to accept different terms.<sup>539</sup> Walton fired Parrott in disgust and hired another law firm to deal with Bass.<sup>540</sup> By the time the second law firm settled Walton's claim against Bass for \$900,000, Parrott had sent Walton a bill for \$1.7 million, which represented 28.66 percent of the \$6 million conditional settlement offer.<sup>541</sup> Walton refused to pay and Hoover intervened in Walton's lawsuit against Bass to try to recover its fee.<sup>542</sup> A jury awarded Hoover \$900,000, but an appellate court reversed the judgment because it found the fee agreement to be unconscionable as a matter of law.<sup>543</sup> The Texas Supreme

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536. *Id.* at 559.

537. *Id.*

538. *Id.* at 559–60.

539. *Id.*

540. *Id.* at 560.

541. *Id.*

542. *Id.*

543. *Id.*



Court granted Hoover's petition for review.<sup>544</sup>

Under Texas law, a lawyer working for a contingent fee who is dismissed without cause may sue in *quantum meruit* or may sue to enforce her fee agreement and collect the fee from the client's recovery.<sup>545</sup> The termination clause here, however, required immediate payment of the contingent fee regardless of whether Walton prevailed in the litigation.<sup>546</sup> That feature unduly burdened Walton's ability to change lawyers, and the clause therefore violated public policy and was unconscionable as a matter of law.<sup>547</sup> The termination clause was additionally improper because it was "unreasonably susceptible to overreaching" and exploited Parrott's superior knowledge, as evidenced by its yield of a fee that exceeded Walton's recovery.<sup>548</sup>

The court further concluded that the termination clause violated the general ban on lawyers acquiring proprietary interests in clients' causes of action.<sup>549</sup> As the court explained:

Examining the risk-sharing attributes of the parties' contract reveals that Hoover's termination fee provision weighs too heavily in favor of the attorney at the client's expense. Specifically, it shifted to Walton the risks that accompany both hourly fee and contingent fee agreements while withholding their corresponding benefits. In obligating Walton to pay a 28.66% contingent fee for any recovery obtained by Parrott, the fee caused Walton to bear the risk that Parrott would easily settle his claims without earning the fee. But Walton also bore the risk inherent in an hourly fee agreement because, if he discharged Hoover, he was obligated to pay a 28.66% fee regardless of whether he eventually prevailed. This "heads lawyer wins, tails client loses" provision altered [Texas law] almost

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544. *Id.*

545. *Id.* at 561. In either instance, the fee must be reasonable. *Id.*

546. *Id.* at 562.

547. *Id.* at 563.

548. *Id.*

549. *Id.* at 564.

entirely to the client's detriment.<sup>550</sup>

The *Hoover Slovacek* court also disparaged the termination clause because it essentially encouraged Parrott to bait Walton into discharging him as soon as he could firmly establish the value of Walton's case.<sup>551</sup> By doing so, Parrott could avoid the contingency supporting the fee agreement to take on other cases and avoid the time, expense, and uncertain outcome of any trial or appeal.<sup>552</sup>

Finally, the termination clause was flawed because it did not explain how the present value of the contingent fee would be calculated.<sup>553</sup> This failure supported a conclusion that the contingent fee Hoover charged was unconscionable.<sup>554</sup>

Although the court concluded that the termination clause was unenforceable, it declined to invalidate the fee agreement altogether.<sup>555</sup> Because the jury had found that Walton discharged Parrott without cause, the court held that Hoover was entitled to a 28.66 percent contingent fee based on the \$900,000 recovery that successor counsel achieved for Walton, or just under \$258,000.<sup>556</sup>

### 3. Advice for Lawyers

When it comes to including conversion or termination clauses in contingent fee agreements, there are obvious extremes. A lawyer can safely state in a contingent fee agreement that if the client discharges her without cause before the agreed contingency occurs, the lawyer will be

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550. *Id.*

551. *Id.*

552. *Id.*

553. *Id.* at 564–65.

554. *Id.* at 565.

555. *Id.*

556. *Id.* at 566.

entitled to recovery in *quantum meruit*.<sup>557</sup> The parties may further attempt to define termination for cause in the agreement.<sup>558</sup> At the opposite end of the spectrum, a lawyer clearly cannot insist on a conversion or termination clause that effectively penalizes the client for discharging the lawyer. The problem is figuring out what is permissible in the vast middle ground.

A lawyer should be able to state in a contingent fee agreement how any *quantum meruit* award will be calculated as long as she does so clearly and the resulting fee is reasonable. For example, a lawyer should be able to state that if the client discharges her, the client will compensate her for the reasonable value of her services rendered up to the time of the discharge based on her standard hourly rate in effect at the time of the termination.<sup>559</sup> A lawyer might also state that the hourly rate at which she will be compensated will be determined by comparison to the hourly rates of other lawyers in the locality of similar experience. A conversion or termination clause could state that the lawyer will receive (a) a reasonable percentage of the opponent's last settlement offer; or (b) a reasonable percentage of the total recovery reduced to reflect the lawyer's contribution to the case in relation to the contribution of the succeeding lawyer.<sup>560</sup>

Lawyers should also avoid conversion or termination clauses that provide for the payment of a flat fee in *quantum*

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557. Colo. Bar Ass'n, Ethics Comm., Formal Op. 100, at 4-295 (1997); N.M. St. Bar Ethics Advisory Ops. Comm., Op. 1995-2, at 2 (1995). In Colorado, lawyers must provide for quantum meruit recovery in their contingent fee agreements to be able to seek it following discharge or withdrawal. *In re Gilbert*, 2015 CO 22, ¶ 21, 346 P.3d 1018, 1023.

558. Colo. Bar Ass'n, Ethics Comm., Formal Op. 100, at 4-295 (1997); N.M. St. Bar Ethics Advisory Ops. Comm., Op. 1995-2, at 2 (1995).

559. *Four Winds, LLC v. Smith & DeBonis, LLC*, 854 N.E.2d 70, 71 (Ind. Ct. App. 2006).

560. Colo. Bar Ass'n, Ethics Comm., Formal Op. 100, at 4-296 (1997).

*meruit*. Such clauses are “inherently suspect” because it is impossible to predict when during a matter the client might discharge the lawyer, meaning that the *quantum meruit* fee would be unreasonable until the value of the lawyer’s services matched or exceeded the amount of the flat fee.<sup>561</sup> The unreasonable nature of the flat fee until the value of the lawyer’s services equaled or exceeded it in amount would infringe the client’s right to discharge the lawyer.<sup>562</sup>

#### B. *Lawyers’ Right to Compensation When They Withdraw from Contingent Fee Representations*

While clients may discharge their lawyers at any time and for any reason or no reason, lawyers may also withdraw from representations. If a lawyer withdraws from a contingent fee representation before having fully performed under her agreement with the client, courts generally consider the lawyer to have breached the agreement.<sup>563</sup> For the lawyer to receive compensation in *quantum meruit*, she must have withdrawn for “good cause,” also described as “just cause” or “justifiable cause.”<sup>564</sup> A lawyer who withdraws without good cause, on the other hand, forfeits any right to

561. *Id.* at 4-295 to -296.

562. *Id.* at 4-296.

563. Hricik, *supra* note 4, at 366.

564. See *Lewis v. Haskell Slaughter Young & Rediker, LLC*, 582 F. App’x 810, 813 (11th Cir. 2014) (predicting Alabama law); *Duchrow v. Forrest*, 156 Cal. Rptr. 3d 194, 212 (Ct. App. 2013); *Williams v. Victim Justice, P.C.*, 198 So. 3d 822, 824–25 (Fla. Dist. Ct. App. 2016) (quoting *Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994) (defining good cause); *Doman v. Stapleton*, 611 S.E.2d 673, 676-77 (Ga. Ct. App. 2005); *Tucker v. Rio Optical Corp.*, 885 P.2d 1270, 1272 (Kan. Ct. App. 1994); *Lofton v. Fairmont Specialty Ins. Managers*, 367 S.W.3d 593, 597 (Ky. 2012); *Somuah v. Flachs*, 721 A.2d 680, 688 (Md. 1998); *Bank of Am., N.A. v. Prestige Imps., Inc.*, 54 N.E.3d 589, 597 (Mass. App. Ct. 2016); *In re* Petition for Distribution of Attorney’s Fees Between Stowman Law Firm, P.A., 870 N.W.2d 755, 756, 763 (Minn. 2015); *Bell & Marra, PLLC v. Sullivan*, 2000 MT 206, ¶¶ 32, 34, 6 P.3d 965, 970; *Dinter v. Sears, Roebuck & Co.*, 651 A.2d 1033, 1038–39 (N.J. Super. Ct. App. Div. 1995); *Hartwig v. Johnsen*, 2008 UT 40, ¶ 8, 190 P.3d 1242, 1244; *Ausler v. Ramsey*, 868 P.2d 877, 880 (Wash. Ct. App. 1994).

compensation.<sup>565</sup>

The lawyer “bears the burden of proving good cause to withdraw.”<sup>566</sup> Whether good cause for withdrawal exists is determined on a case-by-case basis.<sup>567</sup> “Good cause” is difficult to define in this context, but it certainly describes a narrow set of circumstances.<sup>568</sup> According to the Minnesota Supreme Court, good cause generally requires a lawyer to show that the client has engaged in culpable conduct, the lawyer has not, and the client’s continued representation would be unethical.<sup>569</sup> Thus, good cause may include the reasons for mandatory withdrawal identified in Model Rule 1.16(a), and at least some of the reasons for permissive withdrawal listed in Model Rule 1.16(b).<sup>570</sup> Other courts either express the good cause standard differently or describe it more generally. In *Law Offices of Scott E. Combs v. Dishluk*,<sup>571</sup> for example, a Michigan court stated that there “is good cause for an attorney to withdraw from a suit if there has been a complete breakdown in the attorney-client relationship.”<sup>572</sup> Massachusetts courts apply a similar standard.<sup>573</sup> Still other courts do not attempt to delineate the

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565. *Duchrow*, 156 Cal. Rptr. 3d at 212–13; *Williams*, 198 So. 3d at 824–25 (quoting *Faro*, 641 So. 2d at 71); *B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., L.P.A.*, 373 S.W.3d 419, 423 (Ky. 2012); *Bank of Am.*, 54 N.E.3d at 596; *Bell & Marra*, 2000 MT 206, ¶¶ 32, 33, 6 P.3d at 970; *Dinter*, 651 A.2d at 1038.

566. *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 663 (5th Cir. 1996) (discussing Texas law).

567. *Lofton*, 367 S.W.3d at 597–98; *Bonar*, 373 S.W.3d at 423; *In re Petition for Distribution of Attorney’s Fees*, 870 N.W.2d at 765; *Bell & Marra*, 2000 MT 206, ¶¶ 32, 33, 6 P.3d at 970.

568. *In re Petition for Distribution of Attorney’s Fees*, 870 N.W.2d at 765.

569. *Id.*

570. *Id.* (referring to MINNESOTA RULES OF PROF’L CONDUCT r. 1.16(a) & 1.16(b)(2)–(3) (2015)).

571. No. 262784, 2005 WL 3190341 (Mich. Ct. App. Nov. 29, 2005).

572. *Id.* at \*3.

573. *See, e.g., Bank of Am., N.A. v. Prestige Imps., Inc.*, 54 N.E.3d 589, 596

sort of conduct that might constitute good cause,<sup>574</sup> preferring to leave that determination for the facts of the specific case.<sup>575</sup> Ultimately, for many courts, good cause for a lawyer's withdrawal is like pornography: they know it when they see it.<sup>576</sup>

It is much easier to describe conduct or circumstances that do *not* constitute good cause for withdrawal. A lawyer who withdraws because she believes a case is meritless is not entitled to recovery in *quantum meruit*.<sup>577</sup> In that instance, the lawyer withdrew with no expectation of payment.<sup>578</sup> A lawyer's belief that a case will be unprofitable or insufficiently profitable is not good cause for withdrawal.<sup>579</sup> "Attorneys who agree to represent clients on a contingent fee basis must choose their cases carefully, because the law does not allow them to easily jettison their mistakes, especially after [a] complaint has been filed."<sup>580</sup> Lawyers' disapproval of their co-counsel's litigation strategy does not qualify as good cause for withdrawal.<sup>581</sup> Certainly, a client's

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(Mass. App. Ct. 2016) (agreeing that "a breakdown of the attorney-client relationship and the trust that must underlie it" constitutes good cause for withdrawal).

574. *Lofton v. Fairmont Specialty Ins. Managers* 367 S.W.3d 593, 597 (Ky. 2012); see *Hartwig v. Johnsen*, 2008 UT 40, ¶¶ 6, 8, 190 P.3d 1242, 1244.

575. *Lofton*, 367 S.W.3d at 598 (stating that good cause is determined on a case-by-case basis); *Hartwig*, 2008 UT 40, ¶¶ 8, 190 P.3d at 1244 ("Whether good cause exists is a fact-intensive inquiry based on the reasons for withdrawal and the actions of the parties prior to withdrawal.").

576. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within . . . [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.").

577. *Rus Miliband & Smith v. Conkle & Olesten*, 6 Cal. Rptr. 3d 612, 623 (Ct. App. 2003).

578. *Id.*

579. *In re Kiley*, 947 N.E.2d 1, 8 (Mass. 2011); *Bell & Marra, PLLC v. Sullivan*, 2000 MT 206, ¶ 39, 6 P.3d 965, 971.

580. *In re Kiley*, 947 N.E.2d at 9.

581. *B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., L.P.A.*, 373 S.W.3d 419, 423 (Ky. 2012).

unwillingness to settle on terms that the lawyer considers reasonable is not good cause for withdrawal.<sup>582</sup>

Just as it can be difficult to define good cause for withdrawal when a lawyer is seeking recovery in *quantum meruit*, it is also easy to confuse that standard with the standard for withdrawing from cases where compensation is not at issue. Indeed, when lawyers move to withdraw from cases, they often state in their motions or supporting memoranda that there is good cause for withdrawal.<sup>583</sup> But what constitutes good cause for a court to permit a lawyer to withdraw is not necessarily good cause for purposes of compensating the lawyer in *quantum meruit*.<sup>584</sup> These are different standards.<sup>585</sup> As the Fifth Circuit explained in *Augustson v. Linea Aerea Nacional-Chile S.A.*:<sup>586</sup>

The objectives of a hearing on cause to withdraw differ from the objectives of a hearing on attorney's fees, and because of these differences circumstances can arise that would authorize a trial court to permit counsel to withdraw but retain no fee. When considering a motion to withdraw, a trial court is given broad discretion in order to protect the best interests of the client. In such a setting, the court generally focuses on . . . circumstances harmful to the attorney-client relationship, and inquiry into the cause of these circumstances is irrelevant. At a lien hearing, however, the focus . . . is on the cause of attorney-client problems.<sup>587</sup>

Or, as a California court observed:

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582. *Lofton v. Fairmont Specialty Ins. Managers*, 367 S.W.3d 593, 597 (Ky. 2012); *Law Offices of Scott E. Combs v. Dishluk*, No. 262784, 2005 WL 3190341, at \*3 (Mich. Ct. App. Nov. 29, 2005); *In re* Petition for Distribution of Attorney's Fees Between Stowman Law Firm, P.A., 870 N.W.2d 755, 766 (Minn. 2015).

583. See MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(7) (AM. BAR ASS'N 2017) (permitting lawyers to withdraw from representations where "other good cause for withdrawal exists").

584. *Duchrow v. Forrest*, 156 Cal. Rptr. 3d 194, 213 (Ct. App. 2013) ("[T]he granting of a motion to withdraw does not ipso facto establish justifiable cause for a quantum meruit recovery.").

585. *Lofton*, 367 S.W.3d at 596.

586. 76 F.3d 658 (5th Cir. 1996).

587. *Id.* at 664.

The law can afford to take a relatively permissive attitude toward withdrawals qua withdrawals. If attorney and client cannot agree, how can they litigate together? There is no need to unequally yoke a union when one of the parties clearly wants out. But the right to recover in *quantum meruit* after withdrawal is a different matter, and one on which the law takes a more rigorous approach.<sup>588</sup>

The difference in the standards is easily understood by example. Assume that a lawyer who agreed to represent a plaintiff for a contingent fee finds herself at odds with the client over settlement. The defendant has offered \$150,000 to settle, which the lawyer considers reasonable. The client, who at the time has unrealistic expectations, will not accept less than \$1 million. Frustrated, and unwilling to persist in the litigation and incur expenses that she may never recover, the lawyer moves to withdraw under Model Rule 1.16(b)(6) on the basis that the representation will impose “an unreasonable financial burden” on her and has been “rendered unreasonably difficult by the client.”<sup>589</sup> If the court grants the motion, the lawyer will be permitted to withdraw from the case. The lawyer will not, however, be entitled to recover any fees in *quantum meruit* if the client’s new lawyer persuades the client to accept the defendant’s subsequent take-it-or-leave-it \$250,000 settlement offer. This is because “disagreement with a client over whether to accept a settlement offer is not good and sufficient cause for an attorney to withdraw with [the] expectation of a *quantum meruit* fee.”<sup>590</sup>

Just as a lawyer may define cause in a conversion or termination clause when providing for compensation in *quantum meruit* if the client discharges her without cause, a lawyer may in such a clause attempt to define good cause for

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588. *Rus Miliband & Smith v. Conkle & Olesten*, 6 Cal. Rptr. 3d 612, 623–24 (Ct. App. 2003) (emphasis omitted).

589. MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(6) (AM. BAR ASS'N 2017).

590. *Lofton*, 367 S.W.3d at 597 (emphasis omitted).



withdrawal.<sup>591</sup> Model Rule 1.16 is obviously a good place to start when defining withdrawal for good cause,<sup>592</sup> although a lawyer must be careful not to attempt to define good cause in such a way as to impair the client's right to control settlement.<sup>593</sup>

#### CONCLUSION

Contingent fees have historically been predominant in plaintiffs' personal injury and employment litigation. And, again historically, lawyers charging contingent fees have typically practiced solo or in small firms. Neither the traditional view of the types of litigation for which lawyers charge contingent fees nor the types of lawyers or law firms charging them is reliably accurate today. Large and mid-sized law firms now represent clients on a contingent fee basis in various matters, and major corporations with substantial resources frequently engage lawyers on a contingent fee basis.

There are at least two reasons that contingent fees have spread beyond their historical realm to practice areas such as intellectual property and commercial litigation, and are now charged by law firms that have traditionally eschewed them. First, organizational clients are increasingly seeking lawyers who will represent them on a contingency basis because they believe that a contingent fee aligns the lawyer's interests with theirs. By insisting on a contingent fee, the

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591. Colo. Bar Ass'n, Ethics Comm., Formal Op. 100, at 4-295 (1997).

592. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(2)–(6) (AM. BAR ASS'N 2017).

593. For example, withdrawal based on the client's insistence on "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" (MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2017)) or withdrawal where "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client" (MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(6) (AM. BAR ASS'N 2017)) cannot be construed to permit withdrawal for good cause where the lawyer and client disagree on settlement.

client also avoids the potentially significant expense attributable to hourly billing. Second, large law firms are increasingly receptive to contingent fees because some cases are potentially much more profitable on a contingent fee basis than they would be if they were billed hourly.

As established, popular, or increasingly widespread as they are, contingent fees raise numerous professional responsibility issues. For lawyers who are not immersed in contingent fee practice, these issues are lurking traps. Even lawyers who have long experience with contingent fees may occasionally stumble over unfamiliar problems. For lawyers who charge contingent fees, ethical scrutiny is nearly constant because of the special attention that courts devote to contingent fee agreements. Unfortunately, some areas, such as the acceptable scope of conversion or termination clauses, are difficult to navigate because of factual differences between cases and the variable sensitivities of courts and disciplinary authorities. This Article has surveyed some of the more prominent professional responsibility challenges in contingent fee representations in an effort to help lawyers meet them. The burden remains on lawyers, however, to be as careful and thoughtful in structuring and managing their representations as they are in all other aspects of their litigation practices.