

## Legal Fees: Gross Overcharging By An Attorney Warranting Disciplinary Action

Despite the fact that the practice of law is a means of economic livelihood, it is not solely a commercial activity. As the American Bar Association has said, "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."<sup>1</sup> If the legal profession is to honor its responsibilities to public service, it is essential that the society which it serves should not view the professional abilities of lawyers as representing avaricious and purely personal efforts to obtain wealth. Instead, the goal of the profession should be to impart to all segments of society the understanding that lawyers are primarily devoted to public service and to the pursuance of justice and are allowed a compensation commensurate with professional efforts. If an attorney ignores this philosophy his imprudence should warrant discipline.<sup>2</sup> Otherwise the legal profession will be viewed with cynicism and distrust by the very society it seeks to serve, and such discredit can only impair effective legal practice.<sup>3</sup>

### *The Difficulty in Determining a Reasonable Fee*

A review of the leading cases involving excessive fees ought to establish conclusive principles which courts apply in determining the reasonableness or unreasonableness of an attorney's fee. This is

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1. ABA CANONS OF PROFESSIONAL ETHICS, Canon 12.

2. A fee which has been charged by an attorney as compensation for services to a client will be considered sufficiently unreasonable so as to warrant discipline if the organized Bar of which the attorney is a member adjudges his fee too unreasonable, and if the judgment of the Bar is sustained by the judgment of the courts. Romell, *The Reasonable Fee and Professional Discipline*, 14 CLEVE.-MAR. L. REV. 94, 102 (1965).

3. "A Lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession." ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-17.

Although canons of ethics of American and state bar associations are not enforced as binding obligations, the codes of legal ethics are commonly recognized as establishing wholesome standards of professional action, and an attorney may be disciplined for not observing them. 7 C.J.S. *Attorney and Client* § 23 (1937).

not, however, the case. Instead, there is a considerable amount of uncertainty in this area of legal ethics.

There are apparently three reasons for the continuing uncertainty about what constitutes a fee so excessive that the practitioner charging it must be punished. First, there is the inherent difficulty of defining a reasonable fee. This problem arises because no exact standard for fixing an attorney's fee exists,<sup>4</sup> and a general feeling persists throughout the legal profession that it would be unjust to condemn a fee as unethical merely because it exceeds another's judgment of what is fair.<sup>5</sup>

Secondly, there is the reluctance of attorneys to testify against their brethren whenever a matter of fees is involved.<sup>6</sup> This reluctance is probably premised upon the subjective nature of fees and upon an attorney's unwillingness to condemn an amount charged by another solely on the basis of his own opinion.<sup>7</sup> However, this contention is strained when contrasted with the fact that attorneys are willing to testify to the reasonableness of their fellow attorneys' fee.<sup>8</sup> Nor are courts unaware of this situation,<sup>9</sup> and in at least one case,

4. *People ex rel. Chicago Bar Ass'n v. Green*, 353 Ill. 638, 641, 187 N.E. 811, 812 (1933); 7 C.J.S. *Attorney and Client* § 23 (1937).

5. *In re Quinn*, 25 N.J. 284, 289, 135 A.2d 869, 872 (1957).

6. "The opinion of eminent lawyers as to the value of services rendered by members of their profession in any given case is helpful, and should always be considered. At the same time courts should and do keep in mind that there is an *esprit de corps* among men of the same profession which restrains them from underestimating the value of their own services." *Peltier v. Thibodaux*, 175 La. 1026, 1028, 144 So. 903, 904 (1932).

"Two attorneys, with a complaisance not unusual in such cases, testified that the charges were not unreasonable, and that the services were worth somewhat more than the charges." *Lee v. Lomax*, 219 Ill. 218, 221, 76 N.E. 377, 378 (1905).

7. See *Adams v. Brothers*, 155 Kan. 23, 26, 122 P.2d 757, 758 (1942); *Epp v. Hinton*, 102 Kan. 435, 438, 170 P. 987, 988 (1918); *Husk v. Blancand*, 155 La. 816, 818, 99 So. 610, 612 (1924); *In re Roth*, 181 App. Div. 618, 620, 169 N.Y.S. 151, 153 (1918).

8. *Grievance Comm. v. Ennis*, 84 Conn. 594, 80 A. 767 (1911); *Lee v. Lomax*, 219 Ill. 218, 76 N.E. 377 (1905); *Adams v. Brothers*, 155 Kan. 23, 122 P.2d 757 (1942); *Epp v. Hinton*, 102 Kan. 435, 170 P. 987 (1918); *Peltier v. Thibodaux*, 175 La. 1026, 144 So. 903 (1932); *Husk v. Blancand*, 155 La. 816, 99 So. 610 (1924); *In re Roth*, 181 App. Div. 618, 169 N.Y.S. 151 (1918).

9. *Lee v. Lomax*, 219 Ill. 218, 221, 76 N.E. 377, 378 (1905); *Peltier v. Thibodaux*, 175 La. 1026, 1028, 144 So. 903, 904 (1932); *Buschle v. Buschle Mfg. Co.*, 15 Ohio N.R. (n.s.) 618 (Cincinnati Sup. Ct. 1913).

However, the determination of a reasonable attorney's fee for services rendered is largely within the discretionary power of the court, and this determination may

the tendency of legal practitioners to testify only in favor of the fee charged by another attorney was denounced.<sup>10</sup>

Finally, though there is now no doubt that exacting an unreasonable fee may subject an attorney to disciplinary action,<sup>11</sup> courts seldom administer discipline against an attorney for over-charging. Indeed, the determination of whether a legal fee is so excessive as to warrant discipline is "a matter of equivocation and rationalization by the courts."<sup>12</sup> This is perhaps understandable in view of a number of significant factors which courts must take into consideration in reaching their decision. Among these factors are: (1) the age and experience of the attorney; (2) the desire not to deprive one of a livelihood; (3) the type of role which the attorney plays, his eminence at the bar, and any special skills he may have; (4) the diversity of factual situations; and (5) a single incident of overcharging versus a lifetime of such misconduct. And because of the numerous factors involved, cases dealing with exorbitant fees provide little clarity on the matter and still less support for a precise statement of existing law.

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be made with or without expert testimony as to the matter. 7 C.J.S. *Attorney and Client* § 191 (1937).

10. "Many attorneys act upon the principle of the French minister, Colbert, who in the matter of taxation always endeavored to pluck as many feathers off the goose as he could possibly pluck, without making the goose squeal." *Prather v. First Presbyterian Soc'y*, 13 Ohio N.D. (n.s.) 169, 181, 25 Ohio Dec. 613, 625 (1912).

While it may not be known generally, it is well known to the court that it is next to impossible to procure an attorney to testify against another attorney in a claim made by him for his fees. The species of free-masonry which exists among professional men . . . seems to influence them and deter them from testifying against their fellow members whenever a matter of their fees is involved. It is easy to secure the testimony of an attorney to testify as to the reasonable value of another attorney's fees, and the public generally have come to look with distrust and disfavor upon the legal profession because of this attitude on the part of attorneys and their disposition to aid one another in securing as much fees as it is possible to secure from the client. . . . These men who have testified to the very large amount which they have set as the reasonable value of plaintiff's . . . services have not, in the opinion of the court, added anything to their reputations as members of this bar, nor have they, by their conduct, tended to allay the public feeling that does exist against the legal profession.

*Id.* at 180-81, 25 Ohio Dec. at 624-25.

11. 7 C.J.S. *Attorney and Client* § 23 (1937). In general, any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession will constitute grounds for suspension or disbarment. *Id.*

12. Romell, *supra* note 2 at 100.

*Judicial Definition of a Reasonable Fee*

Attorneys are entitled to fees which adequately compensate them for their services,<sup>13</sup> and an attorney has a right to contract for any fee he chooses so long as it is not excessive.<sup>14</sup> However, even an excessive fee is generally regarded as insufficient to warrant disciplinary action unless there are other factors, coupled with the excessive fee, which would warrant such action.<sup>15</sup> Foremost among these factors are fraud,<sup>16</sup> misrepresentation,<sup>17</sup> and moral turpitude.<sup>18</sup> And this general rule has held true even though subsequent events may prove the fee to have been unreasonably large or the services rendered unnecessary.<sup>19</sup>

But a number of cases have modified the terms "excessive" or "unreasonable" fee. A fee which is clearly excessive,<sup>20</sup> or one which is so excessive as to indicate that it could not have been charged in good faith will warrant disciplinary action.<sup>21</sup> Such action will also be justified if an attorney's compensation for his services is so excessive and disproportionate to the services rendered as to amount to extortion.<sup>22</sup> In addition, it is sufficient indication of misconduct on the part of an attorney if his fee leads to a determination that he intended to take undue advantage,<sup>23</sup> or overreach his client in the

13. *In re Hahn*, 84 N.J. Eq. 523, 528, 94 A. 953, 959 (Ch. 1915); 7 C.J.S. *Attorney and Client* § 23 (1937).

14. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS No. 190 (1939).

15. *United States v. Stringer*, 124 F. Supp. 705 (D. Alas. 1954), *Rev'd on other grounds*, 233 F.2d 947 (9th Cir. 1956); *Ex parte Goodman*, 377 Ill. 578, 37 N.E.2d 345 (1941).

16. *In re Reilly*, 177 Ore. 584, 164 P.2d 410 (1945). See *Florida Bar v. Winn*, 208 So. 2d 809, 810 (Fla. 1968); *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378, 382 (1921).

17. *State Bd. of Law Examiners v. Sheldon*, 43 Wyo. 522, 7 P.2d 226 (1932). See *Myers v. State Bar of California*, 4 Cal. 2d 528, 50 P.2d 795 (1935).

18. See *Barbee v. State Bar of California*, 213 Cal. 296, 2 P.2d 353 (1931); *In re Quinn*, 25 N.J. 284, 135 A.2d 869 (1957).

19. *In re Roth*, 181 App. Div. 618, 620-21, 169 N.Y.S. 151, 152-53 (1918).

20. *State ex rel. Nebraska State Bar Ass'n v. Richards*, 165 Neb. 80, 90, 84 N.W.2d 136, 143 (1957); *State v. MacIntyre*, 238 Wis. 406, 412, 298 N.W. 200, 205 (1941).

21. *In re Myrland*, 54 Ariz. 284, 289, 95 P.2d 56, 60 (1939).

22. *Florida Bar v. Quick*, 279 So. 2d 4 (Fla. 1973); *Florida Bar v. Winn*, 208 So. 2d 809 (Fla. 1968).

23. *In re Hahn*, 84 N.J. Eq. 523, 530, 94 A. 953, 958 (Ch. 1915); *Morehouse v. Brooklyn Heights R.R.*, 185 N.Y. 520, 523, 78 N.E. 179, 181 (1906).

exaction of his fee.<sup>24</sup> Other terms used by courts in subjecting attorneys to discipline for unreasonable fee charges are: "unconscionable" or "exorbitant,"<sup>25</sup> and "grossly" or "flagrantly," excessive.<sup>26</sup>

A few courts have avoided this sort of semantic equivocation and have sought to establish a more practical standard based on the judgment of the court itself. An excellent example of this practical approach is the recent decision of *Bushman v. State Bar of California*.<sup>27</sup> Here the Supreme Court of California found that attorney Bushman had charged his clients an exorbitant and unconscionable fee and had disseminated news releases for the purposes of soliciting professional employment.

According to the facts, Bushman attempted to collect 2,800 dollars from his client for services reasonably valued at 300 dollars. By misrepresenting the amount of litigation involved in a routine divorce proceeding, he induced sixteen year-old Barbara Cox, her parents, and a man with whom Barbara was allegedly having an affair,<sup>28</sup> to sign a promissory note for 5,000 dollars and a retainer agreement providing for an hourly fee of not less than sixty dollars. At the time the note and retainer agreement were signed, Bushman knew that Barbara was a minor, that her parents were on welfare, that there was no community property by the Cox marriage, and that the only substantial issue involved in the litigation was the custody of Barbara's child by her estranged husband. The custody issue was resolved by a stipulation of parties in favor of Barbara, and the divorce court ordered that her husband pay Bushman a fee of 300 dollars plus sixty dollars in costs. Without notifying the court of the prior agreements with his clients, Bushman then sought to bill them 2,800 dollars plus sixty in costs based on his contention that he had spent over 100 hours on the case. In a disciplinary

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24. *People ex rel. Chicago Bar Ass'n v. Green*, 353 Ill. 638, 187 N.E. 811 (1933); *In re Loring*, 62 N.J. 336, 301 A.2d 721 (1973); *In re Quinn*, 25 N.J. 284, 135 A.2d 869 (1957).

25. *In re Giordano*, 49 N.J. 210, 229 A.2d 524 (1967); *In re Richards*, 202 Or. 262, 274 P.2d 797 (1954); *In re Smith*, 42 Wash. 2d 188, 254 P.2d 464 (1953).

26. *Ex parte Goodman*, 377 Ill. 578, 37 N.E.2d 345 (1941); *In re Hartzog*, 257 S.C. 84, 184 S.E.2d 116 (1971).

27. 11 Cal. 3d 558, 522 P.2d 312, 113 Cal. Rptr. 904 (1974).

28. The man, Hughes, was told by Bushman that there was a possibility he would be charged with statutory rape because of his alleged involvement with Barbara.

hearing before the State Bar, Bushman was unable to substantiate his claim. The State Bar found that this attorney's actions constituted gross overcharging and recommended disciplinary action against him. On review of this recommendation, the Supreme Court of California concluded that the 5,000 dollar promissory note, the retainer agreement, and the ultimate fee of 2,800 dollars demanded by Bushman were grossly disproportionate to the value of the service he had rendered, and that his course of conduct with regard to the fee matter contained elements of fraud and overreaching which warranted discipline. Quoting from the earlier case of *In re Goldstone*,<sup>29</sup> the court held: "It is settled that a gross overcharge of a fee by an attorney may warrant discipline. The test is whether the fee is 'so exorbitant and wholly disproportionate to the services performed as to shock the conscience.'"<sup>30</sup>

Although other courts have not been inclined to use the *Goldstone* test,<sup>31</sup> this test appears nonetheless to be the best available in excessive fee cases because it emphasizes a comparison between the fee charged and the services performed. This comparison permits the consideration of factors other than the mere size of an attorney's fee and provides a court with the framework necessary to determine what constitutes an unreasonable fee warranting discipline.

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29. 214 Cal. 490, 6 P.2d 513 (1931). *Goldstone* involved an attorney who was retained to process a claim which his client had filed previously with the State Industrial Accident Commission. The client was unaware that his claim had resulted in an award of benefits by the Commission. The attorney examined his client's claim file at the Commission offices, discovered the award, and accompanied his client to the office of the State's insurance carrier, where he provided the identification which enabled his client to collect that portion of his award then due and payable. The attorney charged a fee equal to 40 percent of the portion of the award collected by his client (\$310 out of \$882.96) and later attempted to obtain an additional amount. The court ruled that such flagrant overreaching justified the attorney's suspension from the practice of law for three months.

30. 11 Cal. 3d at 563, 522 P.2d at 314, 113 Cal. Rptr. at 906, Bushman was suspended from practice for one year. Another California case, *Herrscher v. State Bar of California*, 4 Cal. 2d 399, 49 P.2d 832 (1935), also expressed a preference for this shock-the-conscience doctrine.

31. Although the reason for this is unclear, cases from various jurisdictions demonstrate the absence of an awareness that there are a number of different tests used in the excessive fee area. Perhaps this is a result of the confusion in this area, or it may be that courts not relying as a rule of law on the shock-the-conscience test are, as a practical matter, weighing the same factors as those involved in *Goldstone*.

*Factors Involved in Determining a Reasonable Fee*

The consideration of other factors (e.g., amount of time spent on a matter) is important because the problems encountered by courts in the examination of excessive fee situations arise primarily from the difficulty of determining what is a reasonable fee in light of the facts of a particular case, rather than from the various tests which may be applied to these facts.

In cases in which an attorney's fee is fixed or limited by statute there is little difficulty in determining that a fee in excess of this amount is unreasonable.<sup>32</sup> Nor do courts experience problems when an attorney demands a sum which exceeds the fee established by his contract.<sup>33</sup> And discipline is clearly merited in situations in which an attorney has failed to render any services for the fee charged.<sup>34</sup>

However, many cases do not fall within these categories and, therefore, must be determined on the basis of what constitutes a reasonable value for the services rendered.<sup>35</sup> The courts, in reaching a conclusion as to the reasonableness or unreasonableness of a fee, have suggested a number of criteria.<sup>36</sup> Traditionally, the major factors to be considered are:<sup>37</sup> (1) the nature, extent, and difficulty of the services rendered; (2) the time and labor devoted to the matter in question; (3) the loss of opportunity for other employment; (4)

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32. *In re Fisch*, 188 App. Div. 525, 177 N.Y.S. 338 (1919); *State ex rel. Okla. Bar Ass'n v. Mason*, 380 P.2d 961 (Okla. 1963); *In re Hatch*, 108 Utah 446, 160 P.2d 961 (1945).

33. *In re Egan*, 37 S.D. 159, 160-64, 157 N.W. 310, 313-16 (1916).

34. *In re Somers*, 46 App. Div. 2d 517, 363 N.Y.S.2d 596 (1975); *In re Cleere*, 39 App. Div. 2d 132, 332 N.Y.S.2d 476 (1972).

35. *Burnett v. Graves*, 230 F.2d 49 (5th Cir.) *cert. denied*, 351 U.S. 984 (1956). In *Burnett*, two attorneys sought compensation for their services in obtaining reversal of a judgment requiring delivery of an oil and gas lease. The original case had been lost at trial by another attorney, and the difficult and complex nature of the task in securing the reversal in addition to the substantial amount of money involved was held to justify a \$5,000 attorney fee even though no contract or statute existed which fixed the amount an attorney should be entitled to.

36. *United States v. Stringer*, 124 F. Supp. 705 (D. Alas. 1954), *rev'd on other grounds*, 233 F.2d 947 (9th Cir. 1956); *In re Osofsky*, 50 F.2d 925 (S.D.N.Y. 1931); *Irwin v. Swinney*, 45 F.2d 890 (W.D. Mo. 1930), *aff'd sub nom. Gossett v. Swinney*, 53 F.2d 772 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932).

37. Annot., 56 A.L.R.2d 13 (1957); ABA, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2.

the ability and standing of an attorney within the bar; (5) the amount involved and the responsibility assumed; (6) the contingency of compensation and hazards of litigation; (7) the results and benefits obtained; (8) the ability of a client to pay as determined by his financial conditions;<sup>38</sup> (9) the rules and practices of the court in setting fees; (10) the customary charges by other attorneys for similar services; (11) the possibility of duplication of services; and

| Factor considered  | finding in <i>Bushman</i>   |
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| (1) nature and difficulty of the services rendered             | routine divorce action  |
| (2) time and labor devoted to the matter                       | unable to substantiate 100 hours (opposing attorney spent five hours on the case)           |
| (5) amount involved  | small; no community property involved   |
| (8) financial condition of clients                             | clients were on welfare   |
| (9) practice of a court in setting fees                        | court set fee at \$300 plus \$60 in costs; <i>Bushman</i> sought \$2,800 plus \$60 in costs |
| (10) customary charges by other attorneys for similar services | opposing attorney charged her client \$300 plus \$60 in costs                               |

38. A number of cases go beyond the financial condition of the client and examine his overall circumstances. Among those cases in which the circumstances of the client were a factor in determining a fee to be excessive are: *United States v. Stringer*, 124 F. Supp. 705 (D. Alas. 1954) (client charged with violation of white slave statutes was fearful, ignorant, and not experienced in the attorney-client relationship); *Ex parte Goodman*, 377 Ill. 578, 37 N.E.2d 345 (1941) (client, although a lawyer, had never practiced law and was ignorant of what was normally charged in foreclosure actions); *People ex rel. Chicago Bar Ass'n v. Pio*, 308 Ill. 128, 139 N.E. 45 (1923) (client was a poor, illiterate Polish woman); *In re Feinberg*, 2 N.J. Misc. 1000, 126 A. 667 (1922) (client charged with robbery was poor, semi-illiterate, frightened, and ignorant of the law); *In re Cohen*, 169 App. Div. 544, 155 N.Y.S. 517 (1915) (client was a spendthrift with absolutely no knowledge of business); *In re Egan*, 37 S.D. 159, 157 N.W. 310 (1916) (one client was mentally unbalanced, and another was under great emotional distress).

(12) the character of employment—whether casual or for a constant client.<sup>39</sup>

In *Bushman* the court considered a number of these factors in reaching its conclusion.

Although no one of these factors can be considered controlling, they are nevertheless useful guidelines in ascertaining the real value of services rendered, and they allow courts to compare this value

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Other cases using the circumstances of the client have found the fee charged to be reasonable: *Myers v. State Bar of California*, 4 Cal. 2d 528, 50 P.2d 795 (1935) (\$150 for unsuccessful effort to obtain probation for an indigent Mexican); *Herrscher v. State Bar of California*, 4 Cal. 2d 399, 49 P.2d 832 (1935) (client was an unsavory and ruthless businessman); *In re Loring*, 62 N.J. 336, 301 A.2d 721 (1973) (\$3,500 for successful criminal defense of a tool-maker earning \$150 a week); cf. *Haunstein v. McCalister*, 172 Okla. 613, 46 P.2d 552 (1935) (client was not unversed in business matters).

39. Despite an increasing reliance upon pragmatic and flexible factors to evaluate the reasonableness of an attorney's fee, these factors were most useful in cases in which the fee charged and the services performed may be viewed retrospectively. A special problem arises, however, when contingent fees are involved. These fees must be viewed prospectively because in many instances both the amount and the character of the services by the attorney, and the results to be anticipated from the litigation are uncertain from the outset. In this situation many of the factors used by courts in cases such as *Bushman* would seem inapplicable. Indeed, those factors which are relevant such as: (3) loss of opportunity for other employment; (5) amount involved and responsibility assumed; and (6) contingency of compensation and hazards of litigation, might be used by attorneys to justify large and potentially excessive fees.

Two cases in particular illustrate this point. *In re Novo*, 200 La. 833, 9 So. 2d 201 (1942), an attorney originally agreed to represent a client for a contingent fee equal to 40 percent of the amount which might be recovered but later obtained a second agreement with his client calling for a contingent fee equal to 50 percent of any eventual recovery. At the time of the second agreement the case had been before the courts for two and one-half years, had gone to the Court of Appeals twice, and had been before the Supreme Court once on certiorari. The Supreme Court of Louisiana ruled that in view of these circumstances and the fact that the second agreement was accepted voluntarily by the client, the fee was not unreasonable. The attorney was suspended for six months on the basis of other charges against him.

In *Grievance Committee v. Ennis*, 84 Conn. 594, 80 A. 767 (1911), the attorney entered into a contingent agreement with his minor client by which the attorney was entitled to one-half of any recovery in his client's personal injury suit. The court held that had the agreement not been based on the possibility that there would be no recovery, a fee of \$250 out of \$500 recovered by settlement might have indeed been excessive. Continuing, the court said there was no certain test to

with the fee actually charged in order to determine if the fee was excessive.<sup>40</sup>

### *Judicial Determination of an Excessive Fee*

Notwithstanding the existence of numerous objective and pragmatic tests for determining excessive fees, without evidence of fraud, misrepresentation, or moral turpitude, there exists little chance for disciplinary action against an attorney.<sup>41</sup> This general principle was made clear in *Bushman*:

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determine what an attorney should charge in such cases, and that it was thus largely a matter of opinion, the exercise of which would not warrant discipline. The court did require that the attorney return some of his fee to his client.

Nonetheless, courts in some instances have been willing to apply factors other than those which seem to vindicate large contingent fees. In one such case, *In re Hill*, 261 Or. 573, 495 P.2d 261 (1972), the court held that a contingent fee of \$12,500 for recovering property valued at \$50,000 in a divorce proceeding was excessive and unconscionable. The court in rejecting the attorney's claim that he had spent between 200-300 hours on the case, reasoned that the attorney had either grossly overestimated the time spent on the matter, or he was grossly inefficient in the use of his time.

In another case, *Florida Bar v. Winn*, 208 So. 2d 809 (Fla. 1968), an attorney entered into an agreement with his client which provided that the attorney would recover 50 percent of any value he might recover for his client in her divorce action against her husband. After the attorney had done a small amount of preliminary work on the matter, the husband died and the attorney claimed one-half of the \$4,000 estate left to the wife. The court found this fee to be extortionate in view of the services performed and the fact that the client was earning \$14.26 a week as a beautician trainee.

Other cases demonstrate that high percentage (40-50 percent) contingent fee contracts are subject to close scrutiny, particularly when they are entered into with persons in necessitous circumstances. *People ex rel. Chicago Bar Ass'n v. Letterman*, 353 Ill. 399, 187 N.E. 424 (1933); *In re Richards*, 202 Or. 262, 274 P.2d 797 (1954); *State v. Barto*, 202 Wis. 329, 232 N.W. 553 (1930).

40. *Westchester County Bar Ass'n v. St. John*, 43 App. Div. 2d 218, 350 N.Y.S.2d 737 (1974). In this case an attorney attempted to charge his client \$33,500 for prosecuting a claim for an accident death benefit on a \$100,000 insurance policy although the attorney had spent a mere 20 hours on the matter. The court held that the fee was excessive and not justified by the time spent, or the gravity of the matter, or any unusual difficulties encountered. Thus, the attorney's actions were deemed by the court to warrant a one-year suspension from the practice of law.

41. *United States v. Stringer*, 124 F. Supp. 705 (D. Alas. 1954), *rev'd on other grounds*, 233 F.2d 947 (9th Cir. 1956); *Ex parte Goodman*, 377 Ill. 578, 37 N.E.2d 345 (1941).

In *Herrscher*<sup>42]</sup> this court stated that in most cases warranting discipline on this ground [excessive fee] involved an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's fund.<sup>43</sup>

The court in this instance found elements of fraud and overreaching because Bushman misrepresented to his clients the amount of time and labor involved in divorce litigation; he also failed to document for his clients the number of hours he claimed to have spent on the case. In addition, the promissory note rendered four persons liable for Bushman's efforts without regard to the value of his legal services to each, and there were no qualifications in any of the agreements which provided for a surrender of a portion of the fee charged in the event service by Bushman did not warrant the full amount of the fee. The court also found that Bushman had obligated persons on public assistance to pay sixty dollars an hour without any limitation upon the time he was to spend on a simple domestic matter.

In *Herrscher v. State Bar of California*,<sup>44</sup> an attorney was charged with collecting a fee of 23,000 dollars for services rendered over a period of several months, and with later claiming additional fees of 50,000 dollars for representing the wife of his then incompetent client in both the wife's personal matters and in her capacity as guardian of her husband. The California Supreme Court, while using the same test as it had used earlier in the *Goldstone* case, found that although the fees were large and apparently excessive, they were not so exorbitant as to shock the conscience. Furthermore, the court concluded that an attorney has a degree of discretion in deciding upon fees and that in the absence of a showing of overreaching or failure to disclose the true facts to his clients, an attorney's actions in such matters would not warrant discipline.

In *In re Quinn*,<sup>45</sup> an attorney demanded a contingent fee of one-third the value of property he had recovered for his client. The attorney claimed that the sum of 1,000 dollars which he had been paid represented only a portion of that contingent fee, while his client asserted that the 1,000 dollars constituted the entire fee upon which the two had agreed. The court in resolving the matter in favor

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42. 4 Cal. 2d 399, 49 P.2d 832 (1935).

43. 11 Cal. 3d at 563, 522 P.2d at 314, 113 Cal. Rptr. at 906 (1974).

44. 4 Cal. 2d 399, 49 P.2d 832 (1935).

45. 25 N.J. 284, 135 A.2d 869 (1957).

of the attorney held that he did not act in bad faith when, by applying the agreement with his client, he charged 5,000 dollars for recovering property valued between 18,000-33,000 dollars. The court ruled that the degree of moral turpitude necessary for punishment to be administered had not been demonstrated. The opinion also reasoned that an attorney who had thirty years of experience and an unblemished record would probably not have demanded an unconscionable additional sum if he had in fact initially agreed to a fixed fee of 1,000 dollars.

Similar to *Quinn*, was the case of *Florida Bar v. Quick*.<sup>46</sup> In this instance two attorneys sought almost 15,000 dollars for 450 hours of service rendered in a divorce proceeding. This fee was based on an hourly rate of thirty dollars which had been agreed to by the attorneys' client. The client claimed that by subsequent agreement the attorneys had agreed to accept a flat payment of 5,000 dollars. In the absence of evidence that a subsequent agreement had been made, or a showing that 450 hours had not been spent on the case, the court held that such a fee, although unusually large, was not extortionate and did not merit disciplinary action against the two attorneys.

As these cases demonstrate, courts are reluctant to administer discipline solely on the basis of an unreasonable fee. Because of this reluctance, cases dealing with claims of excessive fee setting usually involve additional charges.<sup>47</sup> In fact, seldom is the excessive fee allegation the principal allegation against an attorney.

In *In re Hartzog*,<sup>48</sup> a charge that the attorney extracted exorbitant fees was only one of five counts against him. In *State v. MacIntyre*,<sup>49</sup> the court found that exaction by an attorney of a clearly excessive fee warranted a reprimand. However, additional findings of subornation of perjury and obstruction of justice warranted suspension from practice for one year.

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46. 279 So. 2d 4 (Fla. 1973).

47. *In re Kerrigan*, 530 P.2d 26 (Ore. 1975). The attorney in this case entered into an agreement with his client providing for a fee of 25 percent of any settlement before filing and 33 1/3 percent of any settlement made thereafter. The court held that the attorney violated this agreement by charging the latter amount even though he had never filed the case. Such deliberate overcharging by the attorney and the attorney's lies to his client about having filed the claim were found to warrant an 18 months suspension.

48. 257 S.C. 84, 184 S.E.2d 116 (1971).

49. 238 Wis. 406, 298 N.W. 200 (1941).

The case of *Cleveland Bar Association v. Fleck*<sup>50</sup> emphasized the ingenious procedure used by the defendants to obtain larger fees than they were entitled to by special law, rather than the excessive fees which resulted therefrom. And in *In re Reilly*,<sup>51</sup> a two year suspension from the practice of law was based upon the concealment by attorneys of the fact that the value of securities which they had accepted as payment for their services had appreciated substantially in excess of the agreed upon fees. Even in *Bushman*, the one-year suspension appears to be premised as much upon the attorney's solicitation of professional services by advertisement as it does on the excessive fee charge.

### *Conclusion*

As these examples suggest, courts encounter great difficulty in determining what constitutes so gross an overcharge by an attorney that discipline is warranted. The failure of courts to establish precise principles in the area of excessive fees is based in part upon the larger problem of determining the reasonable value of services, and in part upon the grave consequences which discipline imparts upon the individual attorney and his reputation. From this perspective it is understandable that a more satisfactory method for dealing with this problem has not evolved. And the absence of a general rule may even be beneficial since the cases demonstrate a diversity of facts which would seem to require a case-by-case determination based on the totality of the circumstances.

The determination of a proper fee requires consideration of the interests of both client and lawyer. However, the ultimate focus of the judiciary should be upon whether an attorney's action indicates a lack of consideration for his client's interest and an abuse of his professional relationship with his client. In cases in which the facts and circumstances before the court reflect a disregard for these standards, an attorney's action should warrant discipline. Otherwise, the integrity of the legal profession and the mutual respect and

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50. 172 Ohio St. 467, 178 N.E.2d 782 (1961), *cert. denied*, 369 U.S. 861 (1962), *rehearing denied*, 370 U.S. 914 (1962).

51. 177 Or. 584, 164 P.2d 410 (1945).

confidence between the members of the bar and the society they serve will be diminished.<sup>52</sup>

*Wesley Romine*

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52. There are few of the business relations of life involving higher trust and confidence than that of attorney and client, or generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law; or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party best owing it.

*Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850) (Nelson, J.).