

## Revocation of Contingent Fee Agreement by Client

Petitioner in *In re Estate of Poli*<sup>1</sup> was a New Jersey attorney who had been discharged prior to the completion of his services under a contingent fee contract. Petitioner claimed that because the client prevented him from carrying out his duties, he should be entitled to recover a fee measured by the agreed upon percentage set out in the contract. Petitioner's main argument was that the contingent fee contract gave him a vested right in any proceeds of the action. The court disagreed and held that there was no vested right by virtue of the contract and that petitioner could recover only for his services rendered on a quantum meruit basis.

The general rule is that the client can discharge his attorney at any time, with or without cause, with the question of cause going to the issue of the amount, if any, the attorney may recover.<sup>2</sup> Based on the foregoing authority, perhaps the question should be when can a client *not* revoke a contingent fee agreement. The following discussion attempts to answer this question and to focus generally upon a number of circumstances in which clients have attempted to discharge their attorneys after having made contingent fee arrangements. It will also give special attention to the remedies the attorney

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1. 134 N.J. Super. 222, 338 A.2d 888 (1975).

2. *Paolillo v. American Export Isbrandtsen Lines, Inc.*, 305 F. Supp. 250 (S.D.N.Y. 1969); *Estee Candy Co. v. United States*, 343 F. Supp. 1362 (Cust. Ct. 1972); *Potts v. Mitchell*, 410 F. Supp. 1278 (W.D.N.C. 1976); *Owens v. Bolt*, 218 Ala. 344, 118 So. 590 (1928); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498, 489 P.2d 837 (1971); *Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972); *People v. Radinsky*, 512 P.2d 627 (Colo. 1973); *Cole v. Myers*, 128 Conn. 223, 21 A.2d 396 (1941); *Goodkind v. Wolkowsky*, 180 So. 538 (Fla. 1938); *Thompson v. Taylor*, 12 Ill. App. 2d 472, 139 N.E.2d 794 (1957); *Finney v. Carter's Estate*, 164 N.E.2d 656 (Ind. Ct. App. 1960); *Henry v. Vance*, 111 Ky. 72, 63 S.W. 273 (1901); *Louque v. Dejan*, 129 La. 519, 56 So. 427 (1911); *Collier v. Necaize*, 285 So. 2d 778 (Miss. 1973); *In re Downs*, 363 S.W.2d 679 (Mo. 1963); *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964); *Simon v. Chicago, M. & St. P. Ry.*, 45 N.D. 251, 177 N.W. 107 (1920); *Markarian v. Bartis*, 89 N.H. 370, 199 A. 573 (1938); *In re Estate of Poli*, 134 N.J. Super. 222, 338 A.2d 888 (1975); *Walters v. Hastings*, 84 N.M. 101, 500 P.2d 186 (1972); *Crowley v. Wolf*, 281 N.Y. 59, 22 N.E.2d 234 (1939); *Osmun v. Koke*, 116 Ohio App. 282, 188 N.E.2d 69 (1961); *Dolph v. Speckart*, 94 Ore. 550, 186 P. 32 (1920); *Sundheim v. Beaver County Bldg. & Loan Ass'n*, 140 Pa. Super. 529, 14 A.2d 349 (1940); *Spears v. Polk*, 17 Tenn. App. 556, 69 S.W.2d 239 (1933); *Howell v. Kelly*, 534 S.W.2d 737 (Tex. Ct. Civ. App. 1976); *Midvale Motors, Inc. v. Saunders*, 21 Utah 2d 181, 442 P.2d 938 (1968); *Dill v. Public Util. Dist.*, 3 Wash. App. 360, 475 P.2d 309 (1970); See H. DRINKER, *LEGAL ETHICS* 177 (1953) [hereinafter cited as DRINKER].

may have when the client unlawfully revokes the contingency fee agreement.

If an attorney is granted an interest in the subject matter of the suit, and not merely in the proceeds to be derived from the suit, then the client no longer has the right to discharge the attorney or discontinue the suit at will.<sup>3</sup> A contingent fee contract per se does not give an attorney such an interest.<sup>4</sup> In fact, in light of the ABA *Code of Professional Responsibility*, Disciplinary Rule 5-103, acquiring an interest in the subject matter of a suit seems to be unethical.<sup>5</sup> Nevertheless, at least two states have recognized that an attorney may acquire such an interest.

In the Texas case of *Thomas v. Mandell & Wright*,<sup>6</sup> the court recognized that a client can assign to an attorney an interest in the cause of action even if the attorney is hired on a contingent fee basis.

In Louisiana an attorney can acquire an interest in the subject matter of a suit, and the rules governing the acquisition are set out in statutory form.<sup>7</sup> A Louisiana statute limits what a client can do

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3. 1 S. SPEISER, *ATTORNEY'S FEES* 172-173 (1973) [hereinafter cited as SPEISER]; E. WOOD, *FEE CONTRACTS OF LAWYERS* 199 (1936) [hereinafter cited as WOOD].

4. F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 77 (1964) [hereinafter cited as MACKINNON].

5. The pertinent text of Disciplinary Rule 5-103 is as follows:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

6. 433 S.W.2d 219 (Tex. Ct. Civ. App. 1968), *rev'd on other grounds*, 441 S.W.2d 841 (Tex. 1969).

7. LA. REV. STAT. ANN. § 37:218 (West). The text of which is as follows:

By written contracts signed by the client, attorneys at law may acquire as their fee an interest in the subject matter of the suit, proposed suit, or claim, in the prosecution or defense of which they are employed, whether the suit or claim be for money or for property. In such a contract for employment, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file it with the clerk of the district court in which the suit is pending or is to be brought and have an original or certified copy made and served by registered or certified mail on the opposing party. After such service, any settlement, compromise, discontinuance, or other disposition made of the

with a suit without the written consent of the attorney so that the attorney can acquire an interest in the suit to the detriment of the attorney's fee and keep the client from discontinuing the suit.<sup>8</sup> If the client does dismiss the suit, the statute allows the attorney to proceed with the suit on his own behalf.<sup>9</sup> Under this statute, however, the client not only cannot discontinue the suit, he cannot compromise or settle the suit without the written consent of the attorney.<sup>10</sup>

The Louisiana statute does not specifically speak to the issue of the discharge of an attorney by a client, and there is authority to the effect that even if the attorney has complied with the statute, the client may discharge him, with the issue then becoming what the attorney can recover from the client as a fee.<sup>11</sup> Thus, the practical effect of acquiring an interest in the subject matter of a suit may simply be that the client may not be able to afford to exercise his "right" to discharge the attorney.<sup>12</sup>

### *Discharge of Attorney for Good Cause*

If an attorney is discharged for good cause, he generally may not recover at all.<sup>13</sup> There are cases, however, which hold that an attorney discharged for good cause may still recover on a quantum meruit basis when the discharge is prior to the fulfillment of his services.<sup>14</sup> The issue in a case such as this then becomes what constitutes "good cause." "Justifiable causes of discharge may consist of a refusal to perform duties, improper, insulting, or profane language used in the presence of the client, inattention to duties, unfaithful-

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suit or claim by either the attorney or the client without the written consent of the other is null and void and the suit or claim shall be proceeded with as if no such settlement or discontinuance had been made.

8. See *Succession of Vlaho*, 140 So. 2d 226 (La. Ct. App. 1962).

9. *Robinson v. Hunt*, 211 La. 1019, 31 So. 2d 197 (1947).

10. *Due v. Due*, 331 So. 2d 858 (La. Ct. App. 1976).

11. *Id.*

12. See generally MACKINNON, *supra* note 4, at 77-78.

13. *Taylor v. Perkins*, 157 S.W. 122 (Mo. Ct. App. 1920); see 1 SPEISER, *supra* note 3, at 189.

14. See, e.g., *Smith v. Westside Transit Lines, Inc.*, 313 So. 2d 371 (La. Ct. App.), *cert. denied*, 318 So. 2d 43 (La. 1975) (where attorney had complied with the Louisiana statute concerning discontinuance of a suit without the attorney's consent, and client discharged him for good cause, the court held that the attorney could recover a fee on a quantum meruit basis).

ness to duties, disbarment, and an attempt to deceive the client."<sup>15</sup> At least one court has held that a "breakdown in communications" between the attorney and his client may be sufficient cause for discharge.<sup>16</sup>

### *Discharge of Attorney Without Cause*

What can the attorney recover if he is discharged prior to the happening of the contingency without justifiable cause? Some jurisdictions allow the attorney to recover the stipulated contract percentage of any judgment recovered by the client, *i.e.*, the full contract price.<sup>17</sup> Others give the attorney a choice either to sue for the reasonable value of services rendered up to the time of discharge, or to sue for damages for breach of contract.<sup>18</sup> Some jurisdictions have held that, because of the nature of the relationship between attorney and client, a discharge of an attorney hired on a contingent fee basis will not be a breach of contract, and, thus, the suit for damages for such a breach will not be available as an option for the attorney, with the remaining remedy being a suit in quantum meruit.<sup>19</sup> The majority of jurisdictions allow an attorney discharged

15. Wood, *supra* note 3, at 202. At least one court has held that an attorney disbarred prior to fulfillment of performance should still be able to recover in quantum meruit when the services rendered were not involved in the unprofessional conduct occasioning the disbarment. *Stein v. Shaw*, 6 N.J. 525, 79 A.2d 310 (1951).

16. *Smith v. Westside Transit Lines, Inc.*, 313 So. 2d 371 (La. Ct. App.), *cert. denied*, 318 So. 2d 43 (La. 1975).

17. *United Gas Pub. Serv. Co. v. Christian*, 186 La. 689, 173 So. 174 (1937) (where attorney has statutory interest in subject matter of the suit); *In re Downs*, 363 S.W.2d 679 (Mo. 1963) (provided contingency occurs); *Walters v. Hastings*, 84 N.M. 101, 500 P.2d 186 (1972) (provided contingency occurs); *Harrison v. Johnson*, 64 Ohio App. 185, 28 N.E.2d 615 (1940); *Dolph v. Speckart*, 94 Ore. 550, 186 P. 32 (1920) (provided contingency occurs); *Thomas v. Mandell & Wright*, 433 S.W.2d 219 (Tex. Ct. Civ. App. 1968), *rev'd on other grounds*, 441 S.W.2d 841 (Tex. 1969).

18. *Henry v. Vance*, 111 Ky. 72, 63 S.W. 273 (1901); *Simon v. Chicago, M. & St. P. Ry.*, 45 N.D. 251, 177 N.W. 107 (1920); *Neibuhr v. Sassadeck*, 15 N.J. Misc. 285, 190 A. 783 (1937); *Chambliss, Bahner and Crawford v. Luther*, 531 S.W.2d 108 (Tenn. Ct. App. 1975).

19. *Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972); *Cole v. Myers*, 128 Conn. 223, 21 A.2d 396 (1941); *see Owens v. Bolt*, 218 Ala. 344, 118 So. 590 (1928); *People v. Radinsky*, 512 P.2d 627 (Colo. 1973); *Milton Kelner, P.A. v. Lincoln Road Inc.*, 328 So. 2d 193 (Fla. 1976) (*dictum*); *Finney v. Carter's Estate*, 164 N.E.2d 656 (Ind. Ct. App. 1960); *Dill v. Public Utility Dist.*, 3 Wash. App. 360, 475 P.2d 309 (1970); *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964); *In re*

without good cause to recover in quantum meruit,<sup>20</sup> and this is true even if other options are also available.<sup>21</sup>

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Estate of Poli, 134 N.J. Super. 222, 338 A.2d 888 (1975); Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932); Crowley v. Wolf, 281 N.Y. 59, 22 N.E.2d 234 (1939).

20. Owens v. Bolt, 218 Ala. 344, 118 So. 590 (1928); State Farm Mut. Ins. Co. v. St. Joseph's Hospital, 107 Ariz. 498, 489 P.2d 837 (1971); Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972); People v. Radinsky, 512 P.2d 627 (Colo. 1973); Cole v. Myers, 128 Conn. 223, 21 A.2d 396 (1941); Thompson v. Taylor, 12 Ill. App. 2d 472, 139 N.E.2d 794 (1957); Finney v. Carter's Estate, 164 N.E.2d 656 (Ind. Ct. App. 1960); Henry v. Vance, 111 Ky. 72, 63 S.W. 273 (1901); Breathitt Coal, Iron & Lumber Co. v. Gregory, 78 S.W. 148 (Ky. 1904); Hubbard v. Goffinett, 253 Ky. 779, 70 S.W.2d 671 (1934); Inman v. Gonzales, 89 So. 2d 914 (La. Ct. App. 1956); Doucet v. Standard Supply & Hardware Co., 250 So. 2d 549 (La. Ct. App. 1971); Cabral v. Heitkamp, 252 So. 2d 353 (La. Ct. App. 1971); Kramer v. Graham, 272 So. 2d 716 (La. Ct. App. 1973); Wright v. Fontana, 290 So. 2d 449 (La. Ct. App. 1974); Guilbeau v. Firemen's Fund Ins. Co., 293 So. 2d 216 (La. Ct. App. 1974); Krebs v. Bailey's Equip. Rentals, Inc., 328 So. 2d 775 (La. Ct. App. 1976); Louque v. Dejan, 129 La. 519, 56 So. 427 (1911); Succession of Carbajal, 139 La. 481, 71 So. 774 (1916); Barthels v. Garrels, 206 Mo. App. 199, 227 S.W. 910 (1920); Baker v. Zikas, 176 Neb. 290, 125 N.W.2d 715 (1964); Simon v. Chicago, M. & St. P. Ry., 45 N.D. 251, 177 N.W. 107 (1920); Markarian v. Bartis, 89 N.H. 370, 199 A. 573 (1938); *In re* Estate of Poli, 134 N.J. Super. 222, 338 A.2d 888 (1975); Stein v. Shaw, 6 N.J. 525, 79 A.2d 310 (1951); Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932); Crowley v. Wolf, 281 N.Y. 59, 22 N.E. 2d 234 (1939); Bolton v. Marshall, 153 Ohio 250, 91 N.E.2d 508 (1950); Sundheim v. Beaver County Bldg. & Loan Ass'n, 140 Pa. Super. 529, 14 A.2d 349 (1940); Spears v. Polk, 17 Tenn. App. 556, 69 S.W. 2d 239 (1933); Chambliss, Bahner and Crawford v. Luther, 531 S.W.2d 108 (Tenn. Ct. App. 1975); Howell v. Kelly, 534 S.W.2d 737 (Tex. Ct. Civ. App. 1976); Thompson v. Smith, 248 S.W. 1070 (Tex. 1923); Dill v. Public Util. Dist., 3 Wash. App. 360, 475 P.2d 309 (1970).

21. Henry v. Vance, 111 Ky. 72, 63 S.W. 273 (1901) (if services have been rendered, quantum meruit is the remedy. If no services have been rendered, breach of contract is the remedy); Succession of Carbajal, 139 La. 481, 71 So. 774 (1916) (even if the attorney does not acquire an interest in the subject matter of the suit the attorney may still recover in quantum meruit); Barthels v. Garrels, 206 Mo. App. 199, 227 S.W. 910 (1920) (if attorney is summarily dismissed after judgment and pending appeal, he can either treat the contract as rescinded and sue in quantum meruit, or treat it as liquidated by reduction to judgment subject to results on appeal); Simon v. Chicago, M. & St. P. Ry., 45 N.D. 251, 177 N.W. 107 (1920) (attorney can recover in quantum meruit or for damages actually sustained by breach of the contract); Bolton v. Marshall, 153 Ohio 250, 91 N.E.2d 508 (1950) (if there is a stipulated fee amount in the contract, the attorney can sue on the contract, otherwise he can sue in quantum meruit); Chambliss, Bahner and Crawford v. Luther, 531 S.W.2d 108 (Tenn. Ct. App. 1971) (attorney can sue in quantum meruit or for damages for breach of contract); Howell v. Kelly, 534 S.W.2d 737 (Tex. Ct. Civ. App. 1976) (since in Texas an attorney can acquire an interest in the subject matter of a suit he has three options if discharged without cause: (1)

When a suit in quantum meruit is brought, there is a split of authority on whether the recovery should be limited to the stated contract percentage.<sup>22</sup> Another issue is whether the attorney's cause of action accrues immediately upon dismissal, or whether the attorney must wait until the contingency occurs to be able to sue. The majority of courts favor immediate accrual of the cause of action.<sup>23</sup> Most courts will allow the attorney to recover in quantum meruit even if the client does not later recover anything by way of judgment or settlement.<sup>24</sup>

One major problem with recovery on a quantum meruit basis is determining the value of the services rendered by the attorney. Several factors, in addition to time expended, are to be considered in placing a reasonable value on the services rendered by the attorney up to the point of discharge.<sup>25</sup> These include the measure of success achieved; the skill and labor required of an attorney undertaking the particular type of task; the ability, skill, and reputation of the attorney; the amount of responsibility placed on the attorney; the nature and value of the subject matter of employment; and the value of reasonable expenses incurred.<sup>26</sup>

It should be kept in mind that a client will still be responsible for certain expenses whether or not he pays a fee.<sup>27</sup> These expenses usually include filing fees, costs of investigation, witness fees, and jury fees, but not telephone or hotel bills unless specifically con-

treat the contract as rescinded and sue in quantum meruit; (2) keep the contract alive and be ready and able to perform; (3) sue for profits he would have received had he not been prevented from performing).

22. *Chambliss, Bahner and Crawford v. Luther*, 531 S.W.2d 108 (Tenn. Ct. App. 1975) (recovery limited to contract price); *Thompson v. Smith*, 248 S.W. 1070 (Tex. 1923) (not limited to contract price).

23. *See, e.g., Tillman v. Komar*, 259 N.Y. 133, 181 N.E. 75 (1932). *Contra, Fracasse v. Brent*, 6 Cal.3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

24. *See Comment, Contingent Fees in California After Fracasse v. Brent*, 3 GOLDEN GATE L. REV. 285, 295 (1973). *Contra, Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

25. *Smith v. Westside Transit Lines, Inc.*, 313 So. 2d 371 (La. Ct. App.), *cert. denied*, 318 So. 2d 43 (La. 1975).

26. *King v. Kieth*, 257 Ala. 463, 60 So. 2d 47 (1952); *see* ABA, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Disciplinary Rule 2-106. For a general discussion of measuring compensation on a quantum meruit basis see 1 SPEISER, *supra* note 3, at 293-330.

27. *Comment, Ethical and Practical Considerations of a Client's Breach of a Contingent Fee Contract*, 6 U.W.L.A.L. REV. 92, 101 (1974).

tracted for.<sup>28</sup>

One situation which attorneys should be aware of is that when a third party fraudulently induces a client to revoke the contingent fee agreement for his own benefit, a tort action for damages against the third party may accrue in favor of the attorney.<sup>29</sup> Also, if a contingent fee agreement is entered into in a divorce case, then the attorney may not be able to recover a fee if discharged by the client since this type of agreement may be held to be void as against public policy.<sup>30</sup> This result rests on the premise that contingent fee contracts in divorce cases are believed to encourage divorce.<sup>31</sup>

The rule in California with regard to recovery on a contingent fee contract for premature discharge by a client has recently undergone change. In the 1972 case of *Fracasse v. Brent*,<sup>32</sup> the court held that recovery for discharge without cause is limited to the reasonable value of services rendered up to the time of discharge with the cause of action accruing when and if the contingency occurs. The prior rule had been that an attorney discharged without cause under a contingent fee contract was entitled to the same amount of compensation, and under the same contingency, as if he had completed the services.<sup>33</sup> Although all of the implications of the *Fracasse* decision are yet to be manifested, it appears that a complete about face was made from allowing recovery of the contract price, to limiting recovery to quantum meruit if the contingency occurs.<sup>34</sup>

### *Settlement or Compromise by Client*

Up to this point the discussion has centered upon problems arising from the premature discharge of an attorney by a client. Similar problems arise when the client settles or compromises a suit without the consent of the attorney.

If there is no agreement in the contract limiting the client's

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28. *Id.*

29. *See, e.g., State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498, 489 P.2d 837 (1971).

30. *Singleton v. Foreman*, 435 F.2d 962 (1970) (contingent fee contracts in divorce cases are void and unenforceable under Florida law); *see Annot.*, 100 A.L.R. 2d 1378 (1965).

31. *Burns v. Stewart*, 188 N.W.2d 760 (Minn. 1971).

32. 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

33. *See, e.g., Jones v. Martin*, 41 Cal. 2d 23, 256 P.2d 905 (1953).

34. *See Comment, Contingent Fees in California After Fracasse v. Brent*, 3 GOLDEN GATE L. REV. 285 (1973).

right to settle or compromise the case on his own, then the client can settle or compromise at any time, and the question becomes whether the attorney can recover a fee and, if so, in what amount.<sup>35</sup> It has been held that such a settlement or compromise cannot serve to deprive the attorney of his fee.<sup>36</sup> Sometimes the attorney can recover on the contract as if he had fully performed;<sup>37</sup> or he can recover the stipulated percentage of the actual settlement.<sup>38</sup> At other times he is relegated to a recovery in quantum meruit for services actually rendered.<sup>39</sup>

Unless an attorney acquires an interest in the subject matter of the suit, he cannot prosecute the case on his own behalf to recover the fee if the client dismisses or settles the suit.<sup>40</sup> Even if there is an agreement in the contract to the effect that the client cannot settle or compromise the suit without the consent of the attorney, the agreement is generally held to be void as against public policy.<sup>41</sup> The majority of jurisdictions will, nevertheless, permit the attorney to recover in quantum meruit.<sup>42</sup>

In the special case of Louisiana, where an agreement limiting compromise or settlement by the client is allowed by statute,<sup>43</sup> the attorney can sue on the contract and recover the full contract fee,<sup>44</sup> or continue the suit as if the settlement had not taken place.<sup>45</sup> The courts, however, will not allow an attorney to take unfair advantage of a client under the guise of this statute. Thus, where the only work done by the attorney was the filing of one petition in two years prior to the client's compromise, the attorney was relegated to recovery

35. See 1 SPEISER, *supra* note 3, at 201.

36. *Katapodis v. Liberian S/T Olympic Sun*, 282 F. Supp. 369 (E.D. Va. 1968).

37. *Dombey, Tyler, Richards & Grieser v. Detroit, T & I. R.*, 351 F.2d 121 (6th Cir. 1965) (citing Ohio Law).

38. *Franklin v. Local Fin. Co.*, 136 S.W.2d 112 (Mo. Ct. App. 1940).

39. *Fuessel v. Cadillac Bar Corp.*, 63 N.J. Super. 430, 164 A.2d 821 (1960).

40. *Dow Chemical Co. v. Benton*, 357 S.W.2d 565 (Tex. 1962).

41. See, e.g., *Davis v. Webber*, 66 Ark. 190, 49 S.W. 822 (1899).

42. *Davis v. Webber*, 66 Ark. 190, 49 S.W. 822 (1899) (recovery permitted since the agreement was not *malum prohibitum* or *malum in se* but merely void as against public policy); *Calvert v. Stone*, 33 Cal. 2d 97, 199 P.2d 297 (1948); *Proctor v. Louisville & N.R.*, 192 Ky. 330, 233 S.W. 736 (1921); *Papineau v. White*, 117 Ill. App. 51 (1904); *Rochester v. Campbell*, 184 Ind. 421, 111 N.E. 420 (1916).

43. LA. REV. STAT. ANN. § 37:218 (West).

44. *United Supply & Mfg. Co. v. Tucker, Bronson & Martin*, 210 F.2d 415 (5th Cir. 1954).

45. LA. REV. STAT. ANN. § 37:218 (West).



in quantum meruit.<sup>46</sup>

If an attorney is retained by an economically poor client, a suit to recover fees may be futile.<sup>47</sup> This is doubly true if such a client fails to recover a judgment or to make a settlement out of which the attorney can recover a fee.<sup>48</sup> In a situation such as this, a suit may even be unethical.<sup>49</sup> This may be true since "[a] lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."<sup>50</sup> Thus there may be no "fraud" or "gross imposition" if the client is merely indigent.

One method of obtaining a fee short of suit is the use of the general or retaining lien. Through this method, the attorney can keep all property of the client acquired during their course of dealing, including files and papers, until the client pays the attorney a reasonable fee for his services if the attorney has been discharged without cause under a contingent fee agreement.<sup>51</sup> The drawback to the use of this lien, however, is that it cannot be enforced in a court of law or equity,<sup>52</sup> and thus its practical effect is merely to worry or embarrass the client into paying.<sup>53</sup>

An equitable lien on any future judgment may arise if the client specifically states in the contract that such a lien is to arise.<sup>54</sup> If, however, the attorney is merely to share in any amount recovered, no lien will be created.<sup>55</sup> It is never certain whether a contingent fee contract which does not specifically grant an equitable lien can give rise to one,<sup>56</sup> and it is therefore wise to specify any liens in the contract.<sup>57</sup> If such a lien on the fund to be recovered does arise, the attorney can petition the court, in the client's action, to set aside

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46. *Guilbeau v. Firemen's Fund Ins. Co.*, 293 So. 2d 216 (La. Ct. App. 1974).

47. Comment, *Fracasse v. Brent: Contingent Fee Compensation for an Attorney Discharged Without Cause—A Right or a Mere Possibility?*, 9 CAL. W.L. REV. 355, 364 (1973).

48. *Id.*

49. *Id.*

50. ABA CODE, Ethical Consideration 2-23 [hereinafter cited as EC].

51. See *Midvale Motors, Inc. v. Saunders*, 21 Utah 2d 181, 442 P.2d 938 (1968).

52. 2 SPEISER, *supra* note 3, at 378.

53. *Id.* at 379.

54. WOOD, *supra* note 3, at 39.

55. *Id.*

56. 1 SPEISER, *supra* note 3, at 125.

57. *Id.* at 126.

his fee out of the fund.<sup>58</sup> This lien, however, can be defeated by a good faith dismissal, compromise, or settlement by the client in the absence of statutory provisions to the contrary.<sup>59</sup>

### *Conclusion*

The attorney should always attempt to avoid conflicts with clients over fees.<sup>60</sup> In order to avoid being discharged with resulting fee disputes, the attorney should keep all lines of communication open to the client and inform him of each step in the proceedings. This not only lets the client know how the case is proceeding, but also keeps him from getting the impression that the attorney is not applying himself diligently to the business at hand.

It is generally true that a client can revoke a contingent fee agreement at any time,<sup>61</sup> but if he discharges the attorney without good and sufficient cause he should not be able to avoid having to pay the attorney a reasonable fee.<sup>62</sup> A statute such as the one in Louisiana appears to provide the lawyer maximum protection in that it limits the client's right to settle or compromise the suit.<sup>63</sup> The client, however, should be able to control his own lawsuit.<sup>64</sup>

Due to the fiduciary nature of the attorney-client relationship, any provisions for recovery for attorney's fees, whether they are statutory, contractual, or otherwise, should be equitable to both parties. The attorney is not a businessman,<sup>65</sup> and is entitled to

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58. 2 SPEISER, *supra* note 3, at 399.

59. *Id.* at 392.

60. ABA CODE, EC 2-23. One method of settling any conflicts over fees short of a suit is arbitration. Under this method the parties agree on a private tribunal which will decide all issues of law and fact in dispute. The final decision is called an "award," and it is enforced as a common law contract usually by specific performance. The drawbacks to this method include: (1) arbitration carries no right to trial by jury; (2) the benefit of judicial instruction on the law is not given to the arbitrator; (3) arbitrators are not required to give reasons for their decisions; (4) review of an arbitration award is more limited than review of a trial; and (5) the records of an arbitration proceeding are not as complete as in a court of law. For a discussion of arbitration see 2 SPEISER, *supra* note 3, at 489-503.

61. *See* note 2 *supra*.

62. *See* *Katapodis v. Liberian S/T Olympic Sun*, 282 F. Supp. 369 (E.D. Va. 1968).

63. *See* note 7 *supra*.

64. DRINKER, *supra* note 2, at 177.

65. *See*, *American Trial Lawyer's Ass'n v. New Jersey Supreme Court*, 126 N.J. Super. 577, 316 A.2d 19, *aff'd*, 66 N.J. 258, 330 A.2d 350 (1974).

charge only a reasonable fee.<sup>66</sup> In view of this it seems that the fairest method of computation of a discharged attorney's fee is the reasonable value of services rendered up to the time of discharge. Depending upon time of discharge, this method may actually bring results which would be near the result of a suit on the contract if such a suit were allowed. It is also true that in a suit on a contingency basis there is always the possibility of no recovery even where the suit is prosecuted to the fullest extent. Due to this fact, an attorney should not be displeased with a recovery in quantum meruit when discharged since he might have received nothing otherwise.

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66. ABA CODE, EC 2-17.