FEE FORFEITURE: WHEN DOES IT OCCUR AND TO WHAT EXTENT?

Fee forfeiture is one sanction that courts may impose on attorneys who breach the duties owed to their clients. However, there are certain situations where forfeiture of fees may not be required of an attorney who breaches his duty, and there are likewise situations where an attorney may not collect full compensation even where the attorney did not breach any duty or where the client was at fault.

I. FEE FORFEITURE AND COLLECTION IN CONTINGENT AND FIXED FEE AGREEMENTS

A. Collection and Forfeiture of Fees Where the Attorney Is Not at Fault.

In the case of contingent fee agreements, there is no uniform procedure among various jurisdictions for determining attorney fee collection or forfeiture where an attorney is dismissed without fault on the attorney’s part before the conclusion of the matter under contingent or fixed fee agreements. In these situations, even as the injured party, an attorney is likely to collect only a portion of the fee and not the total fee itself. There are predominant methods of determining the amount of attorney’s fees in these situations as well as the timing when an attorney may recover.

In International Materials Corp. v. Sun Corp., the Missouri Supreme Court permitted an attorney who was terminated under a contingency agreement before the matter was completed to collect fees on the basis of quantum meruit for the reasonable amount of services rendered if the attorney was terminated without cause or had just cause to withdraw. The court in dicta declared that as a general rule, “a lawyer who abandons or withdraws from a case, without justifiable cause, before termination of a case, and before a lawyer has fully performed the services required, loses all right to services rendered.”

In International, the Missouri court held forfeiture to be improper in

1. 824 S.W.2d 890 (Mo. 1992) (en banc).
2. See id.
3. Id. at 894.
that particular case.\(^4\) In *International*, a law firm withdrew as counsel for International Materials Corp. (IMC) after numerous delays as a result of the client's disappointment and dissatisfaction with the law firm.\(^5\) Because the efforts of the attorneys did contribute to IMC's final victory, the trial court found the firm was not at fault, though the court determined that the firm did not have adequate time or resources to handle what the court termed complex litigation.\(^6\) The Missouri Supreme Court agreed with the finding of the trial court that the attorneys for IMC retained their right to collect a fee and that total fee forfeiture was inappropriate because the attorneys withdrew for cause.\(^7\)

The Missouri court and other courts have discussed what would constitute withdrawal for cause, thus preserving the right to collect some portion of a contingent fee. Courts have found just cause for attorney withdrawal when the client threatens perjury,\(^8\) when a client accuses the lawyer of dishonesty,\(^9\) when the client causes a total breakdown in communication between the attorney and client,\(^10\) and when the client employs other counsel with whom the attorney cannot cordially cooperate.\(^11\) *International* held that when a lawyer has done nothing blameworthy, complete forfeiture is not a proper remedy.\(^12\)

The court in *International* found that the attorneys involved had failed to fulfill the entire terms of their contingent fee arrangement, and thus could not recover under the terms of the contract, even though they had not breached the contract.\(^13\) Therefore, the court concluded that the only proper method of recovery was in quantum meruit.\(^14\) The Missouri Supreme Court, unlike the trial court, found that recovery should not be based on the number of billable hours used by the attorneys, but instead

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4. See id. at 895.
5. See id. at 893.
6. See *International*, 824 S.W.2d at 893.
7. See id. at 895.
12. See *International*, 824 S.W.2d at 895.
13. See id.
14. See id.
on the basis of benefit bestowed on the client. Citing Plaza Shoe Store, Inc. v. Hermel, Inc., the court concluded that recovery must be limited to the reasonable value of services rendered, "not to exceed the contingent amount and payable only on the occurrence of the contingency." International also limited the collection of fees under quantum meruit, stating that the client would not have to pay for duplicate services that a new law firm representing the client would have to repeat because these services did not unjustly enrich the client.

A Michigan court, when facing a fixed-fee agreement, based its formula for computing fees on different factors from the Missouri court. The Michigan courts did agree that when an attorney was wrongfully discharged or withdrew for just cause under a contingency agreement, the attorney could not collect on the basis of the contract, but could recover on the basis of quantum meruit. The court in Plunkett & Cooney, P.C. v. Capitol Bancorp, Ltd. stated that a client could discharge an attorney at any time without breaching the fee contract, but the client would be liable to the attorney for services rendered. Unlike in a contingent situation, Michigan courts have held that under a fixed fee agreement, the attorney's recovery is based not on quantum meruit, but on what percentage of the agreed-upon services have been performed, multiplied by the contract price. However, this formula does not apply where the fee contract specifies alternate formulas for determining remedies. This rationale is based on the belief that where the agreed-upon value of services is stated in a fixed fee agreement, the reasonable value of fees based on quantum meruit is inherently incorporated in the contract price. In Morris v. Detroit, a Michigan court, when awarding com-

15. See id. at 895.
16. 636 S.W.2d 53 (Mo. 1982) (en banc).
17. Id. at 59-60.
18. See International, 824 S.W.2d at 895.
20. 536 N.W.2d 886.
21. See id. at 889.
22. See id.
23. See id. at n.4.
24. See id. at 889-90.
25. 472 N.W.2d 43.
pensation for attorneys under quantum meruit in a situation similar to *International*, imposed a list of factors to be considered when determining the reasonable value of attorneys' fees, including:

(1) The professional standing and experience of the attorney;
(2) the skill, time, and labor involved;
(3) the amount in question and the results achieved;
(4) the difficulty of the case;
(5) the expenses incurred; and
(6) the nature and length of the professional relationship with the client.\(^{26}\)

These factors go beyond the simple formula of unjust enrichment advanced by the Missouri Supreme Court in *International*. Applying these factors could likely result in a different amount of fees being recovered than if recovery were simply based on unjust enrichment. Either way, in Michigan or Missouri, the attorney is not likely to recover the entire contingent amount and under quantum meruit would possibly not recover all amounts expended by the attorney. Almost certainly, the recovery would not be based on the basis of billable hours expended by the attorney.

The Arkansas Supreme Court in *Henry, Walden, & Davis v. Goodman*\(^{27}\) best explained the rule of why attorneys cannot recover under a contingency fee contract in most situations in which the attorney is discharged before the completion of the matter. The court in *Henry* expressly overruled preexisting Arkansas authority which held that an attorney discharged without cause while under a contingency fee contract could recover the amount specified in the contract less expenses that would have been incurred had the legal services continued.\(^{28}\) Like many other courts, the Henry court held that a client may discharge an attorney at any time, and the attorney will be limited to quantum meruit recovery for his or her services.\(^{29}\)

The court explained its decision by reasoning that

the exercise of the right to discharge an attorney with or without cause does not constitute a breach of contract because it is a basic term of the contract, implied by law into it by reason of the matter of

\(^{26}\) *Id.* at 47.

\(^{27}\) 741 S.W.2d 233 (Ark. 1987).

\(^{28}\) *See* Brodie v. Watkins, 33 Ark. 545 (1878); Berry v. Nichols, 298 S.W.2d 40 (Ark. 1957).

\(^{29}\) *See* *Henry*, 741 S.W.2d at 236.
the attorney-client relationship, that the client may terminate that contract at any time. It would be an injustice to the client to hold him liable for both contingency fees [for a new attorney and the discharged attorney] for exercising that fundamental right.30

The court in Henry and most other courts place more emphasis on client's rights than those of an attorney under a contract.

The Henry court also discussed the situation that could occur if the client discharged the attorney "on the courthouse steps" just prior to settling a case in an attempt to prevent the attorney from collecting under a contingency fee contract.31 The court concluded that in this situation, "the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services."32 The factors the court would consider include the amount of time and labor involved, the skill of the attorney, and the nature and extent of the litigation.33

The Eleventh Circuit has also prevented a client from being able to escape contingency fees by firing an attorney after trial but before an appeal.34 A doctor in an employment discrimination case discharged his attorney prior to appealing the amount of damages awarded to him at trial.35 The client claimed that since he was appealing, the litigation was not completed, and the attorney was limited to a quantum meruit recovery.36

The court found that the contingency agreed upon in the contract had occurred prior to the discharge because the client had received full recovery of his judgment in the trial court.37 The court held that even though the client had rejected the relief granted, the attorney who had obtained the contingency called for in the contract could recover the contingent fee specified and was not limited to a quantum meruit recovery.38

31. Henry, 741 S.W.2d at 236.
32. Id.
33. See id.
34. See Zaklama v. Mount Sinai Medical Center, 906 F.2d 652 (11th Cir. 1990).
35. See id.
36. See id.
37. See id. at 653.
38. See id.; see also Kelner v. 610 Lincoln Rd., Inc., 328 So. 2d 193, 196 (Fla. 1976).
The timing of a discharged attorney’s fee recovery under these contingency and fixed-fee situations is another issue which courts have decided differently. Some courts follow the “California rule” laid out in Fracasse v. Brent,39 where a cause of action for services rendered prior to the revocation of a contingent fee contract only accrues after the occurrence of the stated contingency.”40 While this would at first glance seem fair, since the attorney was hired on a contingency basis, the client’s actions in these specific situations led to the nullification of the contract, not the actions of the attorney. Furthermore, an attorney who labored to the best of his ability for his client could see any hope of recovery destroyed by an incompetent replacement who loses the case.

Many courts have rejected the California rule in favor of the New York rule, holding that an attorney’s cause of action accrues immediately when the attorney is terminated without cause, without being forced to wait until the occurrence of the contingency.41 This rule seems more equitable to the attorney who is discharged without cause.

Under contingent and fixed fee agreements where an attorney is discharged without cause by the client, the various jurisdictions throughout the legal system have not developed a uniform standard for awarding fees. An attorney almost certainly will not recover the entire contingent fee, unless the discharge is an effort by the client to prevent payment of a fee.42 The attorney may recover under quantum meruit in nearly every state, but the factors involved in the determination vary. Furthermore, there is a split between courts among the timing of the recovery, with some courts following the California rule and some courts adhering to the New York rule. While an attorney is almost certainly entitled to a recovery, that recovery will not be the same in every jurisdiction.

40. See id. at 15; see also Rosenberg v. Leven, 409 So. 2d 1016, 1022 (Fla. 1982).
B. Fee Forfeiture and Compensation in Contingent Fee Contracts
Where the Attorney is Discharged “For Cause”

In International, the Missouri Supreme Court stated what it considered the general rule, that attorneys who are discharged with cause lose all right to compensation.\(^{43}\) However, not all states are in agreement with the general rule. In Crockett & Brown, P.A. v. Courson,\(^ {44}\) however, the Arkansas Supreme Court allowed an attorney who was discharged for cause to collect a fee on the basis of quantum meruit for the reasonable value of the attorney’s services.\(^ {45}\) Unlike some cases which based recovery on the occurrence of the contingency, following the California Rule, Crockett & Brown followed the New York rule and thus did not require the contingency to occur.\(^ {46}\) This may be due in part to the fact that Crockett & Brown did not involve a pure contingent fee contract, but involved a retainer and expense portion of the contract as well.\(^ {47}\) The decision in Crockett was criticized particularly as to what constituted cause for discharge of attorneys in Arkansas, something which has not been defined with certainty by the Arkansas courts.\(^ {48}\)

C. Illegal or Unethical Contingent Fee Contracts

An attorney’s state of mind may be relevant to the extent of forfeiture under illegal or unethical contingency fee contracts. In Illinois, section 2-114 of the Illinois Code of Professional Responsibility limits the amount of contingency in medical malpractice actions. When faced with a situation where a contract was in violation of this section, but the attorney was unaware of the section, the Illinois Appellate Court determined that, “merely because a contingent fee agreement provides for compensation in excess of the maximum percentage that an attorney may receive

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43. See International Materials Corp. v. Sun Corp., 824 S.W.2d 890, 894 (Mo. 1992) (en banc).
44. 849 S.W.2d 938 (Ark. 1993).
45. See id. at 939.
47. See Crockett & Brown, 849 S.W.2d at 938.
48. See Reid, supra note 46, at 729.
without court approval does not render the agreement wholly unenforceable."49 The court seemed to express that complete forfeiture would be warranted only in situations where there is more than a technical violation of the rules.50 The court instead stated that the question of whether a violation of 2-114 was serious enough to warrant total forfeiture was to be determined on a case by case basis.

II. FeRFEITURE FOR CAUSE: ATTORNEY CONDUCT REQUIRED FOR FEE FORFEITURE

A. Breach of Duties to Client Resulting in Forfeiture

Where an attorney violates the mandates of professional responsibility, courts may order forfeiture of attorney’s fees.51 There are numerous instances where courts have found that fees should be forfeited due to an attorney’s breach of his duties to the client. Where an attorney undertakes representation that poses an actual or potential conflict of interest without the informed consent of the client, fee forfeiture may be ordered.52 Charging a client for services on a basis other than that agreed upon can result in a return of excessive fees.53 Model Rule of Professional Conduct 1.5 provides a list of factors to be used in determining if a fee charged is excessive:

(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.

(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 circum-

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50. See id. at 681.
52. See id. at 616.
stances.

(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.

(8) Whether the fee is fixed or contingent. 54

A finding that a fee is excessive will most likely result in a forfeiture of the excessive portion of the fee.

An attorney who charges an excessive fee may be required to do more than simply forfeit the excessive amount of the fee. In United States v. Strawser, 55 Ronald Strawser charged a client $47,500 for negotiating what the court termed two fairly simple guilty pleas to drug charges. 56 The court required that Strawser represent his client without fee on appeal of a motion to quash the prosecution on double jeopardy grounds and forfeit the excessive fee. 57

Also, the law firm of an attorney who practices law while he or she is suspended is not entitled to collect fees on cases assumed after a suspension order. 58 However, the Fifth Circuit did hold that an attorney’s law firm could be compensated in quantum meruit for cases that he assumed before the suspension order and worked on during the suspension. 59

There are also other instances where an attorney’s conduct may result in a forfeiture of fees. Where an attorney perpetrates a fraud on his or her client, courts have recognized that this "will prevent him from recovering for services rendered." 60 Also where a law firm interfered with the client’s right to settle the case after the law firm’s discharge, it has lost any right to compensation under a contingent contract. 61 All of these situations involving attorney misconduct may result in forfeiture of fees.

55. 800 F.2d 704 (7th Cir. 1986).
56. See id. at 708.
57. See id. at 706.
59. See id.
III. CONCLUSION

It is fairly clear that there are instances where an attorney will be required to forfeit fees for cause. It also is fairly well established that an attorney who is discharged without cause has some right to collect a fee. However, in a contingency situation, an attorney discharged for cause in some jurisdictions may not be allowed to collect a fee until the occurrence of the contingency called for in the contract.

There are no clear answers in situations where an attorney is discharged for cause or where the attorney violates an ethical rule or duty to his or her client. While some courts will often espouse a general rule that attorneys cannot recover for services rendered in contradiction to the requirements of professional responsibility,\textsuperscript{62} other courts will announce that a breach of a professional duty is but one factor in determining the reasonableness of fees.\textsuperscript{63} It seems fair to say that technical violations of rules of professional responsibility will not often rise to the level of requiring fee forfeiture, but serious intentional violations of duty to a client may result in at least partial fee forfeiture.

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\textsuperscript{63} \textit{See} Kidney Ass'n of Oregon v. Ferguson, 843 P.2d 442 (Or. 1992).