The Law of Lawyers' Contracts Is Different

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Cover Page Footnote
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THE LAW OF LAWYERS' CONTRACTS IS DIFFERENT

Joseph M. Perillo*

The greatest Trust, between Man and Man, is the Trust of Giving Counsel. For in other Confidences, Men commit the parts of life; Their Lands, their Goods, their Children, their Credit, some particular Affaire: But to such, as they make their Counsellours, they commit the whole: By how much the more, they are obliged to all Faith and integrity.**

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** Sir Francis Bacon, Of Counsell, in The Essayes or Counsels, Civill and Morall 63, 63 (Michael Kiernan ed., Oxford Univ. Press 1985) (1597).
I. Introduction

The common law of contracts frequently treats lawyers differently from lay persons and even from other professionals. At times, the judges who make the common law identify with the concerns of their brothers and sisters at the bar, and a more favorable rule is put in place than is created for others. As stated by Judge Earl of the New York Court of Appeals, some of these rules are "device[s] invented by the courts for the protection of attorneys against the knavery of their clients." More often, the courts' treatment of lawyers' contracts reflects a policy of enforcing professionalism by showing their scorn for the knavish conduct of scoundrels in the legal profession.

Policies other than the suppression of knavery are also at work. The courts have forged rules designed to create respect for the legal profession and confidence in the system for the administration of law. In addition, major developments in twentieth-century American law governing lawyers' contracts include the enshrinement of "client choice" as a salient characteristic of lawyer-client relations and "lawyer autonomy" in respect to competition among lawyers. Although many have claimed that the practice of law has changed from a professional calling to a service business, and Russell Pearce has sounded a clarion call to the legal system to recognize this change as a paradigm shift, many striking dissimilarities between lawyers' contracts and business contracts remain.


The assistant counsel to the Oregon State Bar reports:

Over the years the Oregon State Bar Client Security Fund has been called upon to make reimbursement to claimants who have suffered losses arising out of investments with or loans to their lawyers . . . . In the great majority of cases, the lawyer abused the lawyer-client relationship by using the lawyer's greater bargaining power and position as trusted advisor to induce the client to entrust funds to the lawyer without adequate protection.


Lawyers have been and continue to be subject to special controls from two sources.4 As officers of the court, they are subject to the disciplinary and rule-making powers of the courts. As members of a profession, they are subject to the ethical prescriptions formulated by bar associations.5 When lawyers appear before the courts as litigants, special rules laid down for lawyers in contract cases can be viewed as extensions of the courts' powers to regulate the conduct of members of the bar. Similarly, the courts' application, in contract decisions, of disciplinary standards of conduct, can be seen as further extensions of the power of the organized profession to guide or discipline the conduct of individual lawyers. The disciplinary standards and the special rules of contract law for lawyers' contracts often are designed to protect clients, but frequently are devised to preserve the mystique of the practice of law as a special calling.

As a result of lawyers' special role in the legal system, contracts between lawyer and client receive different treatment than other contracts. Similarly, rules governing contracts between lawyers have unique features. While freedom of contract is the guiding principle underlying contract law, contractual freedom is muted in the lawyer-client and the lawyer-lawyer contexts. I have written:

It has been suggested that there is no law of contracts, or that if there is, it ought to be done away with. The thrust of the argument is that the variety of contractual contexts is so extensive and that the social and economic needs of each kind of transaction [are] so different that a disservice is done if one attempts to resolve transactional disputes by the application of supposed general principles of contract law.6

Although I generally disagree with this suggestion, judicial treatment of lawyers' contracts is the best evidence that there is some merit to the proposition.

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5. Although these prescriptions are promulgated by the courts, they are formulated by bar associations; the courts' role in formulating them is largely passive. See Charles W. Wolfram, Modern Legal Ethics § 2.3 (1986). Courts, however, have a major role in the enforcement of the prescriptions. See id. § 3.1. The first of the national prescriptions was the 1908 Canons of Ethics formulated by the ABA, and adopted in some states by state bar associations, in others by court rules, and still others by legislation. See id. § 2.6.2. This was followed by the 1969 Code of Professional Responsibility adopted in almost every state, sometimes with variations, usually by the state's highest court. See id. § 2.6.3. Finally, the 1983 ABA Model Rules of Professional Conduct were formulated. Not all states have adopted the Model Rules. See id. § 2.6.4.

II. THE RETAINER AGREEMENT

A. Fragility of the Retainer Agreement

Contracts engender expectations, and contract law generally protects those expectations by rules providing for awarding of damages, restitution, or specific enforcement; moreover, constitutional principles protect these expectations from government interference.\(^7\) Rules of tort law also protect these expectations from interference by third parties.\(^8\)

Consequently, it is somewhat surprising that a lawyer has no expectancy interest in a special retainer contract, that is, a contract retaining a lawyer for a particular case. As explained by one court, "[t]he contract under which an attorney is employed by a client has peculiar and distinctive features which differentiate it from ordinary contracts of employment."\(^9\) A leading text echoes the case law: "It is now uniformly recognized that the client-lawyer contract is terminable at-will by the client. For good reasons, poor reasons, or the worst of reasons, a client may fire the lawyer."\(^10\) If the client elects to fire the lawyer without cause, the lawyer is entitled to recover in quantum meruit, but, subject to a few exceptions, she has no right to expectancy damages.\(^11\) Health care professionals are also inhibited from seeking expectancy damages,\(^12\) but

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7. See U.S. Const. art. I, § 10, cl. 1.
12. A search has turned up no cases where a health care professional has sought damages for breach as opposed to compensation for work done. The closest cases are actions by dentists who have sought and received payment for dentures that were incomplete because of patient non-cooperation. See Giering v. Lemoine, 106 So. 2d 534 (La. Ct. App. 1958); Parvey v. Barasch, 142 A. 230 (R.I. 1928). The Patient's Bill of Rights of the American Hospital Association provides: "The patient has the right to refuse treatment to the extent permitted by law . . . ." Cyril H. Wecht, Medical Ethics and Legal Liability 337 (1976) (quoting from the American Hospital Association's Patient Bill of Rights). It follows that if the patient has this right, the health care professional has no right to expectancy damages.
other licensed professionals recover expectancy damages for breach.\textsuperscript{13}

What happens when the client dismisses the lawyer for cause, or if the attorney withdraws for cause? While the language of contract law distinguishes between partial and total breach (or immaterial and material breach), the Restatement of the Law Governing Lawyers (the "Restatement") and much of the literature, instead, concentrate on whether there is "just cause" for ending the relationship.\textsuperscript{14} In determining the consequences of ending the relationship, the Restatement focuses on grounds for "forfeiture" of compensation.\textsuperscript{15} "Forfeiture" is a loaded term, connoting the seizure of what one had earned. A more neutral approach would be to inquire whether compensation has been "earned." One student writer who accepted the "forfeiture" characterization has aptly concluded that the criteria defining misconduct justifying forfeiture of fees lack coherence.\textsuperscript{16} In contrast to the reasonably clear criteria in the general law of contracts for determining when a breach is total, thereby justifying cancellation of a contract,\textsuperscript{17} and restitutionary criteria in general contract law for determining when a party in breach may have restitution,\textsuperscript{18} the section of Restatement of the Law Governing Lawyers that governs "Partial or Complete Forfeiture of Lawyer's Compensation"\textsuperscript{19} has the clarity of the Milky Way as seen during a thermal inversion.

One thing about the provision is clear; it is lawyer-friendly. Even if the lawyer engages in a "clear and serious violation of a duty to the client," the lawyer may be entitled to some or all of the agreed fee or quantum meruit.\textsuperscript{20} While in some jurisdictions, as discussed below,\textsuperscript{21} a party who materially breaches a contract may have a restitutionary recovery, this rule was forged for arms-length rather than fiduciary transactions. After many re-readings of the Restatement section, one concludes that all its verbiage simply states that the courts have total

\begin{itemize}
\item \textsuperscript{13} See, e.g., Bernard Tomson & Norman Coplan, Architectural and Engineering Law 233-36 (2d ed. 1967) (listing case briefs of damages recoveries).
\item \textsuperscript{14} Restatement (Third) of the Law Governing Lawyers § 49 (Proposed Final Draft No. 1, 1996). This document will be cited from time to time. Unlike most restatements it is a highly controversial document and has been subject to many lobbying pressures. In general, it should be taken with the proverbial grain of salt. See, e.g., Lee A. Pizzimenti, Screen Verite: Do Rules About Ethical Screens Reflect the Truth about Real-Life Law Firm Practice?, 52 U. Miami L. Rev. 305, 306 (1997) (discussing section 204, a controversial provision).
\item \textsuperscript{15} Restatement (Third) of the Law Governing Lawyers § 49.
\item \textsuperscript{16} Nancy L. Sindell, Note, Toward a Uniform System of Attorney Fee Forfeiture, 9 Cardozo L. Rev. 1859 (1988).
\item \textsuperscript{17} See Calamari & Perillo, supra note 6, § 11.18; E. Allan Farnsworth, Contracts § 8.18 (2d ed. 1990).
\item \textsuperscript{18} See Calamari & Perillo, supra note 6, § 11.22; Farnsworth, supra note 17, § 8.14.
\item \textsuperscript{19} Restatement (Third) of the Law Governing Lawyers § 49.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} See infra text accompanying notes 49-51.
\end{itemize}
discretion on the question of whether the lawyer is entitled to compensation despite a violation of the lawyer's duties to the client. Other fiduciaries are not so privileged. The Restatement (Second) of Agency provides:

An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.\(^2\)

My own reading of the cases results in a different summary than that of the Restatement of the Law Governing Lawyers. As for the lawyer who has been dismissed for his or her material breach, the prevailing view seems to be\(^23\) that he or she has earned no compensation. This is in accord with the traditional rule applicable to contracts in general.\(^24\) Where the lawyer is disbarred prior to completion of the retainer, some cases hold that the disbarment is the equivalent of a material breach, and the lawyer can recover nothing.\(^25\) Others permit quantum meruit recovery for services rendered prior to disbarment, at least where the misconduct was unrelated to the particular matter for which recovery is sought.\(^26\) These pro-lawyer cases differ from the general law of contracts. In the general law of contracts, impossibility of performance can be the basis for an excuse from performance and for recovery in quantum meruit for part performance. Such an excuse and such recovery are, however, not available where the event making performance impossible is the product of contributory fault.\(^27\) Thus, if

\(^{22}\) Restatement (Second) of Agency § 469 (1957); see also id. § 456(b) (prohibiting compensation upon agent's willful and deliberate breach).

\(^{23}\) The word "seems" needs explanation. Much of the language of the courts, influenced more by disciplinary rules and the literature about these rules than by the law of contracts, is couched in terms of "just cause" rather than of "breach." See Restatement (Third) of the Law Governing Lawyers reporter's notes, at 759.

\(^{24}\) New York generally holds to the traditional view that a party who materially breaches a contract is not entitled to recovery except where provided by statute. The leading case is Lawrence v. Miller, 86 N.Y. 131 (1881). See Collar City Partnership v. Redemption Church of Christ of the Apostolic Faith, Inc., 651 N.Y.S.2d 729, 730 (App. Div. 1997) (noting that Lawrence v. Miller is still the law). Shockingly, this traditional view does not apply to lawyers who willfully breach their fiduciary duties. As stated in In re Rosenman & Colin, 850 F.2d 57, 63 (2d Cir. 1988): "Where a retainer agreement is unenforceable, the attorney is entitled under New York law to collect the reasonable value of his services, notwithstanding that it was the attorney's misconduct that precluded liability under the written contract." For extreme application of this pro-lawyer exception, see Mar Oil, S.A. v. Morrissey, 982 F.2d 830, 840 (2d Cir. 1993).

\(^{25}\) See Fletcher v. Krise, 120 F.2d 809, 810 (D.C. Cir. 1941); George L. Blum, Annotation, Attorney's Right to Compensation as Affected by Disbarment or Suspension Before Complete Performance, 59 A.L.R.5th 693, § 3 (1998).

\(^{26}\) See In re Mekler, 672 A.2d 23, 24 (Del. 1995); Stein v. Shaw, 79 A.2d 310, 311 (N.J. 1951) (stating that a contrary result would unjustly enrich the client); Blum, supra note 25, § 4.

\(^{27}\) See Calamari & Perillo, supra note 6, § 13.15; Farnsworth, supra note 17, § 9.6.
a dealer in grains is de-licensed because of fraudulent conduct, it is not excused from its contractual obligations to purchase, despite the legal impossibility to purchase.\textsuperscript{28}

We have seen that the client can generally discharge the attorney at-will.\textsuperscript{29} Can the lawyer sever the relationship on the same basis? According to the Restatement, the lawyer can withdraw without cause if there would be no "material adverse effect on the interests of the client."\textsuperscript{30} This is, of course, a startling departure from the general law of contracts. The client's power to dismiss has been explained.\textsuperscript{31} No rationale is given in the Restatement commentary for the granting of a similar power to the attorney, other than the fact that such a breach by the attorney is merely "nominal."\textsuperscript{32} But whether the breach results in merely nominal damages may not be ascertained until well after the withdrawal. My own reading of the law is that if a lawyer withdraws without cause, the lawyer is entitled to no compensation,\textsuperscript{33} may be liable for malpractice or breach of contract,\textsuperscript{34} and be subject to discipline.\textsuperscript{35} If the damages are merely nominal, liability for breach and discipline are unlikely to be pursued, but the inability to claim compensation has real consequences for the withdrawing lawyer.

B. Nonrefundable Retainers

Because the lawyer has no expectancy interest in the retainers contract, it follows that a contract based on payment in advance for serv-

\textsuperscript{29} See supra text accompanying note 10.
\textsuperscript{30} Restatement (Third) of the Law Governing Lawyers § 44(3)(a) (Proposed Final Draft No. 1, 1996). If the case is before a tribunal, the attorney must comply with rules requiring notice to and permission from the tribunal. See id. § 44(4).
\textsuperscript{31} See supra notes 9-11.
\textsuperscript{32} Restatement (Third) of the Law Governing Lawyers § 44 cmt. h(ii). The Reporter's Note to comment h(ii), id., indicates that the provision is consistent with Model Rules of Professional Conduct Rule 1.16(b).
\textsuperscript{33} See Augustson v. Linea Aerea Nacional-Chile, S.A., 76 F.3d 658, 664-65 (5th Cir. 1996) (holding that a firm that withdrew with court permission "for just cause"—refusal of a settlement offer—could not recover as it did not have "just cause" for purposes of compensation); Faro v. Romani, 641 So. 2d 69 (Fla. 1994) (denying recovery to lawyer who withdrew because client turned down a settlement offer); Dinter v. Sears, Roebuck & Co., 651 A.2d 1033 (N.J. Super. Ct. App. Div. 1995) (holding that because the lawyer did not appeal, he was not entitled to quantum meruit); Shaw v. Manufacturer's Hanover Trust Co., 499 N.E.2d 864 (N.Y. 1986) (holding that a lawyer who did not appeal was not entitled to file a lien against client for compensation based on quantum meruit); George L. Blum, Annotation, Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case, 53 A.L.R.5th 287 (1997).
\textsuperscript{34} See Alan Scott Rau, Resolving Disputes Over Attorneys' Fees: The Role of ADR, 46 S.M.U. L. Rev. 2005, 2015 (1993) ("Clients also sue lawyers, and whether the suit is denominated as one for malpractice, fraud, or breach of contract, a substantial number of such cases turn on claims by the client that the attorney's fee is unwarranted." (footnote omitted)).
\textsuperscript{35} See Walker v. State Bar, 783 P.2d 184 (Cal. 1989) (disbarring a lawyer who abandoned his practice and pending files).
ices is problematic where the services turn out to be less than anticipated or totally unnecessary.\textsuperscript{36} Courts have “traditional authority . . . to supervise the charging of fees for legal services under the courts’ inherent and statutory power to regulate the practice of law.”\textsuperscript{37} In exercising that authority, some courts have banned the use of nonrefundable retainers because such a retainer acts as a brake on the ability of the client to change counsel.\textsuperscript{38} On the other hand, a general retainer—an amount paid or promised in exchange for the lawyer’s agreement to perform legal services during an agreed period of time—is binding in some jurisdictions.\textsuperscript{39} The general retainer, sometimes called an engagement retainer, is a sort of an option to call upon the lawyer’s time.\textsuperscript{40} It can be argued, however, that even this kind of retainer imposes costs on a client who would like to change counsel, and thereby “obstruct[s] client freedom to discharge lawyers.”\textsuperscript{41}

Although general retainers are permitted and enforced by many jurisdictions,\textsuperscript{42} a trend is building to rein them in. In a Georgia case, the client entered into a seven-year general retainer contract.\textsuperscript{43} The agreement provided that it would automatically renew for a five-year term. If the client exercised a termination power prior to the automatic renewal, the client was to pay liquidated damages. The court invalidated the contract as an impermissible evisceration of the “cli-

\textsuperscript{36} See generally Brickman & Cunningham, supra note 11 (arguing that most nonrefundable retainers are unethical and illegal).


\textsuperscript{38} See Wong v. Michael Kennedy, P.C., 853 F. Supp. 73, 80-82 (E.D.N.Y. 1994); In re Cooperman, 633 N.E.2d 1069, 1071 (N.Y. 1994); Wright v. Arnold, 877 P.2d 616, 618 (Okla. Ct. App. 1994); see also Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. Rev. 1 (1993) (proposing a rule which specifies that non-refundable retainers are impermissible as a matter of ethics); Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers: A Response to Critics of the Absolute Ban, 64 U. Cin. L. Rev. 11, 11 (1995) (“In the short span of time since the New York Court of Appeals banned nonrefundable retainers, numerous other courts have joined in prohibiting this widespread practice of lawyers charging a fee for services in advance and keeping the fee even if the services are not performed.” (footnotes omitted)). For a defense of the nonrefundable retainer in one context, see David C. Broson & Robert H. Mnookin, Scaling the Stonewall: Retaining Lawyers to Bolster Credibility, 1 Harv. Negotiation L. Rev. 65, 71-74 (1996).


\textsuperscript{40} The retainer fee is for the option. Thus, the funds immediately become the property of the lawyer. At times, the retainer is a hybrid by which the retainer fee acts as an advance payment for the lawyer’s time and the lawyer draws against the fund. This is the client’s money and belongs in a trust account. An attempt to make it nonrefundable is invalid. See In re Gray’s Run Techs., Inc., 217 B.R. 48, 57 (M.D. Pa. 1997).

\textsuperscript{41} Brickman & Cunningham, supra note 11, at 153 (footnote omitted).

\textsuperscript{42} The Restatement seems to recognize their enforceability. See Restatement (Third) of the Law Governing Lawyers § 46 cmts. c-e (Proposed Final Draft No. 1, 1996) (discussing validity of "engagement retainer").

\textsuperscript{43} See AFLAC, Inc. v. Williams, 444 S.E.2d 314 (Ga. 1994).
ent's absolute right to terminate.”44 Louisiana also recognizes a client's unfettered right to terminate a general retainer.45 A New Jersey case struck down a yearly retainer agreement that annually renewed unless six months notice of termination was given but, in calculating recovery, ruled that one month's notice of termination would have been reasonable.46 This represents a more nuanced judgment than an all-or-nothing approach. The court noted that "it would be counterproductive to preclude clients from bargaining for a reduction in fees in exchange for a reasonable limitation on the right to discharge a lawyer."47

Professors Brickman and Cunningham have argued that the rule against nonrefundable retainers is consistent with general contract law.48 Their thesis is that such retainers violate standard contract rules barring penalty clauses and also run afoul of the law's abhorrence of forfeitures. The accuracy of this argument depends on which state's common law of contracts is applicable. The classical view is that a party in default cannot get restitution for services rendered or money paid. Thus, under the classical view of contract law, a nonrefundable retainer would be treated neither as a penalty nor as a forfeiture. In contrast, the modern view allows quantum meruit recovery to a breaching party to the extent that this sum exceeds the aggrieved party's damages.49 The conflict among jurisdictions is so pronounced that even Palmer on Restitution is unable to sort out whether the traditional view or the modern view prevails.50 Sometimes, both views coexist in the same jurisdiction—one view for construction contracts standing beside the opposite view for employment contracts.51

Whether or not the rule against nonrefundable retainers is consistent with the general common law of the jurisdiction, the prohibition is a sound one. In the great majority of cases involving the formation of the fiduciary relationship between the lawyer and client, only the lawyer can foresee the time and effort necessary to bring the matter to a conclusion. If, because of the lawyer's innocent or negligent failure to foresee these facts with any degree of accuracy, far less time and effort are needed, there is no rational reason to place the risk of the lawyer's miscalculation on the client. Similarly, if the client wishes to

44. Id. at 317. As an alternative ground, the court held that the liquidated damages clause was an invalid penalty.
47. Id. at 1198.
48. See Brickman & Cunningham, supra note 11, at 176-89.
49. See Calamari & Perillo, supra note 6, § 11.22; Farnsworth, supra note 17, § 8.14.
51. See id. §§ 5.13-.14.
withdraw from the retainer, recovery by the client of the unearned portion of the fee would be consistent with the law's willingness to allow clients the freedom to change representation.

C. Fee Regulation

1. The Fee Agreement

Disciplinary rules require the lawyer to inform the client of the basis or rate of the fee that will be charged.\(^5\) Putting disciplinary consequences aside, the lawyer who fails to comply with this requirement will be relegated to compensation on the basis of *quantum meruit*.\(^5\) There are a number of different ways to measure *quantum meruit*.\(^5\) In the absence of an agreement on fees, the Restatement provides that "the lawyer is entitled to recovery only at the lower range of what otherwise would be a reasonable negotiated fee."\(^5\) The purpose of the requirement that the lawyer promptly furnish fee information is to give the client an early opportunity to decide whether to seek out another lawyer.\(^5\)

In any dispute, the "tribunal should construe an agreement between client and lawyer as a reasonable person in the circumstances of the client would have construed it."\(^5\) Moreover, the lawyer has the burden of persuasion on all issues concerning the propriety and reasonableness of the fee.\(^5\) The reasons for this are multiple.\(^5\) In almost every case, it is the lawyer who will draft or articulate the contract.\(^5\) The lawyer is undertaking to become a fiduciary and the lawyer-client contract charts the course of the relationship.\(^5\) Also, the lawyer

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\(^5\) See Model Rules of Professional Conduct Rule 1.5(b) (1994) (providing an exception for a former client who understands the basis or rate); Restatement (Third) of the Law Governing Lawyers § 50(b) (Proposed Final Draft No. 1, 1996); cf. Model Code of Professional Responsibility EC 2-10 (1980) (stating that a lawyer should ensure that the information in any advertising is disseminated clearly and objectively). But see Lawrence A. Dubin, *Client Beware: The Need for a Mandatory Written Fee Agreement Rule*, 51 Okla. L. Rev. 93 (1998) (urging promulgation of a rule requiring written fee agreements).

\(^5\) See Restatement (Third) of the Law Governing Lawyers § 50 cmt. b; see also *In re Santemma*, 660 N.Y.S.2d 451, 452 (App. Div. 1997) (holding that an attorney who fails to carry the burden of proof as to the existence of a contingent fee agreement can only recover on a *quantum meruit* basis); Neals v. Cox, 658 N.Y.S.2d 1007, 1007 (App. Div. 1997) (holding that a lawyer, who did not prove the number of hours she worked on a case, is not entitled to compensation).

\(^5\) See *infra* text accompanying notes 117-18.

\(^5\) Restatement (Third) of the Law Governing Lawyers § 51 cmt. b(ii).

\(^5\) See id. § 50 cmt. b.

\(^5\) Id. § 29A(2).

\(^5\) See id. § 54.

\(^5\) See id. § 29A cmt. h.

\(^5\) See id.

\(^5\) See id.
should be more able than the client to foresee and clarify the risks of
the representation.\(^{62}\)

The Restatement also deals with lawyer-client fee agreements that
are made or modified after the representation is underway.\(^{63}\) Such
contracts deserve stricter scrutiny because the client's bargaining
power at this stage of the representation is often weak indeed.\(^{64}\) The
lawyer's position at this stage of the representation may well be close
to that of a monopolist. A change of lawyers is nearly unthinkable at
certain stages of a case. Nonetheless, there may be a genuine benefit
to the client in, say, a change from an hourly basis to a contingent fee
where the case has become more complex than either party had
anticipated.\(^{65}\)

Typically, however, the lawyer may be seeking to modify the fee
upward offering neither any concomitant benefit to the client nor a
shift of the risks previously assumed. The pre-existing duty rule of
contract law, recognized by most jurisdictions,\(^{66}\) would hold such a
modification ineffective. The *Restatement (Second) of the Law of
Contracts*, however, espouses a minority view that a modification is
enforceable without additional consideration due to an unanticipated
change of circumstances making a contractual task more onerous or
more valuable, and the modification is fair and equitable.\(^{67}\) Taking
the *Restatement of the Law of Contracts* as its guide, the *Restatement
of the Law Governing Lawyers* regards modifications as binding, but
requires that the content of the modification, and the circumstances
under which it was made, be fair and reasonable to the client.\(^{68}\) Inasmuch
as another provision of the Restatement requires fee agree-
ments to be fair and reasonable, the rule as to modifications must
mean that the change in contract terms must have a fair and reason-
able basis judged in the light of changed circumstances.\(^{69}\)

2. Excessive Fees

As a corollary to the principle of freedom of contract, a general rule
of contract law is that the courts will not inquire into the adequacy of
the consideration.\(^{70}\) The parties make their own bargains and the
courts will enforce them unless the agreement is tainted by fraud or

\(^{62}\) See id.
\(^{63}\) See id. § 29A cmt. e.
\(^{64}\) See id.
\(^{65}\) See id. § 29A illus. 2.
\(^{67}\) Restatement (Second) of Contracts § 89(a) (1981). This section is referenced
in Restatement (Third) of the Law Governing Lawyers § 29A cmt. e.
\(^{68}\) Restatement (Third) of the Law Governing Lawyers § 29A cmt. h.
\(^{69}\) See id.
\(^{70}\) See Calamari & Perillo, *supra* note 6, § 4.4; Farnsworth, *supra* note 17, § 2.11.
the like,\textsuperscript{71} or the imbalance is so profound as to be declared unconscionable.\textsuperscript{72} However, lawyers' contracts are different. "Courts have a stake in attorney's fees contracts; the fairness of the terms reflects directly on the court and its bar."\textsuperscript{73} The Model Rules of Professional Conduct provide that "[a] lawyer's fee shall be reasonable."\textsuperscript{74} While this and its predecessor are disciplinary rules, courts have generally regarded them also as rules of contract law.\textsuperscript{75} An almost automatic review of the excessiveness of fees takes place where the fee is charged to the client's adversary. Such charges are authorized under many contracts, especially leases and loan agreements,\textsuperscript{76} and under a number of statutes.\textsuperscript{77}

Applying the Model Code's disciplinary rule as a rule of contract law, the Tennessee Supreme Court struck down a fee agreement that provided for a $2500 retainer and a one-third contingency fee to secure a widower's rights in his deceased wife's estate.\textsuperscript{78} The probate court had refused to award the contingency fee and, instead, had granted a quantum meruit recovery of $12,500.\textsuperscript{79} The probate proceeding had not been very complicated and no novel issues of law were involved.\textsuperscript{80} The Supreme Court agreed that the fee was excessive, but held that the lawyer should receive no compensation, because such recoveries "would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of quantum meruit is there in case of a subsequent fall."\textsuperscript{81}

\textsuperscript{71} See Calamari & Perillo, supra note 6, § 9; Farnsworth, supra note 17, §§ 4.9–20.

\textsuperscript{72} See Calamari & Perillo, supra note 6, §§ 9.37–40; Farnsworth, supra note 17, § 4.28.

\textsuperscript{73} Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982).

\textsuperscript{74} Model Rules of Professional Conduct Rule 1.5(a) (1994); see Model Code of Professional Responsibility DR 2-106(B) (1980); Restatement (Third) of the Law Governing Lawyers § 46.


\textsuperscript{76} See, e.g., John E. Theuman, Annotation, Excessiveness or Adequacy of Attorneys' Fees in Matters Involving Real Estate—Modern Cases, 10 A.L.R.5th 448, § 4(c) (1993) (citing many similar cases).

\textsuperscript{77} See Jane Massey Draper, Annotation, Excessiveness or Adequacy of Attorneys' Fees in Domestic Relations Cases, 17 A.L.R.5th 366 (1994).

\textsuperscript{78} See White v. McBride, 937 S.W.2d 796, 797, 803 (Tenn. 1996). But see Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir. 1979) (holding that a $1,000,000 fee was not excessive).

\textsuperscript{79} White, 937 S.W.2d at 799.

\textsuperscript{80} Id. at 797-800.

\textsuperscript{81} Id. at 803.
As one judge has noted, fee disputes require particularly delicate handling, "because of the public's concern that judges might sympathize with their colleagues at the bar." On the other hand, he continued, the practitioners may be concerned "that judges are unfamiliar with the economic realities of modern law practice."

To minimize the need for review of individual cases, some jurisdictions have promulgated definite and specific rules for particular kinds of cases (i.e., contingent fees, estate administration, and matrimonial matters). Some states set maximum contingency fees usually based on a sliding scale. California and New York, among others, regulate contingency fees in malpractice actions against health care providers by legislation setting a sliding scale of maximum fees dependent upon the amount recovered. Arizona and Iowa require court review of the reasonableness of fees in medical malpractice cases. The above is just a sampling of fee regulation by legislation or court rule.

The disciplinary rule can be invoked in a disciplinary proceeding. In Arizona, a lawyer took a tort case on a one-third contingency fee basis. The liability of the intoxicated driver was clear; the client's damages were severe. The defendant's insurance carriers quickly settled for $150,000, the full amount of coverage. The lawyer did not have to do much work. Because the plaintiff's injuries were job-re-

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87. On a variety of grounds, such limits on medical malpractice fees have been found unconstitutional by some courts. See Wanda Ellen Wakefield, Annotation, Validity of Statute Establishing Contingent Fee Scale for Attorneys Representing Parties in Medical Malpractice Actions, 12 A.L.R.4th 23, 25 (1982).


89. See Iowa Code Ann. § 147.138 (West 1997).


91. Id. at 1239.

92. Id.

93. Id.
lated, 94 there was a large Workers' Compensation lien on the settlement. 95 As a result, under the retainer, the lawyer would receive $50,000, the Workers' Compensation Fund $100,000, and the client nothing. 96 Despite the lawyer's argument that the client would still receive nothing had he reduced the fee, because the reduction would inure to the benefit of the Fund, 97 the court suspended the lawyer for six months and ordered disgorgement of the excessive part of the fee. 98 Although the reduction of the fee would not have benefited the client, 99 the lawyer had violated an obligation to the system of justice. 100

Aside from disciplinary rules, "there should be recognition of the traditional authority of the courts to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law." 101 Thus, no reference was made to ethical rules where a lawyer was denied a twenty percent contingency fee for collecting on an uncontested life insurance policy by performing "services of a menial class." 102

3. Adequacy of Controls on Fee Agreements

The substantive rules of law governing retainer agreements seem stacked in favor of the client. The agreed fees must be reasonable. The lawyer is subject to duties to disclose that are not placed on the client. Burdens of persuasion in all disputes are on the lawyer. Are these protections effective, or are they more like the proverbial mirage of an oasis in the desert? Although the substantive rules seem fair enough, 103 the procedural mechanisms for the resolution of fee disputes often prevent implementation of the client-protection rules.

94. Id.
95. Id. at 1239.
96. Id. at 1240.
97. Id. at 1244.
98. Id. at 1248.
99. A sub-text is that the client could have benefitted if the lawyer had negotiated with the Fund for a reduction of its lien in exchange for a reduction in his fee, apparently a common practice in Arizona and a tactic suggested by a lawyer for the Fund. See id. at 1244-45.
100. Id. at 1244.
103. One observer thinks that the substantive rules need to be made more client friendly. See Stephen Gillers, Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers, 10 Geo. J. Legal Ethics 581 (1997) (arguing that the Restatement of the Law Governing Lawyers' rules, as they pertain to fees, itemization of bills, and the parties' roles in fee disputes, are inadequate because there are too few bright line rules).
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Typically, the client in a fee dispute will need to hire a lawyer to combat his former lawyer. The former lawyer's costs to pursue the client for the fee or to defend in a restitution action may be close to zero.\(^\text{104}\) The client's costs in legal fees alone will be considerable.\(^\text{105}\) Bar associations have created voluntary programs for the arbitration of fee disputes largely to preserve the image of the profession by "avoidance of the public airing of fee disputes."\(^\text{106}\) These programs have not been totally successful. They require the consent of both parties, and, apparently, many lawyers are reluctant to submit to the arbitral process.\(^\text{107}\) A small number of states have made arbitration mandatory for the lawyer if the client so requests.\(^\text{108}\) These rules have withstood constitutional challenges that the lawyer has been deprived of the right to trial by jury, to equal protection, to due process, to be free from involuntary servitude, and rights under the contract clause and antitrust laws.\(^\text{109}\) The basic notion is that lawyers are officers of the court and subject to court regulation. The public interest in "the maintenance of public confidence in the judicial system" justifies the slight curtailment of lawyer's rights.\(^\text{110}\)

4. Lawyer Discharge and the Contingent Fee

American courts are nearly unanimous on two points: (1) the discharge of a lawyer on special retainer is not a breach; and (2) the lawyer who is discharged without cause is entitled to quantum meruit.

\(^{104}\) The lawyer's costs will vary with the circumstances. A litigator may be able to obtain the services of another litigator on a barter basis. This is not a zero cost but its cost depends on the marginal value of the lawyer's time.

\(^{105}\) For a case involving a disputed $10,000 fee in a matrimonial action, see In re Marriage of Pitulla, 491 N.E.2d 90 (Ill. App. Ct. 1986), appeal after remand, 559 N.E.2d 819 (Ill. App. Ct. 1990), appeal after remand, 628 N.E.2d 563 (Ill. App. Ct. 1993), appeal denied, 633 N.E.2d 14 (Ill. 1994). The cost of disputing this fee must have been enormously greater than the amount in dispute. For the heavy burden on clients in fee dispute litigation, see Special Comm. on Resolution of Fee Disputes, American Bar Ass'n, The Resolution of Fee Disputes: A Report and Model By-Laws 2-4 (1974); Rau, supra note 34, at 2018.

\(^{106}\) George E. Bodle, The Arbitration of Fee Disputes Between Attorneys and Clients, 38 L.A. B. Ass'n Bull. 265, 265 (1963) (Mr. Bodle served as Chairman of Los Angeles County's Committee on Arbitration).

\(^{107}\) See Rau, supra note 34, at 2022-23.

\(^{108}\) See Cal. Bus. & Prof. Code § 6200 (West 1990); Rau, supra note 34, at 2023 n.64.

\(^{109}\) See Guralnick v. Supreme Court, 747 F. Supp. 1109, 1110 (D.N.J. 1990) (holding that a mandatory arbitration system in New Jersey is both constitutional and does not violate antitrust laws); Miller v. Purvis, 921 P.2d 610 (Alaska 1996) (finding that the absence of an appeal does not offend due process); Anderson v. Elliott, 555 A.2d 1042 (Me. 1989) (holding that bar rules mandating attorney-client arbitration to settle fee disputes did not violate attorney's constitutional right to trial); In re LiVolsi, 428 A.2d 1268 (N.J. 1981) (upholding the constitutionality of a rule establishing an attorney arbitration committee); cf. Shimko v. Lobe, No. 96APEI-1555, 1997 WL 746431, at *7-*8 (Ohio Ct. App. Nov. 25, 1997) (holding that a rule must be found reasonable before lawyer will be bound).

\(^{110}\) Guralnick, 747 F. Supp. at 1115.
recovery against the client. Consequently, a lawyer, who is discharged without cause and whose agreed compensation was to be a contingent fee, is entitled to the reasonable value of services rendered up to the point of discharge and any severable portion of the contract that has been performed.\textsuperscript{111}

This simple formulation conceals a significant amount of chaos in the decisions. Here are some of the issues: (1) whether \textit{quantum meruit} can be quantified as a sum in excess of what would be due under the terms of the retainer;\textsuperscript{112} (2) whether, when a second lawyer is retained on a contingency basis, the award of fees to two lawyers may exceed the larger of the two contingency retainers; (3) whether, if the client settles the case without the help of a second lawyer, the contingent fee retainer is enforceable; and (4) whether the discharged lawyer may obtain a judgment for \textit{quantum meruit} before the contingent fee case has been resolved.

I will not replicate the task of collecting the cases raising these issues.\textsuperscript{113} Rather, I will try to show some of the bases of the conflicts in the case law. The modern rule permitting the client to discharge a lawyer without liability, introduced by \textit{Martin v. Camp},\textsuperscript{114} was designed to implement the concept that the lawyer-client relationship was not a commercial deal. The \textit{Martin} court said the rule “is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential.”\textsuperscript{115} To implement this concept, the court held that the retainer is terminable by the client at will.\textsuperscript{116} The court held that although such termination is not a breach, the lawyer deserves compensation for the work already done on a \textit{quantum meruit} basis.\textsuperscript{117}

The chaos of the decisions applying the concept of \textit{quantum meruit} to actions brought by discharged lawyers stems in part from the general confusion engendered by the term “\textit{quantum meruit}.” Some think of the term as describing a particular cause of action. \textit{It does


\textsuperscript{112} The Restatement provides that the recovery cannot exceed the contract rate. \textit{Id.} § 52 cmt. d. \textit{But see In re Montgomery's Estate}, 6 N.E.2d 40, 41 (N.Y. 1936) (finding that the contract price is not a limitation on an attorney's amount of recovery). For a discussion of this problem in general contract law, see Calamari & Perillo, supra note 6, § 15.4.


\textsuperscript{114} 114 N.E. 46 (N.Y. 1916).

\textsuperscript{115} \textit{Id.} at 48.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}
not. It describes the proper goal for recovery—"how much is merited." The amount "merited" varies greatly with the context. To illustrate, compare two situations involving a service contract not involving a lawyer. X agrees to design software for Y for the agreed sum of $100,000. X then puts in time and materials worth $110,000 and has not yet completed the task. It is clearly a losing contract for X. Consider two remarkably different possibilities: (1) because Y has changed his mind about the project, Y repudiates, and the incomplete work is worthless to Y; and (2) because it is a losing proposition, X repudiates and quits the job, and the work done is worthless to Y.

In the first of these instances, where Y is in breach, X can sue for damages or opt for restitution where the measure of recovery is *quantum meruit*. In this fact pattern, the measure of *quantum meruit* will be $110,000, the market value of Y's services and other costs. In the second of these instances, some jurisdictions will allow a breaching party such as X to bring a quasi-contractual action where the measure of restitution is described as *quantum meruit*. Here, the measure of recovery will not be $110,000. Instead, it should, at best, be zero, the amount by which Y has been enriched.118

Thus, *quantum meruit* is a variable instrument for justice. It must be retooled for each specific context in which it is applied.119 In the context of recovery by the contingency-fee lawyer who is discharged without cause, it is important to bear in mind that the goal is "to promote public confidence in the members of an honorable profession whose relationship to their clients is personal and confidential."120 In arriving at a formula, courts should consider the following factors. First, the client is not in breach, thus no penalty should be attached to the client's decision to terminate the retainer.121 Second, no judgment in favor of the discharged lawyer should be rendered until the contingency fee case is brought to a positive judgment or settled.122 "[T]he contingent fee is the poor man's key to the courthouse door."123 To make the client pay without a successful outcome would penalize the client for having discharged the lawyer.124 Third, in no event should

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118. See Restatement (Second) of Contracts § 371 (1981). Since Y is in breach, X's counterclaim for damages should bring X an affirmative judgment.

119. See Calamari & Perillo, supra note 6, § 1.11; Farnsworth, supra note 17, § 2.20.

120. Martin, 114 N.E. at 48.


122. See Lansberry, 629 N.E.2d at 436; Restatement (Third) of the Law Governing Lawyers § 52 illus. 3 (Proposed Final Draft No. 1, 1996).


the combined fees of the discharged attorney and the successor attorney exceed the amount of the originally-agreed-upon contingency fee. A contrary rule brings the legal profession into disrepute and penalizes the client for substituting attorneys. On the other hand, if the client discharges the attorney to collect the offered settlement and freezes the attorney out from the final contingency, the attorney ought to be able to recover the promised contingent fee.\textsuperscript{125}

5. Referral Fees

Finders' fees and brokerage fees are normal phenomena of American business. Nonetheless, there are legal and ethical barriers to the payment of such fees by lawyers. It is quite clear that contracts to pay such fees to lay persons who steer clients to lawyers are illegal and void.\textsuperscript{126} This rule is also applicable to other professionals, such as physicians\textsuperscript{127} and dentists\textsuperscript{128} who are barred from paying referral fees. In this instance, lawyers are treated in the same fashion as other professionals. Lawyers are also prohibited from forming firms with non-lawyers where any part of the activities of the firms consists of the practice of law.\textsuperscript{129}

The rationale usually given for the prohibition of fee splitting with non-lawyers is that "[a] person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services."\textsuperscript{130} While this rationale has some relevance to the rule prohibiting partnerships from the client until the case is finally resolved, due to the realities of most tort litigation. The attorney's right to compensation will be protected by a charging lien. Typically, the outgoing attorney will opt for a portion of the contingency fee the newly retained attorney will be awarded. The outgoing attorney's share is fixed by agreement or by the court at the end of the case. \textit{See id. at 572.}

\textsuperscript{125} \textit{See} Restatement (Second) of Agency §§ 454, 455 (1957); Restatement (Third) of the Law Governing Lawyers § 52 cmt. c; \textit{see also} Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So. 2d 947, 951-52 (Fla. Dist. Ct. App. 1993) (permitting recovery despite lawyer's violation of disciplinary rule).

\textsuperscript{126} \textit{See} Trotter v. Nelson, 684 N.E.2d 1150, 1154 (Ind. 1997) (holding against a clerical employee who claimed a 5% share of cases she brought to her employer); Vidrine v. Abshire, 558 So. 2d 288, 292 (La. Ct. App. 1990); Plumlee v. Paddock, 832 S.W.2d 757, 759 (Tex. Ct. App. 1992) (holding that an ambulance company owner was in \textit{pari delicto} with a lawyer); Restatement (Third) of the Law Governing Lawyers § 11(3) (Proposed Final Draft No. 2, 1998). \textit{But see} Shimrak v. Garcia-Mendoza, 912 P.2d 822, 826 (Nev. 1996) (holding that a private investigator may enforce a fee-splitting agreement with an attorney; the investigator was not in \textit{pari delicto}).


\textsuperscript{128} \textit{See In re} Toffler, 598 N.Y.S.2d 445, 447-48 (Sup. Ct. 1993) (holding that a periodontist's percentage lease with dentist-landlord constitutes illegal fee splitting).

\textsuperscript{129} \textit{See} Restatement (Third) of the Law Governing Lawyers § 11(1)-(2).

\textsuperscript{130} \textit{Id.} § 11 cmt. b.; \textit{see also} Wolfram, \textit{supra} note 5, § 9.2.4 (discussing the rationale underlying restrictions on fee splitting with non-lawyers).
with non-lawyers for the practice of law, it seems wholly inadequate to explain why contracts to pay referral fees to "runners"—ambulance drivers, insurance brokers, private investigators, and the like—are forbidden. Such individuals are unlikely to have much control over the lawyer's activities. Rather, the rationale against fee splitting with non-lawyers is best expressed by the individual who played a large role in creating the prohibition. Henry S. Drinker wrote, "[t]he duty not to advertise or solicit professional employment is not strictly one owing to the public, the courts, clients, or colleagues. It is a duty to the traditions and amenities of an honorable profession . . . ."  

Referrals by one lawyer to another are treated differently. The rule is that a contract to pay an improper referral fee to a lawyer who steers a client to another lawyer is void.  

When the issue of the propriety of a referral-fee agreement arises in litigation—usually when the referring attorney seeks to enforce the agreement—most courts look to the disciplinary rules. Under DR 2-107 of the ABA Model Code of Professional Responsibility, the fee is improper if the referring lawyer performs no services, or if the fee exceeds a proportionate share of the total services.  

The later ABA Model Rules of Professional Conduct, Rule 1.5(e), preserves the criteria of proportionate service, but, as an alternative, permits any fee division agreed to by the lawyers if both lawyers accept joint responsibility. The disciplinary rules also require that the client be fully apprised of the participation of each of the lawyers involved. The Model Code also requires that the client consent to the fee decision. Some jurisdictions require that the client's consent be in writing. The Model Rule merely re-

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131. Henry S. Drinker, Legal Ethics at xii (1953). The prohibition was enacted as an amendment to the Canons of Ethics in 1928. Id. at 215 n.31.  
133. If some service is rendered by the referring lawyer, courts do not often address the question of proportionality. See A. Stanley Proner, P.C. v. Julien & Schlesinger, P.C., 520 N.Y.S.2d 771, 773 (App. Div. 1987) (holding performance of "some" work sufficient); Wilson v. Lynch & Lynch Co., 651 N.E.2d 1328, 1332 (Ohio Ct. App. 1994) ("Case law in Ohio and elsewhere supports the proposition that because of its nature, a contingent fee arrangement need not have the same proportionate relationship to the work actually performed as would an hourly fee."); see also Belli v. Shaw, 657 P.2d 315, 319 (Wash. 1983) (holding that a disproportionate division renders the agreement against public policy). When the issue is addressed, it is generally held that "[a]s long as the agreement to divide the fee was based on a good faith division of services and responsibility at the time of contracting, the fee agreement should be binding." Rutenbeck v. Grossenbach, 867 P.2d 36, 37 (Colo. Ct. App. 1993).  
quires client acquiescence. Failure to comply with the entirety of the applicable rule, including writing requirements, may render the referral agreement void and subject the lawyers to disciplinary sanctions. Usually the client is not involved in referral fee litigation, but an occasional client has sued and received a judgment for restitution.

The lawyer of record who retains trial counsel in consideration of a portion of the contingency fee bears the burden of complying with client disclosure and consent requirements and, therefore, cannot refuse payment on the ground of his or her own violation of the disciplinary rules. Similarly, if the lawyer to whom the case is referred had promised to comply with the rule on behalf of both lawyers, that lawyer will be estopped from arguing that the referral agreement is illegal and void.

Exempt from the fee-splitting prohibition is the division of a fee with partners of the firm. Because of this exemption, some commentators argue that "it is hypocritical to ban fee-splitting outside of firms." The soundness of restrictions on referral fees can also be questioned from the perspective of the client. The referring lawyer is almost certainly making the referral to someone more competent and experienced in the subject matter of the case. Strict enforcement of the

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135. See Kaplan v. Pavalon & Gifford, 12 F.3d 87, 92 (7th Cir. 1993); Post v. Bregman, 707 A.2d 806, 817-19 (Md. 1998); Christensen v. Eggen, 577 N.W.2d 221, 224-25 (Minn. 1998) (en banc) (finding a fee-splitting agreement void where a client did not consent in writing and was not informed of the share each lawyer was to receive); Lemond v. Jamail, 763 S.W.2d 910, 914 (Tex. Ct. App. 1988). But see Freeman v. Mayer, 95 F.3d 569, 575 (7th Cir. 1996) (holding that despite the absence of a writing, substantial compliance renders a fee-splitting agreement enforceable); Davies v. Grauer, 684 N.E.2d 924, 929 (Ill. App. Ct. 1997) (finding substantial compliance).


140. Both rules cited in supra note 136 state this exception.


142. See the eloquent concurrence of Justice Neely in Watson v. Pietranton, 364 S.E.2d 812, 816-18 (W. Va. 1987). It is of course possible that a busy lawyer may refer a relatively minor case to a less experienced lawyer. The reported cases do not present this scenario.
prohibition would induce lawyers to handle matters in which they lack expertise.\textsuperscript{143} The ostensible rationale for the rule limiting fee splitting is to protect the client against an unfair increase in legal fees to benefit someone who has done little or no work.\textsuperscript{144} While economic theory might lead to the conclusion that referral fees add to the client’s costs, the data make it reasonably clear that the client does not pay more in the typical case referred to a tort or products’ liability specialist.\textsuperscript{145} The specialist absorbs the cost of the forwarding fee because the referring lawyer has already winnowed the wheat from the chaff,\textsuperscript{146} reducing the specialist’s costs.\textsuperscript{147} At any rate, both the Model Code and the Model Rules condition the permissibility of a fee division on the reasonableness of the total fee.\textsuperscript{148}

A related rationale is that restrictions on referral fees are designed to deter referrals to the specialist who pays the highest referral fee rather than to the most qualified specialist.\textsuperscript{149} It is difficult to understand how this rationale bolsters the restrictions on referrals. None of the rules require that the client be told of competing bids for the client’s case.\textsuperscript{150}

An additional rationale that has been proffered is that the addition of another lawyer widens the circle of individuals privy to the client’s

\begin{footnotesize}
\begin{enumerate}
\item See Rhode, \textit{supra} note 141, at 569; Zeligson, \textit{supra} note 135, at 813-14 (citing, among other sources, New York State Bar Association Summary Report of Special Committee to Consider Adoption of ABA Model Rules of Professional Conduct 6 cmt. 4 (Aug. 7, 1985)). While the statement in the text appears intuitively correct, there is tension between the statement and “professional rules that require a lawyer who is too busy or unskilled to handle a case not to accept it in the first place.” Wolfram, \textit{supra} note 5, § 9.2.4, at 510-11 n.98.
\item Writing in 1953, Drinker takes notice of a longstanding practice to pay a referral fee of one-third of the final fee, and that this practice had been banned by the Canons of Ethics. Drinker, \textit{supra} note 131, at 186. Canon 34 provided: “[n]o division of fees for legal services is proper except with another lawyer, based upon a division of service or responsibility.” \textit{Id.} at 321. Three decades later, the ABA Journal reported that “[a] third of a third” is a common formula in [contingent fee] personal injury cases. \textit{Referral Fees: Everybody Does It, but Is It OK?}, A.B.A. J., Feb. 1985, at 40, 40. The ABA Journal also reported that most lawyers thought referral fees were appropriate. \textit{See Lauren Rubenstein Reskin, Forwarding Fees Are Fine with Most Lawyers, A.B.A. J.}, Feb. 1985, at 48, 48.
\item By way of analogy, a passenger pays no more for an airline seat bought from a travel agent than the same seat sold by the airline. The travel agent relieves the airline from much of the time-consuming process of discussing variations in routes, schedules, rates, and the like.
\item See Model Code of Professional Responsibility DR 2-107(3) (1980); Model Rules of Professional Conduct Rule 1.5(e)(3) (1994).
\item See Restatement (Third) of the Law Governing Lawyers § 59 cmt. b. 150. “It is not a condition of validity that the client be informed of the terms of the division.” \textit{Id.} § 59 cmt. e.
\end{enumerate}
\end{footnotesize}
Yet, the client remains free under the disciplinary rules, and under common-law doctrines concerning the delegation of duties, to object to the farming out of a case.\textsuperscript{152} It should also be recalled that the client is free to discharge the lawyer, thus avoiding the sharing of confidences.\textsuperscript{153}

A totally different rationale for restrictions on referrals was given by Henry S. Drinker, an earlier-day ethics czar: "The lawyer is not supposed to get paid for anything but the legal services that he renders, and selling a man a client is not a legal service. I think it beneath the dignity of the profession to take money for something that is not a legal service."\textsuperscript{154} A reading of the cases and the literature leads to the suspicion that Drinker's rationale—the preservation of lawyer dignity and decorum—correctly describes the origin, and remains the basis of, the restrictions surrounding lawyer referrals. The Restatement, after decrying the danger of overcharging and voicing the fear that cases will be farmed out to the highest bidders as rationales for "[t]he traditional prohibition of fee-splitting," adds: "[b]eyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients."\textsuperscript{155} In so adding, it reveals the real basis for restrictions on referrals.

These restrictions are adjuncts to now defunct rules expressing hostility to advertising and to other means of marketing the services of a lawyer. They reflect what might be called the "mystique" of professionalism, rather than serve a rational purpose.\textsuperscript{156} The evolution of the restrictions from the Model Code's requirement of work proportionate to the division of fees, to the Model Rule's allowance of any agreed fee splitting if the lawyers accept joint responsibility, is a step toward recognizing that referrals are useful business-like arrangements for matching the client with a lawyer better able to serve the client's needs.

6. Referral Fees—A Critique of Contemporary Doctrine

As discussed immediately above, several rationales have been offered for restrictions on referral fees. Generally, the focus is on the protection of the client, although the likely fundamental basis is the protection of the dignity and decorum of the profession. Ironically, the case law that implements the disciplinary codes in contractual dis-

\begin{footnotes}
\footnotetext{152}{The common law rules are discussed \textit{infra} in the text accompanying notes 160-62.}
\footnotetext{153}{See supra Part II.C.4.}
\footnotetext{154}{Panel Discussion, The Determination of Professional Fees from the Ethical Viewpoint—A Panel Discussion, 7 U. Fla. L. Rev. 433, 434 (1954).}
\footnotetext{155}{Restatement (Third) of the Law Governing Lawyers § 59 cmt. b.}
\footnotetext{156}{This observation agrees with many of Judge Posner's comments in Richard A. Posner, Professionalisms, 40 Ariz. L. Rev. 1 (1998).}
\end{footnotes}
putute fails to protect either clients or the dignity of the profession. Far from it! If the relevant disciplinary code is found to have been violated, and if, as most courts have done, the disciplinary code is found to be a binding basis for decision in a contract dispute between lawyers, either as a rule of law, or as a declaration of public policy, the party benefiting is not the client. Rather, the benefit flows to one of the two lawyers who jointly violated the disciplinary code, usually the lawyer to whom the case was forwarded. Thus, the person benefited is the paragon of virtue who has not only violated the disciplinary code, but has also reneged on an agreement with the forwarding lawyer. This is a scenario worthy of the creator of Alice’s Adventures in Wonderland and Through the Looking Glass. How has the client been protected or in any way benefited? Has the dignity of the profession been rescued from the mud or has it been further sullied when the reneging lawyer is permitted to default?

Assume for the moment that no disciplinary rule governed referrals, and that the general law of contracts applied to a referral by one lawyer to another. Assume also that the lawyer retained by the client unsuccessfully attempts to obtain a reasonable settlement, determines that further proceedings should be referred to a specialist, and makes such a referral without consulting the client. What would be the rights of the three parties involved—the client, the forwarding lawyer, and the lawyer to whom the case has been referred? To start, the duty of representing a client is a non-delegable duty. If the client has contracted for the lawyer’s services but has not consented to a referral, the client owes nothing to the lawyer he has retained and nothing to the lawyer to whom the case has been referred. The first lawyer has not earned anything by performance and has materially breached the retainer by farming out the case—delegating non-delegable duties. The second lawyer proceeded without authority, is not in privity, and earned nothing under the law of contract or quasi-contract. Typically, however, the client will be asked to consent to the referral and will consent. If the express consent of the client is not sought, the client will likely acquiesce to the referral by cooperating with the second lawyer. Such acquiescence constitutes consent and waives the non-delegability of the first lawyer’s duties.

The client’s situation under common law, then, is exactly the same as it is under the Model Rules. The Model Rule on fee divisions un-

158. Lewis Carroll, Through the Looking Glass and What Alice Found There (1872).
159. “It is a principle universally recognized in the courts that a contract for legal services is personal in its nature, and consequently unassignable.” Corson v. Lewis, 109 N.W. 735, 736 (Neb. 1906).
necessarily adds some redundant criteria that already exist under other Model Rules and under the law of contracts. Rule 1.5(e) states that the total fee must not be excessive. This adds nothing as it is already an implicit term of the lawyer-client contract and is explicit in Model Rule 1.5(a) and DR 2-106. Rule 1.5(e) also states that the forwarding lawyer must do a proportionate amount of the work or accept joint responsibility. This adds nothing to common law requirements. When a lawyer assigns a retainer contract to another and delegates all of his or her duties to another, such delegation does not divest the delegant of his or her duties. It is basic contract law that no obligor can divest obligations by transferring them to another. The assumption of duties by the second lawyer creates new rights for the client. Joint responsibility exists as a matter of law.

The situation is different if the referring lawyer does not enter into a retainer contract with the client, but merely directs the prospective client to go to a specific other lawyer, and makes an arrangement for the division of fees with the other lawyer, or has a prior arrangement. In this instance, the referring lawyer has no contractual responsibility to the client. Under the Model Rules, the referring lawyer would not be entitled to a portion of the fee unless he or she does further work, or the retainer with the lawyer to whom the case has been forwarded includes a clause providing for the joint responsibility of the forwarding lawyer.

Naturally, lawyers experienced in referrals will routinely provide for joint responsibility either in a retainer agreement with the lawyer the client initially contacts, or in the retainer agreement with the lawyer to whom the client has been referred. Consequently, the Model Rules merely targets the lawyer who on rare occasion sends a prospective client to another lawyer, and the latter does not protect the forwarding lawyer with an appropriate retainer clause. In addition, to activate the rule in contract litigation between the lawyers, the lawyer to whom the client has been referred must default on the agreement to divide the fee. Such situations are likely to be rare.

If the recovery of the forwarding fee is denied, justice would dictate that the defaulting lawyer act as a constructive trustee for the client in holding the amount of the agreed forwarding fee. The requirements for client consent and joint responsibility are ostensibly for the benefit of the client. The suggestion made here would genuinely benefit the client. Our system of common law and equity, however, is reluctant to award a judgment to a person who has not actively sought it. Nonetheless, an exception could be made by virtue of the power of the courts to regulate the profession.

162. See supra notes 70-75 and accompanying text.
163. See Calamari & Perillo, supra note 6, § 18.25.
164. See id. § 18.26.
D. Retaining and Charging Liens

Lawyers are endowed with remedial tools for the collection of fees that are not available to other professionals. In the eighteenth century, the common law courts empowered lawyers to assert retaining liens on their clients' papers and charging liens on their clients' judgments or amounts received in settlement. The retaining lien consists of the lawyer's privilege to retain, with certain exceptions, the papers, documents, and other personal property of the client which have come into the lawyer's possession in his or her professional capacity. The lien continues until the lawyer's fee and disbursements have been paid, or the client posts sufficient security assure payment. The power of retention is not limited to the lawyer's work product; nor is it limited to papers enhanced in value by the lawyer's efforts. The lien is discharged if the lawyer is suspended or disbarred, withdraws without cause, is discharged for cause, or commits misconduct in the case.

Any power to assert a lien is capable of abuse. While a lien may be a just and legitimate instrument in aid of collection of fees that are due, what if the lawyer is asserting a lien for a claim of an outrageously excessive fee? In one case, a lawyer, who demanded an exor-

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Where the lawyer who was retained on a contingent fee basis is discharged without cause, the court may direct that the retaining lien be discharged and the papers turned over to substituted counsel. In replacement, outgoing counsel will be given a charging lien on any recovery. See Braider v. 194 Riverside Owners Corp., 654 N.Y.S.2d 755, 756 (App. Div. 1997).

168. Factors and bankers have retaining liens similar to those of lawyers. See Restatement (Second) of Agency § 464(b) (1958). Other agents have retaining liens limited to those items that were connected to the principal's debt to the agent. See id. § 464(a).

169. If a lawyer withdraws without good cause or is found to have committed professional misconduct in connection with the case, the retaining lien is forfeited. See People ex rel. MacFarlane v. Harthun, 581 P.2d 716, 718 (Colo. 1978) (en banc); In re Kaufman, 567 P.2d 957, 960 (Neve. 1977); Burnett v. State, 642 S.W.2d 765, 769 n.10 (Tex. Crim. App. 1982) (en banc).

bitant fee and refused to turn over papers that were needed for the consummation of a corporate takeover, was found guilty of duress; a fee-settlement agreement coerced by the assertion of the retaining lien was set aside.171

Where the client owes no fee, the assertion of a retaining lien is unethical and the lawyer is subject to disciplinary action.172 Similarly, the assertion of a lien coupled with a demand for an excessive fee is a disciplinary offense.173 Such results are predictable. More interesting, however, are intimations that the assertion of a lien that is justified under law may be unethical.174 There are intimations,175 yes, but little in the nature of holdings.176

Where the liberty interests of the client are at stake, the court may order the delivery of the liened property to the client or the client's new lawyer even if the lawyer's fee has not been paid,177 but where the documents that the lawyer holds are subpoenaed for use in a civil suit, the court will not discharge the lien unless the fee is paid or adequate security for payment is posted.178

The Restatement of the Law Governing Lawyers takes a radical position on retaining liens—there are none—except where provided by statute or rule of court.179 It recognizes that it has adopted a minority

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173. See People v. Radinsky, 512 P.2d 627, 628 (Colo. 1973) (en banc) (disbaring a lawyer for excessive fee demands); see also In re Gemmer, 566 N.E.2d 528, 533 (Ind. 1991) (applying a disciplinary penalty for abuse of lien).
176. See Academy of Cal. Optometrists, Inc. v. Superior Court, 124 Cal. Rptr. 668, 670-72 (Ct. App. 1975) (supporting the proposition while also holding that California does not recognize a retaining lien).
178. Although the courts in the cited cases ordered delivery of the papers or other property, the courts stated that surrender pursuant to such an order does not dissolve the lien. Presumably this means that at a later point the liened property must be returned to the lawyer. For a practical consequence of this rule, see Brauer v. Hotel Assocs., 192 A.2d 831 (N.J. 1963). In Brauer, the court ordered that liened documents be turned over to receiver of the insolvent client and the continuing lien gave the lawyer a preference in the insolvent's estate. Id. at 834-35.
It views the retaining lien as "in tension with the fiduciary responsibilities of lawyers," which "could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim." Despite the Restatement's condemnation of the retaining lien, in almost all jurisdictions it remains very much a weapon in the lawyer's arsenal in fee disputes with clients.

In addition to the continued availability of retaining liens, charging liens have survived in modern times. The charging lien is a security interest that the lawyer has in a judgment or settlement brought about by the lawyer's efforts. It secures the lawyer's rights to fees and reimbursement for disbursements. The lien also attaches to other funds the lawyer receives for the client in the lawyer's professional capacity. The general rule is that the lien does not secure fees owed by the client for services unrelated to the particular judgment or settlement. While some jurisdictions established this lien as a matter of common law, others have established it by legislation. The ability to assert retaining and charging liens does not bar a wrongfully discharged lawyer from bringing a plenary action for the agreed fee or for quantum meruit.

There is no barrier to the lawyer securing from the client a recordable security interest in the form of an assignment of the proceeds of litigation. Indeed, the Restatement seems to suggest that, in the absence of a statute or rule, charging liens should exist only by contract with the client. The desirability of obtaining such a consensual lien depends on state law. In case of the client's bankruptcy, the effectiveness of the lawyer's statutory or common-law lien is determined

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180. See id. § 55 cmt. b. For jurisdictions that do not recognize the retaining lien, or that recognize a variant of it, see the Reporter's Note to section 55.
181. Id. § 55 cmt. b.
182. See Restatement of Security § 62 cmt. j (1941); Restatement (Second) of Agency § 464(e) (1957); Brown, supra note 167, § 13.10.
183. See Brown, supra note 167, § 13.10. But no lien attaches to property interests in the client's possession that a judgment determines that the client is entitled to keep. See Rosenman & Colin v. Richard, 850 F.2d 57, 61 (2d Cir. 1988).
185. See Brown, supra note 167, § 13.10.
by an interplay of the Bankruptcy Code and state law. Because Article 9 of the Uniform Commercial Code excludes common law and statutory liens from its coverage, priority disputes outside of bankruptcy proceedings are dependent on the vagaries of individual state laws.

More complicated is the case where the client obtains a judgment to which the lawyer’s charging lien attaches, and the opposing party has obtained judgment against the client either on a counterclaim or as a result of a separate action. Ordinarily, the client’s judgment on the complaint and the opponent’s judgment on the counterclaim would be offset against each other. Consequently, the legal interests of the lawyer and the client’s adversary are in conflict. The question is, who has priority—the client’s lawyer or the client’s adversary.

The issue has arisen a surprising number of times. Most cases have given priority to the charging lien. The rationale is that the existence of such a lien is designed to ensure that the impecunious obtain representation. In contrast, a significant number of cases have given priority to the judgment creditor. Many of the cases, however, do not manifest any conflict in policies, but turn on local rules as to when the charging lien and judgment lien attached, whether the judgment arose under the same or a different transaction, etc.

In contrast to the ability of lawyers to assert liens, most other professionals can assert neither retaining liens nor charging liens. While accountants have ownership rights in their own worksheets, internal memoranda, and the like, and, thus, can withhold such papers from the client, they may not withhold any documents furnished by

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189. Compare 11 U.S.C. § 544 (1994) (providing that a trustee in bankruptcy may avoid a lien in certain cases), with In re Hagen, 922 F.2d 742, 745 (11th Cir. 1991) (noting that under Florida law, the lien is perfected at the time of the retainer), and In re Electronic Metal Prods., 916 F.2d 1502, 1505 (10th Cir. 1990) (noting that under Colorado law, the lien is not perfected until notice is filed with the clerk of the court), and In re Pacific Far East Line, Inc., 654 F.2d 664, 669 (9th Cir. 1981) (noting that under California law, existence of the lien depends on intention of the parties), and In re 9 Stevens Cafe, Inc., 161 B.R. 96, 97 (Bankr. S.D.N.Y. 1993) (stating that under New York law the lien takes effect from the time services were commenced).

190. U.C.C. § 9-104 (1990). But see id. § 9-310 (covering certain liens such as repairman’s lien and landlord’s liens but specifically excluding statutory liens).


193. See id. § 3.

194. See id. § 4.

195. But see supra note 168 (discussing liens held by factors, bankers, and agents).

196. See A. Petry, Annotation, Ownership of, and Literary Property in, Working Papers and Data of Accountant, 90 A.L.R.2d 784 (1963). They may be compelled to turn over such papers to a trustee in bankruptcy. See 11 U.S.C. § 542(e) (1994). On the other hand, under the majority rule, clients who have paid their fees are presumpt-
the client nor any final work product such as a tax return or audit.\textsuperscript{197} They have no lien by virtue of common law, nor has the power to assert a lien been conferred by legislation.\textsuperscript{198} A manual published for accountants states in a bolded sidebar: NE\textsuperscript{VER} WITHHOLD CLIENT RECORDS.\textsuperscript{199} The manual cites cases involving disciplinary action against accountants for attempting to withhold their work product as leverage to obtain their fees.\textsuperscript{200} As to other professions, there seem to be no cases where architects, engineers, physicians, or surveyors have attempted to assert a retaining lien or a charging lien,\textsuperscript{201} although under standard contract principles they may refuse to hand over their

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\footnote{The lack of a charging lien is perhaps explicable by the fact that rarely are members of these professions in a position to create a fund for their clients or patients. Hospitals, however, often have statutory liens on recoveries by patients against tortfeasors. See Md. Code Ann. Com. Law II art. 16 §§ 16-601 to 16-605 (Michie 1990 & Supp 1991); N.Y. Lien Law § 189 (McKinney 1993); Okla. Stat. Ann. tit. 42, § 43 (West 1990 & Supp. 1998). On given projects, engineers, architects, and surveyors may be protected by asserting mechanics' liens on real property. See Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 237 (3d ed. 1985).}
final work products if payment is not tendered.\textsuperscript{202} One real estate broker who arranged for shopping center leases was rebuffed in an attempt to obtain an equitable charging lien in the rents stemming from the leases.\textsuperscript{203}

Accountants have no charging lien on a client's tax refund or other fund that the accountant was instrumental in producing,\textsuperscript{204} but an equitable lien will be imposed if the client promises to pay the accountant's fee from the fund.\textsuperscript{205} In this respect, their rights are no greater than those of anyone who has been promised payment out of a fund.\textsuperscript{206}

\section*{III. Lawyers' Liability to Expert Witnesses, Court Reporters, and the Like}

An agent for a disclosed principal, acting within the scope of the agency, is generally not liable on contracts made with third persons. Yet, lawyers have been held liable to service providers who, when hired, were apprised that they must look to the client for payment. While the jurisdictions are divided on the question,\textsuperscript{207} the modern approach is to hold the lawyer liable to expert witnesses, court reporters, and other litigation-support providers unless the lawyer makes it clear at the time the provider is retained that the provider must look only to the client.\textsuperscript{208} If the lawyer does not make this clear, the "attorney has been derelict in... preserving a good public image of the legal profession."\textsuperscript{209} "Putting the burden on the attorney promotes public trust and confidence in the legal profession."\textsuperscript{210} The connection between public trust in the profession and this rule is that the common understanding of the service provider is that the lawyer, as the chief strate-

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  \item See Calamari & Perillo, \textit{supra} note 6, § 11.17; Farnsworth, \textit{supra} note 17, § 8.12. This is so unless the parties have agreed upon deferred compensation. See Farnsworth, \textit{supra} note 17, § 8.
  \item See VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 527-28 (N.J. 1994).
  \item See \textit{In re} Myer, 106 N.Y.S.2d 688, 693 (Sup. Ct. 1951).
  \item See \textit{In re} Estate of Hoffman, 304 A.2d 721, 725-26 (N.J. 1973) (holding that an accountant who was promised payment out of proceeds of income tax refund has an equitable lien that has priority over claims of decedent's judgment creditors and ex-wife).
  \item See Calamari & Perillo, \textit{supra} note 6, § 18.3.
  \item Copp, 782 P.2d at 1105 (quoting Washington State Bar Ass'n, Ethics Opinion 140 (1969)).
  \item Id. at 1107.
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gist and manager of the litigation, is responsible for payment.\textsuperscript{211} Of course, the lawyer finds it easier to engage services if the service provider knows that the lawyer will be responsible for payment, and with the lawyer’s charging lien it often will be relatively easy for the lawyer to recover the necessary funds. It will, however, be a serious burden to the lawyer who represents a client who does not recover a judgment or the lawyer who has been dismissed prior to final judgment.

The developing case law in this area demonstrates one instance where lawyers are burdened with a liability that is not borne by other professionals.

Another burden that the courts have begun to thrust on lawyers is the liability of members of the firm for the borrowings of one of their partners from a present or past client of the firm. This is discussed below.\textsuperscript{212}

\section*{IV. Champerty and Maintenance}

Lawyers have always needed fees to survive, but medieval society frowned on lawyers marketing their services. Indeed, the ban on lawyers’ marketing was stringently enforced by leaders of the profession until recent decades. However, illicit marketing in medieval times did not take the form of advertising.\textsuperscript{213} Rather, it was the financing of litigation that was disquieting and prohibited. Blackstone described a triad of related crimes: barratry,\textsuperscript{214} maintenance, and champerty, where the “offender,” he laments, “(as is too frequently the case) belongs to the profession of the law.”\textsuperscript{215} These offenses involved the

\textsuperscript{211} See id. at 1106. Interestingly, advertising agencies have been held liable to the media for the price of advertisements placed on behalf of their clients. The courts have based this on established custom. See Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc., 252 Cal. Rptr. 573, 579 (Ct. App. 1988); Toledo Broadcasting, Inc. v. Stockton, West & Burkhart, Inc., 572 N.E.2d 266, 268 (Ohio Hamilton County Mun. Ct. 1990).

\textsuperscript{212} See infra notes 322-31 and accompanying text.

\textsuperscript{213} Lawyers’ advertising was a violation of the Code of Professional Responsibility. However, the ban on advertising was held to be a violation of the First Amendment’s free speech clause in Bates v. State Bar, 433 U.S. 350 (1977). Later cases have broadened further the advertising rights of lawyers. See Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 472-78 (1988).


\textsuperscript{215} Id. Although these offenses are not limited to lawyers, two centuries after Blackstone, a commentator notes that the terms champerty and maintenance “have come to be applied almost exclusively to the activities of lawyers.” F.B. MacKinnon, American Bar Found., Contingent Fees for Legal Services 37 (1964). Interestingly, the Saladini case, cited below, appears to involve only lay persons. It is the most clear-cut case of champerty in recent times that I have seen.

Although lawyers may have been the major culprits in Blackstone’s time, it is likely that the first rules against maintenance were aimed at the rich and powerful. See R.D. Cox, Champerty as We Know It, 13 Memphis St. L. Rev. 139 (1983) (concentrating on champerty and real property rules); Max Radin, Maintenance by Champerty, 24 Cal.
stirring up of litigation (barratry), the financing of litigation (maintenance), and the splitting of the fruits of litigation (champerty).

This arcane chapter of the law is rarely, if ever, played out in the criminal courts. Rather, the issue usually surfaces by way of a defense of illegality to a claim for payment of a fee or for breach of contract. There is an obvious tension between the growth of free assignability of assets and the doctrine of champerty. There is also tension between the legality of contingent fees and the illegality of the barratry, maintenance, and champerty triad. The triad has become incoherent.\textsuperscript{216} Corbin squares the prohibition against champerty and the legality of the contingent fee in this language: “a bargain is not champertous if the contingent fee is not a share of the money or other thing recovered but is merely measured by a specified percentage of the value of the recovery.”\textsuperscript{217} This nicely finesses the issue, but when one recalls that the lawyer has a charging lien in the sum recovered, Corbin’s distinction becomes rather flimsy. Indeed, many jurisdictions hold that, although a lawyer cannot enforce a champertous contract, the lawyer may recover the reasonable value of his or her services in quasi-contract for services rendered under such a contract.\textsuperscript{218} The Massachusetts Supreme Judicial court abolished the triad of offenses in 1997.\textsuperscript{219} In so doing, the court quoted from an earlier decision which had noted that “the decline of champerty, maintenance, and barratry as offences is symptomatic of a fundamental change in society’s view of litigation—from ‘a social ill, which, like other disputes and quarrels, should be minimized’ to ‘a socially useful way to resolve disputes.’”\textsuperscript{220}

The \textit{Restatement of the Law Governing Lawyers} provides for a limited survival of the ban on champerty. Lawyers may not acquire a proprietary interest in the client’s cause of action.\textsuperscript{221} The Restatement, however, does not forbid the assignment of a cause of action by a client to the client’s lawyer provided that the lawyer had not represented the client in asserting the claim.\textsuperscript{222} As to maintenance, it au-

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\textsuperscript{216} Incoherent, but not dead. If the precise terms of the rule in a particular jurisdiction are violated, the champertous agreement will not be enforced. Thus, where a counterclaim was assigned to a defendant who could pursue the counterclaim at his own expense and retain a portion of the proceeds, the counterclaim was dismissed. See Kenrich Corp. v. Miller, 377 F.2d 312, 314 (3d Cir. 1967); see also Ehrlich v. Rebeco Ins. Exch., Ltd., 649 N.Y.S.2d 672, 674 (App. Div. 1996) (stating that assignment of a counterclaim that could not have been brought in an original action violates champerty statute), appeal dismissed, 680 N.E.2d 618 (N.Y. 1997).

\textsuperscript{217} 6A Arthur Linton Corbin, Corbin on Contracts § 1422 (1962).

\textsuperscript{218} See \textit{In re Kamerman}, 278 F.2d 411, 413-14 (2d Cir. 1960).


\textsuperscript{220} \textit{Id.} at 1226 (quoting F.B. MacKinnon. American Bar Found., Contingent Fees for Legal Services 210 (1964)).


\textsuperscript{222} \textit{Id.} cmt. b.
Authorizes lawyers to advance litigation expenses on behalf of clients, even on a contingency fee basis. Startlingly, it authorizes the lending of money to destitute clients, despite the fact that such loans may violate disciplinary rules. This authorization appears in square brackets—a sign that its survival into the final draft of the Restatement is still being debated. The commentary to the Restatement's rules on champerty and maintenance warns the lawyer that its provisions may conflict with state laws.

The Restatement treats the client's grant to the lawyer of literary or media rights with respect to the representation as a "forbidden financial arrangement." Such a direct or indirect grant would give the lawyer the incentive to generate the maximum publicity and suspense surrounding the representation. It would also involve the possible disclosing of confidential information. The Restatement does not indicate the consequences of the violation of the prohibition. Presumably, the intention is to render such a grant void. The case law has not dealt with the respective rights of lawyer and client to the client's story under such a grant. Rather, it has played out in disciplinary proceedings and in criminal cases on the question of effectiveness of counsel.

Courts will almost certainly declare clients' grants of media rights to be against public policy and void, because of the disciplinary rule and the criminal cases in which grants of media rights to the lawyer provoked disturbances in otherwise normal proceedings. Once again, we see a situation in which a different legal regime exists for lawyers than for anyone else. While contract law generally holds that agreements against public policy are void, a rule of public policy has been created here that applies only to lawyers. As a result, members of the bar are burdened with a prohibition that applies to no other group.

V. Licensing and Contracts

While the Massachusetts Supreme Judicial Court was pondering the obsolescence of the offenses of barratry, champerty, and maintenance, the California Supreme Court was being asked to consider whether the need for a local license for out-of-state lawyers, who come to California to arbitrate or settle a case on behalf of a California client, was obsolescent. The court answered that a local license was needed, and the out-of-state lawyers who rendered services in

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223. Id. § 48(2)(a).
224. Id. § 48(2)(b).
225. Id. § 48(3); accord Model Code of Professional Responsibility DR 5-104(B) (1980); Model Rules of Professional Conduct Rule 1.8(d) (1994).
227. See supra notes 219-20 and accompanying text.
California were not entitled to a fee.²²⁸ Apparently, the same result would have been obtained if they had associated with local counsel.²²⁹ Although the out-of-state lawyers were tainted with the charge that they had committed misdemeanors, it is doubtful whether any prosecution will be brought. The forfeiture of a fee of “over $1 million,”²³⁰ however, is no small penalty.

Despite the national, even global, nature of the practice of law, the decision is not surprising. It is in accord with most decisions involving out-of-state lawyers.²³¹ Exceptions are sometimes made, for example, for purely federal matters.²³² Ironically, a California statute provides that anyone, including a lawyer from another nation, can appear for a client in an international commercial arbitration or conciliation.²³³

²²⁸ See Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 5 (Cal. 1998).

²²⁹ The client argued “that by practicing law without a license in California and by failing to associate legal counsel while doing so,” the out-of-state lawyer violated the statute against the unlawful practice of law. Id. at 4 (emphasis added). The court, however, stated that the result would be the same even if local counsel was associated. Id. at 4 n.3. But see Winer v. Jonal Corp., 545 P.2d 1094, 1097 (Mont. 1976) (finding that an attorney who had informed client that he was not licensed in Montana and that he needed to associate with local counsel could recover fees). The wisdom of requiring associated local counsel has been said to “tend to justify the charge that the motive of such restrictions is ‘feather bedding’ rather than the protection or advantage of the public.” Roel v. New York County Lawyers Ass’n (In re Roel), 144 N.E.2d 24, 31 (N.Y. 1957) (Van Voorhis, J., dissenting).

²³⁰ Birbrower, 949 P.2d at 4.


Variations of the local license problem are replicated in other professions. Engineers, architects, and brokers who are locally non-licensed have also been challenged. Nothing indicates that lawyers receive either preferential or discriminatory treatment from the courts as compared to the treatment of other unlicensed professionals.

Licensing requirements are created for the benefit of the public, but their effect is often distorted to protect local practitioners. Yet, if recovery for out-of-state lawyers were generally allowed, unless there were a national licensing system for lawyers, isn’t it likely that one of our states would choose to become a center for the minting of lawyers?

VI. Relations with Other Lawyers

A. Covenants Not to Compete

A lawyer’s covenant not to compete with the law firm that employs the lawyer or of which the lawyer is a member is void. This is the conclusion of all courts that have considered the matter in recent de-

234. See, e.g., Food Indus. Research and Eng’g. Inc. v. Alaska, 507 F.2d 865, 865 (9th Cir. 1974) (stating that the district court should reconsider ruling that engineer not licensed in Alaska may not recover); Warde v. Davis, 494 F.2d 655, 658 (10th Cir. 1974) (holding that a landscape architect who was not licensed in Colorado may recover fees); Hedla v. McCool, 476 F.2d 1223, 1226-27 (9th Cir. 1973) (finding that out-of-state architects could not recover fees for services in Alaska); Costello v. Schmidlin, 404 F.2d 87, 94 (3d Cir. 1968) (holding that a New York engineer can recover for services to a New Jersey architect); Interglobal Realty Corp. v. American Standard, Inc., 571 N.Y.S.2d 20, 21-22 (App. Div. 1991) (holding that a New York real estate broker cannot recover a fee for sale in New Jersey); Marcus & Nocka v. Julian Goodrich Architects, Inc., 250 A.2d 739, 742 (Vt. 1960) (holding that an out-of-state architect cannot recover fees); Badger III Ltd. Partnership v. Howard, Needle, Tammen & Bergendorff, 539 N.W.2d 904, 910 (Wis. Ct. App. 1995) (holding that an out-of-state real estate broker cannot recover fees); Thomas J. Griffin, Annotation, Right of Architect or Engineer Licensed in One State to Recover Compensation for Services Rendered in Another State, or in Connection with Construction in Another State, Where He Was Not Licensed in the Latter State, 32 A.L.R.3d 1151, 1153-54 (1970) (surveying case law on recovery of fees by out-of-state architects and engineers).

This rule is consistent with the idea that the lawyer has no property interest in the relationship with the client. To avoid the impact of this rule, law firms developed the tactic of providing in partnership and employment agreements that competition by servicing clients of the firm, or starting a practice within a specified geographical area, would result in a diminution or forfeiture of benefits that would otherwise be paid to the departing partner or employee. The courts have given such provisions the same treatment—non-enforcement—meted out to outright restraints. A major exception is that forfeiture of retirement benefits will be upheld.

Although the rule of non-enforcement of covenants not to compete may be explained conceptually by the absence of a property right or other protectible interest in the lawyer’s relationship with the client, the question of whether the rule serves any sound policy should be raised. A provision of the Model Code of Professional Responsibility that is substantially replicated in the later Model Rules of Professional Conduct has guided court decisions. Both documents state that no lawyer shall be a party to a partnership or employment agreement with another lawyer that restricts the right of the lawyer to practice law after the termination of the relationship except with respect to retirement benefits.

What is the rationale for these ethical rules? Prior to the Model Code, when the Canons of Ethics were in effect, the ABA’s Committee on Professional Ethics issued Formal Opinion 300 which advised that a covenant not to compete in an associate’s contract was im-


Two interrelated rationales were offered. To start with, "[c]lients are not merchandise" and attempts to "barter in clients" are unprofessional. This ethical proposition was reinforced with the rationale that the firm had little to fear from competition from a departing associate. The associate would be barred by then existing Canon 7 from attempting to "encroach upon" the clientele of the firm and Canon 27 would bar the associate from soliciting its clients.

A later opinion of the Committee held a contract provision to be improper where it restricted an employee from handling the legal work of an established client of the firm at the time the employment relationship ended. Finally, an opinion held it improper for a partnership agreement to provide for restrictive covenants among partners. No longer did the opinions indicate that the law firm was sufficiently protected by the ban on solicitation; the opinions' whole emphasis was now on clients' freedom to choose their own lawyers.

These opinions set the gist of the relevant provisions of the Model Code, and later, the Model Rules. Client freedom of choice that is not coupled with strong restraints on lawyers' luring away of clients of the firm has created "a modern-day law firm fixture[:] the revolving door." This modern-day fixture has produced a flood of literature.

A patient's freedom to choose a physician would appear to be as important as a client's ability to choose a lawyer; yet the law effectuates restrictive covenants in contracts among physicians. The rule

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247. In addition to other materials cited in this section of the article, see 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyers § 7.3:202 (2d ed. Supp. 1998); Robert W. Hillman, Hillman on Lawyer Mobility, §§ 2.1-2.3 (Supp. 1995); Wolfram, supra note 5, § 16.2; Charles E. Cantu & Jared Woodfill V, Upon Leaving a Firm: Tell the Truth or Hide the Ball, 39 Vill. L. Rev. 773, 777 (1994); Vincent Robert Johnson, Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability, 50 U. Pitt. L. Rev. 1 (1988); Analysis, 5 Laws. Man. on Prof. Conduct (ABA/BNA) 107, 108 (1989) ("The firms are using other ethics rules, as well as agency, partnership, and tort laws, in an attempt to put a stop to what they view as rapacious and illegal conduct by departing lawyers.").
of non-enforcement is not applied to other professions,\textsuperscript{249} such as accounting\textsuperscript{250} or dentistry.\textsuperscript{251}

A thought-provoking report by the Committee on Professional Responsibility, Association of the Bar of the City of New York, challenges the notion that the underlying rationale for the ban on lawyers' covenants not to compete is based primarily on the protection of client choice.\textsuperscript{252} It asserts that the "client choice basis of the rule is overstated."\textsuperscript{253} Rather, "the rule serves the salutary purpose of protecting attorneys, particularly newer members of the bar, from bargaining away their right to open their own office or move to another firm after they end an association with a legal employer."\textsuperscript{254} One suspects that there is much truth in this observation, but laudable as "client choice" and "lawyer autonomy" may be, the break-up of law firms and related phenomena have produced much "human and professional wreckage."\textsuperscript{255}

B. Client "Grabbing"

Associates or partners who leave their firms to join or form another firm frequently lure clients to come with them. Usually, these clients are those who have worked closely with the departing lawyer. This luring away of clients occurred in some of the covenant not to compete cases discussed above, but no head-on attack was made in those cases against the practice of "grabbing" clients from the former firm.\textsuperscript{256} Such an attack has been made in only a few reported cases. This is quite surprising in that the practice of grabbing clients may conflict with basic principles of agency and partnership law.\textsuperscript{257} The

\begin{itemize}
\item \textit{nership Agreement, 62 A.L.R.3d 970, 975 (1975); Ferdinand S. Tinio, Annotation, Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Sale of Practice, 62 A.L.R.3d 918 (1975).}
\item \textit{See Vitauts M. Gulbis, Annotation, Validity and Construction of Contractual Restriction on Right of Accountant to Practice, Incident to Sale of Practice or Withdrawal from Accountancy Partnership, 13 A.L.R.4th 661, 663 (1982).}
\item \textit{See Karpinski v. Ingrasci, 268 N.E.2d 751, 754 (N.Y. 1971).}
\item \textit{See Committee on Professional Responsibility, Association of the Bar of the City of New York, Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice, 20 Fordham Urban L.J. 897, 897 (1993).}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Johnston, supra note 247, at 122 (stating that such wreckage could be minimized by clearer rules); see Sol M. Linowitz, The Betrayed Profession 32-33 (1994) (pointing out the harmful effects of many lateral moves).}
\item \textit{For the vocabulary of firm breakups, including the term "grabbing," see Hillman, Law Firm Breakups, supra note 235, § 1.3}
\item \textit{For suggested changes in the Model Rules to clarify the rights and duties of departing lawyers, see Mark W. Bennett, Note, You Can Take It With You: The Ethics of Lawyer Departure and Solicitation of Firm Clients, 10 Geo. J. Legal Ethics 395 (1997).}
\end{itemize}
question then becomes whether the ethical rules that stress client choice, lawyer autonomy, and the lawyer's fiduciary duty to the client override the rules governing fiduciary relations to one's employer or partners under agency and partnership law.258

Some important cases hold that the agency and partnership rules are not overridden. Thus, at its simplest, some courts have ruled that a departing partner, who takes a client who is tied to the firm with a contingent fee contract, has a fiduciary duty to the firm to disgorge the fee less the percentage to which the departing partner would have been entitled had he or she remained with the firm.259

Where contingent fees are not an issue, but the partner prior to departing solicits a client of the firm, he or she may have violated a fiduciary duty to the firm even if the departing partner brought the client into the firm and has represented the client for years. The New York Court of Appeals, however, has suggested that lawyers who are planning to depart may inform clients with whom they have a professional relationship about their plans and may inform the client of the right to choose its counsel.260

At the other end of the spectrum, [however,] secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties . . . 261

Such a breach would give rise to actions for damages for breach of contract, and constructive trusts for violations of fiduciary duties, but the court did not address itself to remedies, merely denying defendants' motion for summary judgment. Those suggested breaches that involve dishonesty to the firm may also be sanctionable as disciplinary violations.262

Massachusetts has a similar nuanced approach as New York to the fiduciary duties of departing law partners. The client's freedom of

258. The flavor of some of these cases is captured in two articles concerning the departure of Coudert Brothers partners in Indonesia and Hong Kong. See Rex Bonsert, Ex-Partner Under Fire: Coudert's Revenge?, Nat'l L.J., May 26, 1997, at A4; Lisa Brennan, U.S., Indonesian Firms Bash Morgan's Poaching: Megafirm Runs Into Legal, Political Buzzsaw After It Opens Offices in SE Asia, Nat'l L.J., Apr. 6, 1998, at A13.


261. Graubard, 653 N.E.2d at 1183-84.

262. See In re Cupples, 952 S.W.2d 226, 234-37 (Mo. 1997) (reviewing relevant cases).
choice coexists with, rather than supersedes, the partners' fiduciary
duties to each other. In *Meehan v. Shaughnessy*, two members of a
law partnership decided to depart and set up a new firm. Before
notifying their partners of their intentions, they quietly rented space,
borrowed money, enticed several associates to join them, spoke to a
major client and received assurances that the client would follow
them, and prepared letters to individual clients soliciting them to also
follow. The letters were to be sent as soon as the departing lawyers
had notified their partners. During this period, one of the depart-
ing partners on three occasions had been asked by a partner whether
rumors about his planned departure were true. Each time, he de-
nied the truth of the rumors. These lies and the preemptive tactics
to grab the clients were breaches of fiduciary duties. For the latter,
the court imposed the burden of proof on the departing partners to
show that the clients that followed them to the new firm would have
followed them if the old firm had had an equal opportunity to solicit
their continued patronage. As to instances where the new firm
could not meet the burden of proof, it would have to disgorge the
profits it made from the work done for the client.

In denying summary judgment to either side, the Illinois Supreme
Court in large measure followed the reasoning of the New York Court
of Appeals in a case where departing partners “grabbed” a major cli-
ient. A key fact that needed exploration was whether the solicita-
tion of the client took place before or after the partners withdrew. If
before, the departing partners could be liable for tortious interference
with prospective economic advantage.

In the Pennsylvania case of *Adler, Barish, Daniels, Levin &
Creskoff v. Epstein*, all of the departing lawyers were associates. As in *Meehan*, they made plans to create their own firm in advance of
terminating their association with the firm for which they were work-

264. *Id.* at 1257.
265. *Id.* at 1258-60.
266. *Id.* at 1259.
267. *Id.*
268. *Id.*
269. *Id.* at 1265.

270. *See* Connors, Fiscina, Swartz & Zimmerly v. Rees, 599 A.2d 47, 50 (D.C. Ct. App. 1991) (finding that clients would have followed the departing lawyer even if he had not made misrepresenations to them); *Meehan*, 535 N.E.2d at 1269-70. *But see In re Smith*, 843 P.2d 449, 452-53 (Or. 1992) (finding misrepresentations by a departing lawyer to clients to be grounds for disciplinary action).

271. Inasmuch as the profits would go to the old firm that had been dissolved, but not wound up, the departing partners would participate in the division of the profits they must disgorge. *See Meehan*, 535 N.E.2d at 1270.

274. *Id.* at 1177.
They rented office space and borrowed money, using cases they were handling for the firm as collateral for a loan. In upholding the trial court's injunction against soliciting clients to follow them into the new firm, the court indicated that such solicitations involved tortious interference with the existing contracts between the clients and the law firm. The reasoning was somewhat different from the reasoning of the court in Meehan. While the associates who joined the departing partners in Meehan were not enjoined, a constructive trust was placed on their profits from the cases they brought with them to the new firm. The rationale, however, was not tortious interference but breach of their fiduciary duties to their former employer.

C. Tortious Interference

Because a lawyer has no property right, or right akin to a property right, in the lawyer-client contract, it would seem to follow that interference with such a contract could not constitute a tort outside of the cases just discussed involving interference in violation of a fiduciary duty. The case law does not agree. This may in part be explicable by standard tort law. In many jurisdictions, an enforceable contract is not a necessary ingredient for the tort. But in the interference with the lawyer-client relationship a special policy reason also exists. In many of the cases, the client's adversary commits the tort; an insurance company, opposing counsel, the client's employer or other adverse party interferes with the lawyer-client relationship. In such cases, there is a strong analogy to the crime of obstruction of justice, and the client is "deprived of the advice and aid of her counsel." Punitive damages have been assessed in such cases.

In one case, it was alleged that an investigator for an insurance company had convinced an accident victim's wife that a particular law firm would do a better job than the lawyer she had already retained. She discharged her lawyer and retained counsel suggested by the investi-
gator. The court held that the investigator for the adverse party and
the new counsel would be liable for the tort of interference with the
first lawyer’s contract if it were to be proved that they knew that a
lawyer had already been retained. These are routine cases of tor-
tious interference. They establish that the at-will lawyer-client con-
tact is nonetheless a relationship in which the lawyer has a pecuniary
interest.

If the alleged tortfeasor is a competing lawyer, the result may be
different. The lawyer-client relationship is generally at-will and client
choice as to representation or counseling is among the key values of
the legal system. There is tension between that value and standard
tort thinking. However, if the first lawyer has a charging lien on
any judgment or settlement, and if the second lawyer disburses the
proceeds to the client in disregard of the lien, then a tort claim has
been made out. Conversely, where a law firm unjustifiably sent a
“lien letter” to a lawyer’s major client, causing the client to withhold
payment from the lawyer, the firm was liable for tortious
interference.

D. Whistle Blowing

Absent an agreement to the contrary, hiring in the United States is
at-will. This includes contracts hiring lawyers as associates or as
corporate counsel. Many, perhaps most, jurisdictions, however, have
carved out a public policy exception. If an at-will employee is dis-
charged for reasons that violate public policy, the discharge is a legal
wrong which can be described as either a tort or a breach of contract.
Among the discharges that have been held to violate public policy are

283. See Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Ni-

284. Because the client’s contract with the lawyer is enforceable by the client, when
a third party tortiously interferes, causing the lawyer to withdraw, the client has
an action against the third person. See Erlandson v. Pullen, 608 P.2d 1169, 1172 (Or.
App. 1980).

that the attorney-client relationship may always be terminated with the client’s con-
sent, with or without cause); Brown v. Larkin & Shea, P.A., 522 So. 2d 500, 501 (Fla.
Dist. Ct. App. 1988) (denying the lawyer a legal right to a continuing relationship with
a client under an at-will contract); Walsh v. O’Neill, 215 N.E.2d 915, 918 (Mass. 1966)
(stressing client choice); Madorsky v. Bernstein, 626 N.E.2d 694, 696 (Ohio Ct. App.
1993) (granting co-counsel who could not work together the privilege to inform cli-
cents of their ability to choose their preferred representation); Skonkin & Melena Co.
not liable for sending letters to clients offering representation and “one fee” for him-
self and the former firm). But see Anderson v. Anchor Org. for Health Maintenance,
654 N.E.2d 675, 685 (Ill. App. 1995) (upholding a cause of action where a discharged
attorney brought suit against former co-counsel).

286. See Pearlmutter v. Alexander, 158 Cal. Rptr. 762, 764 (Ct. App. 1979); Weiss


“whistleblower” cases where the employee has been discharged in re-
taliation for reporting the employer’s illegal activities to the authori-
ties or to higher management. New York has rejected the trend and
has denied relief to whistleblower. Delaware has adopted a very
narrow concept of abusive discharge. Yet, the status of lawyer-em-
ployees in the context of whistle blowing is different from the status of
other employees in those jurisdictions. In New York, an associate,
who claimed to have been discharged for insisting on reporting uneth-
tical behavior of a fellow associate to state disciplinary authorities, was
held to have stated a cause of action. In Delaware, house counsel,
under a hiring at-will, stated a cause of action for wrongful discharge
by alleging that she was fired for reporting the organization’s legally
inappropriate activity to the board of directors. Both decisions
were based on the lawyer-employee’s professional obligations under
the applicable state ethical rules. In contrast, Illinois, which whole-
heartedly provides remedies for retaliatory discharges, has refused to
allow an action by house counsel who reported the company’s impor-
tation of substandard kidney dialyzers to the FDA after telling com-
pany officers he would do so. The Illinois court relied on the rule
that lawyers can always be discharged, and on the thought that the
allowance of an action for retaliatory discharge would inhibit frank
and open discussion between corporate officers and house counsel.
Although Illinois differed from New York and Delaware, all three
states carved out a rule for lawyers that differed from the rule applied
to everybody else.

The rationale expressed by the court in Wieder was that an implied
term of the contract between the firm and its associate is that both will
act “in accordance with the ethical standards of the profession,” and
any disincentives to such conduct “would subvert the central profes-

Ct. App. Div. 1988) (holding that the discharge of an employee who reported safety
conditions to OSHA violated private policy).
quient to Murphy protects a whistle blower only if he or she reports, testifies to, or
objects to a violation that “creates and presents a substantial and specific danger to
the public health or safety.” N.Y. Labor Law § 740(2)(a)-(c) (McKinney 1988).
1996).
York’s version of DR 1-103(A), which requires a lawyer to report knowledge “that
raises a substantial question as to another lawyer’s honesty, trustworthiness or fitness
in other respects”).
294. Rule 1.2 of the Delaware Rules of Professional Conduct prohibited a lawyer
from assisting a client in engaging in any conduct that is “criminal or fraudulent.” Id.
at 588. For the New York rule, see supra note 292.
296. See supra notes 9-11.
297. Wieder, 609 N.E.2d at 108.
298. Id.
301. See id.
302. Exceptions are made for routine transactions such as where the lawyer makes a purchase in the ordinary course of business from a client who is a storekeeper.
304. See Austin W. Scott, The Fiduciary Principle, 37 Cal. L. Rev. 539, 541-42 (1949). "Thus if a trustee sells trust property to himself individually, the consent of the beneficiary to the sale will not prevent him from setting aside the sale, . . . if the price and all other conditions of [the] sale were not fair and reasonable." Id. at 542. Note, however, that Scott discusses dealings with trust property, not with a contract between trustee and beneficiary concerning matters outside the trust relationship.
quences and that there was no exploitation of the client’s confidence.”

There is no lack of other formulations, but the underlying reasoning is that a business transaction between lawyer and client is presumptively “invalid” (i.e., voidable), as is a testamentary provision in favor of the lawyer who prepared the will. Thus, a loan made by a lawyer to a client is presumptively voidable and, if the presumption is not rebutted, the client must repay only the principal and the cost of the money to the lawyer. Courts in some cases have held that the presumption can only be rebutted by clear and convincing evidence. As stated by the New Jersey Supreme Court, the presumption “can be overcome by only the clearest and most convincing evidence showing full and complete disclosure of all facts known to the attorney and absolute independence of action on the part of the client.”

Aside from the possible avoidance of the transaction with the client, the lawyer may face disciplinary charges, and even disbarment. The promulgated standards that govern lawyer-client contracts do not have the force of contract law, and some courts have rejected their

310. See Murray, 680 A.2d at 791-92 (discussing that where the agreed interest rate was 16.5%, the cost of money to the lender was presumably less). But see Fanaras Enters. v. Doane, 666 N.E.2d 1003, 1004 (Mass. 1996) (holding that a loan made by a client to a retained lawyer not part of the lawyer-client relationship). See id. at 1006. Thus, the lawyer’s malpractice insurer was not liable for the lawyer’s non-payment. See id.
311. In re Gavel, 125 A.2d 696, 703 (N.J. 1956) (disciplinary case) (citations omitted); cf. Monco v. Janus, 583 N.E.2d 575, 581-82 (Ill. App. Ct. 1991) (shifting the burden of persuasion to the client only after clear and convincing evidence has rebutted the presumption). But see Franciscan Sisters Health Care Corp. v. Dean, 448 N.E.2d 872, 878 (Ill. 1983) (holding that once clear and convincing contrary evidence is introduced in a will contest, the presumption disappears and evidence is evaluated neutrally).
312. See In re Harper, 485 S.E.2d 376, 380 (S.C. 1997) (imposing a 60-day suspension for a questionable property transaction where there was no evidence that the client had any understanding of the nature of the transaction).
313. See In re Wolk, 413 A.2d 317, 318 (N.J. 1980) (finding that a lawyer had counseled his client “to make a hopeless investment in a building in which he had an interest, and concealed material information from her, including the fact of a foreclosure”).
314. The Model Rules of Professional Conduct provide:
applicability to civil litigation, but others have applied them to civil disputes, either as directly applicable standards or as evidence of proper contractual conduct. Nonetheless, the cases involving disciplinary action and the cases involving contract remedies use remarkably similar reasoning, and the Restatement of the Law Governing Lawyers appears to synthesize them into a coherent whole. This Article opened with a quotation from Sir Francis Bacon to the effect that clients entrust lawyers, as counselors, "with the whole" of their being. It is in the context of the lawyer-client business contract that the quotation has the greatest resonance.

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Model Rules of Professional Conduct Rule 1.8(a) (1994).

The Model Code of Professional Responsibility contains a similar, but less detailed, rule which provides: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." Model Code of Professional Responsibility DR 5-104(A) (1980).


Appellee relies heavily on the violation of two disciplinary rules contained in the Code of Professional Responsibility as a ground for vacating the judgment against him. However, we point out that these violations, if they in fact occurred, are not defenses and furthermore they are not even counterclaims. Ethical violations fall within the exclusive jurisdiction of the Board of Commissioners of Grievances and Discipline of the Supreme Court of Ohio.


See Cornell v. Wunschel, 408 N.W.2d 369, 376-79 (Iowa 1987).

There is no per se rule prohibiting lawyers from contracting with their clients in matters beyond the rendering of legal services. In a proper case, the court will even grant specific performance to the lawyer. Even if the transaction is valid and violates no disciplinary rule, the contract will, however, be strongly construed against the lawyer who drafted it.

VIII. Partnership Liability for Client Business Contracts

If the lawyer's violation of the disciplinary standards with respect to contracting with a client can be characterized as negligence within the scope of that lawyer's partnership authority, then the liability of the firm and its malpractice insurer is engaged. This is precisely the tactic the plaintiff employed in Phillips v. Carson. Carson, plaintiff's lawyer and a law firm member, borrowed approximately $275,000 from his client, secured by a mortgage on Carson's property which Carson did not record. At no time did Carson suggest that his client seek independent advice, nor did he advise her of four prior mortgages on the property that secured his client's mortgage. Other counts of wrongful omission and commission were also proved. Carson filed for bankruptcy, leaving little hope that he would repay any part of the loan.

The court held that it was a question of fact whether Carson's activities concerning the loan, including the advice he gave and the advice he failed to give, were within the scope of his apparent authority to bind the partnership. Among the indicia of apparent authority were the facts that the transaction took place in the firm's offices, correspondence was on firm stationery, and the clerical personnel work-

319. See Howard v. Murray, 346 N.E.2d 238, 239 (N.Y. 1976) (upholding trial court findings that the lawyer had dealt openly and frankly with the client, although the lawyer got the better of the bargain).


321. See Shaffer v. Terrydale Management Corp., 648 S.W.2d 595, 600-09 (Mo. Ct. App. 1983) (finding that the lawyer-stockholder was an employee within the meaning of the contract he drafted although he was not an employee in the usual sense); Rogers v. Niforatos, 394 N.Y.S.2d 473, 476 (App. Div. 1977).

322. 731 P.2d 820 (Kan. 1987); see Roach v. Mead, 722 P.2d 1229, 1232-34 (Or. 1986) (holding that agency principles create liability on the part of law firm for wrongful act of partner).

324. Id. at 828.
325. Id.
326. Id. at 824.
327. Id. at 825-29, 836.
ing on the matter were the same as those who worked on the probate of the plaintiff's late husband's estate.\textsuperscript{328}

Other theories of firm liability on similar facts include breach of fiduciary duty,\textsuperscript{329} and breach of contract.\textsuperscript{330} Earlier cases had denied liability on the theory that business ventures were outside the scope of a law partnership's activities. The more modern cases view a law partnership, for purposes of vicarious liability, as a business venture.\textsuperscript{331}

IX. RATIONALE FOR THE PRESUMPTION OF UNDUE INFLUENCE

Four strands of thought have been advanced either severally or conjoined to justify the creation of the presumption of undue influence in contracts between lawyer and client and the promulgation of related disciplinary standards. These are: (1) the assumption by the client that the lawyer has no interest that conflicts with the client's own interests; (2) the ability of the lawyer to dominate the client; (3) the existence of the lawyer's fiduciary duty; and (4) the need to instill confidence in the system for the administration of justice.

A. Client's Assumption

Courts have justified the presumption of undue influence by asserting that clients are entitled to assume that the lawyer does not have interests that conflict with their own. In a disciplinary proceeding that resulted in the disbarment of a New Jersey lawyer, the court reviewed the lawyer's conduct with respect to the widow of a longtime client.\textsuperscript{332} After her husband's death, she asked the lawyer for advice on how to invest the proceeds of his estate.\textsuperscript{333} The lawyer suggested that she invest by making a second mortgage loan in the amount of $10,000 to the owner of a particular multiple dwelling.\textsuperscript{334} He had a one-quarter interest in the corporation that owned the building.\textsuperscript{335} At some point in his dealings he informed the widow that he had an interest in the corporation, but concealed the fact that the corporation had recently purchased the building for $8000, taxes were in arrears, and the build-
ing was a dilapidated slum. Moreover, the second mortgage, which he drafted, contained a clause subordinating the loan to possible future mortgages. After disciplinary charges were filed, the lawyer made arrangements for repayment, but this fact did not prevent his disbarment for this and other malefactions.

In disbarring the lawyer, the court concluded that it was proper for the client to presume that her lawyer was acting exclusively in her best interest. It quoted Justice Story:

> When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.

Although the lawyer at one point suggested that the widow seek independent advice, the court noted that the lawyer’s statement in this regard “appears designed to protect him rather than his client. Respondent cannot shield himself behind the glib recitation of a disclosure the practical meaning of which was unknown to his client.” As another court put it:

> “Full disclosure” includes a clear explanation of the differing interests involved in the transaction and the advantages of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client entailed in the agreement, including any liabilities that will or may foreseeably accrue to him.

### B. The Ability of the Lawyer to Dominate the Client

Cases of undue influence, outside the context of lawyer-client relations, fall into two roughly drawn categories. In one class of cases, a dominant party uses a dominant psychological position to induce the subservient party to enter into a transaction that the subservient party would not otherwise have consented to. In the second class, one party uses a position of trust and confidence—such as a fiduciary duty—to unfairly persuade the other into a transaction. At times, the two classes coalesce. The dominant party may dominate primarily because

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336. *Id.* at 319-20.
337. *Id.* at 319.
338. *See id.* at 318, 320 n.6. This wonder also managed to record 117 billable hours in a five day period. *Id.* at 318.
339. *Id.* at 321.
340. *Id.* (quoting Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C. Me. 1824) (No. 17,733) (Story, J.)).
341. Wolk, 413 A.2d at 321.
of the trust and confidence engendered in the subservient party. The two classes of cases replicate themselves in lawyer-client transactions.

As a contract principle, the stronger (dominant) party has an obligation to demonstrate that he or she did not take advantage of the weaker one. In one case, a lawyer, Hulnick, was appointed administrator of the estate of Henry Gee, who had died intestate.\(^{344}\) Hulnick failed to produce a detailed accounting, but caused his clients, the sole distributees, to sign a release reciting that they had received roughly forty percent more from the estate than they really had.\(^{345}\) The three distributees were elderly; each was more than seventy-five years old and the oldest was eighty-seven. Putting aside alternative grounds for setting aside the release involving interpretation of the release and fraudulent misrepresentations, the court said:

> In all cases of this nature wherever, "the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality . . . it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood."\(^{346}\)

Similarly, in a disciplinary case, In re Wolk,\(^{347}\) the court focused on the inequality of the parties, pointing to the client's total dependence on her lawyer, among other factors, including that the lawyer had failed to rebut the presumption of undue influence when he induced her to invest in a second mortgage on property in which the lawyer had an interest.\(^{348}\) Besides discussing the client's "dependence,"\(^{349}\) the court also stated "she was relying not only upon his advice but upon his judgment and upon the confidence she had in him based on his past [sixteen] years of service as her late husband's attorney."\(^{350}\) This combination of "dependence" and "confidence" is not an unusual combination in the case law.

345. The court did not resolve the conflict of testimony. Gee claimed, although it was disputed, that

> [W]hen he attempted to read the paper he was told by Hulnick that the latter was in a hurry and it would take too long. When Gee asked him what it was, he was told that Hulnick had to present it to the judge to show the he had given the distributees their checks.

Id. at 666.
346. Id. at 665 (emphasis added) (quoting Cowee v. Cornell, 75 N.Y. 91, 99-100 (1878)).
347. 413 A.2d 317 (N.J. 1980).
348. The court wrote that "[g]iven the widow's total dependence upon respondent, the one-sidedness of the transaction, the financial realities of a $10,000 investment in a building worth perhaps half that sum . . . . He should have insisted that she retain independent counsel or refused to consummate the transaction." Id. at 321.
349. Id. at 321.
350. Id. at 320.
C. The Existence of a Fiduciary Duty

No one would contest that a lawyer-client relationship creates fiduciary duties owed by the lawyer to the client. Thus, one finds cases setting aside transactions where no evidence of unfairness, non-disclosure, or the like, is presented. This is because it is incumbent on the lawyer to produce the evidence absolving himself or herself from the presumption of undue influence. In Blasche v. Himelick,351 all we can discern from the printed report of the case is that the client, while allegedly infirm and feeble, conveyed realty to his lawyer on May 28, and died on August 15 of the same year.352 The client’s heirs thereafter brought suit to cancel the deed.353 The lawyer died before trial.354 The court ruled that, as a matter of law, a case of undue influence had been made out.355 The court explained:

There are few of the business relations of life involving a 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.356

D. The Need to Instill Confidence in the System for the Administration of Justice

A theme that sounds in many lawyer-client disputes ruled on by courts is that special rules governing lawyer conduct are designed, in part, to forward the states’ interests in the administration of justice. In Ohralik v. Ohio State Bar Association,357 the United States Supreme Court examined the validity of state bar associations’ role in enforcing professional standards. Although the context was different from that of lawyer-client contracts, the Court’s discussion is applicable to and supports the presumption of undue influence in the formation of contracts between lawyers and their clients:

[T]he State bears a special responsibility for maintaining standards among members of the licensed professions. “The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” While

352. Id. at 380.
353. Id.
354. Id. at 379.
355. Id. at 381.
356. Id. at 381 (quoting Stockton v. Ford, 52 U.S. 232, 247 (1850)).
lawyers act in part as “self-employed businessmen,” they also act “as trusted agents of their clients . . . .”358

X. Conclusion

This Article does not seek to capture all situations in which litigation about lawyers’ contracts arise. Worthy of treatment are the creation of the lawyer-client relationship, which may be non-contractual, and contracts where the lawyer deals at arms’ length with a non-client, but seeks to secure a special advantage because of the lawyer’s special knowledge.359 Most of the multiple problems of interpretation360 and validity361 of contingency-fee agreements have not been discussed. The doctrine of account stated is often applied differently to lawyers’ bills than to bills sent by, for example, lumber yards; because of the fiduciary relationship between lawyer and client, courts appear reluctant to find assent to a lawyer’s bill.362

The ability of a lawyer to purchase or sell a practice is an important topic that is not dealt with in this Article. This Article also ignores the rights third parties may have as third party beneficiaries of the lawyer-client retainer.363 One could further multiply issues, but this Article has dealt with significant issues in lawyers’ contracts and has been extensive enough to reveal significant differences between general contract law and the treatment of lawyers’ contracts.

Lawyers are treated differently from other litigants by their brothers and sisters on the bench. Often, the rules governing their contracts place lawyers under a disadvantage as compared to other contracting parties. Their expectancies in executory retainer agree-


ments are usually not protected. Non-refundable retainers are increasingly declared to be invalid. While general contract law takes a hands-off attitude on the question of whether an agreed price is too high, attorneys'-fee agreements can be reviewed for reasonableness. While citizens in other walks of life can negotiate for, and enforce, finder's-fee agreements, the validity of attorney-referral-fee agreements is circumscribed. While agents for disclosed principals are not liable under contracts made for their principals, lawyers are liable on the contracts they make for their clients. The lawyer who enters into a business contract with a client has walked into an ambush. If the deal goes sour, the lawyer is ensnared. Typically, however, in the litigated cases, it is the client who escapes the snare set by the unscrupulous attorney.

While the lawyer's freedom of contract is muted, contract law has given lawyers certain privileges. They have remedial tools—retaining liens and charging liens—that are superior than those available to others. Lawyers are not bound by covenants not to compete and may engage in conduct that in other occupations would result in liability for tortious interference with contracts or with prospective advantage. At least according to some authorities, they have great leeway to breach their retainer agreements. Additionally, according to the same authorities, if they breach or are disbarred, they are entitled to payment for services rendered toward completion of the contract on terms that are much more favorable than to others similarly situated.

The overall picture is as one might expect. The scene consists of artifacts created by lawyers whose respect and even affection for their profession has caused them to place certain controls on fellow members of their caste. At the same time, impelled by self-interest, it is perhaps inevitable that they have endowed their caste with certain preferences.