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Dear Lawyer: If you decide it's not economical to represent me, you can fire me as your contingent fee client, but I agree I will still owe you a fee.

David Hricik
Mercer University School of Law, hricik_d@law.mercer.edu

Dear Lawyer: If you decide it's not economical to represent me, you can fire me as your contingent fee client, but I agree I will still owe you a fee.

by David Hricik*

I. INTRODUCTION

Contingent fees are a relatively recent development in American law.[1] Once banned through common law doctrines, contingent fees have become a tool that allowed delivery of legal services to those who would otherwise be unable to front attorney fees in a case.[2]

No doubt in part because of the historic prohibition against contingent fees, and also because clients in the typical personal injury case in which they were used were not sophisticated consumers of legal services,

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* Professor of Law, Mercer University Walter F. George School of Law, Macon, Georgia. Clerk, The Honorable Chief Judge Randall R. Rader, United States Court of Appeals for the Federal Circuit (2012-13). University of Arizona (B.A., 1984); Northwestern University School of Law (J.D., cum laude, 1988).

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In the interest of full disclosure, I have advised lawyers about ethical issues in contingent fee agreements for many years, and have served as an expert witness in cases involving enforceability of clauses like those discussed here.

1. *See* Ethics Comm. Colo. Bar Ass'n, Formal Op. 100 (June 21, 1997) [hereinafter Colo. Bar Op. 100].

2. *Id.*

courts, legislatures, and bar associations have since the outset heavily regulated their use.[3] Yet, the regulation has not been Draconian. Instead, courts have balanced competing policies. For example, a client has an unfettered right to discharge counsel, yet, it is unfair to allow a client to discharge a lawyer in order to deprive the lawyer of a fee that has been earned but simply not collected.[4] As a result, courts have permitted attorneys to recover under equitable remedies such as quantum meruit for work done prior to discharge.[5] Likewise, courts have sometimes permitted lawyers to obtain "high" contingent fees in a particular case because they recognize that an occasional "high" fee is needed to offset the equally likely lower recovery, and thus allow for the economic operation of contingent fee arrangements.[6]

More recently, contingent fees have been utilized in class actions, complex commercial litigation, patent infringement suits, and other suits where the client is generally more sophisticated[7]–no longer is the contingent fee arrangement limited to solo practitioners, small firm lawyers, and personal injury clients. Today, sophisticated clients represented by large law firms agree to representation on a contingent fee basis in business litigation.

As a matter of public policy, courts have generally held that a lawyer who is discharged with "good cause" will receive only quantum meruit for work done,[8] and an attorney who withdraws without "just cause" will forfeit all right to compensation.[9] I have reviewed many contingent fee agreements over the course of my years in advising lawyers and law firms about legal ethics, and the cases discussed here confirm my experience was typical.

In some of the arrangements I have seen or which have been litigated or analyzed by the bar associations, lawyers have attempted to alter the aforementioned balance. Generally, the provisions (a) either restrict the client's ability to terminate the lawyer, or expand the lawyer's right to withdraw from representing the client; (b) increase the compensation

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3. *See id.* (discussing the Colorado Supreme Court's regulation of contingent fee agreements as originating from "the enhanced potential for conflicts of interest and overreaching that inhere" in them). *See infra* notes 164-65 and accompanying text.

4. *See infra* notes 18-19 and accompanying text.

5. *See* Ruby & Assocs., P.C. v. George W. Smith & Co., No. 297266, 2011 WL 4580594, at *4 (Mich. Ct. App. Oct. 4, 2011).

6. *See infra* notes 22-24 and accompanying text.

7. *See* Colo. Bar Op. 100, *supra* note 1 (noting that even as of 1997, "in recent years, there has been an increased use of contingent fee agreements in contexts other than . . . personal injury [representation]").

8. *See infra* notes 17-19 and accompanying text.

9. *See infra* notes 28, 54-68 and accompanying text.

due if the client terminates the lawyer or the lawyer withdraws; or (c) a combination of those two approaches. Lawyers have, for example, sought to require clients who discharge the lawyer to agree to pay, not just a quantum meruit award for the work performed prior to discharge, but compensation at full hourly rates. Some lawyers have even required that it be paid upon withdrawal and not be contingent upon recovery.[10] This Article refers to any variant on this theme as "compensation on withdrawal provisions."

This Article thus analyzes clauses which seem to be increasingly used that seek to require their clients to pay if the lawyer decides to walk away from the case—not just if the client fires the lawyer, but if the lawyer fires the client. There has been no considered analysis of whether these clauses in contingent fee agreements are enforceable.[11]

This Article fills this gap in the literature on an issue of importance to the bench and bar. It addresses whether clauses that seek either to increase the freedom of lawyers to withdraw from a representation beyond just cause, or to allow for any compensation if withdrawal is without just cause, are enforceable in contingent fee agreements. Put simply, can a client agree that if a lawyer decides it's not economical to represent the client, lawyers can fire the client as their contingent fee client and still be paid?

In getting to that question, this Article first briefly describes the fundamental principles necessary to understand regulation of termination on withdrawal provisions in contingent fee agreements. It then describes the jurisprudence from a few key jurisdictions analyzing what has historically allowed a lawyer to withdraw but be compensated–the requirement of "just cause." Finally, it turns to a complete analysis of whether a contractual provision enhancing the ability of a lawyer to voluntarily quit a contingent fee arrangement but obtain compensation should be enforceable, arguing that as a general principle, any provision that allows for lawyers to withdraw in circumstances beyond those defined as just cause under state law, or with any compensation if done without just cause, should be unenforceable, or at least left to the

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10. *See, e.g.*, Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 562 (Tex. 2006).

11. One example is a short article, Elizabeth J. Cohen, *Hedge Your Bets Carefully*, 84 A.B.A. J. 76, 76 (1998). Two student pieces also lightly touch on these issues. Jonathan J. Fox, *Comment, Fixing Compensation Pursuant to a Contingent Fee Contract Following a Premature Termination of the Attorney-Client Relationship*, 57 LOY. L. REV. 861, 863 (2011); Tiffane S. Clausewitz, *On the Trail to Increased Client Protection: Attorney Contingent Fee Contract Termination in Light of Hoover v. Walton*, 39 ST. MARY'S L.J. 539, 540-41 (2008). The most widely-cited publication on the subject is George L. Blum, *Circumstances under which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case*, 53 A.L.R. 5th 287 (1997).

legislature or other rule-making body to regulate carefully, and not left to the slow and awkward development of the common law process.

II. AN OVERVIEW OF PUBLIC POLICIES UNDERLYING PERMITTING BUT REGULATING CONTINGENT FEE AGREEMENTS

A. The Social Utility Served by Contingent Fee Agreements

Contingent fees are permitted because they are perceived to provide social utility. Among other things, they permit clients who otherwise could not afford to hire a lawyer to obtain justice and pay the costs out of any award from the opposing party.[12] At the same time, they permit lawyers to earn a living by bearing the risk of non-recovery for the client, but potentially obtaining recovery if successful.[13]

B. Pertinent Limitations on Contingent Fee Agreements

Probably the fundamental principle in understanding the law regarding lawyer compensation-on-withdrawal provisions is that a lawyer retained to handle a contingent fee case is deemed to have agreed to carry it through to completion: the fee is not earned until and unless the lawyer obtains a recovery for the client.[14] As a consequence, a lawyer who withdraws from a case has breached the contract by failing to perform as agreed.[15] He is entitled, as will be seen, to no compensation with the exception of when the client has given the lawyer just cause to withdraw (sometimes referred to as "justifiable cause" or occasionally the confusing term, "good cause").[16]

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12. *See* Fox, *supra* note 11, at 865-66.

13. *Id.* at 866.

14. Davenport v. Waggoner, 207 N.W. 972, 974 (S.D. 1926); W. Wagner & G. Wagner Co. v. Block, 669 N.E.2d 272, 275-76 (Ohio Ct. App. 1995) ("It is generally held that when an attorney agrees to represent a client it is implied that he agrees to see the matter through to its conclusion."); Riley v. Dist. Ct., 507 P.2d 464, 465 (Colo. 1973) (noting that "an attorney who undertakes to conduct an action impliedly stipulates that he will prosecute it to a conclusion"); Faro v. Romani, 641 So. 2d 69, 71 (Fla. 1994) (presuming "that an attorney will follow the representation to completion unless withdrawal is necessitated by one of the conditions set forth" in the disciplinary rules); *see* JOHN BURKOFF, 4 CRIMINAL DEFENSE ETHICS § 2 (June 2012).

15. Beaumont v. J.H. Hamlen & Son, 81 S.W.2d 24, 25 (Ark. 1935) ("The contract being entire he must perform it entirely, in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation.").

16. *See infra* notes 46-80 and accompanying text.

The law regulates the flipside of the relationship as well: the client's ability to terminate the lawyer. Courts have long recognized that a client has a right to discharge counsel for good cause or no cause.[17] However, courts have recognized that simply because a client controls the unfettered right to discharge a lawyer does not mean that the client can escape compensating the lawyer for the value of services rendered. Accordingly, although the client may fire the lawyer without any cause at all, a lawyer fired without good cause is entitled to compensation. A majority of courts permits recovery of only quantum meruit or the contingent fee amount, whichever is less. A minority permits recovery of whichever is greater.[18] A lawyer fired for cause is generally limited to recovering quantum meruit for the value of services rendered prior to termination.[19]

Another fundamental feature of contingent fee agreements is that they must be contingent–if the client does not recover, the lawyer will receive nothing.[20] By definition, a fee that is earned, whether or not the client recovers, is not "contingent."[21]

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17. *See, e.g.,* Woodbury v. Andrew Jergens Co., 61 F.2d 736, 739 (2d Cir. 1932) (discussing New York law).

18. As the Fifth Circuit explained:

> Most jurisdictions, following *Martin v. Camp*, 114 N.E. 46 (1916), and *Fracasse v. Brent*, 494 P.2d 9 (1972), limit the discharged attorney's recovery to *quantum meruit* (or to the lesser of *quantum meruit* and the contract price), refusing to apply normal contract rules to the attorney-client relationship because of the special trust and confidence that must exist between attorney and client. The majority jurisdictions reason that allowing recovery on the contract impinges on the client's absolute right to select the lawyer of his choice by forcing the client to pay double fees, one to his discharged attorney and one to his new lawyer. These jurisdictions typically imply a term into the contingency contract allowing discharge of the attorney at will, so that discharge is not considered a breach and does not give rise to contract damages. *See, e.g., Martin*, 114 N.E. at 47-48.

Augustson v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658, 662 n.6 (5th Cir. 1996) (criticizing Texas law, which allows the attorney to choose the greater of *quantum meruit* or recovery on the contract).

19. *See Ruby & Assocs.*, 2011 WL 4580594, at *14 (applying majority rule and also noting that in some states under some circumstances *quantum meruit* may exceed the contract fee). The majority approach also denies *quantum meruit* awards unless the client actually recovers. *See id.*

20. *See* Colo. Bar Op. 100, *supra* note 1.

21. State rules authorizing contingent fees typically follow Model Rule 1.5(c), which states that a "fee may be contingent on the outcome of the matter for which the service is rendered . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2011).

The concept holds true–there is no contingency—if there is in fact no risk of nonrecovery. *See* Utah St. Bar Ethics Advisory Comm. Op. 114 (Feb. 20, 1992), http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_114.html ("A significant body of case law also supports the general conclusion that where there is virtually no risk of nonrecovery, a contingent fee

Another somewhat counter-intuitive but nonetheless critical principle is that sometimes a "high" contingent fee in a particular matter is reasonable, because those "high" fees balance out the risk that the lawyer will recover nothing in other cases.[22] Thus, what may be a "high" fee in a particular case is generally not a basis to find the fee excessive.[23] Further, the potential for a high fee compensates the lawyer for delay between the delivery of legal services and the recovery of the fee.[24]

This Article examines these interests and regulations further below, since all are implicated if a contingent fee agreement contains a provision allowing lawyers to walk away from the case when they deem it no longer worth the effort.

III. HOW COURTS IN SELECT JURISDICTIONS REGULATE COMPENSATION WHERE THE LAWYER FIRES THE CLIENT

Although disagreeing on the particulars, courts generally determine how much compensation an attorney who is retained under a contingent fee contract but does not complete the case is entitled to by looking at who terminated the agreement–the client or the lawyer–and whether the termination occurred with or without sufficient cause.[25] The courts generally agree that different rules govern compensation due upon: (a) termination by the client; (b) termination by the lawyer; or (c) mutual abandonment.[26] This Article focuses on the middle circumstance.

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charged by an attorney on the amount of the recovery is inappropriate.").

22. Wythe II Corp. v. Stone, 342 S.W.3d 96, 103 (Tex. App. 2011). The court reasoned:

> A contingent-fee contract is permissible in Texas in part because the potential for a greater fee compensates the attorney for assuming the risk that the attorney will receive no fee if the case is lost, while the client is largely protected from incurring a net financial loss in the event of an unfavorable outcome.

Id.; Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 815-16 (1989); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1125 (1970).

23. Colo. Bar Op. 100, *supra* note 1.

24. *Id.*

25. *See generally*, Fox, *supra* note 11, at 886-88 (summarizing the laws of California, Texas, New York, Florida, and Louisiana). Both lawyer and client can agree to terminate a contingent fee agreement, which generally means that the lawyer may recover in *quantum meruit*. *See* Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 584 (5th Cir. 2003), rev'd, 465 F.3d 587 (5th Cir. 2007).

26. Diaz v. Attorney General of Texas, 827 S.W.2d 19, 22-23 (Tex. App. 1992); Kopelman & Assocs., L.C. v. Collins, 473 S.E.2d 910, 916-17 (W. Va. 1996); Oneida Indian Nation v. Cnty. of Oneida, 802 F. Supp. 2d 395, 426-27 (N.D.N.Y. 2011). "Mutual abandonment" would occur, for example, if the lawyer and client agree to abandon a

A. *The General Requirement of "Just Cause" for Withdrawal is Universally Recognized as a Prerequisite to Compensation*

As a preliminary matter, it may not be obvious why portions of this Article discuss disciplinary rules in determining whether a lawyer can enforce a fee agreement with a client. Disciplinary rules have an important but circumscribed role in that context. Although disciplinary rules are not intended to apply to legal issues, courts tend to give them some weight in determining liability issues, including enforceability of contingent fee agreements.[27] Thus, though they do not control, in many states disciplinary rules are pertinent to these issues.

The courts in all states have generally recognized that lawyers who withdraw from a contingent fee case forfeit all right to compensation unless they can establish that withdrawal occurred for some reason, which they characterize as just cause, good cause, or justifiable cause.[28]

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contract, but for whatever reason the parties agree that the lawyer will continue to represent the client in the case. Under those circumstances, the courts imply a contract that includes an obligation to pay some form of compensation, either in *quantum meruit* or under the contract itself. *See Diaz*, 827 S.W.2d at 23.

27. *See Hoover*, 206 S.W.3d at 562 n.6 (recognizing in a dispute over scope of client's right to terminate lawyer under contingent fee agreement that although the Texas Disciplinary Rules of Professional Conduct "do not define standards of civil liability for attorneys, they are persuasive authority outside the context of disciplinary proceedings," and they have been applied as "rule[s] of decision in disputes concerning attorney's fees"); Tomar, Seliger, Simonoff, Adourian & O'Brien, P.C. v. Snyder, 601 A.2d 1056, 1058-59 (Del. Super. Ct. 1990) (applying disciplinary rules to enforcement of contract in dispute over division of fees among lawyers in different firms).

28. *See Woodbury*, 61 F.2d at 740 (applying New York law); Dinter v. Sears, Roebuck & Co., 651 A.2d 1033, 1038 (N.J. Super. Ct. App. Div. 1995); Bell & Marra, PLLC v. Sullivan, 6 P.3d 965, 970 (Mont. 2000), *op. on subsequent appeal*, 66 P.3d 294 (Mont. 2003); Tucker v. Rio Optical Corp., 885 P.2d 1270, 1272 (Kan. Ct. App. 1994); Int'l Materials Corp. v. Sun Corp., 824 S.W.2d 890, 894 (Mo. 1992) ("The general rule is that a lawyer who abandons or withdraws from a case, without justifiable cause, before termination of a case and before the lawyer has fully performed the services required, loses all right to compensation for services rendered."); Carbonic Consultants, Inc. v. Herzfeld & Rubin, Inc., 699 So. 2d 321, 323 (Fla. Dist. Ct. App. 1997); *Augustson*, 76 F.3d at 662 (applying Texas law); Sosebee v. McCrimmon, 492 S.E.2d 584, 587 (Ga. Ct. App. 1997); Dykema Gossett, PLLC v. Ajluni, 730 N.W.2d 29, 35 (Mich. Ct. App. 2007); Naeole v. D'Enbeau, 107 P.3d 1189 (Haw. 2004); Stall v. First Nat'l Bank of Buhl, 375 N.W.2d 841, 845-46 (Minn. Ct. App. 1985); Doman v. Stapleton, 611 S.E.2d 673, 675 (Ga. Ct. App. 2005); Lofton v. Fairmont Specialty Ins. Managers, Inc., 367 S.W.3d 593, 597 (Ky. 2010) ("A prevailing view is accepted across the nation that permits attorneys to recover remuneration for services rendered under *quantum meruit*, based on a contingency fee contract, even if they withdraw from representaiton for good cause [or just cause] shown."); Kirschner, P.A. v. Biritz, 843 So. 2d 349, 350 (Fla. Dist. Ct. App. 2003); *Faro*, 641 So. 2d at 70; Calley v. Woodruff, P.A., 661 So. 2d 20, 20 (Fla. Dist. Ct. App. 1994); Calley v. Thomas M. Woodruff,

A law firm that fired its client but still seeks compensation for time incurred has the burden to establish just cause.[29]

The courts that have considered the issue have held that just cause is not established simply because the court in which the matter was pending permitted the lawyer to withdraw from a case–regardless if the client consented or did not object. Even if lawyers properly withdrew in terms of the disciplinary rules, they may still have forfeited any right to compensation. For example, a lawyer who is disbarred *must* withdraw, but the vast majority of courts hold that a disbarred lawyer forfeits all right to compensation.[30] In other words, lawyers who must withdraw or merely have "good cause" to permit withdrawal may still forfeit any right to compensation if they do so without just cause.

P.A., 751 So. 2d 599, 601 (Fla. Dist. Ct. App. 1998); *In re* Wilhelm, 298 B.R. 464, 467-68 (Bankr. S.D. Fla. 2003) (applying Florida law); Liberty Mut. Ins. Co. v. Holbrook, 861 So. 2d 1216, 1217 (Fla. Dist. Ct. App. 2003); DePena v. Cruz, 884 So. 2d 1062, 1063-64 (Fla. Dist. Ct. App. 2004); Kyle v. Glickman, No. Civ. A. 99-3111, 2001 WL 35996143, at *3-4 (E.D. La. June 29, 2001) (making an *Erie* guess that a contingent fee lawyer who withdraws without just cause under Louisiana law "leaves a contingent fee on the table."); Feldman v. Davis, 53 So. 3d 1132, 1136 (Fla. Dist. Ct. App. 2011); Santini v. Cleveland Clinic Florida, 65 So. 3d 22, 29 (Fla. Dist. Ct. App. 2011); Ambrose v. Detroit Edison Co., 237 N.W.2d 520, 522 (Mich. Ct. App. 1975) ("[W]here an attorney is justified in refusing to continue in a case, he does not forfeit his lien for services already rendered.") (quoting 7A C.J.S. Attorney & Client § 220); Ecclestone, Moffett & Humphrey, P.C. v. Ogne, Jinks, Alberts & Stuart, P.C., 441 N.W.2d 7, 8 (Mich. Ct. App. 1989) ("An attorney retained on a contingent fee arrangement who withdraws from a case for good cause is entitled to compensation for the reasonable value of his services . . . not the contingent fee contract."); United States v. 36.06 Acres of Land, 70 F. Supp. 2d 1272, 1276 (D.N.M. 1999); *Beaumont*, 81 S.W.2d at 25; Hardison v. Weinshel, 450 F. Supp. 721, 723 (E.D. Wis. 1978); Ryan v. Washington, 51 P.3d 175, 176 (Wash. Ct. App. 2002); Ivins v. Elbinger Shoe Mfg. Co., 1921 WL 1302, at *3 (Ohio Ct. App. May 16, 1921); Sandler v. Gossick, 622 N.E.2d 389, 391 (Ohio Ct. App. 1993); Matheny v. Farley, 66 S.E. 1060, 1061 (W. Va. 1910); *Davenport*, 207 N.W. at 974. *See* Amason v. Harton, 89 So. 37 (Ala. 1921). *See generally* Blum, *supra* note 11 (collecting other cases and summarizing them and some of the foregoing).

In at least one case, the client did not assert that withdrawing without just cause constituted forfeiture of all fees, but instead argued that it merely reduced the amount recoverable. Verges v. Dimension Dev. Co., 32 So. 3d 310, 313, 315 (La. Ct. App. 2010).

While it may create distinct issues where they are regulated by statute, a related issue is whether a lawyer has good cause to assert a charging or retaining lien. *See* Rangel v. Save Mart, Inc., 142 P.2d 983, 989 (N.M. Ct. App. 2006); Lucky-Goldstar Int'l (America), Inc. v. Int'l Mfg. Sales Co., 636 F. Supp. 1059, 1061 (N.D. Ill. 1986). Courts often treat good cause to assert a charging lien as synonymous with just cause to withdraw. *E.g.*, *Faro*, 641 So. 2d at 69-70 (Fla. 1994); Stair v. Calhoun, 722 F. Supp. 2d 258, 267 (E.D.N.Y. 2010). The two are treated synonymously here, though conceivably a lawyer might not be entitled to assert a lien, even if a fee is warranted, if the state statute requires more than does state common law concerning just cause.

29. Staples v. McKnight, 763 S.W.2d 914, 916 (Tex. App. 1988).

30. *See infra* notes 99-106 and accompanying text.

Applying Texas law, the United States Court of Appeals for the Fifth Circuit reached this result in 1996.[31] The lawyer seeking compensation after withdrawing argued that "because it withdrew for good cause, by permission of the court, under Tex. Disciplinary R. Prof. Conduct 1.15(b), it therefore satisfied the Texas just cause requirement for recovering attorneys fees."[32] Judge Reavley assumed the trial "court correctly found good cause to withdraw," but "[n]evertheless, we conclude that [Texas's just cause requirement] prohibits all compensation in this case."[33] The court explained why:

> The objectives of a hearing on cause to withdraw differ from the objectives of a hearing on attorney's fees, and because of these differences *circumstances can arise that would authorize a trial court to permit counsel to withdraw but retain no fee.* When considering a motion to withdraw, a trial court is given broad discretion in order to protect the best interests of the client. In such a setting, the court generally focuses on the presence of circumstances harmful to the attorney-client relationship, and inquiry into the cause of these circumstances is irrelevant. At a lien hearing, however, the focus of attention is on the cause of attorney-client problems.
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> A court at a withdrawal hearing must also be concerned about the quality of representation a client will receive from an attorney who has a fundamental disagreement with a client's objective, or who believes that the client's objective poses an unreasonable financial burden. But the objective is for the client to choose. If the objective is neither illegal nor frivolous, then an attorney who is retained under a contingent fee contract and who withdraws because he disapproves of his client's objective may not receive compensation through the court. Any other rule would impinge on the client's right to choose the objectives of his representation.[34]

This was also the rationale relied upon by an Ohio appellate court. The district court held that because withdrawal had been permitted in the underlying litigation and indeed without the client's objection, it meant that the attorney had just cause sufficient to be compensated after withdrawal.[35] The appellate court reversed entry of summary judgment, explaining the following:

> It is uncontroverted that the law firm sought and received the trial court's permission to withdraw from representing appellants, and

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31. *Auguston*, 76 F.3d at 663-64.
32. *Id.*
33. *Id.*
34. *Id.* at 664 (emphasis added) (citation omitted).
35. *W. Wagner & G. Wagner Co., L.P.A.*, 669 N.E.2d at 275-76.

> appellants did not oppose the motion to withdraw. At that time, however, appellants were not put on notice that their acquiescence in the withdrawal of the law firm would preclude them from raising "unjustified withdrawal" as a defense to a subsequent action against them for attorney fees. Additionally, they cannot be charged with the responsibility of knowing the consequences of their acquiescence since they were without representation at the time. Therefore, the argument that the time for appellants to raise objections and contend that appellee did not have just cause to withdraw was when the motion to withdraw was litigated does not provide a just result in this case. This is especially true when it is clear from the motion to withdraw and the order granting that motion that the question of whether the law firm had just cause to withdraw was not addressed. There was simply a vague and general statement that counsel wished to withdraw because he "has been unable to effectively communicate with his clients and therefore cannot render effective legal representation," and a cursory order granting the motion but saying nothing about whether the withdrawal was with just cause.[36]

As another court explained in reaching the same conclusion, the "law can . . . take a relatively permissive attitude toward withdrawals *qua withdrawals*" but "the right to recover in quantum meruit after withdrawal is a different matter, and one on which the law takes a more rigorous approach."[37] In fact, every court that considered the question with care rejected equating cause to withdraw with just cause sufficient to withdraw and be paid.[38]

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36. *Id.* at 276.

37. Rus, Miliband & Smith v. Conkle & Olesten, 113 Cal. App. 4th 656, 673 (2003).

38. *E.g., Bell & Marra,* 6 P.3d at 971 (quoting *Auguston*, 76 F.3d at 664-65), *op. on subsequent appeal,* 66 P.3d 294 (Mont. 2003); *Rus, Miliband & Smith*, 113 Cal. App. 4th at 673 ("The law governing an attorney's right or duty to merely withdraw from a case–and be done with it for good–is a 'different question' than an attorney's right to withdraw and then *later* recover.") (citing Estate of Falco v. Decker, 188 Cal. App. 3d 1004, 1007 (1987)); *Faro*, 641 So. 2d at 71 ("The existence of grounds for withdrawal does not always translate into an attorney's right to be paid for work performed.") *See* Barr v. Sprint Corp., No. 16CV98-24925, 2002 WL 34227367 (Mo. Cir. Ct. June 28, 2002) (characterizing a hearing on withdrawal as usually constituting a "mundane event"); Robert Rossi, *3 Attorneys' Fees* § 8 (June 2012) ("[N]either the existence of 'good cause,' which entitles an attorney to withdraw under the rule of professional conduct, nor court approval of the attorney's withdrawal, necessarily indicates that there was justifiable cause for the withdrawal so as to entitle the attorney to compensation.").

Other courts have recognized that if the need for withdrawal was due to an ethical conflict facing the lawyer, the conflict must have been caused by forces beyond the attorney's control. *See Carbonic Consultants, Inc.*, 699 So. 2d at 324 (noting that "common sense require[s] the client's conduct to have caused an ethical dilemma in order for fees to be recoverable" because this "effectively serve[s] to protect the client, while at the same time insuring attorney compensation where an attorney is forced to withdraw from a

However, a few courts have failed to distinguish between withdrawal sufficient to permit or require withdrawal under the disciplinary rules, and circumstances sufficient to constitute just cause requiring the client to still pay the lawyer.[39] The net result is that these few cases conflate the question of whether the cause is sufficient to permit withdrawal with the question of whether just cause is sufficient to withdraw and still be paid.[40] However, the vast majority of courts, and all of them that actually considered the issue, have held that cause sufficient to require or permit a lawyer to withdraw is insufficient to constitute just cause sufficient to withdraw but still be paid. This Article next turns to the question of how much "more" a lawyer is required to show beyond merely that withdrawal was proper.

The courts generally agree that there is no simple boundary for what may in a particular case pass for just cause. Courts typically rely upon language from an American Law Reports article in defining the basic contours of just cause.[41] That article provides in pertinent part the following:

> Courts have found "good cause" where the attorney knows that the client's claim is fraudulent, the attorney has professional objections to the client's retention of additional counsel, the client is uncooperative, the attorney and client suffer a 'breakdown' in communication, the client degrades the attorney (usually by claiming the attorney was dishonest), the client refuses to pay justified attorney fees and costs or ethical rules require the attorney to withdraw. . . . It has been held

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pending case as a result of forces beyond his or her control"); B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., 373 S.W.3d 419, 423 (Ky. 2012) (finding that the attorney who withdrew due to problems with relationship with other client caused by representation lacked good cause "particularly in light of the fact that" those problems "existed at the time she began" the representation).

However, one court permitted a lawyer to recover where the lawyer withdrew due to "conflicts of interest" without elaborating why this was the fault of the client. *Naeole*, 107 P.3d at 1189.

39. *See Stall*, 375 N.W.2d at 845-46; Joseph Brenner Assocs., Inc. v. Starmaker Entm't, Inc., 82 F.3d 55, 57 (2d Cir. 1996); Leighton v. New York, Susquehanna & W. R.R. Co., 303 F. Supp. 599, 615 (S.D.N.Y. 1969).

40. On a related note, a client's claim that a lawyer should *forfeit* earned fees as the result of a breach of fiduciary duty is distinct from the issue here. Whether a lawyer breaches a fiduciary duty and so should forfeit earned fees begs the question of whether he earned those fees in the first place.

41. *Ryan*, 51 P.3d at 178-79 (quoting Wade R. Habeeb, *Annotation, Circumstances Under Which Attorney Retains to Compensation Notwithstanding Voluntary Withdrawal from Case*, 88 A.L.R.3d 246 (1978)); Ausler v. Ramsey, 868 P.2d 877, 880 n.4 (Wash. App. 1994) (same); Cerrano v. Ballantyne, 1982 WL 4581, at *4 n.4 (Ohio App. Dec. 21, 1982) (same).

> unjustifiable for an attorney to withdraw from a case because the client has retained other counsel, the attorney does not believe the negotiated contract with the client is sufficiently compensatory, the attorney feels that the case has no potential or the client refuses to accept a settlement offer.[42]

Another court utilized a somewhat similar definition from a treatise on agency law:

> No general rule can be laid down by which it can, in all cases, be determined what cause will be sufficient to justify an attorney in abandoning a case in which he has been retained[.] But if the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money, during the progress of a long litigation, to his attorney to apply upon his compensation, sufficient cause may be furnished to justify the attorney in withdrawing from the further service of the client. So any conduct upon the part of the client during the progress of the litigation which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses, or any other unjustifiable means, which would furnish sufficient cause. So if the client demanded of the attorney the performance of an illegal or unprofessional act; or if the client were seeking to use the attorney as a tool to carry out the malicious or unlawful designs of the client, the attorney might lawfully abandon the service. So if the client insists upon the employment of counsel with whom the attorney cannot cordially co-operate, the attorney will be justified in withdrawing from the case.[43]

Courts in more recent years have not offered a more precise definition. A recent Montana Supreme Court decision relied upon a Fifth Circuit decision, stating the following:

> Whether good cause for withdrawal exists depends on the facts and circumstances of each case. As the Fifth Circuit Court of Appeals pointed out:
> "Generally, just cause exists when the client has engaged in culpable conduct. Thus, for example, courts have found just cause where the client attempts to assert a fraudulent claim; fails to cooperate; refuses to pay for services; degrades or humiliates the attorney; or retains other counsel with whom the original attorney cannot work."

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42. *Ryan*, 51 P.3d at 178-79.

43. *Matheny*, 66 S.E. at 1061 (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 855 (Callaghan & Co. 1889).

> Just cause has also been found where continued representation would violate ethical obligations of the attorney or where the attorney lacked the resources to pursue litigation.[44]

Other recent decisions have also adopted fact-intensive tests based upon amorphous words.[45]

In fact, these broad characterizations taken at face value inaccurately capture the narrow circumstances in which just cause has in fact been found by the courts. As the following section shows, the majority of the courts have required proof by the lawyer of significant, intentional client misconduct that effectively caused the lawyer to withdraw.

This section next describes the case law in the majority and minority approaches to what constitutes just cause. The vast majority of the jurisdictions require a substantial showing by the lawyer seeking compensation after withdrawal.

B. The Two Approaches to Identifying the Boundaries of "Just Cause"

1. The Majority Approach Favors the Client by Essentially Requiring Proof That But For the Client's Conduct the Lawyer Would Have Stayed in the Case and the Client Recovered. The majority of the courts that have addressed the issue have adopted a very narrow definition of "just cause," one that only protects a lawyer who is forced to withdraw from a representation due to the client's misconduct.

California is a prime example of this and addressed the issue very early on. In the leading case of *Estate of Falco v. Decker*,[46] the court recognized that adopting an expansive definition of "just cause" would have adverse effects on the lawyer-client relationship. For example, it recognized that permitting recovery after withdrawal, but not making it mandatory, would require courts to weigh the veracity of the attorney's testimony that he had an ethical motive against the measureable

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44. *Bell & Marra*, 6 P.3d at 970 (quoting *Augustson*, 76 F.3d at 663 (Texas law)) (citations omitted).

45. *E.g., Lofton*, 367 S.W.3d at 597 ("What is 'just cause' or 'good cause' to withdraw and still maintain a claim for *quantum meruit* compensation depends on the facts and circumstances of each case.") (quoting 7A C.J.S. Attorney & Client § 360 (2012)); *B. Dahlenburg Bonar, P.S.C.*, 373 S.W.3d at 423 (same); May v. Seibert, 264 S.E.2d 643, 681 (W. Va. 1980); *Staples*, 763 S.W.2d at 916 n.1 ("No general rule can be laid down by which it can, in all cases, be determined what cause will be sufficient to justify an attorney in abandoning a case in which he has been retained.") (quoting *Matheny*, 66 S.E. at 1061).

46. 188 Cal. App. 3d 1004, 1015-16 (1987).

ulterior motive of a desire to reduce the lawyer's losses by walking away from his contract with his client.[47]

Because of these and other concerns, the court in *Falco* required an attorney to establish each of the following elements to recover a fee after firing his client:

> (1) counsel's withdrawal was mandatory, not merely permissive, under statute or state bar rules;
> (2) the overwhelming and primary motivation for counsel's withdrawal was the obligation to adhere to these ethical imperatives under statute or state bar rules;
> (3) counsel commenced the action in good faith;
> (4) subsequent to counsel's withdrawal, the client obtained recovery; and
> (5) counsel has demonstrated that his work contributed in some measurable degree towards the client's ultimate recovery.[48]

While later California cases have pondered whether in rare circumstances permissive withdrawal might satisfy the first element of the *Falco* test,[49] California courts adhere to the five-element test of *Falco*.[50] One court explained why, if withdrawal was merely permissive, any quest for compensation should be subject to "heightened scrutiny,"[51] stating in pertinent part the following:

> The reason fees are barred . . . is the inequity of allowing lawyers to capitalize on their own voluntary actions in leaving clients lawyerless. [A prior decision] opened its opinion by characterizing the withdrawing attorney's behavior as bet hedging, and closed by analogizing the attorney to the man who kills his parents and then asks for mercy as an orphan. *Falco* repeated the bet hedging metaphor, and pointed to an attorney's possible economic motivations in seeking to reduce his or her "own losses."
>
> To those thoughts let us add this gloss: To allow an attorney under a contingency fee agreement to withdraw without compulsion and still seek fees from any future recovery is to shift the time, effort and risk of obtaining the recovery (economists would refer to these things as the "costs" of obtaining recovery) from the attorney, who originally agreed to bear those particular costs in the first place, to the client. The withdrawing attorney gets a free ride as to many of the headaches of

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47. *Id.* at 1016.

48. *Id. See generally* Rutman v. Bennett, No. D036046, 2002 WL 80302, at *8 (Cal. Ct. App. Jan. 22, 2002) (stating general rule).

49. *See Rus, Miliband & Smith*, 113 Cal. App. 4th at 675 (dicta).

50. *E.g.*, Reckas v. Kalashian, No. A102718, 2005 WL 984401, at *2 (Cal. Ct. App. Apr. 28, 2005).

51. *Id.* (citations and quotations omitted).

> litigation which he or she otherwise would have had to endure: answering the client's phone calls, showing up for depositions, responding to discovery, fending off summary judgment motions, preparing for trial, fending off *in limine* motions, picking a jury, fending off motions for nonsuit, judgment notwithstanding the verdict and new trial if he or she does win, and then, at the end of it all, protecting the fruits of victory by responding to an appeal. It is a very tough row which a contingency fee attorney originally agrees to hoe. Thus it is unassailably unfair to allow him or her to escape that labor absent the most compelling of permissive reasons—reasons that, as *Falco* indicated, must pass heightened scrutiny.[52]

Although using different words than California to describe what is required for just cause, Florida courts also require a significant showing of client misconduct. In the leading case of *Faro v. Romani*,[53] the Florida Supreme Court stated that only "if the client's conduct makes the attorney's continued performance of the contract either legally impossible or would cause the attorney to violate" an applicable disciplinary rule might the lawyer be entitled to a fee if there is eventually a recovery.[54] Florida courts have limited the exceptions to those two circumstances.[55]

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52. *Rus, Miliband, & Smith*, 113 Cal App. 4th at 675-76 (emphasis added) (citations omitted) (quoting *Falco*, 188 Cal. App. 3d at 1016). *See also Barr*, 2002 WL 34227367 (Mo. Cir. Ct. June 28, 2002) (applying California law to fee dispute, court found just cause to withdraw where client had caused total breakdown of attorney-client relationship in complex class action context).

53. 641 So. 2d 69 (1994).

54. *Id.* at 71. *See Carbonic Consultants, Inc.*, 699 So. 2d at 323 (citations omitted). In *Carbonic Consultants, Inc.*, the court stated:

> In most circumstances, an attorney retained on a contingent basis who voluntarily withdraws will be held to have forfeited any right to compensation. An exception is made where there is a justifiable cause for withdrawal based on a finding that the client's conduct either rendered the attorney's performance legally impossible, or would result in the attorney violating an ethical rule.

Id. (citations omitted); *Calley*, 661 So. 2d at 20 (noting that "if the client's conduct makes it necessary for the attorney to withdraw from further representation of the client, the attorney might be entitled to a fee"); *Kirschner*, 843 So. 2d at 350 (2003) (holding lawyer had withdrawn due to serious disagreements with client over handling of case, not for just cause, and so forfeited any compensation); *In re Wilhelm*, 298 B.R. at 469 (finding lawyer had withdrawn in order to be paid from available funds, and not due to conflict of interest caused by client); *Liberty Mut. Ins. Co.*, 861 So. 2d at 1217 (discussing that lawyer who married and moved out of state lacked just cause); Lynn v. Allstar Steakhouse & Sports Bar, 736 So. 2d 722, 723 (Fla. Dist. Ct. App. 1999); Kay v. Home Depot, 623 So. 2d 764, 765 (Fla. Dist. Ct. App. 1993) (recognizing that disagreement over settlement value was not just cause).

55. *DePena*, 884 So. 2d at 1064 (acknowledging that "the two enumerated exceptions in *Faro* are the only circumstances that justify a finding that the attorney was entitled to

Consequently, a Florida bankruptcy court addressed whether a law firm was entitled to any compensation when it was forced to withdraw from a contingency fee agreement due to a conflict of interest created when the firm chose to merge with another firm.[56] The court recognized that it could not "be argued in good faith that the Law Firm did not voluntarily" withdraw, and that, as a result, it was not entitled to any compensation because:

> an attorney who is retained on a contingency fee agreement is not entitled to compensation for services rendered after the attorney voluntarily withdraws in the absence of any evidence that the client breached the attorney's contract or legally caused to be breached or placed the attorney in an ethical dilemma.[57]

As with these courts, Michigan courts recognize that just cause to deny compensation arises only when the client "actively prevents the occurrence of an event that triggers an attorney's recovery under a contingent fee agreement, the attorney has a right to recover on a *quantum meruit* theory."[58] Thus, for example, when a client's fraud caused the lawyer to present a false damages theory to the jury at trial, the firm was able to recover a reasonable fee.[59] Likewise, if a client has caused the total breakdown in the attorney-client relationship, including disparaging the lawyer and failing to cooperate, just cause may exist.[60]

Another example of a jurisdiction following the client-centered approach to determining just cause is Texas. An early Texas decision stated that only where the client "wrested" the case from the lawyer

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the fee"); *Santini*, 65 So. 3d at 30 (noting lawyer must show that the client's conduct caused withdrawal).

56. *In re* Naturally Beautiful Nails, Inc., No. 95-321-8P1, 2004 WL 2931367, at *1 (Bankr. M.D. Fla. Oct. 13, 2004).

57. *Id.* at *2.

58. *Dykema Gossett, PLLC*, 730 N.W.2d at 35-36 (emphasis added).

59. *Id.*

60. *Ambrose*, 237 N.W.2d at 522; *see* Meyer v. Township of Macomb Cnty., No. 06-14953, 2010 WL 891268, at *3 (E.D. Mich. Mar. 10, 2010) (assuming that withdrawal due to breakdown of attorney-client relationship was sufficient to constitute "just cause" but without addressing the issue directly); Kapelanski v. West Iron Cnty. Bd. of Educ., No. 226906, 2001 WL 966523, at *3 (Mich. Ct. App. Aug. 24, 2001) (expressly presuming but not deciding that a breakdown of relationship was sufficient to constitute just cause); Huguley v. Gen'l Motors Corp., No. 83-2864, 1991 WL 88413, at *1, *3 n.3 (E.D. Mich. May 26, 1991) (leaving for later determination whether counsel had good cause to withdraw). *But cf.* Hawk v. Jewish Vocational Serv., No. 290048, 2010 WL 1568456, at *5 (Mich. Ct. App. Apr. 20, 2010) (rejecting lawyer's effort to prove this as basis for withdrawal, finding instead lawyer had withdrawn for economic reasons, and so affirming denial of compensation and award of sanctions against lawyer for making claim).

"without any fault on" the lawyer's part could the lawyer recover.[61] The modern leading case of *Staples v. McKnight*[62] illustrates this approach. In that case, the lawyer contended that he believed his client was going to commit perjury, so he was required to withdraw, and thus had just cause to do so.[63] The trial court entered judgment on a jury verdict for the lawyer, and the client appealed, arguing that no evidence supported the judgment.[64] The appellate court reversed.[65] While agreeing that "a client's intention to give perjured testimony provides just cause for an attorney to withdraw," the lawyer did not meet his burden of establishing that the threatened testimony was, in fact, false.[66] He was entitled to no fee.

In fact, no modern reported Texas case has ever found just cause sufficient to permit an attorney to withdraw but still be compensated.[67] Instead, both before and after *Staples*, Texas courts have rejected every argument that just cause existed,[68] with two odd exceptions.[69]

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61. Crye v. O'Neal & Allday, 135 S.W. 253, 254 (Tex. Civ. App. 1911) (dicta) (quoting Myers v. Crockett, 1855 WL 4877, at *1 (Tex. 1855)).

62. 763 S.W.2d 914 (Tex. App. 1988).

63. *Id.* at 916-17.

64. *Id.* at 915.

65. *Id.* at 917-18.

66. *Id.* at 917. One judge dissented, finding the evidence was sufficient to support the verdict. *Id.* at 918 (Stephens, J., dissenting).

67. *See* Rapp v. Mandell & Wright, P.C., 127 S.W.3d 888, 898 (Tex. App. 2004) (finding that the firm had not established just cause where it had withdrawn without having been requested to do so and had not remained responsible for the case); Kelly v. Murphy, 630 S.W.2d 759, 761–62 (Tex. App. 1982) (holding that an attorney who dismissed his client's lawsuit without client's authorization was not entitled to recover even in quantum meruit); *Staples*, 763 S.W.2d at 917 (discussing lawyer who withdrew due to disagreement with client over expected testimony, but lost any right to compensation because lawyer could not prove he had just cause to drop the client where he could not prove the client in fact had intended to commit perjury); Royden v. Ardoin, 331 S.W.2d 206, 209 (1960) (deeming attorney disbarred for unrelated misconduct to have voluntarily abandoned a client and forfeited any right to compensation); *Augustson*, 76 F.3d at 663, 665 (finding disagreement with client over settlement value and extent of discovery was not just cause to require the client still to pay lawyer, even though it was cause sufficient to permit the lawyer to withdraw from the case).

68. *Auguston*, 76 F.3d at 662 (citing *Royden*, 331 S.W.2d at 209). *See Rapp*, 127 S.W.3d at 898 (finding firm had not established just cause where it had withdrawn without having been requested to do so and had not remained responsible for the case); *Kelly*, 630 S.W.2d at 761–62 (holding that an attorney who dismissed his client's lawsuit without client's authorization was not entitled to recover even in quantum meruit).

69. In one very old case, the Texas Supreme Court held that a lawyer who had been appointed to be a judge could recover for services rendered, stating that "the law did not intend that every attorney elected as judge, should be punished by the loss of compensation for services already rendered," characterizing it as a consequence of the "operation of law."

Courts in other jurisdictions have less-developed case law than these states, but still have applied the same client-centered definition of just cause, holding that lawyers who withdraw from a representation forfeit any right to compensation unless the client effectively brought about the need for withdrawal.[70] For example, in one New York case, the clients ignored their own case, caused delay, and impaired the ability of the lawyer to settle the case.[71] As a result, the court held the lawyer had good cause to withdraw, since the clients were "responsible for the present unsatisfactory situation in which this case now stands."[72] In one Kansas case, the appellate court held that, if proven, a client's demand that the lawyer try to bribe the judge would constitute just cause.[73] Another Kansas court stated that a client who asserts a fraudulent claim may be forced to pay quantum meruit for the value of services provided prior to the lawyer discovering the fraud.[74]

As with these courts, courts in other jurisdictions have applied the client-centered approach. In addition to citing the California decision in *Falco,* the Missouri Supreme Court stated the fact that the lawyer was required to withdraw was merely "one factor" that a court could consider in determining whether just cause existed.[75] The West Virginia

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Baird v. Ratcliff, 10 Tex. 81, 1853 WL 4279, at *1 (1853).

There is one modern unpublished case with waived errors and deemed findings that make the case of limited utility, though it still illuminates the kind of conduct required before a court will order a client fired by his lawyer to pay him. Russell v. Henry, No. 05-95-00817-CV, 1997 WL 527264 (Tex. App. Aug. 27, 1997). The lawyer was representing a client in a dispute with a bank. The client sent a defamatory letter about the bank. The lawyer warned the client not to send more letters, but the client ignored the lawyer's advice and was sued for having sent the letters. The lawyer promptly filed a motion to withdraw. *Id.* at *1-2. The appellate court held there was sufficient evidence to support the deemed finding that there was good cause because the lawyer found these letters to be "repugnant, unethical, and immoral." *Id.* at *6.

Russell is of limited import because the trial court had failed to include the lawyer's requested instruction on what constituted "good cause," and the client did not object to its omission. *See* 1997 WL 527264, at *6.

70. *E.g., Leighton*, 455 F.2d at 391 (New Jersey law); *Sosebee*, 492 S.E.2d at 587 (Ga. Ct. App. 1997) (permitting recovery if client prevents the contingency from happening).

71. Borup v. Nat'l Airlines, 159 F. Supp. 808, 809-10 (S.D.N.Y. 1958).

72. *Id.* at 810.

73. *Tucker*, 885 P.2d at 1272.

74. Clark v. Nichols, 127 A.D. 219, 219 (N.Y. App. Div. 1908).

75. *Int'l Materials Corp.*, 824 S.W.2d at 895 (holding that firm was entitled to quantum meruit compensation where it had litigated a case for eleven years for a client who then settled relatively quickly with replacement counsel, and firm lacked resources to continue case). *See generally* Timothy E. Gammon, *Attorney Fees: Another Light Shines Through,* 48 J. MO. B. 415, 419 (1992) (viewing *Int'l Materials Corp.* as an expansion of attorneys' right to compensation on withdrawal).

Supreme Court recognized that the just-cause exception permitted recovery of fees if the attorney "abandons the case for good cause, or be prevented by the act of his client from full performance."[76] The court found just cause based on the fact that the lawyer had withdrawn after learning that his client had committed fraud which had resulted in sanctions.[77] Other courts are just beginning to apply the concept to particular facts.[78]

Perhaps illustrating the narrowness of the majority approach, the foregoing analysis shows that there is only a handful of modern cases where just cause has been found.[79] They involve truly egregious, intentional client conduct that frustrates the ability of lawyers to perform their obligation to complete representation. Anything less is insufficient.[80]

2. The Minority Approach Employs a More Lawyer-Friendly Concept of Just Cause. The vast majority of cases follow the rule that a lawyer who withdraws without just cause forfeits any right to compensation. But there are exceptions. In Illinois, one appellate court decision has given a somewhat narrow interpretation to just cause.[81] In West Virginia, the state supreme court has created an exception to the rule that withdrawal without just cause results in forfeiture of all compensation.[82]

The Illinois case is discussed more fully in the next section.[83] It allows for just cause to be found where a client refuses a settlement offer—a position expressly rejected by every other court that has analyzed it. Arguably, the statement in the case misapprehends Illinois law.[84]

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76. Pritt v. Suzuki Motor Co., 513 S.E.2d 161, 168 (W. Va. 1998) (quoting *Methany*, 66 S.E. at 1061).

77. *Id.* at 169.

78. Kentucky courts are just beginning this analysis, adopting the rule in the summer of 2012 that just cause is required. *Lofton*, 367 S.W.3d at 597-98.

79. Courts have suggested that actual knowledge that a client intends to commit perjury will constitute just cause but have found actual proof lacking. *E.g., Staples*, 763 S.W.2d at 917; *Calley*, 751 So. 2d at 601.

80. In one other case, the court found that the lawyer's inability to continue to represent the contingent fee client was caused by circumstances beyond the control of both lawyer and client. Tranberg v. Tranberg, 456 F.2d 173, 175 (3d Cir. 1972). The court allowed a recovery. *Id.*

81. McGill v. Garza, 881 N.E.2d 419, 423 (Ill. Ct. App. 2007).

82. *May*, 264 S.E.2d at 674-75.

83. *See infra* notes 94-96 and accompanying text.

84. *See infra* notes 94-97 and accompanying text.

The West Virginia Supreme Court's approach was more deliberate. In *May v. Seibert,*[85] that court created a narrow exception, not to the definition of just cause, but to the rule that withdrawal without just cause forfeits all fees.[86] The net effect, of course, is to allow for a lawyer to be compensated after withdrawal under broader circumstances than the majority approach. In that case, the court held that if a lawyer properly withdraws by giving notice to the client and obtaining court permission, the lawyer can recover in quantum meruit so long as withdrawal causes no prejudice to the client and may do so even if the lawyer lacks just cause that would otherwise be required.[87] In other words, under West Virginia law, lawyers can recover if *either* they have just cause to withdraw, *or* they withdraw without just cause and withdrawal causes no prejudice to the client.

The facts of *May* illustrate its likely narrow confines. There, the lawyer had prepared the case for trial, obtained an offer of the full insurance policy that was available to settle the claim, and ultimately the client settled for exactly the same amount.[88] Under these circumstances, the court held that the lawyer was entitled to compensation based upon the time spent by the lawyer, taking into account "the result ultimately obtained compared with the intermediate accomplishments by the withdrawing counsel."[89]

3. Two Illustrations of the Different Approaches. This section looks at how the jurisdictions approach two commonly recurring fact patterns, and whether they constitute just cause. First, do lawyers have just cause to withdraw if the client rejects a reasonable settlement offer? Second, do lawyers have just cause to withdraw if they are disbarred because of unrelated conduct? Only one jurisdiction answers the first question in the affirmative, while there is a deeper split on the second. But both illustrate the underlying values emphasized in these analyses.

The first illustration between the minority approach and the majority approach is whether a client's refusal of a settlement offer can ever constitute just cause. For example, the vast majority of courts hold that a client's refusal to accept a settlement offer cannot constitute just cause that permits a lawyer to be paid if the lawyer withdraws, and the client

85. 264 S.E.2d 643 (W. Va. 1980).

86. *Id.* at 647-48.

87. *Id.* at 647. *See generally* Neely v. Zimmer, 2012 WL 3198557, at *4 (S.D. W. Va. Aug. 2, 2012) (summarizing *May*); Kopelman & Assocs., L.C. v. Collins, 473 S.E.2d 910, 917 (W. Va. 1996) (same).

88. *May*, 264 S.E.2d at 648.

89. *Id.* at 647-48.

later settles the case or obtains a judgment.[90] The courts reason that allowing the lawyer to withdraw and be paid if a client refuses a settlement offer effectively vitiates the client's right to determine whether to settle and undoes the risk-sharing inherent in contingent fee representations.[91] In the context of denying any recovery to lawyers who withdrew because their client rejected a settlement offer, a Washington state appellate court stated:

> Contingent fee arrangements serve an important function. Many injured persons do not have the means to hire an attorney. If these people were required to pay attorney fees at an hourly rate, regardless of winning or losing, they would simply forego pursuing legal action for fear that if they lost it would ruin them. Also, many attorneys would be unwilling to invest much time for a client who might not be able to pay. As a result, the legal system would systematically under-compensate poorer people while still compensating wealthier victims. In the typical contingent fee arrangement, attorneys in effect insure their clients and themselves against the cost of losing by covering those

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90. *See, e.g.*, Itar-Tass Russian News Agency v. Russian Kurier, Inc., No. 95 Civ 2144 (JGK), 1999 WL 58680, at *15 (S.D.N.Y. Feb. 4, 1999) ("A charging lien is not available under the terms of the statute to enforce a contract between two lawyers simply because the amount one attorney will owe the other under their contract will ultimately depend on how much money their common former client collects."); Dowler v. Cunard Line Ltd., No. 94 Civ. 7480, 1996 WL 363167, at *2 (S.D.N.Y. June 28, 1996) (denying an attorney's request to impose a charging lien on a client after granting the attorney's request to withdraw); *Carbonic Consultants, Inc.*, 699 So. 2d at 323 n.1 ("[T]he cases are in almost universal agreement that failure of a client to accept a settlement offer does not constitute justifiable cause for a withdrawing attorney to collect fees."); *Kay*, 623 So. 2d at 766-67 (finding disagreement over settlement value was not just cause); *Lofton*, 367 S.W.3d at 598 ("[T]he conflict between lawyer and client must rise to a higher level than withdrawing from representation over a disagreement as to settlement."); Kahn v. Kahn, 186 A.D. 719, 720-21 (N.Y. App. Dept. 1992) (holding that an attorney must demonstrate justified withdrawal and if he fails to do, he forfeits right of recovery); *Ausler*, 868 P.2d at 878 (finding client's refusal of settlement offer did not constitute good cause for the attorney to withdraw). Some courts hold that a client's refusal to settle is in fact insufficient cause to permit withdrawal, let alone to permit withdrawal and still be paid. *E.g.*, Deflumer v. Leschack & Grodensky, P.C., No. 99-CV-1650 (NAM/DRH), 2000 WL 654608, at *1 (N.D.N.Y. May 19, 2000) ("The mere fact that an attorney and client may disagree over a proposed settlement will not establish good cause for withdrawal of representation."); Marrero v. Christiano, 575 F. Supp. 837, 839 (S.D.N.Y. 1983) ("[T]he refusal of a client to accept a settlement offer is not good and sufficient cause for the withdrawal of the attorney."); *In re* Busby, 207 A.D.2d 886, 887 (N.Y. App. Dept. 1994) ("[A] client's refusal to accept a settlement generally does not constitute the kind of uncooperative behavior which is sufficient to authorize an attorney to withdraw.").

91. *See, e.g.*, Charles Gruenspan Co. v. Thompson, No. 80748, 2003 WL 21545134, at *13 (Ohio Ct. App. July 10, 2003) (finding that a literal reaching at the agreement would strip the client of his voice in determining settlment).

> losses with higher-than-normal fees in winning cases. To that end, the percentages used by contingent fee contract attorneys, whether established by custom or even regulated by statute, are designed to reflect the risk of failure in a given case, as well as the overall risks in the attorney's general practice . . . .
>
> Contingent fees also have drawbacks for both the attorney and the client. The victorious client's compensation will be diminished by the attorney's higher-than-normal fee. The attorney risks a minimal recovery, or no recovery at all. This may occur because a client wants to go to trial or appeal a case that the attorney has come to believe will be unsuccessful.
>
> Clients often must accept the drawbacks of a contingent fee arrangement if they want to acquire an attorney at all. Attorneys must do the same. Therefore, an attorney should not be permitted to withdraw from a "bad case" on grounds that the client "uncooperatively" wishes to go to trial, thereby eliminating his or her exposure to risk, and still recover fees for that case.[92]

The minority approach on this issue comes from two cases arguably misreading Illinois law. In *McGill v. Garza,*[93] an Illinois appellate court stated that Illinois law provided that just cause existed where the lawyer "voluntarily withdrew for the sole reason that the clients did not agree to accept a reasonable settlement offer or negotiate as the attorney thought best."[94] For support, the court in *McGill* cited its own earlier decision in *Kannewurf v. Johns.*[95] However, in *Kannewurf,* the appellate court did not hold that a lawyer had just cause to withdraw simply because the client rejected a settlement offer, but instead stated that "there was sufficient evidence in this case for the trial court to reasonably determine that [the conduct of the clients had] . . . forced a complete breakdown in the attorney-client relationship . . . ."[96] And the United States Court of Appeals for the Seventh Circuit recognized that *Kannewurf* did not allow withdrawal simply for a rejected settlement offer.[97] Nonetheless, relying on the reading of Illinois law, a federal

92. *Ausler*, 868 P.2d at 881.

93. 881 N.E.2d 419 (Ill. Ct. App. 2007).

94. *Id.* at 423.

95. *Id.* (citing Kannewurf v. Johns, 632 N.E.2d 711 (Ill. Ct. App. 1994)).

96. *Kannewurf*, 632 N.E.2d at 716.

97. Goyal v. Gas Tech. Inst., 389 F. App'x 539, 544 (7th Cir. 2010) (summarizing Illinois law as allowing compensation "'if his sole reason for withdrawing is because his clients do not want to negotiate a case in the manner he thinks best,' causing a 'complete breakdown' in the attorney client relationship") (quoting *Kannewurf*, 632 N.E.2d at 714, 716).

district court in New Mexico found just cause where a client rejected a settlement offer.[98]

Even the Seventh Circuit's narrower reading of Illinois law suggests that a client's rejection of a lawyer's advice on a matter left by law to the client—whether to settle the case—can be the root cause of a breakdown in the attorney-client relationship. The client, however, has the unfettered right to reject a settlement, and so a lawyer's disagreement with a client's decision should not logically be deemed to be a reason for the lawyer to withdraw from the case, or it renders the client's ability to decide whether to settle largely illusory.

The second common fact pattern the courts have confronted is whether lawyers who are disbarred due to conduct in some other case have sufficient just cause to withdraw to permit the lawyer to recover in quantum meruit for services provided prior to disbarment.[99] (All compensation is forfeited where the conduct causing disbarment relates to and harms the particular case in which the fee is sought.[100]) The courts all agree that a disbarred attorney may not recover pursuant to the contract (after all, the contingency did not occur), but they disagree on whether a lawyer forfeits all right to compensation or may obtain quantum meruit recovery for work performed before being disbarred.[101]

One court recently described this split, recognizing that under one view "the fact that an attorney was suspended or disbarred is regarded as the equivalent of unjustified voluntary abandonment of the client and precludes recovery for legal work performed prior to the disciplinary action."[102] However, another line of cases "does not bar recovery per

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98. *36.06 Acres of Land*, 70 F. Supp. 2d at 1276 (citing *Kannewurf* for the proposition that "a client's refusal to accept a reasonable settlement offer can constitute justifiable cause for withdrawal").

99. *See generally* George L. Blum, *Attorney's Right to Compensation as Affected by Disbarment or Suspension before Complete Performance*, 59 A.L.R. 5th 693 (1998).

100. *Id.* at § 3; Kowouvacilis v. Am. Fed'n of State, Cnty., & Mun. Emps., 841 N.E.2d 1273-80 (Mass. Ct. App. 2006); Phil. Bar Ass'n Prof. Guidance Comm. Ethics Op. 2007-14, at *2 (Dec. 2007) [hereinafter Phil. Bar Op. 2007-14]. *See also* Nehad v. Mukasey, 535 F.3d 962, 971 (9th Cir. 2008) ("[I]t is generally held that a lawyer may not withdraw merely because a client refuses to settle.").

101. *See infra* notes 102-03 and accompanying text.

102. *Kourouvacilis*, 841 N.E.2d at 1279. *See* Pearson v. Tanner, No. 12-798, 2012 WL 1432282, at *6 (E.D. Pa. Apr. 25, 2012) (finding termination of the agreement flows from attorneys' wrongful act); Fletcher v. Krise, 120 F.2d 809, 812 (D.C. Cir. 1941) (stating that "appellant's disbarment deprived him of any right to compensation either under his contract or on a quantum meruit [basis]"); *Davenport*, 207 N.W. at 974 (finding attorney disbarred while case was pending on appeal to have abandoned his contract "without just cause," thereby "forfeit[ing] all right to payment for any services previously rendered"); *In re* Woodworth, 85 F.2d 50 (2d Cir. 1936).

se, but rather allows a disbarred or suspended attorney to recover the reasonable value of services rendered prior to the discipline in certain situations."[103]

The interesting concept which they divide on is whether disbarment is a voluntary act by the lawyer. Courts that reject providing any compensation characterize disbarment as "the proximate results of [the attorneys'] own wrongful conduct," and thus constituting a material breach of contract, resulting in loss of the right to any compensation.[104] Courts awarding compensation view disbarment as voluntary, but

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Texas follows the approach that disbarment results in denial of compensation. *Royden*, 331 S.W.2d at 209. The court denied attorney's request for compensation for services rendered prior to suspension, explaining:

> His disbarment or suspension is considered tantamount to and to have the same effect as a voluntary abandonment, for the attorney by knowingly and willfully practicing such a course of conduct that would lead to the termination of his right to practice, renders it impossible to complete the work that he engaged to perform.

Id. at 209.

In a very old case, however, the court held somewhat inconsistently that a lawyer who accepted a judgeship did not forfeit all compensation, as this was not voluntary but was by operation of law. *Baird*, 10 Tex. at 81. Presumably, *Baird* is limited to its facts.

The Missouri Court of Appeals recently rejected the holding of its own supreme court on this issue. In *Collins v. Hertenstein*, 181 S.W.3d 204 (Mo. Ct. App. 2006), the court allowed a disbarred lawyer to recover in quantum meruit even though it recognized that the Missouri Supreme Court in *Kimmie v. Terminal Railroad Association of St. Louis*, 126 S.W.2d 1197 (Mo. 1939) had rejected an attorney's request for legal fees and in doing so equated the attorney's suspension with a voluntary abandonment of his contract of employment. 181 S.W.3d at 214-15 (citing *Kimmie*, 126 S.W.2d at 1201).

103. *Kourouvacilis*, 841 N.E.2d at 1280. *See Eisenberg*, 761 F. Supp. at 22 (holding that even voluntary acceptance of discipline resulting in disbarment was not voluntary abandonment of client's case); *In re* Mekler, 672 A.2d 23, 24 (Del. 1995) (finding that one client owed the lawyer for part fees before suspension); Phil. Bar Op. 2007-14, *supra* note 10; Harris Trust & Sav. Bank v. Chicago College of Osteopathic Med., 452 N.E.2d 701, 704 (Ill. Ct. App. 1983) (allowing *quantum meruit* under the theory that otherwise there would be unjust enrichment and finding there was no voluntary abandonment); Stein v. Shaw, 79 A.2d 310, 312 (N.J. 1951) (allowing *quantum meruit*, stating that bringing "economic considerations into disciplinary proceedings would not only needlessly complicate them, but would in many instances serve to defeat the essential purpose thereof"); Flecha v. Goodman, 221 N.Y.S.2d 823, 826 (N.Y. Sup. Ct. 1961) (reasoning that it was immoral to allow a party to use discipline in an unrelated matter of a lawyer under a contingent fee arrangement to "retroactively" deprive a lawyer of a fee in quantum meruit); *In re* Emanuel, 422 B.R. 443, 449 (Bankr. S.D.N.Y. 2009) (permitting quantum meruit recovery to disbarred lawyer); Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C., 756 N.Y.S.2d 147, 151 (N.Y. App. Div. 2003) (same). *Cf.* Pollock v. Wetterau Food Distrib. Group, 11 S.W.3d 754, 773 (Mo. Ct. App. 1999) (holding disbarred lawyer could obtain statutory attorneys' fees from opposing party).

104. *Pearson*, 2012 WL 1432282, at *6.

consider the impact on the attorney-client relationship as an involuntary act:

> As to the question of voluntariness, the plaintiff's resignation was, under the Rules of Disciplinary Enforcement, tantamount to a guilty plea. Rule 215 of the Pennsylvania Rules of Disciplinary Enforcement provides that an attorney who is the subject of an investigation into allegations of misconduct may resign if he submits a verified statement to the Disciplinary Board which states, *inter alia*, that his resignation was freely and voluntarily given and that the material facts upon which the complaint against him is based are true. Thus in resigning from the bar, the plaintiff admitted that he was guilty of misconduct in a matter not related to his representation of the defendant. This resignation effectively precluded the plaintiff from continuing his representation of the defendant and all other clients. The plaintiff's decision to resign from the bar may itself have been voluntary, but the termination of his professional services to the defendant was simply an inevitable consequence of this decision rather than a voluntary, independent act.[105]

More recently, a Pennsylvania court attacked this reasoning, stating that "an attorney's disbarment or suspension is not, in fact, an event beyond his or her control," and so could not constitute a basis for frustration of contract.[106]

What is important is that those courts that view disbarment's impact on fee agreements as being voluntary—as being within the control of the attorney—deny compensation. Those that view the need for withdrawal as being caused by something other than the lawyer's choice permit the lawyer some compensation.

IV. COURTS SHOULD HOLD LAWYER-WITHDRAWAL-COMPENSATION PROVISIONS IN CONTINGENT FEE AGREEMENTS UNENFORCEABLE IF THEY VIOLATE THE REGULATORY BALANCE OF STATE LAW

At the outset, courts agree that lawyer-client fee agreements are not mere commercial contracts. They instead recognize that contracts that implicate the attorney-client relationship must be read in light of public

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105. *Eisenberg*, 761 F. Supp. at 22-23. *See Harris Trust & Sav. Bank*, 452 N.E.2d at 705 (rejecting premise that "withdrawal from a suit by reason of disbarment" does not constitute "a voluntary abandonment of the contract without just cause" because the "contract was not voluntarily abandoned, it was automatically terminated by operation of law, when the order of the court made further performance impossible"); *Santini*, 65 So. 3d at 30 (finding suspension was not an act of the client and so caused right to compensation to be forfeited).

106. *Pearson*, 2012 WL 1432282, at *5.

policy and principles of legal ethics. Typical is the analysis of a recent Texas court:

> HBS's principal argument as to why it is entitled to a $900,000 fee is that the termination clause seems to allow this result. HBS's expert echoed this argument when he testified that the parties "agreed to an assessment at the time of termination and by contract, for better or for worse, that's what their deal is." To accept HBS's argument and its expert's testimony would eviscerate the rule prohibiting unconscionable fees. [Texas Rule 1.04(a)] presupposes that the parties may have "enter[ed] into an arrangement for" the fee. As one judge has noted, "[W]hen construing contracts between lawyers and clients, it is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship."[107]

As the Virginia Ethics Committee put it:

> It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each.[108]

As shown above, courts require that attorneys prove just cause for their withdrawal from a contingent fee case before ordering a client to pay. This Article now turns to whether a lawyer in a contingent fee agreement may alter state law, allowing the lawyer to withdraw where, for example, the amount of work exceeds what was expected, or the recovery falls short of what was anticipated, or, in general, where it is in the lawyers own economic interest to withdraw. While obviously a provision that permitted a lawyer to withdraw and recover as allowed by state law would be appropriate, the question is whether the lawyer may by agreement demand to be paid when, in the absence of agreement, state law would bar payment. May a lawyer require a client to agree, for example, that if the client rejects a settlement offer, the lawyer may withdraw but still be entitled to compensation? May the lawyer, in

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107. Walton v. Hoover, Bax & Slovacek, 149 S.W.3d 834, 845-46 (Tex. App. 2004), *aff'd in part and rev'd in part*, 206 S.W.3d 557 (Tex. 2006) (quoting Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 868 (Tex. 2000) (Gonzales, J., concurring and dissenting) (alteration in original) (citations omitted)). *See* Attorney Grievance Comm'n of Md. v. Ross, 50 A.3d 1166, 1185 (Md. Ct. App. 2012) ("While 'freedom of contact' may be a general policy animating contract law, that policy is subject to modification by other law; in the regulation of the legal profession, the disciplinary rules prohibit an attorney from charging unreasonable fees.").

108. Va. Legal Ethics Op. 1606 (Nov. 22, 1994) [hereinafter Va. Ethics Op. 1606].

other words, broaden the circumstances in which just cause would otherwise be found?[109]

As next shown, the courts that have addressed efforts by lawyers to alter the common law, public policy, and disciplinary rules to give greater benefit to the lawyer have all rejected the efforts, with the exception of a stray comment from a bar committee in Colorado.

A. The Vast Majority of Authorities Have Prohibited Allowing Lawyers to be Compensated After Termination or Withdrawal in Circumstances Beyond Those Allowed by State Public Policy Expressed in the Common Law

1. Courts Invariably Find Efforts to Contract Around Common Law Protections to the Client as Unenforceable. Several courts and bar associations have addressed contractual terms in contingent fee agreements that *restrict* the *client's* right to terminate the lawyer in ways inconsistent with state common law.[110] All have rejected them.

Florida courts have consistently found provisions that restrict the client's ability to discharge the lawyer as violating the disciplinary rules and thus being unenforceable. For example, Florida law prohibits requiring a client to pay more than quantum meruit to a discharged attorney, so a provision requiring payment of hourly fees upon discharge of the lawyer is unenforceable under Florida law.[111]

Similarly, the Texas Supreme Court in *Hoover Slovacek LLP v. Walton*[112] identified three ways in which a contingent fee agreement sought to tip the balance struck by state law and ethics rules on the question of client compensation upon termination of a lawyer.[113] As

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109. *See generally,* Fox, *supra* note 11; Clausewitz, *supra* note 11.

110. A contract that simply memorializes the common law standard would obviously be enforceable. *See* Howard & Bowe, P.A. v. Collins, 759 A.2d 707, 708-09 (Me. 2000) (enforcing provision that allowed lawyer to withdraw and be compensated for just cause); Ohio S. Ct. Ethics Bd. Op. 95-007 (1995); Or. St. Bar Ass'n Ethics Op. 1991-54 (1991); *see generally,* Cohen, *supra* note 11; *see also Oneida Indian Nation,* 802 F. Supp. 2d at 426-27 (interpreting compensation on withdrawal provision that prohibited fees due to terminated attorneys' "wrongdoing" as being "parallel[]" to New York law requiring forfeiture of fees if discharged for cause).

111. Rubin v. Guettler, 73 So. 3d 809, 812-14 (Fla. Dist. Ct. App. 2011) (discussing other Florida cases in both the disciplinary and contract enforcement context).

Lawyers have also been disciplined for seeking to require greater compensation from a client who discharges a lawyer than is allowed by state law. *E.g., In re* Lansky, 678 N.E.2d 1114, 1116 (Ind. 1997).

112. 206 S.W.2d at 557.

113. *Id.* at 562 (stating that "Hoover's termination fee provision purported to contract around the [state law and ethics] remedies in three ways" including (a) making no

a result, it held the agreement was unenforceable to the extent it restricted the client's right more narrowly than permitted by the ethics rules as interpreted by that court.[114]

Virginia law is in accord. In *Morris Law Office, P.C. v. Tatum,*[115] the fee agreement provided that if the client discharged the lawyer, the lawyer would receive hourly fees and, in addition, the contingent fee. Because this expanded the lawyer's recovery beyond the quantum meruit amount allowed by Virginia law and rules of ethics, the magistrate found the provision unenforceable.[116] The court recognized that for the clause "to be enforceable, it must not run afoul of Virginia's *Rules of Professional Conduct*."[117] Because Virginia courts held that a reasonable fee for a lawyer discharged by a client was in quantum meruit, the provision violated Virginia law and public policy because it gave the lawyer more than Virginia's ethics committee allowed, which was quantum meruit.[118]

Fewer courts have addressed the efforts to *increase* the lawyer's right to withdraw but still be paid. However, these cases are consistent with the cases dealing with the client's right to terminate the lawyer: efforts to expand the lawyer's ability to withdraw but still be compensated beyond withdrawals constituting just cause under state law, or efforts to expand the lawyer's right in other ways are unenforceable.

Florida courts have recognized the basic proposition that if the court permitted enforcement of a contingency fee agreement that violated its rules, it "would afford viability to an unregulated contract of the very kind that we have determined to be in the public interest to regulate."[119] Florida has the most developed jurisprudence on efforts to *expand* the *lawyer's* right to withdraw in ways inconsistent with state law. In 1993, the Florida Supreme Court in *Florida Bar v. Hollander*[120] analyzed a contingent fee agreement that included provisions that both restricted the client's right to terminate the lawyer and expanded the lawyer's ability to withdraw but still be paid.

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distinction between discharges occurring with or without cause; (b) assessing the discharged attorneys' fee in terms of present value at time of discharge; and (c) requiring payment immediately upon discharge).

114. *Id.*

115. 388 F. Supp. 2d 689 (W.D. Va. 2005).

116. *Id.* at 692, 708-09. The lawyer did not contest that holding before the district judge, but argued that the court could sever it from the rest of the contract. *Id.* at 693. The district court refused to do so. *Id.*

117. *Id.* at 709.

118. *Id.* at 710 (citing Va. Ethics Op. 1606, *supra* note 108).

119. Chandris, S.A. v. Yanakakis, 668 So. 2d 180, 185 (Fla. 1996).

120. 607 So. 2d 412 (Fla. 1992).

The termination-of-services clause at issue provided:

> [S]hould this claim be abandoned by the client or any other lawsuit filed pursuant hereto be dismissed at the client's insistence or request, then and in that event, the client agrees to promptly pay the firm for all services rendered up through and including the date of termination along with any other fees, charges and/or expenses incurred to that date. The services rendered to that point shall be paid by client at the prevailing hourly rate for firm members at the time services were rendered.[121]

The termination-of-services clause further stated:

> All expenses of the firm shall be immediately paid by the client. In addition, the firm shall be entitled to a fee based on the fee schedule stated herein and computed on a prorata [sic] basis comparing the time expended by this firm to the time expended by any new attorneys and the total recovery of the client.[122]

The withdrawal provision expressed in part that "the client agrees to promptly pay the firm for all services rendered up through and including the date of withdrawal, and all other fees, charges and expenses incurred through the date of withdrawal."[123] In the event of withdrawal, the clause also provided:

> The client agrees that Hollander & Associates, P.A., shall continue to be entitled to a fee equal to the percentage of the amount received by the client as set forth in this agreement, unless and until a new and mutually agreeable fee agreement is worked out between the client, this firm, and any new counsel taking over representation of the client.[124]

The court held that both the termination and withdrawal provisions violated the Florida disciplinary rules:

> We uphold the referee's findings that the termination and withdrawal clauses of the agreement violate Rule Regulating The Florida Bar 4-1.5(A). Both clauses provided that Tschirgi promptly pay for all services, fees, charges, and expenses incurred through the date of either the termination or withdrawal. In addition, both clauses also provided that Hollander's law firm was entitled to a fee equal to the percentage amount stipulated in the contingency fee agreement until Tschirgi, Hollander's firm, and any new counsel worked out a mutually

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121. *Id.* at 414 (alteration in original).
122. *Id.* at 414-15.
123. *Id.* at 415.
124. *Id.*

> agreeable fee agreement. The agreement on its face allowed Hollander to collect twice for the same work, and thus, the agreement had the effect of intimidating a client from exercising the right to terminate representation. As we stated in *The Florida Bar v. Doe*, "[a]n attorney cannot exact a penalty for a right of discharge."[125]

Significantly, the court stated that "any contingency fee contract which permits the attorney to withdraw from representation without fault on part of the client or other just reason, and purports to allow the attorney to collect a fee for services already rendered would be unenforceable and unethical."[126] Through dicta, the court then explained that the clause was not consonant with Florida law: Florida law limited a withdrawing or terminated lawyer to quantum meruit recovery, but neither clause contained "language referring to a court determination of quantum meruit in setting fees with clients."[127]

More recently, a Florida appellate court recognized that a withdrawal provision in a contingent fee contract could not be read to require compensation be paid to an attorney who withdrew without just cause, for doing so violated the disciplinary rules.[128] The clause in *Feldman v. Davis*[129] allowed the lawyer to withdraw at any time for any reason and so terminate the contract, but was silent as to the amount of compensation that the client would owe.[130] The court stated that "to be enforceable, the contingency fee agreement must be interpreted such that if the law firm's withdrawal was voluntary, it would be entitled to no fees."[131]

Finally, another Florida appellate decision applied the rule that a lawyer who withdraws without just cause forfeits any right to compensation.[132] In *Santini v. Cleveland Clinic Florida*,[133] the lawyer had been suspended for one year.[134] The court emphatically stated that the rule governed all Florida contingent fee agreements and that any fee agreement that attempted to alter the balance struck by the just cause requirement was unenforceable:

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125. *Id.* (citation omitted) (quoting Fla. Bar v. Doe, 550 So. 2d 1111, 1113 (Fla. 1989)).
126. *Id.*
127. *Id.*
128. *Feldman*, 53 So. 3d at 1136 n.5.
129. 53 So. 3d 1132 (Fla. Dist. Ct. App. 2011).
130. *Id.* at 1136 n.5.
131. *Id.* (citing J.R.D. Mgmt. Corp. v. Dulin, 883 So. 2d 314, 316 (Fla. Dist. Ct. App. 2004)).
132. *Santini*, 65 So. 3d at 29.
133. 65 So. 3d 22 (Fla. Dist. Ct. App. 2011).
134. *Id.* at 26.

> [W]e hold that a contingent fee contract entered into by a member of The Florida Bar must comply with the rule governing contingent fees in order to be enforceable. We have determined that the requirements for contingent fee contracts *are necessary to protect the public interest.* Thus, a contract that fails to adhere to these requirements is against public policy and is *not enforceable by the member of The Florida Bar who has violated the rule.*[135]

Because the lawyer had withdrawn due to suspension from the practice, the court held he lacked just cause and was entitled to no compensation.[136] Unless the violations are merely "technical or immaterial," fee contracts that violate Florida law are unenforceable.[137]

A Connecticut ethics committee reached the same conclusions as have Florida courts.[138] The Connecticut ethics committee was asked whether lawyers could include in their fee agreement a provision that allowed them to withdraw if the client refused a settlement offer that they found appropriate, and to be compensated on an hourly fee basis instead of the agreed upon contingent fee.[139] The committee found the provision unethical for two reasons. First, it gave the attorney the right to withdraw whether or not the client was materially adversely affected,

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135. *Id.* at 31 (quoting *Chandris*, 668 So. 2d at 185-86). *See* Foodtown, Inc. of Jacksonville v. Argonaut Ins. Co., 102 F.3d 483, 485 (11th Cir. 1997) (refusing to enforce oral fee agreement because doing so would violate disciplinary rules); King v. Young, Berkman, Berman & Karpf, P.A., 709 So. 2d 572, 573-74 (Fla. Dist. Ct. App. 1998) (refusing to enforce provision that based lawyer compensation on results of divorce proceeding because doing so would violate the disciplinary rules); Santiago v. Evans, 2012 WL 3231025, at *6 (M.D. Fla. June 21, 2012) (finding oral agreements violated disciplinary rules and thus, void); Elser v. Law Office of James Russ, P.A., 679 So. 2d 309, 313 (Fla. Dist. Ct. App. 1996) (holding provision requiring waiver of right to complain about bills ten days after receipt unenforceable as against public policy); *see also* Morrison v. West, 30 So. 3d 561, 563 (Fla. Dist. Ct. App. 2010) (contract with attorney not licensed to practice law in Florida was unenforceable); *see also* Fla. State Bar Ass'n Comm. on Prof'l Ethics Op. No. 04-2 (Jan. 21, 2005) (addressing enforceability of restrictions on practice made in settlement agreements with the opposing party).

136. *Santini*, 65 So. 3d at 32. Florida courts have recognized the rule that a clause that would permit recovery without just cause is unenforceable means and that allowing the remedy in the absence of such a clause is equally improper. *Kay*, 623 So. 2d at 766 (Fla. Dist. Ct. App. 1993). *See also* Mangel v. Bob Dance Dodge, 739 So. 2d 720, 723 n.2 (Fla. Dist. Ct. App. 1999).

137. State Contracting & Eng'g Corp. v. Condotte Am., Inc., 368 F. Supp. 2d 1296, 1305 (S.D. Fla. 2005). This "exception" appears essentially to relate to severability, *e.g.*, Lackey v. Bridgestone/Firestone, Inc., 855 So. 2d 1186, 1188 (Fla. Dist. Ct. App. 2003), though not all Florida courts examine it using that terminology. *See, e.g., State Contracting & Eng'g Corp.*, 368 F. Supp. 2d at 1305.

138. Conn. Bar Ass'n Comm. on Prof'l Ethics Op. 95-24, at *2 (July 6, 1995).

139. *Id.* at *1.

and thus, gave the lawyer a right to withdraw that was broader than that allowed by the ethics rules.[140] Second, "[t]he agreement diminishes the client's right to decide whether to settle [the] case and on what basis."[141]

Though not precisely on point, there are also other authorities that support these results. A New York court recognized that a fee agreement that ostensibly permitted compensation upon withdrawal under broader circumstances than New York law permitted was unenforceable unless limited to "good and sufficient cause."[142] In *J.M. Heinike Associates, Inc. v. Liberty National Bank,*[143] the agreement stated that the attorney could withdraw at any time, so long as he provided "an explicitly detailed basis for any such withdrawal."[144] The court refused to allow the lawyer to withdraw from the case, let alone be compensated, unless the agreement was "construed as requiring 'good and sufficient cause' for withdrawal," noting that permitting the lawyer to retain any of the retainer without such showing would be "unconscionable."[145]

The Utah Supreme Court analyzed whether a lawyer had withdrawn for good cause where his agreement provided that if the client's actions caused the lawyer to withdraw, the client was obligated to pay full hourly fees for the time already expended.[146] Neither party asserted that the contractual standard governed; instead, the parties argued over the definition of "just cause" in state law. Because the trial court had required the lawyer to show that the client had caused an irretrievable break down of the attorney-client relationship, which was narrower than "good cause," the court remanded.[147]

Other authorities have reached similar conclusions. For example, an Arizona ethics opinion concluded that a withdrawal provision that permitted the lawyer to withdraw at any time "the amount of work necessary to achieve a settlement or judgment far exceeds the fee that the firm would likely derive from the case" violated state rules regulating withdrawal.[148] It permitted lawyers to withdraw in circumstances

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140. *Id.* at *2.

141. *Id.*

142. J.M. Heinike Assoc., Inc. v. Liberty Nat'l Bank, 530 N.Y.S.2d 355, 356 (N.Y. App. Div. 1988).

143. 530 N.Y.S.2d 355 (N.Y. App. Div. 1988).

144. *Id.* at 356.

145. *Id.* at 356-57.

146. Hartwig v. Johnsen, 190 P.3d 1242, 1249 (Utah 2008). Under Utah law, an attorney also forfeits any retaining lien if he withdraws without good cause. Midvale Motors v. Saunders, 442 P.2d 938, 940 (Utah 1968).

147. *Hartwig*, 190 P.3d at 1245.

148. Ariz. Ethics Op. 94-02, at 14 (Mar. 1, 1994).

broader than the disciplinary rules, which required them to remain in a case if the tribunal ordered the lawyers to stay.[149] A Michigan appellate court recognized that a contract for fees must be construed to be limited to reasonable fees; "otherwise[,] it violates public policy . . . ."[150]

Finally, some authorities have simply made the broad statement that the ethics rules always override contrary agreements. For example, the Virginia Ethics Committee in an opinion designed to clarify the principles governing fee agreements in that state wrote:

> The Disciplinary Rules set certain restrictions on all legal fees that cannot be avoided by the employment contract. Regardless of the agreed terms, the designation of the fee in the employment contract cannot alter the true nature of the fee and will not be dispositive in determining whether there is a violation of the Disciplinary Rules. Neither will the terminology used to describe the fee determine whether the fee has been earned by the lawyer or into which type of account the fee must be placed. A lawyer cannot by contract alter the nature or the ownership of fees received, nor can he legitimize a fee that is otherwise prohibited by the Disciplinary Rules.[151]

2. The Bar Commentary from Colorado Is the Only Exception. Unlike other states, Colorado has adopted a more detailed regulatory system covering contingent fees. The starting point is Colorado's rule governing fees, which expressly provides:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."[152]

The Rules Governing Contingent Fees are unique to Colorado and also differ from prior Colorado law.[153] However, both the disclosure statement and model contingent fee agreement endorsed by the bar limit the lawyer to withdrawing only with justifiable cause and limiting fees

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149. *Id.*

150. *In re* Matter of Howarth, 310 N.W.2d 255, 257 (Mich. Ct. App. 1981).

151. Va. Ethics Op. 1606, *supra* note 108 (citation omitted).

152. COLO. RULES PROF'L CONDUCT 1.5(c) (2007).

153. *See generally,* Elliott v. Joyce, 889 P.2d 43, 46 (Colo. 1994) ("[W]e decline the invitation to look to case law from other jurisdictions or to rely solely upon our case law prior to the adoption of Chapter 23.3. Chapter 23.3, which governs here, has express provisions that should control and they provide sufficient guidance under the present facts.").

to a reasonable amount.[154] Specifically, the disclosure provided to the client states:

> I have been informed and understand that if, after entering into a fee agreement with my attorney, I terminate the employment of my attorney or my attorney justifiably withdraws, I may nevertheless be obligated to pay my attorney for the work done by my attorney on my behalf. The fee agreement should contain a provision stating how such alternative compensation, if any, will be handled.[155]

Consistent with this, the model form endorsed by the bar provides:

> In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney. If the attorney and the client cannot agree how the attorney is to be compensated in this circumstance, the attorney will request the court or other tribunal to determine: (1) if the client has been unfairly or unjustly enriched if the client does not pay a fee to the attorney; and (2) the amount of the fee owed, taking into account the nature and complexity of the client's case, the time and skill devoted to the client's case by the attorney, and the benefit obtained by the client as a result of the attorney's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the client and the amount of such fee shall not be greater than the fee that would have been earned by the attorney if the contingency described in this contingent fee agreement had occurred.[156]

An earlier Colorado Bar ethics opinion specifically rejected efforts to contract around these prohibitions.[157] It stated that "conversion clauses should be drafted to limit their application to client terminations without cause and attorney terminations with cause."[158] It also stated that, while it might be appropriate to convert a contingent fee to an hourly fee if the client terminated without cause, "conversion to a fixed fee upon discharge will be inherently suspect."[159] Thus, as things stood in Colorado, the rules, forms, and bar opinions all suggested that

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154. COLO. R. CIV. P. 23.3(7).
155. *Id.*
156. *Id.*
157. Colo. B. Op. 100, *supra* note 1.
158. *Id.*
159. *Id.*

clauses that sought to limit the scope of the lawyer's right to compensation either after withdrawal or termination were inappropriate.

However, a comment to changes made to the Colorado rules in 2001 suggests that some greater restriction on withdrawal, termination, or on the amount owed may be available to Colorado lawyers.[160] While most of the new language is consistent with limiting conversion clauses to just cause and quantum meruit,[161] the committee in a comment stated:

> any conversion clause that purports to remove the contingency by making the attorney's fees payable without regard to the occurrence of the contingency, is presumptively invalid, unless the client is relatively sophisticated, has the demonstrated means to pay the attorney's fee even before the occurrence of the contingency, and has specifically negotiated the conversion clause.[162]

To that extent, Colorado stands alone in suggesting that a sophisticated and wealthy client might be made to agree to pay a fee upon termination or withdrawal that is due even if there is no recovery. While the committee did not expand the definition of good cause to terminate or just cause to withdraw, it did suggest that in this narrow

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160. COLO. R. CIV. P. 23.3(7), Rule Change #2001(11) [hereinafter Rule Change #2001(11)], adopted May 24, 2001 by the Colorado Supreme Court, *available at* http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Rule_Changes/-2001/2001_11.pdf. *See* Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP, No. 009CA0788, 2011 WL 724742, at *7 (Colo. Ct. App. Mar. 3, 2011) ("An attorney who withdraws. . . may recover in quantum meruit from a client only if the agreement explicitly states that such a recovery is possible.").

161. Rule Change #2001(11). For example, the rule changes added this language to one form:

> In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney. If the attorney and the client cannot agree how the attorney is to be compensated in this circumstance, the attorney will request the court or other tribunal to determine: (1) if the client has been unfairly or unjustly enriched if the client does not pay a fee to the attorney; and (2) the amount of the fee owed, taking into account the nature and complexity of the client's case, the time and skill devoted to the client's case by the attorney, and the benefit obtained by the client as a result of the attorney's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the client and the amount of such fee shall not be greater than the fee that would have been earned by the attorney if the contingency described in this contingent fee agreement had occurred.

Id.

162. *Id.*

circumstance the obligation to pay need not be contingent on the outcome.[163]

B. Courts Should Not Enforce Compensation-on-Withdrawal Provisions that Increase the Ability of a Lawyer to Withdraw Beyond "Just Cause" or That Allow the Lawyer to Recover Other Than in Quantum Meruit

As shown above, apart from the comment in Colorado, the courts overwhelmingly hold that lawyers who withdraw without just cause forfeit any right to compensation, and any effort to "contract around" these limitations are unenforceable. This Article next shows that the courts not only properly reject efforts to contract around state law, but doing so would also frustrate the very justifications for current law permitting but regulating contingent fees.

1. Broad Compensation-on-Withdrawal Provisions Undermine the Justification for "High" Recoveries. As explained above, courts often allow recovery of a contingent fee that on its face seems higher than the circumstances appear to justify because they recognize that there are also cases in which the lawyer's compensation is lower than might be "fair."[164] A provision in a contingent fee agreement that permits a lawyer to walk away from a contingent fee representation where the economic circumstances do not turn out as well erodes the foundation for awarding premium fees, since the arrangement allows for withdrawal in the less favorable cases. One court recognized this impact, stating:

> Clients must often accept the drawbacks of a contingent fee arrangement if they want to retain an attorney and cannot afford to pay on an hourly basis. Attorneys must do the same if they expect to receive the higher than normal fee generally gained as the result of a successful contingency fee case. Therefore, an attorney should not be allowed to withdraw from a "bad case" on the grounds that the client wishes to proceed to trial or pursue an appeal, eliminating his or her exposure to risk, and still be entitled to recover fees for that case. An attorney must demonstrate that his or her withdrawal from the case was for good cause before the attorney is allowed to recover fees on a *quantum meruit* basis.[165]

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163. *Id.*

164. *See supra* notes 22-24 and accompanying text.

165. *Bell & Marra*, 6 P.3d at 970 (citation omitted).

If lawyers are permitted to use broad compensation-on-withdrawal provisions, then the justification for allowing lawyers to obtain premium recoveries disappears. This undermines a key rationale for contingent fee agreements.

2. Broad Compensation-on-Withdrawal Provisions Create Conflicts of Interest and Undermine Zealous Representation. A compensation upon withdrawal provision that permits a lawyer to abandon a case but still be paid could easily create economic incentives for the lawyer that conflict with those of a client. If lawyers knew they could withdraw from a case of questionable value solely for that reason but preserve a right to compensation even in quantum meruit, they could abandon the case, let replacement counsel take the risk on a contingent fee, or, more likely, have the client replace the contingent fee lawyer with hourly-paid counsel—and yet have their economic interest protected if their client is ultimately successful. Lawyers avoid the risk that continued investment will not pay off.

As one court observed in explaining why the just cause principle is narrowly defined, "Indeed, as a matter of policy, any other rule creates perverse incentives. The first attorney to represent a client would have reason to do as little as possible and then jump on the hint of first client noncooperation to maximize recovery with a minimum of hassle."[166] A fee agreement that permitted a client to walk would allow an attorney employed on a contingency fee basis to "determine that it is not worth his time to pursue the matter, instruct his client to look elsewhere for legal assistance, but hedge his bet by claiming a part of the recovery if a settlement is made or a judgment obtained."[167] Broad compensation upon withdrawal provisions creates conflicts of interest and undermines the principle of zealous representation.

3. Broad Compensation-on-Withdrawal Provisions Undermine the Lawyer's Obligation to Specify the Scope of Representation, Eliminate Shared Risk, and Essentially Create Option Contracts for Lawyers, But Not Clients. As shown above, the general principle is that lawyers who agree to handle a matter earn their fee only by completing the representation.[168] A corollary to that principle is that lawyers who want to avoid undertaking that obligation—to handle a matter through appeal, for example—must expressly limit the scope of

166. *Rus, Miliband & Smith*, 113 Cal. App. 4th at 676 n.11. *See Reckas*, 2005 WL 984401, at *3.

167. Hensel v. Cohen, 155 Cal. App. 3d 563, 563-64 (Cal. Dist. Ct. App. 1984).

168. *See supra* notes 161-65 and accompanying text.

their representation to ensure that the client understands the lawyer will not, in fact, see the matter to resolution.[169] It would erode the obligation of lawyers to be clear about the scope of a contingent fee representation if lawyers could simply "opt out" of any appeal when they deem their own interest is served by doing so.

As a general principle, lawyers who undertake a contingent fee case obligate themselves to take the case to judgment and, as just shown, perhaps through appeal if the lawyer is not specific as to the scope of representation.[170] The fact that a case turns out to require more work than the lawyer initially thought it would does not justify the lawyer demanding greater compensation.[171] If attorneys are given control over whether to withdraw from a case, then the rule that they earn a contingency only by completing the case is turned on its head: they earn their fee when they withdraw.[172]

4. Broad Compensation Clauses Violate Disciplinary Rules Including Those That Do Not Allow for Client Consent. In addition to creating inherent and intractable conflicts of interest and undermining the policies furthered by contingent fee agreements, withdrawal on compensation provisions also violate state disciplinary rules regulating withdrawal as well as those prohibiting arranging for, charging, or collecting an unreasonable or unconscionable fee. Importantly, there is no provision in any of these rules for client consent, let alone "prospective" consent to an unconscionable fee, to impinging upon the client's right to settle, or to withdraw without complying with the ethical rules.[173] In addition, to the extent that these provisions create

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169. *See* Glenn Machado, *Can Flat Fees be Non-Refundable? Only if the Fee is Reasonable,* 17 NEV. LAW. 38, 39 (Dec. 2009). *See, e.g.,* City of New Albany v. Cotner, 919 N.E.2d 125, 131-33 (Ind. Ct. App. 2009).

170. *See supra* notes 166-67 and accompanying text.

171. *E.g., Woodbury*, 61 F.2d at 740 (discussing New York law).

172. *Carbonic Consultants, Inc.*, 699 So. 2d at 323 n.1 ("Central to the determination of the existence of justifiable cause in these cases is whether the events requiring withdrawal were within the reasonable control of the attorney.") (citing *Int'l Materials Corp.*, 824 S.W.2d at 899).

173. After summarizing the laws regulating the amount that a terminated or withdrawing lawyer may recover, an ethics treatise states that whether agreements to the contrary would be enforceable "will depend upon the sophistication of the client and an application of principles of equity and public policy." RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILTY § 1.5-33(j) (2012-2013 ed.). This statement, made without citation to any authority, incorrectly presumes that the rules allow clients to consent to unreasonable fees, to withdrawal when it will cause adverse effect on the client, and so on.

non-consentable conflicts of interest, they violate rules relating to conflicts between the lawyer's interests and those of the client.[174]

Under Model Rule 1.16, withdrawal is permitted or required under limited circumstances, none of which includes client consent.[175] Thus, if withdrawal violates the rule, it is unethical.

A lawyer who withdrew relying upon a compensation on withdrawal provision that allowed for withdrawal in circumstances other than those enumerated would violate the rule. There is no provision that permits the lawyer to withdraw, for example, where doing so would have a material adverse effect on the interest of the client, unless other good cause for withdrawal exists. While some courts have held that "good cause" in terms of permissive withdrawal is present if the client gives informed consent *at the time of withdrawal,* any provision in a contingent fee agreement made months or years before the lawyer seeks to withdraw is obviously not informed consent.[176]

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174. *See supra* notes 166-170 and accompanying text.

175. ABA Model Rule 1.16 provides in part as follows:

(a) Except as stated in paragraph (c) [requiring the court's permission to withdraw], a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

MODEL RULES OF PROF'L CONDUCT R. 16 (2012).

176. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether Collaborative Orientation can be Ethically Incorporated into the Practice of Law,* 56 BAYLOR L. REV. 141, 161 (2004) (questioning whether prospective informed consent to withdraw is permitted or practically possible). As noted above, courts also recognize that proper withdrawal is not, in all events, just cause to withdraw and be paid.

Prospective consent to withdraw would require disclosure in the contingent fee agreement of the circumstances under which withdraw would be required and other facts and details that neither the lawyer nor client are likely to appreciate at the time of contracting.[177] As a result, withdrawal in circumstances beyond those authorized by state law would constitute a breach of duty.

The case law limiting a lawyer's right to compensation upon termination or withdrawal is often related to, if it does not originate from, state disciplinary rules prohibiting arranging for, charging, or collecting an unreasonable or unconscionable fee.[178] For example, in one leading case the Texas Supreme Court tied its analysis of a clause permitting a lawyer greater fees on termination than Texas common law allowed directly to the question of unconscionability under the state's disciplinary rules.[179]

Significantly, an agreement requiring a client to pay an attorney's full hourly rates if the lawyer withdraws with cause may be improper. This is because quantum meruit is not measured solely by the hours expended, but instead turns on a multi-factor analysis that focuses not on the cost to the lawyer, but on the benefit received by the client.[180]

As with the withdrawal rules, there is no option for client consent. As a result, because state disciplinary rules define unreasonable fees, and because an unreasonable fee occurs if a lawyer receives any compensation by withdrawing without good cause, any agreement otherwise violates state law as well as state disciplinary rules.[181]

Model Rule 1.2(a) requires a lawyer to abide by a client's decision whether to settle a matter. Most states have identical or nearly identical rules.[182]

A fee provision that permits a lawyer to withdraw from a case if the lawyer finds the case not worth pursuing obviously impairs the client's ability to settle. "The exercise of the right to reject settlement is implicit

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177. *See* Ct. Ethics Op. 95-24, 1995 WL 420028, at *1 (July 6, 1995) (Conn. Bar Ass'n) ("as there is no way for either counsel or client to know [if withdrawal will be without material adverse effect] at the outset of the representation, the agreement is improper").

178. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2012).

179. *Hoover,* 206 S.W.3d at 562 n.7.

180. Courts have upheld clauses requiring a client to pay hourly fees where the client terminates without cause, but seem to read into them a requirement of reasonableness, *i.e.,* they require a *quantum meruit* analysis. *E.g.,* Herr v. Carter Lumber, Inc., 888 N.E.2d 853, 856-57 (Ind. Ct. App. 2008) (noting that they are presumptively enforceable "subject to the ordinary requirement of reasonableness") (quoting Galonis v. Truett, 715 N.E.2d 858 (Ind. 1999)).

181. MODEL RULES OF PROF'L CONDUCT R.1.2(a) (2012).

182. *See* State Adoption of the ABA MODEL RULES OF PROF'L CONDUCT.

in the contract between a client and an attorney, and cannot constitute a breach of contract."[183] Courts and bar associations have repeatedly condemned contractual efforts to penalize clients for exercising their right to determine whether or not to settle a case.[184]

Even assuming prospective agreement were possible,[185] lawyers could simply contract around this prohibition. By allowing the lawyer to terminate but still be paid, the client's right to settle becomes merely an economic leverage against the lawyer. A lawyer who believes a client has rejected a reasonable settlement offer can withdraw and still be entitled to some fee. Thus, clients will necessarily face the prospect of having to use replacement counsel to learn the case anew, either on the attorney's own dime or at the expense of the client at an hourly rate, and replacement counsel under a contingent fee arrangement take the case subject to the existing fee owed to former counsel. The courts almost universally hold that rejecting a settlement offer is insufficient to constitute just cause for these reasons, but a contractual provision would accomplish the same goal and result in the same harm.

V. CONCLUSION

In some respects, this Article presents only the tip of an iceberg. For example, this Article has viewed these contingent fee clauses in the paradigm of a lawyer seeking to enforce them against a client. However, should a lawyer be allowed to avoid a contract based on the fact that it violates the disciplinary rules? Can a client use the agreement defensively to avoid paying the attorney *more* than the agreed-upon

183. *Falco,* 188 Cal. App. 3d at 1018.

184. *See, e.g.,* Neb. Ethics Op. 95-1 (1995) (finding a contingent fee agreement may not prevent client from settling case without lawyer's approval, and may not include provision giving the lawyer either percentage fee or customary hourly fee, whichever is greater, if client settles without lawyer's approval); NYCLA Comm. on Prof'l Ethics Formal Op. 736 (2006) (finding a contingent fee agreement may not give the lawyer the authority to convert from a contingent to an hourly fee arrangement if the client refuses "reasonable" settlement offer); Or. Ethics Op. 2005-54 (2005) (finding a contingent fee agreement may not provide that if client rejects "reasonable" settlement offer, the lawyer will be entitled to an agreed portion of the rejected amount plus earn an hourly fee going forward); Phila. Ethics Op. 2001-1 (2002) (a contingent fee agreement may not authorize payment on hourly or *quantum meruit* basis if client rejects lawyer's recommendation to settle); Compton v. Kittleson, 171 P.3d 172, 76-77 (Alaska 2007).

185. This is not likely. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 8 THE LAW OF LAWYERING § 15 ("Even if an adequately counseled client had agreed in advance to such an arrangement [allowing a lawyer to convert from contingent to an hourly fee if the client refused a settlement offer], it probably could not stand in the face of Model Rule 1.2(a) . . . .").

amount?[186] If the agreement is unenforceable, do its compensation terms have any bearing on what might be available in quantum meruit?

These questions remain unanswered. What is clear, however, is the few courts that have analyzed the issue have recognized that the important public policies served by prohibiting a lawyer who withdraws from a contingent fee agreement without just cause from obtaining any compensation cannot be obviated by contract, and they have done so in ways consistent with the disciplinary rules themselves.

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186. This issue was implicated but not directly broached in a Louisiana case. In *Anderson, Hawsey & Rainach v. Clean Land Air Water Corp.*, 489 So. 2d 928 (La. Ct. App. 1986), the fee provision provided in pertinent part:

> The clients or the attorneys may terminate this agreement at any time. If there is a termination of employment before collection of any sums of money or the recovery of any property, the clients jointly, severally, and in solido agree to pay the attorneys for all of their time expended pursuant to this agreement at the attorneys['] normal and usual hourly rates for comparable work plus any unreimbursed court costs and out-of-pocket expenses.

Id. at 930 (alteration in original). The client terminated the lawyer, but paid the hourly compensation as agreed. *Id.* When the client later recovered from the defendant, the lawyers sought *more* than their hourly fees. *See id.* The court held that they were adequately compensated by what they had received under the contract, though it is unclear whether the hourly fees were deemed to be sufficient in *quantum meruit* or the contractual provision worked as a defense to the lawyers' claim for more. *Id.*