

## CONTINGENT FEE REGULATION BY COURT RULE

*Gair v. Peck*

6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959)

The defendants, Justices of the Appellate Division of the Supreme Court of New York, promulgated a rule which established in effect a scale for contingent fees in ordinary personal injury and wrongful death actions.<sup>1</sup> Plaintiff attorneys attacked the court's power to enforce the rule as being unconstitutional and prohibited by statute. They contended that the rule changed substantive law and was therefore a legislative matter. The New York Court of Appeals, in reversing the lower courts, held that the purpose of the rule was to discipline attorneys receiving larger fees than could be collected according to existing law,<sup>2</sup> and thus was within the Appellate Division's statutory rule making power as a procedural device to regulate conduct of attorneys.<sup>3</sup>

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<sup>1</sup> The rule, similar to bar association suggested fee schedules, provides that the maximum contingent fee be limited to percentages of the gross award ranging from 50% of small recoveries to 25% on the amount over \$25,000. In the alternative, the agreement could stipulate for a fraction up to 1/3 of the total recovery. The rule also provides that in *extraordinary circumstances* after a hearing, higher amounts may be permitted in order to *adequately compensate* the attorney for his services. Attorneys receiving more than the permitted amounts were deemed to be in violation of the Canons of Professional Ethics and subject to disciplinary proceedings. The rule will hereinafter be referred to as "the New York rule" even though it applies only in the First Judicial Department. *Gair v. Peck*, 6 N.Y.2d 97, 101—102 n.1, 160 N.E.2d 43, 45—46 n.1, 188 N.Y.S.2d 491 (1959), *modified*, 6 N.W.2d 983, 161 N.E.2d 736, 191 N.Y.S. 2d 951 (1959), *appeal dismissed*, 361 U.S. 374 (1960). Case discussed in 60 Colum. L. Rev. 242 (1960); and 73 Harv. L. Rev. 1212 (1960).

<sup>2</sup> "Contingent fees may be disallowed between an attorney and his client in spite of contingent fee retainer agreements if the amount becomes large enough to be out of all proportion to the value of the professional services rendered." *Gair v. Peck*, *supra* note 1, at 106, 160 N.E.2d at 48.

<sup>3</sup> "The rule-making power of the Appellate Divisions (N.Y. Judiciary Law, § 83) in exercising their long standing 'power and control over attorneys and counsellors-at-law' . . . (Judiciary Law, § 90, subd. 2) has always been adapted to the exigencies of the times and to the ingenuity of lawyers who are trying to sail too close to the wind. We think that it extended to the adoption of rule 4. In view of the existence of subdivision 2 of section 90 of the Judiciary Law, it is not necessary to decide whether, as part of the Supreme Court which is vested by the Constitution with the general jurisdiction in law and equity (N.Y. Const. art. VI, § 1), the Appellate Divisions possess similar powers over attorneys apart from statute." *Gair v. Peck*, *supra* note 1, at 115, 160 N.E.2d at 53.

N.Y. Judiciary Law, § 83 (1945). ". . . A majority of the justices of the appellate division in each department, by order of such majority, shall have power, from time to time, to adopt, amend or rescind any special rule for such department not inconsistent with any statute or rule of civil practice."

N.Y. Judiciary Law, § 90 subd. 2 (1946). "The supreme court shall have power and time, to adopt, amend or rescind any special rule for such department not inconsistent control over attorneys and counsellors-at-law and all persons practicing or assuming to

The use of contingent fees has been extensively commented upon.<sup>4</sup> Most jurisdictions prohibit their use, the view being that they give the attorney a "stake in the claim"; in other words, their use is considered champertous. In the United States, the only major country permitting the use of contingent fees, the argument that they are socially necessary has prevailed. Thus, those unable to pay a retainer are enabled to have their claims litigated. The use of contingent fees where the client is able to pay is being severely criticised and the explanation that their general use in actions for damages is fair to clients generally and necessary for fair remuneration of attorneys, is not altogether convincing. However, "it seems best to concede that the contingent fee is ethical where the client is unable to pay and a genuine contingency as to the possibility of recovery exists."<sup>5</sup>

While the New York rule was held to be a procedural device to regulate the bar, the strenuous dissents<sup>6</sup> and lower court opinions<sup>7</sup> indicate that the rule may well amount to a substantive change in the law.<sup>8</sup> The court's ultimate determination of what circumstances are *extraordinary* to merit a departure from the schedule and what constitutes *adequate compensation* under those circumstances will determine whether substantive law has been

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practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; . . ."

The extensive discussion of Cardozo's opinion in *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487, 60 A.L.R. 851 (1928) in the instant case indicates that the rule-making power may be *inherent* in the New York courts. In *Karlin*, the court held valid the punishment of an attorney for refusing to be sworn to testify before a court conducting a general investigation into the conduct and practices of attorneys. Cardozo, while summarizing the constitutional and legislative history concluded that ". . . there is little room for doubt . . . that attorneys might be regulated by rules and orders of the courts. The provision was declaratory of a jurisdiction that would have been implied if not expressed." While Cardozo left the constitutional question unanswered, he noted that ". . . the courts continued to act upon the theory that the power of regulation was either implied or inherent." *People ex rel. Karlin v. Culkin, supra*, at 477, 162 N.E. at 492. The New York Constitution is silent on the court's power to make rules.

<sup>4</sup> An excellent discussion appears in Comment, "Are Contingent Fees Ethical Where Client is Able to Pay a Retainer," 20 Ohio St. L.J. 329 (1959).

<sup>5</sup> *Id.* at 330. ". . . [I]f, however, it appears that the contract was induced by fraud or misrepresentation, or that, in view of the nature of the claim, the compensation is so excessive as to evidence a purpose on the part of the attorney to obtain an improper or undue advantage over the client, the contract will not be enforced." 5 Am. Jur. "Attorneys at Law" § 159 (1936).

<sup>6</sup> *Gair v. Peck, supra* note 1 at 115, 123, 106 N.E.2d at 53, 58.

<sup>7</sup> *Gair v. Peck*, 5 App. Div. 2d 303, 171 N.Y.S.2d 594 (1958); *Gair v. Peck*, 6 Misc. 2d 739, 165 N.Y.S.2d 247 (Sup. Ct. 1957).

<sup>8</sup> The best statement of the substantive law is that the agreement must be reasonable under all the circumstances. This statement appears in canon 13 of the Canons of Professional Ethics of the American Bar Association as adopted by the New York State Bar Association. The Supreme Court of Ohio has also adopted the canons of the American Bar Association.

changed.<sup>9</sup> The court might well have repeated the cautions expressed by Cardozo in *People ex rel. Karlin v. Culkin*<sup>10</sup> to insure that the rule be construed procedurally:

We place power and responsibility where in reason they should be. No doubt the power can be abused but that is true of power generally. In discharging a function so responsible and delicate, the courts will refrain, we may be sure, from a surveillance of the profession that would be merely odious or arbitrary. They will act considerately and cautiously, mindful at all times of the dignity of the bar and of the resentment certain to be engendered by any tyrannous intervention.

In view of continuing concern directed toward excessive contingent fees,<sup>11</sup> this note will consider first—the law pertaining to contingent fees in Ohio; second—whether solution by court rule is possible in Ohio; and third—whether solution by court rule is desirable.

The Ohio Supreme Court decided at an early date that contingent fees were enforceable.<sup>12</sup> While contracts for extortionate amounts made after the attorney-client relationship has arisen will not be enforced,<sup>13</sup> attorneys may deal with prospective clients “at arm’s length,” making whatever bargain they choose.<sup>14</sup> In short, contracts for contingent fees are enforceable in the absence of undue influence, fraud or duress.<sup>15</sup>

However, such contracts are always subject to the inquiry as to whether or not they are in contravention of public policy, or where the attorney has by reason of surrounding circumstances obtained an advantage, and to enforce such a contract would exact an unreasonable and unconscionable proportion of the claim.<sup>16</sup>

When a fee is held unconscionable, the attorney may recover the reasonable value of his services by an action in quantum meruit.<sup>17</sup>

The Ohio Supreme Court has adopted the Canons of Professional (and Judicial) Ethics of the American Bar Association.<sup>18</sup> Canon 12 establishes guides for determining an adequate but reasonable compensation for attorneys’ services,<sup>19</sup> and concludes that, “In fixing fees it should never be

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<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Supra* note 3, at 479, 480, 162 N.E. at 493.

<sup>11</sup> A recent example entitled “When the Lawyer Gets the Spoils” by Murray Teigh Bloom appeared in the March 1960 issue of the *Reader’s Digest* at page 105. The author discussed extreme instances of overreaching, expressing apparent lay approval of the court rule involved in the instant case.

<sup>12</sup> *Spencer v. King*, 5 Ohio 182 (1831).

<sup>13</sup> *Carlton v. Dustin*, 10 Bull. 294 (Ohio 1883).

<sup>14</sup> *Boldt v. Baker*, 13 Ohio App. 125 (1920); *Carlton v. Dustin*, *supra* note 13.

<sup>15</sup> *Reece v. Kyle*, 49 Ohio St. 475, 31 N.E. 737, 16 L.R.A. 723 (1892); *Healy v. Robinson*, 11 Ohio N.P. (n.s.) 329, 21 Ohio Dec. 579 (Cincinnati Munic. Ct. 1911).

<sup>16</sup> *American Vitrified Products Co. v. Crooks*, 20 Ohio L. Abs. 627, 632 (Ct. App. 1935).

<sup>17</sup> *Id.* at 633.

<sup>18</sup> Ohio Supreme Court Rules of Practice, Rule 28.

<sup>19</sup> The seven criteria mentioned involve time, work and skill of the attorney, the

forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." Canon 13 provides that, "A contract for a contingent fee, where sanctioned by law should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court as to its reasonableness." Even though the canons are not law, they are cogent statements of the significant considerations. Thus, while contingent fees should be disallowed if unreasonable or unconscionable,<sup>20</sup> clarification is in order to avoid possible misunderstandings arising from statements previously set forth, appearing in the Ohio cases.

The Ohio courts have statutory power to make court rules,<sup>21</sup> this power being comparable to the New York statutes which empowered the New York court to adopt its rule.<sup>22</sup> However, the power of the Supreme Court of Ohio to regulate the bar goes beyond the statutes.<sup>23</sup> In affirming a disbarment proceeding the court held that;

Although this court recognizes that the legislative branch may by statute provide standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend or otherwise discipline attorneys for specified causes, such legislation is to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects. . . .

There can be no question now of the inherent power of this

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effect upon his practice, the amount in controversy, the contingency involved and the customary charge for that service. The canon also indicates that a client's ability to pay should only be considered to lower or even negate the attorney's fee.

<sup>20</sup> "An unconscionable contract is said to be one 'such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other! . . . A contract will be regarded as unconscionable if the inadequacy is so gross as to shock the conscience. . . . If an undue advantage is taken to one's situation and circumstances by and through which an unfair and unconscionable contract is obtained from him, equity upon proper application will afford relief. . . ." *Carter v. Boone County Trust Co.*, 338 Mo. 629, 651, 652, 92 S.W.2d 647, 657 (1935), *citing* 1 Page, *Contracts*, § 641 (1st ed. 1905).

<sup>21</sup> Ohio Rev. Code § 2503.36 (1953). "The supreme court may prescribe rules for the regulation of its practice, the reservation of questions, the transmission of cases to it from the lower courts and the remanding of cases."

Ohio Rev. Code § 2505.45 (1953). "The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state.

"The several judges of the courts of common pleas and the judges of the courts of appeals shall make rules not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other rules necessary for regulating the proceedings in any court."

<sup>22</sup> *Supra* note 3.

<sup>23</sup> The Ohio courts are creatures of the Ohio Constitution and as such have "judicial power." Ohio Const. art. 4, § 1, "The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, Courts of Probate, and such other courts inferior to the Courts of Appeals as may from time to time be established by law."

court as to the disciplining of attorneys and, therefore, of its *power to provide by rule the procedure in reference to hearings upon such questions*. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline.<sup>24</sup> (Emphasis added.)

Thus, the Ohio Supreme Court, in exercising its inherent rule-making powers created a state-wide board to make findings, administer mild disciplinary action and submit recommendations to the supreme court.<sup>25</sup> The board is empowered to investigate complaints of misconduct by, or practices of, any attorney or counselor-at-law or judge which tend to defeat the administration of justice or bring the courts or legal profession into disrepute. "Misconduct . . . shall mean any violation of any provision of the oath of office . . . or any violation of the Canons of Professional Ethics . . . or the commission of a crime involving moral turpitude."<sup>26</sup>

Therefore, it being established that the Ohio courts have inherent power to provide by rule for disciplinary proceedings, a procedural rule merely enforcing the law ought to be held valid in Ohio as well as in New York. In Ohio, a fee schedule seemingly could be adopted by an amendment to the definition of "misconduct" with enforcement proceedings being had under the facilities previously discussed.

Aside from the New York type of court rule, there have been varied attempts at preventing the exaction of excessive contingent fees. As previously noted, many jurisdictions have abolished the use of contingent fees. Maine has canons disapproving contingent fees and they are permitted in Massachusetts only when the client is unable to pay a retainer.<sup>27</sup> Oklahoma, by statute, limits contingent fees to 50% of the net recovery.<sup>28</sup> Most states operate on an *ad hoc* basis with individual determinations by the courts as necessary. The latter procedure presented a burden which the New York court felt obliged to relieve by the rule in the instant case.<sup>29</sup> If the use of contingent fees should arouse public indignation, or if individual determinations become burdensome for the courts it will be necessary to take some action. In that event, the apparent flexibility and judicial control of the New York rule makes it worthy of serious consideration. Indeed, as Cardozo observed in *Karlin*,<sup>30</sup> "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."

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<sup>24</sup> *Cleveland Bar Assoc. v. Pleasant*, 167 Ohio St. 325, 334, 335, 148 N.E.2d 493, 494 (1958), *citing* *In re McBride*, 164 Ohio St. 419, 132 N.E.2d 113 (1956).

<sup>25</sup> The operation of the board was discussed in "Disbarment and Reinstatement Procedure in Ohio," 18 Ohio St. L.J. 139 (1957).

<sup>26</sup> Ohio Supreme Court Rules of Practice, Rule 27(1).

<sup>27</sup> Comment, *supra* note 4, at 337.

<sup>28</sup> Oklahoma Stats. Ann. tit. 5, § 7 (1953).

<sup>29</sup> ". . . Contingent fee agreements have been filed with the Clerk of the First Department [pursuant to another court rule] at an annual rate of 150,000 or more, of which upwards of 60% have fixed the attorneys' compensation at 50% of the amount of recovery." *Gair v. Peck*, *supra* note 1 at 102, 160 N.E.2d at 45.

<sup>30</sup> *People ex rel. Karlin v. Culkin*, *supra* note 3 at 480, 162 N.E. 493.

