Washington Law Review

Volume 29
Number 2 *Washington Case Law-1953*

5-1-1954

Legal Profession

Joan Smith

standards is that the union must comply with the procedural requirements set forth in its constitution and by-laws.[8] The case of *Mahoney v. Sailors' Union of the Pacific*[9] again emphasized that the court will look behind the union determination of such a question. The court there held, contrary to the union tribunal, that the determination of the situs of a trial for disciplinary action was not done in compliance with the procedure of the union constitution. In *Minch v. Local Union No. 370, Etc,*[10] it was held proper to submit to the jury the evidence that Minch, the union member, was expelled by less than the number of votes required and that after the union trial and pending appeal he was not reinstated to union membership after payment of his fine and current dues, both in violation of the union constitutional provisions. Thus the court in effect rejected the union's contention that the union trial was a matter of internal discipline, not a *de novo* matter in the trial court.

Likewise, the substantive questions of union law, like the compliance with procedural requirements, will be determined by the court *de novo* and the determination by the union tribunal will in no way be controlling.[11] In the *Mahoney* case[12] the court held that the union's findings of grounds for expulsion were unfounded. "The charge being insufficient, the proceedings based upon it was a nullity and plaintiff's expulsion was void."[13]

ROBERT S. MUCKLESTONE

LEGAL PROFESSION

Contingent Fee Contract in Divorce Action—Disciplinary Action. The Washington court, in In re *Smith,*[1] has held that it is a violation of the ethics of the profession for an attorney to enter into a contingent fee contract in a divorce action. This was the first time a court had

heard enjoined); Furniture Workers' Union Local 1007 v. United Brotherhood of Carpenters & Joiners, 6 Wn.2d 654, 108 P.2d 651 (1940).

[8] Johnson v. United Brotherhood of Carpenters & Joiners, 52 Nev. 400, 288 Pac. 170 (1930).

[9] 143 Wash. Dec. 803, 264 P.2d 1095 (1953), *rehearing granted,* 144 Wash. Dec. 497 (1954). *See* Wollett and Lampman, *The Law of Union Factionalism—The Case of the Sailors,* 4 STAN. L. REV. 177 (1952)

[10] 144 Wash. Dec. 14, 265 P.2d 286 (1953).

[11] Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931); Leo v. Local Union No. 612 of Int'l Union of Operating Engineers, 26 Wn.2d 498, 174 P.2d 523 (1946).

[12] *Supra* note 8.

[13] *Supra* note 8 at 1097.

[1] 42 Wn.2d 188, 254 P.2d 464 (1953). The agreement entered into with his client entitled the attorney to twenty per cent of all sums which might be received by his

made such a finding in a disciplinary action.[2]

In England, contingent fee contracts, in any type of proceeding, are unlawful.[3] Although this view initially prevailed in this country, contingent fee contracts are now generally accepted and are widely used in the field of personal injury actions.[4] Contingent fee contracts are held not to violate Canon 10 of the Canons of Legal Ethics,[5] which precludes a lawyer from acquiring an interest in ligitation which he is conducting, and are expressly allowed by Canon 13, subject to several conditions.

> 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.[6]

It has been held in Washington that the statute permitting the compenation of attorneys to be fixed by the agreement of the parties allows contingent fee contracts.[7] None of the Washington cases construing the statute involve a contingent fee contract in a divorce case,[8] but it is the almost universal rule in other jurisdictions that an attorney-client contingent fee contract in a divorce action is unlawful and unenforcible as against public policy. The underlying basis for such decisions is that "public policy is interested in maintaining the family relation . . . and that society demands a reconciliation, if practicable or possible."[9] Therefore, it is not fitting that an attorney's interest should benefit by

---

client as a result of the divorce proceeding, in addition to the amount of fees he would be allowed by the opposing side.

[2] In *In re* Carleton, 33 Mont. 431, 84 Pac. 788 (1906), a disbarment proceeding, the attorney was found guilty of conduct constituting moral turpitude. Among other acts, he had entered into a contract with his client in a divorce proceeding entitling him to one-fourth of the sum awarded as alimony. However, the suspension was not based on the ground that the attorney had entered into the contract, but rather on the ground that he had failed to disclose the existence of the contract to the court in the divorce action.

[3] AXTELL, CONTINGENT FEE, LEGAL AID AND ETHICS 2 (1950).

[4] DRINKER, LEGAL ETHICS 176 (1953).

[5] CANNON OF PROFESSIONAL ETHICS 10, 34A Wn.2d 129.

[6] CANNON OF PROFESSIONAL ETHICS 13, 34A Wn.2d 130.

[7] Smits v. Hogan, 35 Wash. 290, 77 Pac. 390 (1904); Weed v. Foster, 58 Wash. 675, 109 Pac. 123 (1910); Delbridge v. Beach, 66 Wash. 416, 119 Pac. 856 (1912); Beck v. Boucher, 114 Wash. 574, 195 Pac. 996 (1921); Hamlin v. Case & Case, Inc., 188 Wash. 150, 61 P.2d 1287 (1936).

[8] In Delbridge v. Beach, 66 Wash. 416, 119 Pac. 856 (1912), the contract in issue provided, in the matter of compensation, that the attorney's fee would consist of one-fifth of the property obtained from a contemplated divorce action. The contingent feature of the contract was not discussed in the opinion, however, as the contract was held void as against public policy on the ground that it was a contract intended to promote the dissolution of the marriage.

[9] Jordan v. Westerman, 62 Mich. 170, 180 N.W. 826, 830 (1886).

a failure of the parties to effect a reconciliation. In the *Smith* case,[10] the court adopted this general rule and held that a contract which is void and unenforcible is not "sanctioned by law" as that term is used in Canon 13; consequently, it is a violation of Canon 13 for an attorney to enter into such a contract. Where the contingent fee contract is related to the amount of support money and alimony awarded to the wife, as was the case here, there is the additional objection that such a contract would interfere with the duties of the court.

In fixing the amount and time of payment of support money and alimony, the court is entitled to have all the facts which would influence its decision. It is also entitled to be free from side agreements which would frustrate the court's effort to make suitable provision for the wife without undue burden on the husband.[11]

JOAN SMITH

Conduct of Lawyer before the Court—Candor. In a trial on a breach of contract action, the attorney, testifying on behalf of his client, stated that he had paid the cost of a title insurance policy, but did not reveal to the court that he had requested the insurance company to hold his check until the outcome of the trial. In a disciplinary proceeding, In re *Healy,* 143 Wash. Dec. 247, 261 P.2d 89 (1953), the court held that while the attorney did not testify falsely before the trial court, he failed to exercise the candor which is required of him as an attorney. The attorney was suspended from practice for ninety days.

MUNICIPAL CORPORATIONS

Tort Liability. In its national aspect the tort liability of a municipal corporation presents an area of confusion, contradiction, and lack of uniformity. The field is one of refinement, illogic, and apparently capable of resolution only by legislative enactment. In 1953 the Washington Court rendered three significant decisions which serve to clarify our position on the subject. These three cases, in their order of discussion, are *McLeod v. Grant County School Dist.*,[1] *Kilbourn v. City of Seattle,*[2] and *Hutton v. Martin.*[3]

The general common law rule relating to the tort liability of a municipal corporation is: a municipal corporation is liable for torts committed by its agents in the performance of proprietary function, but, *in the absence of statute,* it is not responsible for torts committed in

[10] *Supra* note 1.
[11] *In re* Smith, 42 Wn.2d 188, 254 P.2d 464, 469 (1953).
[1] 42 Wn.2d 316, 252 P.2d 360 (1953).
[2] 143 Wash. Dec. 345, 261 P.2d 407 (1953).
[3] 41 Wn.2d 780, 252 P.2d 581 (1953).