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CHAPTER 9

Contracts

GORDON L. DOERFER

§9.1. **Introduction.** Although the law of contracts is not expected to be a fast-breaking frontier of judicial activity, several decisions rendered during the 1971 SURVEY year offer an opportunity for some reflection and critical analysis. Two decisions of the Supreme Judicial Court, *McInerney v. Massasoit Greyhound Association*[1] and *Trustees of Tufts College v. Volpe Construction Co.*,[2] seem especially noteworthy because they illustrate the ever-potential conflict between the private law of contracts and the public realm of social policies.

§9.2. **Attorney's fee contracts: Judicial nullification of unconscionable terms.** *McInerney v. Massasoit Greyhound Association*[1] involved a fee contract between an attorney and a client with respect to a domestic relations case. The Supreme Judicial Court held that the contract, which provided for payment of a contingent fee and for an assignment by the client to the attorney of certain stock, was excessive and unreasonable as a matter of law, and consequently null and void. The Court explicitly adopted the principle that the fee arrangements made by attorneys with their clients are subject to judicial scrutiny, and that attorneys are not free to make any bargain without regard to its reasonableness. The Court's decision had its roots not only in the special interest of the Court in regulating the practice of law, but also in the judicial policy of limiting the power of private parties to contract where their mutually agreeable arrangements conflict with social policy. The greatest significance of the case was the Court's broad assertion of jurisdiction to review the fee contracts made by attorneys. This case is fully discussed in the student comment, §9.6 *infra*.

§9.3. **Enforcement of private contracts that promote public policy: Equal opportunity clause.** In *Trustees of Tufts College v. Volpe Construction Co.*,[1] a case of first impression in the nation, the plaintiff Tufts was appealing from an interlocutory decree that had sus-

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§9.1. [1] 1971 Mass. Adv. Sh. 667, 269 N.E.2d 211.
[2] 1970 Mass. Adv. Sh. 1477, 264 N.E.2d 676.

§9.2. [1] 1971 Mass. Adv. Sh. 667, 269 N.E.2d 211.

§9.3. [1] 1970 Mass. Adv. Sh. 1477, 264 N.E.2d 676.

tained, without leave to amend, the defendant's demurrer to Tufts' bill for declaratory relief, and from a final decree dismissing plaintiff's bill. The bill had alleged a construction contract between the plaintiff and the defendant (Volpe) for the building of a dormitory, which contract, as required by Executive Order No. 11,246,[2] contained an equal opportunity clause.[3] Volpe, under the terms of the clause, was not to discriminate in its employment on the dormitory project and was to take affirmative steps to ensure that applicants and employees were not discriminated against. The contract allegedly also contained a promise by Volpe to include the equal opportunity clause in its agreements with subcontractors. Of the work force of 90 persons employed by the defendant on the dormitory, only 6 were minority group members (6.7 percent); of the work force of 19 employed by subcontractors, none were minority group members. The bill further alleged that if Volpe had complied with its contractual obligations, its work force would have contained approximately 20 percent minority employees; that Volpe had failed to supply correct information as to its compliance with the clause; that Tufts had a duty itself to enforce the clause; and that "an actual controversy . . . exists . . . as to whether defendant has complied with its obligations" under the clause. The Supreme Judicial Court reversed the decrees of the lower court and held that the plaintiff was entitled to enforce the equal opportunity clause of the contract and that the existence of parallel federal mechanisms to achieve the same social policies did not preclude Tufts from enforcing its own contractual rights.

The defendant had offered nine grounds (eight procedural and one substantive) in support of its demurrer. The procedural grounds were: (1) failure to state a claim upon which relief could be granted; (2) failure to allege concisely and with certainty sufficient facts to state a claim; (3) nonjusticiability of the controversy; (4) lack of standing on the part of the plaintiff, in part because the plaintiff had not been harmed; (5) lack of jurisdiction of the court over the subject matter of the bill; (6) failure to pursue the proper contractual remedy; (7) absence of necessary parties; and (8) mootness. The Court handled the first three of the defendant's contentions together. After finding that the plaintiff's precision in pleading was sufficient under the circumstances, the Court concluded that the plaintiff's allegations stated facts showing the existence of an actual, justiciable controversy. In reaching its conclusion, the Court relied on those allegations tending to show a breach of the contract between the plaintiff and the defen-

[2] 3 C.F.R. 340 (Comp. 1970), which sets forth seven clauses that must be included in contracts let by certain organizations that avail themselves of federal funds.

[3] Included in the equal opportunity clause was the following provision: "[The contractor] will not discriminate against any employee or applicant for employment because of race . . . color . . . or national origin . . . [and the contractor] will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race . . . color . . . or national origin." 1970 Mass. Adv. Sh. 1477, 264 N.E.2d 676, 678.

dant, specifically that affirmative action had been promised, that affirmative action would have resulted in the hiring of many more minority employees than in fact were hired, and that the defendant gave the plaintiff "false and misleading" information as to compliance with the contract provisions in question.

The next four grounds were addressed to what the defendant claimed was an improper attempt on the part of the plaintiff to act in the place of the federal government in enforcing the equal opportunity clause. The defendant contended that, as part of the contract, a clause had been included that limited enforcement of the contract to the federal government:

> In the event of the Contractor's noncompliance with the Equal Opportunity conditions . . . , this contract may be cancelled . . . and the Contractor may be declared ineligible for further Government contracts, in accordance with . . . Executive Order No. 11246 . . . , and such other sanctions may be imposed and remedies invoked as provided in said Executive Order, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.[4]

The Court, however, disagreed with the defendant's conclusion because the defendant's reading would disregard the right of the university to enforce the provisions of the contract it had reached with the contractor:

> Because the government may enforce a specific provision under the Executive Order does not mean that the University is unable to enforce a similar provision. . . . [T]he University does not seek to enforce the terms of the Executive Order but seeks to enforce the provisions of its contract with the defendant. The fact that a specific provision in the contract is covered by a regulation of a Federal agency regarding the enforcement of that regulation does not deprive the University of the right to enforce the contractual obligations.[5]

The remainder of defendant's procedural points were likewise rejected by the Court. Plaintiff was held to have standing because it was seeking a declaration as to its rights under the terms of its own contract; subject matter jurisdiction existed because breach of contract and not executive order violation per se was at issue; there was no failure to comply with the contractual remedy clause because an action for a declaration of rights under the contract was not foreclosed thereby; and there was no absence of necessary parties because the claimed necessary party (the secretary of labor) was not involved in the alleged contract breach. The case was declared by the Court not to be moot, on the ground that if the contract had been breached, the suit might be maintained for damages.

[4] 1970 Mass. Adv. Sh. 1477, 1483, 264 N.E.2d 676, 681, citing the defendant's brief.
[5] Id. at 1483-1484, 264 N.E.2d at 682.

The one substantive ground pressed by the defendant, that Tufts was in effect demanding an illegal quota system for the hiring of minorities, was no less speedily disposed of. The Court noted that under the terms of the contract affirmative action was required on the part of the defendant to ensure nondiscriminatory employment, and concluded that the hiring of 6 minority group members out of a work force of 90 raised a question as to the existence of affirmative action.

Executive Order No. 11,246 is the means by which the federal government has chosen to regulate the employment practices of that part of the construction industry that contracts with owners or developers who receive federal funds. The order is not legislation but is, rather, a directive that regulates the terms and conditions upon which federal financial assistance may be granted. It applies only to those employers directly involved in federally financed projects. The order does not create or lead to the creation of any privity between a construction contractor and the federal government, although there appears to be no reason why the government might not create such privity if it wished. It does subject the contractor to enforcement by two parties, the government and the owner or developer, in the event that the order is not complied with: the government acting under the order and the owner or developer operating under the contract clause. In a manner of speaking, the government is, by virtue of the insertion of the equal opportunity clause in the construction contract, a third-party beneficiary under the construction contract.

The only issue of contract law presented in *Tufts College* was whether the equal opportunity clause had created any contractual rights that could be enforced by the plaintiff, that is, whether the plaintiff was entitled to assert an interest in the defendant's hiring practices and policies by virtue of the inclusion of the equal opportunity clause in the contract. *Tufts College* makes it clear that Massachusetts owners and developers may bargain for and include in a construction contract a clause binding the contractor to employ persons without discrimination and to take affirmative action to achieve equal employment opportunities. Since the Court in *Tufts College* in no way relied upon the fact that the inclusion of the equal opportunity clause was mandated by the executive order, the Court's holding should be read to embrace not only those covenants in which the executive order would be involved, but also any covenant embodying legally enforceable social policy.

The holding in the *Tufts College* case suggests a new application of contract law to the problem of the exclusion of minority groups from the construction trades. Large institutional owners or developers such as colleges, universities, hospitals, insurance companies, and other quasi-public institutions would do well to insist that equal employment opportunity clauses be included in construction contracts to which they are a party. If substantial contracts are at stake and if the inclusion of equal opportunity clauses is widespread, nondiscrimination standards in the construction industry may be significantly raised.

This may be all the more true if owners and developers take the time and energy to hammer out detailed and enforceable provisions aimed specifically at achieving equal opportunities. The excuse most often relied upon by a contractor in meeting equal opportunity complaints is that he depends upon unions to supply him with labor and has no control over the practices of unions regarding equal employment opportunities. The excuse may not serve well, however, if contractors and contractor associations are faced with an increasing number of institutional builders who insist on effective equal opportunity clauses. The same rationale that would sustain an action by an owner to enforce an equal opportunity clause will sustain an equal opportunity clause bargained for in a collective bargaining contract. The only limit is the bargaining power of the party seeking to impose the covenant.

All of these suggested means of attacking the discrimination problem assume, of course, a market in which at least one party will insist upon the inclusion of an equal opportunity clause. It must be noted that efforts to date have not been successful, mostly because owners and developers have failed to exploit fully their bargaining position.

§9.4. Formation of a contract: Negotiations falling short of a binding agreement. In *Graham v. Oman,*[1] the plaintiff Graham and the defendant cross-appealed from a decree, upon a finding by a master, that awarded the plaintiff a recovery for services rendered in the development of a shopping center. The plaintiff was a real estate broker who originally had acted for the seller in a transaction involving certain land purchased by the defendant, a real estate developer. During the negotiations prior to the signing of the purchase and sale agreement, the plaintiff and defendant had spoken about having the land rezoned for a shopping center. The defendant indicated that if the land could be rezoned and a shopping center erected, arrangements might be made for the plaintiff to be the exclusive broker for the shopping center. No specific terms or agreements were reached. After the land had been purchased, the broker assisted the developer in obtaining the necessary zoning reclassifications and, for two years, devoted a substantial portion of her time in the interests of developing the shopping center. She collected information for the preparation of a brochure and called on many prospective tenants, attempting to interest them in the project. During the two-year period, the plaintiff tried unsuccessfully to get the defendant to sign an exclusive brokerage agreement. Subsequently, the defendant entered into an exclusive brokerage agreement for the shopping center with someone other than the plaintiff. The master found that plaintiff's work was of benefit to the developer, that it was worth $4000, and that she expected to be paid for it by deriving benefits from an exclusive brokerage contract. There was also a finding that the developer knew that the broker expected to be paid for her services and to receive the exclusive brokerage contract.

§9.4. [1] 1970 Mass. Adv. Sh. 1517, 264 N.E.2d 691.

The Supreme Judicial Court, however, held that the broker was not entitled to recover from the developer. In arriving at its decision, the Court read the master's report as compelling the conclusion that the only form of compensation that the broker expected was the award of an exclusive brokerage contract. The Court found that the discussions concerning such a contract did not constitute an offer or enforceable promise and concluded that the conduct of the parties indicated only expectations or negotiations that fell short of a binding agreement. The Court found expressly that "[n]othing which the plaintiff or the defendants said or did permits an inference that the defendants agreed that if the parties did not enter into a brokerage contract the plaintiff would be paid for any services which she performed on her own initiative in anticipation of receiving the contract."[2]

The plaintiff's brief did not present a claim of unjust enrichment or mention the doctrine of quantum meruit but, from the facts disclosed in the opinion, there seems to be some Massachusetts authority upon which the plaintiff could have based such a claim.[3] Moreover, if it had been necessary to find an implied promise in order to permit recovery in the *Oman* case, it is submitted that the facts of the case may support such an inference. The Court's attention was focused upon the exclusive brokerage contract that, it must be admitted, never was entered into. The plaintiff, however, was not seeking to enforce such a contract; she was seeking compensation based upon an implied promise of the defendant to compensate her for various services that were rendered in reliance on her receiving the exclusive brokerage contract. Those services, according to the plaintiff, were of substantial benefit to the defendant and were rendered with his knowledge that she expected to be paid for them.

The Supreme Judicial Court, however, determined that the master's report would not support a conclusion that plaintiff expected any compensation other than the exclusive brokerage for the shopping center. In defense of the Court's decision, it might be said that the particular activities of the plaintiff were consistent with mere solicitation for the favor of the defendant so that he would be favorably disposed to the plaintiff and would award her a valuable contract. A certain amount of pump-priming and public relations might have been the accepted norm in the plaintiff's field of endeavor, and such facts could constitute part of the circumstances under which it was not unjust for the plaintiff to remain uncompensated. If the Court had analyzed the facts with reference to these business principles, the decision would seem less harsh.

§9.5. Covenants not to compete: Violation of decree enforcing

[2] Id. at 1520, 264 N.E.2d at 693-694.

[3] See Duoillette v. Parmenter, 335 Mass. 305, 139 N.E.2d 526 (1957) (unjust enrichment); Casey v. May, 211 Mass. 243, 97 N.E. 913 (1912) (plaintiff, at request of defendant, having rendered valuable services that were not intended to be gratuitous, is entitled to reasonable compensation even though no contract exists). In both of the above cases, however, the defendants had clearly encouraged the plaintiffs to render the services in question.

covenant: Damages; Attorney's fees. In *Coyne Industrial Laundry of Schenectady, Inc. v. Gould,*[1] the defendant was appealing from a master's decision and a lower court decree that declared him to be in contempt of a previous decree that had restrained him from competing with the plaintiff by soliciting business from "any person, firm, corporation or agency" served by the plaintiff.[2] The defendant was the former regional general manager of the plaintiff laundry and had left the plaintiff's employ to engage in an identical business in the same town in which the plaintiff's regional plant was located. Soon after the defendant started his business, the plaintiff sued in equity to enforce the noncompetition covenant that had been included in the defendant's employment contract, and a consent decree had been entered enjoining the defendant from competing for three years. The defendant was subsequently low bidder on certain laundry contracts with the General Services Administration (GSA), a customer of the plaintiff, and the plaintiff sued to have the defendant declared in contempt. A master heard the case, found the defendant in contempt, and ascertained damages, including attorney's fees, all of which was confirmed by the superior court. On appeal, the Supreme Judicial Court affirmed the lower court decree but modified it as to the amount of damages.

The defendant urged upon the Court two chief grounds for reversal: first, that his conduct had not violated the literal language of the consent decree; and second, that even if the Court might find a violation of the decree, the defendant's conduct was not such as constituted contempt. He pointed to the terms *agency* and *solicitation* in the consent decree, arguing that although GSA was concededly a government "agency," to read the decree as including such public agencies would be unreasonable. It was the defendant's position that the covenant not to compete was intended primarily to protect the goodwill established by the former employer's business and to prevent the employee from taking advantage of his contacts with the former employer's customers. The defendant contended that no goodwill or personal contact was involved in the instant case because GSA awarded contracts solely on the basis of impersonal competitive bidding. Admittedly, no confidential information, secret formulas, or personal relationships had been exploited by the defendant.

The Court held that it was not unreasonable to include GSA within the term *agency*, especially since GSA was one of the plaintiff's major accounts, a fact known to the defendant because in his former capacity

§9.5. [1] 1971 Mass. Adv. Sh. 587, 268 N.E.2d 848.

[2] The consent decree enjoined the defendant from "calling upon or otherwise soliciting . . . [for laundry business] from any person, firm, corporation or agency being served by Plaintiff on March 22, 1965 in the States of Massachusetts and Rhode Island and in [named counties] in the State of Connecticut for a period of three (3) years from November 7, 1964 . . . [and] from furnishing such industrial laundry items . . . to any of the aforesaid persons, firms, corporations or agencies . . . and from furnishing in writing or disclosing in any conversation directly or indirectly the names and addresses or any other information concerning the Plaintiff's customers. . . ." Id. at 588 n.2, 268 N.E.2d at 850 n.2.

as regional manager he had signed his employer's bids to GSA. It was also noted that the noncompetition clause was limited in time to three years. The Court's holding indicates that it is not necessary to show that each particular restriction in a restrictive covenant is required to protect confidential information, secret formulas, or personal relationships, and that the Court will look to the reasonableness of the restrictions as a whole, giving weight to the magnitude of the injury involved.[3] The Court also declared that personal contact was not an essential element of "solicitation" and that the actions of the defendant in submitting a bid to GSA and discussing his plant's capabilities was "sufficient 'solicitation' to come within the terms of the decree."

In arguing that contempt ought not to be found, the defendant claimed that even if the terms *agency* and *solicitation* were held to embrace its bid to GSA, those terms were ambiguous and did not clearly and unequivocably forbid the defendant's conduct. The Court suggested that if the defendant thought the terms ambiguous he should have sought judicial clarification. In deciding that the terms were not ambiguous and that defendant had properly been held in contempt, the Court pointed to the essential facts that GSA was a government agency and a customer of the former employer as of the date of the decree, and that the defendant had furnished forbidden services to GSA when, as to time and place, GSA was within the terms of the decree. It is not clear from the *Coyne* decision whether the same result would be reached under the same facts absent the consent decree, that is, if only the covenant not to compete were before the Court.

The defendant attacked the master's findings as to damages on two grounds: (1) that the "cash flow" method of computing damages that was adopted by the plaintiff and the master was incorrect as a matter of law; and (2) that the attorney's fees charged were excessive. The master had found that 51.9 percent of the plaintiff's expenses were fixed, indirect, overhead charges. He computed damages by adding the profits the plaintiff would have received from the contract plus the overhead expenses that would have been allocated under cash flow accounting methods. Plaintiff relied on *F. A. Bartlett Tree Expert Co. v. Hartney*,[4] which had upheld a similar computation of damages. The Court, however, construed *Bartlett* narrowly, distinguishing it on the ground that in *Bartlett* the master had specifically found that the overhead costs of the injured employer had not been materially decreased because of the loss of the purloined customers, nor would they have been materially increased had the customers not been purloined. The Court implied that such a finding would be essential before overhead expenses could be treated as an element of damages under the "so called 'cash flow' theory."[5] It was held that the proper

[3] For a thorough discussion of employee covenants not to compete, see 1970 Ann. Surv. Mass. Law §7.12.

[4] 308 Mass. 407, 32 N.E.2d 237 (1941).

[5] 1971 Mass. Adv. Sh. 587, 593, 268 N.E.2d 848, 853.

measure of damages was "what the plaintiff would have made had the contract been performed." Accordingly, the Court reversed the portion of the decision below that awarded overhead expenses. There is no reason to doubt that the Court's reasoning could be applied in other contexts in which damages for overhead expenses are claimed. The lesson for plaintiff's attorneys is clear: evidence must be produced and a finding must be made precisely as required by *Bartlett* if overhead costs are to be used in the computation of damages.

Although the defendant had originally protested the imposition of attorney's fees as an element of damages, on argument he conceded that some fee was due and challenged only the amount being awarded. The master had found that the plaintiff's attorney had not handled the case "as expeditiously as an experienced trial lawyer," and furthermore that the plaintiff's attorney had charged hourly rates rather than per diem rates, the latter being the customary practice in the city in question. The Court reaffirmed its position that attorney's fees were properly allowable under the instant circumstances, but declared that "strictly conservative principles" would apply in determining fees to be paid to the winning party by the losing party. "[T]he standard is not the same as that applied in an action by an attorney against a client with whom he has voluntary contractual relations. . . ."[6] Although admitting there was evidence tending to show that the amount billed by the plaintiff's attorney was fair and reasonable, the Court nonetheless limited the attorney's fee to an amount determined at the prevailing per diem rate, which resulted in a reduction of 61 percent in the amount recovered for the attorney's fee.

STUDENT COMMENT

§9.6. Attorney-client fee agreements: McInerney v. Massasoit Greyhound Association.[1] Mrs. Elinor Murray, a codefendant in this case, consulted attorney McInerney on August 17, 1961, regarding her marital problems with her husband, the majority stockholder in the defendant Massasoit Greyhound Association. After a 10- to 15-minute discussion with Mrs. Murray, the plaintiff informed her that he wanted to make an agreement with her regarding his compensation for the services he was to render. The plaintiff then dictated the first version of the fee agreement that formed the basis for this suit. This agreement, signed by both parties, provided that McInerney was to obtain for Mrs. Murray a separate support or divorce decree, a property settlement, and everything else that she was entitled to receive from her husband. In return for the plaintiff's services Mrs. Murray agreed to pay a reasonable base fee, plus an additional fee equal to one-third of the value of everything obtained for her by the plaintiff over and above alimony or support payments.

[6] Id. at 595, 268 N.E.2d at 854, citing Hayden v. Hayden, 326 Mass. 587, 596, 96 N.E.2d 136, 142 (1950).

§9.6. [1] 1971 Mass. Adv. Sh. 667, 269 N.E.2d 211.

From the time the fee agreement was made in 1961 until the spring of 1964, McInerney was required to render very little service to Mrs. Murray. In June 1964 the plaintiff filed a petition for separate support on behalf of Mrs. Murray, and in November 1965, after nine days of trial, the plaintiff negotiated a settlement with Mr. Murray's attorney. The negotiations resulted in a separate support agreement that provided for (a) support payments by Mr. Murray of $20,000 a year, free of taxes, (b) purchase of Mrs. Murray's home by Massasoit for $25,000, free of taxes, and (c) an immediate payment of $25,000 to Mrs. Murray, which sum was to be used to pay McInerney for the services he had rendered to her. The negotiations also produced an employment agreement that provided for Massasoit's employment of Mrs. Murray for life at a rate of $7500 per year, and a voting trust agreement was signed that set up a trust of 500 shares of Massasoit stock for her benefit.

In December 1965, after expressing her dissatisfaction with the original fee arrangement, Mrs. Murray signed a revised version of the original fee agreement. Under the terms of this revised version, Mrs. Murray agreed to pay the plaintiff $40,000 for obtaining the $7500 per year employment contract. This sum was to be paid by Mrs. Murray at a rate of $2000 per year for the rest of her life. In addition, Mrs. Murray agreed to transfer to McInerney one-third of the Massasoit stock she had received in the property settlement. The above arrangements did not affect the $25,000 base fee that McInerney had already received.

In May 1967 Mrs. Murray consulted another attorney, who notified the plaintiff that Mrs. Murray considered the revised fee agreement exorbitant and unreasonable. The other attorney suggested that they discuss the matter, but the plaintiff took no action until he was informed that Mrs. Murray had transferred to Massasoit the 500 shares of stock in which he claimed a one-third interest. McInerney then filed a bill for declaratory relief in Suffolk Superior Court, seeking a determination of his rights in 167 shares of Massasoit stock. Mrs. Murray filed answers and counterclaims denying the validity of the plaintiff's claim to the Massasoit stock and charging that his professional misconduct should preclude the relief sought.

The trial judge found that the terms of the 1965 revised fee contract would yield a fee of approximately $131,800, depending on how long Mrs. Murray lived, and he concluded that the arrangement was "champertous, unreasonable and unenforceable."[2] The Supreme Judicial Court agreed that the fee contract was excessive and unreasonable as a matter of law, declared the contract null and void, and ordered McInerney to remit everything except the base fee of $25,000.[3] This holding was embodied in a new final decree, however, because the Court concluded that the trial judge's finding of champerty was incorrect as a matter of law.

[2] Id. at 668, 269 N.E.2d at 213.

[3] Id. at 681-682, 269 N.E.2d at 220. McInerney was ordered to return to Mrs. Murray $2666.56 in monthly installments which she had made on her agreement to pay $2000 per year for the remainder of her life. The assignment of 167 shares of Massasoit common stock to McInerney was declared null and void.

In 1961, when the original fee agreement was drafted, the use of contingent fees in Massachusetts was governed by the doctrine of champerty. The Supreme Judicial Court had defined *champerty* in an 1872 decision as "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it, whereupon the champertor is to carry on the party's suit at his own expense."[4] Hence, any fee agreement was void as champertous if it provided for a share of the recovery as the attorney's only compensation for services. However, the Court distinguished those agreements for compensation which imposed a personal liability on the client. "Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them as security for payment, the agreement is not champertous."[5] As a consequence of the above distinction, attorneys were able to circumvent the champerty restriction by a simple drafting technique. The fee arrangement would provide for both a modest fee, to be paid regardless of the outcome of the case, and an additional amount measured by a percentage of the sum recovered. Such an agreement was not champertous, because the set fee constituted a debt from client to attorney and there was a personal liability between client and attorney for the entire amount.[6]

In *McInerney* the original fee agreement provided that Mrs. Murray would pay a reasonable fee for her attorney's services, plus a sum equal to one-third of everything he obtained for her over and above support or alimony payments. The Court decided that under this arrangement the plaintiff was to be paid something for his services regardless of the outcome of the libel for divorce or separate support. That indebtedness of client to attorney was enough to take the fee contract out of the theory of champerty, but the Court made it clear that it preferred "not to have to rely on this theory in any event."[7]

> There is an increasingly prevalent practice of charging contingent fees. Although contingent fees are susceptible to great abuse, they provide also a method for the litigation of meritorious cases by litigants of little or no means. Their increasing acceptance in principle and the decline of champerty, maintenance, and barratry as offences is symptomatic of a fundamental change in society's view of litigation. . . . The doctrine of champerty is thus a tool ill fitted to curb the evils attendant upon contingent fees.[8]

Moreover, the Court noted that one of its own rules now permits the use of contingent fees.[9] Although the original fee contract in *McIner-*

[4] Scott v. Harmon, 109 Mass. 237, 238 (1872). See also Sherwin-Williams Co. v. J. Mannos and Sons, 287 Mass. 304, 312, 191 N.E. 438, 441 (1934).

[5] Blaisdell v. Ahern, 144 Mass. 393, 395, 11 N.E. 681, 684 (1887).

[6] Walsh v. White, 275 Mass. 247, 248, 175 N.E. 499, 500 (1931).

[7] 1971 Mass. Adv. Sh. 667, 676, 269 N.E.2d 211, 217.

[8] Ibid.

[9] Mass. S.J.C.R. 3:14, 351 Mass. 795-798 (1967), deals with contingent fees and states, in part, that:

ney was signed three years before the rule was adopted, the Court felt that the rule simply repeated "concepts which have been implicitly recognized in our law for many years." It seems apparent that the Court was anxious to evaluate the situation in *McInerney* in terms of current concepts: "[S.J.C. Rule 3:14] indicates that the standards it sets out are meant to replace the old law of champerty."[10]

Although the doctrine of champerty was laid to rest in *McInerney*, the Supreme Judicial Court nonetheless agreed with the trial judge that the contested fee agreement was excessive and unreasonable. This comment will examine some of the criteria which courts have used in assessing the reasonableness of an attorney's fee. There are no rigid formulas to be applied, for attorneys have been allowed considerable latitude in making their own determinations. However, attorneys and potential clients should be aware of the extent to which the courts have established their own standards of reasonableness and the extent to which various professional canons have been interpreted in judicial decisions.

At the outset it should be noted that the issue of reasonableness is not affected by the fact that the fee agreement is made before the attorney-client relationship has been established. Such was the fact situation in *McInerney*, and the plaintiff attorney pointed out the language of a 1908 Massachusetts decision:

> [A]n agreement fairly made between attorney and client, before . . . [the attorney-client relationship] is entered into, as to the compensation to be received by the former for the services which it is expected that he will render, is prima facie valid and binds the parties to it.[11]

In *McInerney*, however, the Court asserted its power to deny enforcement to *any* fee agreement it finds to be excessive and unreasonable, on the ground that in Massachusetts there is not to be a "complete dichotomy between a fee which is reasonable in the light of hindsight and one which is permissible at the outset. . . ."[12] With no Mas-

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"(1) In this rule, the term 'contingent fee agreement' means an agreement, express or implied, for legal services of an attorney or attorneys . . . , under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula. The term 'contingent fee agreement' shall not include an arrangement with a client, express or implied, that the client in any event is to pay to the attorney the reasonable value of his services and his reasonable expenses and disbursements.

"(2) Unless expressly prohibited by this rule, no written contingent fee agreement shall be regarded as champertous if made in an effort in good faith reasonably to comply with this rule.

"(3) No contingent fee agreement shall be made (a) in respect of the procuring of an acquittal upon or any favorable disposition of a criminal charge, (b) in respect of the procuring of a divorce, annulment of marriage or legal separation. . . ."

[10] 1971 Mass. Adv. Sh. 667, 676, 269 N.E.2d 211, 217.

[11] Bar Assn. of Boston v. Hale, 197 Mass. 423, 437, 83 N.E. 885, 886 (1908).

[12] 1971 Mass. Adv. Sh. 667, 680, 269 N.E.2d 211, 219.

sachusetts case directly on point, the Court adopted the rationale of a New York decision:

> It is no less improper for an attorney to take advantage of his client's necessities and inexperience to induce him to make a contract in advance to pay an exorbitant fee for services than it is to take advantage of those necessities and that inexperience to exact an unreasonable fee after the services have been rendered.[13]

In any matter concerning an attorney's conduct, most courts will look to the various canons of the American Bar Association, as well as to the common law of the particular jurisdiction involved. The ABA Code of Professional Responsibility lists a series of factors to be considered by an attorney when he calculates his fee for services rendered.[14] The ABA guidelines are similar to those established by the Supreme Judicial Court in the leading case of *Cummings v. National Shawmut Bank:*

> . . . [a] the ability and reputation of the attorney, [b] the demand for his services by others, [c] the amount and importance of the matter involved, [d] the time spent, [e] the prices usually charged for similar services by other attorneys in the same neighborhood, [f] the amount of money or the value of the property affected by controversy, and [g] the results secured. Neither the time spent nor any other single factor is necessarily decisive of what is to be considered as a fair and reasonable charge for such services.[15]

Most other jurisdictions apply essentially the same criteria as were mentioned in *Cummings*. As a consequence, where there are no Massachusetts decisions interpreting particular criteria, it is useful to examine cases from these other jurisdictions.

In any case where the reasonableness of an attorney's fee is in question, it is a matter to be decided on the facts of each particular case.[16] If the attorney brings an action to recover the value of his legal services and the client charges that the fee is excessive, the burden is on the attorney to prove the reasonableness of his fee.[17] In these instances it is proper for the attorney to introduce testimony of other practicing

[13] In re Cohen, 169 App. Div. 544, 547, 155 N.Y.S. 517, 520 (1915).

[14] Disciplinary Rule [hereinafter abbreviated DR] 2-106(B) (1970) states that the following are relevant considerations in determining the reasonableness of a fee:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

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

[15] 284 Mass. 563, 569, 188 N.E. 489, 492 (1933).

[16] McMahon v. Kraph, 323 Mass. 118, 124, 80 N.E.2d 314, 318 (1948).

[17] Holton v. Denaro, 278 Mass. 261, 262, 179 N.E. 595 (1932).

attorneys as to their opinion of what a proper fee would be in the specific case.[18] In 1967 this practice was considered in *Hofing v. Willis,* where an Illinois appellate court cited with approval the following statement from an early Illinois Supreme Court decision:

> What is a fair and reasonable compensation for the professional services of a lawyer cannot in many, if not in most cases be otherwise ascertained than by the opinions of members of the bar, who have become familiar by experience and practice, with the character of such services. Practicing lawyers occupy the position of experts as to questions of this nature.[19]

However, the courts are not bound by the testimony of experts in determining the reasonableness of an attorney's fee. In a 1951 antitrust case[20] involving an award of attorney's fees, the Seventh Circuit Court of Appeals rejected the expert testimony of attorneys that the services in question were worth between $175,000 and $250,000 and reduced the district court's allowance from $225,000 to $75,000. The knowledge and experience of a particular judge will often render him an independent expert in determining the reasonableness of a given fee.

As noted in *Cummings,* the ability and reputation of the attorney is a primary consideration in determining the reasonableness of a fee. The Supreme Judicial Court relied on this criterion in *Hale v. Gravallese,*[21] in which the attorney was successful in gaining a determination of sanity for his client and arranging for his release from a state hospital over the intense opposition of the client's guardian and the hospital authorities. The Court concluded that the attorney's skill in handling the case was sufficient to justify his fee of $1750.[22] Similarly, in a case where the attorney was successful in overturning a precedent in deed construction that had been followed for almost 50 years, an Illinois court considered the attorney's unusual competency as an important consideration in concluding that his fee was not excessive.[23] In another interesting case, *Cape Cod Food Products, Inc. v. National Cranberry Association,* although the attorney had spent only 597 hours on a successful private antitrust case and had been a practicing attorney for only seven years, the federal district court nonetheless remarked that "the very economy of counsel's methods and his youth are perhaps the most significant hallmarks of an outstanding talent".[24] The attorney's unusual skill was considered an important factor in justify-

[18] Brogna v. Pioneer Petroleum Co., 344 Mass. 382, 386, 182 N.E.2d 303, 306 (1962). In this fee case, testimony was admitted from two attorneys, one a specialist in the particular field of law in question, as to reasonable compensation for the plaintiff attorney's services.

[19] 83 Ill. App. 2d 384, 389, 227 N.E.2d 797, 799 (1967), citing Louisville, N.A. & C. Ry. v. Wallace, 136 Ill. 87, 93, 26 N.E. 493, 495 (1891).

[20] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952).

[21] 340 Mass. 96, 162 N.E.2d 817 (1959).

[22] Id. at 100, 162 N.E.2d at 820.

[23] Hofing v. Willis, 83 Ill. App. 2d 384, 227 N.E.2d 797 (1967).

[24] 119 F. Supp. 242, 244 (D. Mass. 1954).

ing the allowance of a $35,000 fee. Obviously, however, the attorney's evaluation of his own skills will not always justify the fee in question. This point was illustrated in *McLaughlin v. Old Colony Trust Co.*,[25] in which the attorney contended that his ability and standing in the legal community justified a higher fee than he had received. The Supreme Judicial Court concluded that a higher fee was not warranted because the evidence presented did not establish either an ability greater than that of other attorneys in the area or a greater demand for his services than for the services of other competent practitioners in the area.[26]

An important consideration related to an attorney's overall ability is his competency in a specialized area of the law. The Supreme Judicial Court considered this factor in *Brogna v. Pioneer Petroleum Co.*,[27] where the attorney's services dealt with establishing rates for the sale of natural gas. The Court concluded that the attorney "possessed a special knowledge in a field of law which peculiarly affected the [client's] interests and in which few lawyers are engaged,"[28] and that factor was considered important in assessing the appropriate value of the services rendered. On the other hand, the attorney's unique ability or knowledge would not appear to be a proper consideration where the particular case does not require such special talents. This point was illustrated in a 1951 case[29] in which an attorney in an antitrust action contended that his special knowledge of the movie industry was essential to the successful prosecution of the case and justified a commensurately higher fee. The federal court of appeals, in rejecting this contention, concluded that the attorney's special knowledge of the industry was not vital to the case, and that any competent trial lawyer could have prepared and tried the case.[30] It would appear that an attorney's specialization in a field of law should justify a significantly higher fee only when the case could not be handled competently by an attorney who did not have the particular expertise. The measure of an attorney's ability and knowledge is certainly a valid consideration in determining the reasonableness of his fee, but if the fee is challenged in litigation the attorney must be prepared to introduce evidence of his ability and of his standing among his colleagues. The attorney may encounter certain proof problems regarding these factors, but it would seem that expert testimony of other attorneys would be particularly valuable.

Another consideration highly relevant in determining the reasonableness of a fee is the difficulty of the legal issues and other matters involved in a given case. The Supreme Judicial Court agreed with this

[25] 313 Mass. 329, 47 N.E.2d 276 (1943).

[26] Id. at 336, 47 N.E.2d at 280.

[27] 344 Mass. 382, 182 N.E.2d 303 (1962).

[28] Id. at 386, 182 N.E.2d at 306.

[29] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

[30] Id. at 570-571.

proposition in *Muldoon v. West End Chevrolet, Inc.*,[31] a complicated tax case. A better illustration of the use of this criterion is *Hofing*, where the attorney's case depended upon the interpretation of two deeds that raised difficult legal questions involving deed construction and alternate contingent remainders. Another interesting example of a court's delving into the difficulty of a case is *Highway Truck Drivers Local 107 v. Cohen*.[32] The attorney in that case was successful in obtaining an injunction enjoining expenditures from a union treasury to pay counsel fees for the defense of four union officials charged with defrauding the union. The federal District Court for the Eastern District of Pennsylvania noted that the case was one of first impression under the Labor-Management Reporting and Disclosure Act,[33] and this fact was considered important in assessing the attorney's fee.[34]

As the preceding cases illustrate, the difficulty of the legal matters involved has been used to justify a higher fee. However, a higher fee will not be sustained where the case does not involve novel or difficult issues or where the necessary pretrial work is not so complex. In *McInerney*, the Supreme Judicial Court did not regard the intricacies of representing the client at a support hearing as sufficient to justify the high fee charged by the attorney. A similar case, which involved the awarding of attorney's fees in a divorce action, is *Silton v. Silton*, in which the Supreme Judicial Court concluded that an award of $3000 was excessive where the trial lasted only three days and the issues presented were not especially difficult.[35] In *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*,[36] the Eighth Circuit Court of Appeals limited an attorney's fee in a civil antitrust action because a previous criminal antitrust prosecution of the defendants had effectively established a prima facie case against them, thereby leaving the amount of damages as the only real issue in dispute. It would appear that the difficulty of the legal issues, absent other factors, will justify a higher fee only in situations involving particularly complicated or unique legal problems. The bulk of the cases handled by most attorneys would not come within such bounds.

Another of the *Cummings* criteria concerns the amount of money or the value of the property involved in the case. It has been said that "where the amount involved in a case is substantial, the attorney assumes more responsibility when he undertakes to handle the matter . . . and for such additional responsibilities, the lawyer is entitled to additional compensation."[37] However, the Supreme Judicial Court in *McInerney* noted that although the amount involved was large,

[31] 338 Mass. 91, 96, 153 N.E.2d 887, 891 (1958).

[32] 220 F. Supp. 735 (E.D. Pa. 1963).

[33] 29 U.S.C. §501(b).

[34] See also Cape Cod Food Products, Inc. v. National Cranberry Assn., 119 F. Supp. 242 (D. Mass. 1954), where the difficulty of the legal issues in a particular antitrust action was considered by the court.

[35] 352 Mass. 299, 300-301, 225 N.E.2d 320, 321 (1967).

[36] 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

[37] Hofing v. Willis, 83 Ill. App. 2d 384, 388, 227 N.E.2d 797, 799 (1967).

this factor alone did not justify a higher fee, since the case was neither intricate nor especially difficult and the actual services rendered by the attorney did not justify the claimed fee.[38] A similar point of view was expressed in *Young v. Young*,[39] where a trial judge had awarded $7000 to the wife for attorney's fees in a divorce action. The husband's assets were over $1 million, and the wife claimed that the $7000 award for attorney's fees were inadequate. The Michigan Supreme Court disagreed, concluding that although "the amount involved was somewhat larger than in the ordinary divorce case, [this fact] did not necessarily . . . increase the work required or enlarge the rather elementary legal principles involved."[40] In cases where the amount of money involved actually does create additional work and responsibility for the attorney, a higher fee may well be justified; but where he performs a relatively routine service, the fact that the case involves a large amount of money should not itself warrant additional compensation.

In determining the reasonableness of a particular fee, the Supreme Judicial Court in *Blair v. Columbian Fireproofing Co.* considered the fact that acceptance of the particular employment by the attorney may preclude other employment:

> The attorney, by his engagement, gives up the possibility of being employed by the adverse party in the very matter to which the [employment] relates, and the matter may be of such a kind that he gives up the possibility of being employed by others in . . . [related] matters in which employment would be adverse to the interest in which he is retained.[41]

However, *Blair* was decided in 1906, and there have been no subsequent Massachusetts cases in which this "lost employment" factor has been discussed. Similarly, there are few decisions in other jurisdictions involving this factor, although both California and Illinois have in recent years listed it among the relevant criteria used in determining the reasonableness of a particular fee.[42] The ABA Code of Professional Responsibility also includes among the criteria justifying a particular fee "[t]he likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer."[43] In *Blair* the Court seemed to limit its attention to the possible loss of employment due to potential conflict of interest

[38] 1971 Mass. Adv. Sh. 667, 679, 269 N.E.2d 211, 219. In a case in which an attorney's services dealt with determining the validity of amendments to a trust instrument, the Supreme Judicial Court refused to declare the attorney's fee excessive where the record of the lower court decision contained no statement of the value of the trust. Phelps v. State Street Trust Co., 330 Mass. 511, 115 N.E.2d 382 (1953).

[39] 354 Mich. 254, 92 N.W.2d 328 (1958).

[40] Id. at 258, 92 N.W.2d at 330.

[41] 191 Mass. 333, 336, 77 N.E. 762, 763 (1906).

[42] Hofing v. Willis, 83 Ill. App. 2d 384, 389, 227 N.E.2d 797, 800 (1967); Fernandez v. Fernandez, 194 Cal. App. 2d 782, 800, 15 Cal. Rptr. 374, 385 (1961).

[43] DR 2-106(B)(2) (1970).

problems, but the ABA guideline would be equally relevant in situations where the amount of time devoted to a particular case precludes the acceptance of other clients. However, the lawyer would have to show that the employment in issue did in fact prevent him from accepting other employment and that the client was aware of this fact. It is not clear whether the client would have to be aware of the specific lost opportunity or the likely dollar effect of the lost opportunity on the fee he will be charged. In practical terms, only a small percentage of an attorney's work would seem to be affected by such loss of employment.

In declaring attorney McInerney's fee unreasonable, the Supreme Judicial Court understandably placed considerable emphasis on the amount of time that he had expended on the case. The time spent by an attorney is probably the most basic element in evaluating the reasonableness of a particular fee, but as *Cummings* clearly established, "[n]either the time spent nor any other single factor is necessarily decisive of what . . . [constitutes] a fair and reasonable charge for [legal] services."[44] In *Cummings,* an attorney was employed to collect a $160,000 promissory note that a bank had been unable to collect, and he negotiated a settlement for complete payment. The Supreme Judicial Court found the attorney's fee of $5600 to be reasonable in light of the relevant criteria the Court cited, despite the fact that the fee greatly exceeded any computation based solely on a hourly rate. Similarly, in *Cape Cod Food Products,* the federal District Court for Massachusetts examined the services rendered by the attorney, the difficulty of the case, and the ability of the attorney, and concluded that the fee was reasonable despite the fact that it was higher than if it had been keyed to an hourly rate.

When considering the time expended on a given case, some courts have acknowledged that an experienced attorney can often accomplish the same task in less time than his less experienced counterpart. There is no Massachusetts case that clearly articulates this premise, but in *Derdiarian v. Futterman Corp.,* where the attorney represented a successful client in an action under the federal securities laws, a federal district court in New York concluded that "[t]he fact that [the attorney had] been the attorney in very similar cases and, therefore, had to do less work in preparing for this case, . . . should not in any way prejudice his claim for fees. Expertise in a field of law should be rewarded rather than be used as a basis for fee reduction."[45] Conversely, no client should be expected to pay a fee based on a strict hourly rate

[44] 284 Mass. 563, 569, 188 N.E. 489, 492 (1933). See also Highway Truck Drivers Local 107 v. Cohen, 220 F. Supp. 735, 738 (E.D. Pa. 1963), where the court stated that the number of hours expended by the attorney on the case is not "determinative of what the fee should be, for the work of a lawyer is not comparable to the work of an artisan such as a plumber, . . . where the time clock approach is controlling. Many times the final and winning decision of the lawyer as to what should or should not be done is not made at his desk or in his library, but when he is elsewhere. The conscientious lawyer's mind is never at rest. . . ."

[45] 254 F. Supp. 617, 620 (S.D.N.Y. 1966).

when the attorney's use of time is inefficient. This point is exemplified in *Bowl America, Inc. v. Fair Lanes, Inc.*,[46] a 1969 antitrust case in which the attorneys asked $162,433 for their services, based solely on a hourly charge. This amount was ruled excessive and was reduced to $70,000, partly because the case was considered overprepared and because there was duplication of effort among the attorneys involved.[47] Another example of an attorney's poor use of time can be seen in *Cirimele v. Shinazy*,[48] in which the attorney represented a landlord in an action to recover rent under a lease that provided that the tenant would pay a reasonable attorney's fee in any such action. The plaintiff contended that the court's determination of the fee was inadequate since considerable legal work was caused by the defendant's successful change of venue motion. However, a California appellate court concluded that the attorney had brought the extra work upon himself by filing the landlord's action in a district where neither party lived. "The reasonable attorney fee . . . is not necessarily gauged by legal services actually rendered. It is limited to reasonable compensation for legal services that are reasonably necessary under the circumstances of a case."[49] Although *Cirimele* dealt with payment of the attorney's fees under a clause in a lease, the standard enunciated by the court would appear to be relevant in any situation where the attorney bases his fee on the amount of time spent on the case. In any situation where the attorney's inefficiency or error increases the amount of time expended on a case, the client should not be expected to underwrite the added cost.

Both *Cummings* and the ABA Code of Professional Responsibility provide that the result secured for the client by the attorney is another proper measure of the reasonableness of the attorney's fee.[50] This criterion was applied in *Muldoon,* where the attorney represented his client before the Internal Revenue Service in 1958 and was successful in reducing his client's liability from $105,000 to about $15,000. The Supreme Judicial Court refused to find the attorney's fee of $7600 excessive and emphasized the importance of the result secured in the case: "It would be naive to deny that the fact and degree of success are important factors in determining the value of legal services to a client."[51] However, the fact that a client receives a large financial benefit from the case will not automatically justify a higher fee. In *McInerney* the Court considered the benefits obtained for the client and concluded that "[w]ith respect to the property settlement, since [Mr.] Murray was comfortably well off it is not surprising nor any particular tribute to the plaintiff that the settlement amounted to enough to leave [Mrs. Murray] in comfortable circumstances."[52] The Court's conclusion in

[46] 299 F. Supp. 1080 (D. Md. 1969).
[47] Id. at 1100.
[48] 134 Cal. App. 2d 50, 285 P.2d 311 (1958).
[49] Id. at 52, 285 P.2d at 312.
[50] 284 Mass. 563, 569, 188 N.E. 489, 492 (1933); DR 2-106(B) (1970), n.14 *supra*.
[51] 338 Mass. 91, 96-97, 153 N.E.2d 887, 892 (1955).
[52] 1971 Mass. Adv. Sh. 667, 679, 269 N.E.2d 211, 219.

McInerney implies that where the result secured is attributable more to the circumstances of the case than to the attorney's efforts, the financial benefit to the client will not of itself justify a higher fee. On the other hand, a party who wishes to litigate must be prepared to pay the reasonable costs of litigation, regardless of the fact and degree of success. In *Palumbo v. United States Rubber Co.*,[53] the client instructed his attorney to undertake considerable work in a case where the principle involved was important but the amount of money involved was small. The Rhode Island Supreme Court concluded that the client "cannot after the fact object to the charge for legal services on the ground that it is disproportionate both to the amount involved in the controversy and to the number of dollars collected."[54]

Another of the *Cummings* criteria looks to the prices usually charged for similar services by other attorneys in the same area. Although this standard is mentioned in *McInerney*, there is no recent Massachusetts case clearly illustrating its application. A good example is provided by *Perlman v. Feldmann*,[55] a case in which attorneys from New York and Connecticut appeared for stockholders in a lengthy stockholders derivative action. In determining the reasonableness of the fees, the federal district court considered "the prevailing hourly rates of pay for attorneys of different degrees of skill, experience and standing both in Connecticut and New York during the years of the pendency of the [action]. . . ."[56] Another case in point is *Milwaukee Towne Corp. v. Loew's, Inc.*,[57] referred to earlier with respect to the unique ability of an attorney and the effect of expert testimony in fee cases. The plaintiff's attorneys in that case, having represented an independent theater owner against a motion picture distributor in a successful antitrust suit, had been allowed $225,000 in fees by a federal district court. The court of appeals, in deciding that the fee was excessive and should be reduced to $75,000, placed considerable emphasis on the fact that the allowance by the district court was far in excess of the amounts ordinarily charged in the surrounding area. It was noted that experienced trial lawyers in the area could be employed at approximately $40 per hour, with the usual charge for assisting counsel at $20 per hour, while the allowance of the district court approached $100 per hour for all time spent (by the leading counsel and his two assistants). In any litigation involving the reasonableness of a fee, it would appear that evidence showing that an attorney's fees are commensurate with those charged by other attorneys in the same locale with similar ability, experience, and reputation would be quite persuasive in justifying the fee.

The preceding discussion has focused on the various criteria set forth in *Cummings* for determining the reasonableness of a particular fee. A relatively new factor that must be considered in the attorney's

[53] 102 R.I. 220, 229 A.2d 620 (1967).
[54] Id. at 225, 229 A.2d at 623.
[55] 160 F. Supp. 310 (D. Conn. 1958).
[56] Id. at 311.
[57] 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

fee context is the establishment of recommended minimum fee schedules. The Supreme Judicial Court has not delineated the effect of these schedules in Massachusetts. In analyzing the reasonableness of a fee, courts in other jurisdictions have compared the specific fee in question with the figure recommended in the minimum fee schedule and have considered this comparison in reaching a decision.[58] However, the minimum fee schedules have not been treated as mandatory or binding.[59] In *Conway v. Sauk County*,[60] a Wisconsin attorney contended that the fee allowed him as the court-appointed counsel in a criminal case was inadequate because it was less than the minimum fee recommended for such services by the state bar association. In rejecting this contention, the Wisconsin Supreme Court stated:

> The schedule of minimum fees of the State Bar or other bar associations constitutes only the collective judgment of the committees or groups that passed upon it as to a scale of fees generally fair for the types of services listed. They are some evidence relevant to the question of a reasonable charge for services, but have no other legal force.[61]

It has also been emphasized that the rates set out in minimum fee schedules are "minimum rates and are applicable only when no unusual problems are involved."[62] The criteria enumerated in *Cummings* provide a more reliable standard for evaluating the reasonableness of a particular fee than do the minimum fee schedules, since the *Cummings* standards are more flexible and can more readily be adapted to specific fact situations.

The fact that contingent fees are now generally permitted in Massachusetts presents several points for an attorney to consider in establishing a fee arrangement with his client. The ABA Code of Professional Responsibility recommends that where a client can afford to pay a reasonable fixed fee, the attorney should avoid basing his fee on a contingent arrangement.[63] However, many clients, even if able to pay a fixed fee, prefer a contingent agreement.[64] The code also states that such an arrangement is not improper if the client, "after being fully informed of all relevant factors, desires that arrangement."[65] The use of contingent fees is now prohibited in domestic relations cases in

[58] Perlman v. Feldmann, 160 F. Supp. 310 (D. Conn. 1958). In a case where three attorneys performed services in the administration of an estate, the Pennsylvania Supreme Court placed considerable emphasis on the fact that the fee was equal to the minimum hourly rate recommended by the local bar association and concluded that their fee was a reasonable one. In re Browarsky, 437 Pa. 282, 286, 263 A.2d 365, 366 (1970).

[59] Krieger v. Colby, 106 F. Supp. 124, 132 (S.D. Cal. 1952); Hunker v. Melugin, 74 N.M. 116, 123, 391 P.2d 407, 411 (1964).

[60] 19 Wis. 2d 599, 120 N.W.2d 671 (1963).

[61] Id. at 604, 120 N.W.2d at 675.

[62] Hofing v. Willis, 83 Ill. App. 2d 384, 388, 227 N.E.2d 797, 799 (1967).

[63] Ethical Consideration [hereinafter abbreviated EC] 2-20 (1970).

[64] MacKinnon, Contingent Fees for Legal Services 205 (1964).

[65] EC 2-20 (1970).

Massachusetts.[66] In *McInerney,* the Court stated that this prohibition "is based on [the] fear that such arrangements act as an inducement to divorce and as an obstacle to the court's duty to set up an equitable property settlement as among the parties to the marriage and any children."[67] Similarly, the use of contingent fees is not permitted in criminal cases in Massachusetts.[68] The rationale for this prohibition is expressed in the code: "Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res [recovery] with which to pay the fee."[69]

In Massachusetts, Supreme Judicial Court Rule 3:14 provides that the reasonableness of a contingent fee shall be determined "in the light of the circumstances prevailing at the time of making such agreement, including the uncertainty of the compensation and all other relevant factors."[70] Courts in other jurisdictions have taken the view that a larger fee will be authorized where payment depends completely upon the fact and degree of success, as distinguished from the case where the attorney is to be paid whether he is successful or not.[71] One court has stressed the risk factor thusly: "Great weight is given to the contingent nature of fees with the accompanying risk that the . . . labor and the substantial overhead and expense might go for naught. . . ."[72] Because the contingent fee will often be higher than a fixed fee in a similar case due to the uncertainty of the compensation, a contingent fee should not be used as a standard by attorneys or the courts in determining the reasonable value of services in a similar case under a non-contingent fee agreement.[73] This potential for a higher fee under a contingent fee arrangement should be explained to the client before any such arrangement is adopted.

Any attorney attempting to collect a fee from a recalcitrant client should remember the standard of the Code of Professional Responsibility:

> A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.[74]

In *McInerney,* the Court placed considerable emphasis on this standard in discussing the conduct of the attorney, thereby clearly indicating its intention to have the standard adhered to in Massachusetts.

[66] Mass. S.J.C.R. 3:14(3)(b), n.9 *supra.*

[67] 1971 Mass. Adv. Sh. 667, 677, 269 N.E.2d 211, 218.

[68] Mass. S.J.C.R. 3:14(3)(a), n.9 *supra.*

[69] EC 2-20 (1970).

[70] S.J.C.R. 3:14(6), 351 Mass. 797 (1967).

[71] Henlopen Hotel Corp. v. Aetna Ins. Co., 251 F. Supp. 189, 191 (D. Del. 1966); Buckley v. Surface Transp. Corp., 277 App. Div. 224, 226, 98 N.Y.S.2d 576, 578 (1950).

[72] Perlman v. Feldmann, 160 F. Supp. 310 (D. Conn. 1958).

[73] Henlopen Hotel Corp. v. Aetna Ins. Co., 251 F. Supp. 189, 191 (D. Del. 1966).

[74] EC 2-23 (1970).

The *McInerney* decision makes it clear that all attorney fee arrangements are subject to review by the courts. However, the absolute value of legal services cannot be computed with mathematical certainty. Like the standard of the reasonable man in tort law, the standard which is used to determine the reasonableness of an attorney's fee is a broad one that depends upon many variables. The attorney's fee must be considered in relation to the specific fact situation of the case and in consonance with all the relevant criteria found in *Cummings* and the Code of Professional Responsibility.

The matter of a proper fee is a decision which must be ultimately made by the individual attorney, considering both the practical and ethical problems involved. The lawyer must set fees sufficient to provide an adequate standard of living for himself and his family. Also, adequate compensation is necessary if the attorney is to serve his clients properly and preserve the integrity and independence of the bar.[75] It has been said that "[u]nless excellence in the trial lawyer is properly recompensed, the best men will not spend their time in court, and thus there will dry up the most essential sources of an independent bar."[76] On the other hand, an attorney "should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights . . . [and would abuse] the professional relationship between lawyer and client."[77] The individual attorney must remain aware that he is an officer of the court and that his profession is an aspect of the administration of justice.

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[75] EC2-17 (1970).
[76] Cape Cod Food Products, Inc. v. National Cranberry Assn., 119 F. Supp. 242, 244 (D. Mass. 1954).
[77] EC2-17 (1970).