ISSUES IN DETERMINING THE REASONABLENESS OF ATTORNEY FEES

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1. Reasonableness in general.

(a) South Carolina Rule of Professional Conduct 1.5(a) – 8 factors. See *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000). In addition, the court should consider additional factors, such as the professional relationship. Id.

(b) Under fee shifting statutes, court will first consider the lodestar amount, i.e. the amount determined by multiplying the reasonable hourly rates of the attorneys and nonlawyer personnel involved in the case times the number of hours devoted to the matter by the provider. *Layman v. State*, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008). In determining the reasonable amount of time spent and the reasonable hourly rate, the court considers six factors:

(1) the nature, extent, and difficulty of the case;

(2) the time necessarily devoted to the case;

(3) the professional standing of counsel;

(4) the contingency of compensation;

(5) the beneficial results obtained; and

(6) the customary legal fees for similar services.

Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). The lodestar amount can then be adjusted by a multiplier to reflect exceptional circumstances to arrive at an enhanced reasonable fee.

(c) Fees in common fund cases can be based on a percentage of the fund. See *Layman*.

(d) The South Carolina Supreme Court has indicated that a lawyer representing a client on a contingency fee basis in a personal injury or wrongful death action may not charge a fee for collecting personal injury protection (PIP) benefits, unless the benefits are disputed or denied. *In re Hanna,* 294 S.C. 56, 362 S.E.2d 632 (1987); see also *S.C. Bar Ethics Adv. Op. #83-03.*

2. Flat fees and nonrefundable retainers.

See Nathan M. Crystal, *Flat Fees: What are They and What to do with Them?*, S.C. LAW. (July 2011).

3. Fees when lawyer is discharged.

(a) When lawyer is discharged under a contingent fee contract, lawyer may not charge for the time spent on an hourly basis in the absence of a contractual provision allowing such charges. In addition, the lawyer may not assert a retaining lien unless justified by the factors set forth by the Supreme Court in *In re Tillman*, 319 S.C. 461, 462 S.E.2d 283 (1995). *S.C. Bar Ethics Adv. Op. #02-08.*

(b) When a lawyer is discharged without cause under an hourly contract, the lawyer is entitled to enforce the contract subject to the requirement that the fees are reasonable. If the contract contains a mortgage or guarantee, those forms of security may also be enforceable. See *Getzen v. Law Offices of James M. Russ, P.A.,* 323 S.C. 377, 475 S.E.2d 743 (1996) (applying Florida law in part and South Carolina law in part).

(c) When a successor lawyer receives notice from a prior lawyer that the prior lawyer claims a charging lien on settlement funds, the successor lawyer should hold the disputed amount in trust until the dispute is resolved. While the attorney may not unilaterally resolve the dispute, the attorney may take various steps to do so, including declaratory judgment action, mediation,

and arbitration. *S.C. Bar. Ethics Adv. Op. #06-04.* Prior counsel has the right to a constructive trust imposed on fees received by successor counsel to enforce his right to quantum meruit compensation. *Hale v. Finn,* 388 S.C. 79, 694 S.E2d 51 (Ct. App. 2010).

(d) Rule 1.5(e) dealing with division of fees between lawyers does not apply to fee division agreements between prior and successor counsel. Comment 8 to Rule 1.5 states:

> Also, when a client has hired two or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, paragraph (e) should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.

Earlier opinions that indicated the contrary should no longer be followed. See *S.C. Bar Ethics Adv. Op. #98-32a* and *#03-05.*

4. Liens for costs and fees.

(a) Lawyers have a common law charging lien for costs and expenses that is not dependent on contract between the parties. However, the existence of this lien would not authorize the attorney to negotiate any checks the attorney has received. The attorney must hold settlement checks or settlement funds in trust until the dispute is resolved and must take prompt steps to do so. *S.C. Bar Ethics Adv. Op. #05-07.*

(b) South Carolina recognizes a contractual charging lien for fees. *Eleazer v. Hardaway Concrete Co., Inc.*, 281 S.C. 344, 315 S.E.2d 174 (Ct. App. 1984).

5. Fee splitting.

Under Rule 1.5(e), fee splitting between lawyers who are not in the same firm requires

three elements:

- The division of fees is in proportion to services performed or each lawyer assumes joint responsibility for the representation;
- The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing;
- The total fee is reasonable. See *S.C. Bar Ethics Adv. Op. #05-20.*

Questions about the application of the Rule:

What is the meaning of joint responsibility?

May a client give advance consent to fee splitting arrangement?

If lawyers are both actively involved in the matter, how can the fee be divided?

6. Contract attorneys. A firm may bill for the services of a contract attorney as either legal fees or expenses. If the firm bills for the services as legal fees, then the following rules apply: The firm must either adopt the services of the contract attorney as its own and be responsible for the services under Rule 1.1 or it must supervise the services under Rule 5.1. The amount paid by the firm to the contract attorney is a matter of contract between the firm and the attorney and need not be disclosed to the client. The total fee for the services rendered to the client must be reasonable under Rule 1.5(a). If the firm does not adopt the services of the contract attorney as its own or supervise the services, then it cannot bill for the services as legal fees. It must treat the fees as an expense or cost. In that case the details of the arrangement must be disclosed and consented to by the client. *S.C. Bar Ethics Adv. Op. #10-08.*

By way of aside -- Contract attorneys--termination. A lawyer working as a contract attorney for a law firm should not assume that the termination of his or her relationship from the firm ends all duties to clients that the lawyer had been representing while at the firm. In *In re*

Holcombe, 697 S.E.2d 600 (S.C. 2010), the lawyer interviewed the client and wrote a letter notifying the opposing party of the firm's representation. The lawyer did no other work on the file before leaving the relationship with the law firm five months later. The lawyer did not notify the client of his departure from the firm and did not clarify with the firm who would have future responsibilities for the matter. The matter was neglected until after the limitations period had expired, and the failure to protect the client was included among the counts in a later disciplinary ruling against the lawyer.

7. Credit for payment of legal fees.

(a) Use of credit cards is permissible. *South Carolina Bar Ethics Adv. Op. #96 -06 & 81-01.* Attorney may charge client the 3.75% administrative fee charged by credit card company so long as fee is communicated to the client.

(b) Use of trade credit arrangements is permissible. *South Carolina Bar Ethics Adv. Op. #08-02.*

8. Improper contingent fees. In domestic cases it is improper to have a fee that is contingent on securing a divorce or award in lieu of divorce. However, a lawyer may charge a contingent fee for collecting past due alimony or child support. SCRPC 1.5(d)(1). The prohibition on contingent fees in domestic cases applies to fee enhancements based on the success of the matter. *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991) A lawyer may not charge a contingent fee for representing a defendant in a criminal case. SCRPC 1.5(d)(2).

9. Other issues. Many other ethical issues related to legal fees can arise. See the excerpt from Robert M. Wilcox & Nathan M. Crystal, ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT.

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Flat Fees: What are They and What to Do With Them?

Ethics Watch, July, 2011

Nathan M. Crystal

The South Carolina Supreme Court's recent decision in a disciplinary case, *In re Halford*, #26924 (April 11, 2011), has caused concern in the profession about proper handling of "flat fees." In its original opinion the Court had indicated that flat fees must be deposited in the lawyer's trust account. After a petition filed by the South Carolina Association of Ethics Counsel, [1] the Court reconsidered the original opinion. In the revised opinion the Court stated in a footnote:

> Respondent stipulates that the deposit of "flat fees" into his operating account was a violation of the Rules of Professional Conduct. We accept the stipulation here for purposes of honoring the Agreement for Discipline by Consent. The handling of "flat fees" is a complex matter, and we do not intend in this opinion to set forth a categorical rule addressing "flat fees."

So the Court has eased but not eliminated the Bar's concern about the handling of flat fees. This article addresses the issue. While I express specific views in the article, lawyers should understand, as the Court has said, that the issue of flat fees (and indeed, many fee issues) is complex and has not yet been addressed by the courts of this state.

What are "flat fees"?

A flat fee is a fixed payment for specified legal services. The flat fee, unlike the hourly fee, does not change based on the amount of time devoted to the matter. Flat fees can be

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[1] My thanks to Desa Ballard, a member of the Association, for her helpful comments on this article. The views expressed here are, of course, my own.

advantageous to clients because they know the exact amount they will have to pay for legal services; the client does not receive a bill that is larger than he anticipated and can budget for payment of the fixed fee. Flat fees can also be advantageous to lawyers because they give lawyers an incentive to perform services efficiently in either or both of two ways--by trying to resolve the matter as quickly as possible (subject to ethical restraints) and by delegating work to a subordinate lawyer in the firm with the lowest hourly rate who can competently perform the services.

On the other hand, flat fees can be disadvantageous to either lawyers or clients. From the perspective of the lawyer, the flat fee is risky because the lawyer may devote much more time to the matter than the lawyer anticipated, with the result that the lawyer receives payment at an effective hourly rate much lower than the lawyer normally charges. But, flat fees can also be disadvantageous to clients if the lawyer is able to resolve the matter with the expenditure of very little time. In this case the client might feel that the fee was unreasonable because the effective hourly rate for the work done becomes high. Of course, no one knows in advance how much work the case will require, so the flat fee can and should be viewed as a reasonable allocation of risk between lawyer and client. If the amount of time devoted to the matter turns out to be greater or less than anticipated, neither lawyer nor client should have a basis for complaint, at least in the normal situation involving reasonably sophisticated clients.

In addition, it is possible to craft modified flat fee arrangements that reduce the risks described above. For example, the fee agreement could provide for a flat fee of a specified amount, but if the amount of the fee based on the lawyer's time exceeds a certain amount (let's say 20% more than the amount of the flat fee), then the lawyer may charge the client for the time

above this amount at a reduced hourly rate. This hybrid flat fee arrangement reduces the risk to both lawyer and client from a pure flat fee agreement.

Flat fees can also be flexible with regard to the services performed. In the standard flat fee agreement in litigation, the lawyer agrees to handle the client's entire case (usually excluding appeals) for a fee of *X* dollars. However, the parties could agree to flat fee payments for various stages of the matter rather than the entire case. For example, the agreement could provide that the client agrees to pay a flat fee of *V* dollars for the lawyer's initial evaluation of the case and decision to undertake representation, *W* dollars for handling the discovery aspects of the case, *X* dollars for representation in any alternative dispute proceedings, *Y* dollars for preparing the case for trial, and *Z* dollars for trial of the case and any post trial motions.

Flat fees should be distinguished from special and general retainers. A special retainer (sometimes called an advanced fee or security retainer) is a payment by the client in advance for services to be rendered by the lawyer. Flat fees, like special retainers, are usually paid in advance, but advance payment is not part of the definition of a flat fee; a lawyer could agree to charge the client a flat fee payable in stages or at the conclusion of the case. However, there is a crucial difference between the two forms of fees. The lawyer cannot contractually charge the client more than the flat fee for the services rendered (unless the lawyer and client have entered into a type of hybrid fee agreement discussed above); with the special retainer, however, the lawyer is entitled to charge the client for the services rendered at the lawyer's normal hourly rate. The fees are deducted from the special retainer, but the lawyer can charge the client for any deficiency.

A general retainer, like the special retainer, is paid in advance. However, the essence of the general retainer is that the client is paying the lawyer for availability to provide services

rather than for the services rendered; the fees for the services are charged separately and in addition to the general retainer. For example, a large corporation that engages in a substantial number of acquisitions might pay a firm that specializes in that type of work a monthly general retainer to be available to handle the client's matters when they arise. When a specific acquisition occurs, the client pays the firm for its services in addition to the general retainer. The general retainer usually contemplates an ongoing professional relationship. A lawyer could also charge a client an engagement retainer, which is a flat fee for undertaking representation in matter. This fee is similar to a general retainer because it assures the lawyer's availability to handle a particular matter, but it is different from the general retainer in that it does not contemplate an ongoing relationship beyond the particular case.

The label that a lawyer attaches to a fee will not be determinative of how the fee should be classified. For example, a lawyer cannot transform a fee payment into a general retainer simply by attaching that label to the fee. A court will examine the nature of the agreement to determine if it is truly a general retainer. In *In re O'Farrell*, 942 N.E.2d 799 (Ind. 2011), the Indiana Supreme Court publicly reprimanded a lawyer for charging a nonrefundable engagement fee. The court rejected the lawyer's argument that the fee could be justified as a general retainer. The lawyer was unable to show any special circumstances warranting the use of a general retainer in a particular case; instead the lawyer used the fee arrangement routinely. In essence, the court held that labels do not control. To be a general retainer there must be special circumstances warranting a payment to a lawyer for the lawyer's availability. Typically, these circumstances will involve either special expertise by the lawyer or special needs or desires of the client for that particular lawyer or both.

Where should flat fees be deposited?

To the extent that a flat fee represents payment for work to be performed, in my opinion it has not yet been earned and should therefore be deposited in the lawyer's trust account (unless the fee is specified to be nonrefundable, a point discussed below). This is my opinion, however; there is no case law in South Carolina on this issue and I understand that the practice of many lawyers is to deposit flat fees in their operating account. For example, if the lawyer agrees to charge the client a flat fee of $100,000 for handling the client's divorce through trial, then this fee should, in my opinion, be deposited in the trust account. Unless the agreement provided for withdrawal of a portion of the fee at various stages, the amount should be retained in trust until the completion of the case, when the lawyer should (and in fact must) withdraw the fee from trust. Of course, lawyers are ill-advised to have this type of fee arrangement with their clients because it means they will not be paid until the end of the case. Instead, the fee agreement should provide that the lawyer is entitled to withdraw portions of the flat fee on the completion of various stages of the case. An alternative withdrawal method would allow the lawyer to withdraw portions of the flat fee monthly based on the time devoted to the case each month and the lawyer's normal hourly rate; at the conclusion of the case the lawyer would withdraw the balance of the flat fee, if any. The lawyer could not charge the client any amount above the flat fee.

If the flat fee agreement with the client includes an engagement retainer, the lawyer may withdraw this amount when the client and lawyer have executed the engagement agreement. At that moment the engagement portion of the flat fee is earned.

What if the agreement provides that the fee in "nonrefundable"?

The fact that the lawyer designates the fee, regardless of type, to be nonrefundable is irrelevant with regard to whether the fee can be examined for reasonableness. Any fee arrangement may be reviewed by the South Carolina Resolution of Fee Disputes Board or by a court to determine whether it is unreasonable and to order repayment of the excess amount. Indeed, the South Carolina Rules of Professional Conduct specifically recognize the principle that "nonrefundable" fees are not truly nonrefundable. Rule 1.16(d) provides that on conclusion of a matter "The lawyer may retain a reasonable nonrefundable retainer." (emphasis added) See Robert M. Wilcox & Nathan M. Crystal, ANNOTATED SOUTH CAROLINA RULES OF PROFESISONAL CONDUCT 65 (2010) (annotation on Nonrefundable Fees).

This analysis of reasonableness is independent of whether the fee is held in trust or has already been paid to the lawyer. If the lawyer completed a case and has withdrawn the entire flat fee from trust, the client could later challenge the reasonableness of the fee in an appropriate proceeding, and a court could order the lawyer to repay a portion of the fee.

However, the designation of the fee as nonrefundable is significant with regard to where the fee is to be deposited. Comment 4 to Rule 1.5 states:

> The lawyer may deposit the nonrefundable fee immediately into the law firm's operating account. However, if, at the end of the representation, it would be unreasonable for the lawyer to retain the entire fee, the lawyer must then refund that portion of the fee that is unreasonable. See Rule 1.16(d). (emphasis added).

What is the effect of S.C. Code §40-5-390?

Code §40-5-390 provides" "In any criminal case, an attorney may charge a nonrefundable flat fee." The South Carolina Supreme Court has the constitutional and statutory

authority to regulate the practice of law -- S.C. Const. Art. V, §4; S.C. Code §40-5-10 -- and could declare unconstitutional legislation that invades this authority. See *In re Richland County Magistrate's Court*, 389 S.C. 408, 699 S.E.2d 161 (2010). Of course, a court should attempt to interpret legislation to make it constitutional if at all possible. See *Stokes v. Denmark Emergency Medical Services*, 315 S.C. 263, 433 S.E.2d 850 (1993). Moreover, the statute is not that different from the Rules of Professional Conduct, which allow a lawyer to charge a reasonable nonrefundable fee. SCRPC 1.16(d). The Court could interpret the statue to mean that a criminal defense lawyer may charge such a fee, but the court retains the power to determine whether the fee was reasonable and to order the lawyer to repay any amount that it finds to be unreasonable.

The statute does not state where the fee is to be deposited, whether in the trust account or the lawyer's operating account. In accordance with comment 4 to Rule 1.5, quoted above, the lawyer is authorized to deposit the fee in the operating account.

The fact that both the rules of professional conduct and statutory law allow nonrefundable flat fees to be deposited in the lawyer's operating account creates risks to clients. I was recently asked about an unfortunate situation in which a client paid a nonrefundable fee to a defense lawyer, who had deposited the funds in his general account. The lawyer died before the services were rendered and there were no assets to repay the client. As this situation illustrates, if a nonrefundable fee is not deposited in a trust account, the client is at risk. Perhaps the client can obtain relief from the Lawyers' Fund for Client Protection, but the fund does not provide protection unless the lawyer engaged in "dishonest conduct." In my opinion allowing flat fees to be placed in the lawyer's operating account is bad policy; instead the fee should be deposited in the trust account until the fee is earned. As discussed above, the lawyer's

engagement agreement can provide for payment out of trust as the lawyer completes various stages of the case so a lawyer may ethically receive a substantial portion of a flat fee before the end of the case.

What to Do?: Make Your Engagement Agreement as Clear As Possible. Given the lack of judicial guidance regarding the issues discussed in this article, lawyers must carefully draft their engagement agreements. In particular, if a lawyer wishes to be able to deposit a flat fee in the lawyer's operating account, the lawyer should clearly state that the fee is nonrefundable. If a lawyer decides to have an ordinary flat fee that is not stated to be nonrefundable, the lawyer should deposit it in trust and should provide in the engagement agreement for withdrawal on the happening of specified events in the litigation.

The next to last substantive sentence of South Carolina comment [7] does not appear in the comment to the Model Rule. The additional language is derived from Ohio Ethics Advisory Opinion #2003-3.

The second sentence of South Carolina comment [8] does not appear in the comment to the Model Rule. This addition is intended to clarify the applicability of Rule 1.5(e) primarily to circumstances in which one lawyer retains another to simultaneously assist in a client representation.

After the first sentence, South Carolina comment [9] adds a state-specific reference to Appellate Court Rule 416 governing the Resolution of Fee Disputes Board.

CROSS-REFERENCES

- For litigation expenses, see Rule 1.8
- For acquiring an interest in a litigated matter, see Rule 1.8, Annotation
- For liens to secure payment, see Rule 1.8, Annotation
- For status of fees advanced to lawyer, see Rule 1.15, Annotation
- For record-keeping requirements, see Rule 1.15, Annotation
- For sharing fees with a non-lawyer, see Rule 5.4

ANNOTATIONS

» Client-Lawyer Fee Agreements

Prompt agreement between lawyer and client regarding the fee and expenses to be charged is not only a good business practice but an ethical requirement. The lawyer must notify the client of the "basis or rate of the fee and expenses for which the client will be responsible" before or within a reasonable time after the outset of the representation, except when the lawyer will charge a regularly represented client on the same basis as previous representation. Rule 1.5(b). Written notification of the fee arrangement is preferable in all cases. Rule 1.5(b). If a contingent fee is to be charged, the agreement must be in a writing signed by the client. Rule 1.5(c).

Among the types of legal fees charged to clients are flat fees for a particular service, hourly fees, contingency fees, and combinations of two or more of these methods. See *S.C. Bar Ethics Adv. Op.* #84-11 (lawyer may charge contingency fee on claim and hourly rate for defending any counterclaim). See John Freeman, *A-B-C's of Legal Fees,* S.C. LAW., July-Aug. 1996, at 10.

With the client's consent, a lawyer may impose a monthly service charge on an unpaid balance or accept a promissory note or credit card payment. *S.C. Bar Ethics Adv. Op.* #81-01. A lawyer and client may agree that a preauthorized amount will be charged to a client's credit card, but the client should have an opportunity to review the bill before the charge is submitted. *S.C. Bar Ethics Adv. Op.* #96-06.

» Lawyer's Fee in Absence of Agreement

South Carolina appellate courts have indicated in dictum that in the absence of a fee agreement, a lawyer is still entitled to recover in quantum meruit for the reasonable value of the lawyer's services. In *Lester v. Dawson*, 327 S.C. 263, 268, 491 S.E.2d 240, 242 (1997) the supreme court referred to the client's "quasi-contractual obligation to pay the reasonable value of services." Similarly, in *Eleazer v. Hardaway Concrete Co., Inc.*, 281 S.C. 344, 315 S.E.2d 174 (Ct. App. 1984), the court of appeals stated, "An attorney is entitled to the reasonable value of the services performed for his client in the absence of a controlling contract, statute, or rule of court fixing the amount of compensation . . ." Id. at 350, 315 S.E.2d at 178. See also *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) (in absence of fee agreement, lawyer is entitled to recover from client on quantum meruit basis; in determining reasonable value of services court should consider circumstances surrounding client-attorney relationship, not simply factors used in determining court-awarded fees).

Generally, a third party is not liable for a lawyer's fees. When the lawyer's services create a common fund, however, third parties who benefit from the lawyer's services may, in some circumstances, be liable for the reasonable value of the services rendered. See *Peppertree Resorts, Ltd. v. Cabana Ltd. Partnership*, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993). But see *Bonaparte v. Bonaparte*, 317 S.C. 256, 452 S.E.2d 836 (1995) (estate of minor children not liable in quantum meruit for attorney fees incurred by attorney who represented decedent's father in interpleader suit with decedent's wife and children disputing payment of life insurance proceeds, in absence of evidence that children knew firm would expect payment from them).

» Fees on Termination

There is little South Carolina law discussing a lawyer's right to compensation upon termination of a representation. In *South Carolina Public Service Authority v. Weeks*, 201 S.C. 199, 22 S.E.2d 249 (1942), the supreme court stated that "generally where an attorney is discharged without cause by his client after they have entered into a contingent fee agreement, he is entitled to compensation." Id. at 203, 22 S.E.2d at 250. *Weeks* was a condemnation proceeding in which the landowner agreed to pay his attorneys a contingent fee equal to one-half of the amount recovered in excess of what the authority offered. After commencing the proceeding, the Public

Service Authority exercised its statutory right to abandon the action. On these facts, the court held that the attorneys could not recover under the contingent fee contract, because the contingency had not occurred. The court also ruled that the attorneys could not recover in quantum meruit because the landowner had not terminated the client-attorney relationship. In *Getzen v. Law Offices of James M. Russ,* 323 S.C. 377, 475 S.E.2d 743 (1996), the supreme court applied Florida law in finding that a lawyer hired on an hourly rate basis is entitled to hourly fees for work earned prior to discharge.

In an unpublished 2006 opinion, the court of appeals awarded to a discharged lawyer the amount he would have recovered as a contingency fee if he had not been discharged, but not the hourly rate that the fee agreement had provided for in the event of a discharge. The court found that any payment above the contingency fee would have been an unreasonable fee under the circumstances of that case. *Tillman v. Grant,* 2006-UP-340 (S.C. Ct. App. Oct. 5, 2006) (available at http://www.judicial.state.sc.us/opinions/displayUnPubOpinion.cfm?caseNo=2006-UP-340). See also John Freeman, *Fee Agreement Enforceability,* S.C. LAW., May 2007, at 8.

Several ethics advisory committee opinions have indicated that on termination or withdrawal from representation an attorney may be entitled to compensation on a quantum meruit basis. See *S.C. Bar Ethics Adv. Op.* #02-08 (on termination of representation, lawyer with contingency fee agreement should not withhold client's file, but should instead seek to recover in quantum meruit); *S.C. Bar Ethics Adv. Op.* #96-05 (in absence of written contingency fee agreement fees on termination of representation would be determined on quantum meruit basis); *S.C. Bar Ethics Adv. Op.* #90-13 (disqualified lawyer may seek recovery on quantum meruit basis); *S.C. Bar Ethics Adv. Op.* #83-25 (contingent fee lawyer who withdraws at request of client is only entitled to recover on quantum meruit basis).

» Fee Payment Methods and Collection Procedures

A lawyer may accept credit card payment of legal fees. See *S.C. Bar Ethics Adv. Op.* #96-06. A lawyer may also enter into an arrangement in which non-consumer clients are offered trade credit through a trade credit account processor for purposes of paying their legal fees. See *S.C. Bar Ethics Adv. Op.* #08-02.

Unless the client is financially unable to pay, the lawyer is not directly prohibited from using a collection agency to collect from a client who is attempting to work an injustice by not paying. *S.C. Bar Ethics Adv. Op.* #81-21. However, a civil suit against the client may be more appropriate. Id.

» Fee Arbitration

Comment 9 requires lawyers to adhere to bar-established procedures for arbitration or mediation of fee disputes when such procedures are mandatory. South

Carolina Appellate Court Rule 416 permits a client to elect arbitration of certain fee disputes by the Resolution of Fee Disputes Board of the South Carolina Bar. The board also has authority to arbitrate disputes among lawyers regarding the division of a fee. The jurisdiction of the board is limited to situations in which the amount in dispute is less than $50,000. A client who pursues arbitration of a fee dispute and receives a final judgment by the board may not subsequently sue the lawyer on different theories of liability arising out of the same fee dispute. *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999). Rule 416 permits limited grounds for appeal of a board decision to the circuit court. There is, however, no further appeal beyond the circuit court. *Wright v. Dickey*, 370 S.C. 517, 636 S.E.2d 1 (Ct. App. 2006). The arbitration, however, does not apparently preclude an action for malpractice. See John Freeman, *Resolving Fee Disputes,* S.C. LAW., Jan.-Feb. 2000, at 10.

Submission of a fee dispute to arbitration does not insulate a lawyer from later disciplinary proceedings for charging excessive fees. See *In re Fox*, 327 S.C. 293, 490 S.E.2d 265 (1997) (lawyer publicly reprimanded despite having refunded portion of fee in settlement of pending fee arbitration). However, cooperation with the Fee Disputes Board may be a relevant factor in those proceedings. See *In re an Anonymous Member of the South Carolina Bar,* 287 S.C. 250, 335 S.E.2d 803 (1985) (lawyer's cooperation with the Resolution of Fee Disputes Board and ultimate reduction of fee warranted dismissal of grievance).

South Carolina has no law expressly indicating whether a lawyer may include a provision in the fee agreement requiring arbitration of fee disputes. In *Formal Opinion* #02-425 the ABA Committee on Ethics and Professional Responsibility advised that it was ethically permissible for lawyers to enter into engagement agreements in which clients agreed to binding arbitration of fee disputes and malpractice claims under the following conditions:

> (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and
>
> (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law.

The Committee also ruled that such agreements do not amount to a prospective agreement limiting the lawyer's liability under Rule 1.8(h).

Whether arbitration clauses are enforceable in South Carolina depends on a number of issues, including the interpretation and constitutionality of S.C. Code Ann. §15-48-10(b)(3), which deals with arbitration clauses in a "pre-agreement"

between lawyer and client. For discussion of these issues see John Freeman, Ethics Development, S.C. LAW., Nov. 2002, at 7, supplemented in S.C. LAW., Jan. 2003, at 9. See also *S.C. Bar Ethics Adv. Op.* #01-06 (enforceability unclear in South Carolina but suggesting that existence of Resolution of Fee Disputes Board under SCACR 416 indicates that choice should be left to client).

» Forfeiture of a Lawyer's Compensation

Rule 7(b)(7) of the Rules for Lawyer Disciplinary Enforcement, SCACR 413, permits the court to require "repayment of unearned or inequitable attorney's fees or costs advanced by the client" as a sanction for lawyer misconduct. The court may, however, elect to leave resolution of the question of whether a fee should be disgorged to a civil action brought by the client against the lawyer. See *In re Hanna*, 301 S.C. 310, 313 n. 4, 391 S.E.2d 728, 729 n.4 (1990).

» Remedies and Burden of Persuasion in Fee Disputes

An action by a lawyer against the client for recovery of fees allegedly owed under a fee contract is an action at law, with the parties having a right to a jury trial. *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997). An action by the lawyer to enforce a lien on the proceeds of a judgment obtained on the client's behalf is, however, an action in equity. Id. at 270, 491 S.E.2d at 243.

» Attorney-Fee Awards (Fee Shifting)

South Carolina common law did not provide for recovery of attorney fees by a successful litigant. See *Collins v. Collins,* 239 S.C. 170, 122 S.E.2d 1 (1961).

South Carolina follows the American rule. Attorney fees are not recoverable unless authorized by contract or statute or pursuant to the common fund doctrine. See *Layman v. State of South Carolina,* 376 S.C. 434, 658 S.E.2d 320 (2008). The court has made clear that fees recovered under the common fund doctrine are technically a form of "fee spreading" rather than "fee shifting" and will be calculated in a different manner than under fee shifting statutes. See id.

Numerous South Carolina statutes provide for recovery of attorney fees. See, e.g., attorney fees for frivolous proceedings, South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10; attorney fees in state-initiated actions, S.C. Code Ann. §15-77-300; sanctions under South Carolina Tort Claims Act for frivolous pleadings, S.C. Code Ann. §15-78-120(c); suit money in divorce actions, S.C. Code Ann. §20-3-120; actions to enforce liens on real estate, S.C. Code Ann. §27-1-15; actions against landlords, S.C. Code Ann. tit. 27, ch. 40; derivative actions against business organizations, S.C. Code Ann. §33-42-1840; consumer credit sales or leases, S.C. Code Ann. §37-2-413; unfair trade practices, S.C. Code Ann. §39-5-140; failure to pay wages by employers, S.C. Code Ann. §41-

10-80; motor vehicle manufacturers, distributors, and dealers, S.C. Code Ann. §56-15-110.

In *Layman v. State of South Carolina,* 376 S.C. 434, 658 S.E.2d 320 (2008), the court considered an award of fees against a state agency under § 15-77-300. In considering whether the state "agency's position in litigating the case had a reasonable basis in law and in fact," the court noted while an agency's "defense of an unconstitutional statute" raises separation of powers issues that might preclude a fee award, "these same principles will not substantially justify the...defense of what we held to be an illegal act." See also *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (recovery of attorney fees when party prevails against State or political subdivision); *Swanson v. Stratos*, 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002) (no recovery under Frivolous Civil Proceedings Sanctions Act when plaintiff reasonably believed he had valid claim under case law); *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 548 S.E.2d 900 (Ct. App. 2001) (defendant entitled to recover attorney fees under mechanics' lien statute as prevailing party). But see *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 557 S.E.2d 708 (Ct. App.2001) (trial courts do not have authority under either statutes or court rules to award attorney fees for failure to honor settlement agreement; attorneys fees may be awarded if provided in settlement agreement or as expenses incurred in enforcing court's prior order as part of compensatory contempt). See also *Cheap-O's Truck Stop, Inc. v. Cloyd,* 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002) (attorney fees may be awarded for compensatory contempt).

In *Ex Parte Beard*, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004), the court held that any motion for attorney fees under the Frivolous Civil Proceedings Sanctions Act must be filed within ten days after entry of judgment. The court also held that a claim for attorney fees under Rule 11 against the plaintiff's lawyers on the ground that they filed a motion to amend the complaint to add defendants' lawyer as a party for an improper purpose should be denied when plaintiff's counsel relied on an affidavit of an expert witness that the claim was meritorious.

In calculating the amount of a fee award under a fee shifting statute, the court will start by calculating a lodestar amount based on a reasonable hourly rate and the time expended on the case. See *Layman v. State of South Carolina*, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008) (beginning analysis of attorney fee award with lodestar computation). In *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), the court held that when determining the reasonableness of attorney fees under a statute mandating the award of attorney fees, any contract between the client and the attorney does not control the determination of a reasonable hourly rate. Instead, the court will look at six factors in determining whether a fee is reasonable. The court will consider: (1) the nature, extent and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of

compensation; (5) beneficial results; and (6) customary legal fees for similar services. Further, on appeal, an award for attorney fees will be affirmed so long as sufficient evidence in the record supports each factor. Id. at 308, 486 S.E.2d at 760. See also *Layman v. State of South Carolina,* 376 S.C. 434, 658 S.E.2d 320 (2008)(applying the *Jackson* factors); *Williamson v. Middleton*, 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2008) (en banc decision discussing standards for recovery of attorneys fees); *compare Ex Parte Condon (In re Littlejohn)*, 354 S.C. 634, 583 S.E.2d 430 (2003) (affirming 28% fee award in common fund case).

Rules of civil procedure also provide for recovery of attorney fees. See Rule 11 (signing of pleadings); 30 (depositions); 37 (failure to make or cooperate in discovery); 45 (subpoenas); 56 (summary judgment).

» Financing Litigation

The common law doctrine of champerty provides that a contract to finance or carry the expense of litigation in exchange for an interest in the suit is invalid. In 1998 the South Carolina Court of Appeals held that South Carolina continued to recognize the doctrine, but the supreme court reversed and abolished champerty as a defense to a contract to finance a lawsuit. The court reasoned that the historical basis for the doctrine no longer exists and the evils of financing litigation for improper purposes can be controlled in other ways. *Osprey, Inc. v. Cabana Ltd. Partnership,* 340 S.C. 367, 532 S.E.2d 269 (2000). *Osprey* does not deal with barratry, which South Carolina prohibits by statute. S.C. Code Ann. §16-17-10 *et seq.*

Assuming that a transaction to finance litigation is not illegal under South Carolina law, an attorney may ethically counsel a client of the availability of opportunities to finance litigation when the client asks for such information or when the attorney in his professional judgment concludes that a client's legal and economic position warrants advice about such an opportunity. An attorney should render candid advice to the client about the advantages and disadvantages of the proposed transaction. S.C. Rule of Prof. Conduct 2.1. If a client decides to proceed with a financing transaction, the attorney should inform both the client and the financing entity in writing that the client retains the right to control all aspects of the litigation and that the attorney will maintain confidentiality of client communications. Cf. S.C. Rule of Prof. 1.8(f) and 5.4(c). *S.C. Bar Ethics Adv. Op.* #94-04.

» Reasonableness of a Fee Agreement

Rule 1.5(a) prohibits excessive fees and expenses and sets forth eight factors that are relevant to a determination of the reasonableness of fees. Contingent fees are subject to the requirement of reasonableness. Rule 1.5, cmt. 3. Percentage fees,

which may or may not be contingent on the outcome of a matter, also must comply with the reasonableness standard. See *S.C. Bar Ethics Adv. Op.* #04-03 (lawyer may not charge percentage fee for preparing estate-related documents by which donors make either inter vivos or testamentary gifts to non-profit organization)

A fee agreement may be improper if it unreasonably underestimates fees. For example, unless the client is made fully aware of the circumstances, an agreement to provide services only up to a stated amount, "when it is foreseeable that more extensive services probably will be required," unfairly places the client at risk of having to negotiate for more services in the middle of a matter. Rule 1.5, cmt. 5.

An agreement that the client will pay a fee in property is permitted, provided the agreement does not create an interest in the cause of action or subject matter of litigation in violation of Rule 1.8(i) and provided the agreement complies with Rule 1.8(a) dealing with business transactions between lawyer and client. Rule 1.5, cmt. 4.

A lawyer who charges an excessive fee is subject to discipline, including disbarment in egregious cases. See *In re Lee*, 370 S.C. 501, 636 S.E.2d 624 (2006) (lawyer suspended after billing clients for travel to depositions that the lawyer had participated in by telephone); *In re Warder*, 316 S.C. 249, 449 S.E.2d 489 (1994) (lawyer admitted that fee of $2,500 to review appropriateness of a criminal sentence and additional $10,000 to review the transcript of a plea proceeding was excessive); *In re Solomon*, 307 S.C. 1, 413 S.E.2d 808 (1992) (in worker's compensation case respondent collected $1,700 from temporary checks and then received commission approval for 1/3 of final settlement without informing commission of prior fee payments); *In re Hanna*, 301 S.C. 310, 391 S.E.2d 728 (1990) (although respondent committed other serious misconduct, a fee of 85% on a recovery of $175,000 in a personal injury case alone warrants disbarment).

A lawyer who charges an excessive fee is unlikely to avoid discipline even if the lawyer claims good faith or negligence. See *In re Lempesis*, 293 S.C. 510, 362 S.E.2d 10 (1987) (lawyer improperly charged more than permitted under federal law, although lawyer alleged a good faith interpretation of the law and court found no evidence of fraud or deceit by the lawyer); *In re Screen*, 318 S.C. 367, 458 S.E.2d 39 (1995) (lawyer negligently calculated excessive fee and overcharged client by $35,000); *In re Morris*, 270 S.C. 241, S.E.2d 911 (1978) (fee greater than allowed by federal law).

When an hourly rate or similar basis for charging is used, contemporaneous billing is advisable. The court noted in *In re Nida*, 297 S.C. 541, 377 S.E.2d 580 (1989), that it did not "condone" a lawyer's attempt to reconstruct bills by reviewing case files several years after work was performed. Lawyers billing on an hourly basis may not charge two clients for the same hours or bill for hours not worked. For

example, if a lawyer bills a client for travel time while on an airplane, it is improper also to bill another client for work performed during that same travel time, absent a clear agreement with the client allowing the practice. Similarly, when work is billed to one client and the same work can be used for a second client, a lawyer billing on an hourly basis cannot charge the second client again for the time already billed. See *ABA Formal Op.* #93-379 (addressing proper practices for billing professional fees, disbursements, and other expenses). See also ABA Formal Op. #00-420 (law firms may charge clients for services of contract lawyers as either expenses or legal fees; if firm charges as legal fee, it may add a profit or surcharge so long as the overall fee is reasonable; if firm charges as expense, it may bill client only for its actual cost).

The improper billing of costs, as well as of legal fees, may lead to discipline. For example, in *In re Craig*, 317 S.C. 295, 454 S.E.2d 314 (1995), the court disciplined a lawyer who acted also as title agent and failed to prevent an "appearance on impropriety" because the lawyer did not document the reasons for charging a client a residential rather than construction premium rate. The court suggested several times in that opinion that a lawyer may be disciplined for creating an appearance of impropriety, although that language from the prior Code of Professional Responsibility does not appear in current rules.

» **Nonrefundable Fees**

South Carolina rules allow the use of nonrefundable retainers, with the concern focusing more upon the reasonableness of the amount of the fee than upon its nonrefundable character. Although some jurisdictions have indicated that any special nonrefundable retainer is per se improper, see *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994), South Carolina Rule 1.16(d) states, "The lawyer may retain a reasonable nonrefundable retainer." Comment 4 also provides that a nonrefundable fee "may be retained if it is reasonable" under the factors set forth in Rule 1.5(a) and permits deposit of a nonrefundable fee into the firm's operating account. In *In re Miles*, 335 S.C. 242, 516 S.E.2d 661 (1999), respondent collected a number of nonrefundable retainers from various clients. Respondent then failed to complete the work on these cases and refused to refund any portion of the purportedly nonrefundable retainers. The court noted that "[a] 'lawyer may retain a reasonable nonrefundable retainer.' The fee, however, must be reasonable under the factors outlined in the rules and any unearned portion must be returned to the client." See also *In re Anonymous Member of the Bar*, 317 S.C. 10, 451 S.E.2d 391 (1994) (private reprimand for lawyer's failure to disclose to court receipt of nonrefundable retainer without discussion of such retainers in general). For a discussion of the issue see John Freeman, *Understanding retainer fees,* S.C. Law., Sept. 2006, at 10; John Freeman, *Nonrefundable [sic] Retainers*, S.C. LAW., May-June 2002, at 11.

» **Special Requirements Concerning Contingent Fees**

Contingency fees have long been treated differently from fees based on other methods of calculation since a contingency fee gives the lawyer a proprietary interest in the outcome of litigation. Rule 1.8(i), however, specifically permits a lawyer to charge a contingency fee in a civil case, notwithstanding those concerns. Rule 1.5 more completely addresses the issue, permitting contingency fees except in criminal defense cases, most domestic relations cases, and any case in which such a fee is prohibited by law.

Contingent fee agreements must be in writing signed by the client under Rule 1.5(c). See *In re Hall*, 333 S.C. 247, 509 S.E.2d 266 (1998) (respondent failed to secure written contingency agreement for slip and fall case). See also *In re Watson*, 319 S.C. 437, 462 S.E.2d 270 (1995); *In re Houston*, 314 S.C. 94, 442 S.E.2d 175 (1994). The contingent fee agreement must set forth the method of determining the fee, the percentages to be applied, whether expenses are to be deducted from the recovery, and, if so, whether they will be deducted before or after calculating the fee. The agreement must clearly specify the expenses the client is expected to pay. Id. See also *S.C. Bar Ethics Adv. Op.* #91-32. Rule 1.5(c) contemplates that a lawyer may properly charge a different percentage depending upon whether the matter is settled, tried, or appealed, but each such percentage shall be set forth in the fee agreement.

At the end of a matter in which a contingency fee is charged, the lawyer also must give to the client a written statement setting forth "the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." Rule 1.5(c). A problem may arise for the lawyer if the matter is settled and the client later repudiates the settlement. According to an advisory opinion issued under the prior code, if the fee agreement provides for a percentage payment upon settlement, the lawyer may bill the client for a fee earned. *S.C. Bar Ethics Adv. Op.* #86-01. Even in matters not involving a contingency fee, the client may request an itemized statement of fees and a lawyer may be disciplined for failure to comply with the request. See *In re Larkin*, 320 S.C. 512, 466 S.E.2d 355 (1996).

Normally funds recovered under personal injury protection (PIP) coverage should not be considered in setting a contingency fee. The South Carolina Supreme Court has indicated that a lawyer representing a client on a contingency fee basis in a personal injury or wrongful death action may not charge a fee for collecting personal injury protection (PIP) benefits, unless the benefits are disputed or denied. *In re Hanna,* 294 S.C. 56, 362 S.E.2d 632 (1987); see also *S.C. Bar Ethics Adv. Op.* #83-03.

When a lawyer represents both an insured party and a subrogee insurer in a contingency fee case, the lawyer should "subtract the subrogated amount from the entire amount recovered" before calculating the insured's fee. The lawyer then may charge the subrogee a percentage of the subrogated amount. *In re Jones*, 313 S.C. 9, 437 S.E.2d 10 (1993).

Lawyers must exercise care in determining the amount of fees in structured settlements. See *In re Williams*, 336 S.C. 578, 521 S.E.2d 497 (1999) (lawyer misappropriated funds and calculated contingency fee in personal injury action without discounting annuity to its present value). When the structured settlement is funded through the purchase of an annuity from a life insurance company, the attorney's fee is computed based on the cost of the annuity plus any cash paid at the time of settlement. See *In re Fox*, 327 S.C. 293, 490 S.E.2d 265 (1997).

» Contingent Fees in Domestic Relations Matters

While the use of contingency fees in domestic cases is generally barred, there are exceptions under Rule 1.5. The rule bars contingency fees if the fee is contingent upon securing a divorce or upon the amount of any alimony, support, or property settlement in lieu of alimony or support. Rule 1.5(d). It generally is argued that the allowance of a contingency fee in such matters would be inconsistent with state interests in encouraging reconciliation and in providing fair support for families. See *S.C. Bar Ethics Adv. Op.* #87-04. Since those policies are less at stake once the divorce is final and the support amounts have been fixed, a lawyer hired to collect past due alimony or child support may charge a contingency fee. Rule 1.5(d)(1) and cmt. 6.

A South Carolina Bar Ethics Advisory Opinion has interpreted Rule 1.5(d) to permit a lawyer to charge a contingency fee to collect funds due under a previously ordered property division. The committee based its advice upon the fact that, as in cases to collect past due support, the divorce already was final and the amount of the property award had been established. *S.C. Bar Ethics Adv. Op.* #92-05.

» Fee Splitting (Referral Fees)

It is not uncommon for lawyers from more than one firm to work on a matter for a client. A single lawyer or law firm retained by the client may not be able to handle all aspects of a transaction and may retain assistance from another lawyer. Rule 1.5(e) sets forth three requirements for fee splitting agreements. First, the division of fees must be in proportion to services performed or each lawyer must assume joint responsibility for the representation. Second, the client must agree to the fee division, including the share each lawyer will receive, and the agreement must be confirmed in writing. See *S.C. Bar Ethics Adv. Op.* #05-20 (comparing requirements of old and new Rule 1.5); see also *In re Hart*, 361 S.C. 392, 605 S.E.2d

532 (2004) (attorney failed to obtain written consent of clients to fee division as required under old Rule 1.5(e)(1)); *S.C. Bar Ethics Adv. Op.* #03-05 (providing client with copy of letter between lawyers confirming joint representation does not meet requirement of prior Rule 1.5(e)(1) of "written agreement by client"). Third, the total fee must be reasonable. See Rule 1.5, cmt. 7. The 2005 revision of the rules toughens the requirements for fee splitting agreements. Under prior rules, it was not necessary for clients to be informed of the percentage that each lawyer would receive nor was client consent always necessary.

Rule 1.5(e) clearly contemplates that a division of fees among lawyers may be disproportionate to the services performed if each lawyer is responsible for the matter. The Code of Professional Responsibility was less clear. The language of old DR 2-107 required that any division of fees be in proportion to services performed *and* responsibility assumed, suggesting that a division disproportionate to services was not allowed. Older opinions rendered under the code should be read with that distinction in mind, although at least one South Carolina opinion from the period concluded that, notwithstanding the conjunction, a disproportionate division was allowed. See *S.C. Bar Ethics Adv. Op.* #86-03. See also *In re Shelley*, 313 S.C. 144, 437 S.E.2d 86 (1993) (fee arrangement found to be "questionable" under code when lawyer did 80% of work, but paid 80% of fee to lawyer-legislator); *In re Houston*, 314 S.C. 94, 442 S.E.2d 175 (1994) (details of fee arrangement not set forth by court in opinion). The 2005 revision of comment 7 requires that a lawyer who assumes joint responsibility must be knowledgeable about the matter and be available to the client.

Rule 1.5(e) does not apply to fee division agreements when a lawyer departs from a firm, nor does it apply to division of fees when a client discharges one lawyer and retains successor counsel. Rule 1.5, cmt. 8. In these situations the affected lawyers may agree to appropriate division of fees between themselves without the necessity of client consent. The report of the Chief Justice's Commission on the Ethics 2000 Implementation states that comment 8 "appears to overturn the conclusion of the S.C. Bar Ethics Advisory Committee in Opinion 98-32a, which held that Rule 1.5(e) applied to an agreement between a departing lawyer and his former firm regarding division of fees and expenses." See John Freeman, *Leaving on Good Terms*, S.C. LAW., Jan.-Feb. 2008, at 8 (discussing methods of dividing fees between departing lawyer and former firm).

C

Court of Appeals of South Carolina.
W. Rhett ELEAZER, Appellant-Respondent,
v.
HARDAWAY CONCRETE COMPANY, INC., Respondent-Appellant.
In re HARDAWAY CONCRETE COMPANY, INC., Plaintiff,
v.
PALMETTO GRADING AND PAVING COMPANY, INC., Defendant.

No. 0153.
Submitted March 2, 1984.
Decided April 16, 1984.

Attorney brought action to release attachment lien obtained by defendant on judgment that attorney had obtained for client, and to recover out of the judgment an attorney fee, costs and disbursements with respect to services rendered the client in obtaining the judgment. The Common Pleas Court, Richland County, Walter T. Cox, Jr., J., partially dissolved the attachment lien and awarded attorney a fee and an amount for costs and disbursements, and both sides appealed. The Court of Appeals, Goolsby, J., held that: (1) since there was an express agreement between attorney and client that fee would be secured by equitable lien upon proceeds of money judgment obtained, and since attorney acted in good faith, equitable interference was proper to secure from the judgment an amount to pay the fee; (2) attorney had a common-law lien with respect to the costs and disbursements; (3) attorney's liens were superior to attachment lien of defendant; and (4) trial court's award of $400 attorney fee was erroneous, in light of fact that attorney and client agreed on a rate of $60 per hour, attorney expended over 47 hours, and client had not questioned the amount due, even though the proper fee exceeded the amount of the judgment obtained on client's behalf.

Affirmed in part; reversed in part.

West Headnotes

[1] Attorney and Client 45 ⇐171

45 Attorney and Client
45V Lien
45k171 k. Nature of Attorney's Lien. Most Cited Cases

"Attorney's charging lien" is an equitable right to have the fee and costs due an attorney for services rendered in legal proceedings secured to him out of any judgment or recovery obtained therein.

[2] Attorney and Client 45 ⇐171

45 Attorney and Client
45V Lien
45k171 k. Nature of Attorney's Lien. Most Cited Cases

Attorney's charging lien is based on the natural equity that plaintiff should not be allowed to appropriate whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment.

[3] Attorney and Client 45 ⇐175

45 Attorney and Client
45V Lien
45k173 Right to Lien
45k175 k. Nature of Services or Fees. Most Cited Cases

While South Carolina recognizes an attorney's lien created by common law, the lien protects only costs and disbursements; it does not cover an attorney's fee.

[4] Attorney and Client 45 ⇐176

45 Attorney and Client
45V Lien
45k173 Right to Lien
45k176 k. Effect of Contracts. Most Cited

Cases

A lien for the payment of an attorney's fee out of proceeds of a judgment obtained as a result of an attorney's efforts may be created by an express agreement between an attorney and his client.

[5] Attorney and Client 45 ⇐176

45 Attorney and Client
45V Lien
45k173 Right to Lien
45k176 k. Effect of Contracts. Most Cited Cases

Attorney and Client 45 ⇐182(2)

45 Attorney and Client
45V Lien
45k182 Subject-Matter to Which Lien Attaches
45k182(2) k. Judgment or Proceeds Thereof. Most Cited Cases

An agreement between an attorney and his client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment pro tanto which attaches to the judgment as soon as it is entered.

[6] Attorney and Client 45 ⇐182(2)

45 Attorney and Client
45V Lien
45k182 Subject-Matter to Which Lien Attaches
45k182(2) k. Judgment or Proceeds Thereof. Most Cited Cases

Where there was an express agreement between attorney and client that fee would be secured by equitable lien upon proceeds of any judgment obtained on behalf of client, and where there was nothing in the record to indicate that attorney acted in any way other than in good faith, equitable interference was proper to secure from the judgment obtained by attorney for client an amount to pay his fee.

[7] Appeal and Error 30 ⇐1078(1)

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1078 Failure to Urge Objections
30k1078(1) k. In General. Most Cited Cases

Exceptions not argued are deemed abandoned.

[8] Attorney and Client 45 ⇐184

45 Attorney and Client
45V Lien
45k184 k. Priorities. Most Cited Cases

Attorney's equitable lien for his fee and common-law liens for costs and disbursements, in connection with judgment obtained for client, were superior to attachment lien obtained with respect to the proceeds of the judgment by another party who had brought suit against client, since the attorney's liens related back to, and took effect from, the time of the commencement of services rendered to client to obtain the judgment. Code 1976, § 15-19-10 et seq.

[9] Attorney and Client 45 ⇐158

45 Attorney and Client
45IV Compensation
45k157 Actions for Compensation
45k158 k. Nature and Form. Most Cited Cases

An action by attorney to secure compensation for obtaining a judgment for a client is equitable in nature.

[10] Appeal and Error 30 ⇐1009(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(4) k. Against Weight of Evidence. Most Cited Cases

Appeal and Error 30 ⚖1122(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(A) Decision in General
30k1122 Findings and Conclusions
30k1122(2) k. Authority to Find Facts. Most Cited Cases

Where an equitable action is tried by the trial judge alone without a reference, Court of Appeals has jurisdiction to find facts in accordance with its views of the preponderance of the evidence; if an appellant convinces the court that a finding of fact is against the greater weight of the evidence, the Court of Appeals can reverse the factual finding.

[11] Attorney and Client 45 ⚖130

45 Attorney and Client
45IV Compensation
45k130 k. Right to Compensation in General. Most Cited Cases

An attorney is entitled to reasonable value of the services performed for his client in the absence of a controlling contract, statute, or rule of court fixing the amount of compensation.

[12] Appeal and Error 30 ⚖984(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(5) k. Attorney Fees. Most Cited Cases

Where a trial judge undertakes to determine what constitutes reasonable compensation for services performed by an attorney in a given case, his determination will not be set aside on appeal absent a clear showing of an abuse of discretion.

[13] Attorney and Client 45 ⚖171

45 Attorney and Client
45V Lien
45k171 k. Nature of Attorney's Lien. Most Cited Cases

Attorney and Client 45 ⚖176

45 Attorney and Client
45V Lien
45k173 Right to Lien
45k176 k. Effect of Contracts. Most Cited Cases

With respect to an attorney's charging lien, a specific agreement between an attorney and his client regarding the amount the attorney is to be paid for his services **determines** the extent of the lien; only in the absence of such an agreement is a trial judge to base his **determination** as to the amount of the lien upon **quantum meruit** or the reasonable value of the services rendered.

[14] Attorney and Client 45 ⚖167(4)

45 Attorney and Client
45IV Compensation
45k157 Actions for Compensation
45k167 Trial
45k167(4) k. Verdict and Findings. Most Cited Cases

In action by attorney to recover fee from proceeds of judgment obtained for client, against which judgment attorney had an equitable lien, trial court's finding that attorney, who had agreement with client to be paid at rate of $60 per hour and who worked over 47 hours, was entitled to only $400 as attorney fee was erroneous, even though the proper fee due the attorney on the contract exceeded the amount of the judgment obtained for the client.

****176 *346** Michael W. Sautter, Columbia, for appellant-respondent.

Daniel T. Brailsford, Columbia, for respondent-appellant.

GOOLSBY, Judge:

This is an action to dissolve a lien originating by attachment and to recover an attorney's fee, costs, and disbursements. The principal issue is whether W. Rhett Eleazer, an attorney, possesses an

equitable lien upon the proceeds of a judgment he obtained for a client to cover his fee, costs and disbursements in the action which produced the judgment. The trial judge held that a judgment secured by Palmetto Grading and Paving Company, Inc. (Palmetto), against J.A. Metze & Sons, Inc. (Metze), was subject to an equitable lien possessed by Eleazer and that the lien was superior to the lien originating by attachment possessed by Hardaway Concrete Company, Inc. (Hardaway). The trial judge, however, limited the amount Eleazer could recover as an attorney's fee. Both Hardaway and Eleazer appeal. We affirm the existence in this instance of an equitable lien covering the attorney's fee and of a lien covering costs and disbursements; however, we reverse the trial judge as to the amount which Eleazer can recover as an attorney's fee and affirm the trial judge as to the amount Eleazer can recover as costs and disbursements.

*347 Eleazer was retained to represent Palmetto in its claim against Metze for a breach of contract. Palmetto agreed to pay Eleazer an attorney's fee on the basis of $60 per hour plus court costs. Except for $100 paid as a retainer, payment of Eleazer's fee was contingent upon a recovery from Metze. Palmetto also agreed that Eleazer's fee would constitute a lien against any proceeds recovered either by verdict or by settlement. At the time Eleazer undertook to represent Palmetto, it was an active corporation.

Pursuant to the fee arrangement, Eleazer worked, the record shows, a total of 47.25 hours. He performed research, prepared pleadings, motions, and orders, prepared for trial, and engaged in the actual trial of the case. The sum of $80 was spent by him on filing fees and in connection with the service of subpoenas. Expert witnesses who testified during the trial of the case cost Eleazer an estimated $300.

A jury verdict was subsequently rendered in favor of Palmetto in the amount of $1,400 actual damages. After the time for appeal expired, Eleazer notified the Richland County Clerk of Court to enroll the judgment in the Richland County public records.

Before execution could be had, however, Hardaway sued Palmetto on an open account for $5,447.26. Pursuant to Sections 15-19-10 *et seq.* of the South Carolina Code of Laws, 1976, Hardaway attached the proceeds of Palmetto's judgment against Metze on the ground that Palmetto was then a wholly defunct corporation with no address, no telephone, no agent, and no means of establishing or maintaining contact with its creditors. The warrant of attachment was served upon Metze. Metze in turn paid the amount of the judgment owed Palmetto to the Richland County Sheriff.

**177 Eleazer then instituted this action against Hardaway wherein he requested that the court order the attachment released in favor of his claims for an attorney's fee, costs and disbursements. The trial judge concluded that Eleazer was equitably entitled to recover from the judgment proceeds an attorney's fee in the amount of $400 and costs and disbursements in an amount not to exceed $380. The attachment lien was partially dissolved.

*348 I. Hardaway's Appeal

Hardaway maintains that in South Carolina an attorney has no charging lien upon any judgment obtained by him for a client to cover his fee, costs and disbursements; consequently the trial judge erred in partially dissolving its attachment lien and in allowing Eleazer to recover from the judgment obtained by him for Palmetto sums representing an attorney's fee, costs, and disbursements. The cases of *Perry v. Atlantic Coast Life Ins. Co.*, 166 S.C. 270, 164 S.E. 753 (1932) and *Keels v. Powell*, 207 S.C. 97, 34 S.E.2d 482 (1945) are cited in support of its position.

[1][2][3] An "attorney's charging lien" is an equitable right to have the fee and costs due an attorney for services rendered in a legal proceeding secured to him out of any judgment or recovery obtained therein. 7 Am.Jur.2d *Attorneys at Law* § 324 at 336-37 (1980); 7A C.J.S. *Attorney & Client* §

359 at 713 (1980). Although the term "lien" is frequently used in connection with that equitable right, the use of the term has been criticized as inaccurate. *See Massachusetts & Southern Construction Co. v. Township of Gill's Creek,* 48 F. 145, 147 (C.C.S.C.1891), *appeal dismissed,* 154 U.S. 521, 14 S.Ct. 1154, 38 L.Ed. 1073 (1893). In any case, "[t]he lien is based on the natural equity that [the] plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment." 7A C.J.S. *Attorney & Client* § 359 at 713-14 (1980). A common law charging lien is not recognized in all states. 7 Am.Jur.2d *Attorneys at Law* § 325 (1980). While South Carolina recognizes an attorney's lien created by the common law, the lien protects only costs and disbursements; it does not cover an attorney's fee. *See Ex parte Fort In re Boyd v. Lee,* 36 S.C. 19, 15 S.E. 332 (1892); *Simmons v. Reid,* 31 S.C. 389, 9 S.E. 1058 (1889); *Miller v. Newell,* 20 S.C. 123 (1883); *Scharlock v. Oland,* 1 Rich. 207, 30 S.C.L. 207 (1845); *Massachusetts & Southern Construction Co. v. Township of Gill's Creek, supra; cf. Keels v. Powell, supra; Perry v. Atlantic Coast Life Ins. Co., supra.*

[4][5] A lien for the payment of an attorney's fee out of the proceeds of a judgment obtained as a result of an attorney's efforts, however, may be created by an express agreement between an attorney and his client. ***3497** Am.Jur.2d *Attorneys at Law* § 326 at 338 (1980); 7A C.J.S. *Attorney & Client* § 360 at 717 (1980). Indeed, an agreement between an attorney and his client " 'that the attorney shall have a lien on the judgment, is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment *pro tanto* which attaches to the judgment as soon as it is entered.' " *Adair v. First National Bank,* 139 S.C. 1, 6, 137 S.E. 192 (1924); *see also* 7A C.J.S. *Attorney & Client* § 360 at 717-18 (1980). Our courts will recognize an equitable lien created by contract in proper cases. *See Adair v. First National Bank, supra; Simmons v. Reid, supra; cf. Black v. B.B. Kirkland Seed Co.,* 163 S.C. 222, 161 S.E. 489 (1931); *In re Wells,* 43 S.C. 477, 21 S.E. 334 (1895); *Georgia-Carolina Gravel Co. v. Blassingame,* 129 S.E. 18, 123 S.E. 324 (1924).

Regarding the two cases, *Perry* and *Keels,* relied upon by Hardaway, neither case involved an equitable action to enforce an attorney's lien created by agreement.

[6] Here, there was, as the trial judge found, an express agreement between Eleazer and his client, Palmetto, that his fee would be secured by an equitable lien upon the proceeds of any judgment obtained by Palmetto. Because of that ****178** agreement and because there is nothing in the record to indicate that Eleazer acted in any way other than in good faith, we hold that equitable interference was proper to secure from the judgment obtained by Eleazer for Palmetto an amount to pay his fee. *See Adair v. First National Bank, supra; Simmons v. Reid, supra.*

Since the costs and disbursements were covered by a common law lien on the judgment, the trial court properly directed their payment also. *Miller v. Newell, supra; Scharlock v. Oland, supra; see also Massachusetts & Southern Construction Co. v. Township of Gill's Creek, supra.*

[7][8] Hardaway purports to argue in its brief two exceptions regarding the priority of Eleazer's equitable lien and common law lien. Nowhere in its brief can we find where those exceptions are actually argued. Exceptions not argued are deemed abandoned. *State v. Sullivan,* 277 S.C. 35, 282 S.E.2d 838 (1981); *Cudd v. John Hancock Mutual Life Ins. Co.,* --- S.C. ---, 310 S.E.2d 830 (S.C.App.1983). In any case, Eleazer's liens are superior to the claim of Hardaway because they "relate[ ] back to, and take [ ] effect from, ***350** the time of the commencement of the services" rendered by Eleazer as Palmetto's attorney. 7 Am.Jur.2d *Attorneys at Law* § 332 at 343 (1980); 7A C.J.S. *Attorney & Client* § 384 at 758 (1980); *cf. Adair v. First National Bank, supra; Simmons v. Reid, supra.*

II. Eleazer's Appeal

Eleazer complains about the amount allowed him as an attorney's fee. He claims that he was entitled to receive the full amount of the funds attached by Hardaway.

[9][10] An action by an attorney to secure compensation for obtaining a judgment for a client is equitable in nature. 7 Am.Jur.2d *Attorneys at Law* § 324 at 337 (1980); *see Morgan v. Honeycutt,* 277 S.C. 150, 283 S.E.2d 444 (1981). Where an equitable action is tried by the trial judge alone without a reference, the Court of Appeals has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976); *Baron v. Dyslin,* 279 S.C. 475, 309 S.E.2d 767 (S.C.App.1983). If an appellant convinces the court that a finding of fact is against the greater weight of the evidence, the Court of Appeals can reverse the factual finding. *White v. Boseman,* 275 S.C. 184, 268 S.E.2d 287 (1980); *Baron v. Dyslin, supra.* While we agree with the trial judge as to the amount Eleazer should recover as costs and disbursements, we disagree with him as to the sum Eleazer should recover as an attorney's fee.

The only evidence before the trial judge regarding the amount of Eleazer's fee was the client's affidavit to which was attached a statement from Eleazer. It reflected that Eleazer claimed $2,835 as an attorney's fee. Without explanation, the trial judge found Eleazer to be entitled to only $400 as an attorney's fee.

[11][12][13] An attorney is entitled to the reasonable value of the services performed for his client in the absence of a controlling contract, statute, or rule of court fixing the amount of compensation [7 Am.Jur.2d *Attorneys at Law* § 277 (1980); 7A C.J.S. *Attorney & Client* § 324 (1980); *cf. Royal Crown Bottling Co. v. Chandler,* 226 S.C. 94, 83 S.E.2d 745 (1954)]; and where a trial judge undertakes to determine what constitutes reasonable compensation for services performed ***351** by an attorney in a given case his determination will not be set aside on appeal absent a clear showing of an abuse of discretion. *See Wood v. Wood,* 269 S.C. 600, 239 S.E.2d 315 (1977); *Hodge v. First Federal Savings & Loan Ass'n,* 267 S.C. 270, 227 S.E.2d 310 (1976). With respect to an attorney's charging lien, however, a specific agreement between an attorney and his client regarding the amount the attorney is to be paid for his services determines the extent of the lien. 7 Am.Jur.2d *Attorneys at Law* § 327 (1980); 7A C.J.S. *Attorney & Client* § 364 at 725-26 (1980); *see Adair v. First National Bank, supra.* Only in the absence of such an agreement is a trial judge to base his **determination** as ****179** to the amount of the lien upon ***quantum meruit*** or the reasonable value of the services rendered. *See* 7 Am.Jur.2d *Attorneys at Law* § 327 (1980); 7A C.J.S. *Attorney & Client* § 364 at 726 (1980).

[14] Here, as we mentioned, there was a specific agreement between Eleazer and Palmetto regarding the rate of hourly compensation Eleazer was to receive for his services. He was to be paid $60 per hour. No agreement existed, however, concerning the number of hours Eleazer could employ in prosecuting Palmetto's claim against Metze. Even so, Hardaway offered no evidence that Eleazer in representing Palmetto in that action spent less time than his statement reflects. Eleazer's client did not question the amount due. To the contrary, it thought Eleazer's statement to be both "fair and reasonable" even though the amount due as an attorney's fee exceeded the amount of the judgment obtained against Metze. Moreover, nowhere did the trial judge make a finding either that the fee Eleazer sought was not in fact based upon the actual number of hours work was done on the case or that the amount of the fee was unreasonable in light of the particular circumstances. *See* 7 Am.Jur.2d *Attorneys at Law* § 277 (1980).

The parties stipulated in the record before us that Eleazer devoted 47.25 hours to Palmetto's case against Metze and that Palmetto agreed to pay Eleazer $60 per hour. Eleazer, then, is entitled to an attorney's fee in the amount of $2,835 less the $100

Palmetto paid as a retainer. He also possesses an equitable lien against the Metze judgment in the amount of $2,735 for an attorney's fee and a common law lien in the amount of $380 for costs and disbursements. The trial judge's order *352 regarding the sum which Eleazer may recover from the judgment as an attorney's fee, therefore, is reversed.

Because Eleazer's equitable lien for an attorney's fee and his lien for costs and disbursements are superior to Hardaway's attachment lien, we fully dissolve the latter. In doing so, we recognize that no funds will remain after Eleazer is paid to satisfy Hardaway's judgment against Palmetto; however, "[a]s a matter of common justice and as a matter of public policy, Courts must protect attorneys when their conduct has been...fair...." *Adair v. First National Bank, supra* 139 S.C. at 7. But for the efforts of Eleazer, there would have been no judgment for Hardaway to attach.

Accordingly, the judgment appealed from is

AFFIRMED IN PART and REVERSED IN PART.

GARDNER and CURETON, JJ., concur.

S.C.App.,1984.
Eleazer v. Hardaway Concrete Co., Inc.
281 S.C. 344, 315 S.E.2d 174

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C

Supreme Court of South Carolina.
Hazel S. GETZEN, Respondent/Appellant,
v.
LAW OFFICES OF JAMES M. RUSS, P.A., and James M. Russ, individually, Defendants,
of whom Law Offices of James M. Russ, P.A., is Appellant/Respondent.
LAW OFFICES OF JAMES M. RUSS, P.A., Appellant/Respondent,
v.
Hazel S. GETZEN, Lela H. Getzen, and Federal Paper Board Co., Inc., Defendants,
of whom Hazel S. Getzen, is Respondent/Appellant.

No. 24474.
Heard May 22, 1996.
Decided Aug. 12, 1996.

After attorney who had been hired to represent criminal defendant was discharged without cause, defendant's mother filed action seeking to void guaranty and mortgage she had given attorney, and attorney filed action to foreclose on guaranty and mortgage. Cases were consolidated, and the Circuit Court, Edgefield County, William P. Keesley, J., found that attorney was entitled to additional $33,062 in attorney fees under modified quantum meruit method of compensation, but refused to allow attorney to submit application for fees and expenses incurred in action to collect unpaid fees and costs. Both parties appealed. The Supreme Court, Burnett, J., held that: (1) modified quantum meruit method of compensation did not apply; (2) amount of trial judge's attorney fee award was proper; and (3) attorney should have been allowed to submit application for fees and expenses incurred in collecting unpaid fees and costs.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Attorney and Client 45 ⇐134(1)

45 Attorney and Client
45IV Compensation
45k134 Premature Termination of Relation
45k134(1) k. In general. Most Cited Cases

Since attorney-client contract specified hourly rate of compensation, modified **quantum meruit** method of compensation did not apply to **determine** fees owed to criminal defense attorney who was discharged without cause prior to completion of his representation.

[2] Attorney and Client 45 ⇐140

45 Attorney and Client
45IV Compensation
45k139 Value of Services
45k140 k. In general. Most Cited Cases

In computing reasonable attorney fees, court should consider time and labor required, responsibility involved in representation, fee customarily charged in locality for comparable services, results obtained, experience, reputation, and ability of lawyer, efficiency of effort reflected in actual provision of legal services, and attorney-client contract itself. West's F.S.A. Bar Rule 4-1.5(d).

[3] Attorney and Client 45 ⇐134(1)

45 Attorney and Client
45IV Compensation
45k134 Premature Termination of Relation
45k134(1) k. In general. Most Cited Cases

Criminal defense attorney who was discharged prior to completion of his representation was entitled to some, but not all attorney fees he requested, since portion of fees was clearly excessive in light of fee agreement, extent and nature of attorney's advice, attorney's trial strategy, complexity of criminal case, limited time in which attorney had to prepare for trial, reasonableness of attorney's hourly fee compared to other attorneys in area, unreason-

able paralegal charges, and excessive and duplicitous work. West's F.S.A. Bar Rule 4-1.5(d).

[4] **Attorney and Client 45 ⇐144**

45 Attorney and Client
45IV Compensation
45k142 Contracts for Compensation
45k144 k. Construction and operation. Most Cited Cases

Attorney and Client 45 ⇐157.1

45 Attorney and Client
45IV Compensation
45k157 Actions for Compensation
45k157.1 k. In general. Most Cited Cases

Under attorney-client contract, guaranty, and mortgage, criminal defense attorney was entitled to fees and expenses incurred in collecting amounts due from defendant; accordingly, trial court should have allowed attorney to submit application for attorney fees and expenses incurred in action to collect unpaid fees and costs.

****743 *378** Thomas E. Lydon, of Griffin & Lydon, L.L.P., Columbia, for appellant/respondent.

Henry Summerall, Jr., of Summerall & Bailey, P.A., Aiken, for respondent/appellant.

James D. Nance, Aiken, for defendant Lela H. Getzen.

****744** Kenneth W. Fish, Greenwood, for defendant Federal Paper Board.

BURNETT, Justice.

Respondent-Appellant Hazel S. Getzen (Mrs. Getzen) appeals from the order of the circuit court awarding appellant-respondent Russ [FN1] attorney's fees of $33,062. Russ appeals from the same order, claiming he is entitled to attorney's fees of $170,093 under the parties' Contract for Legal Services. We affirm in part, reverse in part, and remand.

FN1. Law Offices of James M. Russ, P.A., and James M. Russ will be referred to collectively as Russ.

FACTS

In July 1991, Mrs. Getzen and her son John (John) hired Russ to represent John on federal drug and conspiracy charges. Mrs. Getzen, John, and Russ reside in Florida.

Mrs. Getzen and John signed a Contract for Legal Services with Russ in which they agreed to pay Russ $300 an hour for his legal work, certain hourly fees for work performed by his staff,[FN2] and costs and expenses, up to $350,000. John signed the Contract for Legal Services as the client and Mrs. Getzen ***379** signed the Contract for Legal Services "individually and as Guarantor." Additionally, Mrs. Getzen executed a guaranty of payment and issued Russ a mortgage on her one-half interest in property in Edgefield County, South Carolina. Before executing these three documents, Mrs. Getzen had the documents reviewed by another attorney. Mrs. Getzen and John paid Russ a $50,000 non-refundable retainer. According to the Contract for Legal Services, Russ was to represent John through appeal.

FN2. For example, Russ' paralegal billed at the rate of $100 per hour.

Although Russ told John that he would probably be found guilty of at least one charge and that he was facing a mandatory minimum sentence of ten years to life imprisonment, John refused to plead guilty and went to trial with several other co-defendants in October 1991. After a three week jury trial, John was convicted of conspiracy and possession with intent to distribute 5,000 pounds of marijuana.[FN3] To that point, Mrs. Getzen had paid Russ $94,500 in attorney's fees and expenses, including the $50,000 retainer. Russ billed Mrs. Getzen an additional $130,145. Disputing the additional bill, John discharged Russ before he was sentenced.[FN4] The parties agree the discharge was without cause.

FN3. The other co-defendants were also convicted on all charges.

FN4. Represented by another attorney, John was sentenced to seventeen years' imprisonment under the Federal Sentencing Guidelines.

Thereafter, Mrs. Getzen filed an action seeking to void the guaranty and mortgage she had given Russ. Before he received Mrs. Getzen's complaint, Russ filed an action to foreclose on the guaranty and mortgage. The cases were consolidated.

During the non-jury trial, Mrs. Getzen's witnesses testified the attorney's fees Russ was attempting to collect were excessive and unreasonable. They suggested Russ had "churned" John's file in order to produce more billable time. Russ' witnesses testified Russ' $300 hourly rate was not excessive and that Russ had not "padded" John's file to increase the time spent on the case. By the end of the hearing, Russ sought a total of $170,093 as the unpaid balance due for his representation of John.

The parties agreed that Florida law governs the attorney's fee issue in this matter. The trial judge held that Florida law required the application of "modified quantum meruit" and ***380** that Russ was entitled to an additional $33,062 in attorney's fees for his representation of John. The trial judge refused to allow Russ to submit an application for attorney's fees and expenses incurred by him in this action to collect the unpaid attorney's fees and costs for his representation of John.

ISSUES

I. Did the trial court err by holding that "modified quantum meruit" applies where the Contract for Legal Services provides for hourly rates?

****745** II. Did the trial court err by failing to consider the "totality of the circumstances," and thereby incorrectly require Mrs. Getzen to pay an additional $33,062 in attorneys' fees?

III. Did the trial court err by maintaining that the guaranty and mortgage were enforceable even though it held the underlying Contract for Legal Services was unenforceable?

IV. Did the trial court err by refusing to allow Russ to submit an application for recovery of his attorney's fees and costs incurred in this litigation?

DISCUSSION

I

Russ argues the trial court erred by applying "modified **quantum meruit**" to **determine** his appropriate compensation. We agree.

In *Rosenberg v. Levin,* 409 So.2d 1016 (Fla.1982), the Florida Supreme Court considered the methods by which a court could determine the appropriate amount of fees which should be awarded to an attorney who is discharged without cause prior to completion of his representation of a client. In *Rosenberg,* the attorney-client contract provided a $10,000 fixed fee, plus a contingent fee of fifty percent of all recovery in excess of $600,000. The client discharged the attorneys without cause and later settled the matter for $500,000. The attorneys sued the client for fees based on a quantum meruit evaluation of their services.

The Florida Supreme Court recognized that both traditional contract rules and quantum meruit rules which allow recovery in excess of the maximum contract price "have a chilling effect on the client's power to discharge an attorney." *Id.* at 1021. Consequently, in an effort to balance the need of a ***381** client to discharge his attorney without economic penalty when he loses confidence in the attorney, with the attorney's right to adequate compensation for work performed, the Florida Supreme Court adopted the modified quantum meruit method of compensation in premature discharge cases. According to the Florida Supreme Court, this method provides a lawyer with recovery of the reasonable value of his services, limited to the maximum fee set forth in the parties' contract.

[1] However, the rationale for the application of modified quantum meruit is not present when the attorney-client contract specifies an hourly rate. After agreeing on an hourly rate, the client has the freedom to discharge the lawyer without incurring an economic penalty because the attorney is only due fees for services performed prior to his discharge. Moreover, the lawyer is compensated for the work actually performed prior to the discharge at the rate agreed upon at the initiation of representation. Accordingly, we hold that the trial judge erred in finding the Florida Supreme Court would apply the modified quantum meruit method of compensation under the facts of this case.

II

Mrs. Getzen argues that in computing the reasonable value of Russ' services under modified quantum meruit, the trial court erred by failing to consider the "totality of the circumstances" surrounding the attorney-client relationship and, therefore, incorrectly required her to pay an additional $33,062 in attorney's fees. Because we hold modified quantum meruit inapplicable, we need not address this issue.

[2] Nonetheless, The Rules Regulating the Florida Bar provide that contracts for attorney's fees will ordinarily be enforced unless they are clearly excessive. 35 Fla.Stat.Ann. Rule 4-1.5(d) (Supp.1996). An attorney's fee is clearly excessive if, after a review of the facts, it exceeds a reasonable fee for the services. Rule 4-1.5(a)(1). In computing a reasonable attorney's fee, eight factors are considered.[FN5] These are the factors**746 which were considered by the trial *382 judge in computing the fee of $33,062.

> FN5. In *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz,* 652 So.2d 366 (Fla.1995), the Florida Supreme Court stated that the eight factors set forth in The Rules Regulating the Florida Bar provide a good starting point by which to determine an award which is fair to both the client and the attorney. These factors include, among others, the time and labor required, the responsibility involved in the representation, the fee customarily charged in the locality for comparable services, the results obtained, the experience, reputation, and ability of the lawyer, the efficiency of effort reflected in the actual provision of the legal services, and the attorney-client contract itself. 35 Fla.Stat.Ann. Rule 4-1.5(d) (Supp.1996).

The trial judge considered the totality of the circumstances in computing the reasonable value of Russ' services. The order contains a thorough discussion of the parties' fee agreement, John and Mrs. Getzen's understanding of the fee agreement, the extent and nature of the advice given by Russ to John (including the unlikely chance of acquittal), Russ' trial strategy and the reasonableness of this strategy, the complexity of the criminal case and the extent of John's involvement in the drug conspiracy, and the limited time in which Russ had to prepare for trial. In addition, the order addresses the reasonableness of Russ' hourly fee compared to that of other criminal defense attorneys in the Orlando, Florida, area and in consideration of Russ' own experience and credentials, the unreasonable charge for paralegal services, and the somewhat excessive and duplicitous work performed by Russ.

[3] The trial judge's decision awarding Russ $33,062 in attorney's fees is supported by the preponderance of the evidence. In concluding that Russ was only entitled to an additional $33,062, the trial judge likewise determined that the remaining $137,031 sought by Russ was clearly excessive. We agree. *Ex parte Stevens, Stevens & Thomas, P.A.,* 277 S.C. 150, 283 S.E.2d 444 (1981) (an action involving a claim for professional fees by an attorney is one in equity); *Doe v. Clark,* 318 S.C. 274, 457 S.E.2d 336 (1995) (on appeal of an action in equity tried by the judge alone, the Supreme Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence). Accordingly, we affirm the trial judge's award of

$33,062 to Russ. *Cherry v. Thomasson,* 276 S.C. 524, 280 S.E.2d 541 (1981) (while this Court may find facts in accordance with its own view of the preponderance of the evidence in an appeal of an equitable action tried by a judge alone, this scope of review does not require the Supreme Court to disregard the findings of the trial judge or to ignore the fact that the trial judge was in a better position to evaluate*383 the credibility of the witnesses; furthermore, it does not relieve the appellant from the burden of convincing this Court that the trial judge committed error in his findings).

III

Mrs. Getzen contends that because the trial judge found the underlying Contract for Legal Services unenforceable, he erred by concluding that the guaranty and mortgage were enforceable. We disagree. Because we hold the Contract for Legal Services enforceable, we decline to address this issue.

IV

Finally, Russ argues the Contract for Legal Services, guaranty, and mortgage expressly entitle him to attorney's fees and expenses incurred in the collection of any amounts due. Consequently, Russ contends the trial court erred by refusing to allow him to submit an application for attorney's fees and expenses. We agree.

[4] The Contract for Legal Services, guaranty, and mortgage each provide that Mrs. Getzen will pay the costs and attorney's fees incurred by Russ in enforcing the three documents. Even though the trial judge did not enforce the Contract for Legal Services, he held Russ was entitled to $33,062 in attorney's fees pursuant to modified quantum meruit. Therefore, under the terms of the guaranty alone, Mrs. Getzen is responsible for the costs and attorney's fees Russ incurred to obtain the $33,062. *See Blumberg v. Nealco,* 310 S.C. 492, 427 S.E.2d 659 (1993) (attorney's fees and costs are recoverable if specified by contract or statute).

Moreover, because we hold the Contract for Legal Services enforceable, Mrs. Getzen is likewise responsible under the terms of that document for costs and attorneys' fees incurred by Russ in enforcing the Contract. Accordingly, the trial judge erred by refusing to allow Russ to submit an application for attorney's fees and expenses incurred in attempting collection of attorney's fees and **747 costs incurred in the underlying litigation. Therefore, we remand this matter to the trial court to consider Russ' application for attorney's fees and costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FINNEY, C.J., and TOAL, MOORE and WALLER , JJ., concur.

S.C.,1996.
Getzen v. Law Offices of James M. Russ, P.A.
323 S.C. 377, 475 S.E.2d 743

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H

Court of Appeals of South Carolina.
James O. HALE and Hale and Hale, P.A., Respondents/Appellants,
v.
Thomas FINN, d/b/a Finn Law Firm, Appellant/Respondent.
James O. Hale and Hale and Hale, P.A., Plaintiffs
v.
Thomas Finn, Defendant.

No. 4683.
Heard March 4, 2010.
Decided May 5, 2010.
Rehearing Denied June 24, 2010.

Background: Attorney filed suit against other attorney and his former law firm arising from dispute between parties over the division of attorney fees in underlying civil litigation matter, asserting claims for breach of contract, intentional interference with contractual relations, and breach of fiduciary duties. Attorney settled with law firm, and parties stipulated that the only cause of action against other attorney was for tortious interference with contractual relations between attorney and client in underlying matter. The Circuit Court, Beaufort County, John P. Linton, Special Referee, awarded attorney actual and punitive damages. Other attorney appealed. Attorney cross-appealed.

Holdings: The Court of Appeals, Thomas, J., held that:
(1) attorney's right to a constructive trust in his favor over attorney fees from underlying civil litigation matter was tried by consent of parties;
(2) appropriate remedy for attorney was imposition of a constructive trust on portion of the fees that would satisfy attorney's right to quantum meruit recovery from other attorney; and
(3) attorney was not entitled to punitive damages.

Affirmed in part and reversed in part.

West Headnotes

[1] Pleading 302 ⇐233.1

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k233.1 k. In general. Most Cited Cases

Pleading 302 ⇐236(1)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k236 Discretion of Court
302k236(1) k. In general. Most Cited Cases

Courts have wide latitude in amending pleadings and, while this power should not be exercised indiscriminately or to surprise or prejudice an opposing party, the matter of allowing amendments is left to the sound discretion of the trial judge.

[2] Torts 379 ⇐246

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k246 k. Attorneys. Most Cited Cases

Award of actual damages to attorney on his cause of action against other attorney for tortious interference with the representation contract between attorney and client, arising from dispute over division of fees in underlying civil litigation matter, was not warranted, where special referee determined that other attorney had not interfered with the representation contract.

[3] Pleading 302 ⇐427

302 Pleading
302XVIII Waiver or Cure of Defects and Objections
302k427 k. Objections to evidence as not within issues. Most Cited Cases

Attorney's right to a constructive trust in his favor over attorney fees from underlying civil litigation matter on which other attorney had also worked was tried by consent of parties, in attorney's suit against other attorney arising from dispute over division of fees in that matter, as attorney testified without objection that after he realized he was no longer counsel of record for client, he filed a lien to protect his interest in his fee agreement with client, other attorney never contended that attorney was not entitled to be paid, but took position that his former law firm was responsible for fulfilling this obligation, and other attorney had duty to notify any third persons who had an interest in funds that he received to promptly deliver such funds accordingly, and to render a full accounting upon request. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 1.15(d).

[4] Trusts 390 ⇐91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

Appropriate remedy for attorney who was entitled to portion of attorney fees he earned in representing client in underlying civil litigation matter was imposition of a constructive trust on portion of the fees that would satisfy attorney's right to **quantum meruit** recovery from other attorney, to whom, along with his former law firm, attorney fees had been disbursed; when attorney realized that he was no longer counsel of record for client in the matter, he filed lien to protect his interest in his fee agreement with client, other attorney did not assert any substantive reason as to why attorney was not entitled to relief based on constructive trust doctrine, and there was no incongruity in using an equitable **measure** to **determine** attorney's recovery on a constructive trust theory.

[5] Trusts 390 ⇐91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust.

[6] Trusts 390 ⇐91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it.

[7] Trusts 390 ⇐91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

A claim for imposition of a constructive trust is not an independent cause of action.

[8] Trusts 390 ⇐91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

A constructive trust does not arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment.

[9] Trusts 390 ⚿91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

A constructive trust is a flexible equitable remedy whose enforcement is subject to the equitable discretion of the trial court.

[10] Appeal and Error 30 ⚿221

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k221 k. Amount of recovery or extent of relief. Most Cited Cases

Appeal and Error 30 ⚿242(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k242 Necessity of Ruling on Objection or Motion
30k242(1) k. In general. Most Cited Cases

Defendant preserved on appeal his arguments that plaintiff was not entitled to punitive damages, where special attorney sent draft order to counsel for the parties for review and comment, and defendant's attorney specifically objected to the punitive damages, and the reduction of the punitive damages in the final order was tantamount to a ruling on this objection.

[11] Attorney and Client 45 ⚿151

45 Attorney and Client
45IV Compensation
45k151 k. Contracts for division, and apportionment. Most Cited Cases

Attorney who had represented client in underlying civil litigation matter was not entitled to punitive damages as result of other attorney's retention of attorney fees disbursed to him and his former law firm in connection with the matter, as the harm resulting from other attorney's failure to disclose attorney's interest in the fees was economic rather than physical, any breach of duty on other attorney's part, therefore, could not be found to evince an indifference to or a reckless disregard of health or safety of others, there was no evidence that attorney, the aggrieved party, had financial vulnerability, other attorney's conduct involved only an isolated incident rather than repeated actions, and harm to attorney was not the result of intentional malice, trickery, or deceit on other attorney's part. Code 1976, § 15-33-135.

[12] Damages 115 ⚿87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In general. Most Cited Cases

Damages 115 ⚿91.5(1)

115 Damages
115V Exemplary Damages
115k91.5 Grounds for Exemplary Damages
115k91.5(1) k. In general. Most Cited Cases

"Punitive damages" are, by definition, punishing damages or private fines levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future.

[13] Damages 115 ⚿87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In general. Most Cited Cases

The state's interests in awarding punitive dam-

ages must remain consistent with the principle of penal theory that the punishment should fit the crime.

[14] Damages 115 ⇐89(1)

115 Damages
115V Exemplary Damages
115k88 Injuries for Which Exemplary Damages May Be Awarded
115k89 In General
115k89(1) k. In general. Most Cited Cases

Trusts 390 ⇐91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

Constructive trust, as an equitable remedy, does not include the imposition of punitive damages.

****53** Curtis W. Dowling and J. Todd Kincannon, both of Columbia, for Appellant/Respondent.

John E. Parker, of Hampton, for Respondents/Appellants.

THOMAS, J.

***82** These cross-appeals arise from a dispute between attorneys over the division of fees in a civil litigation matter. In the primary appeal, Appellant/Respondent Thomas Finn, d/b/a Finn Law Firm (Finn) alleges error in the special referee's award of actual and punitive damages to Respondents/Appellants James O. Hale and Hale and Hale, P.A. (Hale) on Hale's cause of action for tortious interference with contract. In his cross-appeal, Hale argues the special referee should have based actual damages on partnership law rather than on quantum meruit. Both Finn and Hale appeal the special ***83** referee's decision. We affirm the actual damages award and reverse the punitive damages award.

FACTS AND PROCEDURAL HISTORY

On October 15, 1997, Finn and Hale commenced an action on behalf of the Village West Horizontal Property Regime and the Village West Owners' Association (collectively Village West) arising out of a construction dispute. Hale, an attorney practicing in Beaufort County, had begun representing Village West in 1991 in routine legal matters. At Hale's recommendation, the Mullen Firm, ****54** where Finn was employed at the time, was associated in the case.

Because of concerns about the applicable statutes of limitations and repose, the complaint in the Village West lawsuit was filed before Village West finalized a fee agreement with its attorneys. Eventually, an agreement was reached on December 8, 1997, when Village West signed a contingency fee contract hiring Hale to represent it in the above-mentioned construction litigation. Under the agreement, counsel would receive a contingency fee of thirty-three and one third percent of any amount recovered unless an evidentiary hearing, arbitration, or mediation hearing was required. If any of these were necessary, the contingency fee would be forty percent of the recovery. Shortly after Village West signed the contract with Hale, Hale sent the Mullen Firm a copy of the contract with a letter stating his understanding that the contingency fee would be divided equally between the two law firms. Hale never received a reply to this communication.

Hale, Finn, and various other attorneys from the Mullen Firm, actively worked on the Village West lawsuit during the preliminary stages. A mediation in the lawsuit was scheduled for December 11, 2001. Contrary to instructions from his superior, Finn met with the Village West Board of Directors before the mediation instead of arranging for one of the senior partners of the Mullen Firm to meet with the Board. The mediation was unsuccessful, and a status conference had to be set in the matter.

During this time, the Mullen Firm had become dissatisfied with some of Finn's work on other mat-

ters, prompting the senior partner to ask another lawyer in the firm to become *84 involved with the Village West lawsuit. A meeting was scheduled for February 8, 2002, for that lawyer and Finn to review ten files that had been assigned to Finn. On the appointed day, however, Finn advised the other attorney before the meeting was to begin that he intended to leave the Mullen Firm.

By letter dated February 11, 2002, the President of the Village West Board of Directors, advised both the Mullen Firm and Hale of Village West's desire to "move with [Finn]" on the pending construction litigation. On February 22, 2002, attorney Gregory Alford, who had been retained to represent Village West in regime matters, sent Hale a letter requesting that Hale direct all further communications with either the Board or its individual members to Alford's office. Near the end of February 2002, Hale retained counsel to represent his interest in the matter.

By agreement dated March 11, 2002, the Association retained Finn "in association with [the Mullen Firm]" in the Village West construction litigation.[FN1] In a fax to the Mullen Firm dated April 1, 2002, Alford advised as follows:

> FN1. Because of personnel changes, the name of the Mullen Firm changed; however, the change does not impact the merits of this appeal.

> The Board's directive is that this agreement is not effective or to be delivered to either Mullen Law Firm or Finn Law Firm until an agreement to indemnify against Hale is delivered. Finn and Seekings have indicated orally that this would be done and a writing would be forthcoming to that effect.[FN2]

> FN2. Seekings was an attorney with the Mullen Firm.

Despite the Board's directive, neither Finn nor anyone else at the Mullen Firm ever gave written confirmation of an indemnification agreement. Hale apparently continued to believe he was still counsel of record in the Village West lawsuit, as evidenced by his appearance at a status conference in the matter on February 14, 2002, and possibly a summary judgment hearing in May 2002. In July 2002, Alford advised Hale that during its March 2002 meeting, the Village West Board of Directors ratified the termination of Hale's services in the *85 construction litigation. Thereafter, Hale moved to withdraw and assert a lien in the matter.

The Village West lawsuit was settled for $7,002,500 in October 2002, and a settlement disbursement accounting was rendered on November 4, 2002. An attorney's fee of approximately $2,801,000 was disbursed to the **55 Mullen Firm. Finn received 25 percent of this amount. Although Hale's motion to be relieved as counsel and motion for a lien were still pending, a form order was issued dismissing the case.

On September 29, 2003, a hearing took place in the Village West lawsuit on Hale's motion to establish a lien for his fees on the proceeds of the settlement. On November 3, 2003, the court issued an order in which it acknowledged Hale had previously been granted leave to amend his motion to assert a retaining lien and any other equitable liens to which he may have been entitled. The court also granted a motion by Hale to join Finn and the Mullen Firm as parties to this action.

On January 6, 2005, Hale filed a separate action against the Mullen Firm and Finn for breach of contract, intentional interference with contractual relations, and breach of fiduciary duties. In his complaint, Hale sought actual and punitive damages.

Hale was formally relieved as counsel in the Village West lawsuit on August 25, 2005. Later, after all parties remaining in the Village West litigation and those in Hale's action waived their right to a jury trial, the two lawsuits were consolidated and referred to the special referee.

The special referee took testimony in the matter on August 16 and 17, 2006. On the second day of the hearing, Hale settled with the Mullen Firm for $400,000 on the breach of fiduciary duty claim, leaving Finn as the only defendant. Just before the testimony was to resume, counsel stipulated the only cause of action against Finn was the claim for tortious interference with the contractual relations between Hale and Village West.

Hale acknowledged on direct examination there was no written joint representation agreement to which Finn himself was a party. In support of his claim, Hale testified about his correspondence to the Mullen Firm regarding the fee division between the two law firms. He also presented evidence that he ***86** had devoted between six hundred and eight hundred hours to the lawsuit and the directive of the Village West Board of Directors that Finn and the Mullen Firm were to "indemnify against Hale." In addition, it appears undisputed that Finn was aware of Hale's lien.

Sometime during October 2006, the special referee issued to counsel an unsigned draft order. In the draft order, the special referee noted Hale, after settling with all defendants except for Finn, "continued to pursue a single cause of action against Mr. Finn for tortious interference with contractual rights," those contractual rights originating from Hale's representation contract with Village West. With regard to the allegation by Hale that Finn had interfered with the representation agreement between Hale and Village West, the referee's proposed findings were that Hale failed to carry his burden of proof that Finn engaged in tortious interference with this agreement and that the Village West Board "was primarily prompted by the fact that Mr. Finn had earned their respect through his efforts and dedication."

Nevertheless, the special referee proposed to find that "Mr. Finn willfully and recklessly agreed to distribution of the entire fee in total disregard of Mr. Hale's right, and furthermore violated the proper practice of bringing the matter to the Court's attention." Based on this finding, the special referee proposed to order Finn to pay Hale $525,000 in actual damages and $50,000 in punitive damages, with the proviso that the award would be reduced by any amounts paid by those defendants with whom Hale had settled. The amount of actual damages was based on the special referee's **determination** that Hale was entitled to between 15 and 20 percent of the entire fee based on a **quantum meruit** theory of recovery. The special referee also rejected Finn's defense that the Mullen Firm was in charge of actual disbursements, noting that Finn, though aware that Hale had never been removed as counsel of record in the case, agreed to the distribution of the entire fee to the Mullen Firm and himself. Citing *Barnes v. Alexander,* 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530 (1914), and *McNair v. Rainsford,* 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998), the special referee further stated "[t]he attorneys' fees should have been held as a constructive trust, and Mr. Finn's complicity and acquiescence of ****56** 100% without justification constituted***87** an interference with [Hale's] right to a portion of the funds."

Because of objections from Finn to the proposed order, the special referee reopened the record and held another hearing on February 16, 2007. Before the testimony began, counsel for Hale moved to amend the pleadings to conform to the proof offered on the issue of interference with contractual relations at the time the attorney's fees were disbursed and also to include a constructive trust. It is clear from the record that the motion resulted from the special referee's invitation, in which he indicated "that if the original pleading was not adequate to cover interference at the time of disbursement and if the plaintiff wishes to amend to make that a specific allegation then I'll grant that motion and proceed on that basis." Hale declined to submit additional evidence, and the hearing proceeded with Finn as the only witness.

On February 21, 2007, the special referee issued a final order in the matter. As in the draft or-

der previously sent to counsel, the special referee in the final order found Hale failed to carry his burden of proof that Finn tortiously interfered with the representation agreement between Hale and Village West. Nevertheless, although the special referee noted, as he did in the draft order, that Hale's sole cause of action against Finn was for tortious interference with contractual rights, he also retained the findings from his draft order that the contingent fee obtained in the underlying litigation should have been held in trust and that Finn acted improperly in agreeing to the division of the attorney's fee between himself and the Mullen Law Firm without alerting the court to Hale's claim. As he did in the draft order, the special referee ordered Finn to pay actual damages of $525,000.00, less the amount to be paid by the Mullen Firm pursuant to its settlement with Hale; however, punitive damages in the final order were decreased to $15,000. Both Hale and Finn appealed the special referee's final order.

STANDARD OF REVIEW

[1] "Courts have wide latitude in amending pleadings and, while this power should not be exercised indiscriminately or to surprise or prejudice an opposing party, the matter of allowing*88 amendments is left to the sound discretion of the trial judge." *Mylin v. Allen-White Pontiac,* 281 S.C. 174, 180, 314 S.E.2d 354, 357 (Ct.App.1984).

A trial court's determination of the constitutionality of a punitive damages award is subject to a de novo standard of review. *Mitchell v. Fortis Ins. Co.,* 385 S.C. 570, 583, 686 S.E.2d 176, 182 (2009)

LAW/ANALYSIS

I. Finn's appeal

A. Actual damages award

[2][3][4] On appeal, Finn advances several arguments supporting his position that the special referee's award of actual damages was improper. First, relying on the premise that the only issue before the special referee was Finn's alleged interference with the contractual relations between Hale and Village West, Finn argues an award for a claim for intentional interference with contractual relations cannot be fashioned on quantum meruit entitlement. In conjunction with this argument, he contends that the award was inconsistent with the special referee's findings that he did not interfere with the representation contract between Hale and Village West and that he believed the Mullen Firm would assume responsibility for Hale's fees. Second, he alleges the special referee erred in "bootstrapping" to the claim for intentional interference with contractual relations the elements of several unpled causes of action, namely conversion and constructive trust, to support his decision.

We agree with Finn that because the special referee determined he did not interfere with the representation contract between Hale and Village West, damages for that cause of action were unwarranted. We disagree, however, with his argument that the special referee lacked authority to base the award of actual damages on quantum meruit. Such an award was proper to enforce a constructive trust.

**57 As we have noted in our narrative of the facts, after the settlement agreement between Hale and the Mullen Firm was read into the record, counsel stipulated the only cause of action against Finn was interference with contractual relations.*89 Nevertheless, at the commencement of the second hearing in the matter, Hale moved to amend his pleadings to "include a constructive trust," a basis for relief that was cited by the special referee in his proposed order and not objected to by Finn when that order was received by counsel. Furthermore, contrary to the contention in Finn's reply brief that the special referee "certainly did not state in the record any reasons for allowing an amendment of the pleadings to conform to the evidence," the special referee indicated he was willing to grant a motion by Hale to amend his complaint to include "a specific allegation" "to cover interference at the time of disbursement." It is apparent from the other statements the special referee made during the colloquy that he believed such an amendment would conform to the evidence of Finn's "interference at

the time of disbursement." [FN3] Such interference can, as the special referee indicated in both his proposed and final orders, give rise to the imposition of a constructive trust.

> FN3. Moreover, although as Finn argues in his reply brief, the South Carolina Rules of Civil Procedure require the trial judge to "state in the record the reason or reasons for allowing the amendment or evidence," the lack of a formal amendment "does not affect the result of the trial of these issues." Rule 15(b), SCRCP.

[5][6][7][8][9] "A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust." *SSI Med. Servs. v. Cox,* 301 S.C. 493, 500, 392 S.E.2d 789, 793 (1990). It "arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *Id.* at 500, 392 S.E.2d at 793-94. Authority exists to support the proposition that "a claim for imposition of a constructive trust is not an independent cause of action." *Morrison v. Morrison,* 284 Ga. 112, 663 S.E.2d 714, 717 (2008) ; *see also Faulkner v. Faulkner,* 257 S.C. 172, 175-76, 184 S.E.2d 718, 720 (1971) (referring to the doctrine of constructive trust as "a creature of equity jurisprudence, raised without regard to intention to prevent unjust enrichment"). "A constructive trust does not ... arise because of a manifestation of an intention to create it, but it is imposed as a *remedy* to prevent unjust enrichment." *Restatement (First) of Restitution* § 160 cmt. a (1937) (emphasis ***90** added). "A constructive trust is a flexible equitable remedy whose enforcement is subject to the equitable discretion of the trial court." *Wendell Corp. Trustee v. Thurston,* 239 Conn. 109, 680 A.2d 1314, 1320 (1996).

We hold the issue of Hale's right to a constructive trust in his favor was tried with the implied consent of the parties. During the hearing, Hale testified without objection that after he realized he was no longer counsel of record for Village West, he filed a lien to protect his interest in his fee agreement. Moreover, Finn never contended that Hale was not entitled to be paid; rather, his position was that the Mullen Firm was responsible for fulfilling this obligation. Finally, we cannot ignore the duty that Finn, as an officer of the court, must discharge upon receiving funds in which a third person has an interest. *See* Rule 1.15(d), RPC, Rule 407, SCACR (requiring a lawyer to promptly notify any third persons who have an interest in funds that the lawyer receives, to promptly deliver such funds accordingly, and to render a full accounting upon request).

In challenging the special referee's reliance on a constructive trust remedy, Finn has not asserted any substantive reasons as to why Hale would not be entitled to this relief based on this doctrine. In any event, we believe the special referee correctly **determined** the attorney's fees from the Village West lawsuit should have been held in trust pending satisfaction of Hale's claim on them and therefore acted properly in imposing a constructive trust on the portion of the funds that, in his **determination**, would satisfy Hale's right to **quantum meruit** recovery.

Finn has also taken issue with the special referee's award decision to order a quantum meruit award for a legal cause of action. ****58** There is no incongruity, however, in using an equitable measure to determine Hale's recovery on a constructive trust theory. *See Verenes v. Alvanos,* 387 S.C. 11, 17 n. 7, 690 S.E.2d 771, 774 n. 7 (2010) (noting "a constructive trust ... can arise from a breach of a fiduciary duty giving rise to the obligation in equity to make *restitution* ") (emphasis added); *id.* at 15-16, 18, 690 S.E.2d at 772-773, 774 (determining the respondent sought restitution and disgorgement on as remedies for breach of fiduciary duties and therefore rejecting the ***91** appellant's argument that he was entitled to a jury trial because the cause of action he was defending was "primarily a legal action for money damages"). Regardless of whether the award can stand as damages for interference

with contractual relations, the discretion that must be accorded to the special referee compels us to affirm the award as appropriate recompense for misconduct necessitating the imposition of a constructive trust.

B. Punitive damages award

[10][11] Finn also challenges the punitive damages award, arguing (1) he did not engage in the sort of reprehensible conduct that would justify the imposition of punitive damages; and (2) the award was based on his alleged failure to see that a debt was paid to Hale. In response, Hale contends (1) Finn failed to preserve his arguments on this issue for appeal, alleging they were raised neither in the trial court nor in any post-trial motion; (2) Finn's conduct warranted the imposition of punitive damages; and (3) Finn and Hale were fiduciaries, not debtor and creditor.

We agree with Finn that his arguments concerning punitive damages were preserved for appeal. After the special referee sent a draft order to counsel for the parties for review and comment, Finn's attorney specifically objected to the punitive damages, and the reduction of the punitive damages in the final order was tantamount to a ruling on this objection.

[12][13] "Punitive damages are ... by definition 'punishing damages' or 'private fines' levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future." *Patterson v. I.H. Servs.,* 295 S.C. 300, 310, 368 S.E.2d 215, 221 (Ct.App.1988) (citations omitted). "The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that 'the punishment should fit the crime.' " *Mitchell,* 385 S.C. at 584, 686 S.E.2d at 183 (citations omitted). "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C.Code Ann. § 15-33-135 (2005).

Previously, appellate courts in South Carolina have applied an abuse of discretion standard in reviewing a trial court's ***92** post-judgment review of a punitive damages award; however, because of changes in federal case law, the South Carolina Supreme Court has recently adopted a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards. *Mitchell,* 385 S.C. at 583, 686 S.E.2d at 182. Adoption of this heightened standard of review is consistent with our decision in *Longshore v. Saber Security Services,* 365 S.C. 554, 619 S.E.2d 5 (Ct.App.2005), wherein this Court reversed a punitive damages award based on our determination that there was no clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the rights of others. *Id.* at 564-65, 619 S.E.2d at 11

[14] Although we have upheld the award of actual damages, this affirmance is based solely on our determination that the award constituted the enforcement of a constructive trust, an equitable remedy that in this State does not include the imposition of punitive damages. *See Welborn v. Dixon,* 70 S.C. 108, 118, 49 S.E. 232, 235 (1904) (stating " *punitive* damages cannot be awarded on the equity side of the court"); *Harper v. Ethridge,* 290 S.C. 112, 123, 348 S.E.2d 374, 380 (Ct.App.1986) (noting in an action involving both legal and equitable causes of action that "the evidence on punitive damages would be irrelevant to the equitable claims"). In any event, we also agree with Finn that his actions****59** do not call for the payment of exemplary damages.[FN4]

> FN4. None of the issues in Finn's appeal concern the propriety of awarding punitive damages when the corresponding actual damages award are equitable in nature; therefore, we base our reversal of the punitive damages award on the *Mitchell* factors.

The special referee described Finn's apparent disregard of Hale's right to share in the attorney's fees as "willful and reckless"; however, our review of the record in this case indicates otherwise. As the

special referee found, the Mullen Firm was in charge of the actual disbursements, and Finn, at worst, "unilaterally entrust[ed] that responsibility to [the Mullen Firm]." Such behavior, though falling short of what is rightly expected of attorneys when they are handling fee disbursements, does not constitute clear and convincing evidence***93** of misconduct that was willful, wanton, or in reckless disregard of another's rights.

We acknowledge comments were made on Finn's behalf that what happened to Hale was "reprehensible"; however, these unfortunate remarks should not be taken as binding admissions that the alleged reprehensibility of Finn's conduct was of such a degree so as to call for punitive measures. Following the criteria set forth by the South Carolina Supreme Court in *Mitchell* to assess reprehensibility in a dispute concerning punitive damages, we find as follows: (1) the harm resulting from Finn's failure to disclose Hale's interest was economic rather than physical; (2) any breach of duty on Finn's part, therefore, cannot be found to evince an indifference to or a reckless disregard of the health or safety of others; (3) there was no evidence that Hale, aggrieved party in this case, had financial vulnerability; (4) Finn's conduct involved only an isolated incident rather than repeated actions; and (5) the harm to Hale was not the result of intentional malice, trickery, or deceit on Finn's part.[FN5] *See Mitchell,* 385 S.C. at 585, 686 S.E.2d at 184-85. Based on these circumstances, we reverse the punitive damages award ordered by the special referee.

> FN5. As to the fifth factor, we note the special referee himself acknowledged in the appealed order that he was "very impressed with the candor of Mr. Finn's testimony during the reconvened hearing, at which time he explained why he relied upon Mr. Mullen to 'take care of the Hale problem.' " Moreover, apparently based on this testimony, the special referee significantly reduced the amount of punitive damages from what he had proposed in the draft order.

II. Hale's appeal

Hale cross-appeals, contending the calculation of his damages should have been based on partnership law rather than on quantum meruit. We disagree.[FN6]

> FN6. In his proposed draft order, the special referee proposed to base his **determination** of actual damages based on **quantum meruit**. Hale did not object to this proposal, and the provision in the final order regarding actual damages is identical to that in the draft order. It is therefore questionable that the issue of whether the amount of damages should have been based on partnership law was even raised to the special referee. Furthermore, the final order never mentioned that Hale requested damages based on partnership law, much less explicitly ruled on any such request, and Hale did not move to alter or amend the order. Nevertheless, in view of the fact that Hale did not have the opportunity to respond to concerns about error preservation, we address the issue he raised in his cross-appeal on the merits.

***94** In support of his position, Hale cites the South Carolina Uniform Partnership Act, which provides that "the rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: each partner shall ... share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied." S.C.Code Ann. § 33-41-510(1) (2006).

We have upheld the award of actual damages solely on the basis of a constructive trust doctrine. As we previously noted, the trial judge should be given discretion as to how a constructive trust, as an equitable remedy, should be enforced. Considering that such a remedy is fashioned to restore the

aggrieved party to the status quo ante and that the only written agreement regarding the division of attorney's fees was between Hale and the Mullen Firm, we cannot say that an award based on quantum meruit was an abuse of discretion. *See Lollis v. Lollis,* 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) ("A constructive trust results from **60 fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make *restitution.*") (emphasis added).

CONCLUSION

As to Finn's appeal, we reverse the punitive damages award and affirm the award of actual damages on the doctrine of constructive trust. Regarding Hale's cross-appeal, we hold the special referee acted within his discretion in basing actual damages on quantum meruit.

AFFIRMED IN PART, REVERSED IN PART.

SHORT and GEATHERS, JJ., concur.

S.C.App.,2010.
Hale v. Finn
388 S.C. 79, 694 S.E.2d 51

END OF DOCUMENT

C

Court of Appeals of South Carolina.
Wade S. WEATHERFORD, III, Respondent,
v.
William "Buck" PRICE and William Price, Inc. of whom William Price, Inc., is, Appellant.

No. 3180.
Heard Jan. 12, 2000.
Decided June 5, 2000.

Attorney brought action to collect fee for services from client under theories of breach of contract and quantum meruit. Following bench trial, the Circuit Court, Spartanburg County, Larry R. Patterson, J., entered judgment for attorney, and client appealed. The Court of Appeals, Howard, J., held that: (1) circuit court was required to consider circumstances surrounding the professional relationship in **determining** award of **quantum meruit** fees, and (2) attorney who undertook representation of client to recover client's equipment and who obtained that result had no basis for enhancing his attorney fee because outcome was successful.

Reversed and remanded.

West Headnotes

[1] Attorney and Client 45 ⇨142.1

45 Attorney and Client
45IV Compensation
45k142 Contracts for Compensation
45k142.1 k. In General. Most Cited Cases

The burden is upon the attorney to make sure the client understands the fee arrangement. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 1.5(b).

[2] Appeal and Error 30 ⇨419(1)

30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k416 Form and Requisites of Notice
30k419 Descriptions of Judgments or Orders
30k419(1) k. In General. Most Cited Cases

Notice of appeal that referred to order denying defendant's motion for reconsideration of trial court's original order of judgment instead of to original order did not deprive appellate court of jurisdiction over defendant's appeal from original order, where defendant attached a copy of original order to notice of appeal.

[3] Attorney and Client 45 ⇨158

45 Attorney and Client
45IV Compensation
45k157 Actions for Compensation
45k158 k. Nature and Form. Most Cited Cases

An ordinary suit to recover attorney fees, even one based on an implied contract asserting a **quantum meruit measure** of recovery, is an action at law.

[4] Appeal and Error 30 ⇨1010.1(10)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(8) Particular Cases and Questions
30k1010.1(10) k. Contracts in General; Sales; Landlord and Tenant. Most Cited Cases

Appeal from judgment entered in suit to recover attorney fees under implied contract asserting **quantum meruit measure** of recovery is governed

by the any evidence standard of review.

[5] Courts 106 ⚿99(6)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(6) k. Other Particular Matters, Rulings Relating To. Most Cited Cases

Unappealed ruling that there was no express fee contract between attorney and client was law of the case and precluded client from asserting on appeal that trial court erred in denying his motion for directed verdict on question of whether parties entered into a contingency fee contract based solely on successful recovery of lost revenue.

[6] Trial 388 ⚿178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases

In ruling on motions for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions.

[7] Trial 388 ⚿142

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k142 k. Inferences from Evidence. Most Cited Cases

The trial court must deny motions for directed verdict when the evidence yields more than one inference or its inference is in doubt.

[8] Attorney and Client 45 ⚿130

45 Attorney and Client
45IV Compensation
45k130 k. Right to Compensation in General. Most Cited Cases

In attorney's action to recover quantum meruit attorney fees from client, trial court was required to consider circumstances surrounding the professional relationship in addition to factors of nature, extent, and difficulty of case, time and labor devoted to case, professional standing of counsel, contingency of compensation, fee customarily charged in the locality for similar services, and beneficial results obtained. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 1.5(b).

[9] Attorney and Client 45 ⚿140

45 Attorney and Client
45IV Compensation
45k139 Value of Services
45k140 k. In General. Most Cited Cases

All of the circumstances surrounding the attorney-client relationship must be considered when determining a reasonable fee to be paid by a client, and the failure to consider these circumstances is error. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 1.5(b).

[10] Attorney and Client 45 ⚿63

45 Attorney and Client
45II Retainer and Authority
45k63 k. The Relation in General. Most Cited Cases

An attorney/client relationship is by nature a fiduciary one.

[11] Attorney and Client 45 ⚿140

45 Attorney and Client
45IV Compensation
45k139 Value of Services
45k140 k. In General. Most Cited Cases

While the time reasonably devoted to the representation and a reasonable hourly rate are factors to be considered in **determining** a proper **quantum**

meruit award, the court must consider all relevant factors surrounding the professional relationship to ensure that the award is fair to both the attorney and client. Appellate Court Rule 407, Rules of Prof.Conduct, Rule 1.5(b).

[12] Attorney and Client 45 ⟹141

45 Attorney and Client
45IV Compensation
45k139 Value of Services
45k141 k. Specific Services and Particular Cases. Most Cited Cases

Attorney who undertook representation of client to recover client's equipment and who obtained that result had no basis for enhancing his attorney fee because outcome was successful.

****311*575** Paul R. Hibbard, of Johnson, Smith, Hibbard & Wildman Law Firm, of Spartanburg, for appellant.

H. Fulton Ross, Jr., of Gaffney, for respondent.

HOWARD, Judge:

This is an action by Wade Weatherford (Attorney) to collect a fee arising from representation of William Price, Inc. (Client).[FN1] The action was tried non-jury, and the circuit court **determined** a fee of $32,000 was earned by Attorney, granting judgment for that amount on the theory of **quantum meruit**. Client appeals. We reverse and remand.

FN1. Attorney sought judgment against William Price as well as against William Price, Inc. However, the trial court concluded William Price was not individually liable, and that finding is not appealed. For ease of understanding, we refer to William Price and William Price, Inc. interchangeably as "Client" throughout this opinion.

****312 FACTS/PROCEDURAL HISTORY**

Attorney and Client were neighbors, but had no prior professional relationship. Client invented a generator-driven "hydro cooler" to provide refrigeration for crops as they were harvested in the field. Client leased this equipment to Vickery Farms ("Vickery") for use in a Jamaican farming operation. Vickery did not make the lease payments, so Client contacted Attorney to recover the equipment and the amount owed by Vickery. Attorney brought an action in federal court to recover the equipment and amounts due under the lease. Attorney claimed he needed assistance because of the work load in federal court proceedings. For this reason, Client agreed to retain associate counsel from another firm to assist Attorney. Client paid associate counsel an hourly fee which is not involved in this dispute.

According to Attorney, the parties initially agreed to a flat fee of $10,000 for Attorney's work. Client disputed this, claiming a contingency fee arrangement of 25% of the overdue lease payments, which would approximate $10,000 only if ***576** Attorney successfully recovered the $40,000 in unpaid lease revenue.

[1] Vickery contended the equipment was illegally imported into Jamaica, precluding exportation to the United States. Attorney believed this defense dramatically expanded the scope of the legal work. According to Attorney, he discussed this with Client on numerous occasions, and Client repeatedly assured him that he would be reasonably compensated for the extra work. Under Attorney's view, no definite compensation arrangement was discussed, and no additional fee was agreed upon between the parties. Unfortunately, there was no written fee agreement.[FN2]

FN2. The burden is upon the attorney to make sure the client understands the fee arrangement. *See Royal Crown Bottling Co. v. Chandler,* 226 S.C. 94, 83 S.E.2d 745 (1954); *see also Coley v. Coley,* 94 S.C. 383, 77 S.E. 49 (1913); Rule 1.5(b), Rules of Professional Conduct, Rule 407, SCACR ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to

the client, preferably in writing, before or within a reasonable time after commencing the representation.").

Eventually Attorney, Attorney's wife, and Client spent a week in Jamaica. The expenses for the trip were paid by Client. At the conclusion of the trip, the leased equipment was returned to Client. Attorney estimated the value of the equipment to be $125,000. Client disputes this, claiming the equipment was severely damaged in Jamaica. Attorney prepared a bill which was introduced into evidence in the federal suit reflecting a fee for the Jamaica trip of $5,000, based upon 40 hours billed at $125 per hour.

Attorney and associated counsel tried the federal case for one week, resulting in a jury verdict of $40,000. The verdict was set aside by the trial judge. During appeal, the case was settled for $12,000.[FN3]

FN3. The amount of the settlement is not clear from this record. In the brief, Client stated that the amount of the settlement was $12,000, which would provide a 25% contingency fee of $3,000. However, Client argued in the brief that Attorney should be limited to a contingency fee of $1,000. Ascertaining the correct amount is not necessary in view of our resolution of the issues.

About one year later Attorney sent a letter to Client asking to be paid. He requested payment of a "reasonable fee" ***577** which he calculated on the basis of 1/3 of his valuation of the recovered equipment. When Client refused to pay, Attorney brought this action for breach of contract.

At trial, Attorney sought compensation on the basis of contract and, by amendment at the conclusion of the testimony, on the theory of quantum meruit. Attorney testified he did not maintain time records for his work because he had never worked on an hourly basis, and did not do so in this case. The only testimony as to the amount of time expended on the case, other than the description of the work and the length of the federal trial, was Attorney's estimate of 500 hours. He explained that if he had kept track of his time, the fee would far surpass 1/3 of the value of the equipment ($41,666).

****313** The trial court held there was no express contract between the parties. The court awarded a fee in the amount of $32,000 based on the theory of quantum meruit.

ISSUES PRESENTED

DOES THIS COURT HAVE SUBJECT MATTER JURISDICTION?

DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO DIRECT A VERDICT?

DID THE TRIAL COURT COMMIT AN ERROR OF LAW BY FAILING TO CONSIDER THE NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES?

LAW/ANALYSIS

I. SUBJECT MATTER JURISDICTION

[2] We first address the question of subject matter jurisdiction. Attorney argues Client failed to appeal the final order because the Notice of Appeal referred to the order denying the motion for reconsideration.

This Court has previously held that a mere clerical error in a Notice of Appeal does not warrant dismissal of the appeal. *See Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct.App.1995). In *Charleston Lumber Co.*, the court rejected the respondent's attempt to have the ***578** appeal dismissed on jurisdictional grounds when the appellant neglected to appeal one of a series of cases tried together. As in that case, Attorney demonstrates no prejudice as a result of the omission. Though Client did not "technically" appeal from the trial court's original order by referring to it in the Notice of Appeal, the Client did attach a

copy of the order to the Notice. Under these circumstances, we believe Client's omission is of a clerical nature only and this Court has jurisdiction to hear the appeal.

II. SCOPE OF REVIEW

[3][4] An ordinary suit to recover attorney's fees, even one based on an implied contract asserting a ***quantum meruit*** **measure** of recovery, is an action at law. *Lester v. Dawson,* 327 S.C. 263, 268, 491 S.E.2d 240, 242 (1997) ("An action by an attorney for compensation, whether on a written contingency agreement *or on a quasi-contractual obligation to pay the reasonable value of services* prior to its breach, sounds in contract. The proper form of action by which to enforce payment, generally, is by an action at law on the contract....") (emphasis added) (citation omitted); *see also Singleton v. Collins,* 251 S.C. 208, 161 S.E.2d 246 (1968) (wherein action to recover attorney's fees on theory of implied contract was at law). This appeal, therefore, is governed by the "any evidence" standard of review. *See American Fed. Bank, FSB v. Number One Main Joint Venture,* 321 S.C. 169, 173, 467 S.E.2d 439, 441 (1996) (in an appeal of a non-jury action at law, the trial court's factual findings will not be disturbed "unless found to be without evidence which reasonably supports the judge's findings") (citation omitted); *Singleton,* 251 S.C. at 211, 161 S.E.2d at 247 (in attorney's claim against client for professional services rendered, "no appeal lies therefrom if the findings of fact are supported by any competent evidence").

III. DISCUSSION

DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO DIRECT A VERDICT?

[5] Client asserts the trial court should have directed a verdict. We first note the trial court found that there was *no* ***579** express contract between the parties. There is no appeal from this finding, and it is, therefore, the law of this case. *See Brading v. County of Georgetown,* 327 S.C. 107, 490 S.E.2d 4 (1997). Having found no express contract, the court concluded attorney was entitled to recover the reasonable value of the services rendered, a proposition which finds ample support in our case law. *See Singleton v. Collins,* 251 S.C. 208, 161 S.E.2d 246 (1968).

[6][7] In ruling on motions for directed verdict, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the ****314** motions." *Creech v. S.C. Wildlife and Marine Resources Dep't,* 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997). The trial court must deny the motions when "the evidence yields more than one inference or its inference is in doubt." *Id.* This Court will reverse the trial court only when there is no evidence to support the ruling below. *Id.*

We conclude Client would only have been entitled to a directed verdict if the evidence, and all of the inferences which could be drawn from it, point to the singular position advanced by the Client; that is, that the parties entered into a 25% contingency fee based solely on the successful recovery of lost revenues. However, the unappealed ruling that there was no contract is the law of this case. Therefore, this argument is without merit.

DID THE TRIAL COURT COMMIT AN ERROR OF LAW BY FAILING TO CONSIDER THE NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES?

[8] Client next argues the trial judge declined to consider the ethical and public policy considerations implicated by the attorney-client relationship. Client urges this court to hold that Rule 1.5, Rules of Professional Conduct (RPC), Rule 407, SCACR, proclaims the public policy of this State with regard to attorney fees in an attorney-client relationship, and a failure to consider the criteria set forth in RPC Rule 1.5 in determining a reasonable fee constituted an error of law.[FN4]

FN4. Rule 1.5, RPC, reads in applicable part as follows:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (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 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; and
>
> (8) Whether the fee is fixed or contingent.
>
> Rule 1.5(a), RPC, Rule 407, SCACR.

***580** In determining the fee, the trial court specifically enumerated the six factors set forth in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). In that case, our supreme court ruled that a trial court should consider the following factors when determining an award of attorney fees:

> 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained.

Id. at 494, 427 S.E.2d at 660. Attorney maintains that once the court determined there was no express contract, the court correctly based its determination of the fee on the factors set out in *Blumberg*.

The question of what factors should be considered when determining a reasonable attorney fee in an attorney/client relationship has not been definitively addressed in South Carolina. The interrelationship between the ethical rules governing the conduct of attorneys and the substantive law is a subject which has historically created difficulty for courts. Client argues that this court should enforce the Rules of Professional Conduct as the public policy of this State, ruling that a fee agreement which violates the Rules is unenforceable. There are states which have reached this conclusion. *See, e.g., Swafford v. Harris,* 967 S.W.2d 319 (Tenn.1998); *Alexander v. Inman,* 903 S.W.2d 686 (Tenn.Ct.App.1995).

***581** However, in the recent case of *Smith v. Haynsworth, Marion, McKay & Geurard,* 322 S.C. 433, 472 S.E.2d 612 (1996), our ****315** supreme court chose not to adopt our Rules of Professional Conduct as substantive law in the setting of an action for legal malpractice. The court determined the RPC may be relevant and admissible evidence in assessing the legal duty of an attorney in a malpractice action, provided the specific rule was intended to protect a person in the plaintiff's position or is addressed to the particular harm. However, the Court did not say that a violation of the Rules is negligence per se, or evidence of recklessness. We, therefore, conclude that our supreme court has not ruled that a fee agreement which violates Rule 1.5, RPC, is unenforceable in all circumstances as against public policy.

This does not mean, however, that the Rules of Professional Conduct have no bearing on the issue. The *Blumberg* factors were established by our supreme court to determine the fee to be awarded against an adverse party when authorized by contract or by statute. *Blumberg,* at 493, 427 S.E.2d at

660 (citing *Collins v. Collins,* 239 S.C. 170, 122 S.E.2d 1 (1961) (involved an award of attorney fees to the wife against the husband in a divorce case)). Not all *Blumberg* factors are relevant in determining a reasonable fee to be paid by a client. As our supreme court stated in *Glasscock v. Glasscock,* 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), the factor "contingency of compensation" does not refer to the nature of the fee agreement. Rather, "the contingency to be considered is whether the party on whose behalf the services were rendered will be able to pay the attorney's fee if an award is not made." *Id.* This consideration obviously contemplates an award against another party, and is not pertinent to the assessment of a reasonable fee in an attorney-client setting.

[9] More importantly, there are factors which we conclude must be considered in assessing a reasonable fee in an attorney/client setting which are not included in a *Blumberg* analysis. Specifically, as Client asserts, the *Blumberg* factors do not take into account the special nature of the attorney-client relationship. We conclude all of the circumstances surrounding the attorney-client relationship must be considered when determining a reasonable fee to be paid by a client. *See* ***582***Royal Crown Bottling Co. v. Chandler,* 226 S.C. 94, 83 S.E.2d 745 (1954). The failure to consider these circumstances is error.

[10] An attorney/client relationship is by nature a fiduciary one. *Royal Crown Bottling Co.,* at 105-106, 83 S.E.2d at 751; *Hotz v. Minyard,* 304 S.C. 225, 403 S.E.2d 634 (1991); *In re Green,* 291 S.C. 523, 354 S.E.2d 557 (1987). The relationship of an attorney with his or her client is "highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith." 7 AmJur 2d Attorneys at Law § 137 (1997). Historically, fee arrangements between an attorney and client are "examined with utmost care by the courts in order to avoid any improper advantage to the attorney." *Royal Crown Bottling Co.,* 226 S.C. at 105, 83 S.E.2d at 750; *Alexander v. Inman,* 903 S.W.2d 686 (Tenn.Ct.App.1995). As the Florida Supreme Court stated:

> Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Baruch v. Giblin, 122 Fla. 59, 164 So. 831, 833 (1935).

Rule 1.5, RPC, provides guidance to the bar in determining a reasonable fee, and provides a starting point in this analysis. *See Singleton v. Collins,* 251 S.C. 208, 161 S.E.2d 246 (1968) (noting with approval that the lower court, in arriving at the amount of the fee, considered the evidence as to the ****316*** time actually consumed, the services performed and the nature thereof in the light of Canon 12, Supreme Court Rule 33); *Glasscock,* 304 S.C. at 160, 403 S.E.2d at 315 (holding a contingent fee in a domestic case based on the amount of alimony, support or property settlement awarded was unenforceable because it violated Rule 407(1.5)(d)(1), SCACR); *Cf. Smith v. Haynsworth, Marion, McKay & Geurard,* 322 S.C. 433, 472 S.E.2d 612 (1996) (holding the RPC may be relevant ***583*** and admissible in a legal malpractice action in assessing the legal duty of an attorney, provided the Bar Rule involved was intended to protect a person in the plaintiff's position or be addressed to the particular harm). The criteria listed in Rule 1.5 are in accord with the factors overwhelmingly accepted as appropriate considerations in the vast majority of states. *See* 7A C.J.S. Attorney and Client, § 325 (1980).

[11] Significantly, Rule 1.5(a)(6) lists "the

nature and length of the professional relationship with the client" as a factor to be considered. Rule 1.5(a)(6), Rule 407, SCACR. In an analysis similar to that involved in this case, the Florida Supreme Court observed: "Unlike an award of attorney's fees to a prevailing party, a quantum meruit award must take into account the actual value of the services to the client." *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz,* 652 So.2d 366, 369 (Fla.1995). *Cf. Stringer Oil Co., Inc. v. Bobo,* 320 S.C. 369, 465 S.E.2d 366 (Ct.App.1995); *Galanis v. Lyons & Truitt,* 715 N.E.2d 858 (Ind.1999). "Thus, while the time reasonably devoted to the representation and a reasonable hourly rate are factors to be considered in **determining** a proper **quantum meruit** award, the court must consider all relevant factors surrounding the professional relationship to ensure that the award is fair to both the attorney and client." *Searcy,* at 369.

For the foregoing reasons, we conclude that the award of a fee based solely upon the *Blumberg* factors, without regard to the circumstances surrounding the professional relationship, was error requiring reversal.

[12] Client raises one further argument which we address because it may arise again upon remand. Attorney requested a fee based on his success in securing the return of the equipment. Attorney claims that calculating the reasonable fee on the basis of 1/3 of the value of the returned equipment provides a proper method for weighing the amount in controversy and the results obtained, and is not a contingency fee because it does not depend upon the outcome. Client asserts that is improper because it is a contingent fee.[FN5]

> FN5. Courts are divided on this point. In *Glasscock v. Glasscock,* 304 S.C. 158, 403 S.E.2d 313 (1991) our supreme court rejected the argument made by Attorney, although the ruling is based on the specific wording of Rule 1.5, which precludes a fee contingent upon *amount* or outcome in a domestic case. *See also Matter of Estate of Jones,* 329 S.C. 97, 103, 495 S.E.2d 450, 453 (1998) ("A contingent fee is one which is made to depend upon the success or failure in the effort to enforce a supposed right, whether doubtful or not.") (citation omitted); *cf. Eckell v. Wilson,* 409 Pa.Super. 132, 597 A.2d 696, 700-701 (1991) *appeal denied,* 530 Pa. 643, 607 A.2d 253 (1992) ("In this situation, the fee is not truly contingent on the outcome of the case because the attorneys are paid regardless of the outcome of the litigation. In essence, they are exacting a fee based on their performance during the course of the litigation. A contingency fee arrangement carries a risk that an attorney will not be paid if the outcome of the litigation is unsuccessful. No such risk is found here."); *Muldoon v. West End Chevrolet, Inc.,* 338 Mass. 91, 153 N.E.2d 887 (1958); *In re Marriage of Malec,* 205 Ill.App.3d 273, 150 Ill.Dec. 207, 562 N.E.2d 1010 (1990) *appeal denied,* 136 Ill.2d 545, 153 Ill.Dec. 375, 567 N.E.2d 333 (1991); *Head v. Head,* 66 Md.App. 655, 505 A.2d 868 (1986); *but cf. Salerno v. Salerno,* 241 N.J.Super. 536, 575 A.2d 532 (1990).

*584 It is unnecessary to resolve this issue. Attorney undertook representation to recover the equipment. He obtained that result. There is no basis for enhancing the fee merely because the outcome was successful. *See* 7A C.J.S. Attorney & Client, § 324 (1980) ("The measure of compensation is the reasonable value of the services rendered in **317 themselves, and not the benefits to the client... although... the benefits or results secured may be considered as bearing on the efficiency of the services and thus on their reasonable value."). Consequently, a fee based upon the formula proposed by Attorney is improper under these facts.[FN6]

> FN6. Our ruling is based on the facts of this case, and is not intended to encompass situations in which courts have historically

employed a multiplier, often referred to as the "Lodestar" approach. Typically, these situations involve an attorney working on a contingency fee arrangement who is terminated without fault prior to recovery, or in a setting in which fees are assessed against the adversary. *See generally Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz,* 652 So.2d 366, 369 (Fla.1995); *Alexander S. ex rel. Bowers v. Boyd,* 929 F.Supp. 925 (D.S.C.1995).

REVERSED AND REMANDED.

HEARN, C.J., and STILWELL, J., concur.

S.C.App.,2000.
Weatherford v. Price
340 S.C. 572, 532 S.E.2d 310

END OF DOCUMENT

Ethics Advisory Opinion 81-01
Assuming a client is agreeable, a lawyer may (1) charge a monthly service charge on the unpaid balance of legal fees owed by a client, or (2) may take an interest-bearing note in payment of legal fees.

Questions:
The questions presented in these requests are very similar in nature.

In one, the question relates to the propriety of a lawyer charging a monthly service charge on the unpaid balance of legal fees owed by a client.

The other poses a question as to whether there are any ethical considerations which would prevent a lawyer from taking an interest bearing note in payment of legal fees.

Opinion:
The Committee has met and considered these issues and is of the opinion that both procedures would be permissible under the Code of Professional Responsibility. EC 2-17, EC 2-18, and EC 2-19 deal generally with the questions of establishing a proper and reasonable fee for services rendered and the need to reach an early agreement with a client as to the basis of a fee to be charged. Assuming that the client is agreeable to the payment of a service charge or interest on a note, these procedures would appear to be permissible.

The use of a note, to include interest, for the payment of legal fees would appear to be perfectly permissible under the Code of Professional Responsibility.

The use of credit cards for payment of fees has been approved by Formal Opinion 338 of the Committee on Ethic and Professional Responsibility of the American Bar Association and plans for financing fees through arrangements with banks have been approved by Formal Opinion 320, which includes approval for the use of an interest bearing note.

In formal (sic) Opinion 338 the following statement is made: A necessary corollary to the use of credit cards is the charging of interest on delinquent accounts. It is the Committee's opinion that it is proper to use a credit card system which involves the charging of interest on delinquent accounts. It is also the Committee's opinion that a lawyer can charge his client interest providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time.

Return

Ethics Advisory Opinion 96-06

Law Firm has instituted a policy allowing its clients to use credit cards for payment of professional fees. Law Firm is also considering a policy that would allow its clients to pre-authorize charges on their credit cards. This procedure would consist of the client signing a pre-authorization form giving Law Firm authority to charge the client's card directly. The client would set the amount of charges authorized to be made on a monthly basis or to pay the balance of the client's professional fees. In no event would Law Firm be able to charge amounts in excess of the amount authorized by the client. It is anticipated that the pre-authorization form would be used in connection with fixed fee arrangements, retainer arrangements and installment payment plans. The pre-authorization would be valid for no more that one year and could be canceled by the client at any time through written notice to the firm.

Question:

Is the credit card pre-authorization policy considered by Law Firm prohibited by the Rules of Professional Conduct?

Summary:

Law Firm's credit card pre-authorization policy is not prohibited by the Rules of Professional Conduct.

Opinion:

This Committee has previously ruled that clients may use credit cards when paying fees to lawyers. Advisory Op. 81-1. Therefore, based upon the facts presented, it is not inappropriate for the client and lawyer to enter into an agreement whereby a pre-authorized amount may be charged to a client's credit card for services. Such a pre-authorized agreement is subject to the requirements of Rule 1.5(b): "When a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation;" and of Rule 1.5(a): "A lawyer's fee shall be reasonable." Since clients will incur interest on amounts charged by the Law Firm, care should be taken to allow clients an opportunity to review Law Firm's bill for services before it is charged to the credit card.

South Carolina Bar Ethics Advisory Opinion 98-08

Attorney plans to obtain the ability to accept credit cards so clients may charge bills and retainer fees to their credit card. Under Attorney's agreement with the credit card company, the company keeps 3.75% of the amount charged as its service fee.

QUESTION:
1. May Attorney charge back the 3.75% administrative fee charged by the credit card company to her clients as a cost inherent to representation or must Attorney bear the cost of the service fee?
2. Will the answer to the above question be affected if the retainer fee is nonrefundable?

SUMMARY:
1. Attorney may charge the client any amount for a fee or retainer that is objectively reasonable.

A. Attorney may charge a client's credit card for fees and retainers so long as Attorney notifies Client of these charges before they are billed to the credit card.
B. The reasonability factors set forth in RPC 1.5 (a) do not preclude charging actual credit card service fees to Client so long as there is full and prior disclosure of all charges.
C. Where Attorney plans to charge Client's credit card for fees or a retainer, she should first provide Client with the opportunity of payment by other methods.
2. The answer to the above is not affected where the retainer fee is nonrefundable.

DISCUSSION:
In advisory opinion 96-06, this committee held that an attorney may charge a client's credit card for fees and retainers so long as the attorney notifies the client of charges before they are billed to the credit card, and offers the client an opportunity to question any errors. Attorney must comply with RPC 1.5 regarding fees. So long as the fee is reasonable under the factors set forth in 1.5(a), then Rule 1.5 (b) implies that the only other requirement pertinent in this case is that the fee be clearly communicated to the client. The reasonableness factors outlined in RPC 1.5(a) do not appear to preclude charging back credit card service fees to the client. This is particularly true where the attorney gives a client the option of payment either by credit card, with an additional service fee, or by cash. The comments to RPC 1.5 state that "...where there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications." This requirement may be applied by analogy to the situation of payment by credit card. Where an attorney plans to charge a client's credit card for fees or retainer, she should first provide the client with the opportunity of payment by other methods. Where the retainer is refundable and amounts to more than the charges to the client, the attorney is not required to refund the service fee already paid to the credit card so long as the original amount set for the retainer was reasonable under RPC 1.5.

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Ethics Advisory Opinion 02-08. Client, in Maryland hospital, communicates by telephone she desires to retain Lawyer A's services for car wreck, which occurred in Maryland. Lawyer A travels from South Carolina to Maryland, consults with Client who executes a contingency retainer. Lawyer A takes photos of Client and Client's car while in Maryland. Time spent on the case in Maryland consumed about seven hours. The trip from South Carolina to Maryland took approximately eight and one-half hours, as did the trip back. After returning, Lawyer A did an additional eight hours of work on the file over a one and one-half to two months' period. In total, Lawyer A spent thirty-two hours of work on the case.

Client then retained new counsel, Lawyer B, and instructed Lawyer A to discontinue services and to turn file over to Lawyer B. Lawyer A sent a letter to Lawyer B indicating that he would gladly release the file upon receipt of a letter of protection for statement of expenses incurred and fee (32 hours times an hourly rate fee of $100). Lawyer B and Client refuse to provide letter of protection.

Questions:
1. May Lawyer A withhold Client's file until Client or her new lawyer provides a letter of protection of expenses and fee?

2. May Lawyer A charge Client on an hourly basis for time spent on case with contingency fee agreement? If so, may Lawyer A include time he spent for travel to see Client in another state if the trip was made at Client's request?

Summary:
1. Lawyer A should not withhold Client's file but should promptly deliver the file to Client as requested.

2. Lawyer A should not charge Client on an hourly basis for time spent on the case, unless the contingency fee agreement to which Client agreed expressly provided for such an arrangement.

Opinion:
Under Rule 1.16(d) of the Rules of Professional Conduct, when a lawyer is dismissed or withdraws from the representation of a client, he or she "shall take steps to the extent reasonably practicable to a protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ." Id. The rule further allows an attorney to "retain papers relating to the client to the extent permitted by law." Id

Although the South Carolina Supreme Court has recognized that "an attorney's assertion of a retaining lien is not a per se" ethical violation, the attorney must still "consider whether the assertion of a retaining lien in a particular case would be unethical." In re an Anonymous Member of the South Carolina Bar, 287 S.C. 250, 252, 335 S.E.2d 803, 804 (1985) (Anonymous). The Court "warned that the attorney bears the burden of showing the circumstances justify assertion of a lien because 'the client is financially able but deliberately refuses to pay a fee that he has clearly agreed upon and is due.'" Matter of Tillman, 319 S.C. 461, 464, 462 S.E.2d 283, 285 (1995) (quoting Anonymous at 253, 335 S.E.2d at 805) (emphasis added in Tillman).

In his Ethics Watch column, John Freeman warns, "Though the ethics rule recognizes that the layer may have a right to withhold documents in order to assert a retaining lien, good lawyers understand that retaining liens are for the birds. The value of the lien to the lawyer is in direct proportion to the misery visited on the client, revealing a patent conflict of interest. Assertion of the lien invites a grievance." Turning Over "The File," S.C. LAW., July-Aug. 1998 at 10.

There are several factors an attorney should consider if he or she contemplates retaining a client's file and asserting a retaining lien:

(1) the client's financial situation;

(2) the client's sophistication;

(3) the reasonableness of the fee;

(4) the client's clear understanding and agreement to pay the amount of the fee owed;

(5) whether imposition of the lien would prejudice important rights of the client or other parties;

(6) whether failure to impose the lien would result in fraud or gross imposition by the client; and

(7) whether there are any other less stringent means to resolve the dispute or secure the fees owed.

Tillman at 464, 462 S.E.2d at 285; Anonymous at 252, S.E.2d at 805.

Based upon the facts as presented, none of the factors cited above appear to favor Lawyer A's retaining Client's file; several factors oppose such an action. Client intends to file an action or claim for the injuries that she incurred in the accident. Failure to provide the information contained in Client's file could very well prejudice her right in this action.

Moreover, in the case at hand, Lawyer A had a contingency fee agreement with Client. There is no information presented that this agreement allowed Lawyer A to charge an hourly rate for any time spent on the case. There is also no information presented that "the client is financially able but deliberately refuses to pay a fee that [s]he has clearly agreed upon and is due." Id. See also Matter of White, 328 S.C. 88, 92-93, 492 S.E.2d 82, 84-85 (1997) (Court held that retaining a

client's file in order to have "a general assurance that whatever interest he may have would be protected" was an improper basis upon which to assert a lien where the record was clear that it "was not a situation where the client knew how much was owed and deliberately refused to pay it.") As such, Lawyer A should not withhold Client's file until or unless Client provides him with a letter of protection for his fees; rather, Lawyer A should promptly deliver the file to Client as requested.

With some exceptions inapplicable to the situation at hand, an attorney's fee can be based either upon an hourly or contingency fee basis. Rule 1.5(b) provides that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing before or within a reasonable time after commencing the representation." In the case at hand, Lawyer A did enter into a fee agreement with Client, a contingency fee agreement. There is nothing in the facts presented to show that the fee agreement included a provision to allow Lawyer A to charge Client on an hourly basis for time spent on the case. As such, Lawyer A cannot charge Client by the hour for the time he invested in the case or withhold Client's file if Client refuses to pay.

While the Committee does not answer questions of substantive law, it notes for Lawyer A's benefit that depending on the language of the agreement he has with Client and the ultimate outcome of Client personal injury case, he may, however, be able to recover in quantum meruit for the reasonable value of the services that he rendered to Client.

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Ethics Advisory Opinion 03-05

Rule 1.16(a) provides that a lawyer shall withdraw from the representation of a client if the lawyer is discharged. The rule is unambiguous, and the client's right to terminate the representation is absolute absent a Court order to the contrary.Rule 1.16(d) provides that upon termination of representation, a lawyer may retain a reasonable non-refundable retainer. In S.C. Bar Ethics Advisory Op. #90-13, we stated that an inference can be drawn from 1.16(d) that a lawyer is entitled to receive the fee that he has earned upon termination of the representation. Based on several South Carolina Supreme Court and appellate court rulings, it would appear that an attorney acting in good faith should be entitled to recover a reasonable fee up to the time of termination.4

Rule 1.5(e) provides: "A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable."

Under the facts presented, it would appear that the requirements of 1.5(e)(2) have been met, and nothing in the facts suggest that the requirement of 1.5(e)(3) was not also met. Thus, the 20%/80% split agreed to between Lawyers A and B must either be in proportion to the services performed OR by written agreement with the client. Absent the client's consent, the only permissible fee split must be in proportion to the services performed by each lawyer.The issue is whether supplying Client with a copy of a letter from Lawyer B to Lawyer A confirming joint representation and the fee splitting arrangement to which Client does not object coupled with a retainer agreement between Client and Lawyer B constitutes a "written agreement with the client in which each lawyer assumes joint responsibility for the representation."

While a copy of a fee-splitting agreement may have been sent to Client, it does not appear to reach the level of the kind of agreement with the client anticipated by 1.5(e)(1). In any event, it would appear the Client does not admit to consent by virtue of his objection to any payment of fees to Lawyer A.

In S.C. Ethics Advisory Op. #98-32a, the issue was solely whether a lawyer can ethically share an earned fee with another lawyer in a manner disproportionate to the services performed without having advised client of the agreement. We answered that, where a lawyer has failed to do so, lawyer is best advised to retain the disputed funds in the lawyer's trust account until any dispute between the client and the other lawyer is resolved. We believe the facts in this case

warrant similar treatment.See Rule 1.15(c) and S.C. Bar Ethics Adv.Op. #02-07 (lawyer who is holding unearned fees received from brother of client should not unilaterally attempt to resolve issue of who is entitled to fees but should hold fees in trust until the parties reach agreement to resolve the dispute or a court determines their rights).

Ethics Advisory Opinions
UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Ethics Advisory Opinion 05-07
RULE 1.15(c)
Date
March 18, 2005
Facts
Attorney is retained to represent Client in a divorce action that has been pending for some time. Client agreed to pay Counsel an hourly rate for all work done as well as to pay all costs incurred. Such agreement does not specifically include a provision to honor any assignments for costs. Upon the initial scheduling of a final contested hearing, Client insisted that Counsel subpoena numerous witnesses as to the issues raised, including fault basis for divorce, equitable distribution, alimony or support, debt allocation, and restraining order. Counsel contacted a professional process server to serve the subpoenas.
After the initially scheduled hearing was continued and rescheduled, Client insisted that new and additional subpoenas be served. Counsel contacted the same process server, who served many of the subpoenas, but was unable to serve several due to bad addresses and information provided by Client.
At the end of the contested hearing, Counsel submitted a fee affidavit requesting an award of attorney's fees and costs, including all of the costs for the service, and non-service, of the subpoenas by process server.
The Court issued an Order awarding all appropriate relief, including the payment of twelve months of support to Client, to be paid through the Office of Counsel (because Client refused to provide an address, or mailing address due to her fear of her spouse), as well as a specified amount of attorneys fees and costs, which is an amount less than the total amount incurred. Counsel advised Client that the remaining balance of fees, and all costs, specifically including the costs of the process server, must be paid and while Counsel was willing to work with Client as to the attorney's fees, the process service costs needed to be paid immediately from the funds due to her for alimony or support. Client refused to pay such from the initial eight or so monthly payments forwarded through Counsel's office.
Process Server contacts Counsel and demands payment of the balance. Counsel finally insists that the process server fees be paid from the last two (2) months payments of alimony/support and advises Client that he will have to assert a lien on such two payments to pay the balance due to process server, although he will continue to work with Client as to the payment of the remaining attorneys fees. Client refuses to endorse the final two alimony or support payment checks, which are payable to Client, and Counsel refuses to deliver them to Client, maintaining such checks securely, unendorsed, and citing Rule 1.15(c):
(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until

there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Questions

Can Counsel assert a lien on the last two monthly alimony/support payments for the purpose of: (A) paying the legitimate costs of service of subpoenas to process server; or (B) reimbursing himself the costs of service to process server if he pays same directly?

Or should Counsel forward the checks on to Client and attempt to collect same in another fashion?

Summary

Counsel may assert an equitable charging lien for the purpose of retaining an amount sufficient to pay the outstanding costs, pending resolution of the dispute over whether the client is responsible for such costs; however, assertion of a charging lien under these circumstances is fraught with risks.

Whether counsel should pay the costs himself or require the process server to seek payment from the judgment proceeds depends upon the contractual arrangement with the process server and is therefore outside the scope of this opinion.

Opinion

The language of Rule 1.15(c) excerpted above applies to property in a lawyer's possession in which "both the lawyer and another person claim interests." These facts do not reflect that the agreement between client and counsel expressly provided that amounts owed to counsel would be deducted from any amounts recovered in the underlying case. Accordingly, there is reason to doubt that counsel "claims an interest" in the property as a purely contractual matter. Although he may have a claim against the client, he does not appear to have a contractual interest in these particular funds.

However, it appears that counsel may claim an interest as an equitable matter. While this Committee does not render legal opinions, we observe that both South Carolina courts and this Committee have acknowledged the availability of charging liens in analogous circumstances. In Eleazer v. Hardaway Concrete Co., Inc., 281 S.C. 344, 348-49, 315 S.E.2d 174, 177-78 (Ct. App. 1984) the Court of Appeals, citing numerous prior cases, noted the existence of an "attorney's charging lien" whereby an attorney has an equitable right to have costs and disbursements in connection with a matter paid from any recovery in such matter. Likewise, we recognized in Ethics Advisory Opinion 88-07 that a charging lien permits an attorney to recover from a judgment award the costs and disbursements in connection with the case. In Lester v. Dawson, 327 S.C. 263, 270, 491 S.E.2d 240, 243 (1997), the Supreme Court endorsed the holding in Eleazer, pointing out that while a contractual arrangement is necessary for the assertion of a lien by a lawyer seeking fees, a charging lien may be asserted for the recovery of costs regardless of whether counsel has a contractual basis for doing so.

Against this backdrop, an equitable charging lien can be asserted regardless of whether the agreement between counsel and client specifically contemplated the payment of expenses from the judgment proceeds. The factual background provided with this inquiry establishes that the costs of the process server were incurred with the client's full knowledge, and in some cases at the client's insistence. While the process server was not successful with respect to each target of service, it does not appear that the client had any reason to expect that costs would be limited to successful attempts. We therefore assume, based on the factual background provided, that the costs of service were known and approved by the client and that counsel has no basis for

believing that such costs are unreasonable or excessive. As such, it is the opinion of this Committee that Rule 1.15(c) would permit counsel to assert a charging lien to the extent necessary to cover the costs of the process server.

However, the existence of a charging lien "does not assure that its enforcement by a lawyer would be ethical." Robert M. Wilcox and Nathan M. Crystal, Annotated South Carolina Rules of Professional Conduct 92 (S.C. Bar-CLE Div. 2002). Two important caveats apply to counsel's exercise of a charging lien. First, counsel may not simply claim the funds owed, but is permitted by Rule 1.15(c) only to hold the disputed funds "until the dispute is resolved." Whether counsel may ultimately be entitled to recover costs is a separate legal issue which we will not address. Second, counsel may withhold only that portion of the proceeds actually claimed—the remainder must be distributed to the client upon receipt. See Comment to Rule 1.15 ("The undisputed portion of the funds shall be promptly distributed") (emphasis added).

These caveats are of exceptional importance here. It does not appear that counsel can negotiate the checks, as the fact pattern indicates that they are "payable to Client." Moreover, the fact pattern does not indicate whether the amount owed to the process server is greater than, equal to, or less than the amount of the two checks being withheld. Thus, counsel is stuck with property which he cannot liquidate and which may or may not exceed the value of the costs owed by the client. The longer the checks are held, the greater the risk that the funds on which they were drawn may not be available. In short, the potential for prejudice to the client's interests is greater, and the advantage to counsel far less, than if counsel was able to liquidate the funds immediately, hold the disputed amount in his trust account, and return the remaining funds to the client.

While the Committee does not believe that counsel is categorically prohibited by the Rules of Professional Conduct from asserting a charging lien under these circumstances, counsel does so at the risk of compromising his ethical obligations to his client. Our recognition of the availability of a charging lien under these circumstances does not signify our endorsement of the practice of relying on such liens, the problems and limitations of which are demonstrated by these facts.

If counsel does assert a charging lien, given the significant risks generally associated with prolonged fee disputes (see, John Freeman, Ethics Watch: A-B-C's of Legal Fees, 8 S.C. Lawyer 10 (July/August 1996)), and the enhanced potential for prejudice to the client under these facts, counsel must seek as prompt a resolution of the dispute as possible. Turning over the checks to the appropriate court or otherwise making use of an interpleader action are two options that may facilitate such a prompt resolution.

Finally, with respect to whether counsel should pay the process server himself and seek reimbursement or withhold on behalf of the process server an amount sufficient to pay the costs, it is our opinion that this is a matter of contract, and is therefore outside the scope of this inquiry. Whether the process server has a contractual right to payment from counsel, the client, or both is not clear from these facts.

South Carolina Bar Ethics Advisory Opinion 05-20

RULE 1.5(e)

Date: November 18, 2005

Facts
Client engages Attorney A, who meets with client on several occasions and sends demand letter. Attorney A, after dealing with Client for an extended period, determines that suit should be filed and contacts Attorney B for possible association on the case. Subsequently, Attorney A, Attorney B, and Client meet and agree verbally that both attorneys will represent Client. No written agreement is reached as to joint representation, and attorneys do not specifically discuss fee split. Client signed a fee agreement for a 1/3 contingency fee with both attorneys. Shortly thereafter, Attorney B (the associated attorney) files lawsuit with Attorney A listed as co-counsel. The clear intention of all the parties is that Attorney B will be lead attorney and Attorney A will assist with this case by consulting with Client, assisting with discovery responses, attending depositions, etc. Both attorneys assume that fee split will be 50/50 based upon both attorneys being actively involved in the case.

Shortly after suit is filed, Attorney A leaves private practice. He performs no further duties and is no longer involved with the case. Attorney B then successfully concludes the case via settlement after several depositions, much written discovery, hiring an expert witness, and attending a full day of mediation. Attorney A expended approximately 10 hours in this matter and Attorney B spent over 100 hours.

Question
Upon settlement of the case, may Attorney B split the attorneys' fees 50/50 with Attorney A, or must the fee split be based upon the hours spent by the respective attorneys due to Attorney A's withdrawal from the case?

Summary
From the statement of the inquiry, members of the Ethics Advisory Committee (EAC) cannot determine the state of mind of Attorneys A and B, and thus find it impossible to answer the specific question of how to split the fee; however, as guidance, the EAC offers the following comments.

If the fee splitting arrangement was deemed to have been made prior to October 1, 2005, the attorneys may agree to split the fee based either on 1) the degree of services rendered by each or 2) otherwise (*e.g.*, equally) based on the fact that they agreed to share equally in responsibility for the case, provided the client agrees in writing. In either case the client must be advised that the lawyers are sharing the fee. The client need not be advised of the share of each lawyer, but in the case of the assumption of joint responsibility, the client must agree in writing to the joint representation.

If the fee splitting arrangement is deemed to have been made on or after October 1, 2005, the attorneys must obtain the informed written consent of the client for the fee sharing and the

proportions of the split.

Opinion

I Former Rule 1.5(e)
Former Rule 1.5(e) provided: "A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable."

The Comment to that Rule indicates that the client need not be advised of the proportions of the split, but the client must be informed that the lawyers are sharing the fee and be given an opportunity to object.

See S.C. Ethics Advisory Op. 03-05: "Any agreed split between Lawyers A and B must either be in proportion to the services performed OR by written agreement with the client. Absent the client's consent, the only permissible fee split must be in proportion to the services performed by each lawyer." If the client objects, the only permissible fee split must be in proportion to the services performed by each lawyer.

(For treatment of another fee-splitting problem where the client objected, see S.C. Ethics Advisory Op. 98-32a, in which the issue was solely whether a lawyer can ethically share an earned fee with another lawyer in a manner disproportionate to the services performed without having advised client of the agreement and the client objected.)

The fact scenario provided by the inquirer is not sufficient to determine the timing and the details of the agreement between the lawyers. We assume for the purpose of this section of this Advisory Opinion that the agreement to share the fee was made by the lawyers prior to the effective date of the new Rules; therefore, having satisfied the requirement to notify the client of the fact that the two lawyers are sharing the fee, there is no requirement to notify the client of the proportions.

It appears to us from these particular facts that the client did not enter a written agreement with the lawyers for the assumption of joint responsibility; thus Rule 1.5(e) (1) suggests that the fee be split in proportion to the services performed. In order for the fee to be split equally, the client must have agreed in writing for the lawyers to share equally the responsibility for the case and thus dividing the fee in some manner other than in proportion to the services performed, whether that be equally or not.

One factor mitigating in favor of splitting the fee on the basis of work performed is the concept of *quantum meruit*. Absent an agreement between the lawyers, *quantum meruit* would work to give the lawyer who did the majority of the work "as much as he deserves."

II New Rule 1.5(e)
Rule 1.5, among others, was amended by the South Carolina Supreme Court with an effective

date of October 1, 2005. Our Supreme Court made major changes to the Rules of Professional Conduct (S.C.Ap.Ct. Rule 407) to reflect some of the modifications recommended by the American Bar Association in its Ethics 2000 Model Rules. *See* Shearouse Advance Sheet No. 26, June 20, 2005.

Rule 1.5(e) which is now effective in South Carolina reads:

1.5 Fees

[(a) . . . (d)]

(e) A division of a fee between lawyers who are not in the same firm made be made **only** if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) **the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing**; and
(3) the total fee is reasonable.

Comment

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer who assumes joint responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Also, when a client has hired two or more lawyers in succession on a matter and later refuses to consent to a discharged lawyer receiving an earned share of the legal fee, paragraph (e) should not be applied to prevent a lawyer who has received a fee from sharing that fee with the discharged lawyer to the extent that the discharged lawyer has earned the fee for work performed on the matter and is entitled to payment.

(Emphases added.)

In this inquiry, inasmuch as the lawyers did not reach an agreement as to fee-splitting at the beginning of the joint representation (and apparently have not yet reached that agreement), it may be a reasonable interpretation that the agreement to split the fee in some portion or another occurred after the effective date of new Rule 1.5(e). If that is the case, the lawyers must inform the client of the proportions of the fee, and the client must agree in writing, not only as to the joint representation and fee-splitting, but also as to the proportion of the split.

Summation
Assuming that the agreement between the lawyers pre-dates the implementation of the new rules and that there was no written agreement between the lawyers and the client for each lawyer to assume joint responsibility, it seems reasonable to split the fee based on work performed, following the concept of *quantum meruit*.

On the other hand, if the lawyers are just now (after October 1) sealing an agreement to split the fees either 50/50 or in proportion to services performed, the client must agree in writing to the fee sharing arrangement, including the amount each lawyer is to receive.

In all circumstances, the fee must be reasonable.

Caution
We take this opportunity to remind our brothers and sisters at the bar that a written fee agreement in every circumstance is the preferred mode. In this case, a written fee agreement between the two lawyers themselves and between the lawyers and the client would have avoided what could be a painful exercise.

In addition, the Resolution of Fee Disputes Board is available to lawyers who are in dispute about the allocation of the fee.

Return

Ethics Advisory Opinion 06-04

South Carolina Bar Ethics Advisory Opinion 06-04

RULE 1.15

Date

February 17, 2006

Facts

In a civil lawsuit, the plaintiff discharged his attorney and proceeded throughout the litigation *pro se*. Sometime later, the defendant agreed to settle the case with the plaintiff; however, the defendant's attorney received notice that the original attorney for the plaintiff wishes to claim a charging lien in the settlement proceeds for work completed prior to termination. The defendant's attorney is afraid that if she pays the plaintiff the settlement proceeds, irrespective of the other attorney's claims, then the original attorney for the plaintiff will not get paid and will allege that the defendant's attorney is liable for the amount owed from the plaintiff.

The defendant's attorney believes a contract between the plaintiff and the plaintiff's former lawyer exists; however, she has not seen the contract.

Questions

- May the defendant's attorney settle all claims arising from the lawsuit with the *pro se* plaintiff and disburse the settlement proceeds to the plaintiff?
- How must the defendant's attorney distribute the settlement proceeds?
- Must the defendant's attorney withhold the portion of the settlement proceeds in dispute and place them in a trust account until an agreement is reached between the plaintiff and his original attorney, although the defendant's attorney has no client-lawyer relationship with either?

Summary

- The defendant's attorney may not settle all claims arising from the lawsuit with the *pro se* plaintiff and disburse the settlement proceeds to the plaintiff.
- The defendant's attorney must withhold the fees in dispute in her trust account.

- The defendant's attorney must withhold the portion of the settlement proceeds in dispute and place them in a trust account until an agreement is reached between the plaintiff and his original attorney, although the defendant's attorney has no client-lawyer relationship with either.

Opinion

Question 1: May the defendant's attorney settle all claims arising from the lawsuit with the *pro se* plaintiff and disburse the settlement proceeds to the plaintiff?

The Committee advises that defense counsel must "promptly distribute all portions of the property as to which the interests are not in dispute." South Carolina Appellate Ct. Rule 407, Rules of Professional Conduct, Rule 1.15(e); see also Rule 1.15(d). The facts do not state whether the plaintiff disputes his former attorney's charging lien, which would be a reasonable assumption. If the funds are so disputed, and if defense counsel has "received" the funds in dispute, Rule 1.15(e) likely would prohibit defense counsel from distributing the disputed portion of settlement proceeds to the plaintiff.

Rule 1.15(e) provides in part that "[w]hen in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claims interests, the property shall be kept separate by the lawyer until the dispute is resolved. . . ." In other words, once a "person" claims an interest in the funds, they must be kept separate by the lawyer. Here, a person, the plaintiff's former lawyer, has claimed an interest in a portion of the funds in the form of an alleged charging lien for work completed prior to his termination. Accordingly, the Committee advises that the defendant's attorney should not disburse the disputed portion of the settlement proceeds to the plaintiff until the dispute is resolved; instead, the defendant's attorney should keep the disputed portion of the funds separate until the dispute is resolved.

Even though the defendant apparently does not claim an interest in the funds, the Committee believes that Rule 1.15 would still apply. Comment 4 to Rule 1.15 describes the lawyer's duty in terms of protecting disputed funds against interference by the client; however, it does not limit the application of Rule 1.15(e) to only those situations in which the client claims an interest. Even if the comment could be argued to apply only to those situations in which a client claims an interest, the text of the rule would govern. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Preamble to Appellate Ct. Rule 407, South Carolina Rules of Professional Conduct, Paragraph 21. The text of the rule plainly applies to "property in which two or more persons" claim an interest, whether they be clients, creditors of clients or other third parties.

The facts do not indicate whether or not the plaintiff's former lawyer's claim of a charging lien is believed to be frivolous. Comment 4 to Rule 1.15 can be read to imply that that the rule is designed to apply when "third-party claim is not frivolous under applicable law." As "[t]he Rules of Professional Conduct are rules of reason," as indicated in the Preamble, the Committee opines that if the plaintiff's former attorney's claim is frivolous in the professional judgment of the defendant's attorney, the settlement proceeds would not be truly in dispute and Rule 1.15

would not apply. However, given the "significant risks generally associated with prolonged legal fee disputes," it seems unlikely that the plaintiff's attorney would assert a frivolous charging lien. John Freeman, Ethics Watch: A-B-C's of Legal Fees, 8 S.C. Lawyer 10 (July/August 1996), cited in S.C. Ethics Advisory Opinion 05-07.

Question 2: How must the defendant's attorney distribute the settlement proceeds?

How the dispute over the validity of the plaintiff's former attorney's claim is resolved will determine how the disputed proceeds are to be distributed. Although the text of Rule 1.15(e) indicates that disputed funds must be kept separate by the attorney until the dispute is resolved, the text does not mandate how the dispute is to be resolved. Comment 4 to Rule 1.15, does provide a limit on how the dispute may be resolved and also suggests litigation as a possible solution: "A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute." Although a technical reading of this language could limit application of the comment to disputes involving clients, the Committee would apply this comment to disputes between two third parties, such as described in the inquiry.

The Committee interprets Rule 1.15(e) and Comment 4 as placing the choice of the means of resolving the dispute in the reasonable discretion of the defendant's attorney, as long as the defendant's attorney does not unilaterally assume to arbitrate the dispute. As noted in S.C. Ethics Advisory Opinion 02-07, "[t]he comments to Rule 1.15 also provide that the lawyer may suggest means to resolve the dispute." For example, "[i]n previous Advisory Opinions involving disputed healthcare provider liens, the Committee has opined that the prudent course for the lawyer would be to retain the disputed funds in trust and seek either declaratory judgment allowing the lawyer to release the funds, or pursue mediation or arbitration." *Id.* Ethics Advisory Opinion 05-07 also noted the use of interpleader actions for the resolution of disputes over legal fees and costs. The defendant's attorney could even offer to arbitrate the dispute if the defendant's attorney does not "unilaterally" choose this method and the persons claiming an interest in the disputed proceeds agree to such an arbitration. The Committee does not mean to suggest that these are the appropriate options for resolving this particular dispute. Rather, the defendant's attorney should investigate possible options and choose the appropriate means to resolve the dispute using the attorney's best professional judgment and discretion in accordance with the Rules.

Question 3: Must the defendant's attorney withhold the portion of the settlement proceeds in dispute and place them in a trust account until an agreement is reached between the plaintiff and his original attorney, although the defendant's attorney has no client-lawyer relationship with either?

Yes. As indicated previously in this opinion, the application of Rule 1.15(e) does not require an attorney-client relationship between a lawyer and a person claiming an interest in property in the possession of the lawyer: the Committee is unable read into the text of Rule 1.15(e) a requirement that the rule only applies to disputed funds or property in which a lawyer's client

claims an interest.

The Committee is unaware of any decision of any jurisdiction applying Rule 1.15(e) to facts identical to those of the inquirer. More often, Rule 1.15 is implicated in situations involving the payment of settlement proceeds by an attorney when there was a dispute between his client and a third party. For example, in South Carolina Ethics Advisory Op. 95-29, the Committee determined that "assuming the lien is valid and the assignment irrevocable, the lawyer may not disregard a third party assignee or lien holder's rights to the proceeds notwithstanding a client's directive to do so because both encumbrances create an interest in the proceeds in the medical provider." The valid interests of certain persons (clients' medical providers) in settlement proceeds do not appear to require less protection than the interests of other persons (creditors of opposing parties).

The Committee notes that Rule 1.15 has been applied to require lawyers to protect rights of third parties in a variety of other circumstances. See, *e.g., In re Jackson*, 365 S.C. 176, 177-78, 617 S.E.2d 123, 124 (2005) (an attorney failed to timely pay a court reporter and was sanctioned for violating Rule 1.15). It is the Committee's position that Rule 1.15 is designed, ultimately, to protect the valid interests of third parties. If the plaintiff's original attorney's lien is indeed valid, it should not be ignored; accordingly, the dispute must be resolved as to whether the lien is valid. The text of Rule 1.15(e) provides a mechanism for the safekeeping of funds while the dispute is resolved.Return

South Carolina Bar Ethics Advisory Opinion 08-02

South Carolina Rules of Professional Conduct: 1.5, 1.6

Date: April 18, 2008

Facts:
Lawyer is considering entering into an agreement with a trade credit account processor (TCAP) who, working with affiliated lenders (Trade Lenders), will offer trade credit to Lawyer's non-consumer clients for payment of Lawyer's fees. TCAP performs essentially the same functions that Visa and MasterCard perform in consumer credit transactions, which were approved for payment of legal fees in Ethics Advisory Opinion 81-01.

Under this arrangement (currently in place in a variety of other trades and professions), Lawyer submits clients to TCAP for TCAP account, providing only the name, address, and telephone number of the client and the amount of credit requested. The lawyer's agreement will be with TCAP to provide account processing and with the Trade Lender to provide the advance, just as it is in accepting Visa and MasterCard for payment. The relationships among Lawyer, TCAP, Trade Lender, and clients will differ from consumer credit bill-payment transactions in only a few ways.

First, Trade Lenders do not extend credit to individuals for consumer transactions. They extend only trade credit to businesses for business-to-business transactions. Therefore, only Lawyer's non-consumer clients can be involved in the arrangement. Lawyer intends to enter into this arrangement only with Lawyer's collection and foreclosure clients that have ongoing business with Lawyer in multiple legal matters who are themselves sophisticated lending institutions.

Second, Trade Lenders will not charge interest to clients on monies advanced to Lawyer. Lawyer pays Lenders' and TCAP's fees for this service.

Finally, client participation in these trade credit arrangements will be by consent of each non-consumer client. Client authorization for TCAP payment of Lawyer's fees will apply to all matters in which Lawyer represents each client, just as Lawyer's current fee agreement with each client applies to all legal matters as they arise. The agreement between Lawyer and clients will also provide that when a client disputes a fee, Lawyer will refund the TCAP payment and resolve the dispute directly with the client or through the Bar's fee dispute board, if necessary.

As with credit card payments, no confidential client information will be given to TCAP when Lawyer submits payment requests. Detailed accounts of work performed will be sent only to clients.

Questions:
1. May Lawyer ethically enter into this fee-payment arrangement with clients?

2. May Lawyer, with informed client consent, sell existing accounts receivable to a TCAP

(relating only to those clients participating in the trade credit arrangement)?

Summary:
Yes. 1) Lawyer may ethically enter into a fee-payment arrangement with clients and a trade credit account processor (TCAP) and 2) Lawyer, may sell existing accounts receivable to a TCAP, provided informed consent is obtained from the client.

The facts as presented address any ethical concerns in that the client's informed consent is obtained prior to entering into the fee-payment arrangement; clients are not charged any fees, costs, or interest; and client confidentiality is maintained (except for client name and address, which are divulged with permission of the client).

Opinion:
The facts on which this question is based are similar those in a situation where credit cards are accepted by a lawyer in payment of legal fees, with the exception (in the instant case), that fees, costs, or interest are not charged to the client. Apparently, the lawyer here pays the associated fees as a premium for receiving payment early from TCAP.

While SC Bar Ethics Advisory Opinion 81-01 was written under the former Code of Professional Responsibility, its conclusion continues to be applicable under the present Rules of Professional Conduct (SC Ap. Ct. Rule 407). EAC 81-01 approved monthly service charges and permitted a lawyer to take an interest-bearing note for fees owed. In the present case, the facts do not posit any fees being charged to the client, but the precept of client agreement still applies.

SC Bar Ethics Advisory Opinion 96-06 specifically permitted the use of credit cards for payment of legal fees, with caveats as to written fee agreements and opportunities for clients to review invoices. Here, Lawyer's prior agreement with clients and TCAP states that Lawyer will refund any disputed fee and resolve any such issue directly with the client.

Even though the inquiring lawyer states that the TCAP arrangement will apply only to sophisticated non-consumer clients, Lawyer's engagement letter and fee agreement should disclose all relevant facts. If, in cases where Lawyer desires to "sell" existing accounts to the TCAP, the agreements did not contemplate using a TCAP, Lawyer should obtain informed client consent prior to passing the accounts to the TCAP.

The members of the Ethics Advisory Committee are satisfied from the recitation of the facts that the inquiring lawyer has provided adequate safeguards in the agreement with clients and the TCAP.

Practitioners are reminded of the requirement of the reasonableness of fees in Rule 1.5 and the requirement of client confidentiality in Rule 1.6.

South Carolina Bar Ethics Advisory Opinion 10-08

SC Rules of Professional Conduct: 1.1, 1.5, 1.6, 5.1 and 5.2

Date: October 15, 2010

Facts
Lawyer is considering retaining a contract attorney to provide litigation support, research and writing for the benefit of Lawyer's clients. The contract attorney is not a partner or employee of the firm and only works for Lawyer on a case-by-case basis.

Question
May Lawyer add a surcharge when billing the client for the cost of the services performed by the contract attorney in light of South Carolina Rules of Professional Conduct 1.1, 1.5, 1.6, 5.1 and 5.2?

Summary
When services of a contract attorney are billed as fees for legal services, South Carolina Rule 1.5(a) governs the amount that may be charged to the client for those services in that the total fee must be reasonable. The amount of that fee that is paid by the Lawyer to the contract attorney for his services is a matter of contract between the Lawyer and the contract attorney and need not be disclosed to the client, any more than the portion of the fee that would be paid to an employee attorney as salary and benefits would be disclosed. When the legal services of the contract attorney are billed to the client as an expense or cost, the Lawyer may not add a surcharge to the expense or cost absent a retainer agreement with the client that permits such surcharges. In order for the Lawyer to bill the contract attorney's services as fees for legal services, the Lawyer must adopt it as his own and be responsible to the client for it pursuant to South Carolina Rule 1.1 or must supervise the contract attorney pursuant to South Carolina Rule 5.1. If the Lawyer does neither, the services of the contract attorney must be billed as a cost and the details of the arrangement disclosed and consented to by the client.

Opinion
Lawyers associate with other attorneys to perform legal work in a variety of ways – as partners, as members of a limited liability company or registered limited liability partnership, as shareholders in a professional corporation, in long term non-equity arrangements as employees or as of-counsel, and, sometimes, on a temporary basis as independent contractors. It is this last arrangement, the independent contract, which we address in this Opinion.

Lawyers associate with contract attorneys for a variety of reasons – to provide expertise the lawyer does not posses, to provide counsel regarding laws in a jurisdiction where the lawyer is not admitted to practice, to enable the lawyer to handle his case load with diligence, or any of a number of other reasons. Sometimes, the lawyer will closely supervise and review the contract attorney's work and as such adopt it as the lawyer's own in fulfilling the lawyer's obligations under South Carolina Rules of Professional Conduct 1.1 or 1.3. In such a case, the contract attorney is associated with the firm for the purposes of the representation in the same way as of counsel, also generally an independent contractor, is considered associated with a firm for all

purposes. Sometimes, however, the contract attorney may work largely independently and be directly responsible to the client for his own diligence and competence, and the payment for the contracting attorney's services through the lawyer is for the client's convenience or because the client is relying on the lawyer to review and approve the contract attorney's bill. Whether and how the lawyer bills the client for the contract attorney's services and what surcharges or profit may be added depends on which of these two scenarios is at work.

There is nothing unethical about Lawyer outsourcing legal services provided Lawyer renders legal services to his client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" as provided in South Carolina Rule of Professional Conduct 1.1. In fact, Comment [1] to Rule 1.1 contemplates the use of such support when it states: "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." Thus a lawyer may associate or consult with a contract attorney in order to fulfill the lawyer's obligation of competence under Rule 1.1. By analogy, a lawyer may also associate or consult with a contract attorney to fulfill the lawyers other obligations, such as the obligation of diligence under Rule 1.3.

Where the lawyer has outsourced work to the contract attorney for any of these purposes, and the lawyer adopts the work product as his own in fulfillment of the lawyers Article 1 responsibilities, the lawyer may bill the reasonable value of the contract attorney's work to the client as a legal fee. In doing so, the lawyer ratifies the work of the contract attorney and undertakes duties with regard to the contract lawyer and his work under South Carolina Rule of Professional Conduct 5.1, and the contract lawyer's own conduct is subject to Rule 5.2. Where a lawyer is engaged on a temporary basis to perform services that are ratified and adopted under Rules 1.1 and 5.1, the lawyer is to be considered associated with the firm for the purposes of that representation. As a result, the lawyer is permitted to share confidential information regarding the representation to the contract attorney pursuant to the implied authorization of Rule 1.6(a). The lawyer is cautioned that care must be taken so that the engagement of the contract attorney in these circumstances does not violate the conflict of interest rules.

Where the contract attorney is so associated, the amount of the otherwise reasonable fee paid by the lawyer to the contract attorney need not be disclosed to the client, any more than the portion of the fee paid to an employee lawyer as salary and benefits must be disclosed. However, care must be taken such that the billing does not violate Rules 7.1 or 7.5.

Where the contract attorney's work will not be ratified and supervised by the lawyer, the fees for the services of the contract attorney should not be billed as legal fees by the lawyer, but rather should be billed as costs or expenses. No surcharge on costs or expenses is appropriate except where a reasonable surcharge has been disclosed to and approved by the client. Furthermore, because when a client retains a lawyer he expects that only persons that are closely supervised by the firm will perform his legal work, disclosure of confidential client information to a contract lawyer that will not be so supervised cannot be said to be impliedly authorized under Rule 1.6(a) and the client's informed consent to any such disclosure and representation must be obtained.

Although where there is to be a direct division of a lump fee, like a split of a contingent fee, then Rule 1.5(e) must be complied with.